



CITE BY TITLE AND SECTION

Thus

64 C.J.S. Municipal Corporations § 1655

CORPUS JURIS SECUNDUM

A COMPLETE RESTATEMENT OF THE ENTIRE
AMERICAN LAW

AS DEVELOPED BY
ALL REPORTED CASES

By
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EXPLANATION

THE object in view in preparing *Corpus Juris Secundum* has been twofold: First, to provide a complete encyclopedic treatment of the whole body of the law, which means that it must be based upon all the reported cases; Second, to present each title of the law in form and content most suitable as a means of practical reference for the Bench and Bar.

Corpus Juris Secundum is therefore a complete restatement of the entire body of American Law. The clear-cut and exhaustive propositions comprising the text are supported by all the authorities from the earliest times to date. The supporting case citations, conspicuously set out in the notes, point to all decisions handed down since the publication of *Corpus Juris*. When the searcher may wish to consult earlier authorities, a specific reference to *Corpus Juris* makes available all cases back to 1658.

Each title is preceded by a complete section analysis, greatly simplified to facilitate research. Where the scope of any section is such as to require it, a more minute analysis is found thereunder in its appropriate place within the title (see Abatement and Revival, Section 112). The convenience of this method—an innovation in encyclopedic writing—must immediately commend itself.

A concise black-letter summary, indicative of its scope, precedes the full treatment or statement of the law under each section. These introductory summaries, concise and free from interlineation of authorities, have proven of great convenience and value in legal research.

An index is found in the back of each volume covering the titles contained therein, thus providing another convenient means of ready access to the text and notes.

Corpus Juris Secundum is kept to date by means of annual cumulative pocket parts for each volume. This feature of supplementation which has proved so successful in modern digests and statutes conveniently, and with certainty, keeps each title constantly to date through current cases and new precedents.

Corpus Juris Secundum represents the combined product of the highest editorial talent and manufacturing skill. Its many excellent editorial features are fittingly accompanied by corresponding innovations and improvements in mechanical arrangement, typography, and design, which the publisher believes will commend themselves to the profession as representing a new standard in legal publications.

THE PUBLISHERS

TABLE OF ABBREVIATIONS

REPORTS AND TEXTBOOKS

A	A	Am.L.J.N.S.	American Law Journal New Series (Pa.)
A.2d	Atlantic Reporter	Am.L.Rec.	American Law Record (Ohio)
Abb.	Atlantic Reporter Second Series	Am.L.Reg.	American Law Register
Abb.Adm.	Abbott (U.S.)	Am.L.Reg.N.S.	American Law Register New Series
Abb.App.Dec.	Abbott's Admiralty (U.S.)	Am.Law Reg.O.S.	American Law Register Old Series
Abb.Dec.	Abbott's Appeals Decisions (N.Y.)	Am.L.Rev.	American Law Review
Abb.N.Cas.	Abbott's Decisions (N.Y.)	Am.L.T.Bankr.	American Law Times Bankruptcy Reports
Abb.Pr.	Abbott's New Cases (N.Y.)	Am.Law Inst.	American Law Institute, Restatement of the Law
Abb.Pr.N.S.	Abbott's Practice (N.Y.)	Am.Negl.Cas.	American Negligence Cases
A'Beck.Res.	Abbott's Practice New Series (N.Y.)	Am.Negl.R.	American Negligence Reports
Judgin.	A'Beckett's Reserved Judgments (Vict.)	A.M.&O.	Armstrong, Macartney & Ogle (Ir.)
[1917]A.C.	[1917] Appeal Cases (Can.)	Am.Prob.	American Probate
[1918]A.C.	Law Reports [1918] Appeal Cases (Eng.)	Am.Prob.N.S.	American Probate New Series
Acton	Acton (Eng.)	Am.Pr.	American Practice
Adams	Adams Reports (N.H.)	Am.R.	American Reports
Add.	Addison (Pa.)	Am.R.&Corp.	American Railroad & Corporation
Add.Eccl.	Addams' Ecclesiastical (Eng.)	Am.R.Rep.	American Railway Reports
A.&E.	Adolphus & Ellis (Eng.)	Am.S.R.	American State Reports
A.&E.Enc.L.	American & English Encyclopædia of Law	Am.St.R.D.	American Street Railway Decisions
A.&E.Enc.L.&Pr.	American & English Encyclopædia of Law & Practice	And.	Anderson (Eng.)
Aik.	Aikens (Vt.)	Andr.	Andrews (Eng.)
A.K.Marsh.	A. K. Marshall (Ky.)	Ann.Cas.	American & English Annotated Cases
Ala.	Alabama	Ann.Cas.1912A	American Annotated Cases 1912A, et seq.
Ala.App.	Alabama Appellate Court	Anstr.	Anstruther (Eng.)
Alaska	Alaska	Anth.N.P.	Anthon's Nisi Prius (N.Y.)
Alb.L.J.	Albany Law Journal	App.D.C.	Appeal Cases (D.C.)
A.L.C.	American Leading Cases	App.Cas.	Law Reports Appeal Cases (Eng.)
Alc.&N.	Alcott & Napier (Eng.)	App.Div.	Appellate Division (N.Y.)
Alc.Reg.Cas.	Alcock's Registry Cases (Eng.)	Ariz.	Arizona
Aleyn	Aleyn (Eng.)	Ark.	Arkansas
Allison Pr.	Allison's Practice (Sc.)	Ark.Just.	Arkley's Judiciary (Sc.)
Allen	Allen (Mass.)	Arn.	Arnold (Eng.)
Allen (N.B.)	Allen, New Brunswick	Arn.&H.	Arnold & Hodges (Eng.)
Alta.L.	Alberta Law	Ashm.	Ashmead (Pa.)
A.L.R.	American Law Reports	Aspin.	Aspinall's Maritime Cases (Eng.)
A.L.R.2d	American Law Reports, Second Series	Atk.	Atkyn (Eng.)
Am.Bankr.	American Bankruptcy (U.S.)	Austr.C.L.R.	Commonwealth Law Reports, Australia
Ambl.	Amblar (Eng.)	Austr.Jur.	Australian Jurist
A.M.C.	American Maritime Cases	Austr.L.T.	Australian Law Times
Am.Corp.Cas.	American Corporation Cases		
Am.Cr.	American Criminal		
Am.D.	American Decisions		
Am.&E.Corp.Cas.	American & English Corporation Cases		
Am.&E.Corp.Cas. N.S.	American & English Corporation Cases New Series		
Am.&Eng.Ency. Law	American and English Encyclopedia of Law		
Am.&E.Eq.D.	American & English Decisions in Equity	Bacon Abr.	Bacon's Abridgment (Eng.)
Am.&Eng.Pat. Cas.	American and English Patent Cases	Bail.Eq.	Bailey's Equity (S.C.)
Am.&Eng.R.R. Cas.	American and English Railroad Cases	Bailey	Bailey's Law (S.C.)
Am.Electr.Cas.	American Electrical Cases	B.&Ad.	Barnes & Adolphus (Eng.)
Am.&E.R.Cas.	American & English Railroad Cases	B.&Ald.	Barnes & Alderson (Eng.)
Am.&E.R.Cas.N. S.	American & English Railroad Cases New Series	Baldw.	Baldwin (U.S.)
Am.J.Int.L.	American Journal of International Law	Balf.Pr.	Balfour's Practice (Sc.)
Am.L.J.	American Law Journal (Pa.)	Ball & Beatty	Ball & Beatty (Ir.)
C.J.S.		Bank.&Ins.R.	Bankruptcy and Insolvency Reports (Eng.)
		Bann.	Bannister (Eng.)
		Bann.&A.	Banning & Arden (U.S.)
		Barb.	Barbour (N.Y.)
		Barb.Ch.	Barbour's Chancery (N.Y.)
		B.&Arn.	Barron & Arnold (Eng.)
		Barn.	Barnardiston King's Bench (Eng.)
		Barn.Ch.	Barnardiston Chancery (Eng.)
		Barnes	Barnes' Practice Cases (Eng.)
		Barnes Notes	Barnes' Notes (Eng.)
		Batty	Batty (Ir.)
		B.&Aust.	Barron & Austin (Eng.)
		Baxt.	Baxter (Tenn.)
		Bay	Bay (S.C.)

- B.&B.**
B.C.
B.&C.
B.&Macn.
B.D.&O.
Beatty
Beav.
Beav.&Wal.Ry.
Cas.
Beav.R.&C.Cas.
Beaw.Lex.Mer.
Bee
Bell
Bell App.Cas.
Bell Cas.
Bell C.C.
Bell Comm.
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Ben.
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Berks Co.
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Bract.

Bradf.Surr.
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Brev.
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Brightly
Brightly El.Cas.
Bro.Ch.
Brock.
Brock.Cas.
Brod.&B.
Brod.&Fr.

Brodix Am.&E.
Pat.Cas.
Bro.Just.
Brook Abr.
Brook N.Cas.
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Brown,Parl.Cas.
Browne
Brown.&L.
Brownl.&G.
Bruce
Brunn.Coll.Cas.
B.&S.
B.T.A.
Buck
- Broderip & Bingham (Eng.)**
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Browne & Macnamara (Eng.)
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[1917]K.B.	Law Reports [1917] King's Bench (Eng.)	L.J.Adm.	Law Journal Admiralty New Series (Eng.)
Keane & Gr.	Keane & Grant (Eng.)	L.J.Bankr.	Law Journal Bankruptcy New Series (Eng.)
Keble.	Keble (Eng.)	L.J.Ch.	Law Journal Chancery New Series (Eng.)
Keen	Keen (Eng.)	L.J.Ch.O.S.	Law Journal Chancery Old Series (Eng.)
Kellw.	Kellway (Eng.)	L.J.C.P.	Law Journal Common Pleas New Series (Eng.)
Kel.C.O.	Kelyng's Crown Cases (Eng.)	L.J.C.P.O.S.	Law Journal Common Pleas Old Series (Eng.)
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Keyes	Keyes (N.Y.)	L.J.K.B.	Law Journal King's Bench New Series (Eng.)
Keyl.	Keylway (Eng.)	L.J.K.B.O.S.	Law Journal King's Bench Old Series (Eng.)
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Kirby	Kirby (Conn.)	L.J.P.C.	Law Journal Privy Council New Series (Eng.)
Knapp	Knapp (Eng.)	L.J.P.D.&Adm.	Law Journal Probate Divorce & Admiralty New Series (Eng.)
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Kn.C.Moo.	Knapp & Moore (Eng.)	L.J.Q.B.	Law Journal Queen's Bench New Series (Eng.)
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Knox&F.	Knox & Fitzhardinge (N.S.Wales)	Il.&G.t.Pl.	Lloyd & Gould temp. Plunket (Ir.)
Kulp	Kulp (Pa.)	Il.&G.t.S.	Lloyd & Gould temp. Sugden (Ir.)
Ky.	Kentucky	Il.&W.	Lloyd & Welsby (Eng.)
Ky.Dec.	Kentucky Decisions	L.&M.	Lowndes & Maxwell (Eng.)
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Lack.Bar	Lackawanna Bar (Pa.)	L.R.A.1915A.	Lawyers' Reports Annotated 1915A
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Lack.Leg.N.	Lackawanna Legal News (Pa.)	L.R.A.&E.	Law Reports Admiralty & Ecclesiastical (Eng.)
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Lalor	Lalor's Supplement to Hill & Denio (N.Y.)	L.R.C.C.	Law Reports Crown Cases (Eng.)
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Land Dec.	Land Decisions (U.S.)	L.R.Eq.	Law Reports Equity Cases (Eng.)
Lane	Lane (Eng.)	L.R.Exch.	Law Reports Exchequer Cases (Eng.)
Lans.	Lansing (N.Y.)	L.R.H.L.	Law Reports House of Lords (English & Irish Appeal Cases)
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L.C.	Lower Canada	L.R.P.C.	Law Reports Privy Council (Eng.)
L.&C.	Leigh & Cave (Eng.)	L.R.P.&D.	Law Reports Probate & Divorce (Eng.)
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L.C.L.J.	Lower Canada Law Journal	L.T.	Law Times (Pa.)
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L.D.	Law Dictionary	L.T.O.S.	Law Times, Old Series (Eng.)
Ld.Ken.	Lord Kenyon (Eng.)	L.T.O.S.	Law Times, Old Series (Pa.)
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Lea	Lea (Tenn.)	Lush.	Lushington's Admiralty (Eng.)
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Lee Eccl.	Lee's Ecclesiastical (Eng.)		
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Lef.Dec.	Lefevre's Parliamentary Decisions (Eng.)		
Leg.Chron.	Legal Chronicle (Pa.)		
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Lehigh Co.L.J.	Lehigh County Law Journal (Pa.)		
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		Moore&S.	Moore & Scott (Eng.)
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N.H.	New Hampshire		Workmen's Compensation
N.J.	New Jersey Reports	Or.	Oregon
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Nolan	Nolan (Eng.)		
North.	Northington (Eng.)		
North. Co.	Northampton County Reporter (Pa.)		
Northumb. Co. Leg.	Northumberland County Legal News		
N.	(Pa.)		
Northumb. Leg. J.	Northumberland Legal Journal (Pa.)		
Notes of Cas.	Notes of Cases (Eng.)		
Nott & McC.	Nott & McCord (S.C.)		
Noy	Noy (Eng.)		
N. & P.	Neville & Perry (Eng.)		
N.S.	Nova Scotia		
N.S. Dec.	Nova Scotia Decisions		
N.S. Wales	New South Wales		
N.S. Wales L.	New South Wales Law		
N.S. Wales L.R. Eq.	New South Wales Law Reports Equ-		
	ity		
N.W.	North Western Reporter		
N.W. 2d	North Western Reporter Second Se-		
	ries		
N.Y.	New York		
N.Y. Ann. Cas.	New York Annotated Cases		
N.Y. City Ct.	New York City Court		
N.Y. City Ct. Suppl.	New York City Court Supplement		
N.Y. Civ. Proc.	New York Civil Procedure		
N.Y. Civ. Pr. Rep.	New York Civil Procedure Reports		
N.Y. Code Reports.	New York Code Reports, New Series		
N.S.	New York Criminal		
N.Y. Cr.	New York Criminal		
N.Y. Leg. Obs.	New York Legal Observer		
N.Y. L. Rec.	New York Law Record		
N.Y. Month. L. Bul.	New York Monthly Law Bulletin		
N.Y.S.	New York Supplement		
N.Y.S. 2d	New York Supplement Second Series		
N.Y. St.	New York State Reporter		
N.Y. Super.	New York Superior Court		
N.Y. Wkly. Dig.	New York Weekly Digest		
O			
O. Ben.	Old Benloe (Eng.)		
O. Bridgm.	Orlando Bridgman (Eng.)		
Off. Gaz.	Official Gazette		
Ohio	Ohio		
Ohio App.	Ohio Court of Appeals		
Ohio Cir. Ct.	Ohio Circuit Court		
Ohio Cir. Ct. N.S.	Ohio Circuit Court New Series		
Ohio Cir. Dec.	Ohio Circuit Decisions		
Ohio Dec. Reprint	Ohio Decisions (Reprint)		
Ohio F. Dec.	Ohio Federal Decisions		
Ohio L.J.	Ohio Law Journal		
Ohio N.P.	Ohio Nisi Prius		
Ohio N.P. N.S.	Ohio Nisi Prius New Series		
Ohio O.	Ohio Opinions		
Ohio Prob.	Ohio Probate		
Ohio S. & C.P.	Ohio Superior & Common Pleas Deci-		
	sions		
Ohio St.	Ohio State		
Ohio Supp.	Ohio Supplement		
Okl.	Oklahoma		
Okl. Cr.	Oklahoma Criminal		
Olcott	Olcott (U.S.)		
Oliv. B. & L.	Oliver, Beavan & Lefroy (Eng.)		
O'M. & H.	O'Malley & Hardcastle (Ir.)		
Ont.	Ontario		
Ont. A.	Ontario Appeals		
Ont. El. Cas.	Ontario Election Cases		
Ont. L.	Ontario Law		
Ont. L.J.	Ontario Law Journal		
Ont. L.J. N.S.	Ontario Law Journal New Series		
Ont. Pr.	Ontario Practice		
Ont. W.N.	Ontario Weekly Notes		
Ont. W.R.	Ontario Weekly Reporter		
		Op. Atty.-Gen.	Opinions of Attorneys-General (U.S.)
		Op. Sol. Dept.	Opinions of the Solicitor for the De-
		Labor	partment of Labor dealing with
			Workmen's Compensation
		Or.	Oregon
		Orleans App.	Orleans Appeals (La.)
		Overt.	Overtown (Tenn.)
		Owen	Owen (Eng.)
		P	
		P.	Pacific Reporter
		P. 2d	Pacific Reporter Second Series
		[1891] P.	Law Reports [1891] Probate (Eng.)
		Pa.	Pennsylvania State
		Pa. Cas.	Pennsylvania Supreme Court Cases
			(Sadler)
		Pa. Co.	Pennsylvania County Court
		Pa. Corp.	Pennsylvania Corporation Reporter
		Pa. C. Pl.	Common Pleas (Pa.)
		Pa. Dist.	Pennsylvania District
		Pa. Dist. & Co.	Pennsylvania District and County
		Paige	Paige's Chancery (N.Y.)
		Paine	Paine (U.S.)
		Pa. L. J.	Pennsylvania Law Journal
		Pa. L. Rec.	Pennsylvania Law Record
		Pa. L. J. R.	Clark's Pennsylvania Law Journal
			Reports
		Palm.	Palmer (Eng.)
		Pa. Rec.	Pennsylvania Record
		Park.	Parker (Eng.)
		Park. Cr.	Parker's Criminal (N.Y.)
		Park. Exch.	Parker's Exchequer (Eng.)
		Park. Ins.	Parker's Insurance (Eng.)
		Pars. Eq. Cas.	Parsons' Equity Cases (Pa.)
		Pa. Super.	Pennsylvania Superior Court
		Paton App. Cas.	Paton's Appeal Cases (Sc.)
		Patrick El. Cas.	Patrick's Election Cases (Can.)
		Patt. & H.	Patton & Heath (Va.)
		P. D.	Law Reports Probate Division (Eng.)
		P. & D.	Perry & Davison (Eng.)
		Peake N.P.	Peake's Nisi Prius (Eng.)
		Pearce C.O.	Pearce's Reports in Dearsly's (Eng.)
		Pearson	Pearson (Pa.)
		Peck	Peck (Tenn.)
		Peck. El. Cas.	Peckwell's Election Cases (Eng.)
		Pennewill	Pennewill (Del.)
		Pennyp.	Pennypacker (Pa.)
		Penr. & W.	Penrose & Watts (Pa.)
		Perry & Kn.	Perry & Knapp Election Cases (Eng.)
		Pet.	Peters (U.S.)
		Pet. Adm.	Peters' Admiralty (U.S.)
		Pet. C. O. C.	Peters' Circuit Court (U.S.)
		Phil.	Phillips (Eng.)
		Phil.	Phillip (N.C.)
		Phila.	Philadelphia (Pa.)
		Philippine	Philippine
		Phillim.	Phillimore Ecclesiastical (Eng.)
		Pick.	Pickering (Mass.)
		Pig. & R.	Piggott & Rodwell (Eng.)
		Pig. Rec.	Piggott's Recoveries (Eng.)
		Pinn.	Pinney (Wis.)
		Pittsb.	Pittsburgh (Pa.)
		Pittsb. Leg. J.	Pittsburgh Legal Journal (Pa.)
		Pittsb. Leg. J. N.S.	Pittsburgh Legal Journal New Series
			(Pa.)
		P. & K.	Perry & Knapp (Eng.)
		Plowden	Plowden (Eng.)
		Pollexf.	Pollexfen (Eng.)
		Poph.	Popham (Eng.)
		Port.	Porter (Ala.)
		Posey	Posey's Unreported Cases (Tex.)
		Puerto Rico	Puerto Rico
		Puerto Rico Fed.	Puerto Rico Federal
		Pow. Surr.	Powers' Surrogate (N.Y.)
		P. R. & D. El. Cas.	Power, Rodwell & Dew's Election
			Cases (Eng.)
		Proc. Ch.	Precedents in Chancery (Eng.)
		Pr. Edw. Isl.	Prince Edward Island
		Price	Price (Eng.)
		Price Pr. Cas.	Price's Practice Cases (Eng.)
		Pridd. & C.	Prideaux & Obie (Eng.)
		Prob. [1917]	Law Reports, Probate Division (Eng.)
		Prob. Rep.	Probate Reports (Eng.)

TABLE OF ABBREVIATIONS

XV

Pr.Rep. P.Wms. P.U.R. Pyke	Practice Reports (Eng.) Peere-Williams (Eng.) Public Utilities Reports Pyke (Can.)	Russ.&C.Eq.Cas. Russ.Eq.Cas. Russ.&Geld. Russ.&M. Ry.&M.	Russell's & Chealey's Equity Cases (N.S.) Russell's Equity Cases (N.S.) Russell & Geldert, Nova Scotia Russell & Myles (Eng.) Ryan & Moody (Eng.)
Q.B. [1891]Q.B. Q.B.D. Queensl.J.P. Queensl.L. Queensl.L.J. Que.L. Que.Pr. Que.Q.B. Que.Rev.Jud. Que.Super. Quincy	Q Queen's Bench (Adolphus & Ellis New Series) (Eng.) Law Reports [1891] Queen's Bench (Eng.) Law Reports Queen's Bench Division (Eng.) Queensland Justice of the Peace Queensland Law Journal Quebec Law Quebec Practice Quebec Official Reports Queen's Bench Quebec Revised Judicial Quebec Official Reports Superior Court Quincy (Mass.)*	Salk. Sandf. Sandf.Ch. Sask.L. Saund. Saund.&C. Sau.&Sc. S.Austr.L. Sav. Sawyer. Saxt. Sax. S.C. [1907]S.C. Scam. S.C.Eq. Sch.&Lef. Sch.Leg.Rec. Sch.Reg. [1907]S.C.(J.) Sc.Jur. S.C.L. Sc.L.Rep. Scot L.T. Scott Scott N.R. Scr.L.T. Sc.Sess.Cas. S.Ct. S.D. S.E. S.E.2d Searle & Sm. Sel.Cas.Ch. Seld. Selden Selw. Serg.&R. Sess.Cas. Shan. Shaw Shaw&D. Shaw Dec. Shaw, Dunl.&B. Shaw&M. Sheld. Shep.Abr. Sheph.Sel.Cas. Show. Show.P.C. Sid. Silv.A. Silv.Sup. Sim. Sim.N.S. Sim.&St. Skin. Smale&G. Smith Smith Smith&B. Smith K.B. Smith Lead.Cas. Smith Reg. Sm.&M. Sm.&M.Ch. Smythe Sneed So. So.2d Sol.J. Som.Leg.J. Sp. Spinks Spinks	S Salkeld (Eng.) Sandford's Superior Court (N.Y.) Sandford's Chancery (N.Y.) Saskatchewan Law Saunders (Eng.) Saunders & Cole (Eng.) Sausse & Scully (Ir.) South Australia Law Savile (Eng.) Sawyer (U.S.) Saxton (N.J.) Sayer (Eng.) South Carolina Court of Session Cases (Sc.) Scammon (Ill.) South Carolina Equity Schoales & Lefroy (Ir.) Schuykill Legal Record (Pa.) Schuykill Register (Pa.) Court of Justiciary Cases (Sc.) Scottish Jurist South Carolina Law Scottish Law Reporter Scot Law Times Scott (Eng.) Scott's New Reports (Eng.) Scranton Law Times (Pa.) Scotch Court of Session Cases Supreme Court Reporter (U.S.) South Dakota South Eastern Reporter South Eastern Reporter Second Series Searle & Smith (Eng.) Select Cases in Chancery (Eng.) Selden's Notes (N.Y.) Selden (N.Y.) Selwyn's Nisi Prius (Eng.) Sergeant & Rawle (Pa.) Court of Session Cases (Eng.) Shannon (Tenn.) Shaw (Sc.) Shaw & Dunlop (Sc.) Shaw's Digest of Decisions (Sc.) Shaw, Dunlop & Bell (Sc.) Shaw & MacLean (Sc.) Sheldon (N.Y.) Sheppard's Abridgment Shepherd's Select Cases (Ala.) Shower (Eng.) Shower's Parliament Cases (Eng.) Siderfin (Eng.) Silvernail's Appeals (N.Y.) Silvernail's Supreme (N.Y.) Simons (Eng.) Simons New Series (Eng.) Simons & Stuart (Eng.) Skinner (Eng.) Smale & Giffard (Eng.) Smith (Ind.) Smith (N.H.) Smith & Batty (Ir.) Smith's King's Bench (Eng.) Smith's Leading Cases (Eng.) Smith's Registration (Eng.) Smedes & Marshall (Miss.) Smedes & Marshall Chancery (Miss.) Smythe (Ir.) Sneed (Tenn.) Southern Reporter Southern Reporter Second Series Solicitor's Journal (Eng.) Somerset Legal Journal (Pa.) Speers (S.C.) Spinks Admiralty (Eng.) Spinks' Ecclesiastical and Admiralty (Eng.)
Rand. Rap.Jud.Q.U.S. Rawle R.C.L. R.&Can.Cas. R.&Can.Tr.Cas. Redf. Redf.&B. Redf.R.Cas. Redf.Surr. Reeve Eng.L. Reports Reprint Rept.t.Finch Rept.t.Hard. Rept.t.Holt Res.&Eq.Judgm. Rev.Crit. Rev.de Jur. Rev.de Legis Rev.Leg. Rev.Leg.N.S. Rev.Rep. R.I. Rice Rich. Rich.C.P. Ridg. Ridg.Ap. Ridg.L.&S. Ridg.P.O. Ridg.t.Hardw. Riley R.&M. R.M.Charlt. Rob. Rob. Robb Pat.Cas. Robert.App.Cas. Rob.Eccl. Robin.App.Cas. Rob.Wm.Adm. Rolle Rolle Abr. Rolle Ct.Rep. Rom.Cas. Root Rose Ross Lead.Cas. R.&R. Russ.	R Randolph (Va.) Rapport's Judicials de Quebec Cour Supérieure Rawle (Pa.) Ruling Case Law Railway & Canal Cases (Eng.) Railway & Canal Traffic Cases (Eng.) Redfield's Surrogate (N.Y.) Redfield & Bigelow's Leading Cases (Eng.) Redfield's Railway Cases (Eng.) Redfield's Surrogate (N.Y.) Reeve's English Law Reports (Eng.) English Reprint Cases temp. Finch (Eng.) Lee's Reports <i>tempore</i> Hardwicke (Eng.) Reports <i>tempore</i> Holt (English Cases of Settlement) Reserved & Equity Judgments (N.S. Wales) Revue Critique (Can.) Revue de Jurisprudence (Can.) Revue de Legislation (Can.) Revue Legale (Can.) Revue Legale New Series (Can.) Revised Reports (Eng.) Rhode Island Rice (S.C.) Richardson (S.C.) Richardson's Practice Common Pleas (Eng.) Ridgeway's Reports <i>tempore</i> Hardwicke (Eng.) Ridgeway's Appeal (Ir.) Ridgeway, Lapp & Schoale (Ir.) Ridgeway's Parliament Cases (Ir.) Ridgeway temp. Hardwicke (Eng.) Riley (S.C.) Ryan & Moody (Eng.) R. M. Charlton (Ga.) Robinson (La.) Robinson (Va.) Robb's Patent Cases (U.S.) Robertson's Appeal Cases (Sc.) Robertson's Ecclesiastical (Eng.) Robinson's Appeal Cases (Sc.) William Robinson's Admiralty (Eng.) Rolle (Eng.) Rolle's Abridgment (Eng.) Rolle's Court Reports Romilly's Notes of Cases (Eng.) Root (Conn.) Rose (Eng.) Ross' Leading Cases (Eng.) Russell & Ryan Crown Cases (Eng.) Russell (Eng.)		

Spinks, P.C.
 Spottisw.
 Spottisw.Eq.
 Sprague
 Stair
 Stark.
 Stat. at L.
 Stew.
 Stew.
 Stew.&P.
 Stockt.Vice-Adm.
 Story
 Str.
 Strob.
 Stuart Vice-Adm.
 Stu.M.&P.
 Style
 Sumn.
 Susq.Leg.Chron.
 S.W.
 S.W.2d
 Swab.
 Swab.&Tr.
 Swan
 Swanst.

Spinks' Prize Cases (Eng.)
 Spottiswoode (Sc.)
 Spottiswoode's Equity (Sc.)
 Sprague (U.S.)
 Stair (Sc.)
 Starkie Nisi Prius (Eng.)
 United States Statutes at Large
 Stewart (Ala.)
 Stewart's Reports (N.S.)
 Stewart & Porter (Ala.)
 Stockton's Vice-Admiralty (N.B.)
 Story (U.S.)
 Strange (Eng.)
 Strobhart (S.C.)
 Stuart's Vice-Admiralty (L.C.)
 Stuart, Milne & Peddie (Sc.)
 Style (Eng.)
 Sumner (U.S.)
 Susquehanna Legal Chronicle (Pa.)
 South Western Reporter
 South Western Reporter Second Series
 Swabey's Admiralty (Eng.)
 Swabey & Tristram (Eng.)
 Swan (Tenn.)
 Swanston (Eng.)

T

Taml.
 Taney
 Tapp.
 Taunt.
 Taylor
 T.B.Mon.
 Tenn.
 Tenn.App.
 Tenn.Cas.
 Tenn.Ch.
 Tenn.Ch.A.
 Tenn.Civ.A.
 Terr.L.
 Tex.
 Tex.App.
 Tex.A.Civ.Cas.
 Tex.Civ.App.
 Tex.Cr.
 Tex.Suppl.
 Tex.Unrep.Cas.
 Thach.Cr.
 Thomps.&C.
 Thomps.Cas.
 Tinw.
 T.Jones
 T.I.R.
 T.M.R.
 T.&M.
 Toth.
 T.R.
 Transcr.A.
 T.Raym.
 Tread.Const.
 Treas.Dec.
 Tr.&H.Fr.
 Trint.T.
 Truem.Eq.Cas.
 Tuck.Sel.Cas.
 Tuck.Surr.
 T.U.P.Charit.
 Turn.&B.
 Tyler
 Tyrw.
 Tyrw.&G.

Tamlyn (Eng.)
 Taney (U.S.)
 Tappan (Oh.)
 Taunton (Eng.)
 Taylor (N.C.)
 T. B. Monroe (Ky.)
 Tennessee
 Tennessee Appeals
 Unreported Tennessee Cases
 Tennessee Chancery
 Tennessee Chancery Appeals
 Tennessee Civil Appeals
 Territories Law (Northwest Territories)
 Texas
 Texas Court of Appeals
 White & Wilson's Civil Cases (Tex.)
 Texas Civil Appeals
 Texas Criminal
 Texas Supplement
 Posey's Unreported Cases (Tex.)
 Thacher's Criminal Cases (Mass.)
 Thompson & Cook (N.Y.)
 Thompson's Cases (Tenn.)
 Tinwald (Sc.)
 Thomas Jones (Eng.)
 Times Law Reports (Eng.)
 Trade Mark Reports
 Temple & Mew (Eng.)
 Tothill (Eng.)
 Term Reports (Durnford & East) (Eng.)
 Transcript Appeals (N.Y.)
 Thomas Raymond (Eng.)
 Treadway Constitutional (S.C.)
 Treasury Decisions (U.S.)
 Troubat & Haly's Practice (Pa.)
 Trinity Term (Eng.)
 Trueman's Equity Cases (N.B.)
 Tucker's Select Cases (Newfoundland)
 Tucker's Surrogate (N.Y.)
 T. U. P. Charlton (Ga.)
 Turner & Russell (Eng.)
 Tyler (Vt.)
 Tyrwhitt (Eng.)
 Tyrwhitt & Granger (Eng.)

U

U.C.
 U.C.Ch.
 U.C.Cham.
 U.C.C.P.
 U.C.E.&A.
 U.C.K.B.

Upper Canada
 Upper Canada Chancery
 Upper Canada Chamber
 Upper Canada Common Pleas
 Upper Canada Error and Appeal
 Upper Canada King's Bench Reports

U.C.Q.B.
 U.C.Q.B.O.S.
 U.S.
 U.S.App.D.C.
 U.S.Aviation Rep.
 U.S.C.A.
 Utah

Upper Canada Queen's Bench
 Upper Canada Queen's Bench Old Series
 United States
 United States Appeal Cases (D.C.)
 Aviation Reports (U.S.)
 United States Code Annotated
 Utah

V

Va.
 Va.Cas.
 Va.Ch.Dec.
 Va.Dec.
 Van Ness Prize
 Cas.
 Vaughn.
 Vaux
 Vent.
 Vern.
 Vern.Ch.
 Vern.&S.
 Ves.
 Ves.&B.
 Ves.Jr.
 Ves.Jr.Suppl.
 Ves.Suppl.
 Vict.
 Vict.L.
 Vict.L.T.
 Vict.Rep.
 Vict.St.Tr.
 Vin.Abr.
 Virgin Islands
 Vt.

Virginia
 Virginia Cases
 Chancery Decisions (Va.)
 Virginia Decisions
 Van Ness Prize Cases (U.S.)
 Vaughan (Eng.)
 Vaux's Decisions (Pa.)
 Ventris (Eng.)
 Vernon's Cases (Eng.)
 Vernon's Chancery (Eng.)
 Vernon & Scriven (Ir.)
 Vesey Senior (Eng.)
 Vesey & Beames (Eng.)
 Vesey Junior (Eng.)
 Vesey Junior Supplement (Eng.)
 Vesey Senior Supplement (Eng.)
 Victorian
 Victorian Law
 Victorian Law Times
 Victorian Reports
 Victorian State Trials
 Viner's Abridgment (Eng.)
 Virgin Islands
 Vermont

W

Walk.
 Walk.
 Wall.
 Wall.C.C.
 Wall.Jr.
 Wall.Sr.
 Wallis
 Ware
 Wash.
 Wash.2d
 Wash.
 Wash.St.
 Wash.C.C.
 Wash.Co.
 Wash.T.
 Watts
 Watts&S.
 W.Bl.
 W.C.O.
 Webb, A'B.&W.I.
 P.&M.
 Web.Pat.Cas.
 Welsh
 Wend.
 West
 West.Co.L.J.
 West.L.J.
 West.L.Month.
 West.L.R.
 West.L.T.
 West.R.
 West t.Hardw.
 West.Wkly.
 [1917] West.Wkly.
 Whart.
 Wheat.
 Wheel.Cr.
 White&T.Lead.
 Cas.Eq.
 Whitm.Pat.Cas.
 Wight.

Walker (Pa.)
 Walker's Chancery (Mich.)
 Wallace (U.S.)
 Wallace (U.S.)
 Wallace Junior (U.S.)
 Wallace Senior (U.S.)
 Wallis (Ir.)
 Ware (U.S.)
 Washington
 Washington Reports, Second Series
 Washington (Va.)
 Washington State
 Washington Circuit Court (U.S.)
 Washington County Reports (Pa.)
 Washington Territory
 Watts (Pa.)
 Watts & Sergeant (Pa.)
 William Blackstone (Eng.)
 Minton-Senhouse's Workmen's Compensation Cases (Eng.)
 Webb, A'Beckett, & Williams' Insolvency, Probate, and Matrimonial Reports (Victoria)
 Webster's Patent Cases (Eng.)
 Welsh Registry Cases (Ir.)
 Wendell (N.Y.)
 West (Eng.)
 Westmoreland County Law Journal (Pa.)
 Western Law Journal (Oh.)
 Western Law Monthly (Oh.)
 Western Law Reporter (Can.)
 Western Law Times (Can.)
 Western Reporter
 West temp. Hardwicke (Eng.)
 Western Weekly (Can.)
 [1917] Western Weekly (Can.)
 Wharton (Pa.)
 Wheaton (U.S.)
 Wheeler's Criminal (N.Y.)
 White & Tudor's Leading Cases in Equity (Eng.)
 Whitman's Patent Cases (U.S.)
 Wightwicke (Eng.)

Wilcox	Wilcox (Pa.)	Words & Phrases	Words & Phrases
Willes	Willes (Eng.)	Wright	Wright (Oh.)
Wilm.	Wilmot's Notes (Eng.)	W.Rob.	William Robinson's Admiralty (Eng.)
Wils.	Wilson (Ind.)	Wr.Pa.	Wright (Pa.)
Wils.Ch.	Wilson's Chancery (Eng.)	W.Va.	West Virginia
Wils.C.P.	Wilson's Common Pleas (Eng.)	W.W.Harr.	W. W. Harrington (Del.)
Wils.Exch.	Wilson's Exchequer (Eng.)	W.W.&D.	Willmore, Wollaston & Davidson (Eng.)
Wils.P.C.	Wilson's Privy Council (Eng.)		Willmore, Wollaston & Hodges (Eng.)
Wils.&S.	Wilson & Shaw (Sc.)	W.W.&H.	Wyoming
Winch	Winch (Eng.)	Wyo.	Wythe's Chancery (Va.)
Winst.	Winston (N.C.)	Wythe	Wyatt & Webb (Vict.)
Wis.	Wisconsin	Wy.&W.	Wyatt, Webb & A'Beckett (Vict.)
W.Jones	William Jones (Eng.)	Wy.W.&A'Beck.	
W.Kel.	William Kelynge (Eng.)		
Wkly.L.Gaz.	Weekly Law Gazette (Oh.)		
Wkly.N.C.	Weekly Notes of Cases (Pa.)		
Wkly.Rep.	Weekly Reporter (Eng.)		
Wms.Saund.	Williams Notes to Saunders' Reports		
W.N.	Weekly Notes (Eng.)		
Wolf.&B.	Wolferstan & Bristow's Election Cases (Eng.)		
Wolf.&D.	Wolferstan & Dew's Election Cases (Eng.)		
Woll.	Wollaston (Eng.)		
Woodb.&M.	Woodbury & Minot (U.S.)		
Woods	Woods (U.S.)		
Woodw.	Woodward's Decisions (Pa.)		
Woolw.	Woolworth (U.S.)		

Y

Yates Sel.Cas.	Yates Select Cases (N.Y.)
Y.B.	Year Book (Eng.)
Y.&C.Exch.	Younge & Collyer's Exchequer (Eng.)
Y.&Coll.	Younge & Collyer's Chancery (Eng.)
Yeates	Yeates (Pa.)
Yelv.	Yelverton (Eng.)
Yerg.	Yerger (Tenn.)
Y.&J.	Younge & Jervis (Eng.)
York Leg.Rec.	York Legal Record (Pa.)
Young Adm.	Young's Admiralty Decisions (N.S.)
Younge	Younge Exchequer (Eng.)

LAW REVIEWS AND LAW JOURNALS

A.B.A.Jour.	American Bar Association Journal	Mass.L.Q.	Massachusetts Law Quarterly
Ala.L.Rev.	Alabama Law Review	Mercer, Beasley	
Albany L.Rev.	Albany Law Review	L.Rev.	Mercer, Beasley Law Review
Am.J.Int.Law	American Journal of International Law	Miami L.Q.	Miami Law Quarterly
Am.Law S.Rev.	American Law School Review	Mich.L.Rev.	Michigan Law Review
Ark.L.Rev.	Arkansas Law Review	Minn.L.Rev.	Minnesota Law Review
Aust.L.J.	Australian Law Journal	Miss.L.J.	Mississippi Law Journal
B.U.L.Rev.	Boston University Law Review	Mo.L.Rev.	Missouri Law Review
Brooklyn L.Rev.	Brooklyn Law Review	Montana L.Rev.	Montana Law Review
Calif.L.Rev.	California Law Review	Neb.L.B.	Nebraska Law Bulletin
Camb.L.J.	Cambridge Law Journal	N.J.L.J.	New Jersey Law Journal
Chi-Kent Rev.	Chicago-Kent Review	N.J.L.Rev.	New Jersey Law Review
Colum.L.Rev.	Columbia Law Review	N.Y.U.L.Q.Rev.	New York University Law Quarterly Review
Com.L.J.	Commercial Law Journal	Notre Dame Law	Notre Dame Lawyer
Cornell L.Q.	Cornell Law Quarterly	N.C.L.Rev.	North Carolina Law Review
Detroit L.Rev.	Detroit Law Review	Okl.L.Rev.	Oklahoma Law Review
Dick.L.Rev.	Dickinson Law Review	Oreg.L.Rev.	Oregon Law Review
Fed.B.A.J.	Federal Bar Association Journal	Phil.L.J.	Philippine Law Journal
Fla.L.J.	Florida Law Journal	Rocky Mt.L.Rev.	Rocky Mountain Law Review
Fordham L.Rev.	Fordham Law Review	Rutgers U.L.Rev.	Rutgers University Law Review
Geo.Wash.L.Rev.	George Washington Law Review	St. John's L.Rev.	St. John's Law Review
Geo.L.J.	Georgetown Law Journal	St. Louis L.Rev.	St. Louis Law Review (now Washington University Law Quarterly)
Harv.L.Rev.	Harvard Law Review	So.Calif.L.Rev.	Southern California Law Review
Ia.L.Rev.	Iowa Law Review	Southwestern L.J.	Southwestern Law Journal
Idaho L.J.	Idaho Law Journal	Stanford L.Rev.	Stanford Law Review
Ill.L.Rev.	Illinois Law Review	Temp.L.Q.	Temple Law Quarterly
Ind.L.J.	Indiana Law Journal	Tenn.L.Rev.	Tennessee Law Review
J.Am.Jud.Soc.	Journal of the American Judicature Society	Tex.L.Rev.	Texas Law Review
J.Comp.Leg.	Journal of the Society of Comparative Legislation	Tul.L.Rev.	Tulane Law Review
J.N.A.Referees Bank.	Journal of the National Association of Referees in Bankruptcy	U.Chi.L.Rev.	University of Chicago Law Review
J.Soc.Pub.Teach. Law	Journal of the Society of Pub. Teachers of Law	U.Cin.L.Rev.	University of Cincinnati Law Review
John Marshall L.Q.	The John Marshall Law Quarterly	U.Detroit L.J.	University of Detroit Law Journal
Kan.City L.Rev.	Kansas City Law Review	U.Florida L.Rev.	University of Florida Law Review
Kan.St.L.J.	Kansas State Law Journal	U.Kan.City L.Rev.	University of Kansas City Law Review
Ky.L.J.	Kentucky Law Journal	U.Pa.L.Rev.	University of Pennsylvania Law Review
L.J.	Law Journal	U. of Pitts.L.Rev.	University of Pittsburgh Law Review
L.Lib.J.	Law Library Journal	U.Toronto L.J.	University of Toronto Law Journal
Law Q.Rev.	Law Quarterly Review	Vanderbilt L.Rev.	Vanderbilt Law Review
Law Ser.Mo.Bull.	University of Missouri Bulletin, Law Series	Va.L.Rev.	Virginia Law Review
Law Soc.J.	Law Society Journal	Wash.L.Rev.	Washington Law Review
Lincoln L.Rev.	Lincoln Law Review	Wash.U.L.Q.	Washington University Law Quarterly
La.L.Rev.	Louisiana Law Review	Wash.& Lee L.Rev.	Washington and Lee Law Review
Loyola L.Rev.	Loyola Law Review	W.Va.L.Q.	West Virginia Law Quarterly and The Bar
Marq.L.Rev.	Marquette Law Review	Wis.L.Rev.	Wisconsin Law Review
Md.L.Rev.	Maryland Law Review	Wyo.L.J.	Wyoming Law Journal
		Yale L.J.	Yale Law Journal

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CORPUS JURIS SECUNDUM

VOLUME SIXTY-FOUR

MUNICIPAL CORPORATIONS

This Title includes public corporations formed under special charters or by voluntary organization under general laws for purposes of subordinate local government of cities, towns, villages, etc.; their status as bodies politic and corporate; their creation, organization, boundaries, divisions, alteration, amendment or forfeiture of charters, and dissolution; corporate powers and legislative regulation and control; meetings of governing bodies, and passage of resolutions, ordinances, and by-laws; municipal boards, officers, and agents, and their rights, powers, proceedings, and liabilities; public improvements and assessments therefor, and grants of franchises or aid thereto; control and regulation of public places and works, police regulations, licenses, violations of regulations, and liabilities incurred in performance or for non-performance of municipal duties or for acts of municipal boards, officers, or agents; municipal property, contracts, indebtedness, bonds, and other securities; municipal taxation, revenue, and finances; claims against municipal corporations; actions by or against municipal corporations; and criminal prosecutions against municipal corporations.

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XVIII. USE AND REGULATION OF PUBLIC PLACES, PROPERTY, AND WORKS

A. STREETS AND OTHER PUBLIC WAYS

1. IN GENERAL

§ 1653. Definitions and Distinctions

The term "street" is ordinarily used to mean a public way or road in a city or village.

In a general sense, a "street" is a way or a paved way or road;²³ it is a generic term and includes all urban ways which can be and are generally used for ordinary travel.²⁴ Ordinarily the term "street" is

used to mean a public way or road in a city or village,²⁵ and is generally distinguished from public ways or roads outside thereof.²⁶ The term "street" does not include a private road,²⁷ or toll roads or turnpikes,²⁸ or other roads owned by a private corporation,²⁹ or a wharf³⁰ or a park,³¹ or an approach to a bridge.³² On the other hand, the term may in-

23. N.C.—Parsons v. Wright, 27 S. E.2d 534, 223 N.C. 520.
44 C.J. p 881 note 76.

"Lot" and "street" distinguished

The term "lots" in its ordinary meaning includes that portion or part of territory measured and set apart for individual private use and occupancy while the term "streets" means that portion set apart and designated for use by the public and means a public way in a city, town, or village.

U.S.—State of California v. U. S., C.A.Cal., 169 F.2d 914.

Cal.—Peake v. Azusa Valley Sav. Bank, 99 P.2d 382, 384, 37 Cal.App. 2d 296—Hunter v. Roman Catholic Bishop of Los Angeles and San Diego Corporation Sole, 16 P.2d 1048, 1049, 128 Cal.App. 90—Application of Dixon, 8 P.2d 881, 882, 120 Cal.App. 635.

38 C.J. p 284 note 30 [a].

24. Ill.—Carlin v. Chicago, 104 N.E. 905, 262 Ill. 564, Ann.Cas.1915B 213.

43 C.J. p 986 note 77.

25. Ala.—Greil v. Stollenwerck, 78 So. 79, 201 Ala. 303.

Ariz.—City of Phoenix v. Sun Valley Bus Lines, 170 P.2d 289, 64 Ariz. 319.

Ark.—St. Louis S. W. R. Co. v. Underwood, 86 S.W. 804, 74 Ark. 610.

Colo.—Minnequa Lumber Co. v. City and County of Denver, 186 P. 539, 541, 67 Colo. 472.

Ga.—Shannon v. Martin, 139 S.E. 671, 164 Ga. 872, 54 A.L.R. 1246, answers conformed to 140 S.E. 425, 37 Ga.App. 343—Schlesinger v. City of Atlanta, 129 S.E. 861, 161 Ga. 149—Atlanta & W. P. R. Co. v. Atlanta, B. & A. R. Co., 54 S.E. 736, 125 Ga. 529—Belcher v. City of Atlanta, 31 S.E.2d 612, 71 Ga.App. 595.

Ill.—City of Elmhurst v. Buettgen, 68 N.E.2d 278, 394 Ill. 248—Carlin v. City of Chicago, 104 N.E. 905, 262 Ill. 564, Ann.Cas.1915B 213—Central Illinois Coal Mining Co. v. Illinois Power Co., 249 Ill.App. 193.

Ind.—House-Wives League v. City of Indianapolis, 185 N.E. 511, 204 Ind. 685.

Ky.—Nelson County v. City of Bardstown, 99 S.W. 940, 124 Ky. 636, 30 Ky.L. 870.

Miss.—City of Ellisville v. State Highway Commission, 191 So. 274, 186 Miss. 473.

N.C.—Parsons v. Wright, 27 S.E.2d 534, 223 N.C. 520.

Tex.—Town of Refugio v. Strauch, Com.App., 29 S.W.2d 1041.

44 C.J. p 881 note 77.

Surface and depth of street

The word "street" means the whole surface and as much of the depth as is or can be used not unfairly for the ordinary purpose of a street. Ala.—Cloverdale Homes v. Town of Cloverdale, 62 So. 712, 183 Ala. 419, 47 L.R.A.N.S., 607.

Colo.—City of Leadville v. Bohn Mining Co., 86 P. 1038, 37 Colo. 248, 8 L.R.A.N.S., 422, 11 Ann.Cas. 443.

Ky.—Hamby v. City of Dawson Springs, 104 S.W. 259, 126 Ky. 451, 12 L.R.A.N.S., 1164.

Term "street" in plat, map, town ordinance, contract, or deed must be taken as referring to street in true sense of public thoroughfare or highway in city or village.—Town of Refugio v. Strauch, Tex.Com.App., 29 S.W.2d 1041.

City street used as state highway

City streets continue to be such, even though designated by the state highway commission as streets over which a state highway shall be routed.—Cabell v. City of Cottage Grove, 130 P.2d 1013, 170 Or. 266.

Maintenance by state

A street within corporate limits of town does not lose its character as a "city street" by work done for its maintenance or its relocation by virtue of contract between municipality and state highway department.—Brimer v. Municipality of Jefferson City, Tenn., 216 S.W.2d 1.

Statutory definition

"The entire width between prop-

erty lines of every way or place of whatever nature when any part thereof is open to the use of the public, as a matter of right, for purposes of vehicular traffic."—Cihal v. Carver, 79 N.E.2d 82, 334 Ill.App. 234.

26. Ga.—Belcher v. City of Atlanta, 31 S.E.2d 612, 71 Ga.App. 595.

N.C.—Parsons v. Wright, 27 S.E.2d 534, 223 N.C. 520.

44 C.J. p 882 note 78.

Street as highway see Highways § 1.

"Street" and "road" distinguished

The word "road" is a term of general use designating a passageway in the country outside of municipality, and word "street" is term of general use designating passageway in municipality.—Howard v. State, 49 S.E.2d 684, 77 Ga.App. 712.

27. Mass.—Siegemund v. Building Com'r of City of Boston, 156 N.E. 852, 259 Mass. 329.

44 C.J. p 882 note 81.

Permissive use by public

The fact that a roadway, over which the public has a permissive use but which is maintained and controlled by someone other than the city, is within the corporate limits of city does not make it a street of the city.—Kroeger v. St. Louis County, Mo., 218 S.W.2d 118.

28. N.J.—Quinn v. Paterson, 27 N.J. Law 35.

Pa.—Wilson v. Allegheny City, 79 Pa. 272.

29. N.J.—Quinn v. Paterson, 27 N.J. Law 35.

30. U.S.—Illinois, etc., R. & Canal Co. v. St. Louis, C.C.Mo., 12 F.Cas. No. 7,007, 2 Dill. 70.

68 C.J. p 203 note 5.

31. Ind.—Bennett v. Seibert, 35 N.E. 35, 37 N.E. 1071, 10 Ind.App. 369. Parkway as street or park see infra § 1821.

32. N.J.—Robinson v. Board of Chosen Freeholders of Passaic County, 103 A. 359, 91 N.J.Law 154.

clude an avenue,³³ a cul-de-sac,³⁴ a lane,³⁵ a path,³⁶ a town way,³⁷ crosswalks,³⁸ gutter ways,³⁹ curbsings,⁴⁰ the terminus of the street,⁴¹ a connecting bridge over a stream crossing a street,⁴² a bridge along and over a street,⁴³ and also, it has been held, a public pier.⁴⁴

Form or structure. A street need not take any specific form of structure,⁴⁵ and, if its form and structure are such that it serves the purpose of a street, it is immaterial what its form may be or that it may also serve another purpose.⁴⁶

Subjection to public use. A street is a public way from side to side, and from end to end.⁴⁷ The question whether a way is public or private is determined by the right of the public to use it,⁴⁸ and not by its size⁴⁹ or the number of persons who may

choose to exercise the right.⁵⁰ While a "street," in the ordinary acceptance of the term, contemplates a carriageway and a footway, a public way is, nevertheless, a street, although its use is confined to pedestrian travel only.⁵¹

Sidewalk; grass plots. The word "street," as ordinarily used, includes a sidewalk,⁵² although it is sometimes used in its restricted sense as including only the roadway.⁵³ Grass plots and park areas between the roadway and the sidewalk are part of the street.⁵⁴

Intersection means the space occupied by two streets at the point where they cross each other or the space common to both.⁵⁵

Alley. An alley is a narrow way or passage in

83. Mo.—St. Louis v. Breuer, 223 S.W. 108.

"Avenue" distinguished from "boulevard"

Ky.—Newbold v. Brozge, 272 S.W. 755, 209 Ky. 218.

Mo.—City of St. Louis v. Breuer, 223 S.W. 108.

84. N.Y.—People v. Kingman, 24 N.Y. 559.

44 C.J. p 882 note 87.

85. Md.—Wehr v. Roland Park Co., 122 A. 383, 143 Md. 384.

44 C.J. p 882 note 88.

86. Md.—Wehr v. Roland Park Co., supra.

87. Me.—State v. Beeman, 35 Me. 242.

88. N.Y.—Hines v. Lockport, 60 Barb. 378, affirmed 50 N.Y. 236.

89. Ark.—Eickhoff v. City of Argenta, 179 S.W. 367, 120 Ark. 312.

Ind.—Marion Trust Co. v. City of Indianapolis, 75 N.E. 834, 37 Ind.App. 672.

44 C.J. p 882 note 93.

90. Ky.—Covington v. Schlosser, 133 S.W. 987, 141 Ky. 838.

Minn.—Kimball v. St. Paul, 150 N.W. 379, 128 Minn. 95.

91. N.C.—Willis v. New Bern, 132 S.E. 286, 191 N.C. 507.

43 C.J. p 886 note 78.

92. Ky.—Covington v. Schlosser, 133 S.W. 987, 141 Ky. 838.

44 C.J. p 882 note 98.

93. Idaho.—Village of Sandpoint v. Doyle, 95 P. 945, 14 Idaho 749, 17 L.R.A., N.S., 497.

94. Cal.—Pan-Pacific Const. Co. v. Meadows, 260 P. 355, 85 Cal.App. 775.

N.Y.—Gluck v. Ridgewood Ice Co., 9 N.Y.S. 254, affirmed 26 N.E. 753, 125 N.Y. 728.

95. Wis.—Nuthals v. Green Bay, 156 N.W. 472, 162 Wis. 434.

46. Wis.—Nuthals v. Green Bay, supra.

44 C.J. p 883 note 4.

47. Fla.—Corpus Juris quoted in Burns v. McDaniel, 140 So. 314, 316, 104 Fla. 526.

Ind.—House-Wives League v. City of Indianapolis, 185 N.E. 511, 204 Ind. 685.

Iowa.—Cowin v. City of Waterloo, 21 N.W.2d 705, 237 Iowa 202—Lacy v. City of Okaloosa, 121 N.W. 542, 143 Iowa 704, 31 L.R.A., N.S., 853.

Mo.—Brolin v. City of Independence, 114 S.W.2d 199, 232 Mo.App. 1056.

N.Y.—C. J. Sullivan Advertising Co. v. City of New York, 113 N.Y.S. 893, 61 Misc. 425.

N.C.—Willis v. New Bern, 132 S.E. 286, 191 N.C. 507.

44 C.J. p 883 note 5.

48. Fla.—Corpus Juris quoted in Burns v. McDaniel, 140 So. 314, 316, 104 Fla. 526.

44 C.J. p 883 note 6.

49. Fla.—Corpus Juris quoted in Burns v. McDaniel, 140 So. 314, 316, 104 Fla. 526.

Mo.—Marshall v. Springfield, 221 S.W. 17.

50. Fla.—Corpus Juris quoted in Burns v. McDaniel, 140 So. 314, 316, 104 Fla. 526.

Mo.—Marshall v. Springfield, 221 S.W. 17.

"Street" never used by public as road or way for travel or transportation was not street in law.—Basil v. Pope, 5 P.2d 329, 165 Wash. 212.

51. Ky.—Home Laundry Co. v. Louisville, 182 S.W. 645, 168 Ky. 499.

52. Ark.—Chicago, R. I. & P. Ry. Co. v. Redding, 187 S.W. 651, 124 Ark. 368, Ann.Cas.1918D 183—Eickhoff v. City of Argenta, 179 S.W. 367, 120 Ark. 312.

Cal.—Heath v. Manson, 82 P. 331, 147 Cal. 694.

Ga.—Snow v. Johnston, 28 S.E.2d 370, 197 Ga. 146.

Idaho.—McLean v. Lewiston, 89 P. 478, 8 Idaho 472—Giffen v. City of Lewiston, 55 P. 545, 6 Idaho 231.

Ill.—City of Elmhurst v. Buettgen, 68 N.E.2d 278, 394 Ill. 248—City of Chicago v. Pittsburgh, C. C. & St. L. R. Co., 146 Ill.App. 403.

Ind.—House-Wives League v. City of Indianapolis, 185 N.E. 511, 204 Ind. 685—Marion Trust Co. v. City of Indianapolis, 75 N.E. 834, 37 Ind.App. 672.

Iowa.—Gallagher v. City of Jefferson, 101 N.W. 124, 125 Iowa 324.

Ky.—Morton v. Sullivan, 96 S.W. 807, 29 Ky.L. 943.

Mo.—Selbert v. Missouri Pac. R. Co., 87 S.W. 995, 188 Mo. 657, 70 L.R.A. 72.

N.C.—Hester v. Durham Traction Co., 50 S.E. 711, 138 N.C. 288, 1 L.R.A., N.S., 981.

Pa.—Allegheny County Light Co. v. Booth, 66 A. 72, 216 Pa. 564, 9 L.R.A., N.S., 404.

Utah.—Salt Lake City v. Schubach, United Pac. Ins. Co., Intervener, 159 P.2d 149, 108 Utah 266, 160 A. L.R. 809.

44 C.J. p 883 note 11.

53. Ala.—City of Mobile v. Harker, 85 So. 425, 204 Ala. 26.

Ga.—Snow v. Johnston, 28 S.E.2d 270, 197 Ga. 146.

N.Y.—Appeal of Ransom, 149 N.Y.S. 1056, 87 Misc. 1.

44 C.J. p 883 note 12.

54. Ala.—McCraney v. City of Leeds, 194 So. 151, 239 Ala. 143.

N.Y.—Lyman v. Village of Potsdam, 127 N.E. 312, 228 N.Y. 498.

55. Ala.—City of Birmingham v. Young, 23 So.2d 169, 246 Ala. 650.

—Rodgers v. Commercial Casualty Ins. Co., 186 So. 684, 237 Ala. 301.

33 C.J. p 475 notes 70, 71.

"Intersecting street"

Ohio.—Matter of Prohibition, 13 Ohio Cir.Ct., N.S., 574.

33 C.J. p 475 note 62.

a city as distinct from a public street;⁵⁶ a narrow way smaller in size than a street.⁵⁷ It is a narrow street, passage, or way in common use for the special accommodation for the property it reaches; it is a right of way not meant primarily as a substitute for a street but to serve a limited neighborhood for local convenience and not for general passage or travel as in the case of streets.⁵⁸ It has been held that the term "alley" does not embrace streets,⁵⁹ that an alley is not a "street" in the proper sense of the term,⁶⁰ and that a private alley will never be so considered.⁶¹ It has also been held that an alley is not intended for general travel or passage like streets,⁶² and in many instances is not governed by the rules applicable thereto.⁶³ On the other hand, it has been held that the only difference between a street and an alley is in the width of the way⁶⁴ and that a public alley is a public street or highway and is governed by the rules applicable thereto.⁶⁵ The term "alley," when used in connection with streets and highways, means a public alley.⁶⁶

Boulevard. A boulevard is a street with added parklike features.⁶⁷ It has been held to be within the general description of a street or highway,⁶⁸ but it has also been held that a "boulevard" from its ancient signification is not synonymous with "street,"⁶⁹ and a charter provision may be construed with respect to this distinction.⁷⁰ Where the provisions of a statute relating to streets are totally inconsistent with provisions of a statute relating to boulevards, the fact that an ordinance of a municipality denominates the highway a "boulevard" does not make it such, nor does the fact that it denominates it a "street" make it a street.⁷¹ It has been held that the character of a way as a boulevard or ordinary street is to be determined by the governing authorities' intention and plans and the use to which the way has been put.⁷²

§ 1654. Names of Streets

Ordinarily, a municipal corporation may change the names of its streets.

56. Ark.—St. Louis Ry. Co. v. Christian, 261 S.W. 297, 164 Ark. 65.
Ohio.—Morrow v. Wittler, 26 Ohio N.P.N.S., 85.

Wash.—McAbee v. French, 274 P. 713, 150 Wash. 646.
2 C.J. p 1152 note 61.

57. Iowa.—Talbert v. Mason, 113 N.W. 918, 136 Iowa 373, 125 Am.S.R. 259, 14 L.R.A.N.S., 878.
2 C.J. p 1151 note 58.

"Alley" means a narrow street in common use.—White v. Meadow Park Land Co., Mo.App., 213 S.W.2d 123.

58. U.S.—U. S. v. Certain Parcels of Land Situated in Fairfield, Baltimore, D.C.Md., 54 F.Supp. 687.
Ill.—Carpenter v. Capital Electric Co., 52 N.E. 973, 178 Ill. 29, 69 Am.S.R. 286, 43 L.R.A. 645.

Iowa.—Talbert v. Mason, 113 N.W. 918, 136 Iowa 373, 125 Am.S.R. 259, 14 L.R.A.N.S., 878.

N.C.—Parsons v. Wright, 27 S.E.2d 534, 223 N.C. 520.

Wash.—Burkhard v. Bowen, 203 P.2d 361.

2 C.J. p 1151 note 53.

"Cartway" and "alley" distinguished. A quasi-public way located in a rural section is a "cartway" under statute relating thereto, while such a way within the corporate limits of a town or city is an "alley."—Parsons v. Wright, 27 S.E.2d 534, 223 N.C. 520.

59. N.Y.—In re Woolsey, 95 N.Y. 135.

An alley is not necessarily a "street," and the public has not necessarily a right to its use.—Miliken v. Denny, 47 S.E. 132, 135 N.C. 19.

60. Ill.—J. Burton Co. v. City of

Chicago, 86 N.E. 93, 236 Ill. 383, 15 Ann.Cas. 965.
2 C.J. p 1151 note 59.

61. Ill.—Chicago v. Borden, 60 N.E. 915, 190 Ill. 430.

Iowa.—Talbert v. Mason, 113 N.W. 918, 136 Iowa 373, 125 Am.S.R. 259, 14 L.R.A.N.S., 878.

62. Mich.—Face v. Ionia, 51 N.W. 184, 90 Mich. 104—Paul v. Detroit, 32 Mich. 108.

63. Mich.—Face v. Ionia, 51 N.W. 184, 90 Mich. 104—Bagley v. People, 5 N.W. 415, 48 Mich. 355, 38 Am.R. 192.

64. Ill.—J. Burton Co. v. City of Chicago, 86 N.E. 93, 236 Ill. 383, 15 Ann.Cas. 965.

Mo.—Asbury v. Kansas City, 144 S.W. 127, 128, 161 Mo.App. 496.

Tenn.—Western Union Tel. Co. v. Dickson, 173 S.W.2d 714, 27 Tenn. App. 752.

Wash.—Burkhard v. Bowen, 203 P.2d 361.

65. Ga.—Henderson v. Ezzard, 44 S.E.2d 397, 75 Ga.App. 724—Scott v. Reynolds, 29 S.E.2d 88, 70 Ga.App. 545.

Ind.—Bergan v. Co-operative Ice & Fuel Co., 84 N.E. 833, 41 Ind.App. 647.

Kan.—Johnson v. City of Galena, 186 P.2d 96, 163 Kan. 713.

Mo.—O'Brien v. Burroughs Adding Mach. Co., 177 S.W. 311, 191 Mo. App. 501.

W.Va.—Byrne v. Wheeling Can Co., 78 S.E. 758, 72 W.Va. 509.
2 C.J. p 1152 note 62.

66. Ill.—Central Illinois Coal Mining Co. v. Illinois Power Co., 249 Ill.App. 199.

67. Mich.—Barris v. City of Detroit, 245 N.W. 790, 260 Mich. 622.

Ohio.—State ex rel. Copland v. City of Toledo, 62 N.E.2d 356, 75 Ohio App. 378.

Compared with "street"

Ill.—Carlin v. Chicago, 104 N.E. 905, 262 Ill. 564.

Md.—Bouis v. City of Baltimore, 113 A. 352, 138 Md. 284.

Mich.—Barris v. City of Detroit, 245 N.W. 790, 260 Mich. 622.

N.D.—City of Fargo v. Gearey, 156 N.W. 552, 33 N.D. 64.

Distinguished from "street"

Mich.—Campbell v. City of Detroit, 243 N.W. 11, 259 Mich. 297—Doherty v. City of Detroit, 223 N.W. 177, 344 Mich. 660.

Mo.—Albers v. City of St. Louis, 188 S.W. 83, 268 Mo. 349.

Ohio.—State ex rel. Copland v. City of Toledo, 62 N.E.2d 356, 75 Ohio App. 378.

68. Mich.—Barris v. City of Detroit, 245 N.W. 790, 260 Mich. 622.

N.D.—City of Fargo v. Gearey, 156 N.W. 552, 33 N.D. 64.

Okl.—Corpus Juris cited in Yeaman v. Oklahoma City, 73 P.2d 337, 339, 181 Okl. 43.

44 C.J. p 882 note 98.

69. Mo.—St. Louis v. Breuer, 228 S.W. 108.

44 C.J. p 882 note 99.

70. Mo.—St. Louis v. Breuer, supra.

71. Mo.—Albers v. St. Louis, 188 S.W. 83, 268 Mo. 349.

72. Ohio.—State ex rel. Copland v. City of Toledo, 62 N.E.2d 356, 75 Ohio App. 378.

Although it has been held that a city council may not change the name of a street where no good cause exists therefor except on the petition of abutting property owners,⁷³ a municipal corporation having very general powers over the streets, including the authority to regulate and control the use thereof, and the specific power to name them, has the power to change the names or renumber the buildings by ordinance or resolution,⁷⁴ and this right is not exhausted by a previous exercise of the power.⁷⁵ It has been held that an ordinance changing the name of a street is a legislative act not subject to review by the courts,⁷⁶ but it has also been held that the exercise of the power is subject to judicial review where it is arbitrary, unreasonable, or unfair.⁷⁷ An attempt by the council to change the name of a street from a name by which it is sometimes called, instead of from its official name, does not affect the official name.⁷⁸ Where the name of a street becomes the official name by a resolution of the council, the subsequent recording of a map of

a subdivision giving the street a different name is inoperative to change the official designation.⁷⁹ Where a street is designated by a name on a recorded map and the city thereafter accepts as public streets all streets dedicated as such, such designated name becomes the legal name of the street.⁸⁰

§ 1655. Use by Municipality for Purpose Other than Highway

A municipal corporation may use a street for any purpose not inconsistent with its use as a highway, but it may not appropriate the street for a use entirely inconsistent with street purposes.

A municipal corporation holds its streets in trust for the use of the general public, and is without power to convert them to any other use⁸¹ except as specifically authorized by the legislature.⁸² A municipality may not appropriate the street for any use entirely inconsistent with street purposes,⁸³ and hence it may not construct buildings in a street which materially interfere with its use as a highway,⁸⁴ such as a public or municipal market,⁸⁵ or a

73. Ohio.—*Miller v. Cincinnati*, 10 Ohio Dec., Reprint, 423, 21 Cinc.L. Bul. 121.

74. Wash.—*Eldridge v. Fawcett*, 223 P. 1040, 128 Wash. 615.

Abutting owners had no property right in name of street so as to prevent city from changing name, except by eminent domain or by exercise of police power.—*Hagerty v. City of Chicago*, 195 N.E. 652, 360 Ill. 97, 98 A.L.R. 1210.

Implied power

Kan.—*Brown v. City of Topeka*, 74 P.2d 142, 146 Kan. 974.

Change held not unreasonable

Ill.—*Hagerty v. City of Chicago*, 195 N.E. 652, 360 Ill. 97, 98 A.L.R. 1210.

N.Y.—*Bacon v. Miller*, 160 N.E. 381, 247 N.Y. 311.

Renumbering buildings

The board of aldermen of a city authorized to regulate the numbering of houses and lots in streets may, by resolution, authorize a borough president to renumber buildings on a street.—*Van Ingen v. Hudson Realty Co.*, 94 N.Y.S. 645, 106 App. Div. 444.

75. Wash.—*Eldridge v. Fawcett*, 223 P. 1040, 128 Wash. 615.

76. Ill.—*Hagerty v. City of Chicago*, 274 Ill.App. 39.

Unnamed street

The naming, by a board to whom the power is given by charter, of a street not theretofore named is a legislative act, and the circumstance that such a street has been called by a different name does not make such act a judicial one.—*Darling v. Jersey City*, 78 A. 16, 80 N.J.Law

514, affirmed 86 A. 1102, 84 N.J.Law 758—44 C.J. p 909 note 19.

Court may not interfere on basis of difference of opinion as to propriety of resolution authorizing change of numbers on buildings on avenue.—*Bacon v. Miller*, 160 N.E. 381, 247 N.Y. 311.

Motive

Court has nothing to do with motives actuating aldermen in adoption of resolution providing for renumbering on avenue, in absence of fraud or corruption.—*Bacon v. Miller*, supra.

77. Kan.—*Brown v. City of Topeka*, 58 P.2d 64, 144 Kan. 66.

78. Cal.—*Peck v. Barnard*, 108 P. 55, 12 Cal.App. 558.

79. Cal.—*Peck v. Stassforth*, 103 P. 918, 156 Cal. 201—*Peck v. Barnard*, 108 P. 55, 12 Cal.App. 558.

80. Cal.—*Peck v. Stassforth*, 103 P. 918, 156 Cal. 201.

81. U.S.—*Rheinberger v. Security Life Ins. Co. of America*, C.C.A. Ill., 146 F.2d 680.

Ala.—*Thetford v. Town of Cloverdale*, 115 So. 165, 217 Ala. 241.

Iowa.—*Cowin v. City of Waterloo*, 21 N.W.2d 705, 237 Iowa 202.

S.C.—*Bethel M. E. Church v. City of Greenville*, 45 S.E.2d 841, 211 S.C. 442.

43 C.J. p 134 note 73.

The primary purpose of streets, either public or private, is to afford passage.—*Nemours v. Hickey*, 210 S.W.2d 94, 367 Mo. 721, certiorari denied 69 S.Ct. 43, 335 U.S. 821, 93 L. Ed. —

Streets may not be hired to private persons for revenue.—*Huebsch-*

mann v. Grand Co., 172 A. 227, 166 Md. 615.

82. N.Y.—*Peterson v. City of New York*, 183 N.E. 280, 260 N.Y. 156.

83. Iowa.—*Cowin v. City of Waterloo*, 21 N.W.2d 705, 237 Iowa 202. Mo.—*Stout v. Frick*, 62 S.W.2d 1057, 333 Mo. 826, transferred, see, App. 69 S.W.2d 677—*Corpus Juris* cited in *Central Surety & Insurance Corporation v. Hinton*, 130 S.W.2d 235, 239, 233 Mo.App. 1218.

Neb.—*Corpus Juris* cited in *Barger v. City of Tekamah*, 260 N.W. 866, 367, 128 Neb. 805.

S.C.—*Plunkett v. City of Aiken*, 156 S.E. 245, 159 S.C. 97.

Tex.—*Moore v. Gordon*, Civ App., 122 S.W.2d 239, error dismissed. 44 C.J. p 938 note 64.

Ramp built on public street by city dock department to afford driveway to upper floor of dock must be removed as encroachment.—*Peterson v. City of New York*, 183 N.E. 280, 260 N.Y. 156.

Drilling for oil

In determining whether city could be restrained from drilling for oil on land conveyed to city to be used exclusively for street purposes and which was so used, any monetary benefit which city might receive from operation of oil wells on such land could not be considered.—*Marshall v. Standard Oil Co. of California*, 61 P.2d 620, 17 Cal.App.2d 19.

84. Ga.—*Savannah v. Wilson*, 49 Ga. 476.

44 C.J. p 938 note 65.

85. Mo.—*Peters v. St. Louis*, 125 S.W. 1134, 236 Mo. 62, 21 Ann.Cas. 1069.

44 C.J. p 938 note 66.

jail,⁸⁶ or, according to the decisions on the question, rent out a space along the curb to the obstruction of travel or of access to abutting property,⁸⁷ or erect a standpipe or water tank.⁸⁸ So a municipality has no right to erect on a street a permanent structure not aiding public travel and which injuriously affects the beneficial enjoyment of his premises by an abutter,⁸⁹ as in the case of public toilets⁹⁰ or an electric lighting plant.⁹¹

On the other hand, a municipality may use a street for any purpose not inconsistent with its use as a highway,⁹² and its rights are not limited to the mere surface of the street.⁹³ For instance, it may lawfully use the streets for the construction of sewers,⁹⁴ or for subways,⁹⁵ or for drainage;⁹⁶ or to

erect fire alarm boxes, hydrants, and meter boxes;⁹⁷ or to lay gas or water pipes,⁹⁸ or conveyors for heat and power;⁹⁹ or to erect poles and wires for electric lights,¹ telephone service,² or other utilities;³ or to construct a wharf at the terminus of a street,⁴ or to devote a part thereof to bridge approaches;⁵ or to convert a promenade into wharves;⁶ or to set apart for a boulevard a portion of a street not devoted to business purposes.⁷ It has been held that a municipality may construct a flood wall on the street.⁸

While the discretion of the municipal officers in determining the use to be made of the street is not subject to the control of the courts except for the clearest abuse,⁹ injunction is the proper remedy

96. Ark.—Osceola v. Haynie, 227 S. W. 407, 147 Ark. 290.

97. Ohio.—Hites v. Dayton, 8 Ohio Dec., Reprint, 170, 6 Cinc.L.Bul. 142.

98. Ill.—Barrows v. Sycamore, 37 N.E. 1096, 150 Ill. 588, 41 Am.S.R. 400, 25 L.R.A. 635.

44 C.J. p 938 note 69.

99. Wis.—Davis v. Appleton, 85 N. W. 515, 109 Wis. 580.

90. Wash.—Motoramp Garage Co. v. Tacoma, 241 P. 16, 136 Wash. 589, 42 A.L.R. 886.

44 C.J. p 938 note 71.

91. Mich.—McIlhinny v. Trenton, 111 N.W. 1083, 148 Mich. 380, 118 Am.S.R. 583, 10 L.R.A.N.S., 623, 12 Ann.Cas. 23.

92. Miss.—Scranton - Pascagoula Realty Co. v. City of Pascagoula, 128 So. 73, 157 Miss. 498.

Mo.—State ex rel. State Highway Commission v. Cox, 77 S.W.2d 116, 386 Mo. 271.

Tex.—City of Beaumont v. Priddie, Civ.App., 65 S.W.2d 434, reversed on other grounds Texas & N. O. R. Co. v. Priddie, 95 S.W.2d 1290, 127 Tex. 629.

44 C.J. p 937 note 51.

Traffic assistance and street lighting

The statute authorizing municipality to construct and maintain safety isles, standards, beacon lights, and other structures in the streets, and the statute, granting city power to cause streets to be lighted and to erect the necessary poles, fixtures, and equipment, authorized city to erect and maintain in center of street an ornamental pole or fixture set in a wide base serving the double purpose of street lighting and traffic assistance.—Murphy v. City of Asbury Park, C.C.A.N.J., 139 F.2d 888, certiorari denied 64 S.Ct. 1048, 322 U.S. 735, 88 L.Ed. 1569.

Add to travel not essential

Uses of street property by city

need not be strictly in furtherance of and for aid to the traveling public.

—U. S. Bung Mfg. Co. v. City of Cincinnati, 11 Ohio Supp. 37, affirmed 54 N.E.2d 432, 73 Ohio App. 80.

93. Miss.—Scranton - Pascagoula Realty Co. v. City of Pascagoula, 128 So. 73, 157 Miss. 498.

44 C.J. p 937 note 52.

94. Pa.—In re Vacation of Gallagher St., Borough of Bellevue, 168 A. 485, 110 Pa.Super. 427.

44 C.J. p 937 note 53.

95. Mass.—Fifty Associates v. Boston, 88 N.E. 427, 201 Mass. 585.

96. Pa.—In re Vacation of Gallagher St., Borough of Bellevue, 168 A. 485, 110 Pa.Super. 427.

44 C.J. p 938 note 55.

97. Ala.—McCraney v. City of Leeds, 194 So. 151, 239 Ala. 143.

Mass.—Centobar v. Selectmen of Wattertown, 167 N.E. 303, 268 Mass. 121.

98. Wis.—Milwaukee Electric Ry. & Light Co. v. City of Milwaukee, 245 N.W. 856, 209 Wis. 656.

44 C.J. p 938 note 56.

99. Cal.—Thompson v. City of Los Angeles, 185 P.2d 393, 82 Cal.App. 2d 45.

Ohio.—Sorg v. Oak Harbor, 151 N.E. 800, 20 Ohio App. 313—Stons v. Cuyahoga Light Co., 9 Ohio N.P., N.S., 545.

1. Iowa.—Abraham v. Sioux City, 250 N.W. 461, 218 Iowa 1068.

44 C.J. p 938 note 58.

2. Ky.—Louisville Home Tel. Co. v. Louisville, 115 S.W. 955, 130 Ky. 611.

3. Ala.—McCraney v. City of Leeds, 194 So. 151, 239 Ala. 143.

Trolley poles

Iowa.—Abraham v. Sioux City, 250 N.W. 461, 218 Iowa 1068.

4. U.S.—Russel v. The Empire State, D.C.Mich., 21 F.Cas.No.13-145, Newb.Adm. 541.

44 C.J. p 938 note 60.

5. Mo.—St. Louis v. Terminal R. Assoc., 109 S.W. 641, 211 Mo. 364.

6. Miss.—Gulfport, etc., Coast Tract. Co. v. Manuel, 85 So. 308, 123 Miss. 266.

Tenn.—Memphis v. Wright, 6 Yerg. 497, 27 Am.D. 489.

7. Minn.—Apitz v. City of New Ulm, 241 N.W. 47, 185 Minn. 345.

Okl.—Corpus Juris cited in Yeaman v. Oklahoma City, 72 P.2d 357, 359, 181 Okl. 43.

44 C.J. p 938 note 63.

8. Ohio.—U. S. Bung Mfg. Co. v. City of Cincinnati, 11 Ohio Supp. 37, affirmed 54 N.E.2d 432, 73 Ohio App. 80.

Sea walls

A pumping station to be constructed by city to lift drainage water from enclosed city over or under sea wall was an essential and component part of sea wall project and when completed, would be a part of such project within statute, authorizing imposition of additional uses and burdens on streets, etc., for construction and maintenance of sea walls, etc.—White v. City of Port Arthur, Tex.Civ.App., 201 S.W.2d 65.

Nuisance

Evidence did not warrant enjoining city from constructing proposed flood wall in street on ground that such wall would be a nuisance or restrict availability of street for street purposes.—U. S. Bung Mfg. Co. v. City of Cincinnati, 11 Ohio Supp. 37, affirmed 54 N.E.2d 432, 73 Ohio App. 80.

Rights of abutting owners

A taxpayer suing city to enjoin construction of flood wall in street had no standing to have rights of abutting owners determined, and opinion in such suit should not be construed as determinative of their rights.—U. S. Bung Mfg. Co. v. City of Cincinnati, supra.

9. Ind.—Swaim v. City of Indianapolis, 171 N.E. 871, 203 Ind. 312, re-

to prevent an improper use of the streets by the municipality.¹⁰

Park areas; grass plots; ornamentation. Where not needed for purposes of travel, a municipality may use part of the street for park or grass areas.¹¹ A portion of the street may be set aside for purposes of ornamentation,¹² but it has been held that a

municipality may not appropriate a portion of a street for the ornamentation of the front of a public building.¹³ The erection of a suitable monument by a municipal corporation at a street intersection, so situated as not to interfere with the free and reasonable public use of the highway by the public, is not an unlawful invasion of the public highway.¹⁴

2. ESTABLISHMENT, EXISTENCE, AND LEGALITY

§ 1656. Establishment in General

The power and duty to establish streets are discussed supra § 1042, and the manner of establishment infra §§ 1657-1660.

Examine Pocket Parts for later cases.

§ 1657. Manner of Establishment

As a general rule, a street may be established as a public highway only by dedication, prescription, or statutory proceedings.

A street may be established as a public way by dedication, as discussed in Dedication § 8, prescription, as discussed infra § 1660, or by statutory pro-

ceedings, as discussed infra § 1659; and, as a general rule, a street may be established as a public way only in these ways,¹⁵ although it has been said that it is not necessary that the statutory course be pursued.¹⁶ While a direct ordinance is the usual and proper form for establishing a street,¹⁷ it may be effected indirectly by ordinance or resolution recognizing the dedication or existence of the street.¹⁸ The repeal of an ordinance vacating a street will not have the effect of reestablishing it.¹⁹

A street is usually not regarded as actually established until it is open for public use.²⁰ Where lands are dedicated for street purposes by a municipality with an assent thereto and release of all

hearing denied 173 N.E. 287, 202 Ind. 233.

10. N.Y.—*Hellinger v. New York*, 168 N.Y.S. 271, 181 App.Div. 254 44 C.J. p 938 note 75.

11. Ala.—*McCraney v. City of Leeds*, 194 So. 151, 239 Ala. 143.

Pa.—*Schaut v. Borough of St Marys*, 14 A.2d 583, 141 Pa.Super. 388.

S.C.—*Plunkett v. City of Aiken*, 156 S.E. 245, 159 S.C. 97.

Trees

City has right to maintain shade trees within prescribed areas in city streets.—*Abraham v. Sioux City*, 250 N.W. 461, 218 Iowa 1068.

Discretion

Where charter gave council control over streets, extent to which streets are opened for travel or used for parks rests entirely within discretion of council.—*Plunkett v. City of Aiken*, 156 S.E. 245, 159 S.C. 97.

Retention of character as public way

A municipality may set off part of a highway for a particular use, such as use for a parkway, without constituting an abandonment of portion of highway set apart, or without constituting a dedication thereof to an inconsistent purpose, and highway for its full width retains its character as a public way, subject to conversion into a driveway whenever, in the opinion of the constituted authorities, traffic conditions so require; and where city officially authorized creation of a parkway "in" street, and gave a name to the

parkway developed "in" the street, and later board of aldermen directed removal of trees and shrubs "from" the street in preparation for paving, there was no dedication of the locus to use as a park as distinguished from a parkway, and therefore board of aldermen was authorized to pave the locus.—*Spicer v. City of Goldsboro*, 39 S.E.2d 526, 226 N.C. 557.

Restricted use or no use

Municipality may set off part of highway, such as a grass strip, for any restricted use or for no use.—*Mayor and Council of Hagerstown v. Hertzler*, 175 A. 447, 167 Md. 518.

12. Ohio.—*State ex rel. Copland v. City of Toledo*, 62 N.E.2d 256, 75 Ohio App. 378.

Or.—*Butler v. City of McMinnville*, 268 P. 760, 126 Or. 56, 59 A.L.R. 381.

Pa.—*Berberick v. City of Pittsburgh*, Com.Pl., 91 Pittsb.Leg.J. 571.

13. N.Y.—*Hellinger v. New York*, 168 N.Y.S. 271, 181 App.Div. 254.

14. N.Y.—*Wallace v. Canandaigua*, 117 N.Y.S. 912, reversed on other grounds 138 N.Y.S. 1147, 153 App. Div. 938, affirmed 119 N.E. 1084, 223 N.Y. 543, 44 C.J. p 938 note 74.

15. La.—*Shreveport v. Simon*, 60 So. 795, 132 La. 69.

44 C.J. p 884 note 28.

Ways that have been worked and improved

Where a statute declares that all streets, roads, and alleys in a par-

ticular village which have been worked and improved by the trustees and are then used as such shall be public highways, the inquiry as to such ways is as to determining whether they come within the provisions of the statute and not as to whether the way has been established under the common-law or general statutory provisions.—*Hickok v. Plattsburgh*, 41 Barb., N.Y., 130.

16. Mo.—*Rose v. St. Charles*, 49 Mo. 509.

17. Pa.—*Lewis v. Germantown, etc.*, R. Co., 16 Phila. 621—*Spring Grove Borough v. Wentz*, Com.Pl., 58 York Leg.Rec. 38.

Ordinance not properly enacted

Under charter of city, ordinance establishing street held void, where president of council assumed to act as president in calling meeting and passing ordinance during absence of mayor and acted as mayor in approving ordinance and ordinance had not been published according to law.—*Carlton v. Jones*, 158 So. 170, 117 Fla. 622.

18. Wash.—*Columbia, etc., R. Co. v. Seattle*, 33 P. 824, 84 P. 725, 6 Wash. 332.

44 C.J. p 884 note 31.

19. Iowa.—*Bradley v. Centerville*, 117 N.W. 968, 139 Iowa 599.

20. Mich.—*Jackson v. People*, 9 Mich. 111, 77 Am.D. 491.

44 C.J. p 885 note 34.

Liability for defects see supra § 787.

claims for damage by the owners, they make an existing street at least as between them, and one dealing with property so dedicated to street purposes, although not actually in public use, who recognizes the right to use such land for street purposes, may not thereafter in dealing with the same person repudiate the existence of the street.²¹ Where the ordinance under which a railroad company is granted a right of way through a city recognizes the existence of certain streets, the railroad company after accepting the privileges and benefits of the ordinance may not question the character of such streets as public ways.²²

Right of private owner. A lot owner may permit the use of a lot by the public as a street or dedicate it to such use without violating the rights of the owner of the adjacent lot.²³

§ 1658. — Adoption of Plan or Plat

Streets may be established with reference to a particular plat or plan.

While the legislature on the incorporation of a city may establish the public streets therein with reference to a particular plat or plan,²⁴ and by statute a plan filed on incorporation or on annexation of territory to the city may make the streets shown thereon public streets,²⁵ the mere fact that a street

is shown on a map or plan of the city does not make it an actual street where it has not been opened as such.²⁶ This is true notwithstanding the city owns in fee simple the land designated in the plan as the place where the street is to be located.²⁷ By express provision of the statutes in some jurisdictions, whenever a city has been surveyed and a plat thereof has been filed showing the streets, such streets are public highways.²⁸ Where streets have been established by the proper authorities according to a plan, if they can be identified and drawn on the ground from the description in the record and the delineation on the plan taken together, the laying out of the way will not be void or vitiated by a misdescription.²⁹ The municipality may under the authority of the legislature change the plan, and thereby the extent, of the street.³⁰

§ 1659. — Statutory Proceedings

Statutes, which must be substantially complied with, sometimes provide for the establishment of streets by proceedings based on the consent of the property owners or a majority of them.

By provisions of the charter or other statutes, it is provided in many jurisdictions that streets may be established by municipal proceedings based generally on the consent of the property owners or a majority thereof manifested by petition or election,

21. N.Y.—*People v. Priest*, 99 N.E. 547, 206 N.Y. 274.

22. Ky.—*Chesapeake, etc., R. Co. v. Dayton*, 197 S.W. 969, 177 Ky. 502.

23. Va.—*Raleigh Court Corp. v. Faucett*, 124 S.E. 433, 140 Va. 126.

24. W.Va.—*McClellan v. Weston*, 39 S.E. 670, 49 W.Va. 669, 55 L.R.A. 898.

44 C.J. p 835 note 39.

No intent to establish streets

Under private statutes granting and amending charter of town, the legislature merely attempted to fix corporate limits of town and did not recognize that streets should be only as shown on a map which was registered when statutes were enacted and which described platted land which was included in the town.—*Home Real Estate Loan & Insurance Co. v. Town of Carolina Beach*, 7 S.E.2d 13, 216 N.C. 778.

25. Colo.—*Brell v. Town of Ovid*, 293 P. 961, 38 Colo. 198.

44 C.J. p 835 note 40.

26. Md.—*United Finance Corporation v. Royal Realty Corporation*, 191 A. 31, 173 Md. 138.

Pa.—*City of Hazleton v. Lehigh Valley Coal Co.*, 16 A.2d 23, 339 Pa. 585.

44 C.J. p 835 note 41.

Adoption of plan

(1) Borough plan prepared by surveyor at direction of council was not competent evidence to establish projection of street by municipality unless adopted by council.—*Pittenger v. Borough of Wilson*, 191 Pa.Super. 381.

(2) Approval by city planning board of plan for construction of street on private way, shown by recorded plan referred to in deeds of abutting lots, did not affect grantees' rights established by such deeds or confer any rights in such lots on corporation constructing street; grantees in deeds, conveying lots with right of way over street between them, were charged with notice that recorded plan, showing such street, was approved by city planning board and could properly assume that it was approved in accordance with statutes, but were not bound by hearsay testimony adduced before board or conditions orally imposed thereby before sanctioning plan.—*Walker v. E. William & Merrill C. Nutting*, 20 N.E.2d 441, 303 Mass. 535.

(3) Adoption or revision by city council of general map pursuant to statute did not divest landowner's title in bed of street as shown thereon, and did not obligate city to begin condemnation proceedings pres-

ently to acquire land in bed of street as shown on map, or compel city to open street shown thereon until council decided that it was actually needed.—*Headley v. City of Rochester*, 5 N.E.2d 198, 272 N.Y. 197.

Abandonment of rights

Where land lying adjacent to city was platted under statute providing plan for extension of system of streets, avenues, and alleys into unplatted territory, any right municipality acquired thereby was abandoned.—*United Finance Corporation v. Royal Realty Corporation*, 191 A. 31, 173 Md. 138.

27. Ga.—*Robins v. McGehee*, 56 S. E. 461, 127 Ga. 431.

28. Wash.—*State v. Forrest*, 41 P. 194, 12 Wash. 483.

29. Mass.—*Glover v. Boston*, 14 Gray 282.—*Henshaw v. Hunting*, 1 Gray 203.

30. Pa.—*Willock v. Beaver Valley R. Co.*, 72 A. 237, 222 Pa. 590.

Ramp

Even if final map of city which acquired title to realty in trust for street purposes, contained plans for building a ramp, that did not prevent city from altering the character of the improvement.—*In re Northern Boulevard*, in *Borough of Queens, City of New York*, 23 N.E.2d 167, 221 N.Y. 48.

or by other proceedings initiated by the municipality, and substantial compliance with the statutes is required to make the establishment valid,³¹ although the presumption is that the statute was complied with,³² and mere irregularities will not invalidate the proceedings.³³ A property owner who signs a petition to have a street laid out in front of his premises is not thereby estopped, as owner of that property or of property subsequently acquired, to question the legality of the proceeding.³⁴

Applicability and construction of statutes and ordinances. A city may not avail itself of a statute applicable to county roads only.³⁵ An ordinance, fixing the course and limits of the street, in the absence of anything appearing to the contrary, will be construed as establishing it at once, and not as merely preparatory to its future establishment.³⁶ A statute referring to a street for the purpose of designating a boundary will not be construed as extending the street itself.³⁷ A statute establishing streets through a cemetery does not apply to streets not within such boundaries.³⁸

Effect of prior dedication. A dedication by the filing of a map will not prevent a city from proceeding under the method provided by statute for the establishment of a street over the lines of a proposed street as shown on the map.³⁹

Description and location. It is essential to the lawful location of a city street that its termini be definitely located,⁴⁰ and the proceeding is void where it does not definitely locate the street.⁴¹

Review. Under a statute giving the right of appeal only to a person "aggrieved," citizens and taxpayers of the city who show no special injury different from the public in general have no right to appeal from the laying out of a highway by the municipality.⁴²

§ 1660. — Prescription

A street or alley may be established by prescription.

A street or an alley may be established by prescription,⁴³ or long usage from which may arise the conclusive legal presumption of establishment by competent authority.⁴⁴ User by the public for

31. Mass.—*Baker v. Fall River*, 72 N.E. 336, 187 Mass. 53.

44 C.J. p 885 note 48.

32. N.Y.—*Long Island R. Co. v. New York*, 92 N.E. 681, 199 N.Y. 288.

33. Ind.—*Pittsburgh, etc., R. Co. v. Wolcott*, 69 N.E. 451, 162 Ind. 399.

44 C.J. p 886 note 50.

34. N.Y.—*Hoy v. Hubbell*, 109 N.Y. S. 301, 125 App.Div. 60.

35. Miss.—*Illinois Cent. R. Co. v. State*, 48 So. 561, 94 Miss. 759.

44 C.J. p 886 note 52.

36. Tex.—*Grace v. Walker*, 64 S.W. 930, 65 S.W. 482, 95 Tex. 39.

37. Cal.—*People v. Dana*, 22 Cal. 11—*People v. Kruger*, 19 Cal. 411.

38. Pa.—*Naglee v. Philadelphia*, 10 Phila. 121.

39. N.J.—*New Jersey Junction R. Co. v. Jersey City*, 52 A. 352, 68 N.J.Law 108, affirmed 69 A. 1117, 70 N.J.Law 826.

44 C.J. p 886 note 56.

40. Or.—*Chapman v. Hood River*, 196 P. 467, 100 Or. 43.

41. Mass.—*Hinckley v. Hastings*, 2 Pick. 162.

44 C.J. p 886 note 58.

42. N.H.—*Lane v. Keana*, 66 A. 101, 74 N.H. 599.

43. Ky.—*City of Paducah v. Katterjohn*, 30 S.W.2d 307, 235 Ky. 223—*Cartmell v. City of Maysville*, 23 S.W.2d 102, 231 Ky. 566.

Mass.—*Spott v. City of Worcester*, 154 N.E. 324, 257 Mass. 520.

Miss.—*Maxwell v. Town of New Haven*, 178 So. 127.

N.C.—*Trellinger v. City of Burlington*, 200 S.E. 408, 214 N.C. 845—

Wright v. Town of Lake Waccamaw, 158 S.E. 99, 200 N.C. 616.

Pa.—*Conklin v. City of Scranton*, Com.Pl., 49 Lack.Jur. 53.

Tex.—*City of Houston v. Roberson*, Civ.App., 195 S.W.2d 674—*City of Dallas v. Schawe*, Civ.App., 12 S.W.2d 1074, error dismissed.

Wash.—*Richey & Gilbert Co. v. Northwestern Natural Gas Corporation*, 134 P.2d 444, 16 Wash.2d 631.

44 C.J. p 886 note 60.

Establishment of highway by prescription see Highways § 3 et seq.

Grade of street

Statute providing that council "shall, by ordinance establish" grades in city does not prevent establishment of grade by user, acquiescence or recognition, but merely authorizes council to establish grades.—*Cook v. State*, 29 N.Y.S.2d 626, 176 Misc. 947, affirmed 46 N.Y.S.2d 15, 267 App.Div. 847.

Agreed facts held to establish title by prescription.—*Hylton v. Town of Mount Airy*, 44 S.E.2d 51, 227 N.C. 622.

Question of fact

Evidence raised a question of fact as to whether city had acquired prescriptive right for use of property as a public thoroughfare.—*City of Houston v. Roberson*, Tex.Civ.App., 195 S.W.2d 674.

Jury question

Tex.—*Boone v. City of Stephenville*, Civ.App., 37 S.W.2d 842.

Public and private rights

Evidence did not authorize finding

that adjacent owners as such had acquired easement, but established that rights of adjacent owners were servient to those of the public.—*Robb & Rowley Theaters v. Arnold*, 138 S.W.2d 773, 200 Ark. 110.

Failure to replace fence

Where portion of fences between private land and alleged streets was destroyed and not replaced, prescriptive rights which had ripened into perfection through long public use were not impaired.—*St. John v. King*, 20 P.2d 123, 130 Cal.App. 356.

Railroad right of way

Town maintaining street along railroad right of way adversely and continuously for many years acquired title under presumption of exercise of power of eminent domain, notwithstanding statute providing that railroad may not be deemed to have conveyed right of way by reason of its occupation by another.—*In re Southern Ry. Co. Paving Assessment*, 147 S.E. 301, 196 N.C. 756.

In Louisiana

(1) Municipality may not acquire land for street by prescription.—*Town of Ruston v. Adams*, 121 So. 661, 9 La.App. 618—44 C.J. p 886 note 60 [d].

(2) A municipality can acquire property for public use, such as streets, only by direct purchase, by expropriation, or by dedication to public use.—*Brasseaux v. Ducote*, La. App., 6 So.2d 769—*Town of Pineville v. Ball*, 119 So. 788, 10 La.App. 283.

44. Mass.—*Reed v. Northfield*, 13 Pick. 94, 23 Am.D. 662.

more than forty years,⁴⁵ or for more than twenty-one years,⁴⁶ or for twenty years,⁴⁷ has been held sufficient, and a shorter period of time is sometimes fixed by statute.⁴⁸ So, user continuing for more than the time required by the statute of limitations to bar an action for possession of land may be sufficient.⁴⁹ Where the public generally has used land so as to acquire a prescriptive right to an easement against the owner, the city in which it is situated may assert the rights of the public thus acquired, without itself having asserted the right to the full period of prescription.⁵⁰

Under a statute providing that, whenever any road or portion thereof shall have been used and kept in repair and worked for a stated time continuously as a public highway, it shall be deemed a public road, something more than a mere use of land for public travel is required to set the statute running,⁵¹ and, under a statute providing that the road shall have been used "as a public highway," it has

been held that the road must not only have been traveled on, but must be kept in repair or taken in charge and adopted by the public authorities.⁵² Further, a statute providing that title to a highway may not be acquired by use until so declared by the board of county commissioners has been held to evince a general legislative intent and to require an assumption of jurisdiction by definite action of the municipal authorities, notwithstanding streets are subject to the control of municipal authorities.⁵³

Character of user. The user must be under a claim of right,⁵⁴ with the actual or implied knowledge of the owner,⁵⁵ and it must be exclusive,⁵⁶ open,⁵⁷ notorious,⁵⁸ continuous,⁵⁹ uninterrupted,⁶⁰ undisputed,⁶¹ acquiesced in,⁶² and adverse.⁶³ Where the landowner retains dominion over the land, a mere permissive use under a license from him will not establish a prescriptive right thereto by the public.⁶⁴

Manner and extent of use. In order to create a

Use as raising presumption of dedication see Dedication § 16 et seq.

45. Mass.—Reed v. Northfield, *supra*.

46. Ohio.—Cramer v. New Philadelphia Brewery, 16 Ohio Supp. 140. 44 C.J. p 887 note 64.

47. U.S.—Summerville v. Duke Power Co., C.C.A.N.C., 115 F.2d 440.

Ky.—City of Paducah v. Katterjohn, 30 S.W.2d 207, 235 Ky. 222.

N.C.—Hemphill v. Board of Aldermen of Forest City, 193 S.E. 153, 212 N.C. 185.

44 C.J. p 887 note 65.

48. Mich.—Chene v. City of Detroit, 247 N.W. 172, 262 Mich. 253, reheard 248 N.W. 884, 263 Mich. 512.

44 C.J. p 887 note 67.

49. Mo.—McLemore v. McNelly, 56 Mo.App. 556.

Tex.—City of Houston v. Roberson, Civ.App., 195 S.W.2d 674—Tribble v. Dallas Ry. & Terminal Co., Civ. App., 13 S.W.2d 933, error refused.

50. Tex.—Ft. Worth v. Mansfield, 99 S.W. 486, 44 Tex.Civ.App. 372.

51. Minn.—Stees Co. v. Reinhardt, 172 N.W. 219, 142 Minn. 340—Minnesota Brewing Co. v. East Grand Forks, 136 N.W. 1103, 118 Minn. 467.

52. N.Y.—Speir v. Utrecht, 24 N.E. 692, 121 N.Y. 420.

40 C.J. p 887 note 70.

53. Mont.—Barnard Realty Co. v. Butte, 136 P. 1064, 48 Mont. 102. 44 C.J. p 887 note 71.

54. U.S.—Summerville v. Duke Power Co., C.C.A.N.C., 115 F.2d 440.

Ill.—Jobst v. Mayer, 158 N.E. 745, 327 Ill. 423.

Mo.—Kelsey v. City of Shrewsbury, 71 S.W.2d 730, 335 Mo. 79.

N.C.—Hemphill v. Board of Aldermen of Forest City, 193 S.E. 153, 212 N.C. 185.

Ohio.—Cramer v. New Philadelphia Brewery, 16 Ohio Supp. 140.

Tex.—City of Houston v. Roberson, Civ.App., 195 S.W.2d 674—Boone v. City of Stephenville, Civ.App., 37 S.W.2d 842.

Va.—City of Staunton v. Augusta Corporation, 193 S.E. 695, 169 Va. 424.

44 C.J. p 887 note 72.

An easement beginning in permissive use of alley could ripen into title by long, open and continuous use.—Robb & Rowley Theaters v. Arnold, 138 S.W.2d 773, 200 Ark. 110.

55. N.C.—Hemphill v. Board of Aldermen of Forest City, 193 S.E. 153, 212 N.C. 185.

Tex.—Boone v. City of Stephenville, Civ.App., 37 S.W.2d 842.

Presumption of knowledge raises no presumption that owner knew of claim of right.—Dugan v. Zurmuehlen, 211 N.W. 986, 203 Iowa 1114.

56. Ind.—Cincinnati, etc., R. Co. v. Cleveland, etc., R. Co., 123 N.E. 1, 188 Ind. 230.

44 C.J. p 887 note 73.

57. Tex.—City of Houston v. Roberson, Civ.App., 195 S.W.2d 674.

44 C.J. p 888 note 74.

58. Tex.—City of Houston v. Roberson, *supra*.

44 C.J. p 888 note 75.

59. U.S.—Summerville v. Duke Power Co., C.C.A.N.C., 115 F.2d 440. N.C.—Hemphill v. Board of Aldermen of Forest City, 193 S.E. 153, 212 N.C. 185.

Pa.—Donahue v. Punxsutawney Borough, 148 A. 41, 298 Pa. 77.

Tex.—City of Houston v. Roberson, Civ.App., 195 S.W.2d 674.

44 C.J. p 888 note 76.

60. U.S.—Summerville v. Duke Power Co., C.C.A.N.C., 115 F.2d 440.

N.C.—Hemphill v. Board of Aldermen of Forest City, 193 S.E. 153, 212 N.C. 185.

Ohio.—Cramer v. New Philadelphia Brewery, 16 Ohio Supp. 140.

Tex.—Boone v. City of Stephenville, Civ.App., 37 S.W.2d 842.

44 C.J. p 888 note 77.

61. Mich.—Detroit v. Myers, 116 N.W. 620, 152 Mich. 666.

62. Ill.—Wiehe v. Pein, 117 N.E. 849, 281 Ill. 130.

44 C.J. p 888 note 79.

63. U.S.—Summerville v. Duke Power Co., C.C.A.N.C., 115 F.2d 440.

N.J.—Borough of West Long Branch v. Hoch, 138 A. 106, 99 N.J.Eq. 103, reversed on other grounds 131 A. 889, 99 N.J.Eq. 356.

Ohio.—Cramer v. New Philadelphia Brewery, 16 Ohio Supp. 140.

Okl.—City of Hollis v. Gould, 123 P. 2d 241, 190 Okl. 335.

Tex.—City of Houston v. Roberson, Civ.App., 195 S.W.2d 674—Boone v. City of Stephenville, Civ.App., 37 S.W.2d 842.

Va.—City of Staunton v. Augusta Corporation, 193 S.E. 695, 169 Va. 424.

44 C.J. p 888 note 80.

64. U.S.—Summerville v. Duke Power Co., C.C.A.N.C., 115 F.2d 440.

Ala.—Parker v. Fuller, 23 So.2d 207, 248 Ala. 457—Marsh v. State, 21 So.2d 555, 33 Ala.App. 24, certiorari denied 21 So.2d 864, 246 Ala. 539, reversed on other grounds 28

public street by prescription, the use must be by the public;⁶⁵ the crossing of a lot to reach a private residence does not create a public street, but at most a private right of way.⁶⁶ However, it has been held that the use of land by the public generally and not merely by inhabitants of a municipality does not create a prescriptive right in the municipality.⁶⁷ To establish a way by user, the public must have pursued a definite, fixed course over it for the required period,⁶⁸ although the amount of the travel is not controlling.⁶⁹ The width of the way or the extent of the servitude is measured by the character of the user, for the easement cannot be broader than the user.⁷⁰

Acts of municipality. In order to establish a public street by prescription, the municipality must exercise control and authority over the street,⁷¹ although such conduct is not of itself sufficient to establish a street by prescription.⁷² While the rights of the public in a highway may not be admitted away by taxing officers, the fact that the land claimed as a street has been, at all times, listed as private property is significant, in connection with other facts, as affecting the question of adverse, exclusive, and uninterrupted public user.⁷³ Where a street has been established by prescription, the rights of the municipality may not thereafter be prejudiced by the issuance of building permits by the building inspector.⁷⁴

S.Ct. 276, 326 U.S. 501, 90 L.Ed. 265. Followed in *Stephens v. State*, 24 So.2d 768, 32 Ala.App. 31, *Rause v. State*, 24 So.2d 768, 32 Ala.App. 31 and *Williamson v. State*, 24 So.2d 769, 32 Ala.App. 32.

Ky.—*City of Grayson v. Eastern Kentucky Southern Ry. Co.*, 62 S.W.2d 1034, 250 Ky. 316.

N.Y.—*Cobb v. Avery*, 75 N.Y.S.2d 803 —*Feltman v. Ward*, 48 N.Y.S.2d 889, affirmed in part and reversed in part on other grounds 55 N.Y.S.2d 158, 269 App.Div. 786, motion denied 56 N.Y.S.2d 401, 269 App.Div. 843, motion denied 63 N.E.2d 595, 294 N.Y. 964, affirmed 66 N.E.2d 587, 295 N.Y. 814.

N.C.—*Whitacre v. City of Charlotte*, 6 S.E.2d 558, 216 N.C. 687, 126 A.L.R. 438—*Hemphill v. Board of Aldermen of Forest City*, 193 S.E. 153, 212 N.C. 185.

Okl.—*City of Hollis v. Gould*, 123 P.2d 241, 190 Okl. 335.

Pa.—*Groff v. Gabriel*, Com.Pl., 50 Lanc.Rev. 543.

Tex.—*Corpus Juris* quoted in *Fort Worth Stockyards Co. v. Brown*, Civ.App., 161 S.W.2d 549, 553.

44 C.J. p 888 note 81.

Where user of way does not of itself create a right to continue to do so.

Ark.—*City of Dumas v. Edington*, 147 S.W.2d 997, 201 Ark. 1021.

Miss.—*City of Columbus v. Payne*, 124 So. 269, 155 Miss. 170.

Statute barring transfer

Under local act providing that absolute control of half-mile track with park and buildings attached should never pass out of hands of mayor and council of city, the public could not by even general use by all kinds of traffic obtain a prescriptive right to use race track in city park as a public road.—*Barker v. Life & Casualty Ins. Co. of Tenn.*, 50 S.E.2d 375, 78 Ga.App. 252.

65. Miss.—*Stuart v. Town of Morton*, 36 So.2d 246, 200 Miss. 160.
N.C.—*Hemphill v. Board of Alder-*

men of Forest City, 193 S.E. 153, 212 N.C. 185.

Ohio.—*Cramer v. New Philadelphia Brewery*, 16 Ohio Supp. 140.

Incidental use by public

Where walk was created for private purposes and thereafter was maintained and repaired by owners and used for private business and public use was only incidental and at invitation of owners for business purposes, walk could not be declared a public highway.—*Feltman v. Ward*, 48 N.Y.S.2d 889, affirmed in part and reversed in part on other grounds 55 N.Y.S.2d 158, 269 App.Div. 786, motion denied 56 N.Y.S.2d 401, 269 App.Div. 843, motion denied 63 N.E.2d 595, 294 N.Y. 964, affirmed 66 N.E.2d 587, 295 N.Y. 814.

66. Pa.—*Donahue v. Punxsutawney Borough*, 148 A. 41, 298 Pa. 77.

67. Cal.—*Hihn Co. v. Santa Cruz*, 150 P. 62, 170 Cal. 436.

44 C.J. p 889 note 85.

68. N.C.—*Hemphill v. Board of Aldermen of Forest City*, 193 S.E. 153, 212 N.C. 185.

44 C.J. p 889 note 82.

Where no regular driveway was established over land, village had not acquired easement by prescription for highway purposes.—*Village of Manchester v. Blaess*, 242 N.W. 798, 258 Mich. 652.

69. Mich.—*Grandville v. Jenison*, 47 N.W. 600, 84 Mich. 54, 49 N.W. 544, 86 Mich. 567.

44 C.J. p 889 note 83.

70. Colo.—*Goerke v. Manitou*, 139 P. 1049, 25 Colo.App. 482.

44 C.J. p 889 note 84.

71. U.S.—*Summerville v. Duke Power Co.*, C.C.A.N.C., 115 F.2d 440.

N.C.—*Hemphill v. Board of Aldermen of Forest City*, 193 S.E. 153, 212 N.C. 185.

Building of water main and sewer line across property to reach a manufacturing establishment on other side of railroad did not tend to es-

tablish dedication or acceptance of an alleyway or adverse user of a public way across the property.—*Summerville v. Duke Power Co.*, C.C.A.N.C., 115 F.2d 440.

72. Ill.—*Jobst v. Mayer*, 153 N.E. 745, 327 Ill. 423.

N.Y.—*Feltman v. Ward*, 48 N.Y.S.2d 889, affirmed in part and reversed in part on other grounds 55 N.Y.S.2d 158, 269 App.Div. 786, motion denied 56 N.Y.S.2d 401, 269 App.Div. 843, motion denied 63 N.E.2d 595, 294 N.Y. 964, affirmed 66 N.E.2d 587, 295 N.Y. 814.

Limited use by public of alley and city's maintenance of electric light and using alley for removing garbage did not make city chargeable with duty of maintenance.—*City of Columbus v. Payne*, 124 So. 269, 155 Miss. 170.

73. Mich.—*Detroit v. Myers*, 116 N.W. 620, 152 Mich. 666.

Mo.—*St. Louis v. Cooper Carriage Woodwork Co.*, 216 S.W. 944.

Wash.—*Seattle v. Hinckley*, 121 P. 444, 67 Wash. 273.

Estoppel by collection of assessments and taxes see Estoppel § 198.

Payment of taxes by landowner during the forty or fifty years throughout which public used alley did not prevent acquisition of public easement.—*Robb & Rowley Theaters v. Arnold*, 138 S.W.2d 773, 300 Ark. 110.

Failure to tax

City could not acquire an interest in private walk by failing to tax it.—*Feltman v. Ward*, 48 N.Y.S.2d 889, affirmed in part and reversed in part on other grounds 55 N.Y.S.2d 158, 269 App.Div. 786, motion denied 56 N.Y.S.2d 401, 269 App.Div. 786, motion denied 56 N.Y.S.2d 401, 269 App.Div. 843, motion denied 63 N.E.2d 595, 294 N.Y. 964, affirmed 66 N.E.2d 587, 295 N.Y. 814.

74. Mont.—*Butte v. Mikosowicz*, 103 P. 593, 39 Mont. 350.

§ 1661. Highways in Territory Included by Incorporation or Annexation

As a general rule, a highway, on its inclusion by incorporation or annexation within the boundaries of a municipality, ipso facto becomes a street.

A public highway, on its inclusion by incorporation or annexation within municipal boundaries, generally becomes ipso facto a street and subject to municipal control,⁷⁵ and the municipal corporation takes it in its condition in fact and law existing at the time of its inclusion.⁷⁶ This rule has also been applied as to county roads.⁷⁷ A municipality whose limits include streets succeeds to the rights of the prior public agency having jurisdiction of the area.⁷⁸ Thus on annexation by a municipality, village or town streets become streets of the municipality.⁷⁹ However, the question whether a highway becomes a street when included within the corporate limits of the city has been held to depend on the intention of the legislature as gathered from the city charter, general laws, and the entire course

of legislation on the subject,⁸⁰ and, further, it would seem to be within the power of the city to determine whether it will assume control over such highways;⁸¹ but where the charter of a city confers full control of all roads and highways or parts thereof within the corporate limits, and excepts them from the jurisdiction of the county, the city by acting under its charter accepts such relinquishment and grant as to the county roads within its territory and they ipso facto become streets.⁸²

§ 1662. Sidewalks

A sidewalk may be established by resolution as well as by ordinance.

A sidewalk may be established by a resolution as well as by an ordinance.⁸³ Under a statute empowering the city to lay out, widen, and vacate streets and sidewalks, the city may regulate the width of sidewalks and abolish them if traffic warrants, unless some private rights protected by the constitution are impaired.⁸⁴

3. LOCATION AND EXTENT, AND ALTERATION OF COURSE OR WIDTH

§ 1663. Location and Extent

The rules with respect to locating boundaries generally apply in locating a street from a description in a map or plat.

In locating a street from a description in a map or plat, the rules with respect to locating boundaries generally have been applied.⁸⁵ For example, measurements will be taken from an existing and permanent monument rather than from an object

subject to possible shifting and variation.⁸⁶ Fixed monuments, whether natural or artificial, control course and distance in ascertaining boundaries.⁸⁷ Where an original survey is shown to have been inaccurate, a street may not be located on it, where the monuments have been lost, by running from a known line of the survey.⁸⁸ Where a plat shows a street crossing other streets in a curve, the outside line of the street being continuous but the inner line

75. Ind.—Michigan Cent. R. Co. v. Michigan City, 169 N.E. 878, 94 Ind.App. 481.

Iowa.—Incorporated Town of Ackley v. Central States Electric Co., 220 N.W. 315, 206 Iowa 533.

Ky.—Tolliver v. Louisville & N. R. Co., 10 S.W.2d 623, 226 Ky. 132.

Miss.—Corpus Juris cited in City of Ellisville v. State Highway Commission, 191 So. 274, 275, 186 Miss. 473.

N.C.—Corpus Juris cited in Parsons v. Wright, 27 S.E.2d 534, 537, 223 N.C. 520.
44 C.J. p 839 note 83.

76. Ky.—Preston Land Co. v. Paintsville, 234 S.W. 445, 192 Ky. 738.

44 C.J. p 890 note 89.

77. Ky.—Lewis v. City of Whitesburg, 69 S.W.2d 989, 253 Ky. 480—King v. Gregory, 47 S.W.2d 1019, 243 Ky. 281.

78. Ky.—Chesapeake & O. Ry. Co. v. City of Bellevue, 38 S.W.2d 943, 239 Ky. 61—City of Middleboro v.

Kentucky Utilities Co., 35 S.W.2d 877, 237 Ky. 523.

79. Iowa.—Kelroy v. City of Clear Lake, 5 N.W.2d 12, 232 Iowa 161.
Pa.—O'Brien v. Borough of Jeanette, 194 A. 314, 128 Pa.Super. 443.

Boulevard

Boulevard in annexed village retained its status, but fact that street was designated as "boulevard" on plat of village subsequently annexed to city was held not to make it such as respected city's duty to maintain.—Coburn v. City of Wyandotte, 222 N.W. 729, 245 Mich. 314.

Status fixed at time of incorporation
The status of public grounds, streets, alleys, and highways was fixed at time of incorporation.—Harbor Land Co. v. Village of Fairport, Ohio App., 49 N.E.2d 194.

80. Or.—Gaston v. Thompson, 174 P. 717, 89 Or. 412.

44 C.J. p 890 note 90.

81. Ala.—Benton v. State, 52 So. 842, 158 Ala. 175.

44 C.J. p 890 note 91.

82. Or.—Gaston v. Thompson, 174 P. 717, 89 Or. 412.

44 C.J. p 890 note 92.

83. Ohio.—Cox v. Lancaster, 3 Ohio Cir.Ct., N.S., 218, 24 Ohio Cir.Ct. 265.

Pa.—Commonwealth v. Beaver Borough, 83 A. 112, 171 Pa. 542.

84. Tex.—Jones v. Houston, Civ. App., 188 S.W. 688.

85. Minn.—Wayzata v. Great Northern R. Co., 52 N.W. 912, 50 Minn. 438.

Map held conclusive

N.Y.—Mellilo v. Kracke, 28 N.Y.S.2d 743, 261 App.Div. 631, motion granted and appeal dismissed 39 N.E.2d 281, 287 N.Y. 655.

86. Mich.—Davison v. Cartwright, 210 N.W. 226, 236 Mich. 249.

44 C.J. p 890 note 93.

87. Wis.—Madison v. Meyers, 73 N.W. 43, 97 Wis. 392, 65 Am.S.R. 127, 60 L.R.A. 635.

44 C.J. p 890 note 94.

88. Cal.—Hellman v. Los Angeles, 58 P. 10, 125 Cal. 383.

being broken into a series of angular spaces caused by the shortening of the rectangular blocks within the curve, such angular spaces form part of the street.⁸⁹

Practical location on the ground. While the boundaries of a lawfully platted street are to be located by the plat and not by the actual public use,⁹⁰ and the lines and boundaries of streets as between public and private owners cannot be established by acquiescence,⁹¹ nevertheless lines actually run and established on the ground will control mere distances indicated by the plat;⁹² and, where the original monuments cannot be ascertained, a practical location under, and in pursuance of, a plat will not be overcome by a discrepancy in distance.⁹³ Further, where the lines have been for a long time acquiesced in and recognized, they will not be changed by a resurvey merely to obtain mathematical exactness.⁹⁴ Where the center line of a street cannot at all points be located by bearings, and distances of survey and monuments are absent, the line may be determined by regarding also the location of the street as used by the public and the duration of such use.⁹⁵

Location of termini. It is essential to the lawful location of a city street that its termini be definitely located.⁹⁶

Width of roadway. A statute providing that in all streets of a certain width sidewalks shall be constructed of a certain width not only prescribes the width of the sidewalk, but by mere arithmetical computation prescribes the width of the roadway of such streets.⁹⁷ A statutory provision as to width

referring to the creation of a public highway by dedication and acceptance does not apply to the establishment of a village street acquired by purchase or condemnation.⁹⁸

Error in recorded plat. While it will be presumed that a recorded plat shows a correct description of the lines and dimensions of the street,⁹⁹ the record, if erroneous, is conclusive only where it appears that rights have been acquired in reliance on it.¹ The true location of the street may be pleaded and proved as against one who is alleged to have knowledge of the error² or who could have had such knowledge by the exercise of ordinary diligence.³

Boundary by waters or watercourses. Where a navigable lake or river is adopted as one of the boundaries of a street, the rule applied is the same as in the case of a private grant,⁴ and, if the street is bounded only by navigable water, the boundary is the low-water mark,⁵ or the center of a navigable stream,⁶ unless there is an apparent intention that the street shall stop at the edge.⁷ Where a river is indicated on a plat to be the boundary of one side of a street, it will control a statement in the plat that the street is to be of a certain width.⁸ So, where a highway is laid out along a shore, following the shore line, there is no constructive extension of the street into the water, although it touches the water at intervals.⁹

When streets run to navigable water, the extension of the shore front by accretions or otherwise generally extends the street to the new water line,¹⁰ and this is so even where the street terminates in a bulkhead.¹¹ So, where a street, as originally laid

89. Cal.—San Francisco v. Center, 66 P. 83, 133 Cal. 673.

90. Conn.—Hamlin v. Norwich, 40 Conn. 13.

91. Iowa.—Johnson v. Shenandoah, 133 N.W. 761, 153 Iowa 493.

92. Pa.—Washington Female Seminary v. Washington Borough, 18 Pa.Super. 555.

Acquisition and abandonment

Where a highway is laid out by the city or by plat and dedication and the city for more than twenty years opens and uses a strip of land of the same width as and for such highway, which strip by mistake does not exactly coincide with the lines of the laid-out way, the city acquires the right to use that particular strip for its highway and thereby abandons those portions of the laid-out way not included within the strip actually used.—Blatz Brewing Co. v. Milwaukee, 131 N.W. 416, 146 Wis. 239—44 C.J. p 890 note 10.

93. Wis.—Madison v. Mayers, 73 N.

W. 43, 87 Wis. 390, 65 Am.S.R. 127, 40 L.R.A. 635.

94. Or.—Hart v. Independence, 164 P. 719, 84 Or. 194.

Pa.—Washington Female Seminary v. Washington Borough, 18 Pa.Super. 555.

95. Ohio.—Fleming v. City of Steubenville, 184 N.E. 701, 44 Ohio App. 121.

96. Or.—Chapman v. Hood River, 196 P. 467, 100 Or. 43.

97. Mo.—Asphalt, etc., Constr. Co. v. Haeussler, App., 80 S.W. 5, affirmed 100 S.W. 14, 201 Mo. 400.

98. N.Y.—Allen v. Kebler, 134 N.Y. S. 369, 76 Misc. 40, affirmed 136 N.Y.S. 1130, 151 App.Div. 920.

99. Tex.—Dallas v. McMurray, Civ. App., 282 S.W. 296.

1. Tex.—Dallas v. McMurray, supra.

2. Tex.—Dallas v. McMurray, supra.

3. Tex.—Dallas v. McMurray, supra.

4. Minn.—Wayzata v. Great North-

ern R. Co., 42 N.W. 913, 50 Minn. 438.

5. Minn.—Wayzata v. Great Northern R. Co, supra.

6. Ill.—Owen v. Brookport, 69 N.E. 952, 208 Ill. 35—Brooklyn v. Smith, 104 Ill. 429, 44 Am.R. 90.

7. Ill.—Owen v. Brookport, 69 N.E. 952, 208 Ill. 35—Brooklyn v. Smith, 104 Ill. 429, 44 Am.R. 90.

8. U.S.—Corpus Juris cited in Phillips Petroleum Co. v. Threlkeld, C.C.A.Okl., 123 F.2d 434, 437, 44 C.J. p 891 note 23.

9. Wash.—Anderson Steamboat Co. v. King County, 146 P. 855, 84 Wash. 375.

10. Fla.—Frater v. Baylen St. Wharf Co., 49 So. 188, 57 Fla. 63, 131 Am.S.R. 1084, 44 C.J. p 891 note 25.

11. N.Y.—In re Brooklyn, 73 N.Y. 179—People v. Lambier, 5 Den. 3, 47 Am.D. 273.

out, was bounded by a river, the mere fact that a portion of the street at the water's edge had been called a "public landing" does not necessarily preclude it from being held as a part of the street.¹² A resolution providing for the extension of a street to a river will authorize the acquisition of land necessary to extend the street to the bulkhead line and not merely to the high-water mark, in order to give the city access to the river as contemplated;¹³ and where a map shows a terminus of a street some distance short of high-water mark, proceedings to open the street are effective to open it to the ocean notwithstanding the inaccuracy of the map, where the character of the proceedings clearly indicates the purpose to open it to that point.¹⁴

Surveying, bounding, or marking out. The municipal authorities having the care of the highways of the municipality have the power even in the absence of special statutory authority to survey, bound, or mark out the lines of an existing highway.¹⁵ Such a proceeding is distinct from a proceeding to lay out a highway,¹⁶ and the procedure prescribed by statute for the laying out of highways is inapplicable.¹⁷ The determination of the boundaries of a street by a municipal body requires action of a judicial nature,¹⁸ and the parties to be affected have a right to notice¹⁹ and to be heard.²⁰ Where the procedure to establish the bounds of a street which have become lost and uncertain is prescribed by statute, strict compliance with each of the steps required by the statute is essential to the validity of the proceedings.²¹

A statute providing for the designation of street lines by commissioners and making the record or map or profile filed by them "full evidence" of the street does not deprive abutting property owners of

the right to have a judicial determination of the boundaries of their properties, but only makes the designated documents prima facie evidence thereof.²² Where a statute provides that, on notice from one intending to erect a building within a specified distance from the street, the city engineer shall proceed to mark out and define the street if the line can be accurately determined, a street line not correctly marked by the city engineer is not binding on such an owner.²³ In an action by persons owning land adjacent to an alley to establish the boundaries of such alley, other abutting owners are properly made parties, since the determination of such boundaries necessarily affects their rights.²⁴ Under a statute providing for the appointment of county processioners, the act of processioners in locating the public square and streets of a city is not binding on the property owners of the city whose rights are involved unless such property owners consented to the act of the processioners.²⁵

§ 1664. Alteration of Course or Width

Municipal authority to alter the course or width of a street must be exercised in accordance with charter and statutory provisions.

Municipal authority to alter the course or width of a street is dependent on the charter or general statutes, as discussed supra § 1045, and such authority must be exercised in accordance therewith.²⁶ An ordinance is void which merely reduces the width of a street without designating what part shall remain.²⁷ The owner of a city lot has a remedy in equity against an attempt of the city and the owner of other lots in a subdivision to change the location of a street where the injury alleged is special and peculiar,²⁸ but one not an abutting owner can-

12. Ill.—Chicago, etc., R. Co. v. People, 78 N.E. 790, 222 Ill. 427.

13. N.Y.—Matter of East 136th St., 111 N.Y.S. 916, 127 App.Div. 672.

14. N.Y.—Neumann v. New York, 122 N.Y.S. 62, 137 App.Div. 55.

15. R.I.—Horgan v. Jamestown, 80 A. 271, 32 R.I. 528.

44 C.J. p 891 note 30.

16. R.I.—Horgan v. Jamestown, supra.

17. R.I.—Horgan v. Jamestown, supra.

18. N.J.—Chain v. Merchantville, 108 A. 303, 93 N.J.Law 326—Voorhees v. Bound Brook, 26 A. 710, 55 N.J.Law 548.

19. N.J.—Chain v. Merchantville, 108 A. 303, 93 N.J.Law 326.

44 C.J. p 891 note 35.

20. N.J.—Chain v. Merchantville, supra—Voorhees v. Bound Brook, 26 A. 710, 55 N.J.Law 548.

21. Conn.—Hartford Trust Co. v. West Hartford, 81 A. 244, 84 Conn. 646, Ann.Cas.1912D 997.

44 C.J. p 891 note 37.

22. N.J.—Lathrop v. Morristown, 51 A. 852, 67 N.J.Law 247.

23. R.I.—Greenough v. Industrial Trust Co., 82 A. 266, 33 R.I. 470.

24. Ind.—New Castle v. Hunt, 93 N. E. 173, 47 Ind.App. 249.

25. Ky.—Whitesburg v. Baker, 244 S.W. 686, 196 Ky. 272.

26. Ky.—Schickli v. Keeling, 210 S. W.2d 780, 307 Ky. 210.

Pa.—Scholl v. Borough of Yeadon, 28 A.2d 185, 143 Pa.Super. 601.

Tex.—Lundberg v. City of Raymondville, Civ.App., 4 S.W.2d 127, error refused.

44 C.J. p 892 note 44.

"Alteration" of street defined

As applied to streets, the word "alteration" generally refers to a

change in the source thereof, and therefore necessarily involves, to some extent, the establishment of a new street for which the substitution is made.—Rogers v. Attica, 98 N. Y.S. 665, 113 App.Div. 603—2 C.J. p 1166 note 91.

Consent of abutters

S.C.—Plunkett v. City of Aiken, 156 S.E. 245, 159 S.C. 97.

44 C.J. p 892 note 44 [c].

Acquisition of property

If ordinance directing establishment of new building line was initial step to widening street, it was ineffective until abutting owners by gift, contract, or condemnation transferred their rights to public.—Nusbaum v. City of Norfolk, 145 S.E. 257, 151 Va. 801.

27. W.Va.—Pence v. Bryant, 46 S.E. 275, 54 W.Va. 263.

28. Fla.—Gainesville v. Phifer, 59 So. 194, 64 Fla. 34.

not enjoin a municipal government from changing the course of a street for the public benefit, where his access to his property is not impaired, his remedy at law by action for damages being adequate.²⁹

Discretion of municipality. The determination of the width of a public road belongs to the local authorities and not to the courts.³⁰ Similarly, the municipality has discretion in altering or relocating a street³¹ and the exercise of its discretion is not subject to judicial interference except for abuse.³² If a municipality ordains that the width of a highway shall be changed, it will be presumed that it is done in the interest of the public, and is necessary for public purposes, and the burden of showing the contrary will be on the persons who object to the proceeding,³³ but the exclusive control of the streets and the power to make regulations for keeping them in repair, conferred on the municipal authorities by statute, does not imply the power to narrow their width, at discretion, after they have been established and improved and have gone into general public use, even though it may be to the public advantage so to do.³⁴ Where a municipality has decided on alterations and its decision has been acted on by the

court in the appointment of commissioners, it is not competent for the municipality to resume the subject and alter a plan promulgated by it on the faith of the stability of which persons have made purchases of lots which will be materially depreciated in value if a new plan is adopted.³⁵

Effect of alteration. It has been held that the alteration of an existing street by competent authority operates as a discontinuance of such portions of the old street as are not embraced within the limits fixed for the new one,³⁶ and this without an express order of discontinuance.³⁷

Sidewalks. Where the statute in no way fixes the width of the street, or the relative widths of the roadway and the sidewalk, the necessity for making a change in the width of a sidewalk is a matter for the determination of the municipal authorities in their discretion under the general power over streets conferred by statute.³⁸ A municipal corporation may not arbitrarily prevent an abutting owner from constructing a sidewalk of a reasonable width in a street dedicated for public use,³⁹ and where a street is too narrow for the increasing public needs if sidewalks are built in it, the city's reme-

29. Tex.—Dallas Cotton Mills v. Industrial Co., Civ.App., 252 S.W. 821.

30. La.—Moreauville v. Boyer, 71 So. 187, 138 La. 1070.

Va.—Nusbaum v. City of Norfolk, 145 S.E. 257, 151 Va. 801.

Protection against floods

Proposal of city to protect area on one side of viaduct against floods by the construction of a concrete wall connecting the center pillars under the viaduct, which would still leave the spaces under the viaduct open for travel on both sides of the wall except during floods, would not violate any rights of abutting property owners.—U. S. Bung Mfg. Co. v. City of Cincinnati, 54 N.E.2d 432, 73 Ohio App. 80.

31. Ohio.—Koch v. City of Toledo, 164 N.E. 124, 30 Ohio App. 68.

Cost of change in location of street is proper consideration and particular choice of location is not to be condemned merely because persons especially benefited may agree to pay the cost, in whole or in part, but choice must be made on considerations of public benefit and not by barter and sale to private interests.—Perellis v. Mayor and City Council of Baltimore, Md., 57 A.2d 341.

Industrial growth; traffic

City council on question of relocating street may consider industrial growth and welfare as well as needs of traffic and its hazards.—Koch v. City of Toledo, 164 N.E. 124, 30 Ohio App. 68.

32. Ohio.—Koch v. City of Toledo, supra.

Purpose of change

Courts cannot pass on question of policy and must determine from facts of each case whether primary purpose or effect of change in location of street is public or private.—Perellis v. Mayor and City Council of Baltimore, Md., 57 A.2d 341.

33. Ill.—Glencoe v. Stone, 129 N.E. 700, 296 Ill. 177.
44 C.J. p 893 note 51.

Plaza

Under ordinance for widening of street, city had right to provide for plaza, which is an open square, of reasonable proportion in front of railroad station as part of new highway project to provide for modern traffic needs of city, notwithstanding all of plaza was not intended to be paved for travel.—City of St. Louis v. Senter Commission Co., 84 S.W.2d 133, 336 Mo. 1209.

34. D.C.—Walter v. McFarland, 27 App.D.C. 182.

35. N.Y.—In re Beekman St., 20 Johns. 269.

36. Wis.—Miller Inv. Co. v. City of Milwaukee, 244 N.W. 753, 209 Wis. 517.

Effect of alteration of highway see Highways § 111.

Narrowing of street held not "discontinuance" within statute requiring written petition as basis for action by village board, and could be legally effectuated by village board's vote without petition by property

owners.—Huenig v. Shenkenberg, 242 N.W. 552, 208 Wis. 177.

37. Wis.—Miller Inv. Co. v. City of Milwaukee, 244 N.W. 753, 209 Wis. 517.

38. Ky.—Corpus Juris quoted in City of Covington v. Averbeck, 50 S.W.2d 50, 52, 244 Ky. 117.

Ohio.—Anderson v. Columbus, 14 Ohio S. & C.P. 180, 1 Ohio N.P.N. S. 541.

No invasion of rights

Evidence held not to show that city authorities directing sidewalk to be narrowed acted either arbitrarily, fraudulently, or so as to create manifest invasion of rights of abutting property owner.—City of Covington v. Averbeck, 50 S.W.2d 50, 244 Ky. 117.

Narrowing dedicated sidewalk

Where owner of property built sidewalk thereon adjacent to street and impliedly dedicated sidewalk to public by permitting unrestricted public use thereof, without expressly restricting use to be made of sidewalk, city could widen street by removing part of sidewalk over objections of subsequent owner of abutting property, as long as remaining sidewalk would accommodate pedestrian travel and afford ingress to, and egress from, abutting property.—City of Fulton v. Penny, 116 S.W. 2d 963, 273 Ky. 465.

39. Ky.—Georgetown v. Hambrick, 104 S.W. 997, 127 Ky. 43, 31 Ky. L. 1276, 128 Am.S.R. 323, 13 L.R.A., N.E., 1113.

dy is to widen the street by taking property for that purpose.⁴⁰

Arbitration. The right of the public to an ease-

ment for a highway may not be divested by the municipality by submitting the extent of the easement to arbitration.⁴¹

4. VACATION

§ 1665. Power to Vacate

Subject to constitutional limitations, the state has plenary power to vacate streets and this power may be exercised by the legislature or delegated to a municipal corporation or to a board or commission.

Subject to the limitations contained in the Constitution of the United States and in its own constitution, the power of a state to vacate streets or other public ways within its borders is plenary and absolute,⁴² and this power may be exercised by the

state legislature,⁴³ or may be delegated to a municipal corporation⁴⁴ or to a board or commission,⁴⁵ notwithstanding a constitutional provision prohibiting the legislature from vacating streets by local or special laws.⁴⁶ The power to vacate streets may also be given to the owners of the abutting property.⁴⁷

The power to vacate streets is not inherent in a municipal corporation,⁴⁸ but must be conferred on

40. Ky.—Georgetown v. Hambrick, *supra*.

41. R.I.—State v. Peckham, 9 R.I. 1.

42. Ala.—Chichester v. Kroman, 128 So. 166, 221 Ala. 203.

Cal.—People v. City of Oakland, 274 P. 438, 96 Cal.App. 488.

Ill.—American Asphalt Paving Co. v. City of Chicago, 161 N.E. 772, 330 Ill. 330.

N.J.—Con Realty Co. v. Ellenstein, 14 A.2d 544, 125 N.J.Law 196.

Or.—Cabell v. City of Cottage Grove, 130 P.2d 1013, 170 Or. 256, 144 A.L.R. 286.

44 C.J. p 893 note 60.

Vacation of plat see *supra* § 84.

Sovereign power to create highways comprehends power to discontinue them.—City of Huntsville v. Gross, 135 So. 462, 223 Ala. 205.

Landowner held not to have such private right in and to street as would prevent vacation of the street.—Skinner v. Pitman-Moore Co., Ind. App., 85 N.E.2d 279.

43. Ala.—City of Huntsville v. Gross, 135 So. 462, 223 Ala. 205.

Ill.—People ex rel. Hill v. Eakin, 50 N.E.2d 474, 383 Ill. 383—Nielsen v. City of Chicago, 161 N.E. 768, 330 Ill. 301.

N.J.—Con Realty Co. v. Ellenstein, 14 A.2d 544, 125 N.J.Law 196.

N.Y.—Green v. Miller, 162 N.E. 593, 249 N.Y. 83.

Or.—Cabell v. City of Cottage Grove, 130 P.2d 1013, 170 Or. 256, 144 A.L.R. 286.

44 C.J. p 893 note 61.

44. Ala.—City of Huntsville v. Gross, 135 So. 462, 223 Ala. 205—Chichester v. Kroman, 128 So. 166, 221 Ala. 203.

Cal.—People v. City of Oakland, 274 P. 438, 96 Cal.App. 488.

Ill.—People ex rel. Hill v. Eakin, 50 N.E.2d 474, 383 Ill. 383—American Asphalt Paving Co. v. City of Chicago, 161 N.E. 772, 330 Ill. 330.

Ky.—Shurtleff v. City of Pikeville, 217 S.W.2d 976, 309 Ky. 420.

Mont.—Lloyd v. City of Great Falls, 86 P.2d 395, 107 Mont. 442.

N.J.—Con Realty Co. v. Ellenstein, 14 A.2d 544, 125 N.J.Law 196.

Or.—Cabell v. City of Cottage Grove, 130 P.2d 1013, 170 Or. 256, 144 A.L.R. 286.

Tex.—*Corpus Juris* cited in Harper v. City of Wichita Falls, Civ.App., 105 S.W.2d 743, 751.

Wash.—Fry v. O'Leary, 252 P. 111, 141 Wash. 465, 49 A.L.R. 1249.

44 C.J. p 893 note 62.

Municipal affairs

The vacation of streets is within the scope of municipal affairs.—Constantine v. City of Sunnysvale, Cal.App., 304 P.2d 922.

City may be made trustee for public to vacate streets.—Texas Co. v. Texarkana Mach. Shops, Tex.Civ. App., 1 S.W.2d 928.

Sovereign power

In vacating streets, cities exercise legislative sovereignty.—Neff v. City of Indianapolis, 198 N.E. 328, 209 Ind. 203.

Municipality may not delegate power to vacate streets.—Messinger v. City of Cincinnati, 173 N.E. 260, 86 Ohio App. 387.

45. Ill.—People ex rel. Hill v. Eakin, 50 N.E.2d 474, 383 Ill. 383.

44 C.J. p 894 note 63.

Board of public works, rather than common council, had power to vacate portion of city street.—Skinner v. Pitman-Moore Co., Ind.App., 85 N.E. 2d 279.

Subsequent change

Determination of board of public works as to which streets are to be left open and which streets are to be vacated, in track elevation proceeding, does not preclude further action on question as to which streets are to be left open or vacated.—Neff v. City of Indianapolis, 198 N.E. 328, 209 Ind. 203.

Common council

Mich.—Roberts v. City of Detroit, 216 N.W. 410, 241 Mich. 71, cer-

tiorari denied 49 S.Ct. 79, 278 U.S. 566, 642, 73 L.Ed. 509.

46. Colo.—Goldfield v. Golden Cycle Gold Min. Co., 152 P. 896, 60 Colo. 220.

47. U.S.—Balanced Rock Scenic Attractions v. Town of Manitou, C.C. A.Colo., 38 F.2d 28, certiorari denied 50 S.Ct. 463, 281 U.S. 764, 74 L.Ed. 1172.

Revocation of dedication see Dedication §§ 58–61.

Correction deed

Where owner of six contiguous blocks, after filing first deed vacating certain blocks, streets and alleys, no longer owned four adjacent blocks, second vacation deed was void.—Brell v. Town of Ovid, 293 P. 961, 88 Colo. 198.

Right only in municipality

Where purchasers of lots extending back to alley had shown no right to strip of ground dedicated as alley other than right to use it as a public way, they were not entitled to have the alley closed.—Shurtleff v. City of Pikeville, 217 S.W.2d 976, 309 Ky. 420.

48. Okl.—City of Stillwater v. Lovell, 15 P.2d 12, 159 Okl. 214.

Or.—Cabell v. City of Cottage Grove, 130 P.2d 1013, 170 Or. 256, 144 A.L.R. 286.

Wash.—Petersen v. City of Seattle, 71 P.2d 668, 191 Wash. 587.

44 C.J. p 894 note 65.

Estoppel

Where city did not have authority to close any of its streets which had not been vacated, it was equally beyond the city's power to authorize the state highway commission to do so and therefore the city was not estopped by its approval of plan for highway improvement calling for barricading of streets to object to the unauthorized acts of the state highway commission in barricading the streets.—Cabell v. City of Cottage Grove, 130 P.2d 1013, 170 Or. 256, 144 A.L.R. 286.

it in express terms or by necessary implication;⁴⁹ it is not conferred by the power to grade⁵⁰ or to establish the boundaries of⁵¹ streets, nor is the permanent closing of a street authorized by the general power of the municipality to control, alter, or widen streets,⁵² or in the interest of public safety temporarily to close them.⁵³ Although the legislature has delegated the power to vacate streets to the municipal authorities, its exercise is dependent on the will and subject to the control of the legislature;⁵⁴ the legislature may revoke it in part as well as in whole,⁵⁵ or, without an express revocation, may exercise it in any particular instance.⁵⁶

A reservation of the right to use the vacated street for water or sewer pipes or other public utilities has been held to invalidate an attempted vacation,⁵⁷ although it has also been held that in such case the reservation, and not the vacation, is invalid.⁵⁸ Under a power to vacate a street or alley or any part thereof, a municipality may vacate a portion of an alley measured from a horizontal plane a specified distance above its surface indefinitely up-

ward without vacating the surface of the alley.⁵⁹

It has been held that a city may vacate a street as a measure of safety under the police power of the municipality,⁶⁰ but under such power a municipality may not close a street for a reason affecting the general public only indirectly.⁶¹ Notwithstanding a power is given the local board in each local improvement district to initiate proceedings to close streets within the district, a general board given power to initiate and carry through such public improvements as it deems for the best interests of the city at large is not deprived of its power to institute proceedings for the closing of a street.⁶² Authority to a board of public works to vacate a street not on the city plan without specific authorization by an ordinance of the municipal council must be expressly granted.⁶³

Partial vacation. A street may be partially vacated,⁶⁴ and the power to vacate a part of a street or other public way will not be excluded by implication from the fact that it is not expressly conferred.⁶⁵ A statute conferring on a particular court

49. Ga.—City of Statesboro v. Dorman, 45 S.E.2d 403, 203 Ga. 35.
Or.—Cabell v. City of Cottage Grove, 130 P.2d 1013, 170 Or. 256, 144 A. L.R. 286.

Wash.—Petersen v. City of Seattle, 71 P.2d 668, 191 Wash. 587.
44 C.J. p 894 note 66.

City held to have power to vacate streets

U.S.—City of St. Petersburg v. Atlantic Coast Line R. Co., C.C.A. Fla., 132 F.2d 677—Clayton & Lambert Mfg. Co. v. City of Detroit, D.C.Mich., 34 F.2d 303.

Ark.—Cernauskas v. Fletcher, 201 S.W.2d 999, 211 Ark. 678—Greer v. City of Texarkana, 147 S.W.2d 1004, 201 Ark. 1041.

Cal.—People v. City of Oakland, 274 P. 438, 96 Cal.App. 488.

Fla.—Roney Inv. Co. v. City of Miami Beach, 174 So. 26, 127 Fla. 773.
Ga.—Vandiviere v. Anderson, 42 S.E. 2d 449, 202 Ga. 142.

Power not implied

Ga.—City of Statesboro v. Dorman, 45 S.E.2d 403, 203 Ga. 25.

Conflicting statutes

(1) A statute providing the procedure for the vacation of a plat by the owners of land which has been platted and the plat recorded does not by implication repeal powers conferred on the municipal authorities as to the vacation of streets.—Chrisman v. Brandes, 112 N.W. 833, 137 Iowa 433.

(2) Statute authorizing commissioner of public lands to vacate platted tideland streets did not restrict cities' power under general statute to vacate single streets on abutting

property owners' petition.—Petersen v. City of Seattle, 71 P.2d 668, 191 Wash. 587.

(3) Track elevation statute held not to supersede general statute with respect to vacation of streets.—Neff v. City of Indianapolis, 198 N.E. 328, 209 Ind. 203.

Incorporated towns

Statute dealing with power and duty of governing board of city in vacating streets, alleys, and lanes does not apply to incorporated towns.—Town of Chouteau v. Blankenship, 152 P.2d 379, 194 Okl. 401.

Reenactment of statute

The legislative intent, evidenced by legislature's reenactment of act, authorizing vacation of streets and alleys by city, substantially in its entirety, is binding on courts, in absence of constitutional inhibitions.—People ex rel. Hill v. Eakin, 50 N.E. 2d 474, 383 Ill. 383.

50. N.Y.—Hyland v. Ossining, 107 N.Y.S. 225, 57 Misc. 212, affirmed 111 N.Y.S. 309, 127 App.Div. 291.

51. Ohio.—Cleveland, etc., R. Co. v. Cleveland, 15 Ohio Cir.Ct.N.S., 193, 33 Ohio Cir.Ct. 482, affirmed 102 N.E. 1123, 87 Ohio St. 469.

52. Tex.—Stevens v. Dublin, Civ. App., 169 S.W. 188.

53. Tex.—Stevens v. Dublin, supra.

54. Cal.—Polack v. San Francisco Orphan Asylum, 48 Cal. 490—Kelley v. Oakland, 201 P. 618, 54 Cal. App. 169.

55. Cal.—Polack v. San Francisco Orphan Asylum, 48 Cal. 490.

56. Cal.—Polack v. San Francisco Orphan Asylum, supra.

57. Iowa.—Gable v. Cedar Rapids, 129 N.W. 737, 150 Iowa 108.
44 C.J. p 895 note 81.

58. Ill.—People v. Chicago, 154 Ill. App. 578.

59. Wash.—Taft v. Washington Mut. Sav. Bank, 221 P. 604, 127 Wash. 503.

60. S.C.—Batson v. Southern R. Co., 91 S.E. 310, 106 S.C. 307.
44 C.J. p 894 note 71.

61. Tex.—Stevens v. Dublin, Civ. App., 169 S.W. 188.

62. N.Y.—Reis v. New York, 80 N.E. 573, 188 N.Y. 58.
44 C.J. p 894 note 73.

63. Pa.—Adair v. Philadelphia, 24 Pa.Dist. 276.

64. Cal.—People v. City of Oakland, 274 P. 438, 96 Cal.App. 488.
Mich.—Manufacturers' Foundry Co. v. City of Holland, 234 N.W. 129, 253 Mich. 60.

Wash.—Fry v. O'Leary, 252 P. 111, 141 Wash. 465, 49 A.L.R. 1249.

Street closed to vehicular traffic

Under city charter empowering commissioners to abolish any street, ordinance declaring that a certain avenue railroad crossing was closed up and abolished as to all vehicular traffic was authorized.—Jones v. City of Decatur, 7 S.E.2d 730, 189 Ga. 732.

Streets and alleys in plat may be partially vacated if not abridging or destroying any rights or privileges of other proprietors in plat.—Fugate v. Carter, 144 S.E. 483, 151 Va. 108.

65. Minn.—State v. St. Paul, 107 N.W. 1129, 98 Minn. 232.

jurisdiction to vacate any street or part thereof will not be construed to confer on the court jurisdiction of a proceeding to vacate a portion of a street by making it narrower, where to do so would be to repeal an exclusive power vested in the city authorities to straighten or alter existing streets.⁶⁶

Conditional vacation. As a general rule, the power to close and vacate streets does not include the power to close streets conditionally,⁶⁷ as, for example, with a reservation of a privilege of reopening them,⁶⁸ or with a proviso that on a certain contingency the vacation shall be void.⁶⁹ The authority having the power to vacate, however, may in its discretion refuse to vacate a street except on compliance with specified conditions.⁷⁰ Moreover, under a statute or charter provision conferring such authority, an ordinance vacating a street may contain reasonable restrictions and conditions,⁷¹ and on failure to comply with such conditions and limitations the city may reopen the street.⁷² It has been held that, even if the municipality is without power to vacate a street with a condition subsequent, a vacation so made is nevertheless valid, only the condition being ineffective.⁷³

Provision of other means of access. It has been held that a city may discontinue a street if other suitable means of access to abutting land are left, even though such access is not as convenient as that afforded by the street to be vacated,⁷⁴ and the statutes sometimes make the provision of another way a condition to the vacation of a street.⁷⁵ Where a statute authorizing the closing of a street for railroad purposes provides that before it shall become operative the railroad shall provide another street of a specified width, title to which shall be vested in

the municipality, the provision of such a street is a condition precedent and is not complied with by the furnishing of a new street of less than the statutory width.⁷⁶

Provision for damages. In the absence of statutory or constitutional requirement, provision for the ascertainment of damages occasioned by the vacation of a street need not be made before its vacation.⁷⁷

§ 1666. Streets or Ways over Which Power Extends

In general, all the public ways and streets of a municipality, however acquired, are subject to the power of vacation.

In general, all the streets and public ways of a city, however acquired, are subject to the power of vacation.⁷⁸ A power to vacate streets may be exercised whether the public acquired the street to be vacated by condemnation or by dedication.⁷⁹ A condition in a deed conveying land to a city for a public way providing that it shall always remain free and open as a public street or alley does not preclude the city from vacating it as it may vacate other streets and alleys.⁸⁰ A statute giving the city the right to vacate streets and limiting the provision to the "streets of the town" does not authorize the vacating of a street, half of which is within the city and half without.⁸¹

Streets part of state or county highways or trunk roads. Where a county highway by incorporation within the boundaries of the municipality has become a street thereof, it may not be vacated by the county authorities,⁸² and, on the other hand, where a county road when taken into a municipal corpora-

66. Ind.—*Princeton v. Hanna*, 113 N. E. 999, 120 N.E. 598, 187 Ind. 582.

67. Miss.—*Berry v. Mendenhall*, 61 So. 163, 104 Miss. 94.
44 C.J. p 895 note 84.

68. Miss.—*Berry v. Mendenhall*, supra.

69. Ill.—*People v. Chicago*, 154 Ill. App. 578.

N.J.—*Hammer v. Elizabeth*, 50 A. 451, 67 N.J. Law 129.

70. Mich.—*Michigan Cent. R. Co. v. Miller*, 137 N.W. 555, 172 Mich. 201.

44 C.J. p 895 note 87.

71. Or.—*Portland Baseball Club v. City of Portland*, 18 P.2d 811, 142 Or. 13.

Erection of grandstand

Condition of ordinance vacating street that abutting owner erect new baseball grandstand, incorporating abutting owner's previous agreement with city, held not void, since it af-

fected only contracting parties and was not unreasonable or contrary to public policy.—*Portland Baseball Club v. City of Portland*, supra.

72. Or.—*Portland Baseball Club v. City of Portland*, supra.

73. Cal.—*National City v. Dunlop*, 194 P.2d 788, 86 Cal.App.2d 380.

74. N.Y.—*Jablowsky v. State*, 44 N. Y.S.2d 549, 267 App.Div. 54, affirmed 55 N.E.2d 517, 292 N.Y. 652, motion denied 56 N.E.2d 745, 293 N. Y. 749.—*Katonah Lumber, Coal & Feed Co. v. State*, 86 N.Y.S.2d 696, 194 Misc. 311.

75. N.Y.—*In re Newton Ave.*, 114 N. E. 837, 219 N.Y. 899.

Pa.—*Van Auken v. Freed*, 45 Pa. Dist. & Co. 597, 69 Montg.Co. 25, 84 Mun.L.R. 145.

44 C.J. p 895 note 88.

76. Ga.—*Central of Georgia R. Co. v. Bibb Brick Co.*, 88 S.E. 676, 145 Ga. 149.

77. Cal.—*Beals v. City of Los Angeles*, 144 P.2d 839, 23 Cal.2d 381. Idaho.—*Canady v. Coeur d'Alene Lumber Co.*, 120 P. 830, 21 Idaho 77.

78. Pa.—*Duff v. Heppenstall Forge, etc., Co.*, 83 A. 204, 234 Pa. 276.—*Van Auken v. Freed*, 45 Pa. Dist. & Co. 597, 69 Montg.Co. 25, 84 Mun. L.R. 145.

44 C.J. p 895 note 94.

79. Cal.—*People v. City of Oakland*, 274 P. 438, 96 Cal.App. 488.

44 C.J. p 896 note 95.

80. Ky.—*Henderson v. Lexington*, 111 S.W. 318, 132 Ky. 890, 33 Ky. L. 703, 22 L.R.A., N.S., 20.

81. Ind.—*Gary v. Much*, 101 N.E. 4, 180 Ind. 26.

44 C.J. p 896 note 4.

82. Neb.—*Lee v. McCook*, 116 N.W. 955, 82 Neb. 26.

tion still remains a county road, although subject to the control and supervision of the municipal authorities, it may not be vacated by the municipal authorities⁸³ unless such power has been conferred on such authorities by the legislature.⁸⁴ It has been held that a municipal corporation, under its statutory power to open, vacate, and improve streets, may impliedly and incidentally withdraw from cooperative maintenance with a county court of a highway leading into the city, by the vacation or discontinuance of a street constituting part of such highway.⁸⁵ The legislature may confer on a municipality the power to vacate a state road within the borders of the municipality.⁸⁶

Effect of private easements. The question whether the private easements of the owners holding by conveyances with reference to a platted street may be extinguished by a vacation of the street is considered *infra* § 1683. However, although it may be held that such easements cannot be affected, the municipality may renounce the rights conferred by the plat with reference to which conveyances have been made,⁸⁷ and may vacate streets shown thereon to the extent of terminating its liability to maintain and keep them in repair.⁸⁸

Effect of rights of public service corporations. The right of the municipality to vacate streets is not defeated by the fact that it has given a public service corporation the right to lay pipes therein.⁸⁹

§ 1667. Discretion as to Exercise of Power

Whether the power to vacate a street will be exercised is, as a rule, within the discretion of the municipal corporation or the board to which the power has been delegated.

Whether a power to vacate a street or a part thereof will be exercised is, as a rule, within the discretion of the municipal body possessing the power,⁹⁰ although such discretion must not be exercised arbitrarily and without regard to the rights and necessities of the public,⁹¹ as they are at the present and may be in the future.⁹² Where a street is vacated by the municipality in good faith on the expectation of certain events, the fact that such events do not occur does not render the vacation void.⁹³

Judicial review of the exercise by the municipality of the discretionary power to vacate streets is discussed *infra* § 1672.

83. Ohio.—Cleveland Terminal, etc., R. Co. v. Akron, 18 Ohio S. & C.P. 231, 6 Ohio N.P., N.S., 81.

84. Pa.—Warner v. Coatesville Borough, 80 A. 576, 231 Pa. 141, 44 C.J. p. 896 note 1.

85. W.Va.—Taylor County Ct. v. Grafton, 86 S.E. 924, 77 W.Va. 84.

86. Mich.—Rogers v. City of Jackson, 231 N.W. 621, 251 Mich. 256.

Power of state highway commissioner not exclusive

Although the statutes impliedly confer the right to vacate a state highway on the state highway commissioner, the control the legislature has given such official must be measured by the scope of his office, and under a proper construction of statutes defining the powers of such official and of municipalities it should be held that a municipality has the delegated power to vacate a state road running within its borders.—Rogers v. City of Jackson, *supra*.

87. Pa.—Chambersburg Shoe Mfg. Co. v. Cumberland Valley R. Co., 87 A. 968, 240 Pa. 519—Carroll v. Asbury, 28 Pa.Super. 354.

88. Pa.—O'Donnell v. H. K. Porter Co., 86 A. 281, 238 Pa. 495.

89. Pa.—Titusville Amusement Co. v. Titusville Iron Works Co., 134 A. 481, 286 Pa. 561.

90. Cal.—People v. City of Oakland, 274 P. 428, 96 Cal.App. 488.

Iowa.—Stoessel v. City of Ottumwa, 289 N.W. 718, 227 Iowa 1021.

La.—State ex rel. Porterle v. Housing Authority of New Orleans, 182 So. 725, 190 La. 710.

Mich.—Cady v. Oliver Farm Equipment Co., 242 N.W. 875, 259 Mich. 161.

N.J.—Con Realty Co. v. Ellenstein, 14 A.2d 544, 125 N.J.Law 196, 44 C.J. p. 896 note 9.

Equity cannot compel a city to keep open and maintain streets, that being a discretionary function of the municipality.—Raht v. Southern R. Co., Tenn.Ch., 50 S.W. 72—44 C.J. p. 884 note 19.

Legislative function

Cal.—People v. City of San Rafael, 273 P. 138, 95 Cal.App. 733.

Or.—Portland Baseball Club v. City of Portland, 18 P.2d 811, 142 Or. 13.

Public interest

City, delegated authority to close streets, must decide in first instance whether closing is in public interest.—People v. City of San Rafael, 273 P. 138, 95 Cal.App. 733.

Premature expression of opinion

Street commissioners' opinion that discontinuance of street would be desirable was subject to change and not binding on them at hearing not yet had.—MacDonald v. Board of Street Com'rs of City of Boston, 167 N.E. 417, 268 Mass. 288.

Need for housing project

Whether a low-cost housing project could be constructed without using a part of city street vacated by ordinance was a question for the discretion of municipal authorities, and not for the judgment of the individual landowner seeking to prevent the vacation of the street.—Con Realty Co. v. Ellenstein, 14 A.2d 544, 125 N.J.Law 196.

91. Fla.—Roney Inv. Co. v. City of Miami Beach, 174 So. 26, 127 Fla. 773.

Iowa.—Stoessel v. City of Ottumwa, 289 N.W. 718, 227 Iowa 1021—Pederson v. Town of Radcliffe, 284 N.W. 145, 226 Iowa 166.

S.C.—Bethel M. E. Church v. City of Greenville, 45 S.E.2d 841, 211 S.C. 442—City of Rock Hill v. Cothan, 40 S.E.2d 239, 209 S.C. 357.

44 C.J. p. 896 note 10.

Nonexercise of discretion

Discretion must not be so grossly abused as to amount to nonexercise of discretion.—People ex rel. Foote v. Kelly, 53 N.E.2d 429, 385 Ill. 543.

92. Iowa.—Gable v. Cedar Rapids, 129 N.W. 737, 150 Iowa 108, 44 C.J. p. 897 note 11.

93. Mich.—Manufacturers' Foundry Co. v. City of Holland, 234 N.W. 129, 258 Mich. 60.

Contention that vacation was without consideration held without merit.—Manufacturers' Foundry Co. v. City of Holland, *supra*.

§ 1668. Private and Public Interests

A municipality or board to which the power to vacate streets has been delegated may exercise such power when, and only when, the vacation of the street is in the public interest or when the street is no longer required for public use and convenience.

A municipality or board to which the power to vacate streets has been delegated may exercise such power when, and only when, the vacation of the street is in the public interest⁹⁴ or when the street is no longer required for public use

and convenience;⁹⁵ it may not vacate a street for the benefit of a purely private interest,⁹⁶ although it receives a consideration therefor,⁹⁷ and the question whether the public interest is subserved may not be made to depend on how much the city will receive by reason of its action.⁹⁸ On the other hand, the fact that some private interest may be served does not necessarily render the vacation of a street or alley void,⁹⁹ nor does the fact that, while some private interests are benefited, others are incidental-

94. Cal.—*People v. City of Oakland*, 274 P. 438, 96 Cal.App. 488—*People v. City of San Rafael*, 273 P. 138, 95 Cal.App. 733.

Ill.—*People ex rel. Hill v. Eakin*, 50 N.E.2d 474, 383 Ill. 383.

Tex.—*Kahn v. City of Houston*, 48 S.W.2d 595, 121 Tex. 293—*Broussard v. L. Cartwright Realty Co., Civ. App.*, 179 S.W.2d 777, error refused—*Harper v. City of Wichita Falls, Civ. App.*, 105 S.W.2d 743, error refused.

Wash.—*Young v. Nichols*, 278 P. 159, 152 Wash. 306.

Future use

Advantage coming to the public from vacating a city street must arise from the vacation itself, and not from the future use to which the vacated street is put.—*Constantine v. City of Sunnyvale, Cal.App.*, 204 P.2d 922.

Representative of public

Power to vacate streets held vested in city only as representative of public, and for public benefit.—*Texas Co. v. Texarkana Mach. Shops, Tex. Civ. App.*, 1 S.W.2d 928.

"Public" defined

The "public," as referred to in determining whether the vacation of a street includes persons other than those in immediate vicinity of street sought to be vacated, and means the "general public."—*Petition of Krebs*, 6 N.W.2d 803, 213 Minn. 844.

Vacation held in public interest**(1) In general.**

Cal.—*People ex rel. Wagner v. City of Pomona, App.*, 200 P.2d 176.

Ill.—*American Asphalt Paving Co. v. City of Chicago*, 161 N.E. 772, 330 Ill. 330—*Nielsen v. City of Chicago*, 161 N.E. 768, 330 Ill. 301.

S.C.—*City of Rock Hill v. Cothran*, 40 S.E.2d 239, 209 S.C. 357.

(2) Vacation of a city street to facilitate building by housing authority, which by statute is constituted an agency and instrumentality of the municipality for the exercise of a function denominated public, was valid as serving the public at large and not a private interest.—*Con Realty Co. v. Ellenstein*, 14 A.2d 544, 135 N.J. Law 196.

(3) Town could direct that street be closed for erection of standpipe

for waterworks system.—*Beadle v. Town of Crossville*, 7 S.W.2d 992, 157 Tenn. 249.

No consideration other than public interest

It must appear clearly that no consideration other than that of public interest could have prompted the action.—*Bethel M. E. Church v. City of Greenville*, 45 S.E.2d 841, 211 S.C. 442—*City of Rock Hill v. Cothran*, 40 S.E.2d 239, 209 S.C. 357.

95. S.C.—*Bethel M. E. Church v. City of Greenville*, 45 S.E.2d 841, 211 S.C. 442.

96. Cal.—*Constantine v. City of Sunnyvale, App.*, 204 P.2d 922—*People ex rel. Wagner v. City of Pomona, App.*, 200 P.2d 176—*People v. City of San Rafael*, 273 P. 138, 95 Cal.App. 733.

Fla.—*Corpus Juris cited in Roney Inv. Co. v. City of Miami Beach*, 174 So. 26, 29, 127 Fla. 773.

Ga.—*Harbuck v. Richland Box Co.*, 49 S.E.2d 883, 204 Ga. 352.

Okl.—*City of Stillwater v. Lovell*, 15 P.2d 12, 159 Okl. 214.

Pa.—*Stone v. Marks Corporation*, 50 Pa. Dist. & Co. 324.

S.C.—*Bethel M. E. Church v. City of Greenville*, 45 S.E.2d 841, 211 S.C. 442.

S.D.—*Corpus Juris quoted in City of Colome v. Von Seggern Bros. & Ludden*, 228 N.W. 800, 801, 56 S.D. 390.

Tex.—*Gambrell v. Chalk Hill Theatre Co., Civ. App.*, 205 S.W.2d 126, appeal dismissed 68 S.Ct. 1071, 334 U.S. 814, 92 L.Ed. 1745—*Industrial Co. v. Tompkins, Civ. App.*, 27 S.W.2d 348, error refused—*Texas Co. v. Texarkana Mach. Shops, Civ. App.*, 1 S.W.2d 928.

44 C.J. p 898 note 21, p 162 note 99.

No matter how patriotic the motive, or how lawful the council believes the vacation to be, a city council cannot vacate a street to serve a purely private use.

Ill.—*People v. Corn Products Refining Co.*, 121 N.E. 574, 286 Ill. 226.

S.D.—*Corpus Juris quoted in City of Colome v. Von Seggern Bros. & Ludden*, 228 N.W. 800, 801, 56 S.D. 390.

Gross abuse of power

Action of municipality in vacating

public street merely for convenience of private individual constitutes gross abuse of power.—*City of Stillwater v. Lovell*, 15 P.2d 12, 159 Okl. 214.

Vacation for private purposes is void
Ga.—*Harbuck v. Richland Box Co.*, 49 S.E.2d 883, 204 Ga. 352.
Iowa.—*Pederson v. Town of Radcliffe*, 284 N.W. 145, 226 Iowa 166.
Tex.—*Texas Co. v. Texarkana Mach. Shops, Civ. App.*, 1 S.W.2d 928.

Sole benefit of abutting owner

(1) A municipality cannot vacate a street or part thereof for sole purpose of benefiting an abutting owner.

S.C.—*Bethel M. E. Church v. City of Greenville*, 45 S.E.2d 841, 211 S.C. 442—*City of Rock Hill v. Cothran*, 40 S.E.2d 239, 209 S.C. 357.

Wash.—*Young v. Nichols*, 278 P. 159, 152 Wash. 306.

(2) Where closing of portion of street at instance of particular abutting owner would substantially impair access enjoyed by other abutting owners and necessary effect of closing was solely for private use and advantage of particular owner, ordinance closing portion of street was invalid notwithstanding another means of access was provided, as good or better for some purposes, and entire cost would be borne by particular owner.—*Perellis v. Mayor and City Council of Baltimore, Md.*, 57 A.2d 341.

Consent of abutting owners

Consent of property owners whose property physically abutted on closed portion of street would not justify city council in closing that portion of street, without public necessity.—*Bethel M. E. Church v. City of Greenville*, 45 S.E.2d 841, 211 S.C. 442.

97. N.D.—*Corpus Juris quoted in City of Colome v. Von Seggern Bros. & Ludden*, 228 N.W. 800, 801, 56 N.D. 390.

44 C.J. p 898 note 22.

98. Ill.—*Lockwood, etc., Co. v. Chicago*, 117 N.E. 81, 279 Ill. 445.

99. Cal.—*Constantine v. City of Sunnyvale, App.*, 204 P.2d 922—*People v. City of Oakland*, 274 P. 438, 96 Cal.App. 488.

Tex.—*Hartwell Iron Works v. Mis-*

ly damaged,¹ where it does not appear that no consideration of public interest led to such vacation.²

Further, decisions to the effect that it is against public policy for a municipality to demand and receive compensation as a condition precedent to the exercise of its power to vacate a street or alley no longer needed for public use are controlled by a statute authorizing such action on the part of the city,³ and an ordinance vacating a street or alley may be conditioned on the payment of compensation by benefited property owners.⁴ It has been held that the public interest is sufficiently served by the vacation where the municipality is thereby relieved from the expense of maintaining a street used by only a small portion of the public⁵ or where the municipality is thereby relieved from liability to the traveling public for injuries from a street having numerous defects.⁶

Betterment of public service. The resulting betterment of the service of public service companies is of such public interest as to authorize the vacation of streets for the purpose of devoting the land to the use of such companies.⁷

Objection by landowners. Ordinarily a street may be vacated despite the objections of abutting owners,⁸ but a statute authorizing the vacation of a public street in a platted town site or addition to a town site on a petition of the owners of the lands adjoining the street, on a proper finding that no private rights will be injured or endangered thereby, does not justify a vacation, where such vacation will cut off public access to an objecting owner's lots.⁹

Application by owners of platted lands. Under

statutes authorizing the vacation of a plat on the application of the owners of the lands included, the platted streets should not be vacated unless the public interest will be served,¹⁰ and, if the statute provides that the plat shall be vacated only where there is no valid objection thereto, streets should not be vacated for the benefit of private persons when such vacation will in all probability seriously inconvenience the general public.¹¹

Disposition to be made of property. Where a street or other public place is properly vacated, the city may devote the ground to whatever legitimate purpose it may elect, as discussed *infra* § 1683 b, and the use which it is proposed to make of the ground is material only as bearing on the question of whether the vacation is in fact for the public benefit.¹²

§ 1669. Effect of Reversion or Transfer of Land to Private Ownership

Where the vacation is otherwise lawful, its validity is not affected by the fact that the land embraced within the vacated street or alley thereby becomes private property.

Where the power to vacate is otherwise rightfully exercised, it does not affect the validity of the vacation that the land embraced within the vacated street or alley thereby becomes private property¹³ or that it is devoted to a private use.¹⁴

§ 1670. Mode of Vacation and Proceedings to Vacate in General

The procedure to vacate a street or other public way must be in strict compliance with the statutory provisions relating thereto.

souri-Kansas-Texas R. Co. of Texas, Civ.App., 56 S.W.2d 922.
44 C.J. p 898 note 24.

Vacation instigated by abutting owner

Mere fact that vacation of street or part thereof was at instigation of individual or private corporation who owns abutting property to enable him to use vacated portion in his business does not of itself invalidate the vacation or constitute such fraud or abuse of discretion as, in absence of any further showing, will authorize court of equity to declare the vacating resolution to be void.—*Bethel M. E. Church v. City of Greenville*, 45 S.E.2d 841, 211 S.C. 442.—*City of Rock Hill v. Cothran*, 40 S.E.2d 239, 209 S.C. 357.

1. Ill.—*Moskal v. Catholic Bishop of Chicago*, 43 N.E.2d 206, 315 Ill.App. 461.
44 C.J. p 898 note 25.

2. Ill.—*Moskal v. Catholic Bishop of Chicago*, *supra*.
44 C.J. p 898 note 25.

3. Ill.—*People v. Chicago*, 152 N.E. 141, 321 Ill. 466.

4. Ill.—*People v. Chicago*, *supra*—*Lincoln State Bank of Chicago v. City of Chicago*, 263 Ill.App. 625.

5. Ill.—*People ex rel. Hill v. Eakin*, 50 N.E.2d 474, 383 Ill. 383—*People v. City of Chicago*, 152 N.E. 141, 321 Ill. 466—*People ex rel. Huempfer v. Benson*, 128 N.E. 387, 294 Ill. 236.

6. Ill.—*People ex rel. Hill v. Eakin*, 50 N.E.2d 474, 383 Ill. 383—*People v. City of Chicago*, 152 N.E. 141, 321 Ill. 466—*People ex rel. Stern v. Elgin, Joliet & Eastern Railway Co.*, 192 N.E. 204, 298 Ill. 574.

7. U.S.—*City of St. Petersburg v. Atlantic Coast Line R. Co.*, C.C.A. Fla., 132 F.2d 675.
44 C.J. p 899 note 82.

Vacation for railroad depot

U.S.—*City of St. Petersburg v. Atlantic Coast Line R. Co.*, *supra*.
44 C.J. p 899 note 82 [b].

8. Ky.—*York v. Chesapeake & O. Ry. Co.*, 41 S.W.2d 668, 240 Ky. 114.

9. Kan.—*Bolmar v. Shawnee County*, 220 P. 245, 114 Kan. 552.

10. Iowa.—*Gable v. Cedar Rapids*, 129 N.W. 737, 150 Iowa 108.
Minn.—*In re Hull*, 204 N.W. 534, 205 N.W. 613, 163 Minn. 439, 49 A.L.R. 320.

Revocation of dedication see *Dedication* §§ 58-61.

11. Iowa.—*Gable v. Cedar Rapids*, 129 N.W. 737, 150 Iowa 108.
44 C.J. p 899 note 35.

12. Iowa.—*Walker v. Des Moines*, 142 N.W. 51, 161 Iowa 215.

13. Cal.—*People v. City of San Rafael*, 273 P. 138, 95 Cal.App. 733.
44 C.J. p 899 note 89.
Effect of vacation on title and ownership of street see *infra* § 1683.

14. U.S.—*Lockwood v. Portland, C. C.A.Or.*, 288 F. 480.
44 C.J. p 900 note 40.

The procedure to vacate a street or other public way must be in strict compliance with the statutory provisions relating thereto.¹⁵ While a statute which provides a complete system for vacating streets will be construed as repealing a prior act,¹⁶ provisions of different statutes which are not inconsistent may be read together to provide a harmonious scheme.¹⁷ However, a statute giving a method of vacating a street in cases in which the municipal corporation is not in active operation, but which is also applicable to cases wherein the municipal corporation is in active operation, is cumulative to a statutory method applicable only in cases where the municipal corporation is in active operation,¹⁸ and alternative methods may be provided under separate statutes.¹⁹

Vacation by dissolution of corporation; statutory conveyance. A discontinuance of a town corporation and its classification as an unincorporated town or village does not vacate the streets of a town, and the right of the people to use such streets continues.²⁰ In such a case the vacation of a street as a highway by the county constitutes merely a disclaimer of jurisdiction and does not affect the rights of lot owners to use the street as a highway.²¹ A statute directing the conveyance of certain lots by commissioners in whom the title to land and streets in a platted city has been vested for the use of the state will be construed as including intervening streets, where the intent is clearly shown to convey the land, not as lots but as an entire tract.²²

Striking or omission from plat or map. The adoption of a map showing the location and establishment of streets by ordinance and its subsequent ratification by the legislature works a discontinuance and abandonment of streets not shown thereon, although shown by previous maps.²³ It is provided by some statutes that a street is closed when it is omitted from a map showing the public highways

adopted by the municipal authorities under proper resolutions, duly filed.²⁴ The omission need not be absolute, as it is sufficient if the streets intended as public highways are clearly distinguishable from the streets intended to be discontinued.²⁵ Such an act does not apply to private ways not accepted by the city.²⁶

Where a board of public works is given authority to confirm or reject all plans or surveys or revisions of plans which have been made by direction of the municipal council, the act of the department of public works in striking a street from a city plan in obedience to an ordinance of the municipal council amounts to a legal vacation of the street.²⁷ However, where exclusive power has been conferred on certain commissioners to lay out and close streets and to cause maps to be filed which shall be conclusive with respect to both the city and landowners, the mere omission of a street from the map filed by the commissioners is not conclusive that such street was closed by them.²⁸

Further, the mere act of municipal authorities in adopting a plan and locating streets does not have the effect of vacating public roads running through the municipal corporation not adopted as streets on the plan,²⁹ and, although a map prepared in providing for a system of street improvements and which is approved by the legislature fails to show certain other streets, they will not be regarded as vacated by implication.³⁰ Under a statute providing that a street is closed when municipal authorities have adopted proper resolutions to that end and have filed a map showing the public highways, the legal discontinuance of the street is complete when the prescribed map is filed indicating the proposed change,³¹ but the physical closing is postponed until other access is provided by the opening of other

15. Ky.—Shurtleff v. City of Pikeville, 217 S.W.2d 976, 309 Ky. 420 —Schickli v. Keeling, 210 S.W.2d 780, 307 Ky. 210.

N.Y.—City of New York v. Aviation Distributors, 84 N.Y.S.2d 84.

Okl.—Town of Chouteau v. Blankenship, 152 P.2d 379, 194 Okl. 401. 44 C.J. p 900 note 41.

Separate classes of streets

Legislature by enacting statute dealing with discontinuance of streets in a village and another statute concerning discontinuance of a highway "extending from a town to a city or village" contemplated the existence of two separate classes of streets or roads.—State ex rel. Welch v. Chatterton, 300 N.W. 922, 239 Wis. 523.

16. Wash.—Rowe v. James, 128 P.

539, 71 Wash. 267—Seattle v. Hinckley, 121 P. 444, 67 Wash. 273.

17. N.Y.—People v. Metz, 104 N.Y.S. 649, 119 App.Div. 271, affirmed 82 N.E. 1131, 189 N.Y. 559.

18. Ind.—Richmond v. Miller, 107 N.E. 550, 58 Ind.App. 20. 44 C.J. p 900 note 46.

19. Ark.—Cernauskas v. Fletcher, 201 S.W.2d 999, 211 Ark. 678. 44 C.J. p 900 note 47.

20. Iowa.—McKinney v. Rowland, 197 N.W. 88, 197 Iowa 180.

21. Iowa.—McKinney v. Rowland, supra.

22. S.C.—Allwarden v. Nelson, 71 S.E. 982, 89 S.C. 868.

23. Cal.—San Francisco v. Burr, 41 P. 482, 108 Cal. 460.

44 C.J. p 900 note 49.

24. N.Y.—Scheibel v. O'Brien, 130 N.E. 293, 230 N.Y. 277.

44 C.J. p 901 note 50.

25. N.Y.—In re New York, 60 N.E. 180, 166 N.Y. 495.

44 C.J. p 901 note 51.

26. N.Y.—In re Wallace Ave., 118 N.E. 506, 222 N.Y. 139.

27. Pa.—Carpenter v. Pennsylvania R. Co., 45 A. 685, 195 Pa. 160.

44 C.J. p 901 note 53.

28. N.J.—State v. Elizabeth, 37 N.J. Law 432.

29. Pa.—Lansdowne v. Hoffman, 10 Pa.Dist. 660, 8 Del.Co. 149.

30. Cal.—People v. Hybernia Sav., etc., Soc., 24 P. 295, 84 Cal. 634.

31. N.Y.—Matter of West 151st St., 117 N.Y.S. 841, 132 App.Div. 867.

streets,³² or, if no such access is provided, until resulting damages have been paid abutting owners.³³

§ 1671. Vacation by Court

Under some statutes the courts may vacate streets in a municipal corporation.

Under some statutes the courts may vacate streets in a municipal corporation,³⁴ and a statute conferring jurisdiction on a court to vacate municipal streets has been held valid;³⁵ but a statute requiring the court to vacate a street on the application of the owners of the abutting property has been held invalid as in conflict with a constitutional provision reserving to cities reasonable control of their streets.³⁶ Power in a court to vacate a street has been held in some jurisdictions to arise from a statute authorizing the vacation of plats by such court.³⁷ Where concurrent jurisdiction in the matter of vacating streets is vested in a particular court and in the municipal council, the court may in its discretion refuse to entertain proceedings to vacate a street where the matter has already been presented to the common council and it has made an order va-

uating the street on performance of certain conditions imposed.³⁸

A proceeding before a court for the vacation of a street is a statutory proceeding and is not technically an action or suit.³⁹ Such a proceeding has been held to be a proceeding in rem,⁴⁰ and there must be a compliance with the requirements of the statute governing the proceeding.⁴¹ Under a statute so providing, the court may not vacate a street on the application of property owners unless it is useless for the purpose for which it was laid out.⁴² Under a statute giving the court jurisdiction to vacate a street which has been rendered unnecessary by the opening of a street or highway in place thereof, the court is without jurisdiction to vacate a street which, while not necessary for travel, is being used for the maintenance of a sewer.⁴³

Parties. The municipality is not a necessary party to a proceeding brought under a statute authorizing persons interested in city property to petition the court to vacate a street, although it is a proper party.⁴⁴ Under a statute providing that, after the adoption of an ordinance authorizing the va-

32. N.Y.—In re Newton Ave., 114 N. E. 887, 219 N.Y. 399.
44 C.J. p 901 note 59.

33. N.Y.—Matter of West 151st St., 117 N.Y.S. 841, 132 App.Div. 867.

34. Mich.—Petition of Hendricks, 232 N.W. 350, 251 Mich. 336.
Ohio.—City of Cincinnati v. Wess, 186 N.E. 855, 127 Ohio St. 99.

Statute held applicable to streets in cities
Ohio.—City of Cincinnati v. Wess, supra.

Planning commission

Statute providing for vacating streets held not in conflict with, or impliedly repealed by, provision for planning commission, or superseded by city charter.—City of Cincinnati v. Wess, supra.

Way not accepted by municipality

Private persons could petition for vacation of part of plat consisting of driveway not accepted by township authorities.—Oakes v. Behm, 229 N. W. 408, 249 Mich. 494.

Statute repealed

Pa.—In re Vacation of Gallagher St., Borough of Bellevue, 168 A. 485, 110 Pa.Super. 427.

35. Ohio.—City of Cincinnati v. Wess, 186 N.E. 855, 127 Ohio St. 99.

36. Mich.—Petition of Hendricks, 226 N.W. 878, 248 Mich. 124, affirmed 232 N.W. 350, 251 Mich. 336
—In re Hawkins, 222 N.W. 108, 244 Mich. 681.

37. Mich.—Detroit Real Est. Inv.

Co. v. Wayne Cir. Judge, 100 N.W. 271, 137 Mich. 271—In re Albers, 71 N.W. 1110, 113 Mich. 640.

Incidental power

Streets, alleys, or highways constituting a portion of a tract of land platted for city purposes may be vacated in conjunction with the vacation of the plat or a portion thereof where the facts essential to justify such a vacation are shown.—Stockton v. Board of Com'rs of Pittsburg County, 85 P.2d 403, 184 Okl. 150—Bohnsack v. Ponca City Development Co., 29 P.2d 61, 167 Okl. 177—Oklahoma City v. Kelsey, 15 P.2d 816, 160 Okl. 48.

38. Mich.—Detroit Real Est. Inv. Co. v. Wayne Cir. Judge, 100 N.W. 271, 137 Mich. 108.

City without power to act

Petition to vacate street held within jurisdiction of circuit court, although similar petition was filed with city commission deprived of power to act under charter.—Petition of Hendricks, 232 N.W. 350, 251 Mich. 336.

39. Ind.—City of Peru v. Cox, 90 N. E. 7, 173 Ind. 241—City of Jasper v. Taichert & Schneider, 7 N.E.2d 534, 103 Ind.App. 302.

Mich.—Detroit Real Est. Inv. Co. v. Wayne Cir. Judge, 100 N.W. 271, 137 Mich. 108.

40. Mich.—Detroit Real Est. Inv. Co. v. Wayne Cir. Judge, supra.

41. Mo.—Pack v. Pemberton, App., 218 S.W.2d 125—Evans v. Andres, 42 S.W.2d 32, 226 Mo.App. 63.

42. Minn.—Petition of Krebs, 6 N. W.2d 803, 213 Minn. 344.

Word "useless," as used in statute permitting vacation of a street when it has become useless for the purpose for which it was laid out, should not be given any restricted meaning, but should be given the meaning of the term as commonly defined as being of no use, unserviceable, and answering no desired purpose.—Application of Baldwin, 15 N.W.2d 184, 218 Minn. 11.

Unused street

Where street which originally connected boulevard with boat landing on lake had not been used by any one in the community for almost twenty-five years, and town did nothing toward keeping it in repair, but street still afforded public means of access to lake, street could not be vacated.—Petition of Krebs, 6 N. W.2d 803, 213 Minn. 344.

Private benefit

Under the statute providing that a street or part thereof may not be vacated unless useless for purpose for which it was laid out, fact that vacation of street will be to interest of persons whose property adjoins street does not, of itself, authorize vacation of street.—Petition of Krebs, supra.

43. Pa.—In re Vacation of Gallagher St., Borough of Bellevue, 168 A. 485, 110 Pa.Super. 427.

44. Mo.—Bingham v. Kollman, 165 S.W. 1097, 256 Mo. 573.
44 C.J. p 901 note 65.

cation of a street, an action shall be instituted in a court for the purpose of closing it, all persons owning property abutting on the street within the block affected are necessary parties, without reference to whether the property abuts on the portion of the street to be closed.⁴⁵ Under a statute giving a right to appeal and be heard to any person or persons "interested," a city has a right to be heard as an interested party in a proceeding instituted to vacate any of its streets.⁴⁶ The petitioners for the vacation of a street do not, by answering a petition to intervene, bar themselves from moving to dismiss the intervention.⁴⁷ After judgment vacating a street, the court has been held without power to reopen the proceedings to permit the intervention of another party.⁴⁸

Petition and notice. The proceeding being statutory, the petitioner must aver facts sufficient to bring himself within the provisions of the statute.⁴⁹ For example, where the statute so requires, the petition must set forth the names of the persons particularly interested in the property which it is sought to vacate.⁵⁰ Under a statute requiring the persons interested to file a petition describing the property to be vacated, giving the names of the persons to be affected, it is, however, not essential that the names of the owners be incorporated in the petition.⁵¹ The requisite number of abutting owners must join in the petition.⁵² The sufficiency of a petition may be tested by demurrer, although the statute provides that the prayer of the petition shall be granted if no written objection is made within a time fixed⁵³ and although the statute contains provisions authorizing the filing of remonstrances.⁵⁴ Notice of the petition must be given to the persons

specified by the statute.⁵⁵

Consent of property owners. Statutory provisions as to the consent of the owners of adjoining property must be complied with,⁵⁶ although it has been held that a technical error will not be fatal.⁵⁷

Remonstrance. Where the statute provides for remonstrances by parties interested, the right of remonstrance is not, unless expressly so limited, confined to owners of property abutting on the part of the street to be vacated.⁵⁸ Where a statute provides that, if no objection in writing is made within a fixed time, the court shall grant the petition, the court may reject a remonstrance filed after the statutory period,⁵⁹ and, although the court permits the remonstrance to be filed, it may afterward, contrary to the rule applicable to civil actions generally, reject it.⁶⁰ It has been held that the only grounds of remonstrance that will be recognized by the court are those specified by the statute.⁶¹

Hearing and determination. In determining an application by property owners to vacate a street, the final test is whether the public interest will or will not be best served by discontinuing the way.⁶² In a proceeding by property owners to vacate a street, it has been held that the burden is on the petitioners to show that no public interest will be served by continuing the street or that its vacation will be beneficial to the public interest,⁶³ and this burden is not discharged by showing that another street is more useful.⁶⁴ Questions of fact are for the trial court,⁶⁵ and a general finding for the petitioners and against the remonstrators amounts to a finding against the remonstrators on all the questions of fact.⁶⁶

45. Ky.—Hill v. Baker, 218 S.W.2d 24, 309 Ky. 514—Riedling v. Harrod, 182 S.W.2d 770, 298 Ky. 232, overruling Henderson El. Co. v. Henderson, 219 S.W. 809, 187 Ky. 453, and Haller v. Louisville, 107 S.W. 741, 32 Ky.L. 1045—Henderson Elevator Company v. City of Henderson, 219 S.W. 809, 187 Ky. 453, 18 A.L.R. 983.

46. Mich.—Story, etc., Piano Co. v. Ottawa Cir. Judge, 179 N.W. 254, 212 Mich. 1.

47. Mich.—Hettche v. Oakland Circuit Judge, 287 N.W. 877, 290 Mich. 453.

48. Mich.—Hettche v. Oakland Circuit Judge, *supra*.

49. Ind.—Southern R. Co. v. French Lick, 100 N.E. 762, 52 Ind.App. 447.

Petition held jurisdictional

Mo.—Evans v. Andres, 42 S.W.2d 32, 236 Mo.App. 63.

Petition held sufficient

Mo.—Pack v. Pemberton, App., 218 S.W.2d 125.

50. Ind.—Southern R. Co. v. French Lick, 100 N.E. 762, 52 Ind.App. 447. 44 C.J. p 902 note 69.

51. Mo.—Bingham v. Kollman, 165 S.W. 1097, 256 Mo. 573. 44 C.J. p 902 note 70.

52. Wis.—Warren v. Wausau, 28 N.W. 187, 66 Wis. 206.

53. Ind.—Southern R. Co. v. French Lick, 100 N.E. 762, 52 Ind.App. 447.

54. Ind.—Southern R. Co. v. French Lick, *supra*.

55. Mich.—Petition of Home Owners' Loan Corporation, 296 N.W. 835, 296 Mich. 676.

56. Mo.—Bingham v. Kollman, 165 S.W. 1097, 256 Mo. 573.

57. Mo.—Bingham v. Kollman, *supra*.

44 C.J. p 902 note 74.

58. Ind.—Southern R. Co. v. French Lick, 100 N.E. 762, 52 Ind.App. 447.

59. Ind.—Petition of Dearmin, 156 N.E. 407, 86 Ind.App. 349. 44 C.J. p 902 note 77.

60. Ind.—Richmond v. Miller, 107 N.E. 550, 58 Ind.App. 20. 44 C.J. p 902 note 78.

61. Ind.—City of Jasper v. Tatchert & Schneider, 7 N.E.2d 534, 103 Ind.App. 302—City of Richmond v. Miller, 107 N.E. 550, 58 Ind.App. 20.

62. Minn.—Application of Baldwin, 15 N.W.2d 184, 218 Minn. 11.

63. Minn.—Petition of Krebs, 6 N.W.2d 803, 213 Minn. 344.

64. Minn.—Petition of Krebs, *supra*.

65. Ind.—City of Jasper v. Tatchert & Schneider, 7 N.E.2d 534, 103 Ind.App. 302.

66. Ind.—City of East Chicago v. E. B. Lanman Co., 10 N.E.2d 288, 212 Ind. 524.

Judgment or order. While it has been held that an order vacating a street must show on its face the statutory jurisdictional facts,⁶⁷ it has also been held that the jurisdiction of the court to render judgment can be collaterally attacked only on showing some fact, recital, or statement contained in the record which affirmatively establishes the absence of jurisdiction.⁶⁸ An order which complies with a valid statute is not void because it also complies with an amendment to the statute which may be invalid.⁶⁹

Reopening proceedings. Where judgment vacating a street was entered at the instance of private persons without any showing that the street had become useless, it is an abuse of discretion to deny a timely motion to reopen the proceedings.⁷⁰

Review. A proceeding for the vacation of a street is a special proceeding, as distinguished from a civil action, and is not appealable under a statute applicable to such actions.⁷¹ The judgment of the trial court as to whether a street will in reasonable probability be soon needed for public use other than that provided for in the decree vacating it may be reviewed notwithstanding the evidence is conflicting.⁷² Certiorari to review the action of the court will not be granted where the petitioner has rested on his rights for an unreasonable length of time while another, in reliance on the regularity of the proceedings, has made large improvements.⁷³ On certiorari, review is limited to whether the lower court acted within its jurisdiction.⁷⁴

Costs. It has been held that costs may not be

awarded against one who petitions to have a street vacated.⁷⁵

§ 1672. Vacation by Municipal Councils or Boards

- a. In general
- b. Judicial review
- c. Persons entitled to attack

a. In General

Proceedings before municipal councils or boards to vacate streets must be in conformity with the procedure prescribed by statute.

Proceedings before municipal councils or boards to which the authority to vacate streets has been delegated must be in conformity with the procedure, if any, prescribed by statute,⁷⁶ and the record should show the existence of jurisdictional facts.⁷⁷ Failure of the council to acquire jurisdiction of proceedings for the vacation of a street in the manner required by statute cannot be cured by a consent of the abutting owners.⁷⁸ A municipality may not exercise its power to vacate streets in such way as to disable it to open them.⁷⁹ The state has been held not a necessary party to a proceeding by a municipality to vacate a state road within municipal limits.⁸⁰

Petition or consent of property owners. Where full power is granted to the municipal council to vacate streets, it may act on its own motion,⁸¹ and a petition of property owners or their consent is not necessary in the absence of a statute requiring it.⁸²

67. Mo.—Evans v. Andres, 42 S.W. 2d 32, 226 Mo.App. 63.

68. Mo.—Bingham v. Kollman, 185 S.W. 1097, 256 Mo. 573—Pack v. Pemberton, App., 218 S.W.2d 125.

Failure to recite jurisdictional fact
County court in vacating streets and alleys in a town acted judicially in a matter intrusted to it by statute, and, even though acting as a court of limited jurisdiction, its judgment was entitled to the same favorable presumptions accorded in like cases to circuit courts and could be collaterally attacked only for some defect in judgment or some necessary proceeding on which judgment was based; the mere fact that county court judgment failed to recite that notice was given as required by statute then in force did not authorize collateral impeachment of such judgment, but in absence of contrary proof it was presumed that requisite notice was given.—Kelley v. Waymeyer, 204 S.W.2d 744, 356 Mo. 1043.

Jurisdictional facts presumed
Mo.—Pack v. Pemberton, App., 218 S.W.2d 125.

69. Mich.—Oakes v. Behm, 229 N.W. 408, 249 Mich. 494.

70. Minn.—Application of Baldwin, 15 N.W.2d 184, 218 Minn. 11.

71. Ohio.—In re Hartford St., 11 Ohio Cir.Ct., N.S., 580, 31 Ohio Cir. Ct. 123.

72. Iowa.—Gable v. Cedar Rapids, 129 N.W. 737, 150 Iowa 108.

Okl.—Orlando v. Stevens, 215 P. 1050, 90 Okl. 2.

73. Mich.—Beutel v. Bay Cir. Judge, 83 N.W. 278, 124 Mich. 521.

74. Mich.—Oakes v. Behm, 229 N.W. 408, 249 Mich. 494.

75. Wis.—Warren v. Wausau, 28 N.W. 187, 66 Wis. 206.

76. Ill.—People ex rel. Hill v. Eakin, 50 N.E.2d 474, 383 Ill. 383.

Ohio.—Messinger v. City of Cincinnati, 178 N.E. 260, 38 Ohio App. 337.

44 C.J. p 900 note 41.

Procedure not specified

The fact that procedure was not

specified in constitution or charter does not invalidate proceeding to vacate street.—Roberts v. City of Detroit, 216 N.W. 410, 241 Mich. 71, certiorari denied 49 S.Ct. 79, 278 U.S. 566, 642, 73 L.Ed. 509.

Statute held inapplicable
Ark.—Cernauskas v. Fletcher, 201 S.W.2d 999, 211 Ark. 678.

77. Tex.—Bowers v. Machir, Civ. App., 191 S.W. 753, 44 C.J. p 904 note 17.

78. Cal.—Keller v. Oakland, 201 P. 618, 54 Cal.App. 169.

79. Tex.—Bowers v. City of Taylor, Com.App., 24 S.W.2d 816.

80. Mich.—Rogers v. City of Jackson, 231 N.W. 621, 251 Mich. 256.

81. Mich.—Curtis v. Charlevoix Golf Assoc., 144 N.W. 818, 178 Mich. 50.

82. Mich.—Curtis v. Charlevoix Golf Assoc., supra.
N.J.—Read v. Camden, 24 A. 549, 54 N.J.Law 347.

N.Y.—Excelsior Brick Co. v. Havrestraw, 36 N.E. 819, 142 N.Y. 146.

Statutory requirements as to the petition or consent of landowners must, however, be strictly complied with.⁸³ Only such owners as are within the contemplation of the statute are required to join in the petition.⁸⁴ Where the statute provides that the vacation of a street shall be granted only on petition of a majority of the owners of property on the line thereof, it will, where the proceeding is to vacate a part of the street, be construed to require the petition of a majority of the owners on such part only;⁸⁵ and, where the owners of land abutting on a proposed improvement are required to consent to the vacation of a street, the consent of owners further along the street is not necessary.⁸⁶ So, where the statute provides for the petition of the owners of more than two thirds of the property abutting on the part of the street or alley which it is sought to vacate, the petition of the owners directly abutting on the part of the street vacated is sufficient, although such part does not extend through the entire platted block.⁸⁷

Under a statute authorizing the vacation of a street or any part thereof without application to the court, provided all persons interested in the plat or a distinct part thereof shall file their consent with

the common council, consent is required only of those having a legal right to compensation.⁸⁸ Where a charter provides that the council on receiving a petition shall, if it deems it expedient that the matter be proceeded with, order the petition to be filed and notice of a hearing given, the question whether the petition was signed by the requisite number of petitioners is one of fact for the council,⁸⁹ and its determination, in the absence of fraud, cannot be set aside, except in a direct proceeding,⁹⁰ and it is competent for the legislature to provide that such a finding by the city council shall be conclusive against collateral attack.⁹¹

Notice. In the absence of a statutory requirement, notice of the proposed vacation is not necessary,⁹² but notice of the proposed vacation, where required by statute, must be given in the manner and to the persons specified by the statute.⁹³ It has been held that persons present at every stage of the proceedings may not complain of lack of notice,⁹⁴ but it has also been held that a failure to give the notice required by the statute is not waived by the appearance of the property owners in opposition to the ordinance.⁹⁵ Where the statute requires notice for a specified time before the meeting of the municipi-

83. Wis.—James v. Darlington, 36 N.W. 834, 71 Wis. 173—Pettibone v. Hamilton, 40 Wis. 402.

44 C.J. p 902 note 90.

Estoppel

One who petitions for the vacation of a street or other public way is, on denial of his petition, estopped to assert that the premises have previously been vacated.—Rapp v. Stratton, 83 P. 182, 41 Wash. 263—Unzelman v. Snohomish, 82 P. 911, 40 Wash. 588.

84. Iowa.—Gable v. Cedar Rapids, 129 N.W. 737, 150 Iowa 108.

Wife of owner

Abutting owner's petition to vacate part of street need not be signed by wife.—Fry v. O'Leary, 252 P. 111, 141 Wash. 465, 49 A.L.R. 1249.

85. Minn.—Tiedt v. Argyl, 162 N.W. 412, 139 Minn. 269—State v. St. Paul, 107 N.W. 1129, 98 Minn. 282.

86. Pa.—Grant's Appeal, 23 Pittsb. Leg.J., N.S., 219.

87. Wash.—Ponischil v. Hoquiam Sash, etc., Co., 83 P. 316, 41 Wash. 303.

88. Mich.—Baudistel v. Michigan Cent. R. Co., 71 N.W. 1114, 113 Mich. 687.

89. Minn.—Minneapolis Brewing Co. v. East Grand Forks, 135 N.W. 1103, 118 Minn. 467.

90. Minn.—Minneapolis Brewing Co. v. East Grand Forks, supra, 44 C.J. p 903 note 96.

91. U.S.—Lockwood v. Portland, C. C.A.Or., 288 F. 480.

92. Mich.—Cady v. Oliver Farm Equipment Co., 242 N.W. 875, 259 Mich. 161—Roberts v. City of Detroit, 216 N.W. 410, 241 Mich. 71, certiorari denied 49 S.Ct. 79, 278 U.S. 566, 642, 73 L.Ed. 509.

Acquiescing owners

Fact that certain abutting property owners affected by the vacation of a street, who have acquiesced in such vacation, were not given notice of the proposed vacation is not ground for holding the ordinance vacating the street void where the statute makes no provision for notice.—Bellevue v. Bellevue Impr. Co., 90 N.W. 1002, 65 Neb. 52.

93. Wis.—State ex rel. Welch v. Chatterton, 300 N.W. 922, 239 Wis. 523.

Notice addressed "To Whom It May Concern"

Fact that publication of notice following adoption of declaratory resolution by board of public works of city was directed "To Whom It May Concern" was not error, where the only landowner shown by resolution to have been injured or benefited was named in the body of the notice.—Skinner v. Pitman-Moore Co., Ind.App., 85 N.E.2d 279.

Abutting owner

(1) Where there was no physical connection between plaintiff's property and portion of alley vacated by

city council, plaintiff's property did not abut on the vacated portion, and, hence, plaintiff was not entitled to notice of council's intention to vacate.—Bulen v. Moody, 63 N.E.2d 916, 77 Ohio App. 61.

(2) Property at end of street sought to be vacated held abutting property requiring publication of ordinance where owners' consent was not filed.—Messinger v. City of Cincinnati, 173 N.E. 260, 36 Ohio App. 337.

Landowner not listed for award or assessment

Where landowner who was not included by board of public works of city on list of awards and assessments for vacation of portion of city street, there was no requirement under statute that landowner be served with written notice or be given notice by publication as to assessments or awards; and court was required to presume, in absence of a contrary showing, that board complied with statute relating to the serving of written notice or notice by publication on those landowners included on list of awards and assessments.—Skinner v. Pitman-Moore Co., Ind. App., 85 N.E.2d 279.

94. Mich.—Roberts v. City of Detroit, 216 N.W. 410, 241 Mich. 71, certiorari denied 49 S.Ct. 79, 278 U.S. 566, 642, 73 L.Ed. 509.

95. Ohio.—Messinger v. City of Cincinnati, 173 N.E. 260, 36 Ohio App. 337.

pal council at which action is to be taken on the proposal to vacate the street, failure to give notice for such time is not cured by the fact that the ordinance vacating the street is passed at a subsequent meeting of the council more than the statutory period after the publication of notice.⁹⁶

Legal notice, when given, is sufficient notice of adjourned meetings and additional notice need not be given,⁹⁷ and, where a city council obtains jurisdiction of the petition to vacate certain streets by virtue of the original notice, it does not lose jurisdiction so completely as to render its subsequent order void because, on a postponement of consideration of the question, no continuance was entered, although the council considered the question of its next meeting without further service.⁹⁸

Protests. Protests must be filed at the time fixed by the statute.⁹⁹ So, where the statute provides for the filing of protests after the passage of the ordinance of intention and posting of notice of public work, a protest is inoperative which is filed after the presentation of the petition and before the passage of the ordinance of intention.¹ In case the proceeding is a summary one under which no personal notice is given and in which there is no right to show individual injury or damage, an abutting owner is not required to appear before the council and protest, and his failure to do so will not preclude him from thereafter seeking injunctive relief.²

Hearing and determination. Unless required by

constitution or statute, the municipality need not hold a hearing before vacating a street.³ Where the statute under which proceedings are brought provides for the filing of a proposed replat and a petition for its adoption by the city council, the council must accept or reject the replat in its entirety and cannot, in the absence of statutory authority, modify the replat and then adopt it as modified.⁴ The record or ordinance need not show a determination by the municipal council that the street vacation is in the public interest, since such determination is implied from the action of the council in vacating the street.⁵ In the absence of a statutory or charter provision so requiring, it is not necessary on vacating the street to determine in advance the use to which the land shall be devoted.⁶

Defects and irregularities. Where the statutory provisions are observed, the action of the municipality in vacating a street has the force of a judgment, and irregularities not jurisdictional will not invalidate the vacation.⁷

Ordinance or order. The council may vacate a street by deed⁸ or order.⁹ It has been held that, although the statute is silent as to whether a power to vacate shall be exercised by ordinance or by resolution, where the power is conveyed by a part of a statute which elsewhere refers to power to be exercised by ordinance, making no reference to powers to be exercised by resolution, the power to vacate must be exercised by an ordinance.¹⁰ Under a statute authorizing the vacation of a public

96. Ga.—Seaboard Air-Line R. Co. v. Greenfield, 128 S.E. 430, 160 Ga. 407.

97. Ind.—Hankins v. State ex rel. Miller, 27 N.E.2d 365, 217 Ind. 225.—Regenstreif v. Mera, 6 N.E.2d 702, 212 Ind. 112.

Final action on day specified by notice not required

Under statute authorizing board of public works to meet at time fixed by notice of final action in street vacation proceedings, consider remonstrances "and thereupon" take final action, board was not required to take final action on day of initial meeting pursuant to notice, and resolution of vacation confirmed two days after initial meeting, pursuant to adjournment from initial meeting for want of quorum, was not void.—Regenstreif v. Mera, supra.

98. Ind.—Regenstreif v. Mera, supra.

Wash.—Brasell v. Seattle, 104 P. 155, 55 Wash. 180.

99. Cal.—People v. Los Angeles, 218 P. 63, 62 Cal.App. 781.

1. Cal.—People v. Los Angeles, supra.

Ohio.—Oliver Schlemmer Co. v. Steinman, etc., Furniture Co., 15 Ohio S. & C. P. 92, 2 Ohio N.P.N. S., 293, affirmed 7 Ohio Cir.Ct.N. S., 468, 28 Ohio Cir.Ct. 474.

2. Ohio.—Oliver Schlemmer Co. v. Steinman, etc., Furniture Co., supra.

3. Mich.—Cady v. Oliver Farm Equipment Co., 242 N.W. 875, 259 Mich. 161.

Constitutional requirement

Rights of abutting owners in existing street may not arbitrarily be taken away by ordinance vacating street without hearing.—Texas Co. v. Texarkana Mach. Shops, Tex. Civ.App., 1 S.W.2d 928.

4. Wash.—Brasell v. Seattle, 104 P. 155, 55 Wash. 180.

5. Cal.—People v. Los Angeles, 218 P. 63, 62 Cal.App. 781.

Ind.—Regenstreif v. Mera, 6 N.E.2d 702, 212 Ind. 112.

Kan.—Kinney v. Reno Community High School, 287 P. 258, 130 Kan. 610.

Mich.—Manufacturers' Foundry Co. v. City of Holland, 234 N.W. 129, 252 Mich. 60.

6. Mich.—Cooper v. Detroit, 4 N.W. 262, 42 Mich. 534.

44 C.J. p 904 note 10.

7. Neb.—Endears v. Friday, 111 N.W. 140, 78 Neb. 510, 15 Ann.Cas. 685.—Bellevue v. Bellevue Impr. Co., 90 N.W. 1002, 65 Neb. 52.

8. Tex.—Blair v. Astin, Civ.App., 10 S.W.2d 1054, error refused.

9. Nev.—Blanding v. City of Las Vegas, 280 P. 644, 52 Nev. 62, 68 A.L.R. 1273.

10. Okl.—Mitchener v. Okmulgee, 228 P. 159, 100 Okl. 93.

44 C.J. p 903 note 7.

Authorization of obstruction

The placing of obstructive curbs on street, which necessitated a more circuitous route for abutting property owner to reach portion of its property fronting on such street, on which were located a filling station and tavern, was merely a regulation in use of street, and was not a vacation of street, so as to require adoption of an ordinance to such end.—Calumet Federal Savings & Loan Ass'n of Chicago v. City of Chicago, 29 N.E.2d 292, 306 Ill.App. 524.

street by the property owners with the acquiescence of the municipality, its consent must be expressed through its records.¹¹ The intent to vacate the street or other way must sufficiently appear from the language of the ordinance.¹² The mere repeal of a prior ordinance authorizing the opening of a street cannot be regarded as a proceeding to vacate it.¹³ However, the authority to occupy a portion of a street may be construed as vacating such portion thereof,¹⁴ but an ordinance granting a railroad a right of way in the street does not vacate the street.¹⁵ Courts will presume that city authorities complied with charter requirements, and that their action in closing a street effected a legal closing;¹⁶ and the language of an ordinance will be reasonably construed to include in a vacation of a street parts thereof which, if not vacated, would be useless for public travel.¹⁷ An order of county commissioners allowing a change of location of streets and providing that all the streets should be improved is not

conditional in the sense that it will not be effective until the new routes are improved.¹⁸

Repeal of ordinance. Except where the ordinance is repealed before the time at which it is to go into effect,¹⁹ the repeal of an ordinance vacating a street does not have the effect of reopening the street²⁰ unless it is accompanied by the same formalities necessary to the opening of a street in the first instance.²¹

b. Judicial Review

The exercise by a municipality of its discretionary power to vacate streets ordinarily is not subject to judicial review except for abuse of discretion, fraud, or lack of jurisdiction.

The exercise of the discretionary power of a municipality²² or a commission to which the power has been delegated to vacate streets²³ ordinarily is not subject to judicial review unless there has been

11. Ala.—City of Huntsville v. Gross, 135 So. 462, 223 Ala. 205.

Any municipal action, clearly expressive of municipal approval of vacation and abandonment of street, is sufficient.—City of Huntsville v. Gross, supra.

12. Kan.—Seneca v. St. Joseph, etc., R. Co., 146 P. 1168, 94 Kan. 323. 44 C.J. p 908 note 8.

Preliminary resolutions do not constitute legal vacation of street.—Grand Trunk Western R. Co. v. City of Flint, D.C.Mich., 55 F.2d 384, affirmed, C.C.A., City of Flint v. Grand Trunk Western R. Co., 69 F.2d 804.

Description and boundaries of street
An ordinance, purporting to vacate an alley but failing properly to describe boundaries of alley, was held invalid.—Pederson v. Town of Radcliffe, 284 N.W. 145, 226 Iowa 166.

Emergency clause

Town council had no power to attach emergency clause to ordinance vacating alley and portion of street, without proper showing as to necessity therefor.—City of Coloma v. Von Seggern Bros. & Ludden, 228 N.W. 800, 56 S.D. 390.

13. Pa.—In re Black St., 84 A. 918, 236 Pa. 395.

14. Kan.—Seneca v. St. Joseph, etc., R. Co., 146 P. 1168, 94 Kan. 323.—Leavenworth v. Douglass, 53 P. 123, 59 Kan. 416. 44 C.J. p 908 note 8.

15. Okl.—Jones v. Oklahoma City, 145 F.2d 971, 193 Okl. 637.

Construction of viaduct

The enactment by city of ordinance providing for construction of viaduct according to plans and specifications on file in office of city clerk

and approved by board of commissioners of city, and construction of such viaduct by railroads affected, did not effectuate a vacation of portion of street abutting adjacent owner's property, notwithstanding construction tended to prevent ready access to owner's building, where access was not totally cut off.—Finlay v. Union Pac. R. Co., D.C.Kan., 6 F.R.D. 284.

Separate ordinances

An ordinance requiring a railroad to elevate its tracks on a street held to be construed together with an ordinance passed several years later establishing a new street, where neither ordinance would have been passed without the other, and they must be considered as one ordinance with respect to a contention that the elevation ordinance vacated the street.—Chicago, B. & Q. R. Co. v. Abens, 137 N.E. 443, 306 Ill. 69.

16. N.Y.—In re Lands on Upper New York Bay, 214 N.Y.S. 234, 215 App.Div. 438, appeal dismissed 154 N.E. 589, 343 N.Y. 522.

17. Kan.—Larned v. Boyd, 90 P. 814, 78 Kan. 37. 44 C.J. p 904 note 12.

18. Tex.—Uvalde County v. Oppenheimer, 115 S.W. 904, 53 Tex.Civ. App. 137.

19. Pa.—Born v. Pittsburgh, 109 A. 614, 266 Pa. 128. 43 C.J. p 557 note 99 [a].

20. N.Y.—Schaefhaus v. New York, 51 N.Y.S. 114, 28 App.Div. 475, affirmed 54 N.E. 1094, 159 N.Y. 557. Pa.—Born v. Pittsburgh, 109 A. 614, 266 Pa. 128.

21. N.Y.—Schaefhaus v. New York, 51 N.Y.S. 114, 28 App.Div. 475, affirmed 54 N.E. 1094, 159 N.Y. 557.

22. Cal.—People v. City of San Rafael, 273 P. 138, 95 Cal.App. 783. Fla.—Corpus Juris cited in Roney Inv. Co. v. City of Miami Beach, 174 So. 26, 29, 127 Fla. 773.

Iowa.—Stoessel v. City of Ottumwa, 289 N.W. 718, 227 Iowa 1021.—Pederson v. Town of Radcliffe, 284 N.W. 145, 226 Iowa 166.

Mich.—Chene v. City of Detroit, 247 N.W. 172, 262 Mich. 253, affirm d 248 N.W. 884, 263 Mich. 512.—Cady v. Oliver Farm Equipment Co., 242 N.W. 875, 259 Mich. 161.—Board of Education of Fordson School Dist. of City of Dearborn v. City of Dearborn, 235 N.W. 312, 253 Mich. 439.—Roberts v. City of Detroit, 216 N.W. 410, 241 Mich. 71, certiorari denied 49 S.Ct. 79, 278 U.S. 566, 73 L.Ed. 509.

Mo.—Campbell v. City of Glendale, App., 211 S.W.2d 519.

N.J.—Con Realty Co. v. Ellenstein, 14 A.2d 544, 125 N.J.Law 196.

S.C.—Bethel M. E. Church v. City of Greenville, 45 S.E.2d 841, 311 S.C. 442.

Wash.—Fry v. O'Leary, 252 P. 111, 141 Wash. 465, 49 A.L.R. 1249. 44 C.J. p 897 note 12.

Refusal to vacate

Action of city in refusing to vacate street is not subject to review, except for abuse of discretion or fraud.—Petition of Hendricks, 226 N.W. 578, 248 Mich. 124, affirmed 232 N.W. 380, 251 Mich. 336.

23. Ind.—Falender v. Atkins, 114 N.E. 885, 136 Ind. 455. 44 C.J. p 897 note 13.

Quasi-judicial function

Mass.—MacDonald v. Board of Street Commissioners of City of Boston, 157 N.E. 417, 268 Mass. 288.

an abuse of discretion,²⁴ fraud,²⁵ interference with a vested right,²⁶ glaring informality or illegality in the proceedings,²⁷ or an absence of jurisdiction.²⁸ Judicial review has been said to be limited to whether the act of vacation was within the authority delegated to the municipality.²⁹ The advisability, expediency, wisdom, and purpose of the vacation ordinarily are not subject to review;³⁰ the courts will not, as a rule, look into the motive influencing municipal officials in the discretionary exercise of their

power to vacate a street,³¹ and their action will be presumed to have been based on consideration of public interests.³² It has been held that the action of the municipality in vacating a street is subject to review as to whether the action was taken in the public interest or for private benefit,³³ but it has also been held that the determination of the municipality is conclusive in the absence of fraud or collusion.³⁴ Where a city council acts without jurisdiction in vacating a street, the question may be

24. Cal.—People ex rel. Wagner v. City of Pomona, App. 200 P.2d 176 —People v. City of Oakland, 274 P. 438, 96 Cal.App. 488—People v. City of San Rafael, 273 P. 138, 95 Cal. App. 733.

Fla.—Corpus Juris cited in Roney Inv. Co. v. City of Miami Beach, 174 So. 26, 29, 127 Fla. 773.

Iowa.—Stoessel v. City of Ottumwa, 289 N.W. 718, 227 Iowa 1021—Pederson v. Town of Radcliffe, 284 N. W. 145, 226 Iowa 186.

Mich.—Cady v. Oliver Farm Equipment Co., 242 N.W. 875, 256 Mich. 161—Board of Education of Fordson School Dist. of City of Dearborn v. City of Dearborn, 235 N. W. 218, 253 Mich. 439.

N.J.—Con Realty Co. v. Ellenstein, 14 A.2d 544, 125 N.J.Law 196.

S.C.—Bethel M. E. Church v. City of Greenville, 45 S.E.2d 841, 211 S.C. 442.

Wash.—Fry v. O'Leary, 252 P. 111, 141 Wash. 465, 49 A.L.R. 1249.

44 C.J. p 897 note 14.

Abuse not shown

Cal.—People v. City of San Rafael, 273 P. 138, 95 Cal.App. 733.

Iowa.—Stoessel v. City of Ottumwa, 289 N.W. 718, 227 Iowa 1021.

Mich.—Green v. Grand Trunk Western R. Co., 282 N.W. 890, 287 Mich. 29—Cady v. Oliver Farm Equipment Co., 242 N.W. 875, 256 Mich. 161—Board of Education of Fordson School Dist. of City of Dearborn v. City of Dearborn, 235 N.W. 212, 253 Mich. 439.

N.J.—Con Realty Co. v. Ellenstein, 14 A.2d 544, 125 N.J.Law 196.

S.C.—City of Rock Hill v. Cothran, 40 S.E.2d 239, 209 S.C. 357.

44 C.J. p 897 note 14 [a].

Discretion held abused

Vacation of part of street used by members of church as means of access to church was an abuse of discretion, where vacation resolution merely stated that "all property owners abutting said portion having given their consent thereto," and did not show that public interest required closing of that part of street. —Bethel M. E. Church v. City of Greenville, 45 S.E.2d 841, 211 S.C. 442.

25. Cal.—People v. City of Oakland, 274 P. 438, 96 Cal.App. 488—People

v. City of San Rafael, 273 P. 138, 95 Cal.App. 733.

Fla.—Corpus Juris cited in Roney Inv. Co. v. City of Miami Beach, 174 So. 26, 29, 127 Fla. 773.

Ind.—Burridge v. City of Mishawaka, 77 N.E.2d 297, 225 Ind. 613.

Mich.—Cady v. Oliver Farm Equipment Co., 242 N.W. 875, 256 Mich. 161—Board of Education of Fordson School Dist. of City of Dearborn v. City of Dearborn, 235 N.W. 212, 253 Mich. 439—Roberts v. City of Detroit, 216 N.W. 410, 241 Mich. 71, certiorari denied 49 S.Ct. 79, 278 U.S. 566, 642, 73 L.Ed. 509.

N.J.—Con Realty Co. v. Ellenstein, 14 A.2d 544, 125 N.J.Law 196.

S.C.—Bethel M. E. Church v. City of Greenville, 45 S.E.2d 841, 211 S.C. 442.

44 C.J. p 897 note 15.

Facts held not to show fraud

Cal.—Beals v. City of Los Angeles, 144 P.2d 839, 23 Cal.2d 381.

Ind.—Regenstreif v. Merz, 6 N.E.2d 702, 212 Ind. 112.

Mich.—Green v. Grand Trunk Western R. Co., 282 N.W. 890, 287 Mich. 29.

Mo.—Arcadia Realty Co. v. City of St. Louis, 30 S.W.2d 995, 326 Mo. 273.

N.J.—Con Realty Co. v. Ellenstein, 14 A.2d 544, 125 N.J.Law 196—Downs v. Mayor and Common Council of City of South Amboy, 185 A. 15, 116 N.J.Law 511.

Wash.—Fry v. O'Leary, 252 P. 111, 141 Wash. 465, 49 A.L.R. 1249.

44 C.J. p 897 note 15 [b].

Presumption of honesty

Every presumption is indulged in favor of honesty of purpose of street commissioners as public officers in proceeding to discontinue street.—MacDonald v. Board of Street Com'rs of City of Boston, 167 N.E. 417, 268 Mass. 288.

26. Wash.—Fry, v. O'Leary, 252 P. 111, 141 Wash. 465, 49 A.L.R. 1249.

27. Fla.—Corpus Juris cited in Roney Inv. Co. v. City of Miami Beach, 174 So. 26, 29, 127 Fla. 773. 44 C.J. p 897 note 16.

28. Fla.—Corpus Juris cited in Roney Inv. Co. v. City of Miami Beach, 174 So. 26, 29, 127 Fla. 773.

Neb.—Bellevue v. Bellevue Impr. Co., 90 N.W. 1002, 65 Neb. 52.

N.J.—Con Realty Co. v. Ellenstein, 14 A.2d 544, 125 N.J.Law 196

29. Ill.—People ex rel. Foote v. Kelly, 53 N.E.2d 429, 385 Ill. 543.

30. Cal.—People v. City of Oakland, 274 P. 438, 96 Cal.App. 488.

Ill.—People ex rel. Foote v. Kelly, 53 N.E.2d 429, 385 Ill. 543.

Mass.—MacDonald v. Board of Street Com'rs of City of Boston, 167 N.E. 417, 268 Mass. 288.

Mich.—Manufacturers' Foundry Co. v. City of Holland, 234 N.W. 129, 253 Mich. 60.

N.J.—Con Realty Co. v. Ellenstein, 14 A.2d 544, 125 N.J.Law 196.

Legislative question

Ill.—Moskal v. Catholic Bishop of Chicago, 43 N.E.2d 206, 315 Ill. App. 461.

Announcing reasons

When city's action in vacating streets is attacked, city need not announce reasons which prompted it to determine that public necessity and convenience required vacation of street and demonstrate soundness of its judgment.—Neff v. City of Indianapolis, 198 N.E. 328, 209 Ind. 203.

31. Ill.—People ex rel. Foote v. Kelly, 53 N.E.2d 429, 385 Ill. 543—Moskal v. Catholic Bishop of Chicago, 43 N.E.2d 206, 315 Ill.App. 461.

44 C.J. p 897 note 18.

32. Ill.—Moskal v. Catholic Bishop of Chicago, supra.

N.J.—Con Realty Co. v. Ellenstein, 14 A.2d 544, 125 N.J.Law 196.

44 C.J. p 897 note 19.

33. Ill.—People ex rel. Foote v. Kelly, 53 N.E.2d 429, 385 Ill. 543—Moskal v. Catholic Bishop of Chicago, 43 N.E.2d 206, 315 Ill.App. 461.

Pa.—Stone v. Marks Corporation, 50 Pa. Dist. & Co. 324.

Tex.—Hartwell Iron Works v. Missouri-Kansas-Texas R. Co. of Texas, Civ.App., 56 S.W.2d 922.

34. Cal.—Beals v. City of Los Angeles, 144 P.2d 839, 23 Cal.2d 381—National City v. Dunlop, 194 P. 2d 783, 86 Cal.App.2d 380—People v. City of Oakland, 274 P. 438, 96 Cal.App. 488.

raised at any time,³⁵ and the proceedings are a nullity.³⁶

Procedure. The action of the municipality in vacating or refusing to vacate a street may be reviewed only in a direct proceeding³⁷ and is not subject to collateral attack.³⁸ The right to appeal does not exist in the absence of statute,³⁹ although it is sometimes conferred.⁴⁰ Under the views taken in some jurisdictions as to the use which may be made of the writ of certiorari, the validity of an ordinance vacating a street or other public way may, in some jurisdictions, be tested by that writ.⁴¹

Pleading. The presumption that the vacation of a street was for a public purpose cannot be indulged to sustain a demurrer to a complaint attacking the vacation of a street on the ground that it was for a private, and not for a public, purpose.⁴² It has been held that an abuse of discretion or fraud must be alleged in a petition to the court to review the action of the municipality in vacating or refusing to vacate a street.⁴³

Evidence. The action of the municipality in vacating the street is presumed to be valid,⁴⁴ and the burden is on the party attacking the vacation to prove its invalidity.⁴⁵ It has been held that parol evidence is admissible to show whether the purpose of the vacation was public or private,⁴⁶ but is not

admissible to show the motives which actuated the members of the council.⁴⁷ Evidence as to the effect of the vacation on adjoining property and on the public is admissible on the question of whether the vacation was for a public purpose.⁴⁸ General rules have been applied as to the weight and sufficiency of the evidence.⁴⁹

Hearing and determination. The court in reviewing the vacation of a street by a municipality will look beyond the recitals of the ordinance or resolution and the statements of the members of the municipal council and will examine the results and the surrounding circumstances to learn the real purpose of the vacation.⁵⁰ Questions of fact are for the trial court.⁵¹

c. Persons Entitled to Attack

Persons who sustain special injury, different in kind from that suffered by the general public, from the vacation of a street by a municipality, and only such persons, may attack or obtain judicial review of the actions of the municipality in vacating the street.

Persons who sustain injury from the vacation of the street different in kind from that suffered by the general public may attack or obtain a judicial review of the vacation of a street by a municipality,⁵² and as a general rule only such persons may do so.⁵³ Thus, as a general rule, an abutting owner

35. Mich.—Curtis v. Charlevoix Golf Ass'n, 144 N.W. 818, 178 Mich. 50.

36. Mich.—Curtis v. Charlevoix Golf Ass'n, supra.

37. Mich.—Petition of Hendricks, 232 N.W. 350, 251 Mich. 336.

38. Mich.—Petition of Hendricks, supra.

39. Pa.—Ebe's Appeal, 10 Pa. Dist. 367.

29 C.J. p 531 note 55.

40. Miss.—Polk v. Hattiesburg, 69 So. 675, 109 Miss. 872, suggestion of error denied 69 So. 1005, 110 Miss. 80.

Collateral attack precluded

Statute permitting property owners not included in list of owners injuriously affected to appear, remonstrate, and be heard, fully protected rights of such owners, and, if they appeared and were dissatisfied, their remedy was by appeal and not by collateral attack on street vacation proceeding.—Neff v. City of Indianapolis, 198 N.E. 328, 309 Ind. 203.

41. Ind.—Regenstreif v. Mertz, 6 N.E.2d 702, 212 Ind. 112.

44 C.J. p 904 note 25.

Fact questions not reviewed on certiorari.—Dickson v. Town of Centerville, 128 So. 332, 157 Miss. 490.

42. Wash.—Fry v. O'Leary, 252 P. 111, 141 Wash. 465, 49 A.L.R. 1249.

43. Mich.—Petition of Hendricks, 226 N.W. 878, 248 Mich. 124, affirmed 232 N.W. 350, 251 Mich. 336.

44. Cal.—National City v. Dunlop, 194 P.2d 788, 86 Cal.App.2d 380.

45. Cal.—National City v. Dunlop, supra.

46. Ill.—Moskal v. Catholic Bishop of Chicago, 43 N.E.2d 206, 315 Ill. App. 461.

47. Ill.—Moskal v. Catholic Bishop of Chicago, supra.

48. Ill.—Moskal v. Catholic Bishop of Chicago, supra.

49. Cal.—National City v. Dunlop, 194 P.2d 788, 86 Cal.App.2d 380.

50. S.C.—City of Rock Hill v. Cothran, 40 S.E.2d 239, 209 S.C. 357.

51. Cal.—National City v. Dunlop, 194 P.2d 788, 86 Cal.App.2d 380.

52. Ga.—City of Statesboro v. Dorman, 45 S.E.2d 403, 203 Ga. 25—City of Rome v. First Nat. Bank, 8 S.E.2d 653, 188 Ga. 279.

44 C.J. p 905 notes 39, 40, 47.

Persons entitled to enjoin vacation see infra § 1675.

Who may set aside vacation see infra § 1674.

Persons outside municipality

(1) Owners of property lying outside city limits could challenge validity of ordinance vacating street leading to subdivision dedicated on

demand of city planning commission.—Messinger v. City of Cincinnati, 173 N.E. 260, 36 Ohio App. 337.

(2) Where village sought to vacate portion of town-village highway, persons living in towns adjoining the village who alleged their use of the highway in going to and from their work, and towns which had made valuable contributions to purchase of lands used as a park on the highway, and residents of such towns who used highway to reach the park, had such an interest in the vacation proceedings as to entitle them to be heard as to legality of proceedings.—State ex rel. Welch v. Chatterton, 300 N.W. 922, 239 Wis. 623.

53. U.S.—Lockwood v. City of Portland, C.C.A.Or., 288 F. 480.

Ky.—York v. Chesapeake & O. Ry. Co., 41 S.W.2d 668, 240 Ky. 114.

44 C.J. p 905 notes 39, 40, p 906 note 53.

A mere inconvenience resulting from the closing of a street when another reasonable, although perhaps not equally accessible, approach remains does not give rise to a legal right in one so inconvenienced, and courts do not look with favor on claims based on such grounds.—Mandell v. Board of Com'rs of Bernalillo County, 99 P.2d 108, 44 N.M. 109.

may attack the vacation of a street by a municipality.⁵⁴ According to some decisions, a person who is not the owner of land abutting the vacated portion of the street may not attack the vacation,⁵⁵ at least where the vacation of the street does not leave him without reasonably convenient means of access to his property,⁵⁶ but other authorities hold that the right to attack a vacation by the municipality is not limited to abutting owners⁵⁷ and that a nonabutting owner may attack the validity of the vacation where it leaves him without reasonably convenient means of access.⁵⁸ The municipality may be estopped to attack the validity of an ordinance vacating a street where all the parties in interest have acted in reliance on the ordinance for a substantial period of time,⁵⁹ but it is not estopped to claim, as against abutters, that an ordinance vacating part of a street was never legally adopted, where the city has not misled them by anything done to their prejudice or otherwise.⁶⁰

§ 1673. Operation and Effect

A street in which the public has only an easement, when properly vacated, ceases to be a street, and the rights of the public therein are divested.

A street in which the public has only an easement,

when properly vacated, ceases to be a street, and the rights of the public therein are divested,⁶¹ and if a street duly vacated continues open to the use of the public it is as a matter of sufferance only, and does not affect the result of the vacation unless sufficient time elapses to reestablish the street by prescription.⁶² Where the proceedings are regarded as in rem, they may be binding on persons who are not signers of an application to a municipal council for such vacation.⁶³

Temporary vacation. A temporary vacation or relinquishment of the right to control a strip of land along the side of a street for parking purposes has been held merely to amount to a revocable permit,⁶⁴ and not to estop the city afterward to claim the land where the act of the city was unauthorized,⁶⁵ and this notwithstanding improvements of the land by the owners.⁶⁶

Detachment of territory. A statute vacating streets in an addition to a city with a proviso that certain streets in the addition should not be affected does not have the effect of vacating the entire addition or detaching it from the city.⁶⁷

§ 1674. Setting Aside

The action of a municipal council in vacating a

Travel by more circuitous route

Obstruction of street or highway, requiring travel by more circuitous route, is not special injury sufficient to support action by individual.—*Blanding v. City of Las Vegas*, 280 P. 644, 52 Nev. 52, 68 A.L.R. 1273.

Diversion of traffic

Probable injuries to garage and gasoline stations because of proposed change in street diverting traffic are not direct and immediate consequences of acts authorizing action by individual.—*Blanding v. City of Las Vegas*, supra.

Only owner of property affected may complain

Wash.—*Olsen v. Jacobs*, 76 P.2d 607, 193 Wash. 606.

Assessment of plaintiff's lot for street sought to be vacated, not abutting on lot, held not to estop city to vacate lot.—*Kemp v. City of Seattle*, 270 P. 431, 149 Wash. 197, appeal, error and certiorari dismissed 49 S. Ct. 482, 279 U.S. 825, 73 L.Ed. 978.

54. Wash.—*Kemp v. City of Seattle*, supra.

What is abutting property

(1) The test of whether property is abutting is whether it is subject to statutory improvement assessments.—*Lee v. City of Stratford*, 81 S.W.2d 1003, 125 Tex. 179.

(2) Property, directly across end of street sought to be vacated, and separated therefrom by another

street bounding property, held not to abut on street sought to be vacated.—*Kemp v. City of Seattle*, 270 P. 431, 149 Wash. 197, appeal, error and certiorari dismissed 49 S.Ct. 482, 279 U.S. 825, 73 L.Ed. 978.

55. N.J.—*Con Realty Co v. Ellenstein*, 14 A.2d 544, 125 N.J.Law 196.

44 C.J. p 905 note 52.

56. Ala.—*Chichester v. Kroman*, 128 So. 166, 221 Ala. 203.

Miss.—*Dickson v. Town of Centerville*, 128 So. 332, 157 Miss. 490.

Ohio.—*Bulen v. Moody*, 63 N.E.2d 916, 77 Ohio App. 61.

57. Tenn.—*Byington v. Bass*, 11 Tenn.App. 569.

44 C.J. p 905 note 51.

58. Ala.—*Chichester v. Kroman*, 128 So. 166, 221 Ala. 203.

Mo.—*Arcadia Realty Co. v. City of St. Louis*, 30 S.W.2d 995, 326 Mo. 273.

Light and air

Property owner cannot complain because of shutting off of light and air from property by vacation of street not abutting on his property.—*Kemp v. City of Seattle*, 270 P. 431, 149 Wash. 197, appeal, error and certiorari dismissed 49 S.Ct. 482, 279 U.S. 825, 73 L.Ed. 978—44 C.J. p 906 note 56 [a].

59. U.S.—*City of St. Petersburg v. Atlantic Coast Line R. Co.*, C.C.A. Fla., 132 F.2d 675.

60. Iowa.—*Sutton v. Mentzer*, 134 N. W. 108, 154 Iowa 1.

61. U.S.—*Roxanna Petroleum Corporation v. Sutter*, C.C.A.Kan., 28 F.2d 159

Kan.—*Board of Com'rs of Marion County v. Clark*, 138 P.2d 449, 157 Kan. 132.

Neb.—*Hart v. Village of Ainsworth*, 131 N.W. 816, 89 Neb. 418, followed in *Johnson v. Buhman*, 152 N. W. 403, 98 Neb. 236.

N.J.—*Downs v. Mayor and Common Council of City of South Amboy*, 185 A. 15, 116 N.J.Law 511.

N.Y.—*Crossin v. Woolf*, 169 N.Y.S. 943, 182 App.Div. 607.

Wash.—*Raleigh-Hayward Co. v. Hull*, 8 P.2d 988, 167 Wash. 39.

44 C.J. p 904 note 29.

Ownership and title after vacation or abandonment see *infra* § 1683.

62. Iowa.—*Bradley v. Centerville*, 117 N.W. 968, 139 Iowa 599.

63. Mich.—*Detroit Real Est. Inv. Co. v. Wayne Cir. Judge*, 100 N.W. 271, 137 Mich. 108.

64. Or.—*Bernitt v. Marshfield*, 174 P. 1153, 89 Or. 556.

65. Or.—*Bernitt v. Marshfield*, supra.

66. Or.—*Bernitt v. Marshfield*, supra.

67. Kan.—*Atchison, etc., R. Co. v. Lyon County*, 82 P. 519, 84 P. 1031, 72 Kan. 13.

street may be set aside by a proceeding in equity where it was beyond the powers of the council.

The action of a municipal council in vacating a street may be set aside in a proceeding in equity where it was beyond the powers of the council,⁶⁸ as where it was a mere attempt to dispose of the public rights and interests for a private use;⁶⁹ and this is true notwithstanding the statute provides that a resolution of vacation shall be conclusive.⁷⁰ Such a proceeding must be brought by one who has suffered special injury different in kind from that suffered by the public in general,⁷¹ as, for example, one who owns property abutting on the street, part of which is vacated.⁷²

Limitations. A statute providing that no action shall be brought to annul or set aside any final order of court or action of a municipal council in proceedings for the vacation of a street after a specified time has expired is valid as within the primary power of the legislature as to the laying out and vacation of streets.⁷³ It is one of limitation and repose,⁷⁴ and is to be given a fair and reasonable construction in order to carry out its purpose.⁷⁵ A limitation on the time within which an action shall be brought to set aside an order of court or action of a city council vacating a street applies in a case wherein a street is vacated by inference through the acceptance of a conveyance of land for a street

by the city council, reciting as its consideration the vacation of the street in question.⁷⁶

Estoppel and laches. One who, with knowledge of the proceedings to vacate, delays for a long time to move to set them aside may be estopped so to do where he has, without objection, permitted large expenditures of money in reliance on the vacation,⁷⁷ but one who institutes proceedings within a reasonable time after learning of the vacation is not barred by laches.⁷⁸

§ 1675. Injunction

Injunctive relief may be obtained by a person entitled thereto against the vacation of a street by a municipal corporation where it is proceeding without jurisdiction or in violation of statutory or charter provisions or not for a public purpose or not in good faith or in abuse of discretion.

Injunctive relief may be obtained against the vacation of a street by a municipal corporation where it is proceeding without jurisdiction or in violation of statutory or charter provisions,⁷⁹ or not for a public purpose,⁸⁰ or not in good faith,⁸¹ or in abuse of discretion;⁸² but injunctive relief will not be granted where the vacation is lawful⁸³ or within the scope of the discretion of the municipal authorities,⁸⁴ although it is hasty or ill advised,⁸⁵ and such relief will not be granted because of irregularities in the assessment of damages or in making the as-

68. Ill.—People v. Elgin, etc., R. Co., 132 N.E. 204, 298 Ill. 574.

69. Ill.—People v. Elgin, etc., R. Co., supra.

70. Ind.—Windle v. Valparaiso, 113 N.E. 429, 62 Ind.App. 342.

71. Wash.—Olsen v. Jacobs, 76 P.2d 607, 193 Wash. 506—Fry v. O'Leary, 252 P. 111, 141 Wash. 465, 49 A.L.R. 1249.

44 C.J. p 905 note 39.

Complaint must allege special injury
Ind.—Burridge v. City of Mishawaka, 77 N.E.2d 297, 225 Ind. 613.

Parties defendant

Abutting lot owner and city held proper defendant, in suit to set aside ordinance vacating part of street and require removal of building thereon.—Fry v. O'Leary, 252 P. 111, 141 Wash. 465, 49 A.L.R. 1249.

72. Wash.—Smith v. Centralia, 104 P. 797, 55 Wash. 573—Brazell v. Seattle, 104 P. 155, 55 Wash. 180.

73. Wis.—Madison v. Fuller, etc., Mfg. Co., 187 N.W. 182, 176 Wis. 462.

44 C.J. p 905 note 42.

74. Wis.—Madison v. Fuller, etc., Mfg. Co., supra.

75. Wis.—Madison v. Fuller, etc., Mfg. Co., supra.

44 C.J. p 905 note 44.

76. Wis.—Madison v. Fuller, etc., Mfg. Co., supra.

77. Idaho.—Canady v. Coeur d'Alene Lumber Co., 120 P. 830, 21 Idaho 77.

44 C.J. p 905 note 46.

78. Mich.—Burton v. Freund, 220 N.W. 672, 243 Mich. 679.

79. Ind.—Hankins v. State ex rel. Miller, 27 N.E.2d 365, 217 Ind. 235. Tex.—Bowers v. City of Taylor, Com. App., 24 S.W.2d 816.

Wash.—Brazell v. Seattle, 104 P. 155, 55 Wash. 180.

Action held premature

Principle that in mandamus in clear case court need not wait until evil is done held not relevant to suit to restrain discontinuance of street prior to hearing thereon; fact that parties regarded equity proceedings more expeditious did not justify equity intervention in suit to restrain discontinuance of street prior to hearing by street commissioners.—MacDonald v. Board of Street Com'rs of City of Boston, 167 N.E. 417, 268 Mass. 288.

Action too late

An abutting owner may lose his right to injunctive relief against the closing of a street by the municipality by failing to act before the vacation and abandonment has be-

come complete by conveyance to the adjacent landowners.—Kehoe v. Rourke, 62 S.E. 185, 131 Ga. 269—Marietta Chair Co. v. Henderson, 49 S.E. 312, 121 Ga. 399, 104 Am.S.R. 156, 2 Ann.Cas. 83.

80. Kan.—Kinney v. Reno Community High School, 287 P. 258, 130 Kan. 610.

44 C.J. p 905 note 49.

81. Ind.—Indianapolis v. Maag, 107 N.E. 529, 57 Ind.App. 493.

Fraud not sufficiently alleged

Nev.—Blanding v. City of Las Vegas, 280 P. 644, 52 Nev. 52, 68 A.L.R. 1273.

82. S.C.—Bethel M. E. Church v. City of Greenville, 45 S.E.2d 841, 211 S.C. 442.

Pleading held insufficient

Mass.—MacDonald v. Board of Street Com'rs of City of Boston, 167 N.E. 417, 268 Mass. 288.

83. Ga.—Savannah Beach, Tybee Island, v. Lynes, 35 S.E.2d 912, 200 Ga. 26.

Ohio.—Stansberry v. City of Cincinnati, 28 Ohio N.P.N.S., 207.

84. Ga.—Jones v. City of Decatur, 7 S.E.2d 730, 189 Ga. 732.

85. S.C.—Bethel M. E. Church v. City of Greenville, 45 S.E.2d 841, 211 S.C. 442.

assessment roll.⁸⁶ It will not be presumed as a ground for an injunction against a municipality to prevent the carrying out of a contract between it and a railroad company to vacate a street that it will not proceed by ordinance as it was empowered, and had contracted, to do.⁸⁷ In an injunction suit against a city to restrain the vacation of a street, if the city has authority to do what is alleged in the bill, such authority should be set up in the answer.⁸⁸ Where the object of the proceeding is to secure access to the railroad, and under the evidence complainant will have such a right of access whether the particular strip of land involved is a street as contended by him or a railroad strip as contended by defendants, the court has power to fix the rights of the petitioner in such strip.⁸⁹

In accordance with general rules, injunctive relief will not be granted where the remedy at law is adequate.⁹⁰ Thus, where the vacation is lawful, it is generally held that, even though a property owner's injury will be of a special character, he is not entitled to an injunction where he is entitled to compensation therefor and his remedy at law is adequate.⁹¹ A public utility company is not entitled to

enjoin the vacation of a street in which its pipes are laid where it has a right to damages and review by appeal.⁹² The owner of an uncondemned easement, however, may enjoin the temporary closing of a street, and the rule that an injunction will not be granted where it would result in greater injury to defendant than its refusal would cause to petitioner has no application in such a case.⁹³

Nuisance. Injunctive relief against a vacation of a street may not be had on the theory that the vacation constitutes a common-law nuisance where it is in compliance with the law and is intended as a bona fide vacation by the municipality within its delegated power.⁹⁴

Persons entitled. Injunctive relief may be obtained by one who would sustain injury by the vacation of a street different in kind from that suffered by the general public,⁹⁵ as in the case of an abutting owner,⁹⁶ and such relief may be obtained by one who is not an abutting owner⁹⁷ although there is also authority, sometimes based on statute, that only an abutting owner is entitled to such relief.⁹⁸ In any event one whose injury is not dif-

86. Ind.—Hankins v. State ex rel. Miller, 27 N.E.2d 365, 217 Ind. 225—Neff v. City of Indianapolis, 198 N.E. 328, 209 Ind. 203—Falender v. Atkins, 114 N.E. 965, 186 Ind. 455—Casky v. City of Greensburg, 78 Ind. 233.

87. Tenn.—Knoxville Ice, etc., Co. v. Knoxville, 284 S.W. 866, 153 Tenn. 536.

88. Ala.—Troy v. Watkins, 78 So. 550, 201 Ala. 274.

89. Iowa.—West Davenport Impr. Co. v. Theophilus, 158 N.W. 689, 177 Iowa 353.

90. Kan.—Kinney v. Reno Community High School, 287 P. 258, 130 Kan. 610.

Tex.—Broussard v. L. Cartwright Realty Co., Civ.App., 179 S.W.2d 777, error refused.

Irreparable injury

Cutting down or wholly taking away sidewalk ordinarily is not irreparable injury, with respect to abutting owner's right to injunction.—E. M. Harrison Market v. Town of Montclair, 147 A. 502, 105 N.J.Eq. 222.

91. Ill.—Nielsen v. City of Chicago, 161 N.E. 768, 330 Ill. 301. 44 C.J. p 906 note 58.

92. Pa.—Titusville Amusement Co. v. Titusville Iron Works Co., 134 A. 481, 286 Pa. 561.

93. Pa.—Stuart v. Gimbel, 131 A. 728, 285 Pa. 102.

94. Ala.—Southern R. Co. v. Ables, 45 So. 334, 153 Ala. 523.

95. Ga.—City of Rome v. First Nat. Bank, 3 S.E.2d 653, 188 Ga. 279. 44 C.J. p 905 note 47.

Persons entitled to attack municipal vacation of street generally see supra § 1672 c.

Access to church

A church whose members used portion of street, directed to be vacated, as means of going to and from church property suffered a special injury different in degree and in kind from that suffered by general public, and could maintain its own suit to enjoin enforcement of the resolution, where portion of street directed vacated afforded only convenient approach to church property.—Bethel M. E. Church v. City of Greenville, 45 S.E.2d 841, 211 S.C. 442.

Complaint held sufficient

R.I.—Wolfe v. City of Providence, 57 A.2d 181, 73 R.I. 417.

Statutory limitation of jurisdiction

Superior court has no other jurisdiction to consider case on merits to restrain discontinuance of street than authorized by statute conferring equity jurisdiction at suit of a specified number of taxable inhabitants.—MacDonald v. Board of Street Com'rs of City of Boston, 167 N.E. 417, 268 Mass. 288.

96. Wash.—Kemp v. City of Seattle, 270 P. 431, 149 Wash. 197, appeal, error and certiorari dismissed 49 S.Ct. 482, 279 U.S. 825, 73 L.Ed. 978.

97. Cal.—Beals v. City of Los Angeles, 144 P.2d 839, 23 Cal.2d 381. Mo.—New v. South Daviess County Drainage Dist of Daviess County, App., 220 S.W.2d 79.

S.C.—Bethel M. E. Church v. City of Greenville, 45 S.E.2d 841, 211 S.C. 442.

Tenn.—Byington v. Bass, 11 Tenn. App. 569.

Wash.—Olsen v. Jacobs, 76 P.2d 607. 193 Wash. 506—Kemp v. City of Seattle, 270 P. 431, 149 Wash. 197, appeal, error and certiorari dismissed 49 S.Ct. 482, 279 U.S. 825, 73 L.Ed. 978.

44 C.J. p 905 note 51.

98. Tex.—Lee v. City of Stratford, 81 S.W.2d 1003, 125 Tex. 179—Gambrell v. Chalk Hill Theatre Co., Civ.App., 205 S.W.2d 126, appeal dismissed 68 S.Ct. 1071, 334 U.S. 814, 92 L.Ed. 1745. 44 C.J. p 905 note 52.

Statute held valid

Tex.—Kahn v. City of Houston, 48 S.W.2d 595, 121 Tex. 293.

Injunction against private persons

Statutory limitation of right to injunctive relief against vacation of streets or alleys to owners of realty abutting on part of street or alley actually closed is not limited to city itself but extends to private persons who proceed under ordinance closing or vacating streets.—Gambrell v. Chalk Hill Theatre Co., Tex.Civ.App., 205 S.W.2d 126, appeal dismissed 68 S.Ct. 1071, 334 U.S. 814, 92 L.Ed. 1745.

ferent in character from that to every other citizen may not enjoin the vacation of the street,⁹⁹ and an injunction will not issue even to an abutting owner where such special damage is not shown.¹ However, where there has been a clear invasion of the common rights of the citizens by some unauthorized act of the officers of the municipality, an injunction may be granted on the petition of the proper official on behalf of the public.² One whose

property does not abut on the part of the street vacated by ordinance cannot maintain an action to enjoin the enforcement of the ordinance merely because he may be inconvenienced by such vacation.³ Where an ordinance vacating a part of a street and abandoning all control over it simply shows an intent to relinquish the public easement without closing a street physically to a property owner's use, injunctive relief is not warranted.⁴

5. ABANDONMENT

§ 1676. In General

The right of the public in a street may be lost by abandonment, but in the absence of statute abandonment is not established by mere nonuse of the street.

The right of the public in a street used as a public highway may be lost by abandonment.⁵ Aban-

donment of a street is a matter of intention⁶ and must be shown by a positive act of abandonment as distinguished from mere nonuser.⁷ Thus, except where it is otherwise provided by statute, as discussed *infra* § 1677, mere nonuser by the public⁸

99. U.S.—*Lockwood v. City of Portland*, C.C.A.Or., 288 F. 480.

Mass.—*MacDonald v. Board of Street Com'rs of City of Boston*, 167 N.E. 417, 268 Mass. 288.

Mich.—*Tomaszewski v. Palmer Bee Co.*, 194 N.W. 571, 223 Mich. 565.

Mo.—*Arcadia Realty Co. v. City of St. Louis*, 30 S.W.2d 995, 326 Mo. 273.

Nev.—*Blanding v. City of Las Vegas*, 280 P. 644, 52 Nev. 52, 68 A.L.R. 1273.

N.C.—*Shaw v. Liggett & Myers Tobacco Co.*, 38 S.E.2d 313, 226 N.C. 477.

Okl.—*Young v. Dyer*, 299 P. 881, 149 Okl. 204.

S.C.—*Bethel M. E. Church v. City of Greenville*, 45 S.E.2d 841, 211 S.C. 442.

Tex.—*Hartwell Iron Works v. Missouri-Kansas-Texas R. Co. of Texas*, Civ.App., 56 S.W.2d 922.

Wash.—*Olsen v. Jacobs*, 76 P.2d 607, 193 Wash. 506—*Kemp v. City of Seattle*, 270 P. 431, 149 Wash. 197, appeal, error, and certiorari dismissed 49 S.Ct. 482, 279 U.S. 825, 73 L.Ed. 978.

44 C.J. p 906 note 53.

Only landowner, whose property is affected by change and who will suffer some peculiar injury, not suffered by public generally may enjoin vacation of street.—*Shaw v. Liggett & Myers Tobacco Co.*, 38 S.E.2d 313, 226 N.C. 477.

Allegation of injury

(1) In general.

Mo.—*Arcadia Realty Co. v. City of St. Louis*, 30 S.W.2d 995, 326 Mo. 273.

Nev.—*Blanding v. City of Las Vegas*, 280 P. 644, 52 Nev. 52, 68 A.L.R. 1273.

Va.—*Genheimer v. Crystal Spring Land Co.*, 154 S.E. 489, 156 Va. 184.

(3) Complaint of property owner

to enjoin city from vacating street must state facts sufficient to enable court to determine danger of special injury.—*Blanding v. City of Las Vegas*, 280 P. 644, 52 Nev. 52, 68 A.L.R. 1273.

(3) Where allegations of complaint did not show substantial injury materially different in kind, as well as in degree, from inconvenience to the public generally, property owner was not entitled to enjoin city from closing street.—*Hebb v. City of Bartow*, 194 So. 312, 142 Fla. 78.

(4) Petition which expressly declined to allege any damage because damages would be incapable of definite ascertainment failed to show any right in plaintiffs to an injunction restraining enforcement of city ordinance closing parts of streets in subdivision in which plaintiffs owned lots.—*Gambrell v. Chalk Hill Theatre Co.*, Tex.Civ.App., 205 S.W.2d 126, appeal dismissed 68 S.Ct. 1071, 334 U.S. 814, 92 L.Ed. 1745.

1. Mich.—*Swanteck v. Detroit*, 162 N.W. 1020, 196 Mich. 307, 44 C.J. p 906 note 54.

2. Ind.—*Indianapolis v. Maag*, 107 N.E. 529, 57 Ind.App. 493.

3. U.S.—*Lockwood v. City of Portland*, C.C.A.Or., 288 F. 480. N.M.—*Mandell v. Board of Com'rs of Bernalillo County*, 99 P.2d 108, 44 N.M. 109, 44 C.J. p 906 note 56.

4. Tex.—*Dallas Cotton Mills v. Industrial Co.*, Com.App., 296 S.W. 503.

5. U.S.—*City of Flint v. Grand Trunk Western R. Co.*, C.C.A.Mich., 69 F.2d 604.

Iowa.—*Beim v. Carlson*, 227 N.W. 421, 209 Iowa 1001.

Okl.—*Corpus Juris* cited in Town of

Chouteau v. Blankenship, 152 P.2d 379, 383, 194 Okl. 401.

44 C.J. p 907 note 66.

Adverse possession of street see *Adverse Possession* § 14.

Laches of municipal officers will not defeat the rights of the public in a street.—*Sacramento County v. Lauszus*, 161 P.2d 440, 70 Cal.App. 2d 639.

Doubt as to public character of road Municipal authorities in case of doubt as to public character of road may abandon right by long years of official action or inaction.—*Lantry v. Gulf States Utilities Co.*, 118 So. 142, 166 La. 1069.

Land platted as a street

In determining the validity of an abandonment of land platted as a street, it has been held that the interest of the public in land platted as a street cannot exceed its interest in an established public road.—*Odom v. Hook*, Mo.App., 177 S.W.2d 165.

6. Minn.—*Village of Newport v. Taylor*, 30 N.W.2d 588, 225 Minn. 299.

7. Okl.—*Corpus Juris* cited in Town of *Chouteau v. Blankenship*, 152 P.2d 379, 383, 194 Okl. 401, 44 C.J. p 908 note 81.

Nonuse is only an evidentiary fact Minn.—*Village of Newport*, 30 N.W. 2d 588, 225 Minn. 299.

Legislative sanction

A street, once dedicated and accepted, cannot be abandoned by municipal authorities, except by legislative sanction.—*Stollenwerck v. Grell*, 87 So. 338, 205 Ala. 217.

8. Ga.—*Mayor and Council of City of Forsyth v. Hooks*, 184 S.E. 724, 182 Ga. 78.

N.C.—*Spicer v. City of Goldsboro*, 39 S.E.2d 626, 226 N.C. 557.

44 C.J. p 907 note 68.

or delay in opening⁹ or improving¹⁰ a street ordinarily is insufficient to show an abandonment of the street. Similarly, an abandonment of a street is not shown by a lease of the street,¹¹ its temporary use for other purposes,¹² permitting a railroad to occupy a part of the street,¹³ or continued encroachments on the street by structures,¹⁴ or the inclosure of the street or a part thereof.¹⁵

On the other hand, a street is abandoned where nonuse is accompanied by a clear and decisive act by the municipality indicating an intention to abandon.¹⁶ Moreover, it has been held that, where a street is not opened or used for the statutory period, and there is adverse possession of the street as private property under a claim of right, abandonment will be presumed.¹⁷

A city is not concluded by the act of its street commissioner in declaring that a particular avenue

was not a street,¹⁸ or by an ordinance condemning a right of way for the purpose of laying sewers and water pipes,¹⁹ or by the fact that it has condemned a portion of a street in widening an intersecting street.²⁰ An abandonment of a part of a street does not work an abandonment of the whole, and a use permitted by the city of such remaining part not inconsistent with its continued use by the city for street purposes does not work an abandonment of the city's rights therein.²¹

Partial opening or improvement. The additional width of a street is not lost merely by the street being opened up and used for part only of its width,²² or by the fact that for a time its use is limited by a subway under a railroad track to only a portion of its original width.²³

Obstruction. A street will not be regarded as abandoned merely because its use is obstructed,²⁴

More delay in asserting public right will not create an abandonment.—Kelroy v. City of Clear Lake, 5 N.W.2d 12, 232 Iowa 161.

9. N.Y.—Hall v. Olean, 143 N.Y.S. 664, 82 Misc. 300.
44 C.J. p 907 note 69.

10. Iowa.—Kelroy v. City of Clear Lake, 5 N.W.2d 12, 232 Iowa 161.
44 C.J. p 907 note 70.

11. Ark.—Beebe v. Little Rock, 56 S.W. 791, 68 Ark. 39.

Tex.—La Grange v. Brown, Civ.App., 161 S.W. 8.

12. Iowa.—Kelroy v. City of Clear Lake, 5 N.W.2d 12, 232 Iowa 161.

Parkway

A municipality may set off part of a highway for a particular use, such as use for a parkway, without constituting an abandonment of portion of highway set apart, and highway for its full width retains its character as a public way, subject to conversion into a driveway whenever, in the opinion of the constituted authorities, traffic conditions so require. —Spicer v. City of Goldsboro, 39 S. E.2d 526, 226 N.C. 557.

13. Iowa.—Kelroy v. City of Clear Lake, 5 N.W.2d 12, 232 Iowa 161.
44 C.J. p 907 note 72.

Entire street

(1) Where town granted to an interurban railway company the right to use for railroad purposes the full width of a portion of street which had never been used by public, and railroad took possession of such portion and continued in exclusive occupancy of such tract for more than fifteen years, judgment of trial court that town had abandoned such tract as a street was not clearly against weight of the evidence. —Johnston v. Town of Yukon ex rel. Dobry, 112 P. 2d 869, 188 Okl. 632.

(2) Where city granted railroad almost entire width of street, leaving remaining strip insufficient for use as street, it amounted to an abandonment. —City of Tulsa v. Horwitz, 3 P. 2d 841, 151 Okl. 201.

14. Iowa.—Kelroy v. City of Clear Lake, 5 N.W.2d 12, 232 Iowa 161.
44 C.J. p 907 note 73.

15. Iowa.—Kelroy v. City of Clear Lake, supra.
44 C.J. p 907 note 74.

16. Minn.—Village of Newport v. Taylor, 30 N.W.2d 588, 225 Minn. 299.

Okl.—Town of Chouteau v. Blankenship, 152 P.2d 379, 194 Okl. 401.

Resolutions of city council relative to vacation of street at request of railroad owning property on each side of it, followed by undisputed occupancy by railroad for many years, and procurement of license by city for construction of sewer across property, vested railroad with title, even though it never built structures required by one resolution. —City of Flint v. Grand Trunk Western R. Co., C.C.A.Mich., 69 F.2d 604.

17. Iowa.—Brewer v. Claypool, 275 N.W. 34, 223 Iowa 1235.
44 C.J. p 907 note 66 [a].

Acquiescence

The occupancy by an individual of land platted for a street must be inconsistent with its future use for such purpose and exist for such length of time as to show acquiescence by the municipality in the permanent appropriation of the ground for private purposes in order to raise presumption of abandonment extinguishing the public rights in the street. —Kelroy v. City of Clear Lake, 5 N.W.2d 12, 232 Iowa 161.

18. Mo.—Laclede-Christy Clay Prod-

ucts Co. v. St. Louis, 151 S.W. 460, 246 Mo. 446.

19. Mo.—Laclede-Christy Clay Products Co. v. St. Louis, supra.

20. Wash.—Seattle v. Hinckley, 121 P. 444, 67 Wash. 273.

21. Ohio.—Cincinnati v. Kirchner, 13 Ohio S. & C.P. 727, 1 Ohio N. P.N.S., 93.

22. N.C.—Corpus Juris cited in Home Real Estate L. & Ins. Co. v. Town of Carolina Beach, 7 S.E.2d 13, 20, 216 N.C. 778.
44 C.J. p 907 note 76.

23. Mo.—State v. Public Service Commission, 197 S.W. 56, 271 Mo. 270.

24. Minn.—Village of Newport v. Taylor, 30 N.W.2d 588, 225 Minn. 299.
44 C.J. p 908 note 78.

Failure to remove obstructions from the streets will not amount to an abandonment. —Kelroy v. City of Clear Lake, 5 N.W.2d 12, 232 Iowa 161.

Nonuser although coupled with failure to remove obstructions erected by abutting landowners or others, will not operate as abandonment of a public street. —Village of Newport v. Taylor, 30 N.W.2d 588, 225 Minn. 299.

Overpass

Construction of overpass on city street over railroad crossing, where overpass was to be used as a roadway and original street remained partially open to traffic, was not such an abandonment or vacation of original street without proceedings therefor as would authorize abutting property owners to enjoin construction of overpass. —Cummings v. City of Minnetonka, 371 N.W. 421, 67 N.D. 214.

or because of the vacation of a county road, making a street a cul-de-sac.²⁵

Taxation and assessment. A municipal corporation will not be held to have abandoned a street by reason of the fact that it has assessed the ground in the name of a private owner and collected taxes from him.²⁶

§ 1677. Statutory Provisions

General highway statutes which declare a highway vacated where it is not opened or used for a specified time have been held to be applicable in some, but not other, jurisdictions to streets, alleys, and other public places in municipalities.

While provisions in general highway statutes which declare a highway vacated which has not been opened or used within the time fixed have in some instances been held inapplicable to streets, alleys, or other public ways in municipalities,²⁷ they have, in other jurisdictions, been held applicable,²⁸ or have been held to apply where the municipal corporation has acquired merely an easement,²⁹ although inapplicable where it has acquired a fee,³⁰ and, where applicable, to repeal or modify previously granted municipal charters in so far as inconsistent with their provisions.³¹ A statute applying to every road "laid out and dedicated" applies to roads which have been dedicated by the owner as well as those laid out in adversary proceedings.³²

Highways incorporated within municipal limits. A statute of the character under consideration, where it is construed to except,³³ or where it expressly excepts,³⁴ streets and alleys in municipal

corporations, is not applicable to a highway which is laid out in territory which is afterward, and before the expiration of the statutory period, brought within the corporate limits of the municipality.

Opening and user. Statutes of this character do not apply where the way while not free from obstruction is in fact open for use and used by the public.³⁵ In order to constitute use as a street so as to prevent its termination through nonuser, it has been held that travel must proceed in reasonably normal forms along the lines of an existing street.³⁶ Travel by pedestrians,³⁷ as by means of an unobstructed sidewalk,³⁸ may preserve a highway, although vehicles are barred. Obstructions of a street narrowing it and not closing the lines of travel will not put an end to its existence.³⁹

On the other hand, where a strip of land along the line of a street has been acquired to widen it, a failure to work or travel such strip for the statutory period may amount to an abandonment.⁴⁰ Where the entire width of the street is blocked, the obstructed section ceases to be a highway, even though other sections are unobstructed,⁴¹ and when a road is laid out as an entirety and only a part opened and worked and the remainder remains entirely closed, the public loses its rights after the statutory period.⁴² In order to constitute travel and use within a charter provision there must be substantial travel or substantial use as a street,⁴³ but light and occasional travel in connection with acts on the part of the municipal corporation recognizing and treating the way as a street will be suffi-

25. Iowa.—Chrisman v. Omaha, etc., R. Co., 100 N.W. 63, 125 Iowa 133.

Dead end

Fact that to uphold alleged abandonment of street would make of street a dead-end thoroughfare was a circumstance adverse to the claimed abandonment.—Kelroy v. City of Clear Lake, 5 N.W.2d 12, 232 Iowa 161.

26. Tex.—La Grange v. Browa, Civ. App., 161 S.W. 8.

44 C.J. p 908 note 30.

Taxes not paid

Fact that abutting owners who claimed title on theory that street was abandoned had not paid taxes thereon is a circumstance adverse to the claimed abandonment.—Kelroy v. City of Clear Lake, 5 N.W.2d 12, 232 Iowa 161.

27. Mo.—Odorn v. Hook, App., 177 S. W.2d 165.—Evans v. Andres, 42 S. W.2d 32, 226 Mo.App. 63.

41 C.J. p 908 note 34.—29 C.J. p 538 note 46 [a].

28. N.Y.—Excelstor Brick Co. v.

Haverstraw, 36 N.E. 319, 142 N.Y. 146.

44 C.J. p 908 note 37.

29. N.Y.—New Rochelle v. New Rochelle Coal, etc., Co., 121 N.E. 270, 224 N.Y. 696.

44 C.J. p 908 note 38.—29 C.J. p 538 note 23 [f] (2), p 538 note 46 [b].

30. N.Y.—Barnes v. Midland R. Terminal Co., 112 N.E. 926, 218 N.Y. 91.

44 C.J. p 908 note 39.

31. N.Y.—Ludlow v. Oswego, 35 Hun 260.

32. N.Y.—Ludlow v. Oswego, supra.

33. Wash.—Brokaw v. Stanwood, 140 P. 358, 79 Wash. 323.

34. Ind.—Lake Shore, etc., R. Co. v. Whiting, 67 N.E. 983, 161 Ind. 76.—Baltimore, etc., R. Co. v. Whiting, 65 N.E. 739, 30 Ind.App. 182.

35. Wash.—Vetter v. K. & K. Timber Co., 313 P. 927, 124 Wash. 151.

44 C.J. p 908 note 34.

36. N.Y.—Leray v. New York Cent. R. Co., 123 N.E. 145, 226 N.Y. 109.

—Kyser v. New York Cent. R. Co., 207 N.Y.S. 536, 311 App.Div. 500.

37. N.Y.—People v. State Tax Commission, 179 N.Y.S. 364, 190 App. Div. 78.

44 C.J. p 908 note 36.

38. N.Y.—Shipston v. Niagara Falls, 176 N.Y.S. 393, 187 App.Div. 421.—Mangam v. Sing Sing, 50 N.Y.S. 647, 26 App.Div. 464.

39. N.Y.—Barnes v. Midland R. Terminal Co., 112 N.E. 926, 218 N.Y. 91.

44 C.J. p 909 note 38.

40. N.Y.—Matter of Ludlow Ave., etc., 160 N.Y.S. 256, 164 App.Div. 839.

41. N.Y.—Barnes v. Midland R. Terminal Co., 112 N.E. 926, 218 N.Y. 91.

44 C.J. p 909 note 1.

42. N.Y.—Buffalo v. Hoffeld, 37 N.Y. S. 869, 6 Misc. 197.

43. U.S.—Delaware, etc., R. Co. v. Syracuse, C.C.N.Y., 257 F. 700, modified on other grounds 196 F. 831, 92 C.C.A. 41.

cient.⁴⁴ Although a street may be regarded as a county road, and as such within the provisions of a statute relating to such roads, it falls within the interpretation of such a statute that a road cannot be regarded as unopened or unused where the country through which it lies is open and unobstructed at the time it was authorized and established.⁴⁵

Streets platted by owner. A statute providing that, where a street or alley has been laid out by the owner on a plat but has not been opened to, or used by, the public for a specified period thereafter, it may not then be opened without the consent of the owner, has been held to have no retroactive effect.⁴⁶ It applies only to unused streets,⁴⁷ and ei-

ther a technical opening of the street or the fact of public user is sufficient to remove the street from the operation of the statute.⁴⁸ So the statute does not apply where the street has been opened for a part of its width and used as such,⁴⁹ but it does apply where during the entire period the bed of the street has been in the possession of the abutting owners and used for the purpose of quarrying stone.⁵⁰ A statute providing that, when any road shown on a plat shall have remained unopened and unused for a specified period, the right to have it opened as a public street shall cease, applies to the whole of the street shown and does not apply when any part of the street is used.⁵¹

6. DETERMINATION OF EXISTENCE OR LOCATION

§ 1678. In General

General rules as to parties have been applied in proceedings to determine the location or existence of a street.

General rules as to parties have been applied in proceedings to determine the location or existence of a street.⁵² If a suit is instituted by an individual to establish title to and recover land claimed to be a street, both the city and the people of the state need not be made parties in order that the judgment may be binding on the public,⁵³ nor is it necessary in an action to establish the existence of a public street that the people of the state and city should join as plaintiffs.⁵⁴

§ 1679. Pleadings as to Existence of Street or Other Public Way

The existence of a street may be pleaded without referring to the mode of its establishment.

The existence of a street may be pleaded without referring to the mode of its establishment⁵⁵ and without allegation of matters of defense,⁵⁶ but, if pleaded as established in one way, proof is not ad-

missible to show its establishment in another.⁵⁷ The pleading must be definite and certain,⁵⁸ but reasonable certainty is sufficient.⁵⁹ The proof must correspond with the allegations and be confined to the point in issue.⁶⁰ Under a general denial of an allegation that a particular street was a highway, any evidence tending to disprove the allegation may be admitted,⁶¹ and a deed purporting to vacate it in accordance with a statutory provision is admissible.⁶²

§ 1680. Evidence of Existence or Location of Street or Other Public Way

- a. Burden of proof
- b. Presumptions
- c. Admissibility
- d. Weight and sufficiency

a. Burden of Proof

The burden of proof as to the existence or location of a street generally rests on the party having the affirmative of the issue as determined by the pleadings or the nature of the investigation.

Generally the burden of proof as to the existence

44. U.S.—Delaware, etc., R. Co. v. Syracuse, *supra*.

45. Kan.—Kiehl v. Jamison, 101 P. 632, 79 Kan. 788.

44 C.J. p 909 note 5.

46. Pa.—Pittsburgh v. Pittsburgh, etc., R. Co., 106 A. 724, 263 Pa. 294 —Bond v. Barrett, 50 Pa.Super. 307.

47. Pa.—Pittsburgh v. Pittsburgh, etc., R. Co., 106 A. 724, 263 Pa. 294 —Bond v. Barrett, 50 Pa.Super. 307.

48. Pa.—Sturges' Appeal, 87 A. 592, 240 Pa. 44.

49. Pa.—Hawkes v. Philadelphia, 107 A. 747, 264 Pa. 846.

50. Pa.—Quicksall v. Philadelphia, 35 A. 609, 177 Pa. 301.

51. N.J.—Ridgefield Park v. West Shore R. Co., 89 A. 776, 85 N.J.Law 385—Ridgefield Park v. New York, etc., R. Co., 89 A. 773, 85 N.J.Law 278.

52. Ill.—Nimpfer v. Village of Fox Lake, 165 N.E. 143, 334 Ill. 46.

53. Cal.—People v. Holliday, 29 P. 54, 93 Cal. 241, 27 Am.S.R. 186.

Ill.—Healy v. Deering, 82 N.E. 226, 231 Ill. 423, 121 Am.S.R. 381.

54. Ill.—Healy v. Deering, *supra*.

55. Cal.—Bituminous Lime Rock Pav., etc., Co. v. Fulton, 32 P. 1137, 4 Cal.Unrep.Cas. 151.

Ind.—State v. Mathis, 21 Ind. 277.

56. Ala.—Stillwell v. McCollister, 107 So. 78, 214 Ala. 141.

57. Minn.—Benson v. St. Paul, etc., R. Co., 64 N.W. 393, 62 Minn. 198.

58. Ky.—Keystone Commercial Co. v. Maysville, 157 S.W. 25, 154 Ky. 239.

44 C.J. p 910 note 25.

59. Ky.—Latonia v. Hall, 83 S.W. 556, 26 Ky.L. 1125.

60. Tex.—Ft. Worth, etc., R. Co. v. Ayers, Civ.App., 149 S.W. 1068.

44 C.J. p 910 note 27.

61. Colo.—Gromer v. Papke, 207 P. 862, 71 Colo. 440.

62. Colo.—Gromer v. Papke, *supra*.

or location of a street or alley rests on the party having the affirmative of the issue as determined by the pleadings or the nature of the investigation.⁶³ This rule, for example, has been applied to the burden of showing that the street was not properly opened,⁶⁴ that a street has been vacated,⁶⁵ discontinued,⁶⁶ or abandoned,⁶⁷ the proper location of street lines,⁶⁸ and the acquisition of property as a street by adverse possession,⁶⁹ including the date at which occupancy began.⁷⁰ So, where uncontested possession to a particular line which corresponds to other lines on the survey is shown, the burden is on the opposite party to establish that the line is not the correct one.⁷¹ An owner asserting that public user was permissive has the burden of proof.⁷²

b. Presumptions

A street once in existence is presumed to continue.

Under the general rules as to presumptions, a street once in existence is presumed to continue,⁷³ and, under the rule as to the presumption of regularity of official proceedings and acts, it may be presumed that a street dedicated and used has been accepted,⁷⁴ that a street was not widened before it was legally authorized,⁷⁵ that railroad companies holding a fee in a strip in the center of a street had either voluntarily relinquished it or had received compensation therefor,⁷⁶ and that a street used by

the public for five years is one of the public streets of the municipality.⁷⁷ A continued and uninterrupted use of land for a highway for the statutory period, in the absence of proof to the contrary, will be presumed to have been under a claim of right.⁷⁸ Where the acts establishing a highway evidence a general intention that it shall be of a certain width but permit the commissioners in their discretion to make it of less width at particular points, it cannot be presumed that it was laid out to the full width at any particular place.⁷⁹ Proof of the work done on a street by the municipality, together with evidence of user by the public, is sufficient to establish a presumption that it is a public street.⁸⁰

c. Admissibility

As a general rule, any competent evidence which tends to show that a highway is a public street is admissible to prove its existence.

As a general rule, any evidence, otherwise competent, which tends to show that a highway is called, or used or recognized as, a public street is admissible to prove its existence,⁸¹ and the introduction of a plat or other documentary evidence that it has been legally laid out and opened⁸² or that it has been established by dedication⁸³ or prescription⁸⁴ is unnecessary. However, the legal existence of a highway may not be proved by the conclusion of a witness.⁸⁵ Evidence to establish a

63. Ala.—Parker v. Fuller, 28 So. 2d 207, 248 Ala. 457.

Pa.—Borough of Milford v. Burnett, 136 A. 669, 288 Pa. 434.
44 C.J. p 910 note 40.

64. Pa.—Ross v. Malcolm, 40 Pa. 284.
44 C.J. p 910 note 41.

65. Kan.—Phillips v. Arkansas Valley Interurban R. Co., 133 P. 429, 89 Kan. 885.

Okl.—Town of Chouteau v. Blankenship, 152 P.2d 379, 194 Okl. 401.

66. Okl.—Town of Chouteau v. Blankenship, supra.

67. Minn.—Village of Newport v. Taylor, 30 N.W.2d 588, 225 Minn. 299.

Okl.—Town of Chouteau v. Blankenship, 152 P.2d 379, 194 Okl. 401.
44 C.J. p 910 note 42.

68. Pa.—Washington Borough v. Steiner, 25 Pa.Super. 392.
44 C.J. p 910 note 44.

69. Mo.—Kelsey v. City of Shrewsbury, 71 S.W.2d 730, 335 Mo. 79.

Mont.—Barnard Realty Co. v. Butte, 136 P. 1064, 48 Mont. 102.

N.C.—Wright v. Town of Lake Waccamaw, 158 S.E. 99, 200 N.C. 616.

70. Mont.—Barnard Realty Co. v. Butte, 136 P. 1064, 48 Mont. 102.

71. Iowa.—Bridges v. Grand View, 139 N.W. 917, 158 Iowa 402.

72. Ala.—Stillwell v. McCollister, 107 So. 78, 214 Ala. 141.
44 C.J. p 910 note 48.

73. Me.—Kelley v. Jones, 86 A. 252, 110 Me. 360.
44 C.J. p 910 note 32.

74. N.Y.—Blackman v. Riley, 34 N. E. 214, 138 N.Y. 318.
Pa.—Scranton v. Scranton Steel Co., 28 A. 1, 154 Pa. 171.

75. Me.—Barker v. Fogg, 34 Me. 392.

76. N.Y.—Long Island R. Co. v. New York, 92 N.E. 681, 199 N.Y. 288.

77. N.Y.—Zwack v. New York, etc., R. Co., 40 N.Y.S. 821, 8 App.Div. 483, affirmed 54 N.E. 785, 160 N.Y. 362.

78. Ill.—Springfield v. Springfield Cons. R. Co., 129 N.E. 82, 295 Ill. 234.

79. N.Y.—Parsons v. Rye, 140 N.Y. S. 961.

80. N.C.—Sanders v. Town of Smithfield, 19 S.E.2d 630, 221 N. C. 166.

44 C.J. p 912 note 80.

81. Ark.—City of Dumas v. Edington, 147 S.W.2d 997, 201 Ark. 1021.
44 C.J. p 910 note 51.

Defective resolutions

Where there was no proof that a resolution of common council was approved by mayor or that requisite number of street commissioners approved a resolution for change of grade, resolutions of council and street commissioners were admissible on question whether streets in question were public streets with grades established by user, acquiescence, and recognition, but resolutions could not be regarded as establishing grade of streets.—Cook v. State, 29 N.Y.S.2d 626, 176 Misc. 947, affirmed 46 N.Y.S.2d 15, 267 App.Div. 847.

Evidence of award of damages to abutting owners is admissible.—Kensington v. Wood, 10 Pa. 93, 49 Am. D. 582.

82. Ill.—Union Stock Yards, etc., Co. v. Karlik, 48 N.E. 1008, 170 Ill. 403.

83. Ill.—Union Stock Yards, etc., Co. v. Karlik, supra.

84. Ill.—Union Stock Yards, etc., Co. v. Karlik, supra.

85. R.I.—Stone v. Langworthy, 40 A. 832, 20 R.I. 602.

44 C.J. p 910 note 55.

prescriptive right must be relevant⁸⁶ and otherwise competent.⁸⁷ General understanding of the community, accompanying user, is admissible to show establishment.⁸⁸ On an issue as to the width of a street, evidence as to its breadth as it was actually opened many years before, with the assent of all the parties interested, is admissible.⁸⁹ Where the order of confirmation describes a street as of a certain width and the record of the viewers is in variance therewith, evidence may be admitted to show the width at which the street was actually opened.⁹⁰

Documents and records. Documentary evidence may be admissible;⁹¹ and, although title is not involved, deeds, plats, and maps are admissible to show the extent of defendant's possession.⁹² Records of proceedings establishing the streets, although defective or void, are admissible as evidence of the existence of a street by prescription⁹³ and to show color of title and the extent of the claim of the public;⁹⁴ but an ordinance dependent for vitality on the acceptance by the landowner is not admissible in the absence of proof of acceptance.⁹⁵ In an action between lot owners and the city involving the location of a street line, the files of another suit between the city and another property owner concerning the same question are not admissible.⁹⁶

Acts of city. Acts of a city or town, such as the making of repairs or using a highway for municipal improvements, may be evidence of the existence of a public highway.⁹⁷ So acts of the taxing officers of the city may properly be considered as circumstances in connection with all the other facts in

evidence on the issue of whether the public user was permissive or hostile and adverse,⁹⁸ and evidence is admissible that the land had not been taxed on the ground that it was a highway.⁹⁹ However, in an action by a city to recover the cost of an original paving of a street, defendant may not show, as evidence of the adoption of the street as a paved street prior to the paving, that the city officials had relieved the contractor of the burden of collecting the assessment bills, and had paid to him directly the entire cost of the work,¹ nor may defendant show, in the absence of formal action by the city, as evidence of adoption, that the road had sidewalks and curbs,² that it was lighted,³ had police protection,⁴ or gas and water service,⁵ or garbage and ash collections,⁶ or that its grade had been changed by the city to conform with the grade of intersecting streets.⁷

Proceedings to perpetuate evidence. Evidence taken by a city in proceedings to perpetuate the evidence of the single witness who is competent to prove its plan may be admissible in subsequent proceedings, notwithstanding there is no individual whose interest it was to oppose the action of the municipal authorities.⁸

d. Weight and Sufficiency

General rules as to the weight and sufficiency of evidence have been applied to evidence as to the existence or location of a street.

The general rules with relation to the weight and sufficiency of evidence in civil actions have been applied to evidence as to the existence or location of a street or other public way.⁹ The mere fact that

86. Ind.—Baltimore, etc., R. Co. v. Seymour, 65 N.E. 953, 154 Ind. 17.

Pa.—Groff v. Gabriel, Com.Pl., 50 Lanc.L.Rev. 543.
44 C.J. p 911 note 56.

87. Ill.—St. Anne v. Coyer, 79 N.E. 54, 223 Ill. 96.

88. Mich.—Grandville v. Jenison, 47 N.W. 600, 84 Mich. 54, 49 N.W. 544, 86 Mich. 567.

89. Pa.—Athens Borough v. Carmer, 32 A. 422, 169 Pa. 426.

90. Pa.—Athens Borough v. Carmer, supra.

91. Mass.—Stone v. Cambridge, 6 Cush. 270.

44 C.J. p 911 note 61.

92. Ill.—Bloomington v. Graves, 28 Ill.App. 614.

93. Mo.—Laclede-Christy Clay Products Co. v. St. Louis, 151 S.W. 460, 246 Mo. 446.

94. Pa.—Athens Borough v. Carmer, 32 A. 422, 169 Pa. 426.

44 C.J. p 911 note 64.

95. Tex.—Sutor v. International,

etc., R. Co., 125 S.W. 943, 59 Tex. Civ.App. 73.

96. Ill.—Wolpert v. Chicago, 117 N. E. 447, 280 Ill. 187.

97. Mass.—Sullivan v. Worcester, 121 N.E. 788, 232 Mass. 111.

44 C.J. p 911 note 67.

98. Mo.—St. Louis v. Cooper Carriage Woodwork Co., App., 216 S.W. 944.

99. Mich.—Grandville v. Jenison, 47 N.W. 600, 84 Mich. 54, 49 N.W. 544, 86 Mich. 567.

1. Pa.—Philadelphia v. Kerchner, 62 Pa.Super. 562.

2. Pa.—Philadelphia v. Kerchner, supra.

3. Pa.—Philadelphia v. Kerchner, supra.

4. Pa.—Philadelphia v. Kerchner, supra.

5. Pa.—Philadelphia v. Kerchner, supra.

6. Pa.—Philadelphia v. Kerchner, supra.

7. Pa.—Philadelphia v. Kerchner, supra.

8. Pa.—Birmingham v. Anderson, 40 Pa. 506.

9. U.S.—Williams v. Atlantic Coast Line R. Co., C.C.A.S.C., 17 F.2d 17. La.—Cogswell v. Texas & N. O. R. Co., 8 So.2d 645, 200 La. 696—Richard v. City of New Orleans, 197 So. 594, 195 La. 898.

Tex.—Tribble v. Dallas Ry. & Terminal Co., Civ.App., 13 S.W.2d 933, error refused.

44 C.J. p 911 note 79.

Evidence held sufficient

(1) To show that way was public street.

Ga.—Langford v. State, 26 S.E.2d 385, 69 Ga.App. 619.

Iowa.—Peck v. Alfred Olsen Const Co., 245 N.W. 131, 216 Iowa 519, 89 A.L.R. 1147.

La.—Tharpe v. Sibley Lake Biste-neau & S. Ry. Co., App., 144 So. 274.

Mass.—Suburban Land Co. v. Town of Billerica, 49 N.E.2d 1012, 314 Mass. 184, 147 A.L.R. 660.

the grading of a street has been neglected will not contradict evidence tending to show that the street is a public highway.¹⁰ The lines originally established are, unless duly changed by legal proceedings,¹¹ conclusive evidence as against both the public and the abutter,¹² provided the public has not acquired additional width by continuous, adverse, and exclusive use for the requisite period to establish its easement.¹³ An ordinance establishing the street is only prima facie evidence that it was established for public use as such, and the fact may be shown to be otherwise.¹⁴ Street signs placed on a proposed street and the appearance of its name in a directory made by the police department and on a tax plat are of small importance to prove the right of the public therein,¹⁵ but the facts that a street was named, that houses fronted on it and were numbered, and that a gas company was having gas pipes laid under it, are sufficient to show that it is a pub-

lic street.¹⁶ Where there is a plan of lots showing the streets and alleys, a reference to a street in subsequent deeds as a public highway is proper, notwithstanding it was not accepted by the municipality, but is no evidence that it was such prior to the dedication.¹⁷ Failure to reserve the right of a street in a conveyance of lots is not conclusive proof that no street exists,¹⁸ and the plat of a survey to locate the line of a street is not evidence of the non-existence of a prescriptive alley running off from such street.¹⁹

An award of damages to abutting owners is not of itself sufficient to prove the existence of a street.²⁰ A proceeding to acquire the right to use land for a street has been held to be an admission that no previous right to such use existed,²¹ but the acceptance of a dedication of the fee does not admit that there was no street by prescription before the dedication.²²

7. TITLE AND OWNERSHIP, USE OF SOIL AND MATERIAL, AND PROTECTION OF INTERESTS

§ 1681. In General

Except as the rule may be affected by statute, it is commonly held that the fee in a street or public way remains in the abutting owner subject to the easement acquired by the public.

Where there is a statute relating thereto, the right or estate of a municipal corporation to land acquired for street purposes is governed thereby.²³ Giving due regard to the circumstances of the ac-

Pa.—City of Hazleton v. Lehigh Valley Coal Co., 16 A.2d 23, 339 Pa. 565.

44 C.J. p 911 note 79 [a] (1).

(2) To show establishment of street by prescription or user.

Ark.—Magnolia Petroleum Co. v. Langford, 212 S.W.2d 22, 218 Ark. 746—Kirby v. City of Harrison, 148 S.W.2d 666, 202 Ark. 1—City of Dumas v. Edgington, 147 S.W.2d 997, 201 Ark. 1021—Robb & Rowley Theaters v. Arnold, 138 S.W.2d 773, 200 Ark. 110.

Colo.—Hecker v. City and County of Denver, 252 P. 808, 80 Colo. 390.

Ga.—Henderson v. Ezzard, 44 S.E.2d 397, 75 Ga.App. 724.

R.I.—Trafton v. Downey, 151 A. 4, 51 R.I. 87.

Tex.—Tribble v. Dallas Ry. & Terminal Co., Civ.App., 13 S.W.2d 933, error refused.

44 C.J. p 911 note 79 [a] (4).

(3) To establish location of street.—McAllister v. Rennison, 204 S.W.2d 808, 305 Ky. 497—44 C.J. p 911 note 79 [a] (8).

Evidence held insufficient

(1) To show that way was public street:

Ala.—Parker v. Fuller, 28 So.2d 207, 248 Ala. 457.

Ky.—Phelps v. Board of Education of City of Pikeville, 392 S.W. 310, 318 Ky. 742.

Mo.—Roth v. Hoffman, 111 S.W.2d 988, 234 Mo.App. 114.

44 C.J. p 911 note 79 [b] (1).

(2) To show existence of street by prescription.

Mont.—Burns v. Eminger, 276 P. 437, 84 Mont. 397.

Ohio.—Cramer v. New Philadelphia Brewery, 16 Ohio Supp. 140

Wash.—City of Spokane v. Catholic Bishop of Spokane, 206 P.2d 277.

44 C.J. p 911 note 79 [b] (2).

(3) To show that the public use was adverse.—City of Staunton v. Augusta Corporation, 193 S.E. 695, 169 Va. 424.

(4) To establish abandonment of street.—Kelroy v. City of Clear Lake, 5 N.W.2d 12, 232 Iowa 161.

10. Ga.—Atlanta v. Williams, 84 S. E. 139, 15 Ga.App. 654.

11. N.Y.—Blackman v. Riley, 34 N. E. 214, 138 N.Y. 318.

12. Cal.—Helman v. Los Angeles, 58 P. 10, 125 Cal. 383.

44 C.J. p 912 note 82.

13. Pa.—Washington Borough v. Steiner, 25 Pa.Super. 392.

14. Iowa.—Strahan v. Malvern, 42 N.W. 369, 77 Iowa 454.

15. Ohio.—Oberhelman v. Allen, 7 Ohio App. 251, 28 Ohio Cir.Ct., N.S., 305.

Street marker

U.S.—Summersville v. Duke Power Co., C.C.A.N.C., 115 F.2d 440.

16. Mo.—O'Hara v. Laclede Gas Light Co., 110 S.W. 642, 131 Mo. App. 428, reversed on other grounds 148 S.W. 884, 244 Mo. 395.

17. Pa.—O'Donnell v. Pittsburgh, 83 A. 314, 234 Pa. 401.

18. N.Y.—Stockwell v. Dunkel, 159 N.Y.S. 32, 174 App.Div. 481.

19. Ill.—Rollo v. Pool, 117 N.E. 756, 280 Ill. 607.

20. N.C.—Henderson v. Davis, 11 S. E. 573, 106 N.C. 88.

21. Ill.—City of Springfield v. Springfield Consol. Ry. Co., 129 N. E. 82, 295 Ill. 234.

22. Ill.—City of Springfield v. Springfield Consol. Ry. Co., supra.

23. Kan.—Miller-Carey Drilling Co. v. Shaffer, 61 P.2d 1320, 144 Kan. 508.

Civil law

Under the civil law, it has been stated, the title to the fee of a public road is in the government.—Dunham v. Williams, 37 N.Y. 251, 4 Transc.A. 209—44 C.J. p 915 note 14.

Dutch law

The ownership of the fee of roads established during the Dutch occupancy of New York was governed by the Dutch law, which vested it in the sovereign; but this rule did not apply after the British assumed sovereignty, and the fee of a street opened thereafter did not vest in the British crown by reason there-

quisition of a street or other public way by a municipality, it is commonly held, apart from statute, that the public or municipality does not acquire a fee therein;²⁴ but the fee remains in the abutting owner,²⁵ or in the original proprietor or dedicator

or one claiming under him.²⁶ Under this rule, the public or the municipality acquires only an easement;²⁷ and the fee is held subject to such easement,²⁸ and to a legitimate use by the municipality.²⁹

of.—*Applenton v. City of New York*, 114 N.E. 78, 219 N.Y. 150, 7 A.L.R. 629, reargument denied 115 N.E. 1033, 219 N.Y. 681—44 C.J. p 915 note 14 [b].

24. U.S.—*Woodville, Okl., v. U. S.*, C.C.A.Okl., 152 F.2d 735, certiorari denied 66 S.Ct. 1021, two cases, 328 U.S. 842, 90 L.Ed. 1617.

Tenn.—*State of Georgia v. City of Chattanooga*, 4 Tenn.App. 674.

44 C.J. p 912 note 95.

Title to fee of highway in general see Highways §§ 136–138.

Effect of:

Dedication see Dedication § 50.

Eminent domain proceedings see Eminent Domain, §§ 449, 450.

25. U.S.—*Woodville, Okl., v. U. S.*, C.C.A.Okl., 152 F.2d 735, certiorari denied 66 S.Ct. 1021, two cases, 328 U.S. 842, 90 L.Ed. 1617—U. S. v. Certain Parcels of Land Situated in Fairfield, Baltimore, D.C.Md., 54 F.Supp. 667—*Grand Trunk Western R. Co. v. City of Flint*, D.C. Mich., 55 F.2d 384, affirmed, C.C.A., City of Flint v. Grand Trunk Western R. Co., 69 F.2d 604.

Ala.—*Snead v. Tatum*, 25 So.2d 162, 247 Ala. 442.

Ark.—*Lincoln v. McGehee Hotel Co.*, 29 S.W.2d 668, 181 Ark. 1117.

Cal.—*Ex parte Anderson*, 19 P.2d 1027, 130 Cal.App. 395.

Fla.—*State Road Department v. Bender*, 2 So.2d 298, 147 Fla. 15.

Ky.—*Goodloe v. City of Richmond*, 63 S.W.2d 785, 250 Ky. 608.

Mo.—*Hannibal Contracting Co. v. Friend*, App., 38 S.W.2d 493.

N.J.—*Faulks v. Borough of Allenhurst*, 1 A.2d 6, 120 N.J.Law 486—*Faulks v. Borough of Allenhurst*, 180 A. 877, 115 N.J.Law 456—*Grady v. Nevins Church Press Co.*, 189 A. 668, 15 N.J.Misc. 190, affirmed 194 A. 782, 119 N.J.Law 135, reversed on other grounds 199 A. 578, 120 N.J.Law 351.

Pa.—*Hindin v. Samuel*, 45 A.2d 370, 158 Pa.Super. 539.

Tex.—*Pecos v. N. T. Ry. Co. v. Falls*, Civ.App., 96 S.W.2d 430—*Fort Worth & D. S. P. Ry. Co. v. Judd*, Civ.App., 4 S.W.2d 1032, error dismissed—*Quannah Acme & P. Ry. Co. v. Swearingen*, Civ.App., 4 S.W.2d 136, error refused.

Va.—*Nusbaum v. City of Norfolk*, 145 S.E. 257, 151 Va. 801.

Wash.—*Shaw v. City of Yakima*, 48 P.2d 630, 183 Wash. 200—*Coleman v. Hammond Lumber Co.*, 294 P. 968, 190 Wash. 170.

44 C.J. p 913 note 94.

Street as distinct from land of street

In action to enjoin city officials from entering on portion of street and removing concrete wall and concrete wings that had been constructed in street, finding that plaintiff acquired no right, title, or interest in, or to part of, street occupied by the concrete wall and wings by virtue of deed to him was merely a determination that plaintiff had acquired no right, title, or interest in the street as distinguished from the land where the street was located, and was correct.—*Steele v. Fowler*, 41 N.E.2d 678, 111 Ind.App. 364.

26. S.C.—*Wilson v. Burress*, 101 S.E. 820, 113 S.C. 474.

44 C.J. p 913 note 97.

27. U.S.—*Woodville, Okl., v. U. S.*, C.C.A.Okl., 152 F.2d 735, certiorari denied 66 S.Ct. 1021, two cases, 328 U.S. 842, 90 L.Ed. 1617—*Jefferson County, Tenn. v. Tennessee Valley Authority*, C.C.A.Tenn., 146 F.2d 564, certiorari denied 65 S.Ct. 1016, 324 U.S. 871, 89 L.Ed. 1425, rehearing denied 65 S.Ct. 1024, 324 U.S. 891, 89 L.Ed. 1438.

Mo.—*Stout v. Frick*, 62 S.W.2d 1057, 333 Mo. 826, transferred, see, App., 69 S.W.2d 677.

N.J.—*Grady v. Nevins Church Press Co.*, 189 A. 668, 15 N.J.Misc. 190, affirmed 194 A. 782, 119 N.J.Law 135, reversed on other grounds 199 A. 578, 120 N.J.Law 351.

Pa.—*Hindin v. Samuel*, 45 A.2d 370, 158 Pa.Super. 539.

Tenn.—*Harbin v. Smith*, 76 S.W.2d 107, 168 Tenn. 112—*State of Georgia v. City of Chattanooga*, 4 Tenn.App. 674.

Tex.—*Texas Co. v. Texarkana Mach. Shops*, Civ.App., 1 S.W.2d 928.

44 C.J. p 913 note 98.

28. U.S.—*Grand Trunk Western R. Co. v. City of Flint*, D.C.Mich., 55 F.2d 384, affirmed, C.C.A., City of Flint v. Grand Trunk Western R. Co., 69 F.2d 604—U. S. v. Certain Parcels of Land Situated in Fairfield, Baltimore, D.C.Md., 54 F.Supp. 667.

Ala.—*McCraney v. City of Leeds*, 194 So. 151, 239 Ala. 143.

Ark.—*Lincoln v. McGehee Hotel Co.*, 29 S.W.2d 668, 181 Ark. 1117.

Cal.—*Ex parte Anderson*, 19 P.2d 1027, 130 Cal.App. 395.

Fla.—*Burns v. McDaniel*, 140 So. 314, 104 Fla. 526.

Ky.—*Goodloe v. City of Richmond*, 63 S.W.2d 785, 250 Ky. 608.

Minn.—*Kooreny v. Dampier-Baird Mortuary*, 291 N.W. 511, 207 Minn. 387.

Mo.—*Hannibal Contracting Co. v. Friend*, App., 38 S.W.2d 493.

N.J.—*Faulks v. Borough of Allenhurst*, 1 A.2d 6, 120 N.J.Law 486—*Faulks v. Borough of Allenhurst*, 180 A. 877, 115 N.J.Law 456.

Pa.—*Westinghouse Elec. Corp. v. United Electrical, Radio & Mach. Workers of America (CIO) Local 601*, 46 A.2d 16, 353 Pa. 446—*Hindin v. Samuel*, 45 A.2d 370, 158 Pa.Super. 539—*In re Annexation of Portion of Abington Tp. to Borough of Jenkintown*, 101 Pa.Super. 227—*Clark v. City of New Castle*, 32 Pa.Dist. & Co. 371, 30 Mun.L.R. 65.

Tex.—*Miller v. Railroad Commission of Texas*, Civ.App., 185 S.W.2d 223, error refused—*Fort Worth & D. S. P. Ry. Co. v. Judd*, Civ.App., 4 S.W.2d 1032, error dismissed.

Va.—*Nusbaum v. City of Norfolk*, 145 S.E. 257, 151 Va. 801.

Wash.—*Shaw v. City of Yakima*, 48 P.2d 630, 183 Wash. 200—*Coleman v. Hammond Lumber Co.*, 294 P. 968, 190 Wash. 170.

44 C.J. p 914 note 99.

Assertion of public right not impeded

The mere existence of naked fee in adjoining owner to center of street does not impede assertion of public right in street.—*Brock v. City of Aniston*, 14 So.2d 519, 244 Ala. 544.

City easement as greater than country easement

The servitude imposed by the easement of public passage on city streets is necessarily greater than that imposed in the open country.—*William Laubach & Sons v. City of Easton*, 32 A.2d 881, 347 Pa. 542.

For ordinary travel only

Ill.—*Kane v. City of Chicago*, 51 N.E.2d 523, 384 Ill. 361, transferred, see 59 N.E.2d 329, 324 Ill.App. 585, reversed on other grounds 64 N.E.2d 506, 392 Ill. 172.

Property rights of limited value

The property rights of owner of fee in public street are very limited and of little value.—*Village of East Rochester v. Rochester Gas & Electric Corporation*, 46 N.E.2d 334, 239 N.Y. 391.

Easement granted to power company

Cal.—*McCormick v. Great Western Power Co. of California*, 26 P.2d 322, 134 Cal.App. 705.

29. Ind.—*Swaim v. City of Indianapolis*, 171 N.E. 871, 202 Ind. 233, rehearing denied 173 N.E. 287, 202 Ind. 233.

Pa.—*Clark v. City of New Castle*, 32 Pa.Dist. & Co. 371, 30 Mun.L.R. 65.

On the other hand, it has been held, under or apart from statutes relating to the establishment of streets, that the fee to a street may be vested in the municipality.³⁰ Thus, under some statutes so providing, as a result of the platting of a municipal site, the municipality may acquire a fee to the streets;³¹ but it does not acquire the fee where the plat is merely a common-law plat,³² or where the plat is made under a statute which does not effect a change in the common-law rule.³³

Grants to a municipality by individual owners,³⁴ or by the state,³⁵ or other sovereign,³⁶ have been recognized or upheld as a grant of the fee; but a grant from the state does not necessarily convey a fee to the municipality.³⁷ Even where the fee vests in the municipality, the public acquires only an easement.³⁸ Where the municipality acquires fee title to the streets, abutting property owners have no interests therein other than those of the general public.³⁹ The grantees under a deed particularly describing the land as beginning at an intersection of designated streets are estopped thereby from denying the rights of the city in and to such streets.⁴⁰

As considered in Boundaries § 35, where an abutting owner owns the fee of a street, a grant or conveyance of the land abutting on such street carries the fee in the street to the center thereof, where the surrounding circumstances do not indicate a contrary intent; but the rule has been held not to apply to conveyances by a municipality of land, owned by it in fee, abutting the street, as discussed in Boundaries § 37.

Fee in state or county. In some jurisdictions it has been held that the fee to a street vests in the state⁴¹ or county,⁴² the city being merely trustee thereof, as discussed infra § 1682; and it has been held, under provisions so construed, that the city does not have an irrevocable grant or a fee simple, but the property is merely committed to the city during the pleasure of the state,⁴³ the title so granted being subject to withdrawal, modification, or transfer to another governmental agency by legislative action.⁴⁴

Presumptions. In the absence of proof to the contrary, presumptions that an abutting owner has title to the fee of the street,⁴⁵ to the middle of the

Va.—Nusbaum v. City of Norfolk, 145 S.E. 257, 151 Va. 801—Page v. Belvin, 14 S.E. 843, 88 Va. 985. Use of street by municipality see supra § 1655.

Lawful use as not "new and additional servitude"

Lawful use of street under dedication is not "new and additional servitude" on fee, and does not involve title of abutting owners.—Stout v. Frick, 62 S.W.2d 1057, 333 Mo. 826, transferred, see, App., 69 S.W.2d 677.

30. Colo.—City of Colorado Springs v. Weiher, 129 P.2d 988, 110 Colo. 55.

Ill.—People ex rel. Hill v. Eakin, 50 N.E.2d 474, 383 Ill. 383—City of Galena v. Altfilisch, 245 Ill.App. 454.

Iowa.—Cowan v. City of Waterloo, 21 N.W.2d 705, 237 Iowa 202—Incorporated Town of Lamoni v. Smith, 251 N.W. 706, 217 Iowa 264—Clare v. Wogan, 216 N.W. 739, 204 Iowa 1021—Incorporated Town of Ackley v. Central States Electric Co., 214 N.W. 879, 204 Iowa 1246, 54 A.L.R. 474.

La.—City of Gretna v. South New Orleans Light & Traction Co., 4 La.App. 480.

Mo.—Neil v. Independent Realty Co., 298 S.W. 363, 317 Mo. 1235, 70 A.L.R. 550.

N.Y.—City of New York v. Aviation Distributors, 84 N.Y.S.2d 84.

Ohio.—Village of Willard v. McEligott, 169 N.E. 447, 121 Ohio St. 456.

44 C.J. p 914 note 2.

"Streets" are public property

Tex.—City of Dallas v. Harris, Civ. App., 157 S.W.2d 710, error refused.

31. Okl.—Guthrie v. Nix, 49 P. 917, 5 Okl. 555.

44 C.J. p 914 note 3.

32. Ill.—Ingraham v. Brown, 83 N.E. 156, 231 Ill. 256.

44 C.J. p 914 note 4.

Rule not changed by statute

The statute regulating the making of surveys and filing for record of maps and plats does not vest in a city the fee in streets indicated on a map or plat of a municipal subdivision, and statute does not affect rule that the fee to middle of street is in abutting owner.—State Road Department v. Bender, 2 So.2d 298, 147 Fla. 15.

No right to convey or lease

If village acquired streets under common-law plat, it did not own the fee and could not convey or lease any portion of street.—Lambach v. Town of Mason, 53 N.E.2d 601, 386 Ill. 41.

33. Or.—McQuaid v. Portland, etc., R. Co., 22 P. 899, 18 Or. 237.

34. N.Y.—O'Connor v. City of Saratoga Springs, 262 N.Y.S. 809, 146 Misc. 892.

44 C.J. p 914 note 6.

For street purpose only

Under deed reciting purpose of conveyance to be extension of city street and containing covenants of general warranty, city acquired title for street purposes only.—Miller-

Carey Drilling Co. v. Shaffer, 61 P.2d 1320, 144 Kan. 508.

35. Ohio.—Cleveland Terminal, etc., R. Co. v. State, 97 N.E. 967, 85 Ohio St. 251, 39 L.R.A., N.S., 1219.

44 C.J. p 914 note 7.

36. N.Y.—Dunham v. Williams, 37 N.Y. 251, 4 Transcr.A. 209.

44 C.J. p 914 note 8.

37. Ohio.—State v. Pittsburg, etc., R. Co., 41 N.E. 205, 53 Ohio St. 189.

38. Mo.—Thomas v. Hunt, 35 S.W. 581, 134 Mo. 392, 32 L.R.A. 857.

39. Tex.—Miller v. Railroad Commission of Texas, Civ.App., 185 S.W.2d 223, error refused.

40. N.J.—Dvorin v. City of Bayonne, 161 A. 654, 111 N.J.Eq. 52.

41. Mont.—Headley v. Hammond Bldg., 33 P.2d 574, 97 Mont. 243, 93 A.L.R. 794—Nord v. Butte Water Co., 30 P.2d 809, 96 Mont. 311.

42. Kan.—Miller-Carey Drilling Co. v. Shaffer, 61 P.2d 1320, 144 Kan. 508.

44 C.J. p 914 note 2 [a].

43. Ill.—City of Geneseo v. Illinois Northern Utilities Co., 1 N.E.2d 392, 363 Ill. 89.

44. Ill.—City of Geneseo v. Illinois Northern Utilities Co., supra.

45. Ala.—McCraney v. City of Leeds, 194 So. 151, 289 Ala. 143.

Cal.—McCormick v. Great Western Power Co. of California, 86 P.2d 822, 134 Cal.App. 705.

street,⁴⁶ and that the public has only an easement,⁴⁷ are commonly indulged, in some instances under statutes expressly so providing.⁴⁸ The circumstances may be such as to give rise to a presumption that the abutting owner has the fee to the entire street.⁴⁹ These presumptions may be rebutted,⁵⁰ and this is sometimes made the rule by statute.⁵¹ These presumptions do not arise in respect of the owner of certain property where there is no evidence that such property extends to, or is bounded by, the street in question;⁵² and there has been a refusal to indulge the presumption that the abutting owner owns the fee where no relief is sought because of ownership of the fee.⁵³ In some jurisdictions in which by virtue of statute the municipality commonly acquires or has acquired a fee, it is presumed that the fee is in the municipality.⁵⁴

Title to, or ownership of, easement. While the view has been taken that the title to the easement may vest in the state or in the municipality,⁵⁵ it

has also been stated that the municipality does not even own the easement.⁵⁶

Street improvements made with public funds do not belong to the abutting owner, but inhere to the street improved.⁵⁷

Land not yet used as street. The fact that land, referred to as a "street" in deeds executed by a city, was never opened or used, being located at a distance from the inhabited portion of the city, does not affect the rights or title of the city thereto.⁵⁸

§ 1682. Extent and Nature of Title or Fee

The title of an abutting owner ordinarily extends to the middle of the street; the public easement goes to the full length and width of the street and extends indefinitely upward and downward. The fee or easement in the municipal corporation is held in trust for the public, and the municipality ordinarily cannot sell or barter the streets.

Ordinarily, where title is in the abutting owner, it extends to the middle of the street;⁵⁹ but the ti-

Fla.—Burns v. McDaniel, 140 So. 314, 104 Fla. 526.

Ga.—Mozley v. City of Marietta, 180 S.E. 122, 180 Ga. 590.

Ind.—Swaim v. City of Indianapolis, 171 N.E. 871, 202 Ind. 233, rehearing denied 173 N.E. 287, 202 Ind. 233.

Mo.—Stout v. Frick, 62 S.W.2d 1057, 333 Mo. 826, transferred, see, App., 69 S.W.2d 677.

Pa.—Clark v. City of New Castle, 32 Pa. Dist. & Co. 371, 30 Mun.L.R. 65.

Wash.—Lanham v. Forney, 81 P.2d 777, 196 Wash. 62.

44 C.J. p 915 note 15.

Presumption as to boundary of land abutting street, highway, or non-navigable watercourse generally see Boundaries § 104 a (4).

46. Ala.—McCraney v. City of Leeds, 194 So. 151, 239 Ala. 143.

Cal.—McCormick v. Great Western Power Co. of California, 26 P.2d 322, 134 Cal.App. 705.

Conn.—Allen v. Mussen, 26 A.2d 776, 129 Conn. 151.

Fla.—Burns v. McDaniel, 140 So. 314, 104 Fla. 526.

Ga.—Mozley v. City of Marietta, 180 S.E. 122, 180 Ga. 590.

Ky.—Goodloe v. City of Richmond, 63 S.W.2d 785, 250 Ky. 608.

Mo.—Stout v. Frick, 62 S.W.2d 1057, 333 Mo. 826, transferred, see, App., 69 S.W.2d 677.

Pa.—Clark v. City of New Castle, 32 Pa. Dist. & Co. 371, 30 Mun.L.R. 65.

44 C.J. p 915 note 16.

Allegation held to raise presumption In abutting property owner's action against city and contractor's sureties for damage for unlawful lowering of street level, allegation

that "the east line of said street was the west line of" owner's property was equivalent to saying that owner's land abutted on street, and raised presumption that owner was owner to center line of street, subject to rights of city to improve and use street.—Cooper v. Massachusetts Bonding & Ins. Co., 186 S.W.2d 549, 239 Mo.App. 67.

47. N.Y.—New Rochelle v. New Rochelle Coal, etc., Co., 144 N.Y.S. 852, 83 Misc. 194, affirmed 158 N.Y.S. 1111, 173 App.Div. 952, reversed on other grounds 121 N.E. 270, 224 N.Y. 696.

48. Cal.—McCormick v. Great Western Power Co. of California, 26 P.2d 322, 134 Cal.App. 705.

44 C.J. p 915 note 18.

49. Wash.—Gifford v. Horton, 103 P. 988, 54 Wash. 595.

44 C.J. p 915 note 19.

50. R.I.—Healey v. Babbitt, 14 R.I. 533.

44 C.J. p 915 note 20.

51. Cal.—Porter v. Los Angeles, 189 P. 105, 182 Cal. 515.

S.D.—Edmison v. Lowry, 52 N.W. 583, 3 S.D. 77, 44 Am.S.R. 774, 17 L.R.A. 275.

52. Fla.—Lovett v. State, 11 So. 550, 30 Fla. 142, 17 L.R.A. 705.

53. Ky.—Bondurant v. North Carolina, etc., R. Co., 13 Ky.Op. 469.

44 C.J. p 915 note 23.

54. Ill.—Sherwin v. Aurora, 100 N.E. 938, 257 Ill. 458, 43 L.R.A. 1116.

44 C.J. p 915 note 24.

55. Ind.—Indianapolis v. Indianapolis Water Co., 113 N.E. 369, 185 Ind. 377.

56. Iowa.—Dubuque v. Maloney, 9 Iowa 450, 74 Am.D. 358.

Vt.—Burlington Light, etc., Co. v. Burlington, 106 A. 513, 93 Vt. 27.

57. Tex.—Gillespie v. Fuller Const. Co., Civ.App., 66 S.W.2d 798, error refused. Certificate of questions submitted dismissed 61 S.W.2d 977, 122 Tex. 506.

58. Tex.—Town of Refugio v. Strauch, Com.App., 29 S.W.2d 1041.

Fenced in by grantees

Fact that "street," referred to in city's deeds of adjoining tracts, was never opened or used and had been fenced by grantees for years, does not affect question whether town or grantees own fee therein, since city is not required to open all "streets," but may hold the land in reserve for street use.—Town of Refugio v. Strauch, supra.

Rights as of private owner

City's rights as owner of land, referred to as "street" in deeds and oil lease executed by it, but located two miles from inhabited portion of city, were the same as those of private owner, except as to duty to keep it self in position to use land for public benefit when necessary.—Town of Refugio v. Strauch, supra.

59. U.S.—Grand Trunk Western R. Co. v. City of Flint, D.C.Mich., 55 F.2d 384, affirmed, C.C.A., City of Flint v. Grand Trunk Western R. Co., 69 F.2d 604.

Ala.—Snead v. Tatum, 25 So.2d 162, 247 Ala. 442.

Cal.—Ex parte Anderson, 19 P.2d 1027, 130 Cal.App. 395.

Fla.—State Road Department v. Bender, 2 So.2d 298, 147 Fla. 15.

Ind.—Swaim v. City of Indianapolis, 171 N.E. 871, 202 Ind. 233, rehear-

tie to the whole street is sometimes in the abutting owner on one side;⁶⁰ and, where the abutting owner who has title to a street has land on both sides of a particular part of the street, his title extends to the whole of such part.⁶¹

The public right to the use of a street goes to the full length and width of the street and extends indefinitely upward and downward,⁶² and includes the sidewalks.⁶³

The title or estate of a municipal corporation in a street or other public way may depend on the circumstances of the acquisition thereof.⁶⁴ In some instances, the fee acquired by the municipality has been characterized as a qualified, base, or determi-

nable fee;⁶⁵ but in others the fee acquired by the municipality has been held to be of a higher nature.⁶⁶ In some jurisdictions, even where the fee is in the municipality, every beneficial use except that for street purposes remains in the original dedicant or proprietor or his grantee.⁶⁷

Right to control street as legal or equitable.

Where the abutting owner retains the fee, the right of the municipality to the possession, use, and control of the street is regarded as a legal, and not a mere equitable, right.⁶⁸

Title in trust; right of disposition. The title to the street, whether a fee or an easement, is held in trust for, or for the benefit of, the public;⁶⁹ and

ing denied 173 N.E. 287, 202 Ind. 233—Vonderachmitt v. McGuire, 195 N.E. 585, 100 Ind.App. 632.

Ky.—Goodloe v. City of Richmond, 63 S.W.2d 785, 250 Ky. 608.

Minn.—Kooreny v. Dampier-Baird Mortuary, 291 N.W. 611, 207 Minn. 367.

Mo.—Hannibal Contracting Co. v. Friend, App., 38 S.W.2d 493—City of Springfield ex rel. Koch v. Eisenmayer, App., 297 S.W. 460.

N.J.—Faulks v. Borough of Allenhurst, 180 A. 877, 115 N.J.Law 456—Grady v. Nevins Church Press Co., 189 A. 668, 15 N.J.Misc. 190, affirmed 194 A. 782, 119 N.J.Law 135, reversed on other grounds 199 A. 578, 120 N.J.Law 351.

Pa.—Westinghouse Elec. Corp. v. United Electrical, Radio & Mach. Workers of America (CIO) Local 601, 46 A.2d 16, 353 Pa. 446—Hindin v. Samuel, 45 A.2d 370, 158 Pa. Super. 539.

Tex.—Miller v. Railroad Commission of Texas, Civ.App., 185 S.W.2d 223, error refused—Pecos & N. T. Ry. Co. v. Falls, Civ.App., 98 S.W.2d 430—Fort Worth & D. S. P. Ry. Co. v. Judd, Civ.App., 4 S.W.2d 1032, error dismissed—Quannah Acme & P. Ry. Co. v. Swearingen, Civ.App., 4 S.W.2d 136, error refused.

Va.—Nusbaum v. City of Norfolk, 145 S.E. 257, 151 Va. 801.

Wash.—Coleman v. Hammond Lumber Co., 294 P. 968, 160 Wash. 170. 44 C.J. p 916 note 28.

60. Wash.—Rowe v. James, 128 P. 539, 71 Wash. 287.

44 C.J. p 916 note 29.

61. Mo.—Hannibal Bridge Co. v. Schaubacher, 57 Mo. 582.

Tex.—Town of Refugio v. Strauch, Civ.App., 20 S.W.2d 326, reversed on other grounds, Com.App., 29 S.W.2d 1041.

62. Ala.—McCraney v. City of Leeds, 194 So. 151, 239 Ala. 143.

Idaho.—Yellow Cab Taxi Service v. City of Twin Falls, 190 P.2d 681, 68 Idaho 145.

Ill.—People ex rel. Jeffrey v. Murphy, 254 Ill.App. 109.

Iowa.—Incorporated Town of Lamoni v. Smith, 251 N.W. 706, 217 Iowa 264.

Ky.—Flechter v. City of Corbin, 71 S.W.2d 423, 254 Ky. 178.

La.—New Orleans v. Kaufman, 70 So. 874, 138 La. 897.

Md.—Hueschmann v. Grand Co., 172 A. 227, 166 Md. 615.

Mich.—Long v. New York Cent. R. Co., 227 N.W. 739, 248 Mich. 437.

Tex.—City of Beaumont v. Priddle, Civ.App., 65 S.W.2d 434, reversed on other grounds Texas & N. O. R. Co. v. Priddle, 95 S.W.2d 1290, 127 Tex. 629.

Use to make easement effective

Public street easement includes such use of land at or beneath surface as will make easement effective.—City of Dixon v. Sinow & Weinman, 183 N.E. 570, 350 Ill. 634.

Use of subsurface as parking garage
Mich.—Cleveland v. City of Detroit, 37 N.W.2d 625, 324 Mich. 527.

63. Mont.—Headley v. Hammond Bldg., 33 P.2d 574, 97 Mont. 243, 93 A.L.R. 794—Nord v. Butte Water Co., 30 P.2d 809, 96 Mont. 311—Mitchell v. Thomas, 8 P.2d 639, 91 Mont. 370.

N.J.—Grady v. Nevins Church Press Co., 189 A. 668, 15 N.J.Misc. 190, affirmed 194 A. 782, 119 N.J.Law 135, reversed on other grounds 199 A. 578, 120 N.J.Law 351.

Pa.—Westinghouse Elec. Corp. v. United Electrical, Radio & Mach. Workers of America (CIO) Local 601, 46 A.2d 16, 353 Pa. 446.

64. Okl.—McClain v. Oklahoma City, 133 P.2d 198, 192 Okl. 4.

Unqualified deed

A clause in a deed of realty to a municipality reciting that the realty is conveyed for street or other public purposes does not qualify the estate conveyed; and the fact that deed of realty to a municipality is silent as to the purpose of the grant

does not limit the title conveyed.—McClain v. Oklahoma City, supra.

65. U.S.—Mayor and Council of City of Baltimore v. U. S., C.C.A.Md., 147 F.2d 786.

Pa.—Brooks v. Buckley & Banks, 139 A. 379, 291 Pa. 1.

44 C.J. p 916 note 32.

66. Iowa.—Lake City v. Fulkerson, 98 N.W. 376, 122 Iowa 569.

67. Mo.—Hatton v. St. Louis, 175 S.W. 888, 264 Mo. 634.

44 C.J. p 916 note 34.

68. Ill.—Chicago v. Wright, 69 Ill. 318.

Ejectment against adverse claimant

Ordinarily, remedy of city against persons in possession of land subject to public easement under claim of title is to bring action of ejectment at law.—Lorenz v. City of Hollywood, 198 So. 17, 144 Fla. 324.

69. U.S.—Hague v. Committee for Industrial Organization, N.J., 59 S.Ct. 954, 307 U.S. 496, 83 L.Ed. 1423—Rheinberger v. Security Life Ins. Co. of America, C.C.A.Ill., 146 F.2d 680—Jefferson County, Tenn. v. Tennessee Val. Authority, C.C.A.Tenn., 146 F.2d 564, certiorari denied 65 S.Ct. 1018, 324 U.S. 871, 89 L.Ed. 1425, rehearing denied 65 S.Ct. 1024, 324 U.S. 891, 89 L.Ed. 1438.

Ala.—Thetford v. Town of Cloverdale, 115 So. 165, 217 Ala. 241.

Colo.—City of Colorado Springs v. Weiher, 129 P.2d 988, 110 Colo. 55.

Ga.—Williamson v. Souter, 157 S.E. 463, 172 Ga. 364—Ferguson v. City of Moultrie, 29 S.E.2d 786, 71 Ga. App. 15, followed in Csiki v. City of Moultrie, 29 S.E.2d 791, 71 Ga. App. 23.

Idaho.—Yellow Cab Taxi Service v. City of Twin Falls, 190 P.2d 681, 68 Idaho 145.

Ill.—City of Elmhurst v. Buettgen, 58 N.E.2d 273, 394 Ill. 248—People ex rel. Hill v. Eakin, 50 N.E.2d 474, 363 Ill. 388—City of Geneseo v. Illinois Northern Utilities

some statutes contain a specific provision to that effect.⁷⁰ The public for whose benefit the streets are held is the general public or the people of the state.⁷¹ It follows that title to streets is held by the municipality in its public or governmental capacity

rather than in its proprietary or private capacity.⁷² Accordingly, a municipal corporation ordinarily has no power to sell or barter or encumber the streets or alleys which it so holds,⁷³ except in so far as, and in the manner that, statutes may provide;⁷⁴ nor

Co., 1 N.E.2d 392, 363 Ill. 89—Chicago Motor Coach Co. v. City of Chicago, 161 N.E. 768, 330 Ill. 200, 66 A.L.R. 834—Nielsen v. City of Chicago, 161 N.E. 768, 330 Ill. 801—Wilmot v. City of Chicago, 160 N.E. 206, 328 Ill. 552, 62 A.L.R. 394.
Iowa.—Cowin v. City of Waterloo, 31 N.W.2d 705, 237 Iowa 202—Incorporated Town of Lamont v. Smith, 251 N.W. 706, 217 Iowa 264.
La.—Town of Napoleonville v. Boudreaux, App., 142 So. 874.
Md.—Huebschmann v. Grand Co., 172 A. 227, 166 Md. 615.
Mich.—Long v. New York Cent. R. Co., 227 N.W. 739, 248 Mich. 437.
Mo.—Stout v. Frick, 62 S.W.2d 1057, 333 Mo. 826, transferred, see, App., 69 S.W.2d 677.
Mont.—Headley v. Hammond Bldg., 33 P.2d 574, 97 Mont. 243, 93 A.L.R. 794—Nord v. Butte Water Co., 30 P.2d 809, 96 Mont. 311.
N.Y.—Green v. Miller, 162 N.E. 593, 249 N.Y. 88—O'Connor v. City of Saratoga Springs, 262 N.Y.S. 809, 146 Misc. 892—Robia Holding Corporation v. Walker, 239 N.Y.S. 659, 136 Misc. 358, affirmed 246 N.Y.S. 210, 230 App.Div. 666, affirmed 178 N.E. 747, 257 N.Y. 431—City of New York v. Aviation Distributors, 84 N.Y.S.2d 84—Bachmann v. New York Tunnel Authority, 47 N.Y.S. 2d 767.
N.C.—Swinson v. Cutter Realty Co., 156 S.E. 545, 200 N.C. 276.
Ohio.—City of Cleveland v. Tussey, 13 Ohio Supp. 11.
Okl.—Corpus Juris cited in Town of Chouteau v. Blankenship, 152 P.2d 379, 383, 194 Okl. 401.
Pa.—Walnut & Quince Streets Corporation v. Mills, 154 A. 29, 303 Pa. 25, appeal dismissed 52 S.Ct. 16, 284 U.S. 573, 76 L.Ed. 498.
Tenn.—Harbin v. Smith, 76 S.W.2d 107, 168 Tenn. 112—McCay v. Du Pont Rayon Co., 96 S.W.2d 177, 20 Tenn.App. 157.
Tex.—City of Dallas v. Harris, Civ. App., 157 S.W.2d 710, error refused—Dallas Taxicab Co. v. City of Dallas, Civ.App., 68 S.W.2d 359—Elston v. City of Panhandle, Civ. App., 46 S.W.2d 420, error refused 50 S.W.2d 1090, 121 Tex. 553—Industrial Co. v. Tompkins, Civ.App., 27 S.W.2d 343, error refused—J. M. Radford Grocery Co. v. City of Abilene, Civ.App., 30 S.W.2d 255, affirmed, Com.App., 34 S.W.2d 830—Texas Co. v. Texarkana Mach. Shops, Civ.App., 1 S.W.2d 928.
Va.—Nusbaum v. City of Norfolk, 145 S.E. 257, 151 Va. 501.

43 C.J. p 1843 note 78—44 C.J. p 916 note 85.

Sidewalk held within rule

U.S.—Campbell v. City of Chicago, C.C.A.III., 119 F.2d 1014.

70. N.Y.—People v. Kerr, 27 N.Y. 188, 25 How.Pr. 258.

Wis.—Kimball v. Kenosha, 4 Wis. 321.

71. Ga.—Ferguson v. City of Moultrie, 29 S.E.2d 786, 71 Ga.App. 15, followed in Caiki v. City of Moultrie, 29 S.E.2d 791, 71 Ga.App. 23.

Ill.—People ex rel. Hill v. Eakin, 50 N.E.2d 474, 383 Ill. 383—City of Geneseo v. Illinois Northern Utilities Co., 1 N.E.2d 392, 363 Ill. 89

—Chicago Motor Coach Co. v. City of Chicago, 169 N.E. 22, 337 Ill. 200, 66 A.L.R. 834—Nielsen v. City of Chicago, 161 N.E. 768, 330 Ill. 301

—Wilmot v. City of Chicago, 160 N.E. 206, 328 Ill. 552, 62 A.L.R. 394.

Ky.—Flechter v. City of Corbin, 71 S.W.2d 428, 254 Ky. 178.

N.Y.—City of New York v. Aviation Distributors, 84 N.Y.S.2d 84—Bachmann v. New York Tunnel Authority, 47 N.Y.S.2d 767.

44 C.J. p 917 note 37.

72. N.Y.—City of Little Falls v. State, 37 N.Y.S.2d 463, 178 Misc. 1063, reversed on other grounds 41 N.Y.S.2d 882, 266 App.Div. 87, affirmed 52 N.E.2d 963, 291 N.Y. 755.

Ohio.—Harbor Land Co. v. Village of Fairport, App., 49 N.E.2d 194.

Tex.—City of El Paso v. Mendoza, Civ.App., 191 S.W.2d 102, error refused for want of merit—City of Beaumont v. Gulf States Utilities Co., Civ.App., 163 S.W.2d 426, error refused.

The power to vacate and close streets was held not to give a municipality proprietary rights in the land.—Texas Co. v. Texarkana Mach. Shops, Tex.Civ.App., 1 S.W.2d 928.

73. U.S.—Rheinberger v. Security Life Ins. Co. of America, C.C.A.III., 146 F.2d 680.

Cal.—Constantine v. City of Sunnyvale, App., 204 P.2d 922—People v. City of San Rafael, 273 P. 138, 95 Cal.App. 733.

Fla.—Corpus Juris cited in Roney Inv. Co. v. City of Miami Beach, 174 So. 26, 29, 127 Fla. 773.

Ga.—Mayor and Council of City of Forsyth v. Hooks, 184 S.E. 724, 182 Ga. 78.

Md.—American Medicinal Spirits Co. v. Mayor and City Council of Baltimore, 166 A. 407, 165 Md. 128.

43 C.J. p 1843 note 78.

Property of private corporations distinguished

Highway easements are unlike property of private corporations, and political subdivisions cannot deal in its roads and highways as a private corporation.—Jefferson County, Tenn. v. Tennessee Valley Authority, C.C.A. Tenn., 146 F.2d 564, certiorari denied 65 S.Ct. 1016, 324 U.S. 871, 89 L.Ed. 1425, rehearing denied 65 S.Ct. 1024, 324 U.S. 891, 89 L.Ed. 1438.

Deed as ultra vires

Deed whereby mayor, in name of municipality, purported to convey a segment of a public street was ultra vires and void.—Duckworth v. Town of Robertsedale, 28 So.2d 182, 248 Ala. 432.

Disclaimer as ultra vires

Resolution of board of aldermen purporting to disclaim title to any right in strip of land which might have inhered in municipality was held ultra vires and void.—Mayor and Council of City of Forsyth v. Hooks, 184 S.E. 724, 182 Ga. 78.

74. Ga.—Savannah Beach, Tybee Island v. Drane, 52 S.E.2d 439, 205 Ga. 14.

Md.—American Medicinal Spirits Co. v. Mayor and City Council of Baltimore, 166 A. 407, 165 Md. 128.

Approval of electorate

Under the statute, the mayor and councilmen are without authority to sell any public street which has been opened to the public by the municipality and used by the public except after approval by a majority vote of all the qualified voters of the municipality.—Savannah Beach, Tybee Island v. Drane, 52 S.E.2d 439, 205 Ga. 14.

Statutory authority granted

(1) Under statute providing that the commission council may by a two-thirds vote sell a street which is no longer necessary for the public use to which it was originally destined, the selling of streets rests within the sound discretion of the commission council.—State ex rel. Porterie v. Housing Authority of New Orleans, 182 So. 725, 190 La. 710.

(2) A city had statutory authority to convey by deed to United States reclamation bureau a portion of city street crossing a canal belonging to bureau, reserving right to use bridge over canal as part of city street system.—City of El Paso v. Mendoza, Tex.Civ.App., 191 S.W.2d 102, error refused for want of merit.

does it ordinarily have the power to divert streets or alleys from the uses to which they were dedicated, or pervert them to other uses, as considered supra § 1655. However, a municipality may in some instances dispose of a street after it has been lawfully vacated, as considered infra § 1683 b; and, where a municipal corporation has acquired the absolute title to land for a street and such use becomes impossible, such corporation may alienate the land for its full value,⁷⁵ or it may sell any surplus of land acquired for street purposes.⁷⁶ A city cannot be divested of its title except in the manner provided by statute;⁷⁷ and a municipal corporation does not lose title to its streets by failure to elect municipal officers, even though such failure should continue for a number of years.⁷⁸

§ 1683. Effect of Vacation and Abandonment

a. In general

Statute construed to grant authority

(1) Charter amendment providing that mayor and councilmen were authorized to lay out, establish, change, alter, transfer and convey, straighten, or improve streets, whenever necessary to best interest of town, authorized mayor and councilmen to sell certain street in town, in absence of showing that closing of street was contrary to best interest of town.—*Vandiviere v. Anderson*, 42 S.E.2d 449, 202 Ga. 142.

(2) Statute permitting municipalities to exchange property with landowners so that new streets may be "laid out" was held applicable to widening of existing street; and the fact that street which city gave landowner in exchange for landowner's property was necessary for public, because city reserved sewerage and water main rights, was held not to invalidate exchange, since due reservation had been made to the extent necessary.—*Wilkie v. Walmsley*, 136 So. 296, 173 La. 141.

75. U.S.—*U. S. v. Case Library, C.* C.Ohio, 98 F. 512, affirmed 104 F. 711, 44 C.C.A. 161.

76. N.C.—*City of Winston Salem v. Smith*, 3 S.E.2d 328, 216 N.C. 1.

77. La.—*Richard v. City of New Orleans*, 197 So. 594, 195 La. 898.

Statement of commissioner of public utilities

Where city, pursuant to ordinance providing for extending and opening a street, acquired from railroad company title to, and possession of, land necessary for opening street, city could not be divested of its title and possession by statement of commissioner of public utilities, prior to adoption of ordinance, that it would be necessary for city to expropriate the property because, inferentially,

it was owned by plaintiffs.—*Richard v. City of New Orleans*, supra.

78. Ohio.—*Harbor Land Co. v. Village of Fairport*, App., 49 N.E.2d 194.

79. Cal.—*Inyo County v. Given*, 191 P. 688, 183 Cal. 415.

Kan.—*Corpus Juris cited in Luttgen v. Ergenbright*, 166 P.2d 712, 718, 161 Kan. 183.

Okl.—*Joy v. Kizzlar*, 38 P.2d 493, 169 Okl. 642.

Pa.—*Chaney v. Bamford*, Com.Pl., 91 Pittsb.Leg.J. 108.

44 C.J. p 917 note 40.

Effect of abandonment of dedicated property generally see Dedication § 64.

Reversion of highway on vacation or abandonment see Highways § 137. Vacation of streets generally see supra §§ 1665-1675.

Vacation of street as ground for compensation to abutting owner see supra § 1233, and Eminent Domain § 126.

Rights of action

Lot owners in a municipal subdivision were not precluded from recovery in suit against state road department to compel department, which had entered subdivision without owners' consent and removed sidewalk and builder's sand while rebuilding a highway, to restore property to original condition or prosecute condemnation proceedings on ground that streets had been dedicated to the public by a plat filed and recorded for such purpose in public records of the county, where evidence showed that streets had been abandoned.—*State Road Department v. Bender*, 2 So.2d 298, 147 Fla. 15.

80. U.S.—*Grand Trunk Western R. Co. v. City of Flint, D.C.Mich.*, 55 F.2d 384, affirmed, C.C.A., City of

b. Disposal of vacated street by municipality

c. Effect on easements or right of access

a. In General

Ordinarily, in the absence of statute affecting the rule, on vacation or abandonment of a street, title, free from the public easement, remains in, or reverts to, the owner of the fee.

Ordinarily, on the vacation or abandonment of a street, the title to the land, free from the public easement, remains in, or reverts to, the owner of the fee.⁷⁹ Thus, where the abutting owner is the owner of the fee, he becomes entitled to the absolute ownership of the part of the vacated or abandoned street in which he has the fee, discharged from the public easement,⁸⁰ notwithstanding the existence of structures lying below the surface.⁸¹ In the absence of statutory provisions affecting the

Flint v. Grand Trunk Western R. Co., 69 F.2d 604.

Ark.—*McGee v. Swearengen*, 109 S.W.2d 444, 194 Ark. 735.

Mo.—*Odum v. Hook*, App., 177 S.W.2d 165—*Evans v. Andres*, 42 S.W.2d 32, 226 Mo.App. 63.

Okl.—*Noble v. Oklahoma City*, 127 P.2d 843, 191 Okl. 20—*City of Tulsa v. Horwitz*, 3 P.2d 841, 151 Okl. 201.

Pa.—*Lipscomb v. City of Pittsburgh*, Com.Pl., 93 Pittsb.Leg.J. 117.

Tex.—*Reynolds v. City of Alice*, Civ. App., 150 S.W.2d 455.

44 C.J. p 917 note 42.

Property conveyed by conveyance of abutting landowner after vacation of abandonment of street see Boundaries § 35 d (3).

Grantee of abutting property

(1) Where land bounded on a street is conveyed without reservation, and thereafter the street is vacated, the land reverts to the grantee discharged of the easement.—*Brown v. Oregon Short Line R. Co.*, 102 P. 740, 38 Utah 257, 24 L.R.A., N.S., 86—9 C.J. p 204 note 33.

(2) Since the conveyance by which the abutting owner acquires title is subject only to the public easement, when the easement is abandoned or otherwise terminated, the title, with all the incidents of ownership, becomes perfect in the adjacent lot owner.—*Sullivan v. Atchison, etc., R. Co.*, 95 N.E. 1081, 251 Ill. 108, 118—9 C.J. p 204 note 34.

(3) Grantor of lots could not be compelled to reopen street, title to center of which had, on abandonment of street, vested in grantees.—*Avondale Heights Co. v. Rhodes*, 3 S.W.2d 774, 228 Ky. 409.

81. Wis.—*Miller Inv. Co. v. City of Milwaukee*, 244 N.W. 753, 209 Wis. 517.

rule, the municipality retains no rights in the property.⁸² On the other hand, where the fee is in the municipality, ordinarily it remains with it after vacation or abandonment,⁸³ and no interest therein reverts to, or vests in, the abutting owner.⁸⁴ However, where the fee which the municipality has acquired is regarded as a base, qualified, or determinable fee, as considered supra § 1682, in some jurisdictions it vests in the abutting owners,⁸⁵ at least in the absence of a statute to the contrary, while in others it has been held that it vests in the dedicator or the owner of the land when the street was established or in the persons who represent him as such dedicator or proprietor.⁸⁶

Before one can acquire title to property in a street by virtue of an abandonment, there must be

a showing of a lawful abandonment.⁸⁷ An ordinance requiring the elevation of railroad tracks in a street is not necessarily a vacation in the sense that a reversion or vesting of the fee results,⁸⁸ but, where compliance with such an ordinance results in a complete obstruction of the street for the ordinary and usual purpose of a street, the ordinance effects such a vacation as will result in such reversion or vesting.⁸⁹

In an action by an abutting owner against a municipality to quiet title to a vacated street, the municipality may not urge reversion to the original grantors, where they are not parties to the action.⁹⁰

Statutory provisions. Under statutes so providing, on the vacation of a street the fee reverts to, or vests in, the owners of the abutting property.⁹¹

82. Tex.—McLennan County v. Taylor, Civ.App., 96 S.W.2d 997, error dismissed.

Reappropriation of property

(1) County having abandoned property for street originally dedicated to it was without authority to appropriate property without new dedication from landowner to whom it reverted, and was liable to landowner for appropriation of abandoned property.—McLennan County v. Taylor, supra.

(2) Where city abandoned easement in property for street purposes, it could not thereafter reopen street without compensating railroad owning property on each side of street before abandonment, even though depot for which street was abandoned had been removed.—City of Flint v. Grand Trunk Western R. Co., C.C.A.Mich., 69 F.2d 604.

(3) Where a road had been opened up and used by a few people and later abandoned and had not been used for a number of years as a road, but had been in the possession of defendant, it was held that the city would be denied an injunction prohibiting defendant from the use of the road for, if it was necessary to open the road, it should bring an action to acquire it by eminent domain.—City of Knoxville v. Sprankle, 9 Tenn.App. 218.

83. N.Y.—Pooler v. Sammet, 115 N.Y.S. 578, 130 App.Div. 650.

44 C.J. p 918 note 43.

Roadway beyond town's reduced limits

Tex.—Meyer v. Galveston, H. & S. A. Ry. Co., Com.App., 50 S.W.2d 268.

84. Iowa.—Harrington v. Iowa Cent. R. Co., 102 N.W. 139, 126 Iowa 388.—Barr v. Oskaloosa, 45 Iowa 275.

85. Ohio.—Mount Union College v. Mistelaki, 33 Ohio N.P., N.S., 504. 44 C.J. p 918 note 46.

86. Ill.—Hyde Park v. Borden, 94 Ill. 26.

44 C.J. p 918 note 47—9 C.J. p 204 note 36.

Terms of dedication

Where plat dedicating streets provided that, in event of vacation thereof, title thereto should revert to dedicator, on vacation or abandonment by city of such property for highway purposes, assignees of dedicator acquired title thereto, although he was not an abutting owner.—State by Burnquist v. Marcks, Minn., 38 N.W.2d 594.

87. Ga.—Mayor and Council of City of Forsyth v. Hooks, 184 S.E. 724, 182 Ga. 78.

Abandonment of streets generally see supra §§ 1676, 1677.

Abandonment without closing

Abandonment of street without taking steps necessary to have street closed does not vest title to land in adjoining landowner.—Wood v. Town of Lewisport, 299 S.W. 197, 221 Ky. 566.

88. Ill.—Chicago, etc., R. Co. v. Abene, 137 N.E. 443, 306 Ill. 69.

44 C.J. p 918 note 49.

89. Ill.—Sullivan v. Atchison, etc., R. Co., 95 N.E. 1081, 251 Ill. 108.

90. Mich.—Manufacturers' Foundry Co. v. City of Holland, 234 N.W. 129, 253 Mich. 60.

91. U.S.—City of Norton v. Lowden, C.C.A.Kan., 84 F.2d 663.

Kan.—Corpus Juris cited in Luttgen v. Ergenbright, 166 P.2d 712, 713, 161 Kan. 183.—Shoen v. Baker, 287 P. 233, 130 Kan. 630.

La.—Jaenke v. Taylor, 106 So. 711, 160 La. 109.

Mo.—Kansas City v. Jones Store Co., 28 S.W.2d 1008, 325 Mo. 226, certiorari denied Jones Store Co. v. Kansas City, Mo., 51 S.Ct. 78, 282 U.S. 873, 75 L.Ed. 771.

Okl.—Askins v. British-American Oil Producing Co., 203 P.2d 877.

Or.—Portland Baseball Club v. City of Portland, 18 P.2d 811, 142 Or. 13.

44 C.J. p 918 note 54.

Statute held valid

Statute is not invalid as authorizing the taking of property of dedicator without due process by providing that ownership shall revert to the then present owners of land contiguous to such road, street, or alley, since land dedicated to public use under statute vests the title to the property in the public as against contention that public had but a servitude on the streets and alleys which on abandonment reverted to the dedicator.—Arkansas-Louisiana Gas Co. v. Parker Oil Co., 183 So. 229, 190 La. 957.

Statute held to embody common-law rule

Or.—Fowler v. Gehrke, 111 P.2d 831, 166 Or. 239.

Limited to unincorporated areas

When streets as laid out on plat of townsite were vacated, under statute concerning vesting of title on vacation of streets in unincorporated areas and municipalities not exercising their corporate functions, the title of owner of a block bounded by streets was extended to center of streets, as far as they adjoined and were in front of block.—Fowler v. Gehrke, supra.

Accretion to abutting lot

It has been held that the part of the street which so passes to an abutting owner becomes a part of his lot which passes under a conveyance in which the lots are described as originally platted.

U.S.—Roxana Petroleum Corporation v. Sutter, C.C.A.Kan., 28 F.2d 159.

Kan.—Board of Com'rs of Marion County v. Clark, 138 P.2d 449, 157 Kan. 132.

44 C.J. p 918 note 54 [a] (1).

However, under some statutes this rule is subject to the limitation that vested rights shall not be affected.⁹² Under certain of such statutes a proportionate part of the street does not necessarily become a part of each abutting lot,⁹³ and, under an express exception to that effect, where the street was taken and appropriated to public use in different proportions, it will revert to the adjacent lots in proportion as it was taken from them,⁹⁴ so that one whose grantor dedicated the entire street is, on subsequent vacation thereof, entitled to the entire width thereof to the exclusion of the opposite owner.⁹⁵ By reason of a specific charter provision the fee sometimes remains in the city notwithstanding the vacation of the street;⁹⁶ and it has been held that a statute providing that the abutting owners should become seized in fee of a vacated street is not effective to divest the municipality of its fee in such street.⁹⁷

On vacation of a street, under some statutes the land reverts to the dedicator or his grantees.⁹⁸ Under statutes providing that platted streets shall belong to the original proprietors or the present owners of the abutting lots on due vacation of a statutory dedication, platted streets which have not become public streets become the property of the original proprietors or the present owners.⁹⁹ Under statutory provision to that effect, on vacation of an alley and its reversion to the abutting owners, they take title thereto subject as a matter of law to the right of the city to reopen the alley without cost to the city.¹ Under some statutes the owner of the fee of a street which has been opened and in use can inclose or occupy the vacated part when,² and only when,³ another street bounding the block in question is open and in use.

Statutory provisions of this nature must, of

course, be followed in order that the rights contemplated by the statute may be obtained.⁴

Surface to which title extends. Because of the general rule that, where the fee of a street is in the abutting owners, each owns to the middle thereof, as discussed supra § 1682, ordinarily the abutting owner on abandonment or vacation is entitled to one half of the original street in front of his property,⁵ and this rule has been applied where there was a vacation of more than half, but less than the whole, street,⁶ with the result that property on the side on which the vacation occurred no longer abutted on the street;⁷ but, if an abutting owner's title which is subject to the public easement extends beyond the middle of the street, on vacation or abandonment he is entitled to the land to which he has title.⁸

Conveyance to person entitled. Where title vests by operation of law, no deed from the municipality to abutting owners is necessary;⁹ and a statement, in a declaratory resolution vacating a portion of a street, that the vacated property should revert to a certain person is mere surplusage, and does not convey the property.¹⁰

b. Disposal of Vacated Street by Municipality

After vacation of a street to which a municipal corporation holds title, it may use or permit the land to be used for any authorized purpose, and may even alienate the property.

Where a municipal corporation holds title to the fee of a street, on a vacation it may use or permit the land to be used for any purpose authorized by law,¹¹ especially where the statute authorizes the vacation of streets and the disposition of the land as the authorities shall direct;¹² or it may grant the land for private ownership.¹³ Accordingly, after a street has been lawfully vacated, the property may

92. Wash.—Rowe v. James, 128 P. 539, 71 Wash. 267.

44 C.J. p 919 note 55.

93. Iowa.—Brown v. Taber, 72 N. W. 416, 103 Iowa 1.

94. Kan.—Shoen v. Baker, 287 P. 233, 130 Kan. 630.

95. Kan.—Shoen v. Baker, supra.

96. Colo.—Albi Mercantile Co. v. Denver, 131 P. 275, 54 Colo. 474.

Neb.—Van Valkenberg v. Rutherford, 139 N.W. 652, 92 Neb. 808.

97. N.Y.—Matter of West 151st St., 123 N.Y.S. 894, 149 App.Div. 55.

44 C.J. p 919 note 56.

98. Mo.—Neil v. Independent Realty Co., 298 S.W. 353, 317 Mo. 1235, 70 A.L.R. 550.

99. Neb.—Johnson v. Buhman, 152 N.W. 403, 98 Neb. 326—Hart v. Ainsworth, 131 N.W. 816, 89 Neb. 418.

1. Okl.—Noble v. Oklahoma City, 127 P.2d 843, 191 Okl. 20.

2. N.Y.—Schonleben v. Swain, 115 N.Y.S. 23, 130 App.Div. 521, affirmed 92 N.E. 1103, 198 N.Y. 622.

3. N.Y.—Stirnweis v. Cacioppo, 179 N.E. 262, 258 N.Y. 63, reargument denied 180 N.E. 364, 258 N.Y. 632, motion denied 182 N.E. 165, 259 N.Y. 525—In re New York, 85 N.E. 755, 192 N.Y. 459.

4. Iowa.—McKinney v. Rowland, 197 N.W. 88, 197 Iowa 180.

44 C.J. p 919 note 60.

5. U.S.—Grand Trunk Western R. Co. v. City of Flint, D.C.Mich., 55 F.2d 384, affirmed, C.C.A., City of Flint v. Grand Trunk Western R. Co., 69 F.2d 604.

Pa.—Lipscomb v. City of Pittsburgh, Com.Pl., 93 Pittsb.Leg.J. 117.

44 C.J. p 919 note 63.

6. Ohio.—Campbell v. Mitchell, 17 Ohio Cir.Ct.N.S., 483.

7. Ohio.—Campbell v. Mitchell, supra.

8. Wash.—Rowe v. James, 128 P. 539, 71 Wash. 267.

44 C.J. p 919 note 66.

9. Ky.—Henderson Elevator Co. v. City of Henderson, 219 S.W. 809, 187 Ky. 453, 18 A.L.R. 932.

44 C.J. p 919 note 67.

10. Ind.—Skinner v. Pitman-Moore Co., App., 85 N.E.2d 279.

11. Iowa.—Walker v. Des Moines, 142 N.W. 51, 161 Iowa 215.

44 C.J. p 899 note 30, p 919 note 69.

12. Iowa.—Hubbell v. Des Moines, 154 N.W. 337, 173 Iowa 55.

44 C.J. p 920 note 70.

13. Iowa.—Krueger v. Ramsay, 176 N.W. 1, 183 Iowa 361.

44 C.J. p 920 note 71.

be sold under a general power of alienation of municipal property;¹⁴ and where, by its charter, a city has authority to open, lay out, widen, straighten, or otherwise change streets in the city, it may vacate and sell to an abutting owner a part of a street, where the selling and closing of the tract will straighten and make more uniform in width the street from which the tract is taken, without closing or preventing the free use of such street by the public.¹⁵

Fee not in municipality. A conveyance by a municipal corporation of a vacated street, the fee of which is in another, does not transfer title;¹⁶ and the right of an abutting owner to one half of the original street in front of his property cannot be divested by an agreement between the city and a third person giving the third person the right to continue the use of the abandoned street.¹⁷

c. Effect on Easements or Right of Access

Generally, vacation or abandonment of a street does not necessarily extinguish private rights or easements in the street in the absence of statute providing therefor.

While municipal corporations may close public

streets as provided by law or by their charters and extinguish the public right of way, as discussed supra § 1673, it is usually held that the vacation or abandonment of a street does not necessarily extinguish property owners' private rights or easements in the street in the absence of a valid statutory provision for such extinguishment.¹⁸ Accordingly, where such rights or easements survive vacation or abandonment, a person who has title to a vacated portion of the street holds the property subject to such rights or easements;¹⁹ and it has been held that, where a street reverts to the owner of the fee on vacation, it is accompanied by the burden of the abutting property.²⁰

Obviously these rules are not applicable where a private easement distinct from, and independent of, the public right does not exist at the time the street is vacated or abandoned, and in such case the property owner has no such easement after vacation or abandonment.²¹ Moreover, the various jurisdictions are not in agreement with respect to the contemporaneous existence of public and private rights in a street and to the effect of vacation or abandonment.²² In some jurisdictions the view is taken that dedication to a public use renders inconsistent

14. Ind.—East Chicago Co. v. East Chicago, 87 N.E. 17, 171 Ind. 654. 43 C.J. p 1344 note 79.

15. Ga.—Patton v. Rome, 52 S.E. 742, 124 Ga. 525.

16. Ill.—Waterloo Condensed Milk Co. v. Voges, 147 N.E. 373, 316 Ill. 477.

44 C.J. p 920 note 73.

17. Ky.—Henderson Elevator Co. v. City of Henderson, 219 S.W. 809, 187 Ky. 453, 18 A.L.R. 983.

18. Cal.—Cohn v. San Pedro, L. A. & S. L. R. Co., 284 P. 1051, 103 Cal. App. 496.

N.J.—Downs v. Mayor and Common Council of City of South Amboy, 185 A. 15, 116 N.J.Law 511.

Pa.—Stone v. Marks Corporation, 50 Pa. Dist. & Co. 324.

44 C.J. p 920 note 75.

Abutting owner's right of access in general see infra § 1703.

Private easement surviving public easement where way created by sale of land bounded by street or alley see Easements § 40.

Purpose of ordinance vacating a public street was held not shown to be physically to close the street so as to bar use by one having private easement.—Dallas Cotton Mills v. Industrial Co., Tex.Com.App., 298 S.W. 503, rehearing denied 3 S.W.2d 22.

19. Ohio.—Kinnear Mfg. Co. v. Beaty, 52 N.E. 341, 65 Ohio St. 264, 37 Am.S.R. 600.

44 C.J. p 920 note 74.

Railroad easement

On abandonment of street abutting lot condemned for railroad purposes, right of fee owner in street was subject to easement of railroad.—Cohn v. San Pedro, L. A. & S. L. R. Co., 284 P. 1051, 103 Cal.App. 496.

Sufficiency of access; enjoining obstruction

(1) The obstruction of a vacated alley by abutting lot owner to whom vacated portion reverts may be enjoined by an owner of property on the alley not abutting the vacated portion, although owner may have access thereto over the street on which it fronts, but to entitle him to such relief, the inconvenience he suffers must be different in kind from that of general public and not one in degree; and he has no right to enjoin the obstruction of the vacated portion by owners to whom it reverted when he has reasonable access to his property by other streets and alleys, although the distance he may have to travel in some directions may be greater than before the vacation.—Bulen v. Moody, 63 N.E.2d 916, 77 Ohio App. 61.

(2) In determining whether non-abutting property owner still had reasonable access to her property after alley had been vacated by city council, proof that another alley which afforded ingress and egress to and from plaintiff's property was less than twelve feet in width did not establish that such alley was too

narrow to be of any practical value, in view of statute fixing maximum width of vehicles using highway at eight feet.—Bulen v. Moody, supra.

20. Tex.—Texas Co. v. Texarkana Mach. Shops, Civ.App., 1 S.W.2d 928, 931.

"The rights of abutting owners in an existing and used street may not at all events be taken away by the mere passage of an ordinance declaring it vacated. The constitutional objection would be present that the abutter could not be deprived of use of, and access to, the street without a hearing upon the subject, and without compensating him therefor, as in the nature of condemnation."—Texas Co. v. Texarkana Mach. Shops, supra.

21. Tex.—Hartwell Iron Works v. Missouri-Kansas-Texas R. Co. of Texas, Civ.App., 56 S.W.2d 922.

44 C.J. p 920 note 77.

Easement to maintain water pipe

R.I.—Molak v. General Fabrics Corporation, 152 A. 607.

Rights of purchasers by reference to map

Private rights of purchasers of lots by reference to map in designated streets terminate when streets become public streets, and do not revive on subsequent vacation of public right.—Schweitzer v. Adami, 159 A. 529, 110 N.J.Eq. 193, affirmed 106 A. 124, 113 N.J.Eq. 46.

22. N.J.—Dodge v. Pennsylvania R. Co., 11 A. 751, 43 N.J.Eq. 351, affirmed 19 A. 622, 45 N.J.Eq. 366.

the continued and contemporaneous existence of a private right of way independent of the public right, and that there is, therefore, no such private right after vacation.²³ It has been held that a county court as the owner of a bridge rendered useless by the vacation of a street is not an abutting owner entitled to an easement in the land constituting the locus of the vacated street.²⁴

Statutes extinguishing all easements. Under some statutes so providing, all public and private easements are extinguished as a result of the vacation of streets in accordance with the statutes.²⁵

§ 1684. Soil and Other Material

Title to the fee of a street extends to the soil and generally includes material in the street which is a part of, or is attached to, the soil.

Where the abutting owner has title to the street, his ownership extends to the soil,²⁶ and includes, as a general rule, material in the street which is a part of, or is attached to, the soil;²⁷ and this ownership is not divested by the mere act of the municipal corporation and contractors in excavating a street in order to improve it.²⁸ This ownership is subject to the public easement,²⁹ and to the right of the municipality to use the material needed to construct or to repair the street.³⁰ On the other hand, where the municipality or the governing body has acquired the fee of the street, title to the soil and other material is in the municipality³¹ or in the gov-

erning body.³²

The question whether the materials used in paving a sidewalk belong to the municipality or to the abutting owners has been held to be dependent on the facts or circumstances of the particular case.³³ Thus, under certain circumstances, the materials with which sidewalks in municipalities are paved may belong to the abutting owner;³⁴ and, where he owns the fee of the street, it has been held that the materials belong to him.³⁵

Removal and use by municipality. The municipality may remove material in connection with improving or repairing a street;³⁶ and, where it has thus removed material as a necessary part of the improvement, it may use such material for improving or repairing the street,³⁷ even at places other than that from which such material was removed,³⁸ and even though the fee of the street is not in the municipality.³⁹ The municipality may not remove or use the soil or other material except for the purposes indicated above;⁴⁰ it must use only such material as it is reasonable to use;⁴¹ and, according to some decisions, it may remove and use only material, the removal of which is necessarily required in the process of construction or repair.⁴² There is authority for the view that the materials removed may be used in improving or repairing streets other than the street on which the abutting owner affected lives,⁴³ at least if the improvement of the two streets is embraced in one and the same general

23. Mo.—Bailey v. Culver, 84 Mo. 531.

24. W.Va.—Taylor County Ct. v. Grafton, 86 S.E. 924, 77 W.Va. 84.

25. N.Y.—Stirnweis v. Cacioppo, 179 N.E. 262, 258 N.Y. 68, reargument denied 180 N.E. 364, 258 N.Y. 632, motion denied 182 N.E. 165, 259 N.Y. 525—Brzozowski v. Boutinger, 43 N.Y.S.2d 57, 181 Misc. 379—Jablowsky v. State, 38 N.Y.S.2d 679, reversed on other grounds 44 N.Y.S.2d 549, 267 App.Div. 54, affirmed 55 N.E.2d 517, 292 N.Y. 652, motion denied 56 N.E.2d 745, 293 N.Y. 749.

44 C.J. p 920 note 83.

Provision as to other means of access as condition precedent to vacation and extinguishment see supra § 1665.

Transferee of a tax lien for taxes thereafter levied on discontinued street was entitled in foreclosure proceedings to sale free from any claim of easement—Crossin v. Woolf, 169 N.Y.S. 943, 182 App.Div. 607.

26. Minn.—West v. White Bear, 119 N.W. 1064, 107 Minn. 237.

44 C.J. p 920 note 84.

Right to soil and materials in highway see Highways § 138.

27. N.Y.—Deverell v. Bauer, 58 N.Y.S. 413, 41 App.Div. 53.

44 C.J. p 921 note 87.

28. Or.—Sharkey Co. v. Portland, 106 P. 331, 114 P. 933, 58 Or. 353.

29. Minn.—St. Paul v. Bielenberg, 204 N.W. 544, 184 Minn. 72.

44 C.J. p 921 note 89.

30. Minn.—St. Paul v. Bielenberg, supra.

44 C.J. p 921 note 90.

31. Ill.—Lambach v. Town of Mason, 53 N.E.2d 601, 386 Ill. 41.

Okl.—McClain v. Oklahoma City, 133 P.2d 198, 192 Okl. 4.

44 C.J. p 921 note 92.

32. Ky.—Hawesville v. Hawes, 6 Bush 232.

33. Ohio.—Leonard v. Cincinnati, 26 Ohio St. 447.

34. N.Y.—Platt v. Oneonta, 84 N.Y.S. 899, 88 App.Div. 192, affirmed 76 N.E. 1106, 183 N.Y. 516.

Ohio.—Leonard v. Cincinnati, 26 Ohio St. 447.

35. N.Y.—Platt v. Oneonta, 84 N.Y.S. 899, 88 App.Div. 192, affirmed 76 N.E. 1106, 183 N.Y. 516.

76 N.E. 1106, 183 N.Y. 516.

36. Okl.—McClain v. Oklahoma City, 133 P.2d 198, 192 Okl. 4.

44 C.J. p 921 note 97.

37. Minn.—St. Anthony Falls Water Power Co. v. King Wrought Iron Bridge Co., 23 Minn. 186, 23 Am.R. 682.

Tex.—La Grange v. Brown, Civ.App., 161 S.W. 8.

38. Or.—Pearson v. Twohy Bros. Co., 231 P. 129, 113 Or. 280, 36 A.L.R. 1113.

44 C.J. p 921 note 99.

39. Minn.—Rich v. Minneapolis, 35 N.W. 2, 37 Minn. 423, 5 Am.S.R. 861.

44 C.J. p 921 notes 97–99.

40. Minn.—Rich v. Minneapolis, supra.

44 C.J. p 922 note 4.

41. Iowa.—Overman v. May, 35 Iowa 89.

42. Minn.—Rich v. Minneapolis, 35 N.W. 2, 37 Minn. 423, 5 Am.S.R. 861.

44 C.J. p 922 note 6.

43. Ky.—Shelbyville v. Hall, 278 S.W. 987, 210 Ky. 830.

44 C.J. p 922 note 2.

plan of improvement;⁴⁴ but there is also authority to the contrary.⁴⁵ It has been held that a municipality has the right to use old discarded paving material for which other material has been substituted whether the municipality owns the fee or merely an easement in the street,⁴⁶ and even though paid for by taxation on benefits to adjacent property;⁴⁷ but the municipality has no authority to remove paving material located in front of certain property and to use it elsewhere merely because of the abutting owner's failure to pay an assessment therefor, where title to such material is in such owner;⁴⁸ and it has been held that the municipality has no right to remove a plank sidewalk laid at the expense of the municipality on the ground that it is the private property of the municipality, regardless of where the fee of the street resides.⁴⁹ Where the abutting owner does not want the soil necessarily removed in the improvement of a street, the right of the municipality to sell it has been recognized;⁵⁰ and soil and earth taken off for grading may be sold and the value thereof recovered from the purchaser.⁵¹

Removal and use by property owner. The view is usually taken that an abutting owner has no right, notwithstanding his ownership of the fee of the street, to remove the soil or minerals for his own use;⁵² and the possibility of a reverter of the fee does not give the abutting owner the right to take materials from the street.⁵³ However, the abutting owner who owns the fee is entitled to material excavated by the municipality or a contractor, which is not used in the improvement or repair of streets,⁵⁴ provided he makes his claim therefor,⁵⁵ or removes it,⁵⁶ in due season. In some jurisdictions it has been held that the abutting owner has

the right of removal,⁵⁷ provided there is no interference with the public use of the street.⁵⁸ While the view has been taken that the abutting owner cannot compel the municipality to remove surplus materials to a place designated by such owner,⁵⁹ according to some decisions, where an abutting owner is entitled to surplus soil or other material, he is entitled to the delivery of such material at some convenient place;⁶⁰ but the municipality or a contractor cannot be required to deliver the surplus material at some remote or inconvenient place.⁶¹ It has been held that, where the title of the soil of the street is in the municipality, a contract of a lot owner with the municipality by which the latter is to pave the street and to place the material coming out of the street on the property of the lot owner is illegal;⁶² but an agreement by a municipality that a person who owns property on both sides of the street and who also owns the fee of the street can remove the stone in the street and dispose of it is sufficient consideration for the agreement of such person to grade the street to the established grade.⁶³

Removal and use by contractor or other third persons. Where the title to the street is in the abutting owners, the municipal authorities have no power to confer on a third person the right to take soil from the street for his use against the objections of the abutting owners.⁶⁴ Similarly, a third person has no right to take minerals from beneath a street, where the title to the street is in the municipality, without the consent of the municipality.⁶⁵ The right of a contractor to remove materials which he has used in improving a street has been upheld where he has not been paid for such improvement, and they may be removed without material injury to the street and

44. Ind.—Aurora v. Fox, 78 Ind. 1. 44 C.J. p 921 note 2 [c].

45. Ga.—Macon v. Hill, 58 Ga. 595—Smith v. Rome, 19 Ga. 89, 63 Am.D. 298.

46. Ark.—Williams v. Ft. Smith, 263 S.W. 397, 165 Ark. 215.

Ky.—Snyder v. Lexington, 49 S.W. 765, 20 Ky.L. 1562.

47. Ark.—Williams v. Ft. Smith, 263 S.W. 397, 165 Ark. 215.

48. N.Y.—Platt v. Oneonta, 84 N.Y. S. 699, 88 App.Div. 192, affirmed 76 N.E. 1106, 183 N.Y. 516.

49. Mich.—Rogers v. Randall, 29 Mich. 41.

50. Mich.—Griswold v. Bay City, 35 Mich. 452.

51. Mich.—Griswold v. Bay City, supra.

52. Ill.—Palatine v. Kreuger, 12 N. E. 75, 121 Ill. 72. 44 C.J. p 922 note 12.

53. Ill.—Matthiessen, etc., Zinc Co. v. La Salle, 2 N.E. 406, 8 N.E. 81, 117 Ill. 411.

54. Or.—Sharkey Co. v. Portland, 106 P. 331, 114 P. 933, 58 Or. 353. 44 C.J. p 922 note 14.

55. Or.—Sharkey Co. v. Portland, supra.

56. Ind.—Haas v. Evansville, 50 N. E. 46, 51 N.E. 105, 20 Ind.App. 482.

57. Pa.—Scranton v. People's Coal Co., 100 A. 818, 256 Pa. 332.

58. Pa.—Scranton v. People's Coal Co., supra. 44 C.J. p 922 note 18.

Right of surface support for street Where lessor before leasing coal to coal company had divested himself of that section of surface occupied by street, which subsequently became a state highway, with the surface went the right to have it undamaged by removal of adjacent coal.

—In re Appropriation and Taking of Lands of Lehigh Val. Coal Co., 40 A. 2d 399, 351 Pa. 108.

59. Ind.—Haas v. Evansville, 50 N. E. 46, 51 N.E. 105, 20 Ind.App. 482.

60. Or.—Adams v. Harmon, 264 P. 356, 124 Or. 173. 44 C.J. p 922 note 20.

61. Ohio.—Dayton v. Haines, 12 Ohio App. 439, 31 O.C.A. 17. Or.—Sharkey Co. v. Portland, 106 P. 331, 114 P. 933, 58 Or. 353.

62. Ga.—Chatham Land, etc., Co. v. Savannah, 129 S.E. 18, 34 Ga.App. 196.

63. Minn.—St. Paul v. Bielenberg, 204 N.W. 544, 164 Minn. 72. 44 C.J. p 922 note 23.

64. Minn.—Althen v. Kelly, 20 N.W. 183, 32 Minn. 280.

65. Ill.—Union Coal Co. v. La Salle, 26 N.E. 506, 136 Ill. 119, 12 L.R.A. 326.

to the abutting property owner.⁶⁶ Moreover, a contractor may make a specified use of material taken from the street where the municipality is authorized so to use the material;⁶⁷ but the contractor may not make such use of material as the municipality is not authorized to make.⁶⁸ The contractor may make a binding agreement with the abutting owner to pay for material removed from the street.⁶⁹

Remedies. Where an abutting owner is the owner of the fee of a street, he may sue for a wrongful injury to, or removal of, the soil or other material.⁷⁰ Moreover, where it is the duty of a property owner to lay a sidewalk and to maintain it in good condition, he has a cause of action against the person through whose negligence the sidewalk is injured;⁷¹ and it has been held that, regardless of who has the fee of the street, an abutting owner may have such an interest in a sidewalk as will support an action for its wrongful removal.⁷² The right of action may be enforced against the municipality where it is chargeable with the wrongful act;⁷³ but the abutting owner is not entitled to restrain the municipal authorities from collecting an assessment for an improvement beyond the actual expense of constructing such improvement after deducting the value of material which the contractor had taken and appropriated to his own use.⁷⁴

Actions by the municipality⁷⁵ or by the governing body,⁷⁶ based on the wrongful removal of materials from the street, have been upheld where title to the street is in the municipality or in the governing body. An injunction will not issue on a bill in equity brought by a municipality to enjoin the removal

of minerals underlying a street on the ground that such removal would cause subsidence of the surface, to the injury of the street and the peril of the traveling public, where it appears that the surface had been sold without the right of support and that the possibility of injury is very remote.⁷⁷

§ 1685. Trees

Trees in the street belong to the owner of the fee of the street, and an action for damages for their destruction may be maintained; but the interest of an abutting owner in trees is subservient to the public right.

Trees in the street belong to the abutting owner where he is the owner of the fee,⁷⁸ unless, according to some decisions, they have been planted by the public authorities.⁷⁹ Similarly, where the municipality owns the fee of a street, it is ordinarily the owner of trees therein.⁸⁰ The reservation in a deed of land for highway purposes of the trees on such land has been given effect.⁸¹

As a general rule the right of an abutting owner to plant and maintain trees in front of his land within the street is recognized where there is no interference with the public use of the street,⁸² even though such owner is not the owner of the fee of the street.⁸³ It has been held that an abutting owner does not have a true servitude in shade trees planted between the sidewalk and the curb in front of his property, but has a right in the nature of an easement.⁸⁴ In any event, his title to, or interest in, trees in the street is subservient to the public right,⁸⁵ and to the power of the municipality to regulate and control such trees, as discussed *infra* §

66. Iowa.—Snouffer v. Tipton, 142 N.W. 97, 161 Iowa 223, L.R.A.1915B 173.

44 C.J. p 922 note 26.

67. Mich.—Bissell v. Collins, 28 Mich. 277, 15 Am.R. 217.

68. Or.—Sharkey Co. v. Portland, 106 P. 331, 114 P. 933, 58 Or. 353. 44 C.J. p 922 note 28.

69. Minn.—St. Anthony Falls Water Power Co. v. King Wrought Iron Bridge Co., 23 Minn. 186, 23 Am.R. 682.

70. Or.—Adams v. Harmon, 264 P. 356, 124 Or. 173. 44 C.J. p 922 note 30.

71. N.Y.—Parish v. Baird, 54 N.E. 724, 160 N.Y. 302—Fix v. Bellow-Merritt Co., 123 N.Y.S. 248, 138 App.Div. 579. 44 C.J. p 923 note 31.

72. Mich.—Rogers v. Randall, 29 Mich. 41.

73. Mich.—Rogers v. Randall, *supra*.

Minn.—Pederson v. Rushford, 177 N.W. 943, 146 Minn. 133.

74. N.Y.—Fisher v. Rochester, 6 Lans. 225.

75. Ill.—Union Coal Co. v. La Salle, 26 N.E. 506, 136 Ill. 119, 12 L.R.A. 326.

Iowa.—Des Moines v. Hall, 24 Iowa 234.

76. Ky.—Hawesville v. Hawes, 6 Bush 232.

77. Pa.—Scranton v. Scranton Coal Co., 100 A. 813, 256 Pa. 322.

78. Ga.—Mozley v. City of Marietta, 180 S.E. 122, 180 Ga. 590. 44 C.J. p 923 note 38.

Municipal control of, or regulation as to, trees in street see *infra* § 1693.

79. N.J.—Avis v. Vineland, 38 A. 1032, 56 N.J.Law 474, 23 L.R.A. 685.

44 C.J. p 923 note 39.

80. Okl.—Norman Milling, etc., Co. v. Bethurem, 189 P. 830, 41 Okl. 715, 51 L.R.A.N.S., 1082.

81. Cal.—Hill v. Oxnard, 189 P. 825, 46 Cal.App. 624.

44 C.J. p 923 note 44.

82. Wash.—Shaw v. City of Yakima, 48 P.2d 630, 183 Wash. 200. 44 C.J. p 923 note 45.

83. N.Y.—Adams v. Syracuse Lighting Co., 121 N.Y.S. 762, 137 App. Div. 449.

44 C.J. p 923 note 46.

84. La.—Kendall v. People's Gas & Fuel Co., App., 158 So. 254.

Under statute so providing, abutting owners have an easement or interest in trees on a public highway.—Broome County v. McKune, 45 N.Y.S.2d 71, 267 App.Div. 18.

85. Del.—Lynch v. Town Council of Georgetown, 180 A. 594, 21 Del.Ch. 25.

Ga.—Mozley v. City of Marietta, 180 S.E. 122, 180 Ga. 590.

La.—Kendall v. People's Gas & Fuel Co., App., 158 So. 254.

Wash.—Shaw v. City of Yakima, 48 P.2d 630, 183 Wash. 200.

44 C.J. p 923 note 47.

1693. Trees on a sidewalk may be an unlawful obstruction,⁸⁶ but shade trees are not a nuisance *per se*, and only become such when they obstruct or interfere with the use of the highway or street.⁸⁷

An abutting owner who owns trees in the street may use whatever force is necessary to protect them from injury.⁸⁸ Ordinarily, the abutting owner has the right to remove a tree at his pleasure,⁸⁹ at least, where, the abutting owner owns the fee of the street,⁹⁰ provided he does not thereby violate a statute or ordinance forbidding or regulating such removal;⁹¹ but it has also been held that the action of an abutting owner in cutting down trees in front of his property constitutes a trespass and wanton disregard of the proprietary rights of the municipality and the public,⁹² and renders him liable to the municipality in damages.⁹³ There is a duty of mutual accommodation between an abutting owner who has an interest in trees in the street and one who is authorized to string wires in the same street.⁹⁴

Liability of abutting owner. An abutting owner who owns a tree in the street may be liable for injuries resulting from his failure properly to maintain it;⁹⁵ but in the absence of a showing that the

abutting owner planted the tree, or that it was his duty to maintain it, he cannot be held liable.⁹⁶

Remedies of abutting owners. Abutting owners who have a property right in trees in a street or in maintaining them,⁹⁷ as where they own the fee of the street,⁹⁸ or, although they do not own the fee of the street, have, in the exercise of a right, planted or maintained the trees,⁹⁹ or have the right of enjoyment of the trees,¹ have a right of action for a wrongful injury to, or the negligent or unnecessary destruction of, such trees. The right to enforce by action the liability of the municipality where it is chargeable with the wrongful act has been recognized or upheld;² and the municipality and a contractor who is doing work for the municipality may be jointly liable.³ Public utility or service companies which wrongfully injure or destroy trees are liable for the damages inflicted;⁴ but a public service corporation may, in case of necessity, trim and cut trees in the street without liability to abutting owners.⁵

Where the abutting owner has a property interest in the trees, he may obtain an injunction against one who threatens wrongful destruction or injury,⁶ or against the municipality if it threatens to re-

86. Wis.—Chase v. Oshkosh, 51 N. W. 560, 81 Wis. 313, 29 Am.S.R. 898, 15 L.R.A. 553.
44 C.J. p 923 note 49.

87. Md.—Frostburg v. Wineland, 56 A. 811, 98 Md. 239, 103 Am.S.R. 399, 64 L.R.A. 627, 1 Ann.Cas. 783.
44 C.J. p 923 note 50.

88. N.H.—Graves v. Shattuck, 35 N. H. 257, 69 Am.D. 536.

89. Iowa.—Armstrong v. Waffle, 236 N.W. 507, 212 Iowa 385.

Use of street for removal

Owner of tree standing in public parking had right to use street in any lawful manner for removal of tree.—Armstrong v. Waffle, *supra*.

90. N.H.—City of Laconia v. Morin, 30 A.2d 479, 92 N.H. 814.
44 C.J. p 923 note 53.

91. N.Y.—Village of Cattaraugus v. Johnson, 249 N.Y.S. 327, 189 Misc. 368, affirmed 250 N.Y.S. 945, 233 App.Div. 799.

Statute held inapplicable to village street

Statutes relating to cutting and destruction of trees within bounds of state highway were inapplicable to village streets.—Village of Cattaraugus v. Johnson, *supra*.

92. La.—City of New Orleans v. Shreveport Oil Co., 128 So. 35, 170 La. 432.

93. La.—City of New Orleans v. Shreveport Oil Co., *supra*.

94. Okl.—Norman Milling, etc., Co. v. Bethurem, 139 P. 830, 41 Okl. 735, 51 L.R.A.N.S., 1082.
44 C.J. p 924 note 54.

95. N.J.—Weller v. McCormick, 19 A. 1101, 52 N.J.Law 470, 8 L.R.A. 798.

96. N.J.—Weller v. McCormick, 1 A. 516, 47 N.J.Law 397, 54 Am.R. 175.

97. N.H.—Darling v. Newport Electric Light Co., 69 A. 885, 74 N.H. 515.
44 C.J. p 924 note 57.

98. N.Y.—McCruden v. Rochester R. Co., 25 N.Y.S. 114, 35 Misc. 59, affirmed 28 N.Y.S. 1135, 77 Hun 609, affirmed 45 N.E. 1133, 151 N.Y. 623.
44 C.J. p 924 note 58.

99. Okl.—Norman Milling, etc., Co. v. Bethurem, 139 P. 830, 41 Okl. 735, 51 L.R.A.N.S., 1082.
44 C.J. p 924 note 59.

1. Del.—Lynch v. Town Council of Georgetown, 180 A. 594, 21 Del.Ch. 25.

Ill.—Murtaugh v. Chicago Motor Coach Co., 269 Ill.App. 290.

La.—Kendall v. People's Gas & Fuel Co., App., 158 So. 254.

N.Y.—Broome County v. McKune, 45 N.Y.S.2d 71, 267 App.Div. 13.

Vt.—Skinner v. Buchanan, 142 A. 72, 101 Vt. 159.

Cutting trees to facilitate moving of house

Cutting trees along street to facili-

itate moving house was an unreasonable use of street, entitling abutting owner to damages.—White v. Berry, 225 N.Y.S. 156, 130 Misc. 639, affirmed 226 N.Y.S. 923, 222 App.Div. 841.

2. Minn.—Pederson v. Rushford, 177 N.W. 943, 146 Minn. 133.
44 C.J. p 924 note 60.

Removal without consent

Removal of trees by municipality on land between sidewalk and street owned by plaintiff in fee simple, without plaintiff's consent, created prima facie right of action for damages.—Baldwin v. City of Dawson, 151 S.E. 825, 41 Ga.App. 90.

3. Ohio.—Massillon v. Huff, 14 Ohio Cir.Ct., N.S., 193, 32 Ohio Cir. Ct. 333.
44 C.J. p 924 note 61.

4. N.Y.—Donahue v. Keystone Gas Co., 73 N.E. 1108, 181 N.Y. 313, 106 Am.S.R. 549, 70 L.R.A. 761.
44 C.J. p 924 note 62.

Ordinance held immaterial

Ill.—Murtaugh v. Chicago Motor Coach Co., 269 Ill.App. 290.

5. N.Y.—White v. Berry, 225 N.Y.S. 156, 130 Misc. 639, affirmed 226 N.Y.S. 923, 222 App.Div. 841.

6. N.Y.—Kingsley v. Pounds, 160 N.Y.S. 228, 36 Misc. 27.
44 C.J. p 925 note 64.

move, destroy, or injure such trees in an oppressive exercise of its power over streets;⁷ but an injunction will not lie in respect of acts which are within the discretion of the municipal authorities.⁸

Rules governing proceedings in civil actions generally have been applied in actions by abutting owners relating to trees in the street.⁹ Thus, the burden of proving the facts on which his cause of action depends is on plaintiff.¹⁰ The facts may be such as to permit the recovery of punitive damag-

es,¹¹ and by virtue of certain statutory provisions treble damages may be recovered.¹²

Remedies of municipality. The municipality has such an interest in trees in a street in front of property owned by the municipality that it may maintain an action for damages for their destruction.¹³ However, where a city is unable to show title to a tree in a highway easement superior to that of the abutting owner, it cannot maintain trespass against such owner, or one acting for the owner, for the removal of the tree.¹⁴

8. POWER TO CONTROL AND REGULATE

§ 1686. Power of State

The legislature, acting for the state, has primary and plenary power to control and regulate streets, and it may delegate such power to a municipal corporation.

Within federal and state constitutional limita-

tions, the legislature as representative of the state has primary and plenary power to control and regulate streets in any way not inconsistent with their proper use.¹⁵ More specifically, it has been held that city streets are public highways, and as such

7. Mo.—Webb v. Strobach, 127 S. W. 680, 143 Mo.App. 459.
44 C.J. p 925 note 65.

8. Cal.—Vanderhurst v. Tholcke, 45 P. 266, 113 Cal. 147, 35 L.R.A. 267.
N.C.—Rosenthal v. Goldsboro, 62 S. E. 905, 149 N.C. 128, 20 L.R.A., N. S., 809, 16 Ann.Cas. 639.

9. Cal.—Altpeter v. Postal Tel.-Cable Co., 164 P. 35, 32 Cal.App. 738.

10. Cal.—Altpeter v. Postal Tel.-Cable Co., supra.
44 C.J. p 925 note 67.

Burden of rebutting presumption

Property owners were not entitled to an injunction, restraining borough from removing shade trees growing in sidewalk area of street in front of plaintiffs' property, in the absence of showing to overcome the presumption that borough officials acted lawfully and in the exercise of a sound discretion in ordering removal of such trees in order that grade of sidewalk area might be lowered as a part of borough's program of street improvement.—Shuck v. Borough of Ligonier, 22 A.2d 735, 343 Pa. 265.

11. N.C.—Wheeler v. Norfolk-Carolina Tel., etc., Co., 89 S.E. 793, 172 N.C. 9.
44 C.J. p 925 note 68.

12. N.Y.—Smith v. Commercial Constr. Co., 130 N.Y.S. 403, 145 App.Div. 603.
Wash.—Simons v. Wilson, 112 P. 653, 61 Wash. 574.

13. Mass.—Salem v. Salem Gas Light Co., 135 N.E. 573, 241 Mass. 438.

14. N.H.—City of Laconia v. Morin, 30 A.2d 479, 92 N.H. 314.

15. Ala.—Chamberlain v. Board of Com'rs of City of Mobile, 11 So.2d 724, 243 Ala. 662.—City of Birmingham v. Hood-McPherson Realty

Co., 172 So. 114, 233 Ala. 352, 108 A.L.R. 1140.

Ariz.—Keller v. State, 47 P.2d 442, 46 Ariz. 106.—Clayton v. State, 297 P. 1037, 38 Ariz. 135, rehearing denied 300 P. 1010, 38 Ariz. 466, followed in Price v. State, 3 P.2d 1114, 39 Ariz. 59.

Cal.—Key System Transit Co. v. City of Oakland, 13 P.2d 979, 124 Cal. App. 733.

Fla.—Roney Inv. Co. v. City of Miami Beach, 174 So. 26, 127 Fla. 773.

Ga.—Mayor and Aldermen of City of Savannah v. V. C. Ellington Co., 170 S.E. 38, 177 Ga. 149, followed in Mayor and Aldermen of City of Savannah v. Hood Coach Lines, 170 S.E. 196, 177 Ga. 315.

Ill.—People ex rel. Hill v. Eakin, 50 N.E.2d 474, 383 Ill. 383.—Ferguson Coal Co. v. Thompson, 174 N.E. 896, 343 Ill. 20.—Nielsen v. City of Chicago, 161 N.E. 768, 330 Ill. 301.—Wilmot v. City of Chicago, 160 N.E. 206, 328 Ill. 552, 62 A.L.R. 394.—People v. Crowe, 158 N.E. 451, 327 Ill. 106.

Ind.—Baldwin v. State, 141 N.E. 343, 194 Ind. 303.—Town of Argos v. Harley, 49 N.E.2d 552, 114 Ind.App. 290.

Ky.—City of Covington v. Averbeck, 50 S.W.2d 50, 244 Ky. 117.

La.—Placid Oil Co. v. Hebert, 194 So. 893, 194 La. 788.

Mass.—City of Boston v. A. W. Perry, Inc., 22 N.E.2d 627, 304 Mass. 18.

Miss.—Village of Ridgeland v. Madison County, 122 So. 753, 154 Miss. 613.

N.Y.—Decker v. Goddard, 249 N.Y.S. 381, 139 Misc. 824, reversed on other grounds 251 N.Y.S. 440, 233 App. Div. 139.—Bachmann v. New York Tunnel Authority, 47 N.Y.S.2d 767.

N.C.—Clayton v. Liggett & Meyers

Tobacco Co., 35 S.E.2d 691, 225 N.C. 563.—Parsons v. Wright, 27 S. E.2d 534, 223 N.C. 520.

Okl.—Continental Casualty Co. v. Lolley, 140 P.2d 1014, 193 Okl. 22.—Martin v. Rowlett, 93 P.2d 1090, 185 Okl. 431.

Or.—State v. Phipps, 299 P. 1009, 136 Or. 454.

Pa.—Maurer v. Boardman, 7 A.2d 466, 336 Pa. 17, affirmed Maurer v. Hamilton, 60 S.Ct. 726, 309 U.S. 598, 84 L.Ed. 969, 135 A.L.R. 1347.—Westmoreland Chemical & Color Co. v. Public Service Commission, 144 A. 407, 294 Pa. 451, followed in 144 A. 412, 293 Pa. 333.

Tenn.—City of Chattanooga v. Tennessee Electric Power Co., 112 S. W.2d 385, 172 Tenn. 524.—Lewis v. Nashville Gas & Heating Co., 40 S. W.2d 409, 162 Tenn. 268.

Tex.—City of San Angelo v. Sitas, 183 S.W.2d 417, 143 Tex. 154.—Fort Worth & D. C. Ry. Co. v. Ammons, Civ.App., 215 S.W.2d 407.

Vt.—Valcour v. Village of Morrisville, 184 A. 881, 108 Vt. 242.

Va.—Nusbaum v. City of Norfolk, 145 S.E. 257, 151 Va. 801.—Price v. Travis, 140 S.E. 644, 149 Va. 536, 56 A.L.R. 209.

Wyo.—Corpus Juris cited in Western Auto Transports v. City of Cheyenne, 120 P.2d 690, 593, 57 Wyo. 351.

12 C.J. p 755 note 73—43 C.J. p 285 note 11—44 C.J. p 925 note 72.

Control and regulation of:

Highways see Highways § 232.
Motor vehicles see Motor Vehicles §§ 14–56.

Use of street as highway see infra §§ 1761–1774.

Exclusive jurisdiction

Legislature has exclusive jurisdiction to lodge control of roads of state in municipalities and to pre-

subject to the primary control of the state legislature;¹⁶ and certainly city streets laid out under legislative enactment are public highways belonging to the state, and in the absence of constitutional limitations may be controlled directly by the state.¹⁷ This power of the legislature has been classified as part of the police power.¹⁸ The state may exercise its paramount authority over the streets whenever it sees fit, even though it has by silence acquiesced in municipal regulation thereof;¹⁹ but the state may be without the power of control where it has conferred such power on the municipalities.²⁰ The rule applies to a vehicular bridge²¹ or tunnel²² where such thoroughfare constitutes a part or extension

of the street or highway.

Delegation of power. Within the limitations imposed by the state constitution, the legislature may delegate to a municipal corporation the control and regulation of its streets.²³

§ 1687. Power of Municipality

Ordinarily, under a grant of power from the state, a municipal corporation has power to control and regulate streets and highways within its limits, and to prescribe particular regulations and conditions governing their use.

While strictly speaking, a municipal corporation has no original or inherent power to control and reg-

scribe rules as to exercise of such control.—*Larson v. New England Tel. & Tel. Co.*, 44 A.2d 1, 141 Me. 326.

Power held not withdrawn

Home rule amendment of constitution does not withdraw from legislature power to enact general laws, or laws relating to municipal highways and affecting their public use.—*City of Portland v. Pacific Telephone & Telegraph Co.*, D.C.Or., 5 F. Supp. 79.

Control as residing in people

Control of state highways, including streets and alleys in incorporated cities, resides primarily in people, and may be exercised through initiative amendment to constitution or agency of state legislature.—*City of Portland v. Pacific Telephone & Telegraph Co.*, supra.

Aesthetic considerations

Legislature has power to regulate aesthetic considerations regarding public property.—*Walnut & Quince Streets Corporation v. Mills*, 151 A. 29, 303 Pa. 25, appeal dismissed 52 S.Ct. 16, 284 U.S. 573, 76 L.Ed. 498.

16. *Tex.*—*Fletcher v. Bordelon*, Civ. App., 56 S.W.2d 313, error refused.

Regulations of highway code apply to city streets; since "highway," as defined in highway code, includes streets and public ways of city or town.—*Clayton v. State*, 297 P. 1037, 38 Ariz. 135, rehearing denied 300 P. 1010, 38 Ariz. 466, followed in *Price v. State*, 3 P.2d 1114, 39 Ariz. 59.

17. *Ind.*—*Vincennes v. Vincennes Tract. Co.*, 120 N.E. 27, 187 Ind. 498.

Wyo.—*Corpus Juris cited in Western Auto Transports v. City of Cheyenne*, 120 P.2d 590, 593, 57 Wyo. 351.

18. *Md.*—*Lee v. Leitch*, 101 A. 716, 131 Md. 30—*Lake Roland El. R. Co. v. Baltimore*, 26 A. 510, 77 Md. 352, 20 L.R.A. 126.

19. *Ga.*—*Mayor and Aldermen of City of Savannah v. V. C. Ellington*

Co., 170 S.E. 38, 177 Ga. 149, followed in *Mayor and Aldermen of City of Savannah v. Hood Coach Lines*, 170 S.E. 196, 177 Ga. 315.

Conflicting powers between state and municipality see *infra* § 1689.

20. *Cal.*—*Key System Transit Co. v. City of Oakland*, 13 P.2d 979, 124 Cal App 733.

Ind.—*Baldwin v. State*, 141 N.E. 343, 194 Ind. 303.

21. *Ga.*—*Floyd County v. Rome St. R. Co.*, 3 S.E. 3, 77 Ga. 614.
44 C.J. p 926 note 73

Control and regulation of bridges generally see *Bridges* § 48.

22. *Ala.*—*Chamberlain v. Board of Com'rs of City of Mobile*, 11 So.2d 724, 243 Ala. 662.

N.J.—*New Jersey Interstate Bridge, etc. Commission v. Jersey City*, 118 A. 264, 93 N.J.Eq. 550.

Completely subject to state legislation

A city which constructed a tunnel after issuing revenue anticipation bonds for financing in part the construction of the tunnel acquired nothing by the tunnel which was not subject to state legislation, except as limited by the constitution.—*Chamberlain v. Board of Com'rs of City of Mobile*, 11 So.2d 724, 243 Ala. 662.

23. *U.S.*—*City of San Antonio v. Rubin*, C.C.A.Tex., 42 F.2d 107—*City of Portland v. Pacific Telephone & Telegraph Co.*, D.C.Or., 5 F.Supp. 79.

Ariz.—*Keller v. State*, 47 P.2d 442, 46 Ariz. 106—*Clayton v. State*, 297 P. 1037, 38 Ariz. 135, rehearing denied 300 P. 1010, 38 Ariz. 466, followed in *Price v. State*, 3 P.2d 1114, 39 Ariz. 59.

Ark.—*Merchants' Transfer & Warehouse Co. v. Gates*, 21 S.W.2d 406, 180 Ark. 96.

Ill.—*Ferguson Coal Co. v. Thompson*, 174 N.E. 896, 343 Ill. 20.

Ind.—*House-Wives League v. City of Indianapolis*, 185 N.E. 511, 204

Ind. 685—*Town of Argos v. Harley*, 49 N.E.2d 552, 114 Ind.App. 290.

La.—*Placid Oil Co. v. Hebert*, 194 So. 893, 194 La. 788.

Mass.—*City of Boston v. A. W. Perry, Inc.*, 22 N.E.2d 627, 304 Mass. 18.

Neb.—*State v. City of North Platte*, 233 N.W. 4, 120 Neb. 413.

N.Y.—*Decker v. Goddard*, 249 N.Y.S. 381, 139 Misc. 824, reversed on other grounds 251 N.Y.S. 440, 233 App Div. 139.

N.C.—*Parsons v. Wright*, 27 S.E.2d 534, 223 N.C. 520.

Okl.—*Continental Casualty Co. v. Lolley*, 140 P.2d 1014, 193 Okl. 22—*Martin v. Rowlett*, 93 P.2d 1090, 185 Okl. 431.

Pa.—*Walnut & Quince Streets Corporation v. Mills*, 154 A. 29, 303 Pa. 25, appeal dismissed 52 S.Ct. 16, 284 U.S. 573, 76 L.Ed. 498.

Tenn.—*City of Chattanooga v. Tennessee Electric Power Co.*, 112 S.W.2d 385, 172 Tenn. 524—*Lewis v. Nashville Gas & Heating Co.*, 40 S.W.2d 409, 162 Tenn. 268.

Tex.—*City of San Angelo v. Sitas*, 183 S.W.2d 417, 143 Tex. 154.

Wyo.—*Corpus Juris cited in Western Auto Transports v. City of Cheyenne*, 120 P.2d 590, 593, 57 Wyo. 351.

44 C.J. p 926 note 78.

Constitutional power of state to delegate control of streets to municipalities see *Constitutional Law* § 140 b (2).

Boards or agencies

Legislature may delegate power of control over its streets to municipal corporations or to governing body in a city, town, or village, or to a particular municipal board, or other agencies.—*Clayton v. Liggett & Myers Tobacco Co.*, 35 S.E.2d 691, 225 N.C. 563.

Building lines

Legislature may under police power empower city to establish building lines.—*Nusbaum v. City of Norfolk*, 145 S.E. 257, 151 Va. 801.

ulate its streets,²⁴ ordinarily, under statutory, charter, or constitutional provisions, a municipality has power to control and regulate streets and highways within its limits,²⁵ for the purpose of preserving

them and promoting their intended use,²⁶ and to prescribe particular regulations and conditions governing their use.²⁷ This authority is not limited by the habendum clause of a deed conveying land for

24. U.S.—Jefferson County, Tenn., v. Tennessee Valley Authority, C.C.A. Tenn., 146 F.2d 564, certiorari denied 65 S.Ct. 1016, 324 U.S. 871, 89 L.Ed. 1425, rehearing denied 65 S.Ct. 1024, 324 U.S. 891, 89 L.Ed. 1438.

Ind.—Town of Argos v. Harley, 49 N.E.2d 552, 114 Ind.App. 290

N.Y.—Tilton v. City of Utica, 60 N.Y. S.2d 249.

44 C.J. p 926 note 81.

25. Ala.—City of Birmingham v. Holt, 194 So. 538, 239 Ala. 248—City of Birmingham v. Hood-McPherson Realty Co., 172 So. 114, 233 Ala. 352, 108 A.L.R. 1140—Birmingham Electric Co. v. Allen, 117 So. 199, 217 Ala. 607.

Ariz.—Hughes v. City of Phoenix, 170 P.2d 297, 64 Ariz. 331—City of Phoenix v. Sun Valley Bus Lines, 170 P.2d 289, 64 Ariz. 319.

Ark.—City of Dumas v. Edington, 147 S.W.2d 997, 201 Ark. 1021—City of Ft. Smith v. Van Zandt, 122 S.W.2d 187, 197 Ark. 91—State v. City of Marianna, 39 S.W.2d 301, 183 Ark. 927.

Idaho.—Yellow Cab Taxi Service v. City of Twin Falls, 190 P.2d 681, 68 Idaho 145.

Ill.—City of Geneseo v. Illinois Northern Utilities Co., 39 N.E.2d 26, 378 Ill. 506, certiorari denied Illinois Northern Utility Co. v. City of Geneseo, Ill., 62 S.Ct. 1046, 316 U.S. 670, 86 L.Ed. 1746—Village of Heyworth v. Central Illinois Electric & Gas Co., 39 N.E.2d 26, 378 Ill. 506, certiorari denied Central Illinois Electric & Gas Co. v. Village of Heyworth, Ill., 62 S.Ct. 1046, 316 U.S. 670, 86 L.Ed. 1746—Huyler v. City of Chicago, 62 N.E.2d 574, 326 Ill.App. 555.

Ind.—House-Wives League v. City of Indianapolis, 185 N.E. 511, 204 Ind. 685—Town of Argos v. Harley, 49 N.E.2d 552, 114 Ind.App. 290.

Ky.—Newport v. Dorsel Co., 136 S.W.2d 11, 281 Ky. 372—City of Fulton v. Penny, 116 S.W.2d 963, 273 Ky. 465.

Mich.—Theisen v. City of Detroit, 237 N.W. 46, 254 Mich. 338—Village of Grosse Pointe Shores v. Ayres, 235 N.W. 829, 354 Mich. 58.

Minn.—State v. Palmer, 3 N.W.2d 865, 212 Minn. 388.

Miss.—City of Ellisville v. State Highway Commission, 191 So. 274, 186 Miss. 473.

Mont.—State ex rel. City of Butte v. Healy, 70 P.2d 437, 105 Mont. 227.

Neb.—State v. City of North Platte, 233 N.W. 4, 120 Neb. 413.

N.J.—Junction Water Co. v. Riddle, 155 A. 887, 108 N.J.Eq. 523.

N.Y.—Good Humor Corporation v. City of New York, 49 N.E.2d 153, 290 N.Y. 312—City of New Rochelle, on Complaint of Conlon, v. Burke, 43 N.E.2d 463, 288 N.Y. 406—People, on Complaint of Crennan, v. Patrick, 14 N.Y.S.2d 249, 171 Misc. 705—Tilton v. City of Utica, 60 N.Y.S.2d 249.

N.C.—Parsons v. Wright, 27 S.E.2d 534, 223 N.C. 520.

Okl.—Palace Garage v. Oklahoma City, 268 P. 240, 131 Okl. 122.

Pa.—Shuck v. Borough of Ligonier, 22 A.2d 735, 343 Pa. 265—Philadelphia Electric Co. v. City of Philadelphia, 152 A. 23, 301 Pa. 291, dismissed 51 S.Ct. 349, 283 U.S. 786, 75 L.Ed. 1414—Hindin v. Samuel, 45 A.2d 370, 158 Pa.Super. 539—Owl Protective Co. v. Public Service Commission of Pennsylvania, 187 A. 229, 123 Pa.Super. 382—Miller v. Borough of New Oxford, 165 A. 766, 109 Pa.Super. 85—Aranson v. City of Philadelphia, 16 Pa.Dist. & Co. 427—Commonwealth v. Roth, 54 Pa.Dist. & Co. 308, 21 Lehigh Co. L.J. 229.

S.C.—Southern Fruit Co. v. Porter, 199 S.E. 537, 188 S.C. 422—Plunkett v. City of Aiken, 156 S.E. 245, 159 S.C. 97—Seaboard Air Line Ry. Co. v. McFadden, 152 S.E. 809, 156 S.C. 147.

Tenn.—City of Chattanooga v. Tennessee Electric Power Co., 112 S.W.2d 385, 172 Tenn. 524—Lewis v. Nashville Gas & Heating Co., 40 S.W.2d 409, 162 Tenn. 268.

Tex.—City of San Angelo v. Sitas, 183 S.W.2d 417, 143 Tex. 154—City of El Paso v. Mendoza, Civ. App., 191 S.W.2d 102, error refused for want of merit—Broussard v. L. Cartwright Realty Co., Civ.App., 179 S.W.2d 777, error refused—City of Dallas v. Harris, Civ.App., 157 S.W.2d 710, error refused—Schoenmann v. Otey, Civ.App., 128 S.W.2d 681—Uvalde Const. Co. v. City of Dallas, Civ.App., 99 S.W.2d 644, error refused—Dallas Taxicab Co. v. City of Dallas, Civ. App., 68 S.W.2d 359—City of Gainesville v. Amarose, Civ.App., 67 S.W.2d 1054, error dismissed—Duvall v. City of Dallas, Civ.App., 27 S.W.2d 1105—Ex parte Smythe, 28 S.W.2d 161, 116 Tex.Cr. 146.

Va.—Price v. Travis, 140 S.E. 644, 149 Va. 536, 56 A.L.R. 209.

Wash.—Burkhard v. Bowen, 203 P. 2d 361.

44 C.J. p 926 note 82.

Extensive and drastic police powers

Municipalities possess extensive and drastic police powers with respect to care, supervision, and control of streets.—Alexander Co. v. City of Owatonna, 34 N.W.2d 244, 222 Minn. 312.

Governmental or proprietary function

(1) The exercise of control over streets and similar facilities is in the discharge of purely governmental functions.

Ky.—City of Covington v. Averbeck, 50 S.W.2d 50, 244 Ky. 117.

Ohio.—Harbor Land Co. v. Village of Fairport, App., 49 N.E.2d 194.

(2) In keeping its streets clean and sanitary, a city is exercising governmental functions.—City of Springfield v. Clouse, 206 S.W.2d 539, 356 Mo. 1239.

(3) Municipality's exercise of proprietary powers over streets is public in its nature.—Interborough Rapid Transit Co. v. Gilchrist, D.C.N.Y., 26 F.2d 912, reversed on other grounds Gilchrist v. Interborough Rapid Transit Co., 49 S.Ct. 282, 279 U.S. 159, 73 L.Ed. 652.

Right of control held not infringed

Decree requiring city to maintain and care for boulevards which were dedicated in subdivision subsequently annexed to city was not an infringement on the constitutional right of the city to a reasonable control of its streets.—Barkley v. City of Detroit, 22 N.W.2d 835, 314 Mich. 404.

Power held not lost

Fact that city took portion of roadway for sidewalk does not prevent regulation of right of street railway to cross street.—City of New Orleans v. New Orleans Public Service, 123 So. 648, 168 La. 984, affirmed New Orleans Public Service v. City of New Orleans, 50 S.Ct. 449, 281 U.S. 682, 74 L.Ed. 1115.

26. Ill.—City of Elmhurst v. Buettgen, 68 N.E.2d 278, 394 Ill. 248.

Mo.—Lewis v. Kansas City, 122 S.W.2d 852, 233 Mo.App. 341.

27. Ark.—City of Ft. Smith v. Van Zandt, 122 S.W.2d 187, 197 Ark. 91.

La.—City of New Orleans v. New Orleans Public Service, 123 So. 648, 168 La. 984, affirmed New Orleans Public Service v. City of New Orleans, 50 S.Ct. 449, 281 U.S. 682, 74 L.Ed. 1115.

N.Y.—People, on Complaint of Crennan, v. Patrick, 14 N.Y.S.2d 249, 171 Misc. 705.

street purposes,²⁸ or the omission to enact proper by-laws.²⁹

Since the power of the municipal corporation is measured by the statute or charter provisions delegating such power,³⁰ the municipality must keep within the limits of the grant and cannot exercise power beyond what is necessary to facilitate travel.³¹ The power of the municipality to adopt regulations tending to promote the general welfare of the public in the use of the streets may rest on several grants of power by the legislature and need not be derived from one grant of power.³²

Construction and operation of grant of power.

The municipal power is frequently construed liberally so as to effect the object of the grant,³³ and will include the power to regulate streets as to new uses uncommon or unknown at the time the power was given,³⁴ and has often been construed as exclusive and plenary.³⁵ However, it has also been held that the delegated power to control and regulate the use of highways will be strictly construed.³⁶ The power conferred on a municipal corporation in a general statute to regulate the use of the streets must be construed in connection with the limitations expressed and implied in other statutes relating to

the same subject matter.³⁷ Municipal ordinances must yield to conflicting legislative enactments.³⁸

Under a statute empowering a municipality to regulate the use of its streets, the grant of power is not limited to the mere right to put the thoroughfare in order for travel or keep it in repair, but authorizes such use of the streets as the public may require.³⁹ Thus it is for the municipal authorities to determine what use shall be made of the streets, that is, what proportion shall be used for roadway and what proportion for sidewalks.⁴⁰ The municipality may even close a street where that is necessary to the security of its travelers.⁴¹ Moreover, it is not only the right, but the imperative duty, of the municipality to make and enforce such regulations covering the use of its streets as will be for the convenience and protection of the public.⁴²

Implied power. A municipal power to control and regulate its streets may be implied from charter or constitutional provisions granting it general power of government;⁴³ and, when the state intrusts control of its highways to municipal agencies, the powers necessarily incident to their complete functioning are conferred by implication.⁴⁴ However, the fact that a city is charged with the

W.Va.—Kaszer v. City of Morgantown, 152 S.E. 747, 108 W.Va. 712. 44 C.J. p 927 note 84.

28. Ill.—Murphy v. Chicago, 29 Ill. 279, 81 Am.D. 307.

29. Me.—Bowers v. Barrett, 27 A. 260, 85 Me. 382.

30. N.C.—Clayton v. Liggett & Myers Tobacco Co., 35 S.E.2d 691, 225 N.C. 563.

No power as to streets

General grant of powers to cities in home rule act relates to local affairs and city property other than streets.—Schenectady Knights of Columbus Bldg. Ass'n v. Golden, 235 N.Y.S. 226, 134 Misc. 412.

31. Ariz.—Keller v. State, 47 P.2d 442, 46 Ariz. 106—Clayton v. State, 297 P. 1037, 38 Ariz. 135, rehearing denied 300 P. 1010, 38 Ariz. 466, followed in Price v. State, 3 P.2d 1114, 39 Ariz. 59.

N.Y.—Robia Holding Corporation v. Walker, 239 N.Y.S. 659, 136 Misc. 358, affirmed 246 N.Y.S. 210, 230 App.Div. 666, affirmed 178 N.E. 747, 257 N.Y. 431.

Okl.—Continental Casualty Co. v. Lolley, 140 P.2d 1014, 193 Okl. 22—Martin v. Rowlett, 93 P.2d 1090, 185 Okl. 431.

Tenn.—City of Chattanooga v. Tennessee Electric Power Co., 112 S.W.2d 385, 172 Tenn. 524.

32. Ill.—City of Chicago v. Rhine, 2 N.E.2d 905, 363 Ill. 619, 105 A.L.R. 1045.

33. Ga.—Georgia R., etc., Co v Atlanta, 115 S.E. 263, 154 Ga. 731.

Ind.—Drew v. Geneva, 50 N.E. 871, 150 Ind. 662, 42 L.R.A. 814.

Regulation as to aesthetic considerations

Pa.—Walnut & Quince Streets Corporation v. Mills, 154 A. 29, 303 Pa. 25, appeal dismissed 52 S.Ct. 16, 284 U.S. 573, 76 L.Ed. 498.

34. Mo.—St. Louis v. Bell Tel. Co., 10 S.W. 197, 96 Mo. 623, 9 Am.S.R. 370, 2 L.R.A. 278.

44 C.J. p 927 note 88.

35. U.S.—City of Norton v. Lowden, C.C.A.Kan., 84 F.2d 663.

Idaho.—Foster's, Inc., v. Boise City, 118 P.2d 721, 63 Idaho 201.

Ky.—City of Newport v. Dorsel Co., 136 S.W.2d 11, 281 Ky. 372.

N.C.—Parsons v. Wright, 27 S.E.2d 534, 223 N.C. 520.

44 C.J. p 927 note 89.

36. Ariz.—Keller v. State, 47 P.2d 442, 46 Ariz. 106—Clayton v. State, 297 P. 1037, 38 Ariz. 135, rehearing denied 300 P. 1010, 38 Ariz. 466, followed in Price v. State, 3 P.2d 1114, 39 Ariz. 59.

Power to declare general policy

Grants of authority to a municipality to declare the general policy with respect to the control of streets are ordinarily strictly construed in the interest of common right.—Cabeall v. City of Cottage Grove, 130 P.2d 1013, 170 Or. 256, 144 A.L.R. 286.

37. Ariz.—Keller v. State, 47 P.2d 442, 46 Ariz. 106—Clayton v. State, 297 P. 1037, 38 Ariz. 135, rehearing denied 300 P. 1010, 38 Ariz. 466, followed in Price v. State, 3 P.2d 1114, 39 Ariz. 59.

38. Ga.—Mayor and Aldermen of City of Savannah v. V.C. Ellington Co., 170 S.E. 38, 177 Ga. 140, followed in Mayor and Aldermen of City of Savannah v. Hood Coach Lines, 170 S.E. 136, 177 Ga. 315.

Minn.—Automatic Signal Advertising Co. v. Babcock, 208 N.W. 132, 166 Minn. 416.

39. Or.—Cove Lodge No. 52 I. O. O. F. v. Harris, 294 P. 355, 134 Or. 566.

Laying of pipes for gas, water, and other conveniences is authorized by such grant of power.—Cove Lodge No. 52 I. O. O. F. v. Harris, supra.

40. Ind.—Swaim v. City of Indianapolis, 171 N.E. 871, 202 Ind. 233, rehearing denied 173 N.E. 287, 202 Ind. 233.

41. S.D.—Seaboard Air Line Ry. Co. v. McFadden, 152 S.E. 809, 156 S.C. 147.

42. Tex.—Fletcher v. Bordelon, Civ. App., 56 S.W.2d 313, error refused.

43. Ohio.—Perrysburg v. Ridgway, 140 N.E. 595, 108 Ohio St. 245.

44 C.J. p 927 note 92.

44. Pa.—Breinig v. Allegheny County, 2 A.2d 842, 332 Pa. 474.

duty of keeping its streets in repair and that the cost of maintaining them is raised by public taxation within the city does not give it control of its streets exclusive of that of the state.⁴⁵ The appropriation and use of a street for telephone poles and wires are a "municipal affair" within the meaning of constitutional provisions conferring on municipalities exclusive control of municipal affairs.⁴⁶

Particular ways subject to control. Public alleys are ordinarily as much under municipal control as a street;⁴⁷ and, where street improvements are made with public funds, such street is subject to the same control and dominion of the municipal corporation as was the case before the improvement was made.⁴⁸ So, also, where a railroad right of way has become an established street, it is subject to municipal regulations under the police power for the public benefit.⁴⁹ The power of control and regulation certainly applies to streets after they have been opened;⁵⁰ but it has also been held that the power of a municipality may apply to platted streets which have not yet been opened, used, or maintained as a street.⁵¹ Where roads outside the limits of a municipality and subject to the jurisdiction of the county board are subsequently includ-

ed within the corporate limits of a municipality, the municipality succeeds to the right of the county board to regulate such streets consistent with other public uses.⁵² Any attempt by a municipality to retain control of streets after they have ceased to be within its limits is ultra vires and void.⁵³

Portion of street under control. A municipality ordinarily has power to control and regulate the entire length and breadth of the surface of its streets,⁵⁴ including sidewalks,⁵⁵ cartways,⁵⁶ and parkings,⁵⁷ and the space above and below the surface as far as any proper street use may require.⁵⁸ Its control does not, however, extend beyond the street line.⁵⁹

In whom power vested; delegation thereof. Ordinarily the power to control and regulate municipal streets is by charter or statute vested in the municipal governing body.⁶⁰ Over some spaces, such as the crossing of streets and boulevards, there may be double jurisdiction by separate boards or officers for distinct and different purposes.⁶¹

A municipal body vested with power to control and regulate streets cannot delegate to another its discretionary power with respect thereto,⁶² without

45. Mont.—State v. Red Lodge, 76 P. 758, 30 Mont. 338.

46. Cal.—Sunset Tel., etc., Co. v. Pasadena, 118 P. 796, 161 Cal. 265.

47. U.S.—City of Norton v. Lowden, C.C.A.Kan., 84 F.2d 663.
Ariz.—City of Phoenix v. Sun Valley Bus Lines, 170 P.2d 289, 64 Ariz. 319.

Ky.—City of Covington v. Averbeck, 50 S.W.2d 50, 244 Ky. 117.

N.C.—Parsons v. Wright, 27 S.E.2d 534, 223 N.C. 520.

Tex.—Duvall v. City of Dallas, Civ. App., 27 S.W.2d 1105.

Wash.—Burkhard v. Bowen, 203 P.2d 361.

44 C.J. p 927 note 90.

48. Tex.—Gillespie v. Fuller Const. Co., Civ.App., 66 S.W.2d 798, error refused. Certificate of questions submitted dismissed 61 S.W.2d 977, 122 Tex. 506.

49. N.C.—Norfolk Southern R. Co. v. Morehead City, 83 S.E. 259, 167 N.C. 118.

50. Ga.—Georgia R., etc., Co. v. Atlanta, 115 S.E. 263, 154 Ga. 731.
44 C.J. p 927 note 83.

51. Ark.—Gowers v. City of Van Buren, 197 S.W.2d 741, 210 Ark. 776.

52. Ala.—City of Prichard v. Alabama Power Co., 176 So. 294, 224 Ala. 339.

53. Ill.—People v. Chicago Tel. Co., 91 N.E. 1065, 245 Ill. 121.

44 C.J. p 928 note 10.

54. Ky.—City of Covington v. Averbeck, 50 S.W.2d 50, 244 Ky. 117.

44 C.J. p 928 note 6.

At railroad crossings

Area within limits of streets where they cross railroad right of way was a portion of the "street" within a law authorizing supervision thereof by town.—Incorporated Town of Ackley v. Central States Electric Co., 220 N.W. 315, 206 Iowa 533.

55. Ala.—City of Birmingham v. Holt, 194 So. 538, 239 Ala. 248.

Ark.—City of Dumas v. Edington, 147 S.W.2d 997, 201 Ark. 1021—State v. City of Marianna, 39 S.W.2d 301, 183 Ark. 927.

Ky.—City of Covington v. Averbeck, 50 S.W.2d 50, 244 Ky. 117.

Mont.—Headley v. Hammond Bldg., 33 P.2d 574, 97 Mont. 248, 93 A.L.R. 794—Nord v. Butte Water Co., Mont., 30 P.2d 809, 96 Mont. 311.

Pa.—Commonwealth v. Roth, 54 Pa. Dist. & Co. 308, 21 Lehigh.L.J. 229.

44 C.J. p 928 note 6.

56. Pa.—Commonwealth v. Roth, supra.

57. Okl.—Norman Milling, etc., Co. v. Bethurem, 139 P. 830, 41 Okl. 735, 51 L.R.A., N.S., 1082.

58. Ill.—Kane v. City of Chicago, 51 N.E.2d 523, 384 Ill. 361, transferred, see 59 N.E.2d 329, 324 Ill.

App. 585, reversed on other grounds 64 N.E.2d 506, 392 Ill. 172.

Mich.—1426 Woodward Ave. Corp. v. Wolff, 20 N.W.2d 217, 312 Mich. 352.

44 C.J. p 928 note 8.

59. Ga.—Georgia R., etc., Co. v. Atlanta, 115 S.E. 263, 154 Ga. 731.

44 C.J. p 928 note 9.

60. Ark.—City of Ft. Smith v. Van Zandt, 122 S.W.2d 187, 197 Ark. 91.

Mont.—State ex rel. City of Butte v. Healy, 70 P.2d 437, 105 Mont. 227.

44 C.J. p 928 note 96.

Broad and sweeping powers

Charter provision giving city council care, supervision and control of all public highways, bridges, streets, alleys, and public grounds within limits of city vests broad and sweeping powers in council.—Alexander Co. v. City of Owatonna, 24 N.W.2d 244, 222 Minn. 312.

61. Ill.—South Park Commissioners v. Chicago City R. Co., 122 N.E. 89, 286 Ill. 504.

44 C.J. p 928 note 97.

62. Pa.—Commonwealth v. Maguire, 9 Pa. Dist. & Co. 680, 75 Pittsb. Leg. J. 27, 19 Mun.L.R. 115.

Tex.—City of El Paso v. Mendoza, Civ.App., 191 S.W.2d 102, error refused for want of merit.

44 C.J. p 928 note 98.

Ordinance held not invalid as unauthorized delegation of power.—

the sanction of the state;⁶³ and assumption by another is invalid,⁶⁴ in the absence of estoppel or laches.⁶⁵ However, where control of a street is relinquished by a city to certain officers, who are not thereafter disturbed in their possession and the making of improvements for many years, their right is not subject to attack on the ground that the transfer by the city was informal.⁶⁶ A city council may delegate to a director of safety the power of granting permits for street meetings under conditions specified in the ordinance;⁶⁷ and, where a department of public parks has been given jurisdiction over a street, it may properly delegate such jurisdiction to the commissioner of public works as far as necessary to enable him to attend to the actual removal of an obstruction.⁶⁸

§ 1688. Relinquishment of Power

Power to control and regulate streets is in trust for the general public, and neither the state nor the municipal corporation can divest itself of this trust.

State or municipal power to control and regulate streets is in trust for the general public,⁶⁹ and not only for the people who live within the municipali-

ty, but also for all who come there;⁷⁰ and neither the state,⁷¹ nor the municipality,⁷² can divest itself of this trust. Accordingly, a contract by which the state or municipality surrenders its police power over the streets is invalid.⁷³ However, a municipality's power to regulate its streets is not lost by a compromise of litigation respecting title thereto,⁷⁴ or by grant of a franchise to a public utility,⁷⁵ or by an injunction restraining the city from interference therewith;⁷⁶ nor does a municipal corporation lose control of its streets by failure to elect municipal officers, even though such failure continues for a number of years.⁷⁷

§ 1689. Conflicting Powers

The state may revoke or reassume or delegate to another public agency the power granted to a municipal corporation to control its streets. Constitutional or statutory provisions will determine which of several boards or agencies shall have control, and whether the county or the municipal corporation shall have control of county roads within the municipal limits.

Where municipal power to control and regulate streets exists by virtue of legislative delegation, it is subject to the paramount authority of the state,⁷⁸

Willmot v. City of Chicago, 160 N.E. 206, 328 Ill. 552, 62 A.L.R. 394.

Board as part of municipal government

Board of highway supervisors vested with authority and control over city streets was held part of municipal government—Philadelphia Electric Co. v. City of Philadelphia, 152 A. 23, 301 Pa. 291, appeal dismissed 51 S.Ct. 349, 283 U.S. 786, 75 L.Ed. 1414.

Jury verdict concerning control of streets and alleys in municipality cannot be substituted for lawful action of council.—Village of Willard v. McElligott, 169 N.E. 447, 121 Ohio St. 456.

63. Tex.—City of El Paso v. Mendoza, Civ.App., 191 S.W.2d 102, error refused for want of merit.

64. Pa.—Clothier v. Philadelphia, 22 Pa.Super. 608.

65. Ill.—West Chicago Park Commissioners v. Chicago, 48 N.E. 1066, 170 Ill. 618.
44 C.J. p 928 note 1.

66. Ill.—Chicago, etc., R. Co. v. West Chicago Park Commissioners, 37 N.E. 1079, 151 Ill. 204, 25 L.R.A. 300.

67. Ohio.—Canton v. Robertson, 20 Ohio N.P., N.S., 241.

68. N.Y.—Metropolitan Exhibition Co. v. Newton, 4 N.Y.S. 593.

69. U.S.—Hague v. Committee for Industrial Organization, C.C.A.N. J., 101 F.2d 774, modified on other

grounds 59 S.Ct. 954, 307 U.S. 496, 83 L.Ed. 1423.

Ala.—City of Birmingham v. Hood-McPherson Realty Co., 172 So. 114, 233 Ala. 352, 108 A.L.R. 1140.

Mich.—Village of Grosse Pointe Shores v. Ayres, 235 N.W. 829, 254 Mich. 58.

Tenn.—City of Chattanooga v. Tennessee Electric Power Co., 112 S.W. 2d 385, 172 Tenn. 524.

Tex.—Bowers v. City of Taylor, Com.App., 24 S.W.2d 816.
44 C.J. p 928 note 11.

70. Ill.—Martens v. Brady, 106 N.E. 266, 264 Ill. 178.
44 C.J. p 929 note 12.

71. Minn.—State v. Minneapolis Park Commissioners, 110 N.W. 1121, 100 Minn. 150, 9 L.R.A. N.S., 1045.
44 C.J. p 929 note 13.

72. Ky.—Louisville Gas & Electric Co. v. Commissioners of Sewerage of Louisville, 33 S.W.2d 344, 236 Ky. 376.

Mich.—Village of Grosse Pointe Shores v. Ayres, 235 N.W. 829, 254 Mich. 58.

Tex.—City of Beaumont v. Gulf States Utilities Co., Civ.App., 163 S.W.2d 426, error refused.
44 C.J. p 929 note 14.

Fee of roadway

City, regardless of question in whom fee to roadway may be, must always remain in position to exercise legislative power.—Bowers v. City of Taylor, Tex.Com.App., 24 S.W.2d 816.

73. U.S.—Carolina & N. W. Ry. Co. v. Town of Lincolnton, C.C.A.N.C., 33 F.2d 719

Ky.—Louisville Gas & Electric Co. v. Commissioners of Sewerage of Louisville, 33 S.W.2d 344, 236 Ky. 376.

Tex.—City of Beaumont v. Gulf States Utilities Co., Civ.App., 163 S.W.2d 426, error refused.
44 C.J. p 929 note 15.

74. Ohio.—Cleveland, etc., R. Co. v. Cleveland, 15 Ohio Cir.Ct., N.S., 193, 33 Ohio Cir.Ct. 482.
44 C.J. p 929 note 16.

75. Ill.—Sullivan v. Best, 121 N.E. 565, 286 Ill. 315.
44 C.J. p 929 note 17.

76. Neb.—State v. Baker, 88 N.W. 124, 62 Neb. 840.
44 C.J. p 929 note 18.

77. Ohio.—Harbor Land Co. v. Village of Fairport, App., 49 N.E.2d 194.

78. Pa.—In re Delaware River Joint Commission, 19 A.2d 278, 342 Pa. 119—Hindin v. Samuel, 45 A.2d 370, 158 Pa.Super. 539—Owl Protective Co. v. Public Service Commission of Pennsylvania, 187 A. 229, 123 Pa.Super. 382.
44 C.J. p 929 note 20.

State's legislative authority favored

Doubt as to whether regulation of use of public street is municipal affair must be resolved in favor of state's legislative authority.—Key System Transit Co. v. City of Oakland, 13 P.2d 979, 124 Cal.App. 733.

which, within constitutional limitations, may revoke the grant and reassume it or delegate it to another public functionary or agency.⁷⁹ However, the legislative intent to revoke the grant, or to redelegate the control to another public agency, must clearly appear from the provisions of the legislative act relied on as doing either of those things;⁸⁰ and, where a subsequent statute is in conflict with the statute granting municipalities power to control their streets, only as much of the earlier statute will be held to have been repealed or revoked as is irreconcilable conflict with the subsequent statute.⁸¹

Accordingly, state statutes delegating to other agencies power to control and regulate rates and service of public utilities,⁸² to construct and maintain streets,⁸³ to supervise street and interurban railways,⁸⁴ or to regulate any other matter not affecting general control of streets,⁸⁵ do not revoke

the general power of regulation possessed by a municipality over streets within its limits. Moreover, a statute delegating executive functions to other agencies does not revoke the legislative control of a municipality over its streets.⁸⁶ So, also, where the power to make parts of city streets parts or links of a state road system is conferred on a state road commission, but to make them parts of such system the streets must be first designated by the commission, the corporation is not deprived of its jurisdiction until the commission has made such designation.⁸⁷

Where the state constitution expressly reserves to municipalities the power to control and regulate their streets, any attempt of the state legislature to take away such power is unconstitutional and void.⁸⁸ Similarly, where by charter the state has granted to a city the exclusive control of its streets, the legis-

79. Ill.—*People v. Crowe*, 158 N.E. 451, 327 Ill. 106.

Ind.—*Town of Argos v. Harley*, 49 N.E.2d 552, 114 Ind.App. 290.

La.—*Placid Oil Co. v. Hebert*, 194 So. 893, 194 La. 788.

Minn.—*Automatic Signal Advertising Co. v. Babcock*, 208 N.W. 132, 166 Minn. 416.

Miss.—*Village of Ridgeland v. Madison County*, 122 So. 753, 154 Miss. 613.

Pa.—*In re Delaware River Joint Commission*, 19 A.2d 278, 342 Pa. 119.

Wyo.—*Corpus Juris cited in Western Auto Transports v. City of Cheyenne*, 120 P.2d 590, 593, 57 Wyo. 351.

44 C.J. p 929 note 21.

80. Ind.—*Town of Argos v. Harley*, 49 N.E.2d 552, 114 Ind.App. 290.

La.—*Placid Oil Co. v. Hebert*, 194 So. 893, 194 La. 788.

Repeals by implication are not favored

Mo.—*City of Springfield v. Stevens*, 216 S.W.2d 450.

Fact that state highway was routed through municipality was held, under statute expressly so providing, not to modify, limit, or restrict the authority conferred on municipal corporations to control and regulate their streets.—*Pattison v. Lutz*, 30 Ohio N.P., N.S., 371.

Grant held not affected or repealed

(1) Statute giving cities of second class express authority to regulate use of streets was not affected or repealed by the Liquor Control Act.—*City of Springfield v. Stevens*, Mo., 216 S.W.2d 450.

(2) A statute providing that the department of highways shall have sole jurisdiction over the selection of the streets through which traffic shall be routed has been held not to

deprive municipalities of control over their streets, and commissioner of highways is authorized to route traffic on state highways in municipality only over streets provided by municipality for such traffic.—*Collier v. Baker*, 27 S.W.2d 1085, 180 Tenn. 571.

(3) The reasonable control of streets reserved to municipalities by constitution is not impaired by legislation which seeks to maintain safety on public highways.—*Surtman v. Secretary of State*, 15 N.W.2d 471, 309 Mich. 270, certiorari dismissed 65 S.Ct. 267, 323 U.S. 806, 89 L.Ed. 643.

81. Ind.—*Town of Argos v. Harley*, 49 N.E.2d 552, 114 Ind.App. 290.

Minn.—*Automatic Signal Advertising Co. v. Babcock*, 208 N.W. 132, 166 Minn. 416.

82. Kan.—*Wilson v. Weber*, 166 P. 512, 101 Kan. 425.

W.Va.—*Bluefield v. Public Service Commission*, 118 S.E. 542, 94 W.Va. 334.

83. N.J.—*Bridgeton v. Corson*, 127 A. 924, 101 N.J.Law 204.

44 C.J. p 929 note 23.

84. Mich.—*Detroit v. Detroit United R. Co.*, 137 N.W. 645, 172 Mich. 136, affirmed 33 S.Ct. 697, 229 U.S. 39, 57 L.Ed. 1056.

44 C.J. p 930 note 24.

85. Or.—*Cabell v. City of Cottage Grove*, 130 P.2d 1013, 170 Or. 256.

44 C.J. p 930 note 25.

Grade crossings

The section of Public Utilities Act relating to authority of commerce commission with respect to grade crossings does not deprive a municipality of its right to exercise control over its streets or public places.—*City of Geneseo v. Illinois North-*

ern Utilities Co., 39 N.E.2d 26, 378 Ill. 506, certiorari denied *Illinois Northern Utilities Co. v. City of Geneseo*, Ill., 62 S.Ct. 1046, 316 U.S. 670, 86 L.Ed. 1746.—*Village of Heyworth v. Central Illinois Electric & Gas Co.*, 39 N.E.2d 26, 378 Ill. 506, certiorari denied *Central Illinois Electric & Gas Co. v. Village of Heyworth*, Ill., 62 S.Ct. 1046, 316 U.S. 670, 86 L.Ed. 1746.

The statute creating the state mineral board and defining its powers and duties does not take away from the town and give to the state mineral board the right to control streets in the town, and the town's dominion over its streets is not impaired; and in proceeding for judgment permitting plaintiff to deposit in registry of court proceeds accrued and which would accrue from operation of oil wells, where the state mineral board was impleaded and oil leases in question covered parts of streets in town, the board did not have an interest sufficient to raise contention that town was not given a right, under its charter, to lease or permit encroachments on its streets, since board did not have control over such streets.—*Placid Oil Co. v. Hebert*, 194 So. 893, 194 La. 788.

86. Pa.—*Denison v. Ryan*, 10 Pa. Dist. 495.

44 C.J. p 930 note 26.

87. Va.—*Chittum v. Morgantown*, 122 S.E. 740, 96 W.Va. 260.

88. Mich.—*Detroit, Wyandotte & Trenton Transit Co. v. City of Detroit*, 244 N.W. 424, 260 Mich. 124.—*North Star Line v. City of Grand Rapids*, 244 N.W. 192, 259 Mich. 654.—*Highway Motorbus Co. v. City of Lansing*, 213 N.W. 79, 238 Mich. 146.

44 C.J. p 930 note 27.

lature will not be permitted to dispute such control by a conflicting statute,⁸⁹ since the only method of taking away such power is by amending or repealing the statute granting and delineating such power.⁹⁰

Between particular boards or agencies. The determination of which of a number of boards or agencies has jurisdiction and control over the public streets depends on the terms of the municipal charter or other legislation.⁹¹ Where the control and regulation of streets, or of particular streets, have clearly been vested in another body, the city council lacks power to regulate them;⁹² but since the common council is the body naturally and ordinarily vested with such authority, that authority remains in it, unless it is clearly taken away and vested in some other person or body.⁹³ Where control is vested in a different body for a specified purpose, it will revert to the usual city authorities on completion of such purpose.⁹⁴ Under charter provisions, a space under a bridge may be subject to control of the bridge commissioner rather than the city comptroller;⁹⁵ but charter provisions giving to the administrator of improvements the power to construct and repair bridges do not prevent the city council, by ordinance, from giving to the administrator of commerce power to manage and control bridges after construction or repair, and an ordinance to that effect is valid.⁹⁶

Between county and municipality. As a general rule, under the various charter, statutory, or constitutional provisions, the city, rather than the coun-

ty, has control of county roads lying within the city;⁹⁷ and the fact that a municipality's street was taken over as a county road does not deprive the municipality of its constitutional right of reasonable control of its streets.⁹⁸ However, in some jurisdictions control of county roads lying in a municipality remains in the county,⁹⁹ and under some statutes a county may acquire jurisdiction and the right to control streets within municipalities under certain conditions.¹ Where a village becomes incorporated, control of streets has been held to vest in it and it succeeds to the rights of the county;² and it is not necessary, as a prerequisite to the exercise of control over the streets, that after incorporation it should make a formal acceptance of the dedication previously made.³ Under statute the city and county authorities may have concurrent jurisdiction.⁴

§ 1690. Exercise of Power

While authorities have wide discretion as to regulations necessary in control of the streets, the regulations must be general and uniform, reasonable and certain, and in conformity with law.

In the exercise of the power to control and regulate the streets, the state or the municipal corporation has a wide discretion in determining what precautions or regulations are necessary or appropriate in the public interest under the circumstances.⁵ However, while it has been held that whatever reasonably tends to make the municipal control effective is a proper exercise of that power,⁶ it is the general rule that the power must be exercised by

89. Md.—State v. Stewart, 137 A. 39, 152 Md. 419.

Mo.—Kerney v. Barber Asphalt Pav. Co., 86 Mo.App. 573.

90. Md.—State v. Stewart, 137 A. 39, 152 Md. 419.

91. Cal.—Leis v. City and County of San Francisco, 2 P.2d 26, 213 Cal. 256.

92. Ind.—Gardner v. City of Covington, 156 N.E. 830, 86 Ind.App. 229.

44 C.J. p 930 note 29.

93. Miss.—Corpus Juris cited in City of Ellisville v. State Highway Commission, 191 So. 274, 277, 186 Miss. 473.

44 C.J. p 930 note 30.

94. Ark.—Pulaski Gas Light Co. v. Rammel, 133 S.W. 1117, 97 Ark. 318.

44 C.J. p 930 note 31.

95. N.Y.—Sorgen v. Prendergast, 123 N.Y.S. 765, 68 Misc. 189, affirmed 124 N.Y.S. 1130, 139 App. Div. 929.

44 C.J. p 930 note 32.

96. La.—McCaffrey v. Cavanac, 30 La Ann 882.

97. Ky.—Graves County ex rel. Robins v. City of Mayfield, 204 S.W. 2d 369, 305 Ky. 374.

44 C.J. p 930 note 36.

98. Mich.—Board of Road Com'rs of Wayne County v. City of Lincoln Park, 232 N.W. 363, 251 Mich. 582.

99. Or.—Christie v. Bandon, 162 P. 248, 82 Or. 481.

44 C.J. p 930 note 37.

1. Iowa.—Incorporated Town of Norwalk v. Warren County, 232 N.W. 682, 210 Iowa 1262.

Particular conditions

Under a statute so providing, a county road system may embrace a street or highway which is within the limits of a town when such street is a direct continuation of the county road system outside such town, provided the board of supervisors and the council can agree in writing as to the manner in which the street is being improved, and provided such contract is approved by the state highway commission.—Incorporated

Town of Norwalk v. Warren County, supra.

2. Ohio.—Harbor Land Co. v. Village of Fairport, App., 49 N.E.2d 194.

3. Ohio.—Harbor Land Co. v. Village of Fairport, supra.

4. Tex.—City of Galveston v. Galveston County, Civ App., 159 S.W. 2d 976, error refused.

44 C.J. p 930 note 38.

5. U.S.—New Orleans Public Service v. City of New Orleans, La., 50 S. Ct. 449, 281 U.S. 682, 74 L.Ed. 1116.

Ark.—City of Ft. Smith v. Van Zandt, 122 S.W.2d 187, 197 Ark. 91.

Iowa.—Stoessel v. City of Ottumwa, 289 N.W. 718, 227 Iowa 1021.

Mass.—Gleason v. Metropolitan Dist. Commission, 170 N.E. 395, 270 Mass. 377.

Okla.—City of Ada v. Burrow, 42 P. 2d 111, 171 Okl. 142—Palace Garage v. Oklahoma City, 268 P. 240, 131 Okl. 122.

S.C.—Plunkett v. City of Aiken, 156 S.E. 245, 159 S.C. 97.

6. N.Y.—Tilton v. City of Utica, 60 N.Y.S.2d 249.

regulations which are general and uniform, reasonable and certain, and in conformity with law.⁷ Thus, the power may not be exercised arbitrarily, capriciously, or in bad faith,⁸ or so as to interfere with the personal liberty of citizens as guaranteed by the constitution and laws,⁹ or in violation of the personal or property rights of the people to the streets.¹⁰ Moreover, authorities must not impose unreasonable conditions which do not tend toward the protection of the interest held as trustee of the public easement in highways,¹¹ but the reasonableness of ordinances regulating the use of streets is presumed and primarily is to be determined by the municipal officers.¹² Accordingly, the courts will not interfere with the action of a municipality in its control of the streets except in a clear case of fraud, or arbitrary and unjust exercise of the power, or a manifest abuse of discretion.¹³

The power of a municipality to control and regulate the use of its streets is a continuing power to be exercised as often as and whenever the municipal authorities may think proper.¹⁴ Under statute

so providing, the power of control delegated to a municipality must be exercised by ordinance.¹⁵ Where the power of control is properly exercised, the regulations are binding on all the inhabitants of the municipality.¹⁶ Since the prescribing of reasonable regulations by a city for the use of its streets is a legislative function, notice of the proposed enactment of any such regulation to the parties to be affected thereby is not a matter of right.¹⁷ The fact that a private person makes a contribution or assumes obligations for the maintenance of the streets does not per se impair the validity of the official action of public boards concerning such ways.¹⁸

The right to use streets as highways, and regulation of such use, are considered *infra* §§ 1757-1774.

Power to prohibit use. Except to the extent that power to do so is granted to a governmental body,¹⁹ the power to regulate does not include the power to prohibit a public use of the streets,²⁰ except temporarily, as where a street is closed pending construction work.²¹ However, it has been held, particu-

7. *Ariz.*—*Hughes v. City of Phoenix*, 170 P.2d 297, 64 *Ariz.* 331.

Pa.—*Shuck v. Borough of Ligonier*, 22 A.2d 735, 343 Pa. 265.

Consistency with state laws

(1) A municipal ordinance must not be inconsistent with the policy of the state as expressed by its statutes.—*Hedrick v. Lanz*, 152 N.W. 610, 170 Iowa 437—44 C.J. p 931 note 41.

(2) A statute authorizing a municipality to adopt and amend local laws does not authorize ordinances, rules, or regulations in conflict with general statutes.—*People v. Gorman*, 231 N.Y.S. 85, 133 Misc. 161.

Religious purposes

A municipality may impose reasonable limitations on the use of its streets for religious or other purposes, when public health, morals, safety, or convenience is invaded.—*Hord v. City of Fort Myers*, 13 So. 2d 809, 153 Fla. 99.

8. U.S.—*City of Norton v. Lowden*, C.C.A.Kan., 84 F.2d 663.

Okl.—*Palace Garage v. Oklahoma City*, 268 P. 240, 131 Okl. 122.

Regulation as to portion of city

Ordinances regulating use of streets applicable to a designated portion of a city only are not discriminatory and invalid if exclusion is reasonably required.—*Dooley v. City of Cleveland*, 135 S.W.2d 649, 175 Tenn. 439.

9. Fla.—*Anderson v. Tedford*, 85 So. 678, 80 Fla. 376, 10 A.L.R. 1481.

44 C.J. p 931 note 39.

To throttle free speech

Power to exercise control over city

streets may not be used as a means of throttling free speech or other constitutional rights.—*Ex parte Waltrip*, Tex.Cr., 207 S.W.2d 872.

10. Ala.—*City of Birmingham v. Hood-McPherson Realty Co.*, 172 So 114, 233 Ala. 352, 108 A.L.R. 1140.

Use of streets

The power may not be exercised by ordinances conferring on particular officers or boards arbitrary power to deny use of the streets.—*Tallageda v. Sims*, 62 So. 958, 8 Ala.App. 471—44 C.J. p 931 note 40.

11. Okl.—*City of Yale v. Davenport*, 54 P.2d 335, 175 Okl. 629.

Tex.—*Ex parte Smythe*, 28 S.W.2d 161, 116 Tex.Cr. 146.

W.Va.—*Kaszer v. City of Morgantown*, 152 S.E. 747, 108 W.Va. 712. 44 C.J. p 931 note 46.

12. Iowa.—*Huston v. Des Moines*, 156 N.W. 883, 176 Iowa 455.

44 C.J. p 931 note 47.

Question of law and fact

The general rules governing the determination as a question of law or fact of the reasonableness of municipal regulations apply to regulations as to the use of streets.

Ark.—*Helena v. Wooten*, 135 S.W. 828, 98 Ark. 156.

Kan.—*Emporia v. Wagoner*, 49 P. 701, 6 Kan.App. 659.

13. Iowa.—*Stoessel v. City of Ottumwa*, 289 N.W. 718, 227 Iowa 1021.

Okl.—*City of Ada v. Burrow*, 42 P.2d 111, 171 Okl. 142.

Pa.—*Philadelphia Electric Co. v.*

City of Philadelphia, 152 A. 23, 301 Pa. 291, dismissed 51 S.Ct. 349, 283 U.S. 786, 75 L.Ed. 1414.

S.C.—*Plunkett v. City of Aiken*, 156 S.E. 245, 159 S.C. 97.

Tenn.—*Corpus Juris cited in Collier v. City of Memphis*, 176 S.W.2d 818, 820, 180 Tenn. 509.

44 C.J. p 932 note 49.

14. Va.—*Thompson v. Smith*, 154 S. E. 579, 155 Va. 367, 71 A.L.R. 604.

15. Neb.—*State v. City of North Platte*, 233 N.W. 4, 120 Neb. 413.

16. Pa.—*Shuck v. Borough of Ligonier*, 22 A.2d 735, 343 Pa. 265.

17. Ga.—*Atlantic, etc., R. Co. v. Cordele*, 57 S.E. 493, 128 Ga. 293.

18. Mass.—*Morrison v. Selectmen of Town of Weymouth*, 181 N.E. 786, 279 Mass. 486.

19. Mass.—*Gleason v. Metropolitan Dist. Commission*, 170 N.E. 395, 270 Mass. 377.

Exclusion of public from reserved spaces

The metropolitan district commission, a state agency, may set aside parts of boulevards as reserved spaces, and may by reasonable rules exclude the public therefrom.—*Gleason v. Metropolitan Dist. Commission*, *supra*.

20. Wash.—*Hadfield v. Lundin*, 168 P. 516, 98 Wash. 657, L.R.A.1918B 909, Ann.Cas.1918C 942.

44 C.J. p 931 note 42.

21. N.Y.—*Steinbrenner v. M. W. Forney Co.*, 127 N.Y.E. 620, 143 App.Div. 73.

larly where the power is granted by statute,²² that a municipality may, in a proper case, within the exercise of its police power, close a street to vehicular traffic, leaving the street open merely for pedestrian use.²³ The right to regulate implies the power to prohibit the disturbance of a public easement by one who has no lawful right to disturb the easement.²⁴

Private or special use. Where a city has power to grant the private use of its streets, as discussed infra § 1725, it may regulate such use,²⁵ in a reasonable²⁶ and uniform²⁷ manner; and the fact that a person has been granted a permit to use the streets does not exempt the permittee from the operation of subsequent ordinances and regulations legally enacted in the exercise of police powers.²⁸ Moreover, the power of a municipality to regulate the use of its streets for private or special purposes, as for private gain, is liberally construed;²⁹ and it has been held that municipal power to regulate includes the power to prohibit a private or special use.³⁰

§ 1691. Particular Regulations

The validity of a particular regulation may depend on whether the regulation relates to the use of a street for business for private gain, or to its use by a member of the public in the usual way.

In passing on the validity of particular regulations as to the use of streets, it is of prime importance to determine first whether the regulation is aimed at regulating a use of the street as a place or instrumentality for business for private gain, or a use of the street by a member of the public in the

usual way for business or pleasure.³¹ While, as considered infra § 1761, municipal power to regulate the use of thoroughfares for ordinary and usual purposes should be sparingly exercised, when it comes to the use of streets as a definite means or instrumentality for a private use, such right may be given or withheld, as discussed supra § 1690.

Particular regulations as to the use of the streets by public utilities, trees, excavations, and various other matters are discussed infra §§ 1692-1695. Other particular regulations considered elsewhere in this title include regulations relating to the rights and remedies of abutting owners, infra §§ 1701-1715; regulations as to obstructions and encroachments, infra § 1747; regulations of the use of the street as a highway, infra §§ 1757-1774; and regulations of the use of the street for business purposes, infra § 1774.

§ 1692. — Use by Public Utilities

- a. In general
- b. Exercise of power to regulate

a. In General

Ordinarily, municipal corporations have the right, delegated to them by the state, to regulate the use of the streets by those engaged in public business, even as to public utilities granted an exclusive franchise.

The state has plenary power to regulate the use of streets by those engaged in public business.³² This power may be delegated to municipal corporations,³³ and has been said to exist solely by virtue of state delegation.³⁴ Under charter, constitution-

22. Cal.—Simpson v. City of Los Angeles, 47 P.2d 474, 4 Cal.2d 60.

23. Cal.—Simpson v. City of Los Angeles, supra.

Evidence held not to invalidate ordinance

Evidence was held to show that ordinance closing street to vehicular traffic was not an invalid exercise of police power as against abutting owner when access to property was thereby impeded, where evidence showed that by closing street movement of vehicular traffic on nearby main arteries would be greatly facilitated.—Simpson v. City of Los Angeles, supra.

24. N.J.—Bayonne v. North Arlington, 79 A. 357, 78 N.J.Eq. 283.

25. N.Y.—People v. LaFrantz, 69 N.Y.S.2d 614, 188 Misc. 989.

44 C.J. p 986 note 19.

26. Me.—State v. Barbelais, 64 A. 881, 101 Me. 512.

44 C.J. p 986 note 20.

27. Tex.—Ex parte Bradshaw, 159

S.W. 259, 70 Tex.Cr. 166.

44 C.J. p 986 note 21.

28. Idaho—Yellow Cab Taxi Service v. City of Twin Falls, 190 P.2d 681, 68 Idaho 145.

29. Mich.—People of City of Dearborn v. Dmytro, 273 N.W. 400, 280 Mich. 82, 111 A.L.R. 128.

30. Ala.—McCraney v. City of Leeds, 1 So.2d 894, 241 Ala. 198—City of Birmingham v. Holt, 194 So. 538, 239 Ala. 248.

Mass.—Commonwealth v. Kimball, 13 N.E.2d 18, 299 Mass. 353, 114 A.L.R. 1440.

Mich.—People of City of Dearborn v. Dmytro, 273 N.W. 400, 280 Mich. 82, 111 A.L.R. 128.

Tex.—City of Dallas v. Harris, Civ. App., 157 S.W.2d 710, error refused.

Wyo.—Corpus Juris cited in Western Auto Transports v. City of Cheyenne, 120 P.2d 590, 594, 57 Wyo. 351.

44 C.J. p 931 note 44.

Obstruction of streets

A village has power to prevent entirely the use of its streets and public places for carrying on a private

business in which streets and places under public control are obstructed by storing goods, wares, and merchandise there for purpose of sale or barter—Plummer v. Village of Swanton, 15 N.E.2d 349, 133 Ohio St. 623.

31. Mich.—People of City of Dearborn v. Dmytro, 273 N.W. 400, 280 Mich. 82, 111 A.L.R. 128.

32. U.S.—Illinois Cent. R. Co. v. City of Mayfield, C.C.A.Ky., 35 F.2d 808, certiorari denied 50 S.Ct. 158, 280 U.S. 608, 74 L.Ed. 651.

44 C.J. p 932 note 54.

Regulation of use of streets by common carrier see infra § 1760.

33. U.S.—Illinois Cent. R. Co. v. City of Mayfield, supra.

44 C.J. p 932 note 55.

34. Ala.—Corpus Juris cited in Phenix City v. Alabama Power Co., Ala., 195 So. 894, 899, 239 Ala. 547.

44 C.J. p 932 note 60.

al, or statutory provisions, municipalities ordinarily have the right to control such use of their streets.³⁵ However, before it will be deemed that the legislature has transferred the power of supervision over public utilities to the municipal authorities under constitutional provisions so permitting, there must be clear and unmistakable statutory provisions conferring such power.³⁶ The municipal right is sometimes inferred from its police power.³⁷ Where the legislature grants enumerated specific powers to a municipality with respect to the adoption of regulations respecting public service corporations, it thereby impliedly withholds from the municipality all other powers in that respect.³⁸ Where roads subject to the jurisdiction of a county board are subsequently incorporated within the limits of a municipality, the municipality succeeds to the right of the county board to regulate the use of the streets by a public utility company.³⁹

The power to regulate the use of the streets by a public service company is a continuing power,⁴⁰ which is not exhausted by the regulations prescribed by the municipal authorities at the time of granting the consent to use the streets;⁴¹ nor can it be bargained away by the city.⁴²

Effect of grant of franchise. The state,⁴³ or a municipality acting under derived power,⁴⁴ does not lose the police power to regulate the use of streets by public utilities because of the grant of an exclusive franchise to the utility, since all such grants are made on the implied condition that they shall be subject to regulation for the public good.⁴⁵ In other words, rights in streets or highways granted to public service corporations are at all times held in subordination to the superior rights of the public,⁴⁶ and are subject not only to subsequent proper police regulations,⁴⁷ but also to prior general ordi-

35. U.S.—Illinois Cent. R. Co. v. City of Mayfield, C.C.A.Ky., 35 F. 2d 808, certiorari denied 50 S.Ct. 158, 280 U.S. 608, 74 L.Ed. 651.

44 C.J. p 932 note 56.

Regulation as to use of streets and highways by:

Electrical supply company see Electricity § 5 b.

Gas company see Gas § 3 c.

Railroads see the C.J.S. title Railroads § 107, also 51 C.J. p 587 note 4-p 588 note 18.

Street railroads see the C.J.S. title Street Railroads § 161, also 60 C.J. p 335 note 4-p 336 note 21.

Telegraph and telephone companies see the C.J.S. title Telegraphs and Telephones § 24, also 62 C.J. p 34 note 46-p 35 note 53.

Under express constitutional provisions a city may be granted the right and plenary power to regulate use of its streets by public utilities—Billings v. Cleveland R. Co., 111 N.E. 155, 92 Ohio St. 478.

Right held not divested by statute

Ill.—City of Geneseo v. Illinois Northern Utilities Co., 39 N.E.2d 26, 378 Ill. 506, certiorari denied Illinois Northern Utility Co. v. City of Geneseo, Ill., 62 S.Ct. 1046, 316 U.S. 670, 86 L.Ed. 1746—Village of Heyworth v. Central Illinois Electric & Gas Co., 39 N.E.2d 26, 378 Ill. 506, certiorari denied Central Illinois Electric & Gas Co. v. Village of Heyworth, Ill., 62 S.Ct. 1046, 316 U.S. 670, 86 L.Ed. 1746.

38. Ariz.—Phoenix R. Co. v. Lount, 187 P. 933, 21 Ariz. 289.

44 C.J. p 932 note 57.

Constitutional proviso

An article of the constitution containing a proviso that incorporated municipalities "may be authorized by

law" to exercise supervision over public service corporations doing business therein does not grant to municipalities such power until legislation in pursuance of such proviso has been adopted—Northeast Rapid Transit Co. v. City of Phoenix, 15 P. 2d 951, 41 Ariz. 71—Phoenix R. Co. v. Lount, 187 P. 933, 21 Ariz. 289.

37. W.Va.—State v. Benwood, etc., Water Co., 120 S.E. 918, 94 W.Va. 724.

44 C.J. p 932 note 59.

Power implied unless expressly negatived

N.Y.—New York City Tunnel Authority v. Consolidated Edison Co. of N. Y., 68 N.E.2d 445, 295 N.Y. 467, reargument denied 70 N.E.2d 551, 296 N.Y. 745.

38. U.S.—City of Tulsa v. Southwestern Bell Telephone Co., C.C.A. Okl., 75 F.2d 343, certiorari denied 55 S.Ct. 656, 295 U.S. 744, 79 L.Ed. 1690.

Power respecting telephone companies

Statute authorizing telephone companies to use streets or public grounds subject to municipal control as to streets or grounds to be occupied and as to location of poles impliedly withholds from municipalities all other powers respecting telephone rights of way.—City of Tulsa v. Southwestern Bell Telephone Co., supra.

39. Ala.—City of Prichard v. Alabama Power Co., 175 So. 294, 234 Ala. 339.

Poles and wire lines

Ala.—City of Prichard v. Alabama Power Co., supra.

40. Neb.—Clough v. North Central Gas Co., 34 N.W.2d 862, 150 Neb. 418, rehearing denied 36 N.W.2d 573, 151 Neb. 75.

41. Neb.—Clough v. North Central Gas Co., supra.

42. Neb.—Clough v. North Central Gas Co., supra.

43. U.S.—New Orleans Gas-Light Co. v. Louisiana Light, etc., Producing, etc., Co., La., 6 S.Ct. 252, 115 U.S. 650, 29 L.Ed. 516.

44. Ala.—City of Mobile v. Farrell, 158 So. 539, 229 Ala. 582, followed in City of Mobile v. Nelson, 158 So. 543, 229 Ala. 587 and City of Mobile v. Mouraites, 158 So. 543, 229 Ala. 588.

N.Y.—Elighth Avenue Coach Corporation v. City of New York, 10 N.Y. S.2d 170, 170 Misc. 243, affirmed 20 N.Y.S.2d 402, 259 App.Div. 870, affirmed 35 N.E.2d 907, 286 N.Y. 84—McCarthy v. City of New York, 10 N.Y.S.2d 170, 170 Misc. 243, affirmed 20 N.Y.S.2d 401, 259 App. Div. 870, affirmed 36 N.E.2d 684, 286 N.Y. 636.

44 C.J. p 932 note 63.

45. U.S.—Atlantic Coast Line R. Co. v. Goldsboro, N.C., 34 S.Ct. 364, 232 U.S. 548, 58 L.Ed. 721.

44 C.J. p 932 note 64.

Right to impose conditions on grant of use of street see *infra* § 1721.

46. Ky.—*Corpus Juris* cited in Louisville Gas & Electric Co. v. Commissioners of Sewerage of Louisville, 33 S.W.2d 344, 345, 236 Ky. 376.

44 C.J. p 932 note 65.

47. Neb.—Clough v. North Central Gas Co., 34 N.W.2d 862, 150 Neb. 418, rehearing denied 36 N.W.2d 573, 151 Neb. 75.

N.Y.—New York City Tunnel Authority v. Consolidated Edison Co. of N. Y., 68 N.E.2d 445, 295 N.Y. 467, reargument denied 70 N.E.2d 551, 296 N.Y. 745.

44 C.J. p 933 note 66.

nances respecting use of the streets.⁴⁸ The grantee of a franchise from a municipality, where the laying of pipes in the street is necessary, takes the franchise subject to delay or refusal on the part of the common council in which is vested control of the streets to grant a permit to lay such pipes.⁴⁹ An agreement between a public utility and a municipality as to the removal of poles, permitted to be placed on the street, to a new position in the event of the widening of the street, is binding and enforceable.⁵⁰

b. Exercise of Power to Regulate

Regulations of the use of streets by public utilities must be reasonable, and must not prohibit, annul, or destroy rights growing out of a valid contract. A reasonable fee or charge may be collected as compensation for the expense of regulation.

Regulations of the use of streets by public utilities must be reasonable,⁵¹ and must not prohibit, annul, or destroy rights growing out of a valid contract.⁵² The power to regulate does not authorize prohibition,⁵³ or include such regulation as constitutes unreasonable interference with the exercise of a franchise.⁵⁴ The measure of municipal power to regulate the use of streets by quasi-public corporations, chartered by the state to supply the public with water, light, conveyance, heat, information, and other conveniences, depends largely on the construction of charters and statutes, by which the state

confers such franchises on the companies and delegates its own power of regulation thereof to the municipalities.⁵⁵

In general, the courts will not interfere with an exercise of discretionary power over the use of municipal streets by public utilities in the absence of a clear abuse of discretion;⁵⁶ and a municipality may enact and enforce all reasonable regulations respecting such use of its streets.⁵⁷ However, under a statute so providing, the reasonableness of municipal regulations is subject to judicial review.⁵⁸ In general, ordinances regulating public utilities are presumed valid until the contrary is shown;⁵⁹ and the burden of showing the unreasonableness of such an ordinance is on the public utility.⁶⁰

The validity of conditions imposed on the grant of the right to use the streets is considered *infra* § 1721.

Regulations held valid. Particular regulations which have been held valid include regulations requiring all work of construction and repair to be done under municipal direction and supervision;⁶¹ requiring the company to repair and maintain consumer's service line without cost to the consumer;⁶² prohibiting excavations⁶³ or the laying of pipes⁶⁴ without express municipal consent, or prohibiting such work during the winter;⁶⁵ requiring relaying,⁶⁶ relocating,⁶⁷ or requiring, according to the

48. Mo.—*Corpus Juris* cited in *City of St. Louis v. Laclede Power & Light Co.*, 152 S.W.2d 23, 25, 347 Mo. 1066.

44 C.J. p 933 note 67.

49. N.Y.—*New York v. New York Refrigerating Constr. Co.*, 28 N.Y.S. 614, 8 Misc. 61, affirmed 31 N.Y.S. 714, 82 Hun 553, affirmed 40 N.E. 771, 146 N.Y. 210.

50. Pa.—*Borough of Collingdale v. Delaware County Elec. Co.*, 9 Pa. Dist. & Co. 518, 18 Del.Co. 68, 18 Mun.L.R. 125.

51. Wis.—*Wisconsin Telephone Co. v. City of Milwaukee*, 270 N.W. 336, 223 Wis. 251.

44 C.J. p 933 note 72.

52. Ind.—*Indianapolis v. Consumers' Gas Trust Co.*, 39 N.E. 433, 140 Ind. 107, 49 Am.S.R. 183, 27 L.R.A. 514.

44 C.J. p 933 note 73.

Recognition of franchise

Exercise of statutory franchise of utility to use city streets may only be controlled by the city in recognition of existence of franchise.—*Wisconsin Telephone Co. v. City of Milwaukee*, 270 N.W. 336, 223 Wis. 251.

53. U.S.—*Essex v. New England Tel. Co.*, Mass., 36 S.Ct. 102, 239 U.S. 313, 60 L.Ed. 301.

44 C.J. p 933 note 70.

54. Wis.—*Eastern Wisconsin R. etc., Co. v. Hackett*, 115 N.W. 376, 1136, 1139, 135 Wis. 464.

44 C.J. p 933 note 71.

55. Ga.—*Georgia R., etc., Co. v. Atlanta*, 115 S.E. 263, 154 Ga. 731.

56. Ill.—*Murphy v. Chicago, etc., R. Co.*, 93 N.E. 381, 247 Ill. 614.

57. U.S.—*Illinois Cent. R. Co. v. City of Mayfield, C.C.A. Ky.*, 35 F.2d 808, certiorari denied 50 S.Ct. 158, 280 U.S. 608, 74 L.Ed. 651.

44 C.J. p 934 note 80.

58. Pa.—*Appeal of Bell Telephone Co. of Pennsylvania*, 10 A.2d 817, 138 Pa.Super. 527.

59. Va.—*Richmond-Ashland Ry. Co. v. Commonwealth ex rel. City of Richmond*, 173 S.E. 392, 162 Va. 296.

Relocation of railroad tracks

Ordinance requiring relocation of electric railroad's tracks at street intersection and regrading and paving of intersection at company's expense is presumed valid until contrary is shown.—*Richmond-Ashland Ry. Co. v. Commonwealth ex rel. City of Richmond*, *supra*.

60. Pa.—*Appeal of Bell Telephone Co. of Pennsylvania*, 10 A.2d 817, 138 Pa.Super. 527.

61. Cal.—*St. Helena v. San Fran-*

cisco, etc., R. Co., 140 P. 600, 24 Cal.App. 71—*Philadelphia v. Western Union Tel. Co.*, 11 Phila. 327.

62. Neb.—*Clough v. North Central Gas Co.*, 34 N.W.2d 862, 150 Neb. 418, rehearing denied 36 N.W.2d 573, 151 Neb. 75.

63. Cal.—*Ex parte Keppelmann*, 138 P. 346, 166 Cal. 770.

44 C.J. p 934 note 82.

Fees for permit to excavate see *infra* § 1694.

Regulation as to excavations generally see *infra* § 1694.

64. Cal.—*Ex parte Keppelmann*, 138 P. 346, 166 Cal. 770.

44 C.J. p 934 note 83.

65. Pa.—*Northern Liberties v. Northern Liberties Gas Co.*, 12 Pa. 318.

66. W.Va.—*State v. Benwood, etc., Water Co.*, 120 S.E. 918, 94 W.Va. 724.

44 C.J. p 934 note 85.

67. N.Y.—*New York City Tunnel Authority v. Consolidated Edison Co. of N. Y.*, 68 N.E.2d 445, 295 N.Y. 467, reargument denied 70 N.E.2d 551, 296 N.Y. 745.

Implied power

The power to compel public service corporations to relocate at their own expense facilities maintained in pub-

decisions on the question, removal⁶⁸ of the utility's facilities; requiring the placing of electric wires in underground conduits;⁶⁹ requiring the removing of street wires to a less dangerous location,⁷⁰ or temporarily removing wires to permit the moving of buildings;⁷¹ restricting limits within which poles may be erected in a street;⁷² or prohibiting their erection without obtaining authority from the council.⁷³

Regulations held invalid. Particular regulations which have been held unreasonable and invalid include regulations prohibiting the digging up of the surface of any street except by permission of the council,⁷⁴ or prohibiting a gas company from laying its pipes along the city streets,⁷⁵ or from opening a paved street to lay pipes from the main to the opposite side of the street,⁷⁶ or limiting the time within which such work shall be done.⁷⁷

Charge for regulation. A municipality may collect a reasonable fee or charge as compensation for the expense of regulation,⁷⁸ which may be in an amount ultimately proving in excess of the actual expense involved;⁷⁹ and the burden of proof rests on the person asserting the unreasonableness of such a charge or fee.⁸⁰ In determining whether such a fee is reasonable, the courts will consider all facts relevant and material to the particular matter

involved.⁸¹ It has been held that a municipality has no authority to compel public service corporations to pay the expense of public regulations, unless such power has been conferred by statute.⁸²

Where a municipality orders one public utility company operating in the street to relocate and use its property in a position and manner which must inevitably completely destroy the property of another public utility company with equal rights in the street, it has been held that the municipality must reimburse the latter company for the cost of removing its property to another location.⁸³

Waiver. A municipal board has no power to waive an ordinance requirement affecting use of the streets by a franchise holding corporation so as to create an estoppel.⁸⁴

§ 1693. — Trees

A municipal corporation ordinarily has control of trees in its streets; and it may, in the exercise of sound discretion, remove trees for a proper purpose, providing it complies with statutory requirements.

Ordinarily, a municipal corporation has control of trees in its streets,⁸⁵ and may act as to them under its police power.⁸⁶ Accordingly, a municipality may forbid any act injurious thereto without municipal consent,⁸⁷ or perform proper municipal functions

lic streets where public health, safety, or convenience requires such relocation is to be implied unless expressly negated—*New York City Tunnel Authority v. Consolidated Edison Co. of N. Y.*, *supra*.

68. Va.—Roanoke Gas Co. v. Roanoke, 14 S.E. 665, 88 Va. 810.
44 C.J. p 934 note 86.

69. Pa.—Appeal of Bell Telephone Co. of Pennsylvania, 10 A.2d 817, 138 Pa.Super. 527.
44 C.J. p 934 note 87.

70. Pa.—Appeal of Bell Telephone Co. of Pennsylvania, *supra*.
44 C.J. p 934 note 88.

71. Neb.—State v. Omaha, etc., R. Co., 161 N.W. 170, 100 Neb. 716.
44 C.J. p 934 note 89.

72. N.C.—Norfolk Southern R. Co. v. Morehead City, 83 S.E. 259, 167 N.C. 118.

73. Mo.—Carthage v. Garner, 108 S. W. 521, 209 Mo. 688.
44 C.J. p 934 note 91.

74. N.J.—Allen v. Jersey City, 22 A. 257, 53 N.J.Law 522.

75. Pa.—Reading v. Consumers' Gas Co., 2 Del.Co. 437—*Chartiers Valley Gas Co. v. Pittsburgh*, 17 Pittsb. Leg.J.,N.S., 240.

76. Pa.—Northern Liberties v. Northern Liberties Gas Co., 12 Pa. 318.

77. Pa.—Chartiers Valley Gas Co. v. Pittsburgh, 17 Pittsb.Leg.J.,N.S., 240.

78. Ga.—Georgia R., etc., Co. v. Atlanta, 115 S.E. 263, 154 Ga. 731.
44 C.J. p 935 note 5.

Fees for permission to open or excavate pavement see *infra* § 1694.

79. Pa.—Chambersburg Borough v. Chambersburg Gas Co., 38 Pa.Super. 311.

80. Pa.—Chambersburg Borough v. Chambersburg Gas Co., *supra*.

81. Pa.—Pottsville Borough v. Pottsville Gas Co., 33 Pa.Super. 480.

44 C.J. p 935 note 8.

82. N.Y.—New York v. Woodhaven Gas Light Co., 168 N.Y.S. 429, 181 App.Div. 188.
44 C.J. p 935 note 9.

83. Ohio.—City of Cincinnati v. Cincinnati & Suburban Bell Telephone Co., 174 N.E. 586, 123 Ohio St. 174.

Streetcar rails over telephone conduits

City cannot have streetcar rails placed over underground telephone conduit system, without reimbursing telephone company for cost of removing conduits.—*City of Cincinnati v. Cincinnati & Suburban Bell Telephone Co.*, *supra*.

84. Mo.—Dugdale v. St. Joseph R.,

etc., Co., 189 S.W. 830, 195 Mo.App. 243.

85. Ala.—City of Montgomery v. Quinn, 19 So.2d 529, 246 Ala. 154.

Ill.—Baker v. Normal, 81 Ill. 108.

Okl.—Norman Milling, etc., Co. v. Bethurem, 139 P. 830, 41 Okl. 735, 51 L.R.A.,N.S., 1082.

Ownership of trees see *supra* § 1685.

The local officers, rather than cities and towns as such, have control of public shade trees within town or city.—*City of Medford v. Metropolitan District Commission*, 22 N.E.2d 110, 303 Mass. 537.

86. Ala.—City of Montgomery v. Quinn, 19 So.2d 529, 246 Ala. 154.

87. N.J.—Consolidated Tract. Co. v. East Orange, 44 A. 1099, 63 N.J. Law 669.

44 C.J. p 935 note 14.

Authority to prosecute for injury
Ga.—City of Albany v. Lippitt, 13 S. E.2d 807, 191 Ga. 756.

Penal ordinance held valid

An ordinance providing for the care and protection of shade trees in the public highways, streets, and avenues that imposes, in addition to a fine, a penalty of imprisonment for its violation is valid.—*Commonwealth v. Roth*, 54 Pa.Dist. & Co. 308, 21 Lehigh.L.J. 229.

What constitutes "shade tree"
Maple tree, so decayed as to be

despite incidental injury to trees.⁸⁸ The power of a municipality over such trees includes the right to remove or trim them where it is reasonably necessary for public safety or convenience,⁸⁹ or for the improvement of the street,⁹⁰ or its beautification,⁹¹ or for preservation of city sewers;⁹² and this power exists, even though the fee of the street is not in the municipality.⁹³ Municipal control over trees is not divested by permission given a street car company to operate its cars through the streets.⁹⁴

While every reasonable intendment will be implied to support the discretionary action of a municipality or its officials with respect to the removal of trees,⁹⁵ and the courts will not interfere unless there is an abuse of discretion,⁹⁶ such municipal power must not be exercised willfully, wantonly, or unnecessarily,⁹⁷ so as to remove as obstructions or

nuisances trees which do not in fact obstruct;⁹⁸ and, it has been held, the power should be so exercised as to avoid, if possible, an entire loss of property.⁹⁹ An ordinance unreasonably directing removal of trees is void;¹ and, a fortiori, trees may not be removed or trimmed where such action is for purposes not covered by statutory authority.² An authority from a council to trim trees does not confer the right to destroy and remove them;³ nor does authority to care for and superintend trees confer such right.⁴ An ordinance requiring the permission of the chairman of the street committee to cut or trim shade trees in a city, and directing him to state in the permit how the work is to be done and that it be done under the supervision of the street overseer, is as to such directions merely directory, and a person who has obtained the permission of the chairman of the street committee cannot be con-

dangerous to public, was not a "shade tree," within an ordinance prohibiting destruction of shade trees in streets.—*Village of Cattaraugus v. Johnson*, 249 N.Y.S. 327, 139 Misc. 368, affirmed 250 N.Y.S. 945, 233 App.Div. 799.

88. N.Y.—*St. Mary of Angels Church v. Barrow*, 124 N.Y.S. 571, 68 Misc. 545.

44 C.J. p 936 note 15.

89. Del.—*Lynch v. Town Council of Georgetown*, 180 A. 594, 21 Del.Ch. 25.

Ga.—*Mozley v. City of Marietta*, 180 S.E. 122, 180 Ga. 590.

Trees along power lines

An ordinance under which city officers use city employees in trimming trees along telephone and electric power lines and charge the expense thereof to utilities involved is within the powers conferred by the welfare clause of the city's charter.—*Erny v. City of St. Paul*, 290 N.W. 427, 207 Minn. 150.

90. Cal.—*Corpus Juris* cited in *Neill v. City of Glendale*, 289 P. 877, 881, 106 Cal.App. 553.

Del.—*Lynch v. Town Council of Georgetown*, 180 A. 594, 21 Del.Ch. 25.

Kan.—*Corpus Juris* cited in *Ditzen v. Kansas City*, 28 P.2d 739, 740, 138 Kan. 880.

Ohio.—*Village of Willard v. McElligott*, 169 N.E. 447, 121 Ohio St. 456.

Pa.—*Goulo v. Taylor Borough*, Quar. Sess., 41 Lack.Jur. 103, 32 Mun. L.R. 34.

44 C.J. p 936 note 16.

Pavement of center parkway

Resolution of board of aldermen of city directing that street be paved and that city manager proceed immediately to remove trees and shrubs

from street to prepare surface for paving, authorized removal of trees and shrubs from parkway in street, where there were no trees and shrubs in street other than those in the parkway.—*Spicer v. City of Goldsboro*, 39 S.E.2d 526, 266 N.C. 557.

91. Ky.—*Lagrange v. Overstreet*, 132 S.W. 169, 141 Ky. 43, 31 L.R.A., N.S., 951.

92. Del.—*Lynch v. Town Council of Georgetown*, 180 A. 594, 21 Del.Ch. 25.

Pa.—*Dare v. City of Harrisburg*, 16 Pa.Dist. & Co. 22.

44 C.J. p 936 note 18.

93. N.C.—*Moore v. Carolina Power, etc. Co.*, 79 S.E. 596, 163 N.C. 300.

44 C.J. p 936 note 19.

94. N.J.—*Consolidated Traction Co. v. East Orange Tp.*, 38 A. 803, 61 N.J.Law 202.

95. Kan.—*Remington v. Whithall*, 108 P. 112, 82 Kan. 234, 31 L.R.A., N.S., 957.

Pa.—*Shuck v. Borough of Ligonier*, 22 A.2d 735, 343 Pa. 265.

96. N.C.—*Munday v. Newton*, 83 S. E. 695, 167 N.C. 656.

44 C.J. p 936 note 25.

Parkway in center of street

Where board of aldermen of city did not abuse its discretion in ordering removal of trees and shrubs from parkway in center of street and the paving of that area, court was without authority to restrain the board from so doing.—*Spicer v. City of Goldsboro*, 39 S.E.2d 526, 226 N.C. 557.

97. Mo.—*Cartwright v. Liberty Tel. Co.*, 103 S.W. 982, 205 Mo. 126, 12 L.R.A., N.S., 1125, 12 Ann.Cas. 249.

44 C.J. p 936 note 26.

Discretion held not abused

Del.—*Lynch v. Town Council of*

Georgetown, 180 A. 594, 21 Del.Ch. 25.

Action held arbitrary or abuse of discretion

(1) Action by city commission in widening street and removing trees therefrom was abuse of discretion, where perusal of record failed to disclose any element of public welfare, public necessity, or even public convenience to be served thereby.—*Bowen v. Winterle*, 30 So.2d 536, 159 Fla. 3.

(2) In absence of proof that tree which had been planted by abutting owner in portion of street which had been set aside by city as parking strip was nuisance or interfered with improvement which city desired to effect, action of city in destroying tree was held arbitrary.—*Shaw v. City of Yakima*, 48 P.2d 630, 183 Wash. 200.

98. Ind.—*Hildrup v. Windfall City*, 64 N.E. 942, 29 Ind.App. 592.

44 C.J. p 936 note 27.

Shade trees are regarded with favor, and do not constitute a nuisance unless they are an actual obstruction to travel along the street or highway.—*Shuck v. Borough of Ligonier*, 22 A.2d 735, 343 Pa. 265.

99. Mich.—*Stretch v. Cassopolis*, 84 N.W. 51, 125 Mich. 167, 84 Am. S.R. 567, 51 L.R.A. 345.

1. Mo.—*Webb v. Strobach*, 127 S. W. 680, 143 Mo.App. 459.

44 C.J. p 936 note 29.

2. Kan.—*Paola v. Wentz*, 98 P. 775, 79 Kan. 148, 131 Am.S.R. 290.

44 C.J. p 936 note 30.

3. Iowa.—*Newland v. Iowa R., etc., Co.*, 159 N.W. 244, 179 Iowa 228.

4. Mass.—*McCarthy v. Boston*, 135

Mass. 197.

victed of a violation of the ordinance, although that official omits to make such directions.⁵

As to rights and duties of abutting owners. Municipal control over trees is not divested by a license to abutters to set out and care for shade trees,⁶ since the rights of abutters are subject to the paramount power of the municipality.⁷ Damages cannot ordinarily be recovered by an abutter for removal of trees which constitute an obstruction to public use of the street;⁸ but, where the action of the municipality in destroying a tree is held to be arbitrary, the municipality may be liable in damages to the abutting owner on the filing of a proper claim.⁹ The owner of land on the side of the road opposite to the land on which injured trees were growing and who had no interest or title in such land is not an abutting owner within a statute making it an offense to injure trees within the highway limits without the consent of the abutting owner.¹⁰

Abutters are not bound to care for the trees planted on the sidewalk by the municipality, in the absence of any statute or municipal regulation imposing that duty on them;¹¹ and power to regulate the planting and protection of shade trees does not include the power to compel an abutter to cut them down.¹²

Even where passively permitted to do so by the municipality, an adjoining owner cannot maintain trees in that portion of the street designed for vehicles so as to block his neighbor's means of ingress and egress.¹³

Who may remove trees; tree wardens. Under a statute so providing, the removal of public shade trees may be made only by the tree warden,¹⁴ or, where there is no tree warden, by such other officer as may be charged with the duties of tree warden.¹⁵ Where, by statute, the power to preserve and care for certain boulevards or ways is placed in a state commission, rather than in the towns or cities, only such commission has the power to remove the trees on such way or boulevard;¹⁶ and a statute placing control of public shade trees in city or town officers does not apply.¹⁷ The tree warden of a town, in performing his official duties, acts as a public officer;¹⁸ and his powers are limited by statute.¹⁹

A private person may not remove or trim trees interfering with public travel without authority from the municipality.²⁰ The city may not transfer to a third person its power of removing or trimming privately owned trees to the detriment of such owner.²¹

Proceedings for removal of trees. While the mu-

5. Ga.—Johnson v. Rome R., etc., Co., 62 S.E. 491, 4 Ga.App. 742.

44 C.J. p 937 note 36.

6. Ill.—Baker v. Normal, 81 Ill. 108.

7. Wash.—Robinson v. Spokane, 120 P. 101, 66 Wash. 527, Ann.Cas. 1913C 1012.

44 C.J. p 936 note 21.

8. Ill.—Simpson v. Gibson, 164 Ill. App 147.

Miss.—Durant v. Castleberry, 64 So. 657, 106 Miss. 699.

Damages for destruction of trees from making of public improvement see supra § 1244.

9. Wash.—Shaw v. City of Yakima, 48 P.2d 630, 183 Wash. 200.

10. Pa.—Commonwealth v. Miller, 47 Pa.Super. 193.

11. N.J.—Weller v. McCormick, 1 A. 516, 47 N.J.Law 397, 54 Am.R. 175.

12. N.J.—Sproul v. Stockton, 62 A. 275, 73 N.J.Law 158.

Pa.—Bushong v. Wyomissing Borough, 25 Pa.Dist. 690.

13. Cal.—Humphrey v. Dunnells, 131 P. 761, 21 Cal.App. 312.

44 C.J. p 937 note 37.

14. Mass.—City of Medford v. Metropolitan District Commission, 22 N.E.2d 110, 303 Mass. 537.

"Public shade trees" within statute are trees within a public way, other than a state highway, or on its

boundaries, and include trees on a "boulevard," since a "boulevard" is a "public way."—City of Medford v. Metropolitan District Commission, supra.

15. Mass.—City of Medford v. Metropolitan District Commission, supra.

16. Mass.—City of Medford v. Metropolitan District Commission, supra.

"Boulevard" as public way

A "boulevard" is a "public way" although it is not a "state highway," the removal of shade trees from which is intrusted to the department of public works.—City of Medford v. Metropolitan District Commission, supra.

Right of municipalities to injunction

In suits by cities to enjoin metropolitan district commission from removing trees on a boulevard within respective cities, allegation that work was being conducted in such manner as to make cities liable to travelers did not entitle cities to relief sought, since under statute the commonwealth, not the city or town, is liable for injuries to travelers through defects in boulevard; moreover, even if trees were property of cities, a naked allegation of arbitrary and irrational conduct and bad faith on part of commission in re-

moving trees was insufficient to entitle cities to relief sought without allegations of facts showing that commission did not have right to remove trees.—City of Medford v. Metropolitan District Commission, supra.

17. Mass.—City of Medford v. Metropolitan District Commission, supra.

18. Mass.—Jones v. Inhabitants of Town of Great Barrington, 174 N. E. 118, 273 Mass. 483.

19. N.H.—City of Laconia v. Morin, 30 A.2d 479, 92 N.H. 314.

Restrictions as to trees subject to control

Under statute depriving city tree warden of control of trees other than those acquired by gift or purchase, or planting or by condemnation, alleged possessory acts of warden regarding privately owned tree on highway easement after passage of such statute were ultra vires as far as city was concerned.—City of Laconia v. Morin, supra.

20. Minn.—State v. Pratt, 95 N.W. 589, 90 Minn. 66.

44 C.J. p 937 note 38.

21. Miss.—Braham v. Meridian Home Tel. Co., 52 So. 485, 97 Miss. 326. N.C.—Moore v. Carolina Power, etc., Co., 79 S.E. 596, 163 N.C. 300.

municipal corporation or its officer, in order to remove a tree from a street, must proceed in a lawful manner,²² the qualified ownership existing in an abutting owner as to the tree does not constitute private property in the sense that the municipality must by legal proceeding condemn the right.²³ While in some jurisdictions notice and a public hearing are not necessarily prerequisite to the removal of a tree,²⁴ it has been held that an owner is entitled to a reasonable notice where the municipality has decided to require such removal.²⁵ Under a statute so providing, trees may not be removed by tree wardens or similar officers without first holding a public hearing;²⁶ and if, on the hearing, written objection has been made to the removal of trees, they may not be removed without approval by the selectman or mayor.²⁷ Where, however, the statute so provides a tree may be removed without notice or hearing,²⁸ or the approval of the mayor,²⁹ where it is ordered done by the officials designated in the statute, whose power and duty it is to order such trimming or removal where a tree within the limits

of the highway is dangerous or an obstruction to travel,³⁰ or where the removal of a tree is necessary for the purpose of widening the highway.³¹ In fact it has been held to be of importance that there be a compliance with the statute requiring a hearing,³² and the failure of the tree warden to comply with the statute cannot be justified simply by the fact of his office and that he acted in good faith.³³

§ 1694. — Excavations

A municipal corporation may make reasonable regulations as to the right to make an excavation in a street. It may prohibit excavations without a permit, and may charge a reasonable fee for such permit.

A municipal corporation may make reasonable regulations as to the right to make an excavation or opening in a street³⁴ and may require indemnity for damages;³⁵ but regulations of this character must be uniform in their application to all who may desire to exercise the privilege,³⁶ and must not confer an arbitrary power to discriminate between citizens.³⁷ A purely gratuitous delegation of power

22. Wash.—Shaw v. City of Yakima, 48 P.2d 630, 183 Wash. 200.

23. Wash.—Shaw v. City of Yakima, supra.

24. Wis.—Chase v. Oshkosh, 51 N.W. 560, 81 Wis. 313, 29 Am.S.R. 898, 15 L.R.A. 553.

44 C.J. p 937 note 39.

25. Iowa.—Waterbury v. Morpew, 125 N.W. 205, 146 Iowa 313.

Mich.—Stretch v. Cassopolis, 84 N.W. 51, 125 Mich. 167, 84 Am.S.R. 567, 51 L.R.A. 345.

Opportunity to transplant or remove them

Mich.—Stretch v. Cassopolis, supra.

43 C.J. p 212 note 55 [b].

26. Mass.—City of Medford v. Metropolitan District Commission, 22 N.E.2d 110, 303 Mass. 537—Jones v. Inhabitants of Town of Great Barrington, 174 N.E. 118, 273 Mass. 483.

Size of tree

Tree wardens of town cannot remove trees over specified diameter without public hearing, even though endangering persons lawfully traveling on public way.—Jones v. Town of Great Barrington, 168 N.E. 779, 269 Mass. 202.

Power of board of public works in respect of trees in street was held controlled by such general law where charter of city so provided.—Graham v. Board of Public Works of Pittsfield, 189 N.E. 820, 285 Mass. 544.

27. Mass.—City of Medford v. Metropolitan District Commission, 22 N.E.2d 110, 303 Mass. 537—Graham v. Board of Public Works of

Pittsfield, 189 N.E. 820, 285 Mass. 544.

28. Mass.—Graham v. Board of Public Works of Pittsfield, supra—Jones v. Town of Great Barrington, 168 N.E. 779, 269 Mass. 202.

29. Mass.—Graham v. Board of Public Works of Pittsfield, 189 N.E. 820, 285 Mass. 544.

30. Mass.—Graham v. Board of Public Works of Pittsfield, supra—Jones v. Town of Great Barrington, 168 N.E. 779, 269 Mass. 202.

31. Mass.—Graham v. Board of Public Works of Pittsfield, 189 N.E. 820, 285 Mass. 544.

What constitutes "widening highway"

"Widening the highway," as used in statute dispensing with public hearing and mayor's approval of order for removal of trees for "widening the highway," signifies change in location of highway or extension of its boundaries by bringing more of the earth's surface within that location by means of exercise of eminent domain, term "widening" being often comprehended in the broader term, "alteration;" and statute was held inapplicable to mere widening of traveled portion of highway, so that, where purpose of board of public works for order that trees not endangering travelers be removed was mere extension of traveled portion of highway, order not approved by the mayor never became effective.—Graham v. Board of Public Works of Pittsfield, supra.

Determination of object of removal
Trial judge's report, made at re-

quest of board of public works, that chairman of board testified that object of order that trees be removed from highway was extension of traveled portion of highway must be accepted where record of board stated no reason for order and judge found that trees did not obstruct, endanger, or incommode travelers.—Graham v. Board of Public Works of Pittsfield, supra.

32. Vt.—Skinner v. Buchanan, 142 A. 72, 73, 101 Vt. 159.

Reasons for rule

"In the first place, if the warden approached the subject with an open mind, as it must be assumed that he would, his conclusion, after hearing the pros and cons, if the question was controverted, might be entirely different than if arrived at without such hearing. Then, too, his decision is no longer final, but may be reviewed by the selectmen or trustees upon the request in writing of a party in interest."—Skinner v. Buchanan, supra.

33. Vt.—Skinner v. Buchanan, supra.

34. Cal.—In re Wilcox, 111 P. 374, 14 Cal.App. 164.

44 C.J. p 937 note 44.

Excavation by public utility company see supra § 1692 b.

35. Cal.—In re Wilcox, supra.

36. Cal.—In re Wilcox, supra.

43 C.J. p 232 note 84 [b].

37. Ala.—Talladega v. Sims, 62 So. 958, 8 Ala.App. 471.

44 C.J. p 937 note 47.

to a municipality to control the time and manner of making excavations in the street to accomplish what the legislature has authorized to be done does not empower the municipality to refuse its assent.³⁸

Permit required; fee therefor. An ordinance is not unreasonable or invalid which prohibits any person from making excavations in a street without the consent of, or a permit from, the municipal authorities,³⁹ provided it imposes no unreasonable conditions as to the manner in which the excavations shall be made and the street repaired.⁴⁰ A municipality may make the excavation of the street conditional on the payment of particular fees or charges,⁴¹ provided they are uniform⁴² and reasonable.⁴³

§ 1695. — Other Matters

The courts have adjudicated the validity of various regulations relating to municipal streets and the use

thereof, such as regulations as to sales, the distribution of circulars, soliciting alms, and the placing of signs and billboards thereon.

Various regulations relating to municipal streets and the use thereof have been held to be valid,⁴⁴ such as regulations relating to the numbering of houses and lots in the streets, and the renumbering thereof in accordance with the conditions contained in a charter provision granting the municipality the power to regulate such matter.⁴⁵

Sales on streets. The right of a municipality to regulate sales of goods, pamphlets, or other articles on the streets carries with it not only the right to impose reasonable restrictions and regulations on such sales,⁴⁶ but even the right to suppress or prohibit sales on the streets.⁴⁷ An ordinance prohibiting sales, or the selling of goods, pamphlets, or other articles, in certain specified congested areas,⁴⁸ or during certain specified hours in certain areas,⁴⁹

38. N.J.—New Brunswick Gas Light Co. v. South River, 77 A. 473, 77 N. J.Eq. 487.

44 C.J. p 937 note 48.

39. N.Y.—City of New Rochelle, on Complaint of Conlon, v. Burke, 43 N.E.2d 463, 288 N.Y. 406.
12 C.J. p 918 note 15.

Purpose of ordinance

Ordinance requiring permit for opening street was for protection of travelers as far as it was for protection of general public.—McKenna v. Andreassi, 197 N.E. 879, 292 Mass. 213.

40. N.Y.—Buffalo v. Stevenson, 100 N.E. 798, 207 N.Y. 258.

44 C.J. p 937 note 49.

41. N.J.—Cook v. North Bergen Tp., 69 A. 1035, 72 N.J.Law 119, affirmed 65 A. 885, 73 N.J.Law 818—Stowe v. Kearny, 59 A. 1058, 72 N. J.Law 106.

Excavation by public utilities

Pa.—Lansdowne Borough v. Springfield Water Co., 16 Pa.Super. 490, 8 Del.Co. 175—Lancaster v. Edison Electric Illum. Co., 8 Pa.Co. 178.

42. Cal.—In re Wilcox, 111 P. 374, 14 Cal.App. 164.

43. N.Y.—Buffalo v. Stevenson, 129 N.Y.S. 125, 145 App.Div. 117, appeal dismissed 100 N.E. 798, 207 N. Y. 258.

Relation to expense

An ordinance conditioning excavations on the payment of a fee for a permit is valid if it imposes no charge for such permit not grossly disproportionate to the expense of issuing it and the probable expense of proper inspection and police surveillance.—Buffalo v. Stevenson, 100 N. E. 798, 207 N.Y. 258—**44** C.J. p 937 note 49.

Fee held reasonable and valid

Pa.—Lansdowne Borough v. Springfield Water Co., 16 Pa.Super. 490, 8 Del.Co. 175.

Fees held unreasonable and invalid

Pa.—Ft. Pitt Gas Co. v. Sewickley Borough, 30 Pittsb Leg J.N.S. 419.
Wis.—Wisconsin Telephone Co. v. City of Milwaukee, 270 N.W. 336, 223 Wis. 251.

44. Pa.—Commonwealth v. Trimmer, Quar.Sess., 53 Dauph Co. 91.

Escaping water

An ordinance providing a penalty against owners or occupants of lots permitting water from any flowing well or spring to flow on any of the streets or alleys of the city is within the power expressly granted to a city to control streets and enforce sanitary regulations.—Skaggs v. Martinsville, 39 NE 241, 140 Ind. 476, 49 Am.S.R. 209, 33 L.R.A. 781.

Sidewalk elevator of hotel, idle for nearly hour before accident, was not "in use" within ordinance requiring doors to be closed.—Curtis v. Keller, 208 P. 196, 136 Or. 67.

Sidewalk grades

Power to establish and alter sidewalk grades can be exercised only by council.—Wilmot v. City of Chicago, 160 N.E. 206, 328 Ill. 552, 62 A.L.R. 394.

Establishment of street grades and change of street grades generally see *supra* § 1046.

45. N.Y.—Bacon v. Miller, 160 N.E. 381, 247 N.Y. 311.

Action of legislative nature

Action of board of aldermen in adopting resolution providing for renumbering buildings on newly added portion of avenue was held legislative in nature in determining

whether its action was void as an arbitrary and unreasonable exercise of power.—Bacon v. Miller, 160 N.E. 381, 247 N.Y. 311.

46. Ill.—City of Chicago v. Rhine, 2 N.E.2d 905, 363 Ill. 619, 105 A.L.R. 1045.

47. Ill.—City of Chicago v. Rhine, *supra*.

Tex.—Ex parte Largent, 162 S.W.2d 419, 144 Tex.Cr. 592, certiorari denied Largent v. Reeves, 63 S.Ct. 72, 317 U.S. 668, 87 L.Ed. 536, rehearing denied 63 S.Ct. 443, 317 U.S. 713, 87 L.Ed. 568.

Wis.—City of Stevens Point v. Bocksenbaum, 274 N.W. 505, 225 Wis. 373.

Purpose of prohibition

Generally, a municipality may prohibit the sale on its streets of foodstuffs, meats, and other articles of merchandise in the interest of public health, to relieve congestion and promote safety.—Dooley v. City of Cleveland, 135 S.W.2d 649, 175 Tenn. 439.

Sale of tickets

An ordinance prohibiting the sale of theater admission tickets on the street is within the power to control the streets and to adopt reasonable regulations as to traffic thereon.—People v. Palmiter, 128 N. Y.S. 426, 71 Misc. 158, affirmed 128 N. Y.S. 1140, 144 App.Div. 894.

48. Ill.—City of Chicago v. Rhine, 2 N.E.2d 905, 363 Ill. 619, 105 A.L.R. 1045.

Use of streets for market place
Tenn.—Dooley v. City of Cleveland, 135 S.W.2d 649, 175 Tenn. 439.

49. Ga.—Burns v. City of Carrollton, 34 S.E.2d 621, 72 Ga.App. 628.

has been held to be a valid and reasonable regulation, even as applied to the sale of religious literature by members of a religious organization.⁵⁰

The consistency of regulations as to the use of public places with the guaranty of freedom of the press is discussed in Constitutional Law § 213 c (2).

Distribution of circulars. While legislation prohibiting the distribution of booklets, handbills, and similar matter in public places, or requiring written permission therefor, has been held to be invalid, as discussed in Constitutional Law § 213 c (2), it has also been held to be within the powers of municipal corporations to regulate or prohibit the throwing, casting, or distributing in or on any of the streets, of handbills, circulars, cards, or other advertising matter,⁵¹ so as to prevent the littering of the streets,⁵² to diminish the danger from fire and the accumulation of filth,⁵³ and to protect from molestation those on the streets who do not desire to be detained;⁵⁴ but such regulations must be reasonable.⁵⁵

It has also been held that a municipality can en-

act reasonable regulations relating to the time, manner, and place of distribution, which do not unreasonably interfere with the distribution of literature expressing opinions and views.⁵⁶ Thus, it has been held that a municipality may properly enact an ordinance limiting the use of the streets for the distribution of circulars to reasonable hours of the day or week,⁵⁷ or an ordinance requiring distributors to obtain a permit⁵⁸ which may prescribe the time and condition under which the street may be so used,⁵⁹ provided such permit is not subject to arbitrary will but is granted on reasonable showing and applies to all alike.⁶⁰ It has been held that such ordinances may regulate the distribution of circulars, even though such distribution is for religious, patriotic, charitable, civic, or political purposes.⁶¹

A municipality may properly prohibit the distribution of obscene, lewd, or indecent literature.⁶²

Rules governing the construction of statutes and ordinances generally have been applied in the construction of ordinances and regulations as to the distribution of circulars.⁶³ An ordinance prohibit-

Held valid under police power

Ga.—Jones v. City of Moultrie, 27 S E 2d 39, 196 Ga. 526—Ferguson v. City of Moultrie, 29 S E 2d 786, 71 Ga. App. 15, followed in Csiki v. City of Moultrie, 29 S.E.2d 791, 71 Ga. App. 23.

50. Ga.—Burns v. City of Carrollton, 34 S.E.2d 621, 72 Ga. App. 628.

Jehovah's Witnesses

Ga.—Jones v. City of Moultrie, 27 S E 2d 39, 196 Ga. 526—Burns v. City of Carrollton, 34 S.E.2d 621, 72 Ga. App. 628—Ferguson v. City of Moultrie, 29 S.E.2d 786, 71 Ga. App. 15, followed in Csiki v. City of Moultrie, 29 S.E.2d 791, 71 Ga. App. 23.

51. Mass.—Commonwealth v. Kimball, 13 N.E.2d 18, 299 Mass. 353, 114 A.L.R. 1440.

Pa.—Commonwealth v. Ash, 31 Pa. Dist. & Co. 369, 54 Montg. Co. 45, 29 Mun. L.R. 142.

43 C.J. p 365 note 93.

Regulation of distribution of pamphlets and circulars on private premises see *supra* § 248.

52. Pa.—Commonwealth v. Ash, *supra*.
13 C.J. p 918 note 17.

53. Neb.—In re Anderson, 96 N.W. 149, 69 Neb. 686, 5 Ann. Cas. 421.

Pa.—Philadelphia v. Brabender, 51 A. 374, 201 Pa. 574, 58 L.R.A. 220.

54. Va.—Robert v. City of Norfolk, 49 S.E.2d 697, 188 Va. 413.

55. N.J.—Coughlin v. Sullivan, 126 A 177, 100 N.J. Law 42

Wis.—City of Milwaukee v. Snyder, 283 N.W. 301, 230 Wis. 131, reversed on other grounds Snyder v. City of Milwaukee, 60 S.Ct. 146, 308 U.S. 147, 84 L.Ed. 155.

Ordinances held void

Cal.—People v. Taylor, 85 P.2d 978, 133 Cal. App. 2d Supp. 760.

Ill.—City of Chicago v. Schultz, 173 N.E. 276, 341 Ill. 208

N.J.—Borough of Edgewater v. Bodine, 4 A.2d 527, 122 N.J. Law 291.

Ordinance held reasonable

An ordinance which prohibited distribution of handbills was held a reasonable exercise of city's power to maintain "internal police" within statute, and was held not to be unconstitutional or unreasonable because of an amendment thereto which created an exception for distribution of notices of a meeting of an organization of citizens which is recognized, if contents of notice are approved by mayor.—Commonwealth v. Kimball, 13 N.E.2d 18, 299 Mass. 353, 114 A.L.R. 1440.

56. Va.—Robert v. City of Norfolk, 49 S.E.2d 697, 188 Va. 413.

57. Fla.—Hord v. City of Fort Myers, 13 So.2d 809, 153 Fla. 99.

58. Fla.—Hord v. City of Fort Myers, *supra*.

59. Fla.—Hord v. City of Fort Myers, *supra*.

60. Fla.—Hord v. City of Fort Myers, *supra*.

Approval of mayor

Under a city ordinance prohibiting distribution of handbills except where distribution is of notice of meeting of organization of citizens which is recognized, and contents of notice are approved by mayor, the sufficient reason for requiring approval is to make sure that scope of exceptions is not exceeded, the approving officer being under duty to approve or disapprove according to his honest judgment, and not arbitrarily.—Commonwealth v. Kimball, 13 N.E.2d 18, 299 Mass. 353, 114 A.L.R. 1440.

61. Fla.—Hord v. City of Fort Myers, 13 So.2d 809, 153 Fla. 99.

62. Va.—Robert v. City of Norfolk, 49 S.E.2d 697, 188 Va. 413.

63. Wis.—City of Milwaukee v. Kassen, 234 N.W. 352, 203 Wis. 383.

Specific words as controlling

In ordinance prohibiting distributing of circulars, handbills, cards, posters, dodgers, "or other printed or advertising matter," quoted phrase is limited by preceding words.—City of Milwaukee v. Kassen, *supra*.

Notices of meeting of "recognized" organizations

In city ordinance prohibiting distribution of handbills except where distribution is of notices of a meeting of an organization of citizens which is recognized, and the contents of notice are approved by mayor, "recognized" means no more than

ing the distribution of advertising matter on the streets of the municipality does not apply to, and is not violated by, a distribution of matter which is not advertising and which is not distributed for advertising purposes.⁶⁴ Similarly, a regulation prohibiting the distribution of handbills and similar matter, and providing that it is not intended to prevent the distribution of anything other than commercial and business advertising, applies only to matter primarily designed to bring about mercantile transactions.⁶⁵ An ordinance prohibiting the distribution of handbills has been held to apply to a general circulation of such matter, and not to isolated acts.⁶⁶

Soliciting alms. It is within the power of a municipality to enact an ordinance prohibiting the business of soliciting alms on its streets without a permit,⁶⁷ provided such ordinance is reasonable.⁶⁸

Signs and billboards. A municipality has the power to regulate or prohibit the erection or placing of signs and billboards along its streets,⁶⁹ and may compel the removal of such existing structures;⁷⁰ and the fact that a state agency has made some regulations relating to signs and billboards will not affect the validity of municipal regulations which are not repugnant thereto.⁷¹

9. CARE OF STREETS

§ 1696. In General

A municipal corporation must keep its streets in repair, free from obstructions and nuisances, and in a reasonably safe condition for public travel.

It is in general the duty of a municipal corpora-

tion to keep its streets which are open for public use in repair, free from obstructions and nuisances and in a reasonably safe condition for public travel;⁷² and this rule applies with regard to state or other general highways as far as within the corpo-

"actual" and "publicly known" as contrasted with "proposed," "intended," or "secret."—*Commonwealth v. Kimball*, 13 N.E.2d 18, 299 Mass. 353, 114 A.L.R. 1440.

64. Pa.—*Commonwealth v. Ash*, 31 Pa. Dist. & Co. 369, 54 Montg. Co. 45, 29 Mun.L.R. 142.

Handing out newspapers

Pa.—*Commonwealth v. Ash*, supra.

65. N.Y.—*People ex rel. Greenberg v. Healy*, 74 N.Y.S.2d 102.

Handbills distributed by union

The prohibition does not include distribution of handbills by members of union urging that purchases from department stores be ordered delivered in order that members of drivers unions might have more jobs, since labor is not a commodity or article of commerce.—*People ex rel. Greenberg v. Healy*, supra.

66. Wis.—*City of Milwaukee v. Kasen*, 234 N.W. 352, 203 Wis. 383.

67. N.C.—*State v. Hundley*, 142 S.E. 330, 195 N.C. 377, 57 A.L.R. 506.

Denial of religious liberties

Such ordinance was held not void as denying charitable organization religious liberties.—*State v. Hundley*, supra.

68. N.C.—*State v. Hundley*, supra.

Ordinance held not unreasonable

N.C.—*State v. Hundley*, supra.

69. Ala.—*City of Birmingham v. Holt*, 194 So. 538, 239 Ala. 248.
Mass.—*Town of Milton v. Donnelly*, 28 N.E.2d 438, 306 Mass. 451.
43 C.J. p 325 note 68.

Aesthetic considerations

An ordinance in effect prohibiting any and all types of vertical signs and any other signs projecting from the face of any building, over any sidewalk, street, highway, or alley in village may be sustained on aesthetic considerations alone.—*Preferred Tires v. Village of Hempstead*, supra.

Ordinance held valid

A city ordinance prohibiting angle signs over sidewalk, street, or highway and prohibiting signs which are flat against building or structure from extending in excess of twelve inches over sidewalk, street, or highway is not invalid on ground of lack of clarity and failure to promote enumerated subjects; nor is such ordinance, prohibiting certain types of signs over sidewalks, but permitting erection and maintenance of signs on a marquee on theaters, hotels, or public buildings arbitrary, capricious, vague, and indefinite because of failure to specify type, size, and other features of signs permitted.—*Mallory, Inc. v. City of New Rochelle*, 53 N.Y.S.2d 643, 184 Misc. 66, affirmed 51 N.Y.S.2d 91, 268 App.Div. 878, appeal denied 51 N.Y.S.2d 758, 268 App.Div. 914, appeal denied 62 N.E.2d 391, 294 N.Y. 839, and affirmed 65 N.E.2d 425, 295 N.Y. 712.

70. La.—*New Orleans v. Kaufman*, 70 So. 874, 138 La. 897.

Order of removal held not unreasonable

Utah.—*Stringham v. Salt Lake City*, 201 P.2d 758.

Absence of permit or license

Ordinance in effect prohibiting any

and all types of vertical signs and any other signs projecting from the face of any building over any sidewalk, street, highway, or alley in the village was not invalid because it applied to existing signs as well as to signs to be erected where village had issued no permit or license for the erection of signs and their existence was by sufferance only.—*Preferred Tires v. Village of Hempstead*, 19 N.Y.S.2d 374, 173 Misc. 1017.

71. Mass.—*Town of Milton v. Donnelly*, 28 N.E.2d 438, 306 Mass. 451.

Permit granted by state department of public works for erection of billboard of certain dimensions did not authorize permittee to violate a by-law of town which prohibited erection of billboard of such dimensions within a designated number of feet of public way.—*Town of Milton v. Donnelly*, supra.

72. U.S.—*Kennedy v. City of Moscow*, D.C.Idaho, 39 F.Supp. 26.

Ga.—*Ferguson v. City of Moultrie*, 29 S.E.2d 786, 71 Ga.App. 15, followed in *Csiki v. City of Moultrie*, 29 S.E.2d 791, 71 Ga.App. 23.

Ill.—*City of Chicago v. Rhine*, 2 N.E.2d 905, 363 Ill. 619, 105 A.L.R. 1045.—*People ex rel. Jeffrey v. Murphy*, 254 Ill.App. 109.

Ind.—*House-Wives League v. City of Indianapolis*, 185 N.E. 511, 204 Ind. 685.

Iowa.—*Cowin v. City of Waterloo*, 21 N.W.2d 705, 237 Iowa 202.

La.—*City of New Orleans v. New Orleans Public Service*, 123 So. 648, 168 La. 984, affirmed *New Orleans Public Service v. City of New Or-*

rate limits and within the control of the municipal authorities,⁷³ although the duty may be placed on county authorities by statute and the municipality relieved from responsibility.⁷⁴ It is not, however, the duty of the municipality to keep streets and alleys open, in repair, and free from nuisance until it opens them to public travel or in some other manner invites the public to use them for street and alley purposes,⁷⁵ and the duty does not apply to thoroughfares unless they have been accepted as a public way by the municipal authorities;⁷⁶ and authority to vacate and close streets empowers the municipality to relieve the public from the charge of maintaining a street no longer used or useful as a street.⁷⁷ Streets must be made and kept suitable for their primary use as public highways,⁷⁸ to the end that the public may enjoy its rights,⁷⁹ even though such streets are subject to a superior servitude.⁸⁰

During the reorganization of a municipal corporation it is not released from its duty to exercise the power with which it is invested to keep its streets and sidewalks in a safe condition.⁸¹

§ 1697. Street Work by Inhabitants

Under power expressly granted, a municipal corporation may require the performance of road work on its streets by its inhabitants, or the payment of money in lieu thereof. An ordinance containing such requirement does not impose a tax.

The legislature may authorize the municipal corporation to compel road work by its inhabitants, or the payment of money in lieu thereof,⁸² and to provide for the imposition of a fine or imprisonment in case of default on the part of able-bodied male inhabitants.⁸³ Such powers are not within the incidental powers of a municipal corporation, however,⁸⁴ but must be expressly conferred;⁸⁵ and the mere fact that no law prohibits or prevents the corporation from requiring such labor is not sufficient.⁸⁶ Moreover, the general power of a municipal corporation to control the streets and highways does not include the power to compel citizens to work thereon;⁸⁷ and, where the express provisions of a statute authorizing cities of a stated class to require its residents to perform labor on the streets are repealed, general grants of power will not read-

leans, 50 S.Ct. 449, 281 U.S. 682, 74 L.Ed. 1115.

Mo.—Lewis v. Kansas City, 122 S.W. 852, 233 Mo.App. 341.

Mont.—State v. Cook, 276 P. 958, 84 Mont. 478.

Ohio—Village of Willard v. McElligott, 169 N.E. 447, 121 Ohio St. 456

Pa.—Shuck v. Borough of Ligonier, 22 A.2d 735, 343 Pa. 265—Dooley v. Pennsylvania R. Co., Com.Pl., 20 Northumb L.J. 156.

R.I.—Di Palma v. Zoning Board of Review of Town of Bristol, 50 A. 2d 779, 72 R.I. 286, 175 A.L.R. 399.

Tex.—Guenther v. Thompson, Civ App., 199 S.W.2d 710.

44 C.J. p 939 note 76.

Duty to improve for public travel see supra § 1044.

Liability for negligence see supra §§ 781–872.

Prevention of obstruction or encroachments see infra §§ 1747–1753.

Imperative duty

Md.—Baltimore Transit Co. v. Faulkner, 20 A.2d 485, 179 Md. 598.

Specific duty

Statute authorizing city or town to keep its streets open and in repair and free from encumbrances was held to impose a specific duty on city or town to keep its streets free from encumbrances.—Incorporated Town of Lamon v. Smith, 251 N.W. 706, 217 Iowa 264.

Duty held not delegable or assignable

Tex.—City of Gainesville v. Amarose, Civ.App., 67 S.W.2d 1054, error dismissed—Coombs v. City of Houston, Civ.App., 35 S.W.2d 1066.

Municipal, not governmental, function

(1) The proper care of streets and alleys has been held to be a municipal, rather than a governmental, function—Sinton v. Ashbury, 41 Cal 525.

(2) Governmental and municipal functions generally see supra § 110.

Responsibility of city manager

Under city charter provision charging city manager with duty of exercising supervision and control over all public improvements, city manager was responsible for the care and protection of city streets, and, in the discharge of such duty, he had the power of selection and of complete control over persons employed therefor—Burson v. City of Bristol, 10 S.E.2d 541, 176 Va. 53.

Maintenance of sidewalks and curbs is administrative function within reasonable control of borough president and superintendent of highways.—Fanroth v. Byrne, 169 N.E. 641, 252 N.Y. 447.

73. Ky.—Letcher County v. Whitesburg, 172 S.W. 1041, 162 Ky. 604.

74. Ala.—State v. Mobile County Revenue, etc., Com'rs, 61 So. 368, 180 Ala. 489.

44 C.J. p 939 note 78.

Control of county roads lying within city see supra § 1689.

75. Ohio.—Dayton v. Rhotehamel, 106 N.E. 967, 90 Ohio St. 175.

76. Miss.—City of Columbus v. Payne, 124 So. 269, 155 Miss. 170.

77. Tex.—Texas Co. v. Texarkana Mach. Shops, Civ.App., 1 S.W.2d 928.

78. Ill.—Jefferson v. Chapman, 20 N.E. 33, 127 Ill. 438, 11 Am.S.R. 136.

79. Md.—Carroll County v. Rickell, 126 A. 711, 146 Md. 463.

Neb.—Omaha v. Richards, 68 N.W. 528, 49 Neb. 244.

80. Colo.—Denver v. Mullen, 3 P. 693, 7 Colo. 345.

81. U.S.—Evanston v. Gunn, Ill., 99 U.S. 660, 25 L.Ed. 306.

82. Ill.—Sawyer v. City of Alton, 4 Ill. 127.

Tex.—Ex parte Earp, 163 S.W.2d 717, 144 Tex.Cr. 404.

44 C.J. p 939 note 87.

Right or duty of property owner to make improvements in general see supra §§ 1070–1077.

83. Ala.—Daader v. Cullman, 22 So. 19, 115 Ala. 539.

44 C.J. p 939 note 88.

84. La.—Winnfield v. Long, 48 So. 155, 122 La. 697.

85. La.—Winnfield v. Long, supra.

44 C.J. p 940 note 90.

Power granted by prior charter

Tex.—Ex parte Earp, 163 S.W.2d 717, 144 Tex.Cr. 404.

86. La.—Winnfield v. Long, 48 So. 155, 122 La. 697.

87. Ind.—Newburgh v. House, 134 N.E. 292, 191 Ind. 609.

44 C.J. p 940 note 92.

ily be construed as conferring the same power by implication.⁸⁸

Taxation distinguished. An ordinance requiring street labor or the payment of money in lieu thereof does not impose a tax;⁸⁹ and it has been held that an ordinance requiring street work or the payment of a tax is not a revenue measure.⁹⁰

Road labor laws generally. Requirements by a municipal corporation, under its delegated power, of work on its streets are distinct from requirements of road labor imposed by general laws.⁹¹

Exemptions. The propriety of requiring persons who are not able-bodied to perform street labor or pay money in lieu thereof in common with other citizens is a question of policy to be settled by the legislative department.⁹² Where statutes or ordinances exempt certain persons because of age, bodily infirmity, or other reasons from the duty to perform such labor, one who claims an exemption must prove his immunity.⁹³ A statute creating an exemption for liability for work on the public roads has been held not to create such an exemption as against a requirement of a municipal corporation of work on the streets.⁹⁴ Under a statute providing that no person shall be liable to do road work more than a prescribed number of days in any one year, one who has paid a street tax as a substitute for road duty in one city is not liable to road duty in another city in the same year.⁹⁵

Enforcement. On the ground that an ordinance requiring street work or the payment of a tax in

lieu thereof is not a revenue measure, it has been held that such an ordinance can be enforced by criminal prosecution.⁹⁶ In such a prosecution, it is no defense that the authorities failed to enforce the ordinance uniformly.⁹⁷

§ 1698. Cleaning Streets

A municipal corporation may provide for the cleaning of its streets; but there must be a compliance with statutory or charter requirements as to the manner in which contracts therefor shall be made.

It has been said that no purpose is more properly connected with the government of a municipal corporation than that which is necessary to be done in cleaning and keeping in order its streets;⁹⁸ but it has also been held that the cleaning of streets calls into exercise private or proprietary functions, rather than governmental functions.⁹⁹ The question whether the cleaning of streets constitutes a governmental or public function, or a corporate or private function, as affecting the liability of a municipality in tort for the acts of its officers or employees, is discussed *supra* § 777.

There must be a compliance with statutory or charter requirements as to the manner in which contracts for street cleaning shall be made,¹ but the municipality is liable for the labor done by employees of its street inspector.² Under a contract for street cleaning, providing that the work shall be performed under the supervision and direction, and be subject to the approval, of a municipal official, such officer has authority to prohibit the doing of work

88. Kan.—Heath v. Iola, 105 P. 82, 81 Kan. 177.

89. Ala.—Ex parte Birmingham, 79 So. 113, 201 Ala. 641.
44 C.J. p 940 note 94.
Taxes in lieu of street work see *infra* § 1993.

90. Ga.—Coggins v. Davis, 174 S.E. 628, 178 Ga. 796—Grier v. City of Waycross, 174 S.E. 221, 49 Ga.App. 111, followed in Miller v. City of Waycross, 176 S.E. 826, 50 Ga.App. 1.

91. Ga.—Whitehead v. Vienna, 78 S.E. 533, 10 Ga.App. 337.
44 C.J. p 940 note 95.
Labor on highways see Highways §§ 307-310.

92. Ill.—Macomb v. Twaddle, 4 Ill. App. 254.

93. Ill.—Harvel v. McGlothlin, 176 Ill.App. 512.
44 C.J. p 940 note 98.

94. Ala.—Best v. Birmingham, 80 So. 695, 16 Ala.App. 631.

Exemption as to county residents

An ordinance requiring residents subject to road duty under a general state law to perform street work or to make a payment is effective as to such residents notwithstanding a special statute exempts citizens of the county wherein the city is located from road duty.—Coggins v. Davis, 174 S.E. 628, 178 Ga. 796—Grier v. City of Waycross, 174 S.E. 221, 49 Ga.App. 111, followed in Miller v. City of Waycross, 176 S.E. 826, 50 Ga.App. 1.

95. Ala.—Whitt v. Gadsden, 49 So. 682, 160 Ala. 271.

96. Ga.—Coggins v. Davis, 174 S.E. 628, 178 Ga. 796—Grier v. City of Waycross, 174 S.E. 221, 49 Ga.App. 111, followed in Miller v. City of Waycross, 176 S.E. 826, 50 Ga.App. 1.

97. Ga.—Coggins v. Davis, 174 S.E. 628, 178 Ga. 796—Grier v. City of Waycross, 174 S.E. 221, 49 Ga.App. 111, followed in Miller v. City of Waycross, 176 S.E. 826, 50 Ga.App. 1.

98. N.Y.—Leverich v. New York, 66 Barb. 623.

Special assessments for street cleaning see *supra* § 1307.

99. Tex.—Houston Lighting & Power Co. v. Fleming, Civ.App., 128 S.W.2d 487, reversed on other grounds Fleming v. Houston Lighting & Power Co., 138 S.W.2d 520, 135 Tex. 463, rehearing denied 143 S.W.2d 923, 135 Tex. 463, certiorari denied Houston Lighting & Power Co. v. City of West University Place, 61 S.Ct. 836, 313 U.S. 560, 85 L.Ed. 1520.

Local purpose

In cleaning streets and alleys, city acts for local purpose and not in exercise of police power.—Bedtke v. City of Chicago, 240 Ill.App. 493.

1. Pa.—McKinley v. Philadelphia, 6 Phila. 123.

44 C.J. p 940 note 4.
Contracts as to sanitation and health generally see *supra* § 980.

2. N.Y.—Hecker v. New York, 18 Abb.Pr. 369, 28 How.Pr. 211.

by the contractor not within the contract.³

Arbitration. Where a contract for street cleaning shows on its face that it was clearly intended to be an arbitration agreement, and an award of the director of public works, as arbitrator, is set up in defense to a suit on the contract, a provision at the conclusion of the contract that no certificate of any city officer should bind the city will not be considered, being repugnant to the paramount intention of parties as to arbitration.⁴ Where a city street-cleaning contract contains an arbitration provision apparently so comprehensive as to include all disputes to be determined by the engineer, and another arbitration provision limited to certain defined questions for determination by a director, they may both stand, and matters specified in the second provision will be excepted from the more comprehensive first provision.⁵ The function of such an arbitrator is judicial where the contract does not provide for ex parte hearings by him and it is his duty to afford the contractor an opportunity to be heard if he so wishes.⁶

Duty of abutting owners. Under a general power to provide for the cleaning of streets and other public places, a municipal corporation cannot require abutting owners to clean the streets in front of their property.⁷

§ 1699. Street Sprinkling

A municipal corporation may provide for the sprinkling of its streets.

The question whether the sprinkling of streets by a municipal corporation constitutes a corporate function or a public function depends on the surrounding circumstances and the purpose of the sprinkling.⁸ A statute conferring on town councilmen the exclusive control over the streets, and power to appoint all officers and agents of the town,

confers authority to provide for the sprinkling of the streets and to appoint a person to perform the service under the control of the council;⁹ and the person appointed may be removed at any time unless the council, in appointing him, may contract with him and bind the town to retain him for a specified term.¹⁰ Even without express authority the city may provide by ordinance, under its general power to regulate the streets, that those who desire to sprinkle streets as a business shall first obtain licenses.¹¹ An ordinance requiring streetcar companies to sprinkle streets so that no dust will be raised by a passing car is invalid where it requires sprinkling in all seasons and fixes an oppressive penalty for failure so to do.¹²

§ 1700. Removal of Ice, Snow, and Other Substances

Generally, municipal regulations may require abutters under penalty to remove ice and snow from their sidewalks, and the duty may be imposed on tenants as well as on owners.

While there is a conflict among authorities as to whether municipal regulations requiring abutters under penalty to remove ice and snow from their sidewalks are valid,¹³ and they have been held invalid in some jurisdictions,¹⁴ the weight of authority sustains them as a proper exercise of the police powers,¹⁵ subject to a general requirement of reasonableness.¹⁶ A requirement that the snow or ice be removed within a specified time has been held valid where such requirement is not shown to be unreasonable;¹⁷ and such provisions, where proper, may be confined to sidewalks of a certain class, although but a small part of the sidewalks in the municipality.¹⁸

The duty may be imposed on persons owning, or in the control of, the abutting property,¹⁹ and on

3. N.Y.—*Mott v. Utica*, 89 N.Y.S. 168, 96 App.Div. 495.

44 C.J. p 940 note 6.

4. Pa.—*Curran v. Philadelphia*, 107 A. 636, 264 Pa. 111.

5. Pa.—*Curran v. Philadelphia*, supra.

6. Pa.—*Curran v. Philadelphia*, supra.
44 C.J. p 941 note 9.

7. Philippine.—*U. S. v. Gaspay*, 33 Philippine 96.

8. Minn.—*McLeod v. City of Duluth*, 218 N.W. 892, 174 Minn. 184, 60 A. L.R. 96.

Street sprinkling and cleaning as corporate or public function as affecting liability of municipality in tort for acts of municipal officers or employees see supra § 777.

Street sprinkling as "local improvement" so as to be chargeable on property by special assessment see supra § 1307.

9. Ariz.—*Tempe v. Corbell*, 147 P. 745, 17 Ariz. 1, L.R.A. 1915E 581.

10. Ariz.—*Tempe v. Corbell*, supra.

44 C.J. p 941 note 13.

11. Pa.—*Chambersburg v. Forney*, 25 Pa.Co. 296.

12. Pa.—*Appeal of Chester Tract Co.*, 40 Wkly.N.C. 183.

13. Me.—*State v. Small*, 137 A. 398, 126 Me. 235.

14. N.H.—*State v. Jackman*, 41 A. 347, 69 N.H. 318, 42 L.R.A. 438.

44 C.J. p 941 note 18.

15. W.Va.—*Rich v. Rosenshine*, 45 S.E.2d 499.

43 C.J. p 433 note 17—44 C.J. p 941 note 19.

Liability of abutting owner for injuries due to snow or ice see supra § 862.

Liability of city for injuries due to snow or ice see supra §§ 811-815.

16. Me.—*State v. Small*, 137 A. 398, 126 Me. 235.

17. Me.—*State v. Small*, supra.

43 C.J. p 433 note 18—44 C.J. p 941 note 20 [a].

18. Mass.—*Clinton v. Welch*, 43 N. E. 1116, 166 Mass. 133.

44 C.J. p 941 note 21.

19. R.I.—*State v. McCrillis*, 66 A. 301, 28 R.I. 165, 9 L.R.A., N.S., 635, 13 Ann.Cas. 701.

43 C.J. p 433 note 18.

tenants as well as on owners.²⁰ However, under an ordinance providing that the occupier, or the owner of premises if unoccupied, shall be liable for a penalty for failure to remove snow, it becomes the duty of owners so to do only when the property is unoccupied;²¹ and in general, in order to impose liability, the place²² and the person²³ must be within the purview of the regulation.

An abutting owner's failure to remove caved-in earth on a sidewalk in front of his property on written notice from the city is not a violation of an ordinance requiring abutting owners to remove all "weeds, earth, snow, ice, or other obstructions or

substances" from sidewalks, such ordinance applying merely to snow and ice and ordinary accumulations of dirt.²⁴

Removal from street railroad tracks. Where the statute authorizes a municipality to establish such rules and regulations as to the removal of snow and ice from the tracks of street railways as in its judgment the convenience of the public may require, the municipality may prohibit the removal of snow and ice from any part or the whole of the road, although such prohibition compels the temporary disuse of the tracks.²⁵

10. RIGHTS AND REMEDIES OF ABUTTING OWNERS

a. In General

§ 1701. In General

An abutting owner has two kinds of rights in the street, the public one which he enjoys in common with all citizens, and certain private rights which arise from his ownership of property contiguous to the street; these private rights constitute property of which an abutter cannot be unlawfully deprived, although they are subordinate to the public use of the street for proper purposes and subject to state or municipal regulation.

An abutting owner²⁶ has two distinct kinds of rights in the street, the public one which he enjoys in common with all citizens,²⁷ and certain private rights which arise from his ownership of property contiguous to the street, and which are not common to the public generally;²⁸ and this is true even though the fee of the street is in the municipal cor-

20. W.Va.—Rich v. Rosenshine, 45 S.E.2d 499.

44 C.J. p 941 note 22.

Owner retaining control of sidewalk

Under an ordinance requiring users or occupants of buildings abutting on sidewalks to remove snow and ice, retention by owners of control of sidewalk for common use and benefit of tenants in their building is not sufficient use and occupancy of the building by the owners to impose on them the duty of snow removal, and the duty rests on one who is tenant and occupant of a first story store-room.—Rich v. Rosenshine, *supra*.

21. Pa.—Philadelphia v. Bergdoll, 97 A. 736, 252 Pa. 545, Ann.Cas. 1918C 1141.

22. N.Y.—Moran v. New York, 90 N. Y.S. 596, 98 App.Div. 301.
44 C.J. p 942 note 24.

23. D.C.—Holtzman v. U. S., 14 App. D.C. 454.

44 C.J. p 942 note 25.

24. Mo.—St. Joseph v. Hax, App., 220 S.W. 695.

25. Mass.—Union R. Co. v. Cambridge, 11 Allen 287.

26. **Property "abuts" on street when no land intervenes between it and the street, and the lot line and the line of the street are in common.**
Conn.—Johnson v. Town of Watertown, 38 A.2d 1, 131 Conn. 84.

Wash.—Kemp v. City of Seattle, 270 P. 431, 149 Wash. 197, appeal, error and certiorari dismissed 49 S. Ct. 482, 279 U.S. 825, 73 L.Ed. 978.

Property connected by right of way

Where one has a private right of way connecting his premises with a public street, it has been held that he is, with respect to the latter, an owner of abutting property.—Paterson v. Rush, 34 Hawaii 831.

27. Ariz.—Corpus Juris cited in Cobb v. Salt River Valley Water Users' Ass'n, 114 P.2d 904, 905, 57 Ariz. 451.

Ga.—Gardner v. City of Brunswick, 28 S.E.2d 135, 197 Ga. 167—State Highway Board v. Baxter, 144 S.E. 796, 167 Ga. 124.

Iowa.—Dugan v. Zurmuehlen, 211 N. W. 986, 203 Iowa 1114.

N.Y.—Russo v. Morgan, Sup., 21 N. Y.S.2d 637, 174 Misc. 1013.

Pa.—Cain v. Aspinwall-Delafield Co., 137 A. 610, 289 Pa. 535.

S.C.—Owens v. Owens, 8 S.E.2d 339, 193 S.C. 260.

Tex.—Eldelbach v. Davis, Civ.App., 99 S.W.2d 1067, error dismissed.

Vt.—Kelbro, Inc., v. Myrick, 80 A.2d 527, 113 Vt. 64.

44 C.J. p 942 note 28.

Any injury to public right is damnum absque injuria

Va.—Nusbaum v. City of Norfolk, 145 S.E. 257, 151 Va. 801.

28. U.S.—Coy v. City of Tulsa, D.C. Okl., 2 F.Supp. 411.

Ariz.—Corpus Juris cited in Cobb v. Salt River Valley Water Users' Ass'n, 114 P.2d 904, 905, 57 Ariz. 451.

Cal.—Baclch v. Board of Control of California, 144 P. 818, 23 Cal.2d 343—Rose v. State, 123 P.2d 505, 19 Cal.2d 713, followed in Betten-court v. State, 123 P.2d 525, 19 Cal. 2d 876, Brandon v. State, 123 P.2d 525, 19 Cal.2d 877, Jones v. State, 123 P.2d 526, 19 Cal.2d 874 and Laughlin v. State, 123 P.2d 526, 19 Cal.2d 875—Beckham v. State, 149 P.2d 296, 64 Cal.App.2d 487—Fitzgerald v. Smith, 271 P. 507, 94 Cal. App. 480.

Ga.—Gardner v. City of Brunswick, 28 S.E.2d 135, 197 Ga. 167—State Highway Board v. Baxter, 144 S.E. 796, 167 Ga. 124.

Iowa.—Liddick v. City of Council Bluffs, 5 N.W.2d 361, 232 Iowa 197.

N.Y.—St. Peter's Italian Church Syracuse v. State, 24 N.Y.S.2d 759, 261 App.Div. 96—Russo v. Morgan, Sup., 21 N.Y.S.2d 637, 174 Misc. 1013—Sorosia Bldg. Corporation v. Prolay Realty Corporation, 241 N.Y.S. 288, 136 Misc. 890, affirmed 245 N.Y.S. 507, 230 App.Div. 683.

Tenn.—City of Knoxville v. Phillips, 36 S.W.2d 434, 162 Tenn. 328.

Tex.—Eldelbach v. Davis, Civ.App., 99 S.W.2d 1067, error dismissed—

poration.²⁹ While it has been broadly stated that an abutting owner's rights in the street are the same as any other member of the traveling public except for the right of access,³⁰ it has been held that these private rights include the rights of light, air, view, and privacy, as discussed *infra* § 1702, as well as the right of access, *infra* § 1703, and anything adding to the value of the street to the abutter.³¹ Thus, it has been recognized that an abutting owner has a right to have the street kept open and continued as a public street for the benefit of his property,³²

and the right to the enjoyment and use of whatever is permitted or maintained by the public authorities as part of the street.³³

The private rights under consideration,³⁴ or at least certain of them,³⁵ constitute property or property rights of which an abutter cannot be unlawfully deprived. They have been termed "easements,"³⁶ and, although they may not be true easements in the strictest sense, they are at least rights in the nature of appurtenant easements, and are

Texas Co. v. Texarkana Mach. Shops, Civ.App., 1 S.W.2d 928.
Vt.—Kelbro, Inc., v. Myrick, 30 A.2d 527, 113 Vt. 64.

Va.—Nusbaum v. City of Norfolk, 145 S.E. 257, 151 Va. 801—Wood v. City of Richmond, 138 S.E. 560, 148 Va. 400.

44 C.J. p 942 note 30.

Rights of abutting owner in highway see Highways § 141.

Rights to use of streets on recorded plat are based on estoppel and written by equity into each contract of sale.—Fugate v. Carter, 144 S.E. 483, 151 Va. 108.

Fee in abutting owner

(1) Where the abutting owner owns the fee to the center of the highway, he retains all rights therein not incompatible with the public easement.—Allen v. Mussen, 26 A.2d 776, 129 Conn. 151.

(2) Where lot owner owns fee to center of street, rights of municipality are paramount only for street purposes.—Village of Cattaraugus v. Johnson, 249 N.Y.S. 327, 139 Misc. 368, affirmed 250 N.Y.S. 945, 233 App. Div. 799.

29. N.Y.—Russo v. Morgan, Sup., 21 N.Y.S.2d 637, 174 Misc. 1013.
Vt.—Kelbro, Inc., v. Myrick, 30 A.2d 527, 113 Vt. 64.
44 C.J. p 942 note 31.

30. Ga.—Gardner v. City of Brunswick, 28 S.E.2d 135, 197 Ga. 167.
Ill.—Clokey v. Wabash Ry. Co., 187 N.E. 475, 353 Ill. 349.
S.C.—Owens v. Owens, 8 S.E.2d 339, 193 S.C. 260.

31. U.S.—Coy v. City of Tulsa, D.C. Okl., 2 F.Supp. 411.
Vt.—Kelbro, Inc., v. Myrick, 30 A.2d 527, 113 Vt. 64.

Lateral support

(1) Generally speaking, the private rights of an abutting owner include the right of lateral support.
Mo.—Siemers v. St. Louis Electric Terminal Ry. Co., 125 S.W.2d 865, 343 Mo. 1201.
N.Y.—Lincoln Safe Deposit Co. v. City of New York, 103 N.E. 768, 210 N.Y. 84, L.R.A.1915F 1009—Matter of Rapid Transit R. R.

Commissioners, 90 N.E. 456, 197 N.Y. 81.

Ohio—Cloyd v. City of Cuyahoga Falls, 179 N.E. 516, 41 Ohio App. 283.

Vt.—Kelbro, Inc., v. Myrick, 30 A.2d 527, 113 Vt. 64.

(2) This right exists regardless of who is the owner of the fee of the street.

Mo.—Siemers v. St. Louis Electric Terminal Ry. Co., *supra*.

N.Y.—Susswein v. Bradley Contracting Co., 172 N.Y.S. 652, 184 App. Div. 852.

(3) However, the right to lateral support in a street is subject to the municipal right to grade and improve the street.—Cloyd v. City of Cuyahoga Falls, 179 N.E. 516, 41 Ohio App. 283.

(4) Stated differently, it has been recognized that the right to lateral support is subject to an exception in the case of excavations made for street purposes.—Lincoln Safe Deposit Co. v. City of New York, 103 N.E. 768, 210 N.Y. 84—New York Steam Co. v. Foundation Co., 87 N.E. 765, 195 N.Y. 43, 21 L.R.A.N.S., 470—Village of Haverstraw v. Eckerson, 84 N.E. 578, 192 N.Y. 54, 20 L.R.A.N.S., 287—Pooler v. Village of Ilion, 13 N.Y.S.2d 926, 257 App.Div. 446.

(5) The reason for this rule has been stated to be that, with respect to the construction and maintenance of a public highway, the municipality exercises a governmental function and can come under no liability in its reasonable performance thereof.—Village of Haverstraw v. Eckerson, *supra*.

32. U.S.—Coy v. City of Tulsa, D.C. Okl., 2 F.Supp. 411.
N.Y.—People v. Propp, 15 N.Y.S.2d 83, 172 Misc. 314.

N.C.—Hiatt v. City of Greensboro, 160 S.E. 748, 201 N.C. 515.
Or.—All v. City of Portland, 299 P. 306, 136 Or. 654.

Vacation of streets and other public ways see *supra* §§ 1665–1675.

Municipality may not permanently close highways to abutting property owners.—Valmont Development Co. v. Rosser, 146 A. 557, 297 Pa. 140.

When property is placed in cul-de-sac by closing one end of public way, property owners on public way may maintain an action to open the way. Cal.—Beals v. City of Los Angeles, App., 116 P.2d 489, affirmed 144 P.2d 839, 23 Cal.2d 381.

Ky.—Cartmell v. City of Maysville, 22 SW 2d 102, 231 Ky. 666.

Public alley

Where an alley has been determined to be a public way, occupancy thereof, or encroachment thereon, does not deprive the abutting owners of the right to have the alley open throughout its length.—Huddleston v. Deans, 21 S.E.2d 352, 124 W.Va. 313.

33. N.Y.—Russo v. Morgan, 21 N.Y.S.2d 637, 174 Misc. 1013.

Arbitrary classification of abutters

It has been held arbitrary and unreasonable for the municipality to classify abutters with respect to such enjoyment and use merely on the basis of their street-level or non-street-level occupancy.—Russo v. Morgan, *supra*.

34. Cal.—Bacich v. Board of Control of California, 144 P.2d 818, 23 Cal.2d 343—Fitzgerald v. Smith, 271 P. 507, 94 Cal.App. 480.

Iowa—Liddick v. City of Council Bluffs, 5 N.W.2d 361, 232 Iowa 197.
N.Y.—Russo v. Morgan, 21 N.Y.S.2d 637, 174 Misc. 1013.

Tex.—Texas Co. v. Texarkana Mach. Shops, Civ.App., 1 S.W.2d 928.

Va.—Wood v. City of Richmond, 138 S.E. 560, 148 Va. 400.

44 C.J. p 942 note 30 [b].

Right to compensation for taking of rights of abutting owner see Eminent Domain § 105.

Infringement of rights may be actionable

Va.—Nusbaum v. City of Norfolk, 145 S.E. 257, 151 Va. 801.

35. Vt.—Kelbro, Inc., v. Myrick, 30 A.2d 527, 113 Vt. 64.

36. Cal.—Fitzgerald v. Smith, 271 P. 507, 94 Cal.App. 480.

Vt.—Kelbro, Inc., v. Myrick, 30 A.2d 527, 113 Vt. 64.

Wyo.—Hirt v. City of Casper, 103 P.2d 394, 56 Wyo. 57.

governed by the law of easements.³⁷ They are appurtenant to the possession and use of the abutting property,³⁸ and they follow and inhere in the property when leased.³⁹ An abutter's particular proprietary rights begin with those of the public when the street is opened to use.⁴⁰

Regulation and restriction of rights. The rights of an abutting owner or occupant are not absolute,⁴¹ even as against persons using the streets for purposes other than travel,⁴² but are subordinate to the public use of the street for travel and for proper municipal purposes,⁴³ and subject to the power of the state and the municipality to control and regulate the streets;⁴⁴ and this is true even though the fee of the street is in the abutting property owner.⁴⁵ An abutting owner has no right to be protected from the hazards of traffic⁴⁶ and has no vested right in the volume of traffic passing his property.⁴⁷

Preventing flow of surface water onto land. The right of the owner of land abutting on a street to fill in his land or erect a barrier on his land so as to prevent the flow of surface water from the street over such land has been recognized.⁴⁸

Park road. It has been held that a roadway constructed and maintained by a municipality as part of its park system does not become a public way in which abutters have special rights apart from agreement.⁴⁹

§ 1702. Light, Air, View, and Privacy

The owner of property abutting on a public street has an easement over the street of light, air, and view, and an interference with his right of privacy has been considered as an element going to make up his right to relief against an encroachment on the highway.

The owner of property abutting on a public street has an easement over the street of light and air,⁵⁰

37. Vt.—Kelbro, Inc., v. Myrick, 30 A.2d 527, 113 Vt. 64.

Abutter has no easement

Adjacent property owners, while they have a standing to object to appropriation of street for private purposes, have no easement in the public highway.—G. I. Veterans' Taxicab Ass'n v. Yellow Cab Co., 65 A.2d 173.

38. Tex.—Spencer v. Levy, Civ.App., 173 S.W. 550.
44 C.J. p 942 note 32.

39. Ill.—Hoskins v. Chicago Park Dist., 35 N.E.2d 525, 311 Ill.App. 98, reversed on other grounds 43 N.E.2d 546, 380 Ill. 78.
N.Y.—Russo v. Morgan, 21 N.Y.S.2d 637, 174 Misc. 1013.
44 C.J. p 942 note 33.

40. Ill.—Farll v. Chicago, 26 N.E. 370, 136 Ill. 277.
44 C.J. p 942 note 34.

41. Wash.—Kimmel v. City of Spokane, 109 P.2d 1069, 7 Wash.2d 372.

42. Wash.—Kimmel v. City of Spokane, supra.

43. Cal.—Schaefer v. Lenahan, 146 P.2d 929, 63 Cal.App.2d 324.
Conn.—Cassidy v. City of Waterbury, 33 A.2d 142, 130 Conn. 237—State v. Muolo, 176 A. 401, 119 Conn. 323.

Ga.—State Highway Board v. Baxter, 144 S.E. 796, 167 Ga. 124.

Mo.—Nemours v. City of Clayton, 175 S.W.2d 60, 237 Mo.App. 497.

Ohio.—Cloyd v. City of Cuyahoga Falls, 179 N.E. 516, 41 Ohio App. 283—Occo Realty Co. v. New York, C. & St. L. R. Co., 169 N.E. 719, 33 Ohio App. 414.

Tenn.—Collier v. City of Memphis, 176 S.W.2d 818, 180 Tenn. 509.

Wis.—Randall v. City of Milwaukee, 249 N.W. 73, 212 Wis. 374.

Wyo.—Blumenthal v. City of Cheyenne, 186 P.2d 556.
44 C.J. p 943 note 35.

Rights not over public rights

Abutting property owners do not have any easement in an existing street, over and above the rights of the general public.—Perellis v. Mayor and City Council of Baltimore, Md., 57 A.2d 341.

44. Conn.—Cassidy v. City of Waterbury, 33 A.2d 142, 130 Conn. 237—State v. Muolo, 176 A. 401, 119 Conn. 323.

Mo.—Nemours v. City of Clayton, 175 S.W.2d 60, 237 Mo.App. 497.
Pa.—Breinig v. Allegheny County, 2 A.2d 842, 332 Pa. 474.

S.C.—Owens v. Owens, 8 S.E.2d 339, 193 S.C. 260.

Va.—Wood v. City of Richmond, 138 S.E. 560, 148 Va. 400.

Power of state and municipality to control and regulate streets see supra §§ 1686, 1687.

Prohibiting voice projection

City has ample police power to enact laws and ordinances whereby property owners adjoining streets, and other public ways can be prohibited from projecting voices from their private property to the irritation, annoyance and inconvenience of people using the streets.—People v. Caponigri, 6 N.Y.S.2d 577, 169 Misc. 9.

Restrictions strictly construed

Restrictions against owner's use of property are most strictly construed against one urging them.—Gulf Refining Co. v. City of Dallas, Tex.Civ.App., 10 S.W.2d 151, error dismissed.

Merely existence of statute authorizing control does not affect abutting

owner's right in street.—Goodloe v. City of Richmond, 63 S.W.2d 785, 250 Ky. 608.

45. Only when land ceases to be street may owner of fee in street enjoy it as private property.—Texas Co. v. Texarkana Mach. Shops, Tex. Civ.App., 1 S.W.2d 928.

Unless clearly unreasonable in its effect on the rights of the abutters, an ordinance enacted under the authority of the legislature in the interest of the public easement of travel will not be declared invalid.—City of Boston v. A. W. Perry, Inc., 22 N.E.2d 627, 304 Mass. 18.

46. Cal.—Beckham v. State, 149 P.2d 296, 64 Cal.App.2d 487.

47. Ill.—Calumet Federal Savings & Loan Ass'n of Chicago v. City of Chicago, 29 N.E.2d 292, 306 Ill. App. 524.

Wyo.—Blumenthal v. City of Cheyenne, 186 P.2d 556.

48. Me.—Bangor v. Lansil, 51 Me. 521.

Mass.—McMahon v. Holyoke, 115 N. E. 920, 226 Mass. 450.

Discharge of surface waters into street, alley, or highway see the C.J.S. title Waters § 116, also 67 C.J. p 881 notes 61–63.

49. Mass.—Burke v. Metropolitan Dist. Commission, 159 N.E. 739, 262 Mass. 70.

50. U.S.—Klaber v. Lakenan, C.C.A. Mo., 64 F.2d 86, 90 A.L.R. 783—Coy v. City of Tulsa, D.C.Okla., 2 F.Supp. 411.

Cal.—Rose v. State, 123 P.2d 505, 19 Cal.2d 713, followed in Bettencourt v. State, 123 P.2d 525, 19 Cal.2d 876, Brandon v. State, 123 P.2d 525, 19 Cal.2d 877, Jones v. State, 123 P.2d 526, 19 Cal.2d 874, and Laughlin v. State, 123 P.2d 526, 19 Cal.2d

and view⁵¹ or prospect,⁵² constituting a property right possessing value.⁵³ However, the right of view does not entitle an abutting owner to demand that the street shall remain in a natural and unimproved condition.⁵⁴

View from street. In a number of decisions the right of an abutting owner to an unobstructed view of his premises from the street,⁵⁵ as, for example, for the purpose of the display of goods⁵⁶ or of advertising signs,⁵⁷ has been recognized. Although there is authority to the contrary,⁵⁸ it has been held that the right is not restricted to the display of goods or of advertising matter related to the business conducted on the premises⁵⁹ and that one who leases the whole or a part of the land for the purpose of erecting an advertising sign on it acquires the same right as the owner had.⁶⁰

Privacy. An interference with an abutting owner's right of privacy has been considered as an ele-

ment going to make up his right to relief against an encroachment on the highway,⁶¹ as where he seeks to enjoin the construction of a bridge across the street connecting parcels of defendant's property located on opposite sides thereof.⁶²

§ 1703. Access

- a. In general
- b. Entrances and driveways
- c. Connection with water mains, sewers, and other pipes

a. In General

An abutting owner has the right to ingress to, and egress from, his property over and by means of the adjacent portion of the street, and, while this right is subservient to the primary rights of the public to the use of the street and is subject to reasonable regulations, it constitutes a property right which may not be taken away or substantially impaired without just compensation.

An abutting owner has the right to ingress to, and egress from, his property over and by means of

875—Beckham v. State, 149 P.2d 296, 64 Cal App 2d 487.

Iowa.—Liddick v. City of Council Bluffs, 5 N.W.2d 361, 232 Iowa 197.

N.Y.—St. Peter's Italian Church Syracuse v. State, 24 N.Y.S.2d 759, 261 App.Div. 96—Russo v. Morgan, Sup., 21 N.Y.S.2d 637, 174 Misc. 1013—People v. Propp, Co.Ct., 15 N.Y.S.2d 83, 172 Misc. 314.

N.D.—Cummings v. Minot, 271 N.W. 421, 67 N.D. 214.

Or.—Lowell v. Pendleton Auto Co., 261 P. 415, 123 Or. 383.

Vt.—Kelbro, Inc. v. Myrick, 30 A.2d 527, 113 Vt. 64.

Va.—Nusbaum v. City of Norfolk, 145 S.E. 257, 151 Va. 801.

Wash.—Fry v. O'Leary, 252 P. 111, 141 Wash. 465, 49 A.L.R. 1249.

44 C.J. p 943 note 36.

Right to light, air, and view over adjoining land generally see Adjoining Landowners §§ 47-49.

Right to light, air, and view over adjoining land generally see Adjoining Landowners §§ 47-49.

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Iowa.—Liddick v. City of Council Bluffs, 5 N.W.2d 361, 232 Iowa 197.

N.Y.—People v. Propp, Co.Ct., 15 N.Y.S.2d 83, 172 Misc. 314.

Or.—Lowell v. Pendleton Auto Co., 261 P. 415, 123 Or. 383.

Vt.—Kelbro, Inc. v. Myrick, 30 A.2d 527, 113 Vt. 64.

44 C.J. p 943 note 37.

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N.J.—Dill v. Camden Bd. of Education, 20 A. 739, 47 N.J.Eq. 421, 10 L.R.A. 276.

53. Iowa.—Liddick v. City of Council Bluffs, 5 N.W.2d 361, 232 Iowa 197.

Right to compensation for taking of right of light, air, and view see Eminent Domain § 105.

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the adjacent portion of the street,⁶³ both on foot and by means of vehicles.⁶⁴ This right exists whether the abutter owns the fee to the center of the street, leaving the public merely an easement of passage, or whether the title to the entire highway is vested in the public;⁶⁵ and the abutter may expect the municipality to protect it by reasonable

traffic regulation, proper street lighting, and other means.⁶⁶ The right is the same whether the property is situated on a street in the business district of a large city or in the residential district of a small town.⁶⁷ The right of access is appurtenant to the lot and is private property,⁶⁸ which may not be taken away or substantially impaired without just

63. U.S.—Klaber v. Lakenan, C.C.A. Mo., 64 F.2d 86, 90 A.L.R. 783—Coy v. City of Tulsa, D.C.Okl., 2 F.Supp. 411.

Ala.—*Corpus Juris* cited in City of Birmingham v. Hood-McPherson Realty Co., 172 So. 114, 123, 233 Ala. 352, 108 A.L.R. 1140.

Ariz.—Wood v. Phoenix-Tempe Stone Co., 275 P. 5, 35 Ariz. 155.

Ark.—Campbell v. Arkansas State Highway Commission, 38 S.W.2d 753, 183 Ark. 780.

Cal.—Bacich v. Board of Control of California, 144 P.2d 818, 28 Cal.2d 343—Rose v. State, 123 P.2d 505, 19 Cal.2d 713, followed in Betten-court v. State, 123 P.2d 525, Brandon v. State, 123 P.2d 525, Jones v. State, 123 P.2d 526 and Laughlin v. State, 123 P.2d 526—McCandless v. City of Los Angeles, 4 P.2d 139, 214 Cal. 67—Beckham v. State, 149 P.2d 296, 64 Cal.App.2d 487—Baldocchi v. Four Fifty Sutter Corporation, 18 P.2d 682, 129 Cal.App. 383.

Conn.—Johnson v. Town of Watertown, 38 A.2d 1, 131 Conn. 84.

Fla.—Fleming v. State Road Dept., 25 So.2d 373, 157 Fla. 170.

Ga.—Gardner v. City of Brunswick, 28 S.E.2d 135, 197 Ga. 167—State Highway Board v. Baxter, 144 S. E. 796, 167 Ga. 124.

Idaho.—Foster's, Inc. v. Boise City, 118 P.2d 721, 63 Idaho 201.

Ill.—Ciokey v. Wabash, 187 N.E. 475, 353 Ill. 349—People ex rel. Calumet Federal Savings & Loan Ass'n of Chicago v. City of Chicago, 55 N. E.2d 391, 323 Ill.App. 295—Hoskins v. Chicago Park Dist., 35 N.E.2d 524, 311 Ill.App. 98, reversed on other grounds 43 N.E.2d 546, 380 Ill. 78.

Ind.—Andrews v. City of Marion, 47 N.E.2d 968, 221 Ind. 422—Swaim v. City of Indianapolis, 171 N.E. 871, 202 Ind. 233, rehearing denied 173 N.E. 287, 202 Ind. 23.

Iowa.—Liddick v. City of Council Bluffs, 5 N.W.2d 361, 232 Iowa 197.

Ky.—Allsmiller v. Johnson, 218 S.W. 2d 28, 309 Ky. 695—Goodloe v. City of Richmond, 63 S.W.2d 785, 250 Ky. 608—Chesapeake & O. Ry. Co. v. Eastham, 60 S.W.2d 361, 249 Ky. 136.

Md.—Huebschmann v. Grand Co., 172 A. 227, 166 Md. 615.

Mass.—Gleason v. Metropolitan Dist. Commission, 170 N.E. 395, 270 Mass. 377—Centebur v. Selectmen of Watertown, 167 N.E. 303, 268 Mass. 121.

Miss.—City of Hattiesburg v. Fogel, 138 So. 813, 162 Miss. 208.

Mo.—Stout v. Frick, 62 S.W.2d 1057, 333 Mo. 826—Christy v. Chicago, B. & Q. R. Co., App., 212 S.W.2d 476—Wilhoit v. City of Springfield, 171 S.W.2d 95, 237 Mo.App. 775.

N.Y.—Small v. Moss, 18 N.E.2d 281, 279 N.Y. 288—St. Peter's Italian Church Syracuse v. State, 24 N. Y.S.2d 759, 261 App.Div. 96—Pooler v. Village of Ilion, 18 N.Y.S.2d 926, 257 App.Div. 446—Russo v. Morgan, 21 N.Y.S.2d 637, 174 Misc. 1018—People v. Propp, 15 N.Y.S. 2d 83, 172 Misc. 314—Decker v. Goddard, 249 N.Y.S. 381, 139 Misc. 824, reversed on other grounds 251 N.Y.S. 440, 233 App.Div. 139—Mann v. Groom, Co.Ct., 231 N.Y.S. 342, 133 Misc. 260.

N.C.—Sanders v. Town of Smithfield, 19 S.E.2d 630, 221 N.C. 166.

N.D.—Cummings v. Minot, 271 N.W. 421, 67 N.D. 214.

Ohio.—State ex rel. Copland v. City of Toledo, 62 N.E.2d 256, 75 Ohio App. 378.

Okl.—City of Norman v. Safeway Stores, 145 P.2d 765, 193 Okl. 534.

Or.—Morris v. City of Salem, 174 P. 2d 192, 179 Or. 666—Lowell v. Pendleton Auto Co., 261 P. 415, 123 Or. 383.

Pa.—Breinig v. Allegheny County, 2 A.2d 842, 332 Pa. 474.

R.I.—Elder v. Mayor of City of Newport, 57 A.2d 653—Newman v. Mayor of City of Newport, 57 A.2d 173, 73 R.I. 385—Allen & Reed v. Presbrey, 144 A. 888, 50 R.I. 53, appeal dismissed 50 S.Ct. 66, 280 U.S. 518, 74 L.Ed. 588.

S.C.—Brown v. Hendricks, 45 S.E.2d 603, 211 S.C. 395—Owens v. Owens, 8 S.E.2d 339, 193 S.C. 260.

Tex.—*Corpus Juris* cited in Adams v. Grapotte, Civ.App., 69 S.W.2d 460, 462, affirmed Grapotte v. Adams, 111 S.W.2d 690, 130 Tex. 587—Gulf Refining Co. v. City of Fort Worth, Civ.App., 36 S.W.2d 285, reversed on other grounds City of Fort Worth v. Gulf Refining Co., Com. App., 55 S.W.2d 792, and reversed on other grounds 83 S.W.2d 610, 125 Tex. 512—Commissioners' Court of Harris County v. Kaiser, Civ.App., 23 S.W.2d 840, error refused.

Wash.—Denman v. City of Tacoma, 268 P. 1043, 148 Wash. 314.

Wis.—City of Neenah v. Krueger, 240 N.W. 402, 296 Wis. 473.

44 C.J. p 943 note 47.

Trees interfering with access see supra § 1693.

Nuisance

Obstruction of abutting owner's access to public street constitutes private and public nuisance.—Lane v. San Diego Electric Ry. Co., 280 P. 109, 208 Cal. 29.

Fact that property is of small value does not impair right to reasonable access as against one appropriating part of street.—Denman v. Mattson, 268 P. 1045, 148 Wash. 321.

Where fact that storm had washed out portion of the highway does not deprive the abutting owner of his right to pass and repass over the highway.—Faulks v. Committee of Ocean Tp., 156 A. 761, 9 N.J.Misc. 1048.

64. Ky.—Chesapeake & O. Ry. Co. v. Eastham, 60 S.W.2d 361, 249 Ky. 136.

Pa.—Breinig v. Allegheny County, 2 A.2d 842, 332 Pa. 474.

65. Conn.—Johnson v. Town of Watertown, 38 A.2d 1, 131 Conn. 84. 44 C.J. p 945 note 48.

66. N.Y.—Small v. Moss, 18 N.E.2d 281, 279 N.Y. 288.

67. Cal.—Rose v. State, 123 P.2d 505, 19 Cal.2d 713, followed in Betten-court v. State, 123 P.2d 525, Brandon v. State, 123 P.2d 525, Jones v. State, 123 P.2d 526, and Laughlin v. State, 123 P.2d 526—Constantine v. City of Sunnyvale, App., 204 P. 2d 922.

68. Cal.—Rose v. State, 123 P.2d 505, 19 Cal.2d 713, followed in Betten-court v. State, 123 P.2d 525, Brandon v. State, 123 P.2d 525, Jones v. State, 123 P.2d 526, and Laughlin v. State, 123 P.2d 526.

Ill.—Hoskins v. Chicago Park Dist., 35 N.E.2d 525, 311 Ill.App. 98, reversed on other grounds 43 N.E.2d 546, 380 Ill. 78.

Iowa.—Liddick v. City of Council Bluffs, 5 N.W.2d 361, 232 Iowa 197.

La.—Martin v. Fuller, 37 So.2d 851, 214 La. 404.

Mo.—Christy v. Chicago, B. & Q. R. Co., App., 212 S.W.2d 476.

Or.—Lowell v. Pendleton Auto Co., 261 P. 415, 123 Or. 383.

R.I.—Newman v. Mayor of City of Newport, 57 A.2d 173, 73 R.I. 385—Allen & Reed v. Presbrey, 144 A. 888, 50 R.I. 53, appeal dismissed 50 S.Ct. 66, 280 U.S. 518, 74 L.Ed. 588.

S.C.—Brown v. Hendricks, 45 S.E.2d 603, 211 S.C. 395.

compensation.⁶⁹

The right of an abutting property owner to access to his property is subservient to the primary rights of the public to the free use of the street for the purpose of travel and incidental purposes,⁷⁰ and is subject to reasonable regulations in the public interest and for the promotion of public convenience and safety,⁷¹ even to the extent, it has been held, of denying vehicular access to the property of an abutting owner.⁷² While the right of access may be exercised, even at the risk of temporary inconvenience to persons traveling on the high-

ways,⁷³ it may not be exercised in such manner as to render the street dangerous for travel.⁷⁴ The extent of the right or easement of access may be said to be that which is reasonably required giving consideration to all the purposes to which the property is adapted,⁷⁵ and the right includes, as incidental thereto, the right to perform acts reasonably necessary to the effective exercise thereof.⁷⁶ The right is more extensive than the mere opportunity to go on the street immediately in front of the property.⁷⁷ Although there is authority to the contrary,⁷⁸ it has been held that the right extends in both directions

Tex.—Corpus Juris cited in Adams v. Grapotte, Civ.App., 69 S.W.2d 460, 462, affirmed Grapotte v. Adams, 111 S.W.2d 690, 130 Tex. 587—Commissioners' Court of Harris County v. Kaiser, Civ.App., 28 S.W.2d 840, error refused. 44 C.J. p 945 note 49.

Right is in nature of easement appurtenant to the property.—Sanders v. Town of Smithfield, 19 S.E.2d 630, 221 N.C. 166.

Grant of land for public use

In the case of a grant of land for public use as streets, there arises by operation of law a private right to use the streets in connection with lots of each abutting proprietor, which right is as inviolable as any other right of property.—**Liddick v. City of Council Bluffs, 5 N.W.2d 361, 232 Iowa 197.**

69. Cal.—Rose v. State, 123 P.2d 505, 19 Cal.2d 713, followed in Bettencourt v. State, 123 P.2d 525, Brandon v. State, 123 P.2d 525, Jones v. State, 123 P.2d 526 and Laughlin v. State, 123 P.2d 526—Beckham v. State, 149 P.2d 296, 64 Cal.App.2d 487.

Fla.—Fleming v. State Road Dept., 25 So.2d 373, 157 Fla. 170.

Iowa.—Liddick v. City of Council Bluffs, 5 N.W.2d 361, 232 Iowa 197. Or.—Lowell v. Pendleton Auto Co., 261 P. 415, 123 Or. 383.

R.I.—Newman v. Mayor of City of Newport, 57 A.2d 173, 73 R.I. 385—Allen & Reed v. Presbrey, 144 A. 888, 50 R.I. 53, appeal dismissed 50 S.Ct. 66, 280 U.S. 518, 74 L.Ed. 588.

Compensation for taking or interference with right of access for public use see Eminent Domain § 105. Effect of vacation or abandonment of street on right of access see supra § 1683.

Infringement of rights may be actionable

Va.—Nusbaum v. City of Norfolk, 145 S.E. 257, 151 Va. 801.

Abridgement of right by closing street may give rise to special damages compensable at law.—Sanders v. Town of Smithfield, 19 S.E.2d 630, 221 N.C. 166.

70. Ind.—Swaim v. City of Indianapolis, 171 N.E. 871, 202 Ind. 233, rehearing denied, 173 N.E. 287, 202 Ind. 233.

Or.—Hickey v. Riley, 162 P.2d 371, 177 Or. 321—McGowan v. City of Burns, 137 P.2d 994, 172 Or. 63. Wash.—Kimmel v. City of Spokane, 109 P.2d 1069, 7 Wash.2d 372.

Interference with access as element of damages caused by construction of improvement see supra § 1246.

Construction of public utilities

The right of access is subservient to the right of the municipality to do work in the street necessary for the construction of public utilities.—**Farrell v. Rose, 170 N.E. 498, 253 N. Y. 73, 68 A.L.R. 1505.**

71. Idaho.—Foster's, Inc., v. Boise City, 118 P.2d 721, 63 Idaho 201. Mo.—Nemours v. City of Clayton, 175 S.W.2d 60, 237 Mo.App. 497—Wilholt v. City of Springfield, 171 S. W.2d 95, 237 Mo.App. 775.

N.Y.—Farrell v. Rose, 170 N.E. 498, 253 N.Y. 73, 68 A.L.R. 1505

Okl.—City of Norman v. Safeway Stores, 145 P.2d 765, 193 Okl. 534. Or.—McGowan v. City of Burns, 137 P.2d 994, 172 Or. 63—Lowell v. Pendleton Auto Co., 261 P. 415, 123 Or. 383.

Pa.—Breinig v. Allegheny County, 2 A.2d 842, 332 Pa. 474.

R.I.—Newman v. Mayor of City of Newport, 57 A.2d 173, 73 R.I. 385.

Tex.—Gulf Refining Co. v. City of Dallas, Civ.App., 10 S.W.2d 151, error dismissed.

Wis.—City of Neenah v. Krueger, 240 N.W. 402, 206 Wis. 473.

Right to park motor vehicle see Motor Vehicles § 28.

Dividing curb along center of street was not unreasonable, and did not discriminate against owner in center of block, notwithstanding prospective customers, in order to enter, would be required to travel a short distance further.—City of Fort Smith v. Van Zandt, 122 S.W.2d 187, 197 Ark. 91.

72. Minn.—Alexander Co. v. City of Owatonna, 24 N.W.2d 244, 222 Minn. 312.

73. N.Y.—Greeley Sightseeing Co. v.

Riegelmann, 195 N.Y.S. 845, 119 Misc. 84.

74. Or.—McGowan v. City of Burns, 137 P.2d 994, 172 Or. 63.

Pa.—Breinig v. Allegheny County, 2 A.2d 842, 332 Pa. 474.

75. Cal.—Baich v. Board of Control of California, 144 P.2d 818, 23 Cal. 2d 343.

76. Right to remove any obstruction, such as a fence, interfering with an abutting owner's exercise of his right of access, is incidental to the right of access.

Conn.—Johnson v. Town of Watertown, 38 A.2d 1, 131 Conn. 84.

Wash.—Denman v. Mattson, 268 P. 1045, 148 Wash. 321.

Bridging ditch or constructing grade

If necessary to enable him to reach the traveled part of the street, the abutting owner has the right to bridge a ditch or construct a grade for that purpose, but in so doing he has no right willfully to obstruct such ditch or street.—**State Highway Board v. Baxter, 144 S.E. 796, 167 Ga. 124.**

77. U.S.—Coy v. City of Tulsa, D.C. Okl., 2 F.Supp. 411.

Cal.—Baich v. Board of Control of California, 144 P.2d 818, 23 Cal.2d 343—Rose v. State, 123 P.2d 505, 19 Cal.2d 713, followed in Bettencourt v. State, 123 P.2d 525, 19 Cal. 2d 876, Brandon v. State, 123 P.2d 525, 19 Cal.2d 877, Jones v. State, 123 P.2d 526, 19 Cal.2d 874, and Laughlin v. State, 123 P.2d 526, 19 Cal.2d 875

Or.—Lowell v. Pendleton Auto Co., 261 P. 415, 123 Or. 383.

Wash.—Denman v. City of Tacoma, 268 P. 1043, 148 Wash. 314. 44 C.J. p 945 note 52.

Full width of street

Abutting owners have right to use full width of street for ingress and egress.—**Fry v. O'Leary, 252 P. 111, 141 Wash. 465, 49 A.L.R. 1249.**

Right extends to area near lot sufficient to make available to abutter full enjoyment of street.—Lowell v. Pendleton Auto Co., 261 P. 415, 123 Or. 383.

78. Mo.—Christy v. Chicago, B. & Q. R. Co., App., 212 S.W.2d 476.

as far, at least, as the next intersecting street,⁷⁹ but it has been held that any inconveniences which may be suffered or hazards encountered beyond the intersecting street do not affect his rights.⁸⁰

Roads part of park system. Abutting owners have been held to have no right of access to parkways or boulevards constructed and maintained by a municipality as part of its park system in the absence of an agreement conferring such right.⁸¹

Improvement, repair, or maintenance of street. While it has been declared that the abutting owner may expect the municipality to protect and preserve his right of access by changing the contour of the street where necessary and practicable,⁸² it has been held that the right of access does not require the municipality to construct approaches from the house or lot of the abutter on the traveled part of the street⁸³ or to grade the street up to the lines of the abutting property.⁸⁴ The municipality may deprive the abutting owner of access for the period necessary to improve, repair, or maintain the street.⁸⁵

Change of grade. Where a municipality has changed the grade of a street, it cannot preclude an abutting owner from making such reasonable improvements or from employing and using such reasonable means as may be necessary to enable him

to exercise and enjoy the right of ingress and egress between the street and his property.⁸⁶ A change of grade may amount to an unreasonable interference with the right of access of an abutting owner, and as such may be invalid;⁸⁷ but, where the grade of a sidewalk has been duly established by the proper authorities, abutters cannot compel a change in its grade to suit their convenience.⁸⁸

Construction of street. A lot owner cannot complain of the construction of a street on an adjoining lot on the ground that his right of access is damaged, since he had no right of access before the street was constructed.⁸⁹

Invitees. The right of access includes not only the abutter's own right to unobstructed passage in and out of his premises, but the right of unobstructed accessibility to guests and patrons who come and go, and who need, without inconveniencing others, to stop briefly in the street in front of his premises.⁹⁰

Lessees. The right of access passes to the lessee of the property while he is in lawful possession.⁹¹

b. Entrances and Driveways

Generally speaking, an abutting owner has a right to construct and maintain over a public sidewalk an en-

Closing of road in one direction held not to interfere with abutting owners' private easements.—In re Cox, 250 N.Y.S. 528, 140 Misc. 313.

79. U.S.—Coy v. City of Tulsa, D.C. Okl., 2 F.Supp. 411.

Cal.—Beals v. City of Los Angeles, 144 P.2d 839, 23 Cal.2d 381—Bacich v. Board of Control of California, 144 P.2d 818, 23 Cal.2d 343.

Ill.—People ex rel. Calumet Federal Savings & Loan Ass'n of Chicago v. City of Chicago, 55 N.E.2d 391, 323 Ill.App. 295.

Tenn.—Illinois Cent. R. Co. v. Moriarity, 186 S.W. 1053, 135 Tenn. 446. Right to damages where access cut off in one direction only see infra § 1712.

80. Cal.—Beckham v. State, 149 P.2d 296, 64 Cal.App.2d 487.

81. Mass.—Gleason v. Metropolitan Dist. Commission, 170 N.E. 395, 270 Mass. 377—Burke v. Metropolitan Dist. Commission, 159 N.E. 739, 262 Mass. 70.

Rights no greater than those of public

The owner of land abutting on a boulevard has no greater right to ingress thereto, and egress therefrom, than that enjoyed by the general public.—State ex rel. Copland v. City of Toledo, 62 N.E.2d 256, 75 Ohio App. 378.

Road held maintained as public highway and not as part of park system, so that abutters could not be deprived of right of access.—Hoskins v. Chicago Park Dist., 35 N.E.2d 525, 311 Ill.App. 98, reversed on other grounds 43 N.E.2d 546, 380 Ill. 78.

82. N.Y.—Small v. Moss, 18 N.E.2d 281, 279 N.Y. 288.

83. Mass.—Metcalf v. Boston, 33 N.E. 586, 158 Mass. 284.

Miss.—Shuptrine v. Herron, 180 So. 620, 182 Miss. 315.

84. Mass.—Attorney General v. Boston, 71 N.E. 574, 186 Mass. 209—Metcalf v. Boston, 33 N.E. 586, 158 Mass. 284.

85. N.Y.—Farrell v. Rose, 170 N.E. 498, 253 N.Y. 73, 68 A.L.R. 1505. Pa.—Presbyterian Hospital in Philadelphia v. City of Philadelphia, 198 A. 53, 329 Pa. 337.

Unnecessary obstruction

Where city leased strip from private lot, taken for widening of street, to private individuals instead of beginning construction, city acted in its proprietary capacity and was liable for damages caused by resulting obstruction to access of former owners of such strip to their adjoining property.—Presbyterian Hospital in Philadelphia v. City of Philadelphia, supra.

86. Idaho.—Sandpoint v. Doyle, 95

P. 945, 14 Idaho 749, 17 L.R.A., N.S., 497.

44 C.J. p 945 note 55.

Change of grade of streets generally see supra § 1046.

87. Mo.—Powell v. Excelsior Springs, 120 S.W. 106, 138 Mo.App. 121.

44 C.J. p 945 note 56.

88. Mass.—Kimball v. Metropolitan Dist. Commission, 153 N.E. 330, 257 Mass. 55.

89. Va.—Raleigh Ct. Corp. v. Faucett, 124 S.E. 433, 140 Va. 126.

90. Ala.—City of Birmingham v. Hood-McPherson Realty Co., 172 So. 114, 233 Ala. 352, 108 A.L.R. 1140.

Tex.—Corpus Juris cited in Adams v. Grapotte, Civ.App., 69 S.W.2d 460, 462, affirmed Grapotte v. Adams, 111 S.W.2d 690, 130 Tex. 587.

Wash.—Bennett v. McGoldrick-Sanderson Co., 129 P.2d 795, 15 Wash. 2d 130.

44 C.J. p 945 note 59.

91. Ga.—City of Rome v. Lecray, 1 S.E.2d 759, 59 Ga.App. 644.

N.Y.—Greeley Sightseeing Co. v. Reigelmann, 195 N.Y.S. 845, 119 Misc. 84.

Tex.—Corpus Juris cited in Adams v. Grapotte, Civ.App., 69 S.W.2d 460, 462, affirmed Grapotte v. Adams, 111 S.W.2d 690, 130 Tex. 587.

trance or driveway for vehicular access to his premises from the street, but this right is subject to reasonable regulation, and there are circumstances under which the right has been denied.

Generally speaking, an abutting owner has a right⁹² or privilege⁹³ to construct and maintain over a public sidewalk an entrance or driveway for vehicular access to his premises from the street. However, this right or privilege is not an unlimited one which may be exercised without appropriate safeguards for the public,⁹⁴ but is subject to reasonable regulation,⁹⁵ and there are circumstances under which it has been denied.⁹⁶ Authority given

municipalities to prevent the passage of vehicles over and across sidewalks has been held to authorize the prohibition of construction and maintenance of private driveways across sidewalks.⁹⁷ On the other hand, it has been held that an ordinance prohibiting driving over a sidewalk does not prohibit the use of private driveways crossing the sidewalk, as the word "sidewalk" in its ordinary acceptance does not include driveways.⁹⁸ A municipality, by granting a permit to construct a driveway over a sidewalk, does not surrender its regulatory power over the streets,⁹⁹ and in a proper case may revoke

92. Mass.—Gustat v. City of Everett, 179 N.E. 217, 278 Mass. 1—Gleason v. Metropolitan Dist. Commission, 170 N.E. 395, 270 Mass. 377.

Tex.—Adams v. Grapotte, Civ.App., 69 S.W.2d 460, affirmed 111 S.W.2d 690, 130 Tex. 587.

Wash.—Bennett v. McGoldrick-Sanderson Co., 129 P.2d 795, 15 Wash. 2d 130.

44 C.J. p 946 note 62.

Vehicles have same right to pass over sidewalks as means of access to places of business abutting thereon that pedestrians have to walk longitudinally upon them, notwithstanding sidewalks are built primarily for pedestrians.—Adams v. Grapotte, Civ.App., 69 S.W.2d 460, 462, affirmed 111 S.W.2d 690, 130 Tex. 587.

Where no interference with public

City is bound to permit owner to construct and maintain driveway under reasonable regulations from street to abutting lot and across sidewalk, where it appears that construction and maintenance of driveway will not materially interfere with use of sidewalk by pedestrians or create traffic hazard.

Okl.—City of Norman v. Safeway Stores, 145 P.2d 765, 193 Okl. 534.

Pa.—Breinig v. Allegheny County, 2 A.2d 842, 332 Pa. 474.

93. Minn.—Alexander Co. v. City of Owatonna, 24 N.W.2d 244, 222 Minn. 312.

94. N.Y.—Fanroth v. Byrne, 169 N.E. 441, 252 N.Y. 447.

Driveway higher than sidewalk held to constitute an unlawful obstruction and nuisance.—City of Marshall v. Cook, 211 N.W. 328, 169 Minn. 248.

95. Ill.—Wilmot v. City of Chicago, 160 N.E. 206, 328 Ill. 552, 62 A.L.R. 394.

Minn.—Alexander Co. v. City of Owatonna, 24 N.W.2d 244, 222 Minn. 312.

N.H.—Tilton v. Sharpe, 155 A. 44, 85 N.H. 138.

Okl.—City of Norman v. Safeway Stores, 145 P.2d 765, 193 Okl. 534

—City of Shawnee v. Robbins Bros. Tire Co., 272 P. 457, 134 Okl. 142, 66 A.L.R. 1047.

Pa.—Breinig v. Allegheny County, 2 A.2d 842, 332 Pa. 474.

Tex.—Kling v. City of Austin, Civ. App., 82 S.W.2d 689.

Wash.—Denman v. City of Tacoma, 268 P. 1043, 148 Wash. 314.

44 C.J. p 946 note 61.

Ordinance requiring permit

(1) An ordinance requiring consent of council for changing sidewalk grade for driveway has been held not void as uncertain, unreasonable, discriminatory, and tending toward monopoly.—Wilmot v. City of Chicago, 160 N.E. 206, 328 Ill. 552, 62 A.L.R. 394.

(2) On the other hand, an ordinance forbidding construction of driveway across sidewalk without permit from city official, who must be satisfied that driveway will not unduly obstruct public travel or be dangerous to the public, and not providing for review of refusal of permit, has been held unconstitutional as vesting in administrative officer unlimited and unguided discretion.—R G Lydy, Inc., v. City of Chicago, 190 N.E. 273, 356 Ill. 230.

Ordinance not a zoning ordinance

A municipal ordinance prohibiting opening of a driveway across a sidewalk within specified distance from nearest property line of intersection of any two avenues was not a zoning ordinance, but merely a traffic ordinance, and defendants' maintenance of driveways across sidewalks, within the forbidden distance furnished no ground for having business declared a nuisance.—State ex rel. Szodomka v. Gruber, 10 So.2d 899, 201 La. 1068.

96. Minn.—Alexander Co. v. City of Owatonna, 24 N.W.2d 244, 222 Minn. 312.

Va.—Wood v. City of Richmond, 138 S.E. 560, 148 Va. 400.

On congested streets, if owner has other means of access, he can be entirely prevented from using vehicles over and across the sidewalk—Breinig v. Allegheny County, 2 A.2d 842,

332 Pa. 474—Farmers-Kissinger Market House Co. Inc., v. Reading, 165 A. 398, 310 Pa. 493.

Access at particular location

(1) There is no privilege of access at any particular location.

Mass.—Metropolitan Dist. Commission v. Cataldo, 153 N.E. 328, 257 Mass. 38.

Mo.—Fowler v. Nelson, 246 S.W. 638, 213 Mo.App. 82.

(2) Easement of access does not include right to cross sidewalk to and from part of public way used for vehicular traffic at all places along sidewalk, and does not necessarily include right to cross sidewalk at outer edge in front of entrance to building.—Centebear v. Selectmen of Watertown, 167 N.E. 303, 268 Mass. 121.

Fact that driveway at particular point is essential to profitable transaction of any particular business on the property is a factor which the owner has a right to have weighed, but it is not determinative of his right, and the right to construct, maintain, and use a driveway at such point may be denied where such use would be fraught with such unusual hazard that the danger to the traveling public would be out of proportion to the detriment to the owner in being deprived of it.—Tilton v. Sharpe, 155 A. 44, 85 N.H. 138.

Right to cut across intervening public land

A city is not required to permit owners of lots abutting on land, purchased by city and dedicated thereby for boulevard purposes, to construct a way across strip of land intervening between such lots and boulevard pavement.—State ex rel. Copland v. City of Toledo, 62 N.E. 2d 256, 75 Ohio App. 378.

97. Pa.—Farmers-Kissinger Market House Co. v. City of Reading, 165 A. 398, 310 Pa. 493.

98. Ill.—City of Elmhurst v. Buettgen, 88 N.E.2d 278, 394 Ill. 248.

99. Wash.—Denman v. City of Tacoma, 268 P. 1043, 148 Wash. 314.

the permit.¹ However, a municipal officer, unless expressly authorized by the statutes or ordinances, cannot require the removal of a driveway for which municipal permission has been given.²

Separate lots belonging to one owner. One using separate lots as one tract is not entitled as a matter of law to a separate driveway for each lot.³

Roads forming part of park system. Although, as discussed supra subsection a of this section, abutting owners have no right of access to parkways or boulevards constructed and maintained by a municipality as part of its park system in the absence of an agreement conferring such right, where such right is given by agreement, in the absence of a provision in the agreement to the contrary, the location, number, and width of the driveways which the abutting owner will be permitted to construct and maintain depend on the facts and circumstances and involve the exercise of judgment and discretion on the part of the municipal authorities,⁴ and their decision will not be disturbed unless it appears that they acted in bad faith, or that it was a mere arbitrary or irrational exercise of power having no substantial relation to the public safety or welfare.⁵

Permit to cut curb for driveway. The municipality may under its power to regulate driveways properly require an abutting owner to obtain a permit

to cut the street curb for a driveway.⁶ The power to grant or refuse such permit may be exercised only by the officer in whom, or the body in which, it resides,⁷ and the extent of the power conferred⁸ and the manner of exercising it⁹ depend largely on the terms of the grant. While the municipal authorities may not arbitrarily refuse a permit,¹⁰ it has been held that the denial of a permit does not violate constitutional guaranties,¹¹ and that the refusal of the city council to grant a permit is a legitimate and proper exercise of the police power where such refusal has a substantial relation to the public safety.¹² Under a grant of power reasonably to regulate curb cuts, the municipal authorities may exercise a reasonable discretion as to the location and width of a driveway.¹³ Power given to issue curb-cut permits should be exercised in a manner that will expedite the public business and with the view to adjusting fairly private and public rights which conflict,¹⁴ and a property owner should not be put to the inconvenience and annoyance of filing repeated applications for a curb cut until a plat in connection therewith finally meets the unexpressed views of the municipal authorities as to what is a reasonable curb cut both as to location and width.¹⁵ In the absence of any other adequate remedy, the abutting owner is entitled to review by certiorari the action of the municipal authorities in refusing a permit.¹⁶ On such review the court is without pow-

1. Where no expenditures of any consequence had been made on the faith of the permit, and revocation would not deprive the holder of the permit of reasonable ingress and egress, the city could lawfully revoke a permit given to construct a driveway at a point not directly in front of the permit holder's land.—Denman v. City of Tacoma, supra.

Permit reserving right to revoke

Where permission to construct a driveway across a sidewalk has been issued without sufficient consideration of the vehicular and pedestrian traffic at or near it and contains a reservation of the right to revoke it at any time, it may be revoked where its continued use will be dangerous to the safety of the traveling public.—Wood v. Richmond, 138 S.E. 560, 148 Va. 400.

Petition to enjoin removal held insufficient

Ky.—Frederick v. City of Louisville, 212 S.W.2d 267, 307 Ky. 740.

2. N.Y.—Greeley Sightseeing Co. v. Riegelmann, 195 N.Y.S. 845, 119 Misc. 84.

3. Mass.—Dwyer v. Metropolitan Dist. Commission, 169 N.E. 416, 269 Mass. 573.

4. Mass.—Dwyer v. Metropolitan

Dist. Commission, supra—Burke v. Metropolitan Dist. Commission, 159 N.E. 739, 262 Mass. 70.

5. Mass.—Dwyer v. Metropolitan Dist. Commission, 169 N.E. 416, 269 Mass. 573—Burke v. Metropolitan Dist. Commission, 159 N.E. 739, 262 Mass. 70.

6. R.I.—Newman v. Mayor of City of Newport, 57 A.2d 173, 73 R.I. 385.

7. Minn.—Alexander Co. v. City of Owatonna, 24 N.W.2d 244, 222 Minn. 312.

8. Reasonable regulation, and not prohibition

R.I.—Elder v. Mayor of City of Newport, 57 A.2d 653—Newman v. Mayor of City of Newport, 57 A.2d 173.

Proposed driveway held within purview of ordinance

Minn.—Alexander Co. v. City of Owatonna, 24 N.W.2d 244, 222 Minn. 312.

9. Fair hearing not denied

Where, under charter and ordinance prohibiting the cutting of curb and construction of driveway over sidewalk without a permit issued by city council after public hearing as provided in ordinance, refusal of council to hear testimo-

ny of engineer in connection with application for such a permit that it was his duty to issue permit in question did not deprive applicant for permit of a full and fair hearing, particularly where applicants' counsel was given opportunity to argue the law on the subject.—Alexander Co. v. City of Owatonna, supra.

10. Refusal held not arbitrary
N.Y.—Socony Vacuum Oil Co. v. Murdock, 1 N.Y.S.2d 574, 165 Misc. 713.

Fact that permits had been granted in other instances did not show that officials acted arbitrarily in refusing an application for a curb cut.—Socony Vacuum Oil Co. v. Murdock, supra.

11. N.Y.—Socony Vacuum Oil Co. v. Murdock, supra.

12. Minn.—Alexander Co. v. City of Owatonna, 24 N.W.2d 244, 222 Minn. 312.

13. R.I.—Elder v. Mayor of City of Newport, 57 A.2d 653.

14. R.I.—Elder v. Mayor of City of Newport, supra.

15. R.I.—Elder v. Mayor of City of Newport, supra.

16. R.I.—Newman v. Mayor of City of Newport, 57 A.2d 173, 73 R.I. 385.

er to substitute its discretion and judgment for that of the municipal authorities.¹⁷

c. Connection with Water Mains, Sewers, and Other Pipes

The right of access of the abutter has been held to include the right to use the street in connecting with service pipes in the street.

The right of access of the abutter has been held to include the right to use the street in connecting with water, gas, sewer, and similar pipes in the streets.¹⁸ While this right may be regulated and controlled,¹⁹ it may not be denied to an abutting owner as long as it is exercised in accordance with coexisting public rights in the street.²⁰

§ 1704. Sidewalks

According to some authorities, but not others, the right of access of an abutting owner does not include the right to a sidewalk.

According to some authorities the right of an

owner whose property abuts on a street to access to his property over the adjacent street, discussed supra § 1703, does not include the right to a sidewalk.²¹ However, there is also authority to the contrary,²² under which it has been held that the owner of the abutting property is entitled to have a reasonable space for a sidewalk, and, where a city council acts arbitrarily or fraudulently in refusing it, the abutting owner may compel the setting aside of a reasonable space.²³

§ 1705. Building Lines and Regulations

Building lines fixed by lawful authority must be observed by an abutting owner; and, unless authorized by law, he may not build beyond the street line.

Unless restricted by agreement, restrictions in the deed, or valid public regulation, the owner of land may build on it as near the street line as he pleases.²⁴ Building lines fixed by lawful authority must be observed by an abutting owner;²⁵ and, unless

17. N.Y.—Socony Vacuum Oil Co. v. Murdock, 1 N.Y.S.2d 574, 165 Misc. 713.

18. W.Va.—McClagherty v. Bluefield Waterworks, etc., Co., 68 S.E. 28, 67 W.Va. 285, 292, 32 L.R.A., N.S., 229.

44 C.J. p 946 note 66.

19. Md.—Lee v. Leitch, 101 A. 716, 131 Md. 30.

44 C.J. p 946 note 67.

20. N.J.—Tomel v. North Bergen Tp., 121 A. 780, 98 N.J.Law 668.

21. Ariz.—Wood v. Phoenix-Tempe Stone Co., 275 P. 5, 35 Ariz. 155.

N.C.—Crotts v. City of Winston-Salem, 86 S.E. 792, 170 N.C. 24—Hester v. Durham Traction Co., 50 S.E. 711, 138 N.C. 288.

Establishment, existence, and legality of sidewalks see supra § 1662.

Right of property owners to build sidewalks see supra § 1071.

Setting aside a portion of the street for sidewalks is not absolutely required.—Brevoort v. Detroit, 24 Mich. 322.

Width

An owner of abutting property is not entitled to have the sidewalk maintained at any particular width. U.S.—Campbell v. City of Chicago, C.C.A.Ill., 119 F.2d 1014.

N.C.—Ham v. City of Durham, 170 S.E. 137, 205 N.C. 107.

In Texas

(1) The text rule finds support in some decisions.—Watland v. Whitham & Co., Civ.App., 261 S.W. 387—Jones v. City of Houston, Civ.App., 188 S.W. 688.

(2) However, a more recent decision, without referring to the earlier decisions, declares that one owning residence property in an incorporat-

ed town has a right to maintain a sidewalk on the portion of the street abutting his property as long as he does not unduly encroach on the street so as to impede traffic, and the abutting owner, in the absence of an ordinance regulating the construction of sidewalks, may make a reasonable appropriation of the street for such purpose, since such appropriation is not an obstruction of traffic, but rather is in furtherance thereof.—McCall v. Alpine Telephone Corporation, 183 S.W.2d 205, affirmed 184 S.W.2d 830, 143 Tex. 335.

22. Ky.—Georgetown v. Hambrick, 104 S.W. 997, 127 Ky. 43, 31 Ky.L. 1276, 128 Am.S.R. 333, 13 L.R.A., N.S., 1113.

Okl.—City of Tulsa v. Hindman, 261 P. 910, 128 Okl. 169, 55 A.L.R. 891. Dedication of street as carrying with it right to a sidewalk see Dedication § 8.

23. Ky.—City of Covington v. Averbeck, 50 S.W.2d 50, 244 Ky. 117—Georgetown v. Hambrick, 104 S.W. 997, 127 Ky. 43, 31 Ky.L. 1276, 128 Am.S.R. 333, 13 L.R.A., N.S., 1113.

24. Mich.—Powers v. Halladay, 146 N.W. 124, 179 Mich. 314.

44 C.J. p 959 note 38.

Validity and construction of restrictions in deeds as to building lines see Deeds §§ 162 b, 164 b.

25. Del.—Papaioanu v. Commissioners of Rehoboth, 20 A.2d 447, 25 Del.Ch. 327.

N.J.—Lattanzi v. Commissioner of Public Works of City of Camden, 48 A.2d 788, 134 N.J.Law 437.

Tex.—Stuckert v. Morris, Civ.App., 194 S.W.2d 606.

Wis.—Hayes v. Hoffman, 211 N.W. 271, 192 Wis. 63.

44 C.J. p 959 note 39.

Long-continued violation

Maintenance of building over building line for long period of years did not show as matter of law abandonment by city of right to require removal or warrant continuance in such location; and existence of ordinance regulating building and construction and maintenance of building over building line did not create presumption of valid location.—Appeal of Phillips, 154 A. 238, 113 Conn. 40.

Application to existing buildings

(1) The setback lines provided by an ordinance have been held to be inapplicable to buildings constructed before the adoption of the ordinance.—Incorporated Village of North Hornell v. Rauber, 40 N.Y.S.2d 938, 181 Misc. 546.

(2) However, an ordinance may require existing buildings to comply with the building line if they are altered.

Pa.—Colonial Federal Sav. & Loan Ass'n v. Porreca, 59 Pa.Dist. & Co. 163.

Tex.—Stuckert v. Morris, Civ.App., 194 S.W.2d 606.

(3) It has been held that the word "alter" as used in such ordinance means a material or substantial change, and that the substitution of noncombustible for combustible support in the front wall of a building, the relocation of the entrance, the removal of a bulk window and the substitution of two smaller ones therefor, and the refinishing of the balance of the old bulk window front with solid brick, constitutes an alteration of the building within the meaning of the ordinance.—Colonial Federal Sav. & Loan Ass'n v. Porreca, supra.

authorized by statute or ordinance, he may not build beyond the street line.²⁶ A permit issued for the construction of a building has been held not to afford any protection against liability for violation of a building line.²⁷

Questions as to the power of the municipal corporation with reference to building lines and other zoning and building regulations are discussed supra §§ 224-228, and whether such regulations amount to an attempt to take property for public use without compensation in Eminent Domain § 7.

As encumbrance. The establishment of a building line has been held to constitute an encumbrance on an abutter's property.²⁸

Procedure for establishment. The establishment of a building line amounting to an encumbrance on an abutter's property should be on notice giving him an opportunity to be heard.²⁹ An order establishing building lines on both sides of a street will not be set aside because, when adopted, no final disposition had been made of an earlier petition to have lines on one side of the street fixed.³⁰ The lapse of time between the institution of proceedings to fix building lines and their conclusion will not render an order establishing such lines invalid.³¹

(4) So, it has been held that the building of new bathroom at front of existing dwelling house so as to project into area wherein city ordinance requires front yard constitutes structural alteration of house and hence violates ordinance.—Stuckert v. Morris, supra.

(5) A provision that parts of structures projecting beyond building line on certain date may be maintained as constructed until their removal is directed by council has been held to be the equivalent of an express permission given prior to erection of structure.—Hayton v. McLaughlin, 32 N.Y.S.2d 292, 263 App. Div. 245, reversed on other grounds 43 N.E.2d 813, 289 N.Y. 66.

Phrase "block front" as used in city ordinance respecting set-back of buildings within the same block front, included only realty located on and fronting on particular street, and not realty on the square block.—Alker v. Collins, N.J.Super.A.D., 64 A.2d 376.

Porch

(1) Porch, although integral part of house in a sense, is usually considered something apart from main body of house from standpoint of building line restrictions, where law or city ordinance fixing building line distinguishes between main building and porches, and the phrase "open porch," as used in ordinance fixing front line of open porch, was

not so indefinite as to afford no basis for enforcement of ordinance.—Stuckert v. Morris, Tex.Civ.App., 194 S.W.2d 606.

(2) However, a front porch of permanent construction with solid foundation and roofing and firmly attached to house has been held to be a building within ordinance defining official building line.—Lattanzi v. Commissioner of Public Works of City of Camden, 48 A.2d 788, 134 N.J.Law 437.

Majority observing minimum front line

An ordinance providing that, where majority of buildings fronting street have observed a minimum front yard line, no buildings thereafter erected shall project beyond the front yard line so established, was not subject to construction that where there are houses with varying set-backs no house shall be built any nearer to the curb than the house closest to the curb; and where no two houses were erected the same distance from the street there was no established line with which subsequent builder was required to conform.—City of Wichita v. Boles, 135 P.2d 542, 156 Kan. 619.

28. Minn.—Kelty v. Minneapolis, 196 N.W. 487, 157 Minn. 430. 44 C.J. p 959 note 40. Encroachment see infra § 1707.

27. Iowa.—Boardman v. Davis, 3 N.W.2d 608, 231 Iowa 1227.

By property owners. Under an ordinance so providing, the building line in any block or square may be established by the majority of the property owners in the block or square.³²

Record. Under a statute requiring that a written survey containing the particular description of the lines established shall be recorded, if the survey is not recorded the building line will not constitute a lien on the land affected.³³

§ 1706. Transfer and Loss of Rights

The private rights of an abutting owner may be lost by adverse user, and he may transfer his right to the use of his premises within the boundary of a street, but he cannot confer special privileges on those who are entitled to use the streets only on equal terms with others similarly situated, or grant to private individuals the right to occupy the street in such manner as substantially and permanently to obstruct traffic thereon.

An abutting owner is not precluded by any law or by public policy from selling or giving away his mere private property right to the use of his premises within the boundary of a street.³⁴ He cannot, however, confer special privileges on those who are entitled to use streets only on equal terms with others similarly situated,³⁵ and he cannot grant to private individuals the right to occupy the street in

23. Mass.—Inhabitants of Town of Watertown v. Dana, 150 N.E. 860, 255 Mass. 67, 44 A.L.R. 1374. 44 C.J. p 959 note 41.

29. Conn.—Northrop v. Waterbury, 70 A. 1024, 81 Conn. 305. 44 C.J. p 959 note 41.

30. Mass.—Zeo v. Springfield, 135 N.E. 458, 241 Mass. 340. 44 C.J. p 959 note 42.

31. Mass.—Zeo v. Springfield, supra. 44 C.J. p 959 note 43.

32. N.J.—Lattanzi v. Commissioner of Public Works of City of Camden, 48 A.2d 788, 134 N.J.Law 437.

33. Conn.—Benedict v. Pettes, 84 A. 332, 85 Conn. 537. 44 C.J. p 959 note 45.

34. Wis.—Walterman v. Village of Norwalk, 130 N.W. 479, 145 Wis. 663. 44 C.J. p 959 note 46.

Lease as giving lessee right of access see supra § 1703.

Transfer of land abutting street as giving transferee transferor's title to middle of street see Boundaries § 35.

Vendee with notice of grant takes subject thereto.—Walterman v. Village of Norwalk, supra.

Conveyance of property abutting streets and alleyways carries with it indispensable use and enjoyment of streets and alleyways.—Martin v. Fuller, La., 37 So.2d 851.

35. Wis.—Park Hotel Co. v. Ketch-

such a manner as substantially and permanently to obstruct traffic thereon.³⁶

Loss of rights. The private rights of an abutting owner may be lost by adverse user,³⁷ but the ap-

propriation by a municipality of an easement in land abutting on the street does not divest the owner of his dominion over the property subject to the easement.³⁸

b. Use, Encroachment on, or Obstruction of, Street

§ 1707. In General

The right of the public to use the streets for purposes of travel is paramount, and the right of the abutter to occupy them for other purposes is permissive and subordinate; but the public right is not absolute and is subject to such incidental and temporary or partial obstruction by the abutting owner as manifest necessity may require.

The right of the public to use the streets for purposes of travel and transportation is paramount, and the right of the abutter to occupy them for

other purposes is permissive and subordinate.³⁹ The abutter may not permanently appropriate, obstruct, or encroach on any part of the street,⁴⁰ although sufficient space is left for use or passage of the public,⁴¹ or use it in an unreasonable manner,⁴² or in such manner as to obstruct, interfere with, or impair the public easement⁴³ or the rights of other abutting owners.⁴⁴ The fact that a landowner owns lands on both sides of a street does not justify his obstruction of it.⁴⁵

um, 199 N.W. 219, 184 Wis. 182, 33 A.L.R. 351.

36. Mich.—Pastorino v. Detroit, 148 N.W. 231, 182 Mich. 5
44 C.J. p 959 note 48.

Depriving public of prescriptive rights

Where the public acquired easement over alley by prescription, it could not be deprived thereof by quitclaim deeds from adjacent owners to third person, especially where deeds were conditional and conditions were never complied with—Robb & Rowley Theaters v. Arnold, 138 S.W. 2d 773, 200 Ark. 110.

37. Ky.—Home Laundry Co. v. Louisville, 182 S.W. 645, 168 Ky. 499.
44 C.J. p 960 note 50.

Effect of vacation or abandonment of street on rights see supra § 1683.

38. Kan.—Corpus Juris cited in Brown v. City of Topeka, 74 P.2d 142, 146, 146 Kan. 974.
Ohio.—Dodson v. Cincinnati, 34 Ohio St. 276.

39. Ariz.—Beltran v. Stroud, 160 P. 2d 765, 63 Ariz. 249.

Del.—Miller v. Town of Seaford, 194 A. 37, 22 Del.Ch. 159.

Ill.—Haggenjos v. City of Chicago, 168 N.E. 661, 336 Ill. 573.

Ind.—Vonderschmitt v. McGuire, 195 N.E. 585, 100 Ind.App. 632.

Mo.—Nemours v. City of Clayton, 175 S.W.2d 60, 237 Mo.App. 497—McWhorter v. Dahl Chevrolet Co., 88 S.W.2d 240, 229 Mo.App. 1090.

Neb.—City of Pierce v. Schramm, 216 N.W. 809, 116 Neb. 263.

N.J.—Sacco v. Hall, 63 A.2d 887, 1 N.J. 377.

N.Y.—Gibson v. Jaystone Drug Co., 45 N.Y.S.2d 380, 267 App.Div. 201.

Okl.—City of Stillwater v. Lovell, 15 P.2d 12, 159 Okl. 214.

Or.—Lowell v. Pendleton Auto Co., 261 P. 415, 123 Or. 383.

Va.—Price v. Travis, 140 S.E. 644, 149 Va. 536, 56 A.L.R. 209.

Wash.—James v. Burchett, 129 P.2d 790, 15 Wash.2d 119.

44 C.J. p 946 note 71

Liability of abutters and others for defects or obstructions in streets see supra §§ 857-872

Right of peaceful picketing

Ind.—Vonderschmitt v. McGuire, 195 N.E. 585, 100 Ind.App. 632.

The operation of a newsstand on the sidewalk cannot be considered an exercise of the public easement or public right of passage superior to the rights of the abutting owner.—823 Broad St. v. Marcus, 3 A.2d 589, 17 N.J.Misc. 25.

40. Kan.—City of Russell v. Russell County Building & Loan Ass'n, 118 P.2d 121, 154 Kan. 154—Corpus Juris cited in City of Emporia v. Humphrey, 297 P. 712, 715, 132 Kan. 682.

La.—Culpepper v. Leonard Truck Lines, App., 23 So.2d 561, reversed on other grounds 24 So.2d 148, 208 La. 1084.

Me.—Silverman v. Usen, 147 A. 421, 128 Me. 349.

Tex.—J. M. Radford Grocery Co. v. City of Abilene, Civ.App., 20 S.W. 2d 255, affirmed, Com.App., 34 S.W. 2d 830.

44 C.J. p 947 note 73.

Obstructions and encroachments in general see infra §§ 1744-1746.

No exclusive right to occupy or use No private individual possesses any exclusive right to occupy, use, or control any portion of the street by reason of his ownership or occupancy of adjacent premises.—Eustace v. Jahns, 38 Cal. 3—Schaefer v. Lenahan, 146 P.2d 929, 63 Cal.App.2d 324.

On, above, or below surface

No owner of property abutting street has right to place an obstruction therein, whether it be on surface or above or below surface.—Culpepper v. Leonard Truck Lines, App., 23 So.2d 561, reversed on other grounds 24 So.2d 148, 208 La. 1084.

Statutory prohibition held applicable to public alleys

Cal.—Curtis v. Kastner, 30 P.2d 26, 220 Cal. 185.

The cost of improvements the abutter has placed on the street is immaterial—Dozier v. Austin, Tex. Civ.App., 253 S.W. 554—44 C.J. p 947 note 80.

Abutting owner's lessee acquires no right to permanently appropriate any part of public street for private business.—Rowe v. City of Cincinnati, 159 N.E. 365, 117 Ohio St. 382.

41. N.Y.—Mann v. Groom, 231 N.Y. S. 342, 133 Misc. 260.

Tex.—J. M. Radford Grocery Co. v. City of Abilene, Civ.App., 20 S.W. 2d 255, affirmed, Com.App., 34 S.W. 2d 830.

44 C.J. p 947 note 75.

42. Fla.—Shamhart v. Morrison Cafeteria Co., 32 So.2d 727, 159 Fla. 629.

43. Mo.—Boyle v. Neisner Bros., 87 S.W.2d 227, 230 Mo.App. 90.

44 C.J. p 947 note 73.

Act impairing safety of sidewalk

An abutting owner has no right to do any affirmative act impairing the safety of the sidewalk in front of his premises.—Cobb v. Salt River Valley Water Users' Ass'n, 114 P.2d 904, 57 Ariz. 451.

44. N.Y.—Mann v. Groom, 231 N.Y. S. 342, 133 Misc. 260.

44 C.J. p 947 note 73.

45. Tex.—Dozier v. Austin, Civ.App., 253 S.W. 554.

The public right is not, however, absolute,⁴⁶ but is subject to such incidental and temporary or partial obstruction by the abutting owners as manifest necessity may require,⁴⁷ and the abutting property owners have the right to make all proper and reasonable use of the street not inconsistent with the rights of the public.⁴⁸ The extent of the right thus to interfere with the free and uninterrupted enjoyment of the use of the street by the public depends on the necessity of the case as far as the individual is concerned and the reasonableness of the use against the public.⁴⁹

Ordinarily, under charter, statutory, or constitutional provisions, a municipality has power to regulate and prohibit obstructions and encroachments on its streets by abutting owners,⁵⁰ and the question whether a thing in fact constitutes an unlawful obstruction or encroachment by an abutting owner⁵¹ and the question of public necessity or convenience⁵² are for the governing body of the municipality, but such body cannot act arbitrarily and deny to

one citizen street privileges which it grants to another under like conditions.⁵³

Obstruction as nuisance. The rule, discussed infra § 1744, that any unreasonable and unauthorized obstruction of a street is a nuisance is followed even though the obstruction is maintained by an abutting owner.⁵⁴ When maintained by others, such obstruction may constitute a nuisance as to the abutting owners,⁵⁵ and this is true even though the nuisance is caused by the municipality.⁵⁶ However, not every obstruction constitutes a nuisance per se with respect to an abutting owner.⁵⁷

§ 1708. Licenses and Permits

- a. In general
- b. Revocation
- c. Rights as against use of street by others under grant or permit

a. In General

In the absence of a clear grant of power a municipal

46. Ill.—Tolman & Co. v. City of Chicago, 88 N.E. 488, 240 Ill. 268, 24 L.R.A.N.S., 97.

Wash.—James v. Burchett, 129 P.2d 790, 15 Wash.2d 119.

Statutory restriction not absolute

Restriction on placing of obstructions on sidewalks by provision of a city code has been held not to be absolute.—People v. Gerand, 21 N.Y.S. 2d 428.

47. Ill.—Tolman & Co. v. City of Chicago, 88 N.E. 488, 240 Ill. 268, 24 L.R.A.N.S., 97.

Wash.—James v. Burchett, 129 P.2d 790, 15 Wash.2d 119.

Temporary or occasional use of sidewalk or roadway see infra § 1709.

48. Idaho.—Rief v. Mountain States Telephone & Telegraph Co., 120 P. 2d 823, 63 Idaho 418.

Ill.—City of Elmhurst v. Buettgen, 68 N.E.2d 278, 394 Ill. 248—Haggenjos v. City of Chicago, 168 N.E. 661, 336 Ill. 573.

Ky.—Goodloe v. City of Richmond, 63 S.W.2d 785, 250 Ky. 608.

Mass.—Smith v. Locke Coal Co., 164 N.E. 381, 265 Mass. 524, 61 A.L.R. 1052.

Minn.—Kooreny v. Dampier-Baird Mortuary, 291 N.W. 611, 207 Minn. 367—Johnson v. Village of Gibson, 212 N.W. 15, 170 Minn. 12.

Ohio.—Plummer v. Village of Swanton, 15 N.E.2d 349, 133 Ohio St. 623.

Pa.—Hindin v. Samuel, 45 A.2d 870, 153 Pa.Super. 539.

Wash.—James v. Burchett, 129 P.2d 790, 15 Wash.2d 119—Shaw v. City of Yakima, 48 P.2d 630, 183 Wash. 200.

44 C.J. p 946 note 72.

Property owner owning fee in

street may use property in any way he desires which is consistent with dominant right of public in easement—Davis v. City of Chicago, 164 NE 673, 333 Ill. 422.

Right to use sidewalk is privilege in nature of an easement.—Mitchell v. Thomas, 8 P.2d 639, 91 Mont. 370.

49. Wash.—James v. Burchett, 129 P.2d 790, 15 Wash.2d 119.

Obstruction above surface must at least be sufficiently high not to obstruct use thereof by lawful vehicles.—Culpepper v. Leonard Truck Lines, App., 23 So.2d 561, reversed on other grounds 24 So.2d 148, 208 La. 1084.

50. Mich.—Woodward Ave. Corp. v. Wolff, 20 N.W.2d 217, 312 Mich. 352.

Existence and extent of power of municipality to regulate and prohibit encroachments and obstructions generally see infra § 1747.

Power to regulate aesthetics of structures placed by abutting owner over or in highways held delegated to municipal art jury.—Walnut & Quince Streets Corporation v. Mills, 154 A. 29, 303 Pa. 25, appeal dismissed 52 S.Ct. 16, 284 U.S. 573, 76 L. Ed. 498.

51. Cal.—Laura Vincent Co. v. City of Selma, 111 P.2d 17, 43 Cal.App. 2d 473.

What constitutes an unlawful obstruction generally see infra § 1746.

52. Neb.—City of Pierce v. Schramm, 216 N.W. 809, 116 Neb. 263—Kenny v. Village of Dorchester, 163 N.W. 762, 101 Neb. 425.

53. Neb.—City of Pierce v. Schramm, 216 N.W. 809, 116 Neb. 263—Kenny v. Village of Dorchester, 163 N.W. 762, 101 Neb. 425.

Power of legislature to prohibit obstructions in certain localities and permit them in others see infra § 1708.

Ordinance held not unreasonable or discriminatory

Mich.—1426 Woodward Ave. Corp. v. Wolff, 20 N.W.2d 217, 312 Mich. 352.

54. Del.—Miller v. Town of Seaford, 194 A. 37, 22 Del.Ch. 159.

Kan.—City of Russell v. Russell County Building & Loan Ass'n, 118 P.2d 121, 154 Kan. 154—City of Emporia v. Humphrey, 297 P. 712, 132 Kan. 682.

Mo.—Boyle v. Neisner Bros., 87 S. W.2d 227, 230 Mo.App. 90.

Tex.—J. M. Radford Grocery Co. v. City of Abilene, Civ.App., 20 S.W. 2d 255, affirmed, Com.App., 34 S. W.2d 830.

Wis.—Holl v. City of Merrill, 28 N. W.2d 363, 251 Wis. 203.

Unreasonable use held public and private nuisance

Fla.—Shamhart v. Morrison Cafeteria Co., 32 So.2d 727, 159 Fla. 629.

55. Ga.—Scott v. Reynolds, 29 S.E. 2d 88, 70 Ga.App. 545.

Pa.—Valmont Development Co. v. Rosser, 146 A. 557, 297 Pa. 140.

56. Pa.—Valmont Development Co. v. Rosser, supra.

57. Idaho.—Rief v. Mountain States Telephone & Telegraph Co., 120 P. 2d 823, 63 Idaho 418.

Tex.—City of San Angelo v. Sitas, 183 S.W.2d 417, 143 Tex. 154.

corporation is usually held to have no power to authorize an abutting owner to encroach on or obstruct the street, but the legislature may authorize structures by abutters which, without such authority, would be encroachments or obstructions, and it may delegate this power to the municipality.

In the absence of a clear grant of power a municipal corporation is usually held to have no right to authorize an abutting owner to encroach on or obstruct the street,⁵⁸ whether on, above, or below the surface of the street,⁵⁹ although there is some authority to the effect that, to at least a limited extent, such power may be derived from the general power to control and regulate the streets.⁶⁰ The legislature, however, by virtue of its general control over public streets and highways may authorize structures by abutters which, without such authority, would be encroachments or obstructions,⁶¹ and it may delegate this power to the municipality.⁶² The power to regulate carries with it the power to authorize the erection or maintenance of obstructions on compliance with the rules adopted on the subject,⁶³ and it is competent for the legislature to prohibit such obstructions in certain localities and to permit them in others,⁶⁴ but the classification of property owners must not be arbitrary or unreasonable.⁶⁵ A statutory provision permitting the maintenance of encroachments until removal is directed has been held to apply to nondangerous encroachments existing at the time of passage.⁶⁶

Implied license. Where the municipality in the

exercise of its powers has provided regulations and restrictions as to such encroachments or obstructions, it amounts to an implied license to construct them within the restrictions imposed by such regulations.⁶⁷ However, an ordinance prohibiting such encumbrances with a penalty for violation may not be construed as giving a license to one maintaining them to continue them on the payment of the penalty.⁶⁸

Approval by state officer. In the absence of express authority conferred on him, the action of a state officer in approving an encroachment on the street will not override the power of the municipality to compel its removal.⁶⁹

Action by council. Where the power to grant a permit is vested in the city council, it has been held that action by the council, a quorum not being present, subject to the approval of absent members, is insufficient,⁷⁰ and is not aided by subsequent approval of the minutes of the meeting at which such action was taken.⁷¹

Notice to adjoining owners. A charter provision authorizing the erection of minor privileges on notice to the adjoining property owners has been held not to be merely directory as to notice,⁷² and, where notice is not given, the appearance of a property owner by an attorney after the application has been acted on is not equivalent to notice previously given.⁷³

58. Ind.—House-Wives League v. City of Indianapolis, 185 N.E. 511, 204 Ind. 685.

La.—Culpepper v. Leonard Truck Lines, App., 23 So.2d 561, reversed on other grounds 24 So.2d 148, 208 La. 1084.

Md.—Huebschmann v. Grand Co., 172 A. 227, 166 Md. 615.

Mass.—Town of Brookline v. Loring, 118 N.E. 981, 229 Mass. 485.

Okl.—City of Stillwater v. Lovell, 15 P.2d 12, 159 Okl. 214.

Tex.—J. M. Radford Grocery Co. v. City of Abilene, Com.App., 34 S. W.2d 830.

44 C.J. p 947 note 82.

Licenses and permits for particular obstructions see *infra* § 1709.

Power of municipality to authorize: Obstructions generally see *infra* § 1746.

Private use of streets generally see *infra* § 1725.

Prohibition in charter

(1) Under a charter so providing, the city council may not pass a local law authorizing the placing or continuing of any encroachment or obstruction in the streets.—People, on Complaint of McLees v. Berner, 10 N.Y.S.2d 839, 170 Misc. 601.

(2) A charter provision prohibiting permission to encroach on or obstruct the streets or sidewalks, except for certain purposes, has been held to refer to illegal or permanent encroachments or obstructions.—Green v. Miller, 162 N.E. 593, 249 N.Y. 88.

Continued maintenance of nuisance cannot be authorized by municipal authorities.—Berl v. Rochester State Corporation, 14 N.Y.S.2d 516.

59. La.—Culpepper v. Leonard Truck Lines, App., 23 So.2d 561, reversed on other grounds 24 So. 2d 148, 208 La. 1084.

60. Ga.—Hanbury v. Woodward Lumber Co., 26 S.E. 477, 98 Ga. 54.

44 C.J. p 948 note 83.

61. N.C.—Clayton v. Liggett & Myers Tobacco Co., 35 S.E.2d 691, 225 N.C. 563.

44 C.J. p 948 note 84.

62. N.Y.—Tymon v. M. L. S. Const. Co., 186 N.E. 429, 262 N.Y. 161—Green v. Miller, 162 N.E. 593, 249 N.Y. 88—People v. Roseman, 295 N.Y.S. 882, 164 Misc. 11.

N.C.—Clayton v. Liggett & Myers To-

hacco Co., 35 S.E.2d 691, 225 N.C. 563.

44 C.J. p 948 note 85.

63. N.Y.—Hoey v. Gilroy, 29 N.E. 85, 129 N.Y. 132.

64. Md.—Storck v. Baltimore City, 61 A. 330, 101 Md. 476

65. Md.—Storck v. Baltimore City, *supra*.

66. N.Y.—Hayton v. McLaughlin, 43 N.E.2d 813, 289 N.Y. 66.

67. N.Y.—People v. Friedman, 16 N.Y.S.2d 925.

44 C.J. p 948 note 89.

68. N.Y.—New York v. Knickerbocker Trust Co., 93 N.Y.S. 387, 104 App.Div. 223.

69. Va.—Dorsey v. Moundsville, 135 S.E. 6, 102 W.Va. 210.

44 C.J. p 948 note 91.

70. Ky.—Leitchfield Mercantile Co. v. Commonwealth, 136 S.W. 639, 143 Ky. 162.

71. Ky.—Leitchfield Mercantile Co. v. Commonwealth, *supra*.

72. Md.—Fralinger v. Cooke, 71 A. 529, 108 Md. 682

44 C.J. p 948 note 94.

73. Md.—Fralinger v. Cooke, 71 A. 529, 108 Md. 682.

b. Revocation

A mere permission or license to the abutting owner to obstruct or encroach on the street is revocable at any time unless there are circumstances creating an estoppel against the public or the license is in the nature of a contract.

A mere permission or license to the abutting owner to obstruct or encroach on the street is revocable at any time⁷⁴ unless there are circumstances creating an estoppel against the public⁷⁵ or the license is in the nature of a contract,⁷⁶ and the abutter acquires no vested rights by reason of a mere permissive use.⁷⁷ Further, no estoppel can arise from the act of municipal authorities done without authority of law.⁷⁸ It has been held, however, that permits for minor privileges in a street, issued without the power of revocation, either in the permits or in some law or ordinance then in force, can be revoked only in the exercise of the police power.⁷⁹ Moreover, while minor privileges granted subject to revocation are revocable,⁸⁰ it has been held that, where the persons to whom privileges were granted paid for them, or were by the granting of them led to incur substantial expense, which may largely be lost, they are entitled to a hearing,⁸¹ and the privileges cannot be revoked unless, under all the circumstances, revocation is shown to be just and equitable or is done in the exercise of the police power.⁸² An ordinance authorizing the granting of permits for the obstruction of the streets is not, by reason of the fact that it requires such permits to be subject to revocation, violative of a constitutional requirement that laws of a general nature shall be uniform in their operation.⁸³

Power to grant irrevocable license. In the absence of express legislative authority, a municipal

corporation cannot grant an irrevocable license.⁸⁴ Further, an attempt to grant to private individuals the right permanently to obstruct the highways for private purposes is invalid as a surrender of the powers of the municipal council to regulate the use to be made of the highways of the municipality.⁸⁵

Effect. Revocation of a license to appropriate part of a street to private use does not immediately make the licensee a wrongdoer, but the question arises as to the existence of a public nuisance.⁸⁶

c. Rights as against Use of Street by Others under Grant or Permit

Ordinarily an abutting owner may not object to a use of the street under municipal permission which does not unreasonably interfere with the safe and convenient use of the way or with the abutter's right of access.

Except in so far as an abutting owner may be entitled to compensation for a new use of the street, as discussed in Eminent Domain § 133, he may not object to a use of the street under permission of the municipality which does not unreasonably interfere with the safe and convenient use of the way⁸⁷ or with the abutter's right of ingress and egress.⁸⁸ Hence, ordinarily he cannot maintain an action for possession of any portion of the street or to eject any other person therefrom who occupies by lawful consent of the city,⁸⁹ nor has he a right to interfere with any structure rightfully on the street or other public way.⁹⁰ On the other hand, a municipality in the absence of express authorization cannot grant a right to use its streets in a manner inconsistent with the rights of abutting owners,⁹¹ and an abutting owner is entitled to redress against a serious interference with, or destruction of, his right of ingress and egress,⁹² or

74. Mass.—City of Boston v. A. W. Perry, Inc., 22 N.E.2d 627, 304 Mass. 18.

N.Y.—Green v. Miller, 162 N.E. 593, 249 N.Y. 88.

44 C.J. p 948 note 97.

Revocation of permits for particular encroachments or obstructions see *infra* § 1709.

75. Ill.—Dickerson v. Le Roy, 72 Ill. App. 588.

44 C.J. p 949 note 98.

76. Pa.—Reading v. Commonwealth, 11 Pa. 196, 51 Am.D. 540.

77. Ky.—City of Paducah v. Katterjohn, 30 S.W.2d 207, 235 Ky. 222. 44 C.J. p 949 note 1.

78. Ill.—Snyder v. Mt. Pulaski, 52 N. E. 62, 176 Ill. 397, 44 L.R.A. 407.

79. Md.—Baltimore v. Nirdlinger, 102 A. 1014, 131 Md. 600.

80. Burden is on licensee in such a case to show that a revocation was

arbitrary and inequitable or illegal.—Baltimore v. Nirdlinger, *supra*.

81. Md.—Baltimore v. Nirdlinger, *supra*.

82. Md.—Baltimore v. Nirdlinger, *supra*.

83. Iowa.—Mettler v. Ottumwa, 196 N.W. 1000, 197 Iowa 187.

84. N.Y.—Green v. Miller, 162 N.E. 593, 249 N.Y. 88. 44 C.J. p 949 note 7.

Town highway commissioners were without authority to bind municipality to any permanent encroachment on public streets.—Reimer v. Fullen, 19 N.Y.S.2d 847, 174 Misc. 54.

85. Colo.—Denver v. Girard, 42 P. 662, 21 Colo. 447.

86. Mich.—Everett v. Marquette, 19 N.W. 140, 53 Mich. 450.

87. Iowa.—Reynolds v. Union Sav.

Bank, 136 N.W. 529, 155 Iowa 519, 49 L.R.A.N.S., 194.

44 C.J. p 960 note 54.

88. Cal.—Brown v. Rea, 83 P. 713, 150 Cal. 171.

44 C.J. p 960 note 55.

89. S.D.—Dewey v. Chicago, etc., R. Co., 158 N.W. 408, 37 S.D. 390.

44 C.J. p 960 note 57.

90. Mich.—Edison Illum. Co. v. Misch, 166 N.W. 944, 200 Mich. 114.

44 C.J. p 960 note 58.

91. U.S.—Klaber v. Lakenan, C.C.A. Mo., 64 F.2d 86, 90 A.L.R. 783.

Ala.—Branyon v. Kirk, 191 So. 345, 238 Ala. 321.

Utah.—Brough v. Ute Stampede Ass'n, 142 P.2d 670, 105 Utah 446.

Wash.—Anderson v. Nichols, 278 P. 161, 152 Wash. 315.

44 C.J. p 960 note 59.

92. Ind.—Woodsmall v. Carr Tire Co., 185 N.E. 163, 98 Ind.App. 446.

44 C.J. p 961 note 60.

other special damage to his property rights.⁹³ An abutting owner has been held entitled to bring a proceeding to set aside an ordinance as ultra vires as authorizing a public nuisance when its maintenance will result in special injury to him.⁹⁴

§ 1709. Particular Uses, Encroachments, or Obstructions

- a. In general
- b. Areaways, cellarways, courtyards, and stairs therefrom
- c. Awnings and canopies
- d. Balconies and bay windows
- e. Excavations adjoining street line
- f. Pillars, cornices, and roofs
- g. Pipes
- h. Signs
- i. Steps rising from street or sidewalk
- j. Structures across street
- k. Vaults, cellars, and other substructures
- l. Temporary or occasional use of sidewalk or roadway

a. In General

The right of an abutting owner to continue or maintain various particular uses, encroachments, or obstructions of a street has been the subject matter of judicial decision.

The right of an abutting owner to continue or maintain various particular uses, encroachments, or obstructions of a street has been the subject matter of judicial decision.⁹⁵

93. Wash.—Anderson v. Nichols, 278 P. 161, 152 Wash. 315.
44 C.J. p 961 note 61.

94. N.J.—Union Towel Supply Co. v. Jersey City, 123 A. 254, 99 N.J.Law 52.
44 C.J. p 961 note 62.

95. Booths, stands, and displays

(1) Display stands on the sidewalk or street are illegal encumbrances and encroachments unless authorized by the legislature.—People v. Friedman, 16 N.Y.S.2d 925.

(2) Where required by a charter provision, an abutting owner or occupant must obtain a license in order to erect and maintain a sidewalk booth, stand, or display.—People, on Complaint of McLees v. Berner, 10 N.Y.S.3d 339, 170 Misc. 501.

(3) A statute declaring it unlawful for any person to place any merchandise or suffer, maintain, or permit such property to be placed at greater distance than a prescribed distance in front of his house, store,

or other building, has been held to permit display within prescribed distance by building owner only, not by others with owner's permission; and statute is not unconstitutional as discriminating against third persons in prohibiting their maintenance of display stands within such distance by owner's permission.—People v. Friedman, supra.

Curb service

An ordinance prohibiting the use of streets for curb service by persons or corporations engaged in business in a store or stand in the sale or soliciting of sales of goods is within municipal constitutional power reasonably to control the use of its streets, and is not discriminatory, because, under another ordinance, hawkers and peddlers are licensed to operate and to make use of streets, where such other ordinance provides that a licensee should not remain in any one place longer than necessary to make a sale.—People of City of Dearborn v. Dmytro, 273 N.W. 400, 280 Mich. 82, 111 A.L.R. 128.

Discharge of water into street. In the absence of municipal regulations to the contrary it has been held that a property owner who cuts his property down to grade, and erects a building thereon, has a right to protect his building from surface waters by leading such waters into a street or alley.⁹⁶ However, it has also been held that an abutting owner has no right to use the street as a conduit to carry surface waters from his property⁹⁷ and that he has no right to run waste water used to sprinkle or irrigate his lawn on or across the sidewalk in front of his premises.⁹⁸

Scales. It has been held that, in the absence of statutory authority, the municipality has no authority to grant to an abutting owner the right to erect and maintain private platform scales in a street.⁹⁹ On the other hand, it has also been held that the city has inherent power to permit such a use where the use does not materially interfere with the public use.¹

b. Areaways, Cellarways, Courtyards, and Stairs Therefrom

As a rule, an abutting owner has no absolute right to use the street for areaways, but a municipal corporation may be authorized to permit a reasonable use of the street for areaways, cellarways, courtyards, and like purposes.

As a rule, an abutting owner or occupant has no absolute right to use the street for areaways to afford either access² or light,³ although in some jurisdictions, in cases wherein the fee is in the abutter, he is held to have the right to maintain an areaway⁴ or basement or cellar entrance⁵ in the street

96. Mo.—Bowen v. Kansas City, 126 S.W. 790, 140 Mo.App. 695.

97. Pa.—Douglas v. Clarke, 13 Pa. Dist. & Co. 267, 20 Del.Co. 535

98. Ariz.—Cobb v. Salt River Valley Water Users' Ass'n, 114 P.2d 904, 57 Ariz. 451.

99. Ohio.—Minnich v. Lutz, 18 Ohio N.P.,N.S., 601.

1. Wis.—Warden v. Hart, 156 N.W. 466, 162 Wis. 495.
44 C.J. p 952 note 55.

2. Mo.—Corpus Juris cited in Slemers v. St. Louis Electric Terminal Ry. Co., 125 S.W.2d 865, 867, 343 Mo. 1201.
44 C.J. p 949 note 11.

3. Iowa.—Callahan v. Nevada, 153 N.W. 188, 170 Iowa 719, L.R.A. 1916B 927.

4. S.D.—Dell Rapids Mercantile Co. v. Dell Rapids, 75 N.W. 898, 11 S.D. 116, 74 Am.S.R. 783.

5. Mo.—Ward v. Kellogg, 148 S.W. 174, 164 Mo.App. 81.

and use it subject to the public easement. A municipal corporation may be authorized to permit reasonable use of the street for areaways, cellarways, courtyards, and like purposes.⁶ Although there is some authority to the contrary,⁷ a municipality under its general powers over streets is ordinarily held to be authorized to license or permit areaways and cellarways provided they do not necessarily interfere with the rights of the public,⁸ and such areaways and cellarways are not illegal as long as they are permitted by the municipal authorities.⁹ The effect of an ordinance permitting abutting owners to use a portion of the street for a courtyard is to permit such owners in accordance with a long-continued custom of the municipality to fence off the courtyard,¹⁰ and to build stoops or stairways to afford access to the houses.¹¹ A municipal corporation may not, however, authorize the maintenance of a fence around a courtyard where such fence constitutes a substantial foreseeable danger to pedestrians or children at play.¹²

Regulation and revocation of license. The use of a portion of a sidewalk by an abutting owner for areaways, courtyards, and cellarways where recognized is subject to reasonable regulation,¹³ and a license permitting such use may be revoked by the municipality at any time.¹⁴ An ordinance provid-

ing that permission to use a portion of the street for an areaway shall contain a reservation of the right to terminate the privilege is not violative of a constitutional provision requiring laws of a general nature to be uniform in their operation.¹⁵

c. Awnings and Canopies

In the absence of legislative or municipal authorization, no person can lawfully maintain an awning or canopy over a sidewalk, and a right granted by a municipal corporation to do so may be revoked at any time.

Apart from legislative or municipal authorization, no person may lawfully maintain an awning or a canopy over a sidewalk,¹⁶ and where an awning is erected without such authority it is a public nuisance whether or not it materially interferes with public travel.¹⁷ The legislature may, however, delegate to the municipal authorities the power to permit the erection of awnings or canopies,¹⁸ and it would seem that they may grant such permits under their general power to regulate and control the streets;¹⁹ but it has been held that such a grant is not justified where it will result in a public nuisance or injury to an adjoining owner²⁰ or where the awning is of a permanent character.²¹

On the other hand, the municipality may prohibit such encroachments on the street.²² Such a

Not prescriptive

The right of a property owner to maintain an entrance to a cellar in a sidewalk never becomes prescriptive.—*Citizens Sav. Bank of Baltimore v. Covington*, 199 A. 849, 174 Md. 638.

6. N.Y.—*Tymon v. M. L. S. Const. Co.*, 186 N.E. 429, 262 N.Y. 161. 44 C.J. p 949 note 17.

7. Kan.—*Smith v. Leavenworth*, 15 Kan. 81.

Permanent use

A municipality may not grant a license to use part of a street as an areaway, since such use, being permanent, is inconsistent with the due use of the street by the public.—*Smith v. McDowell*, 35 N.E. 141, 148 Ill. 51, 22 L.R.A. 393.

8. Iowa.—*Wendt v. Akron*, 142 N.W. 1024, 161 Iowa 338. 44 C.J. p 949 note 15.

Covered cellarway, impliedly consented to by municipality, was held not to constitute a nuisance.—*Opper v. Hellinger*, 101 N.Y.S. 616, 116 App. Div. 281.—*Donovan v. Gillies Coffee Co.*, 111 N.Y.S. 707.

9. N.Y.—*Grogan v. Rappaport*, 293 N.Y.S. 978, 162 Misc. 545.

10. N.Y.—*New York v. Masten*, 161 N.Y.S. 196, 174 App. Div. 661, affirmed 129 N.E. 1034, 223 N.Y. 628. 44 C.J. p 950 note 18.

11. N.Y.—*New York v. Masten*, supra. 44 C.J. p 950 note 19.

12. N.Y.—*Hayton v. McLaughlin*, 43 N.E.2d 813, 289 N.Y. 66.

13. Mo.—*Ward v. Kellogg*, 148 S.W. 174, 164 Mo.App. 81. 44 C.J. p 950 note 20.

14. N.Y.—*Tymon v. M. L. S. Const. Co.*, 186 N.E. 429, 262 N.Y. 161. 44 C.J. p 950 note 21.

15. Iowa.—*Mettler v. Ottumwa*, 196 N.W. 1000, 197 Iowa 187.

16. Cal.—*Corpus Juris* quoted in *Laura Vincent Co. v. City of Selma*, 111 P.2d 17, 20, 43 Cal.App.2d 473.

44 C.J. p 950 note 23.

"Awning" and "marquee" defined

Under ordinance defining an "awning" as an overhead covering over a sidewalk or street except a marquee, and defining a "marquee" as a covering which complies with the requirements for a marquee, overhead coverings of corrugated iron, supported by steel or iron brackets, which did not comply with requirements of a marquee, were awnings.—*Laura Vincent Co. v. City of Selma*, 111 P.2d 17, 43 Cal.App.2d 473.

17. Cal.—*Corpus Juris* quoted in *Laura Vincent Co. v. City of Sel-*

ma, 111 P.2d 17, 20, 43 Cal.App.2d 473.

44 C.J. p 950 note 24.

18. Cal.—*Corpus Juris* quoted in *Laura Vincent Co. v. City of Selma*, 111 P.2d 17, 20, 43 Cal.App.2d 473.

44 C.J. p 950 note 25.

19. Cal.—*Corpus Juris* quoted in *Laura Vincent Co. v. City of Selma*, 111 P.2d 17, 20, 43 Cal.App.2d 473.

44 C.J. p 950 note 26.

20. Cal.—*Corpus Juris* quoted in *Laura Vincent Co. v. City of Selma*, 111 P.2d 17, 20, 43 Cal.App.2d 473.

N.Y.—*Brown-Brand Realty Co. v. Saks*, 214 N.Y.S. 230, 126 Misc. 336, affirmed 218 N.Y.S. 706, 218 App. Div. 827.

21. Ill.—*People ex rel. Davidson v. City of Danville*, 242 Ill.App. 472. 44 C.J. p 950 note 28.

Marquees

However, an ordinance permitting the erection and maintenance of marquees, provided that they meet certain requirements, has been given effect without discussion of the power of the municipality to permit a permanent encroachment.—*Laura Vincent Co. v. City of Selma*, 111 P.2d 17, 43 Cal.App.2d 473.

22. Cal.—*Corpus Juris* quoted in

prohibition is not necessarily invalid, as being special in character, because it is limited in its operation to a portion of the city only.²³

Regulation and revocation. A license to maintain such a structure as an awning over a sidewalk legalizes a form of obstruction which otherwise would constitute a nuisance,²⁴ and the right is subject to reasonable regulation by the municipality,²⁵ and the license affords no protection unless its terms are observed.²⁶ Where the legislature in delegating to the municipality the power to grant such privileges,²⁷ or the municipality, by ordinance, designates a particular board from which the permit shall be obtained,²⁸ the right can be granted only by such board or person. The authority of such board or person depends on the terms of the grant,²⁹ and it has been held that such board may be given power to include æsthetic considerations in its regulations.³⁰ A right granted by the municipality to maintain an awning or canopy over the sidewalk may be revoked by the municipality at any time,³¹ and, in the absence of express legislative authority, a municipality cannot grant an irrevocable license.³²

d. Balconies and Bay Windows

Balconies or bay windows projecting over the sidewalk have been held to be unlawful, but it has also been held that the power to license such structures may be delegated by the legislature to the municipal corporation.

In some jurisdictions it has been held that the maintenance of balconies or bay windows projecting over the sidewalk is a lawful use of the street by the abutting owner when not prohibited by statute or ordinance.³³ In other jurisdictions it has been held that such use amounts to an unlawful encroachment³⁴ and a public nuisance.³⁵ Further, at least in the absence of permissive statute, it has been held that a municipality cannot authorize such encroachment.³⁶ It has been held, however, that the power to license such structures may be delegated by the legislature to the municipality,³⁷ and in some cases a municipality may authorize such encroachments under its general powers.³⁸

Prohibition. Under a direct legislative authority to make rules and regulations in respect of projections from buildings, a municipality may prohibit the erection and maintenance of bay windows not-

Laura Vincent Co. v. City of Selma, 111 P.2d 17, 20, 43 Cal.App.2d 473.

Pa.—Lenon v. Porter, 65 Pa.Super 94.

44 C.J. p 950 note 29, p 1010 note 36

23. Cal.—Corpus Juris quoted in Laura Vincent Co. v. City of Selma, 111 P.2d 17, 20, 43 Cal.App.2d 473.

N.J.—Ivins v. Trenton, 53 A. 202, 68 N.J.Law 501, affirmed 55 A. 1132, 69 N.J.Law 451.

Pa.—Lenon v. Porter, 65 Pa.Super. 94.

24. Mass.—Dalton v. Great Atlantic, etc., Tea Co., 135 N.E. 318, 241 Mass. 400.

25. Pa.—Walnut & Quince Streets Corporation v. Mills, 154 A. 29, 303 Pa. 25, appeal dismissed 52 S.Ct. 16, 284 U.S. 573, 76 L.Ed. 498—Lenon v. Porter, 65 Pa.Super. 94. 44 C.J. p 950 note 32.

Ordinance void for uncertainty

An ordinance prohibiting the erection or use of any awning, except it be upon a suitable frame and meet certain other requirements, is void for uncertainty, because the word "suitable" has no definite meaning in the connection in which it is used—State v. Clarke, 37 A. 975, 69 Conn. 371, 61 Am.S.R. 45, 89 L.R.A. 670.

Slope of marquee

A requirement in ordinance that horizontal surface of marquee should not vary from horizontal plane more than one foot, was unreasonable and was not enforceable against existing structures—Laura Vincent Co. v.

City of Selma, 111 P.2d 17, 43 Cal App 2d 473.

Height of marquee

A requirement in ordinance that no part of support for marquee in business district should be less than eight feet from sidewalk bore a reasonable relation to public use of highway and prevention of obstruction, and was not discriminatory, since a reasonable difference in classification may be made, in regulating awnings and marquees, between coverings over sidewalk which are movable and designed and intended to be frequently moved, and coverings which are permanent and immovable.—Laura Vincent Co. v. City of Selma, supra.

26. Mass.—Dalton v. Great Atlantic, etc., Tea Co., 135 N.E. 318, 241 Mass. 400.

27. Md.—Preston v. Likes, 62 A. 1024, 103 Md. 191. 44 C.J. p 951 note 34.

28. Neb.—World Realty Co. v. Omaha, 203 N.W. 574, 113 Neb. 396, 40 A.L.R. 1313. 44 C.J. p 951 note 35.

29. Ill.—People ex rel. Davidson v. City of Danville, 242 Ill.App. 472.

30. Pa.—Walnut & Quince Streets Corporation v. Mills, 154 A. 29, 303 Pa. 25, appeal dismissed 52 S.Ct. 16, 284 U.S. 573, 76 L.Ed. 498.

Refusal not unreasonable

Refusal of municipal art jury to allow theater to construct permanent illuminated canopy overhanging sidewalk was held not discrim-

inatory or unreasonable.—Walnut & Quince Streets Corporation v. Mills, supra.

31. Ill.—Hibbard v. Chicago, 50 N. E. 256, 173 Ill. 91, 40 L.R.A. 621.

44 C.J. p 951 note 36

32. Ga.—Augusta v. Burum, 19 S.E. 820, 93 Ga. 68, 26 L.R.A. 340.

33. Me.—Farnsworth v. Rockland, 22 A. 394, 83 Me. 508.

44 C.J. p 951 note 38.

34. Pa.—Reimer's Appeal, 100 Pa. 182, 45 Am.R. 373.

44 C.J. p 951 note 39.

35. Pa.—Reimer's Appeal, 100 Pa. 182, 45 Am.R. 373.

44 C.J. p 951 note 40.

36. Ill.—People v. Harris, 67 N.E. 785, 203 Ill. 272.

37. N.Y.—Green v. Miller, 162 N.E. 593, 249 N.Y. 88.

44 C.J. p 951 note 41.

38. N.Y.—Green v. Miller, supra. 44 C.J. p 951 note 42.

General ordinance

(1) Municipalities have the power to permit, under regulations that are reasonable in character, and general in application, the use of the street for such purpose.—Livingston v. Wolf, 20 A. 551, 136 Pa. 519, 20 Am. S.R. 986.

(2) Such use cannot be justified by an individual permit not regulated by rules of general and uniform application.—Reimer's Appeal, 100 Pa. 182, 45 Am.R. 373.

withstanding an earlier general statute impliedly permits such encroachments to a limited extent.³⁹ It has been held, however, that a statute imposing a penalty for maintaining such encroachments is intended for the benefit of the public only, and confers no distinct rights on individual property owners.⁴⁰

Revocation. The right granted by the municipality to maintain such encroachments may be revoked at the pleasure of the municipality.⁴¹

e. Excavations Adjoining Street Line

An abutting owner may excavate on his own land provided he does not disturb the lateral support of the street.

An abutting owner may excavate on his own land⁴² provided he does not disturb the lateral support of the street;⁴³ but not otherwise.⁴⁴

f. Pillars, Cornices, and Roofs

An encroachment on the street by a roof, cornice, or pillars forming part of a building has been held to be unlawful, but the legislature may delegate power to the municipal corporation to authorize such projections.

An encroachment on the street by a roof,⁴⁵ cornice,⁴⁶ or pillars⁴⁷ forming part of a building has been held to be unlawful. The legislature may delegate the power to the municipal corporation to au-

thorize such projections,⁴⁸ but in the absence of statutory authority it has been held that a municipality cannot authorize such an encroachment.⁴⁹

g. Pipes

The owner of the fee in the street subject to the public easement has the right to lay a service pipe below the surface for the conveyance of water, gas, and other purposes subject to the use of the street by the public, and has the right to make such excavations as are necessary for the enjoyment of his rights, subject to the right of the municipal corporation to regulate the work.

The owner of the fee in the street subject to the public easement has the right to lay a service pipe below the surface for the conveyance of water, gas, and other purposes, subject to the use of the street by the public,⁵⁰ and has the right to make such excavations as will enable him to install the material or do the work requisite for the enjoyment of his rights in the land,⁵¹ subject to the right of the municipality to regulate the work⁵² and to impose such restrictions as will cause the least interruption of the public easement.⁵³ Such a right, however, cannot be used as a subterfuge for the private benefit of one other than the abutting owner.⁵⁴ Without consideration of the ownership of the fee, it has been held that at most the abutting owner can acquire merely a revocable license to occupy the soil under the street for these purposes.⁵⁵

39. Mass.—Commonwealth v. Goodnow, 117 Mass. 114.

40. Mass.—Jenks v. Williams, 115 Mass. 217.
44 C.J. p 951 note 44.

41. N.Y.—Acme Realty Co. v. Schinasi, 109 N.E. 577, 215 N.Y. 495, L.R.A.1916A 1176.
44 C.J. p 952 note 45.

42. Mo.—Buesching v. St. Louis Gaslight Co., 73 Mo. 219, 39 Am. R. 503.

Excavation adjoining highway as nuisance see the C.J.S. title Nuisances, also 46 C.J. p 703 notes 79, 80.

Liability of abutter to person injured from excavation:

In street see supra § 864.

On premises adjoining street see the C.J.S. title Negligence § 78, also 45 C.J. p 860 note 81—p 861 note 91.

Safety of persons using sidewalk

It is the duty of an abutting owner excavating on his land so to guard the entrance as to render it secure to persons using the sidewalk.—Buesching v. St. Louis Gaslight Co., supra.

43. Wash.—Rainier Heat, etc., Co. v. Seattle, 193 P. 233, 113 Wash. 95.

44. N.Y.—Sherover Const. Corpora-

tion v. City of New York, 295 N.Y. S. 925, 162 Misc. 893.

44 C.J. p 952 note 48.
Duty to safeguard subway

Abutter constructing building on property owed duty to safeguard existing subway as structure lawfully existing within bed of public street, as against contention that city was liable for cost of constructing foundation deeper than would have been necessary had there been no subway in the street.—Sherover Const. Corporation v. City of New York, supra.

45. N.H.—Garland v. Towne, 55 N. H. 55, 20 Am.R. 164.

44 C.J. p 952 note 49.

Eaves and rafters at height of five to six feet above ground, were held to constitute obstruction in nature of public nuisance.—Curtis v. Kastner, 30 P.2d 26, 220 Cal. 185.

46. Ind.—Grove v. Ft. Wayne, 45 Ind. 429, 15 Am.R. 262.

47. Neb.—Bischof v. Merchants Nat. Bank, 106 N.W. 996, 75 Neb. 838, 5 L.R.A.N.S., 486.

44 C.J. p 952 note 51.

48. N.Y.—Sautter v. Utica City Nat. Bank, 90 N.Y.S. 838, 45 Misc. 15, affirmed 104 N.Y.S. 1139, 119 App. Div. 898, affirmed 87 N.E. 1126, 193 N.Y. 661.

49. Ala.—Montgomery First Nat. Bank v. Tyson, 32 So. 144, 133 Ala. 459, 91 Am.S.R. 46, 59 L.R.A. 399.
44 C.J. p 952 note 53.

50. Ky.—Goodloe v. City of Richmond, 63 S.W.2d 785, 250 Ky. 608.
Mo.—Corpus Juris cited in Central Surety & Insurance Corporation v. Hinton, 130 S.W.2d 235, 240, 233 Mo.App. 1218.

Wash.—Lanham v. Forney, 81 P.2d 777, 196 Wash. 62.
44 C.J. p 954 note 79.

Right of access to mains see supra § 1703.

51. Cal.—Colegrove Water Co. v. Hollywood, 90 P. 1053, 151 Cal. 425, 13 L.R.A.N.S., 904.

Ky.—Goodloe v. City of Richmond, 63 S.W.2d 785, 250 Ky. 608.

52. Mo.—Central Surety & Insurance Corporation v. Hinton, 130 S. W.2d 235, 233 Mo.App. 1218.

53. Cal.—Colegrove Water Co. v. Hollywood, 90 P. 1053, 151 Cal. 425, 13 L.R.A.N.S., 904.

Ky.—Goodloe v. City of Richmond, 63 S.W.2d 785, 250 Ky. 608.

54. Pa.—Sweeney v. Wilkes-Barre, 62 Pa.Super. 54.

55. Ohio.—Elster v. Springfield, 30 N.E. 274, 49 Ohio St. 82.

44 C.J. p 954 note 83.

h. Signs

According to some authorities, but not others, the maintenance of projecting signs above a street is a lawful use of the street, but such use is subject to reasonable regulation.

While it has been held that an abutting owner has no right to erect a billboard or sign over or on the street,⁵⁶ other authorities have held that the maintenance of projecting signs above a street is a lawful use of the street,⁵⁷ although under some circumstances they may be considered a public nuisance and a menace to public safety.⁵⁸ While such use by an abutting owner is subject to reasonable regulation in the interest of the public,⁵⁹ such as regulations as to the height of the sign,⁶⁰ it has been held that such use cannot be interfered with unless it amounts to an actual obstruction or endangers the safety of the public.⁶¹ Where a sign has been properly constructed under the authority of an ordinance and does not in any way interfere with the traffic on the street or with the personal or property rights of any person, it has been held that the municipality may not at its will and for no good reason, by an ordinance changing the general regulations in minor particulars, require its removal.⁶² On the other hand, a sign constituting an unlawful obstruction and a nuisance is not justified on the ground of the convenience of the public seeking a shop of the kind designated by

the sign, or that it is a custom of the neighborhood to create such obstructions, or that there are other similar signs on the same street or sidewalk or elsewhere on the public streets of the city.⁶³

i. Steps Rising from Street or Sidewalk

An abutting owner has no right to obstruct the sidewalk by steps rising from it, although when such structures are not prohibited, are commonly suffered to exist, and are not unreasonable, they, while not in the street as a matter of right, are not necessarily unlawful, and the legislature may authorize the maintenance of steps projecting into the street.

An abutting owner has no right to obstruct the sidewalk by steps rising from it,⁶⁴ although when such structures are not prohibited, are commonly suffered to exist, and are not unreasonable, they, while not in the street as a matter of right, are not necessarily unlawful.⁶⁵ The legislature may directly authorize the maintenance of steps projecting into the street,⁶⁶ but it has generally been held that, in the absence of statutory authority, a municipal corporation may not authorize such encroachments on the sidewalk,⁶⁷ although such authority has been found by some decisions in the power of general control or regulation of the streets.⁶⁸

Such use, unless directly authorized by the legislature,⁶⁹ may be prohibited by the municipality.⁷⁰

Regulation and revocation of license. The main-

56. N.Y.—Sullivan Adv. Co. v. New York, 113 N.Y.S. 893, 61 Misc. 425.

57. Ohio.—Reese v. Cleveland, 5 Ohio N.P.N.S., 193.
44 C.J. p 952 note 57.

58. Mich.—1426 Woodward Ave. Corp. v. Wolff, 20 N.W.2d 217, 312 Mich. 352—Hass v. Booth, 148 N.W. 337, 182 Mich. 173.

59. Ohio.—Reese v. Cleveland, 5 Ohio N.P.N.S., 193.
Tex.—City of San Angelo v. Sitas, 183 S.W.2d 417, 143 Tex. 154.

Ordinance held valid
Minn.—State v. Wong Hing, 223 N.W. 639, 176 Minn. 151.

60. Minn.—State v. Wong Hing, supra.
Tex.—City of San Angelo v. Sitas, 183 S.W.2d 417, 143 Tex. 154.

Purpose of such regulation is to allow free and unobstructed passage under such obstructions as business houses place over sidewalks.—Shields v. Chevrolet Truck, 12 S.E.2d 19, 195 S.C. 437.

Ordinance applicable to marquee-sign
Ordinance requiring sign projecting over sidewalk to be not less than certain distance above curb level applied to a combination marquee and sign.—Shields v. Chevrolet Truck, supra.

Municipal electrical inspector's approval of construction of sign erected in violation of ordinance prescribing minimum height did not make the construction lawful.—Shields v. Chevrolet Truck, supra.

61. N.C.—State v. Higgs, 35 S.E. 473, 126 N.C. 1014, 48 L.R.A. 446.
44 C.J. p 952 note 59.

62. Or.—Portland v. Yates, 199 P. 184, 203 P. 319, 102 Or. 513.

63. Tex.—Sitas v. City of San Angelo, Civ.App., 177 S.W.2d 85, affirmed 183 S.W.2d 417, 143 Tex. 154.

64. Ala.—Hausman v. Brown, 77 So. 993, 201 Ala. 331.
44 C.J. p 952 note 61.

Purpresture and nuisance

Residence doorsteps, which protruded over sidewalk for nearly one half its width, constituted not only a purpresture but also a nuisance.—Miller v. Town of Seaford, 194 A. 37, 22 Del.Ch. 159.

65. Ky.—Pickrell v. Carlisle, 121 S.W. 1029, 135 Ky. 126, 24 L.R.A.N.S., 193.

44 C.J. p 952 note 62.

Taxpayer held not entitled to compel municipal authorities to direct

owner to remove stoop.—Green v. Miller, 162 N.E. 593, 249 N.Y. 88.

Carriage blocks may be maintained in street by owner of abutting premises, if resulting obstruction to public travel is not unreasonable, considering benefits to such owner and public's rights in use of street, and obstruction so maintained does not render highway defective.—City of New Haven v. First Nat. Bank & Trust Co., 57 A.2d 494, 134 Conn. 322—Tiesler v. Norwich, 47 A. 161, 73 Conn. 199.

66. Mass.—Cushing v. Boston, 128 Mass. 330, 35 Am.R. 383.
44 C.J. p 952 note 63.

67. Ala.—Montgomery First Nat. Bank v. Tyson, 32 So. 144, 133 Ala. 459, 91 Am.S.R. 46, 59 L.R.A. 399.
44 C.J. p 953 note 64.

68. La.—Cross v. Baton Rouge, 109 So. 742, 161 La. 921.
Pa.—Livingston v. Wolf, 20 A. 551, 136 Pa. 519, 20 Am.S.R. 936.

69. Mass.—Cushing v. Boston, 128 Mass. 330, 35 Am.R. 383.
44 C.J. p 953 note 66.

70. Ky.—Pickrell v. Carlisle, 121 S.W. 1029, 135 Ky. 126, 24 L.R.A.N.S., 193.

tenance of steps encroaching on the sidewalk is subject to regulation by the municipality,⁷¹ and a license by the municipality for such use, without legislative authority, may be revoked at the pleasure of the municipality.⁷²

Prescription. It has been held that the right to maintain such encroachments may be acquired by prescription.⁷³

j. Structures across Street

An abutting owner has no right to construct an unauthorized overhead structure across a street, but the legislature may delegate to a municipal corporation the power to authorize such structures, provided the property rights of others are not invaded and the public use of the street is not unreasonably obstructed.

An abutting landowner has no right to construct an unauthorized overhead structure across a street, whether or not it interferes with traffic.⁷⁴ The legislature may delegate to a municipal corporation the power to authorize such structures,⁷⁵ provided the property rights of others are not invaded and the public use of the street is not unreasonably obstructed.⁷⁶ In some jurisdictions it has been held that, without express legislative power, a municipality has no authority to grant permits to abutting owners to erect a structure bridging the public streets,⁷⁷ although in other jurisdictions it has been held that, even without such authority, the municipality may permit such structures, subject to its option to revoke the permit if they interfere with the public use of the street.⁷⁸ When empowered to authorize such structures, the municipality may make their erection and maintenance conditional on the

securing of a permit.⁷⁹ The right of an upland owner to build a dock over a street, the fee of which is in himself, out to navigable water, does not involve the right to appropriate the street or to make an unreasonable use thereof.⁸⁰

k. Vaults, Cellars, and Other Substructures

- (1) In general
- (2) Regulation
- (3) Nature and extent

(1) In General

A municipal corporation may authorize the maintenance of vaults, cellars, and similar substructures under the surface of the street, and, where the fee of the street is in the municipality, the abutting owner may maintain such substructures only with municipal permission, and, according to some authorities there must be municipal permission for such use even where the fee of the street is in the abutting owner.

There is a distinction between the right to permit the use of the subsoil of a street by an abutting owner and the right to permit a permanent encroachment on the street.⁸¹ A municipal corporation may authorize the maintenance of vaults, cellars, and similar substructures under the surface of the street.⁸² Where the fee of the street is in the municipality, the abutting owner can make use of the space thereunder for the purpose of maintaining vaults, basements, and cellars only with municipal permission.⁸³ Where the fee of the street is in the abutting owner, in some jurisdictions it has been held that he may use such space without municipal permission, so long as he does not interfere with the dominant easement of the public;⁸⁴

71. Ky.—Pickrell v. Carlisle, *supra*.

72. Va.—Norfolk City v. Chamberlaine, 29 Gratt. 534, 70 Va. 534.

73. Ky.—Pickrell v. Carlisle, 121 S. W. 1029, 135 Ky. 126, 24 L.R.A., N.S., 193.

44 C.J. p 953 note 70.

74. U.S.—Finlay v. Union Pac. R. Co., D.C.Kan., 6 F.R.D. 284.

44 C.J. p 953 note 71—51 C.J. p 104 note 93 [a].

Bridge

Construction of bridge across street, impairing right to air, light, and view of abutting owners, was enjoined—Anthony Carlin Co. v. Halle Bros. Co., 155 N.E. 398, 23 Ohio App. 115.

Driveway connecting with viaduct

Where no resolution or ordinance was passed, or action taken by governing body of city permitting abutting property owner to erect, construct, or maintain any driveway connecting his building with viaduct in street, driveway from building to viaduct constituted a purpresture

entitling city to require its removal.—Finlay v. Union Pac. R. Co., D.C. Ky., 6 F.R.D. 284.

75. N.C.—Clayton v. Liggett & Myers Tobacco Co., 35 S.E.2d 691, 225 N.C. 563.

44 C.J. p 953 note 72.

76. N.C.—Clayton v. Liggett & Myers Tobacco Co., *supra*.

77. Ill.—People v. Corn Products Refining Co., 121 N.E. 574, 286 Ill. 226.

44 C.J. p 953 note 73.

78. Ky.—Leitchfield Mercantile Co. v. Commonwealth, 136 S.W. 639, 143 Ky. 162.

44 C.J. p 953 note 74.

79. Conn.—Andrew B. Hendryx Co. v. New Haven, 134 A. 77, 104 Conn. 632.

44 C.J. p 953 note 75.

80. N.Y.—Buffalo v. Delaware, etc., R. Co., 82 N.E. 513, 190 N.Y. 84, 16 L.R.A., N.S., 506.

44 C.J. p 954 note 76.

81. N.Y.—New York v. Rice, 91 N.E.

283, 198 N.Y. 124, 28 L.R.A., N.S., 375.

Excavation under sidewalk held not nuisance per se

Mass.—Boston v. Gray, 10 N.E. 509, 144 Mass. 53.

Ohio.—Iroquois Hotel Co. v. Columbus, 5 Ohio N.P., N.S., 357.

A coalhole in a sidewalk, properly constructed and covered, is not a nuisance per se, but a lawful use of the street.—Stoetzel v. Swearingen, 90 Mo.App. 588—Gordon v. Peltzer, 56 Mo.App. 599.

82. N.Y.—Tymon v. M. L. S. Const. Co., 186 N.E. 429, 262 N.Y. 161.

44 C.J. p 954 note 85.

83. Ind.—Swaim v. City of Indianapolis, 171 N.E. 871, 202 Ind. 233, rehearing denied 173 N.E. 287, 202 Ind. 233.

44 C.J. p 954 note 87.

84. Ill.—City of Dixon v. Sinow & Weinman, 183 N.E. 570, 350 Ill. 634—Davis v. City of Chicago, 164 N.E. 673, 323 Ill. 422.

Wash.—Corpus Juris cited in Lan-

but according to other authority even then there must be municipal permission for such use.⁸⁵ A permit may be arbitrarily refused by the municipality when it is the owner of the fee in the street,⁸⁶ but not where the fee is in the landowner.⁸⁷ However, where permission is required, it need not be express, but may be implied,⁸⁸ and the lapse of time may raise a presumption of a license,⁸⁹ which may be rebutted by proof.⁹⁰ Where permission to construct a vault under a sidewalk has been granted on express conditions and stipulations to be kept and performed by the grantee, it has been held that the grant constitutes a contract between the parties,⁹¹ and is in itself a species of property which the owner may protect against trespassers.⁹²

Covered openings in sidewalk. The right of abutting owners to have openings in sidewalks, with proper covering such as trap doors, is often conferred by legislative authority,⁹³ but, in the absence of such enactment, it has been held that such right is not an incident of ownership of the abutting premises,⁹⁴ although it has been declared that the right may be recognized by long-established usage and custom.⁹⁵

(2) Regulation

The construction and maintenance by abutters of vaults and other structures under the streets are subject to reasonable regulations.

The construction and maintenance by abutters of vaults and other structures under the streets are subject to reasonable regulations⁹⁶ which must be reasonably construed and applied in accordance with the purpose and intent of the body promulgating them.⁹⁷ Thus, when the fee of a street is in the municipality, it may exact a fee for the privilege,⁹⁸ irrespective of the length of time the vaults have been in existence.⁹⁹ However, if a proper permit has been granted for the construction of vaults in the first place, the owner has the right to continue new vaults in such spaces without an additional permit or payment therefor, provided the continuance does not interfere with the use of the street.¹ Payment cannot be required where the fee is in the abutting owners.²

Bond. The municipality may require a bond to save it harmless.³ However, an ordinance requiring such a bond where such space is used without a

ham v. Forney, 81 P.2d 777, 779, 196 Wash. 62.

44 C.J. p. 954 note 86.

Use permitted without reference to municipal permission. Cal.—Runyon v. Los Angeles, 180 P. 837, 40 Cal. App. 383.

85. Utah—Salt Lake City v. Schubach, United Pac. Ins. Co., Intervener, 159 P.2d 149, 108 Utah 266, 160 A.L.R. 809.

44 C.J. p. 954 note 88.

86. N.Y.—Appleton v. New York, 148 N.Y.S. 870, 163 App. Div. 680, affirmed 114 N.E. 73, 219 N.Y. 150, 7 A.L.R. 629.

87. Fla.—Kress v. Miami, 82 So. 775, 78 Fla. 101, 7 A.L.R. 640.

88. Ind.—Swaim v. City of Indianapolis, 171 N.E. 871, 202 Ind. 233, rehearing denied 173 N.E. 287, 202 Ind. 233.

Utah—Salt Lake City v. Schubach, United Pac. Ins. Co., Intervener, 159 P.2d 149, 108 Utah 266, 160 A.L.R. 809.

44 C.J. p. 954 note 91.

89. Ill.—Gridley v. Bloomington, 43 Ill. 47.

Ind.—Swaim v. City of Indianapolis, 171 N.E. 871, 202 Ind. 233, rehearing denied 173 N.E. 287, 202 Ind. 233.

N.Y.—Tymon v. M. L. S. Const. Co., 186 N.E. 429, 262 N.Y. 161—Jennings v. Van Schalk, 15 N.E. 424, 108 N.Y. 530, 2 Am.S.R. 459.

Utah—Salt Lake City v. Schubach, United Pac. Ins. Co., Intervener,

159 P.2d 149, 108 Utah 266, 160 A.L.R. 809.

44 C.J. p. 954 note 92.

Grant of a permanent right is not presumed.

N.Y.—Deshong v. New York, 68 N.E. 880, 176 N.Y. 475.

Utah—Salt Lake City v. Schubach, United Pac. Ins. Co., Intervener, 159 P.2d 149, 108 Utah 266, 160 A.L.R. 809.

90. N.Y.—Deshong v. New York, 68 N.E. 880, 176 N.Y. 475.

44 C.J. p. 955 note 93.

91. Ill.—Gregsten v. Chicago, 34 N.E. 426, 145 Ill. 451, 36 Am.S.R. 496, 14 C.J. p. 955 note 94.

92. Utah—Salt Lake City v. Schubach, United Pac. Ins. Co., Intervener, 159 P.2d 149, 108 Utah 266, 160 A.L.R. 809.

93. Ky.—Cecil v. Oertel Co., 40 S.W.2d 328, 239 Ky. 825.

94. Utah—Salt Lake City v. Schubach, United Pac. Ins. Co., Intervener, 159 P.2d 149, 108 Utah 266, 160 A.L.R. 809.

Liability of abutters and others for injuries caused by openings in sidewalk see supra § 863.

95. Ky.—Cecil v. Oertel Co., 40 S.W.2d 328, 239 Ky. 825.

96. Utah—Salt Lake City v. Schubach, United Pac. Ins. Co., Intervener, 159 P.2d 149, 108 Utah 266, 160 A.L.R. 809.

44 C.J. p. 955 note 95.

Vault survey by city surveyor. Ordinance requiring applicant for

vault construction permit to present vault survey made by certified city surveyor was not unreasonable or invalid as conflicting with state statute providing for licensing of land surveyors by state.—Oltarsh v. Levy, 274 N.Y.S. 650, 152 Misc. 671, affirmed 271 N.Y.S. 1077, 242 App. Div. 617, affirmed People ex rel. Oltarsh v. Levy, 195 N.E. 182, 266 N.Y. 523.

97. Cal.—Clarke v. Foster's, Inc., 125 P.2d 60, 51 Cal. App.2d 411. N.Y.—People v. Resnick, 21 N.Y.S. 2d 183.

Sidewalk cellar doors

Statute providing that cellar doors in public sidewalk should not be permitted to remain open except when in actual use was designed not only to protect pedestrians against unguarded cellar openings in public sidewalks, but was intended as well to eliminate any unnecessary obstruction of public thoroughfare.—Friedlander v. Eagle Dry Goods Corporation, 48 N.Y.S.2d 208, 267 App. Div. 701.

98. Ill.—Williams v. Chicago, 93 N.E. 165, 247 Ill. 240.

44 C.J. p. 955 note 96.

99. N.Y.—Mahoney v. New York, 130 N.Y.S. 602, 145 App. Div. 884.

1. N.Y.—Deshong v. New York, 68 N.E. 880, 176 N.Y. 475.

44 C.J. p. 955 note 98.

2. Pa.—Arronson v. City of Philadelphia, 16 Pa. Dist. & Co. 427.

44 C.J. p. 955 note 99.

3. Ill.—Tacoma Safety Deposit Co. v. Chicago, 93 N.E. 153, 247 Ill.

permit is not applicable where the abutter owns the fee of the street and no permit is required.⁴

(3) Nature and Extent

Uses of the subsoil of a street must give way to legitimate public uses when asserted, and a license or permit or permissive use conferring such a right may be revoked at any time when the public interest demands it.

Uses of the character under consideration must give way to the legitimate public uses when asserted,⁵ and cannot become a matter of right by long-continued enjoyment,⁶ or a municipal permit.⁷ A license or permit or permissive use conferring a right to use the subsoil of a street may be revoked at any time when the public interest demands it.⁸ However, where an abutting owner, with permission of the city, constructs, at substantial expense, a substructure under the sidewalk or street, the city may not thereafter arbitrarily, capriciously, or unjustly deprive him of such use by the exercise of

its dominant easement or by the revocation of the permit or license.⁹

L. Temporary or Occasional Use of Sidewalk or Roadway

Owners of land abutting on a street have the right to encroach on the primary rights of the public therein to a limited extent and for a temporary purpose.

Owners of land abutting on a street have the right to encroach on the primary rights of the public therein to a limited extent and for a temporary purpose,¹⁰ but such an encroachment must be reasonably necessary and it must not unreasonably interfere with the rights of the public, to which it is subservient.¹¹

Business and household exigencies. An abutter has a limited right to obstruct the roadway and sidewalks in a municipality by reason of his business or household exigencies,¹² as, for example, by teams and vehicles permitted to stand in front of his prop-

192, 31 L.R.A., N.S., 868, 20 Ann.Cas. 564.

4. Ill.—Sears v. Chicago, 93 N.E. 158, 247 Ill. 204, 139 Am.S.R. 319, 20 Ann.Cas. 539.
44 C.J. p 955 note 2.

5. Cal.—Hayes v. Handley, 187 P. 952, 182 Cal. 273—Fallon v. City and County of San Francisco, 112 P.2d 718, 44 Cal.App.2d 404.

Ill.—City of Dixon v. Sinow & Weinman, 183 N.E. 570, 350 Ill. 634.

Ind.—Swaim v. City of Indianapolis, 171 N.E. 871, 202 Ind. 233, rehearing denied 173 N.E. 287, 202 Ind. 233.

Minn.—Ober v. City of Minneapolis, 229 N.W. 794, 179 Minn. 495.

44 C.J. p 955 note 3.

Owner lawfully entering on use of space under sidewalk may continue use so long as he does not obstruct or endanger public use.—Swaim v. City of Indianapolis, 171 N.E. 871, 202 Ind. 233, rehearing denied 173 N.E. 287, 202 Ind. 233.

Owners must bear expense of conforming their servient use of street by maintenance of structure thereunder to dominant use of city.—Swaim v. City of Indianapolis, 173 N.E. 287, 202 Ind. 233.

6. N.Y.—Deshong v. New York, 77 N.Y.S. 563, 74 App.Div. 234, affirmed 68 N.E. 880, 176 N.Y. 475.
44 C.J. p 955 note 4.

7. **Right of use is mere license where ordinances provide for granting of permit.**—Siemers v. St. Louis Electric Terminal Ry. Co., 125 S.W.2d 865, 343 Mo. 1201.

8. Ind.—Swaim v. City of Indianapolis, 171 N.E. 871, 202 Ind. 233, rehearing denied 173 N.E. 287, 202 Ind. 233.

Mass.—City of Boston v. A. W. Perry, Inc., 22 N.E.2d 627, 304 Mass. 18.

N.Y.—Rosenthal v. West, 78 N.Y.S.2d 398, reversed on other grounds 84 N.Y.S.2d 452, 274 App.Div. 442, appeal granted and reargument denied 85 N.Y.S.2d 906, 274 App.Div. 1033.

44 C.J. p 956 note 5.

The construction of a subway for rapid transit under a city street is a public use for which the city can revoke a permit granted to abutting owners to construct vaults under the street.—In re Low, 135 N.E. 521, 233 N.Y. 334, reargument denied 135 N.E. 970, 233 N.Y. 684.

Privilege of maintaining coalholes in sidewalk is by public grace.—Mitchell v. Thomas, 8 P.2d 639, 91 Mont. 370.

9. Ill.—Gregsten v. City of Chicago, 84 N.E. 426, 145 Ill. 451, 36 Am.S.R. 496.

Ind.—Swaim v. City of Indianapolis, 171 N.E. 871, 202 Ind. 233, rehearing denied 173 N.E. 287, 202 Ind. 233.

Neb.—Tierman v. Thorp, 180 N.W. 280, 88 Neb. 662, 32 L.R.A., N.S., 1034.

10. Idaho.—Rief v. Mountain States Telephone & Telegraph Co., 120 P.2d 823, 63 Idaho 418.

Mo.—McWhorter v. Dahl, Chevrolet Co., 88 S.W.2d 240, 229 Mo.App. 1090.

Pa.—Breinig v. Allegheny County, 2 A.2d 842, 332 Pa. 474.

Tenn.—Rose v. Abeel Bros., 4 Tenn. App. 431.

44 C.J. p 956 note 6.

Gate or door opening outward

(1) It has been held that a gate

or door opening outward on a sidewalk used by the abutting landowner is not a nuisance per se, but may become such by negligent interference with public travel.

Idaho.—Rief v. Mountain States Telephone & Telegraph Co., 120 P.2d 823, 63 Idaho 418.

Pa.—Gensler v. Kemble, 76 A. 223, 227 Pa. 508.

R.I.—Edwards v. Brayton, 57 A. 784, 25 R.I. 597.

(2) However, it has also been held that such door may be a nuisance per se.

Mo.—Boyle v. Neisner Bros., 87 S.W.2d 227, 230 Mo.App. 90.

W.Va.—Higginbotham v. Kearse, 161 S.E. 38, 111 W.Va. 265, 77 A.L.R. 1110.

11. Mo.—Nemours v. Hickey, 210 S.W.2d 94, 357 Mo. 731, certiorari denied 69 S.Ct. 43, 335 U.S. 821, 93 L.Ed. — — — McWhorter v. Dahl Chevrolet Co., 88 S.W.2d 240, 229 Mo.App. 1090.

Tenn.—Rose v. Abeel Bros., 4 Tenn. App. 431.

44 C.J. p 956 note 7—43 C.J. p 1110 note 8.

12. Cal.—Corpus Juris quoted in Lane v. San Diego Electric Ry. Co., 280 P. 109, 111, 208 Cal. 29.

N.Y.—Kelly v. Otterstedt, 80 N.Y.S. 1008, 80 App.Div. 398.

Ohio.—Plummer v. Village of Swanton, 15 N.E.2d 849, 133 Ohio St. 623.

Pa.—Breinig v. Allegheny County, 2 A.2d 842, 332 Pa. 474.

Tenn.—Rose v. Abeel Bros., 4 Tenn. App. 431.

44 C.J. p 956 note 8.

Privilege and not matter of right

The use of a public sidewalk as an instrumentality of a business is

erty for a reasonable time.¹³ So, it has been held that an innkeeper has a right to keep his carriages for the use of his guests only, in the adjoining street, in reasonable number and in a reasonable manner subject to immediate call, when so to keep them is a necessity of his business.¹⁴ An abutting owner may also use the street for the purpose of loading and unloading goods or merchandise,¹⁵ or transporting his goods or other portable articles to and from his property,¹⁶ but such uses must be necessary and reasonable,¹⁷ and such as are usual or customary in connection with the particular business or construction,¹⁸ and the abutting owner may not obstruct the street for long periods each day.¹⁹

Occupancy incident to erection or demolition of buildings. An abutting owner has the right to use the street in front of his premises as a place to de-

posit materials and tools for the construction or improvement of buildings on his property,²⁰ either preparatory thereto,²¹ or during the progress thereof,²² and keep them there for a reasonable time;²³ and it has been declared that he has the right to close the street for this purpose.²⁴ Further, as a necessary incident of building operations, he has the right to maintain scaffolds, cranes, and similar appliances needed in the erection of outside walls,²⁵ to erect and maintain a barricade or housing,²⁶ and to excavate a reasonable distance into the street in front of the lot.²⁷ The exercise of such rights must not, however, unreasonably interfere with the rights of the public to use the street, or with the right of an adjacent property owner,²⁸ and the use must be such as is usual and customary in connection with the particular construction.²⁹ This right tempora-

accorded as a mere privilege and not as a matter of natural right.—Wood v. City of Chickasha, 257 P. 286, 125 Okl. 212.

13. Cal.—*Corpus Juris* quoted in Lane v. San Diego Electric Ry. Co., 280 P. 109, 111, 208 Cal. 29. 44 C.J. p 956 note 9.

14. D.C.—Willard Hotel Co. v. District of Columbia, 23 App.D.C. 272. N.Y.—People v. Brookfield, 39 N.Y.S. 673, 6 App.Div. 398.

15. Cal.—*Corpus Juris* quoted in Lane v. San Diego Electric Ry. Co., 280 P. 109, 111, 208 Cal. 29. Ill.—Haggenjos v. City of Chicago, 168 N.E. 661, 336 Ill. 573. 44 C.J. p 956 note 11.

Delivery of coal
Mo.—Maher v. Donk Bros. Coal & Coke Co., 20 S.W.2d 888, 323 Mo. 799.

44 C.J. p 956 note 11 [b].

16. Cal.—*Corpus Juris* quoted in Lane v. San Diego Electric Ry. Co., 280 P. 109, 111, 208 Cal. 29. N.Y.—O'Neill v. City of Port Jervis, 171 N.E. 694, 253 N.Y. 423. 44 C.J. p 957 note 12.

Use of skids

(1) For the purpose of facilitating the removal of merchandise, skids may be used in a reasonable manner so as not unnecessarily to encumber or obstruct the sidewalk.—Haggenjos v. City of Chicago, 168 N.E. 661, 336 Ill. 573.—44 C.J. p 957 note 12 [a].

(2) For one, as occasion requires, to obstruct a sidewalk by a skid from his door to a vehicle for purposes of moving merchandise between them is not within an ordinance prohibiting one from constructing a "door, porch, window, fence, or other projection which shall project into a street."—Gates & Son Co. v. City of Richmond, 49 S.E. 965, 103 Va. 702.

Delivery of coal by chute across sidewalk within a reasonable time is not an unlawful occupation of the way.—Smith v. Locke Coal Co., 164 N.E. 381, 265 Mass. 524, 61 A.L.R. 1052.

17. Cal.—*Corpus Juris* quoted in Lane v. San Diego Electric Ry. Co., 280 P. 109, 111, 208 Cal. 29. N.Y.—O'Neill v. City of Port Jervis, 171 N.E. 694, 253 N.Y. 423.—Kelly v. Otterstedt, 80 N.Y.S. 1008, 80 App.Div. 398.

Tenn.—Rose v. Abeel Bros., 4 Tenn. App. 431.

Wis.—City of Neenah v. Krueger, 240 N.W. 402, 206 Wis. 473. 44 C.J. p 957 note 13.

18. N.Y.—O'Neill v. City of Port Jervis, 171 N.E. 694, 253 N.Y. 423.

19. Cal.—*Corpus Juris* quoted in Lane v. San Diego Electric Ry. Co., 280 P. 109, 111, 208 Cal. 29. Wis.—City of Neenah v. Krueger, 240 N.W. 402, 206 Wis. 473. 44 C.J. p 957 note 14.

Loading platform which extended to curb occupying sidewalk space, was held unauthorized, notwithstanding platform was maintained with city's permission for a long period of time.—J. M. Radford Grocery Co. v. City of Abilene, Tex.Com.App., 34 S.W.2d 830.

20. U.S.—Young v. N. P. Severin Co., C.C.A.Alaska, 79 F.2d 884, certiorari denied N. P. Severin Co. v. Young, 56 S.Ct. 575, 297 U.S. 711, 80 L.Ed. 998.

Ariz.—Beltran v. Stroud, 160 P.2d 765, 63 Ariz. 249.

Mo.—McWhorter v. Dahl Chevrolet Co., 88 S.W.2d 240, 229 Mo.App. 1090.

N.Y.—O'Neill v. City of Port Jervis, 171 N.E. 694, 253 N.Y. 423.

Pa.—Breinig v. Allegheny County, 2 A.2d 842, 332 Pa. 474.

44 C.J. p 957 note 15.

Municipal corporation may by ordinance permit temporary use of street by abutting owners engaged in making improvements.—Housewives League v. City of Indianapolis, 185 N.E. 511, 204 Ind. 685.

21. Ill.—Gones v. Illinois Printing Co., 205 Ill.App. 5.

22. N.J.—Mann v. Max, 107 A. 417, 93 N.J.Law 191, 21 A.L.R. 1227.

23. Ky.—Button v. Louisville, 118 S.W. 977.

44 C.J. p 957 note 18.

24. U.S.—Young v. N. P. Severin Co., C.C.A.Alaska, 79 F.2d 884, certiorari denied N. P. Severin Co. v. Young, 56 S.Ct. 575, 297 U.S. 711, 80 L.Ed. 998.

25. N.J.—Mann v. Max, 107 A. 417, 93 N.J.Law 191, 21 A.L.R. 1227.

26. Iowa.—Jones v. Ft. Dodge, 171 N.W. 16, 185 Iowa 600.

44 C.J. p 957 note 20.

27. Ohio.—Clark v. Fry, 8 Ohio St. 358, 72 Am.D. 590.

28. U.S.—Young v. N. P. Severin Co., C.C.A.Alaska, 79 F.2d 884, certiorari denied N. P. Severin Co. v. Young, 56 S.Ct. 575, 297 U.S. 711, 80 L.Ed. 998.

Ariz.—Beltran v. Stroud, 160 P.2d 765, 63 Ariz. 249.

Mo.—McWhorter v. Dahl Chevrolet Co., 88 S.W.2d 240, 229 Mo.App. 1090.

N.Y.—O'Neill v. City of Port Jervis, 171 N.E. 694, 253 N.Y. 423.

44 C.J. p 958 note 22.

Use held reasonable

Piling of building material in street to extent of eight feet by owner constructing building has been held reasonable.—O'Neill v. City of Port Jervis, *supra*.

29. N.Y.—O'Neill v. City of Port Jervis, *supra*.

rily to use a part of the street for building operations is sustained on the ground of reasonable necessity, irrespective of ownership of the fee in the street.³⁰ One engaged in erecting a building acts for, and on behalf of, the owner, and has the same rights in the public streets adjacent to the property that the owner would have, if engaged in the work himself.³¹ This right, although subject to reasonable regulations, cannot ordinarily be entirely denied.³² Unless authorized by the municipality, no officer of the city may grant an abutter permission to inclose a portion of the streets which he is authorized to use pending construction of a building.³³

Regulation. Notwithstanding the right of an abutting proprietor to occupy temporarily a portion of the street when necessary, the municipal authorities may impose reasonable regulations on such use,³⁴ although it has been held that the power to

regulate does not confer the power to authorize an encroachment injuring owners of abutting property or materially interfering with any legitimate use of the street or sidewalk by the public.³⁵ Under an ordinance permitting the obstruction of a street to a prescribed extent for the purpose of placing building material therein during the continuous construction of a building upon the premises of the abutter, the obstruction cannot be continued while the work is being carried on in a desultory and interrupted manner.³⁶ Likewise, use may not be made of more than the prescribed portion of the street;³⁷ nor may an inclosure be erected in the absence of proper authorization.³⁸ An ordinance regulating the use of streets for building material has been held inapplicable to material excavated from the abutting premises preliminary to the erection of a building.³⁹ A provision imposing a penalty for the obstruction of sidewalks by the use of the word "persons" includes corporations.⁴⁰

C. REMEDIES FOR OBSTRUCTION OR UNLAWFUL USE OF WAY

§ 1710. In General

Subject to some qualifications, where the use or obstruction of a street has occasioned injury to an abutting owner different in kind from that sustained by the public, he may maintain a private action for its redress.

Subject to some qualifications, where the use or obstruction of a street has occasioned an injury to an abutting owner different in kind from that sustained by the public, he may maintain a private action for its redress.⁴¹ No action can be maintained

where the way obstructed has not actually been opened for use by the public as a street.⁴² However, a street need not be a public highway throughout its entire distance in order that an abutting owner may recover for its obstruction if it is a public highway at the point of obstruction.⁴³ Although the construction of an improvement renders access to the abutting owner's premises difficult and dangerous, he may not himself abate the nuisance, but his remedy is by an action for damages.⁴⁴

30. Wis.—Trester, etc., Inc. v. Kahn, 205 N.W. 826, 189 Wis. 60.

44 C.J. p 958 note 23.

31. US—Young v. N. P. Severin Co., C.C.A.Alaska, 79 F.2d 884, certiorari denied N. P. Severin Co. v. Young, 56 S.Ct. 575, 297 U.S. 711, 80 L.Ed. 998.

Mo.—McWhorter v. Dahl Chevrolet Co., 88 S.W.2d 240, 229 Mo.App. 1090.

44 C.J. p 958 note 24.

32. Fla.—State v. York, 106 So. 418, 90 Fla. 625.

33. Tex.—American Constr. Co. v. Seelig, 133 S.W. 429, 104 Tex. 16.

34. Mo.—McWhorter v. Dahl Chevrolet Co., 88 S.W.2d 240, 229 Mo. App. 1090.

44 C.J. p 958 note 28.

35. Ohio.—Salzer v. Bowlus-Hackett Fruit Co., 16 Ohio N.P.,N.S., 358.

44 C.J. p 958 note 29.

36. Ill.—Martin v. Chicago, etc., R. Co., 87 Ill.App. 208.

44 C.J. p 958 notes 30, 31.

37. N.Y.—Mulvey v. New York, 99

N.Y.S. 1114, 114 App.Div. 526, affirmed 82 N.E. 1129, 189 N.Y. 564.

44 C.J. p 958 note 32.

Unreasonable use not permitted

Ordinance limiting occupancy to portion of roadway, merely regulated property owner's common-law right to reasonable use of street on which property fronted by limiting its operation to prescribed portion of street, and did not add any right to use of street in unreasonable manner.—McWhorter v. Dahl Chevrolet Co., 88 S.W.2d 240, 229 Mo.App. 1090.

38. Tex.—American Constr. Co. v. Seelig, 133 S.W. 429, 104 Tex. 16.

44 C.J. p 958 note 28.

39. Wis.—Raymond v. Keseberg, 54 N.W. 612, 84 Wis. 302, 19 L.R.A. 643—Hundhausen v. Bond, 86 Wis. 29.

40. Mo.—McKee v. Peters, 126 S.W. 255, 142 Mo.App. 286.

41. Cal.—Fitzgerald v. Smith, 271 P. 507, 94 Cal.App. 480.

Mandamus to enforce duty to remove obstructions or encroachments on street or highway see Mandamus § 179 d.

Fact that obstruction constitutes a public nuisance does not prevent adjoining property owner from prosecuting an action.—Marshall v. Standard Oil Co. of California, 61 P.2d 520, 17 Cal.App.2d 19.

Remedies

(1) If city permitted switch track in street adjoining flour mill, mill owner could use track without consent of abutting owners, whose remedy, if any, was against railroad.—Stout v. Frick, Mo.App., 69 S.W.2d 677.

(2) Unlawful obstruction or interference with highway is per se a nuisance, and an abutting owner has all the usual rights and remedies of owner of freehold.—Fitzgerald v. Smith, 271 P. 507, 94 Cal.App. 480.

42. Cal.—George v. North Pac. Transp. Co., 50 Cal. 589.

44 C.J. p 961 note 64.

43. Ala.—Beard v. Hicks, 50 So. 232, 163 Ala. 329.

44. Iowa.—McGregor v. Boyle, 34 Iowa 268.

44 C.J. p 961 note 66.

§ 1711. Ejectment

An abutting owner who owns the fee of the street may maintain ejectment against one wrongfully taking or claiming possession of the street, but it has been held that he cannot maintain ejectment against the municipal corporation, or other lawful public authority, or public service corporation, occupying the street within the limits of the public right.

An abutting owner who owns the fee of the street may maintain ejectment against one wrongfully taking or claiming possession of the street;⁴⁵ but it has been held that he cannot maintain ejectment as against the municipal corporation,⁴⁶ or other lawful public authority,⁴⁷ or a public service corporation,⁴⁸ occupying the street within the limits of the public right. Subject to the public easement, he may maintain ejectment to recover possession, where the state takes possession of the street,⁴⁹ but the judgment obtained will be subject to the easement.⁵⁰

§ 1712. Actions for Damages

- a. In general
- b. Conditions precedent
- c. Defenses

a. In General

An abutting owner who has suffered special injury to his property through a wrongful obstruction or en-

croachment of the street, different in kind from that suffered by the public at large, may maintain an action at law to recover damages therefor.

An abutting owner who has suffered special injury to his property through a wrongful obstruction or encroachment of the street or other public way, different in kind from that suffered by the public at large, may maintain an action at law to recover the damages therefor,⁵¹ as where his easement of access is unreasonably impaired,⁵² and it is immaterial whether the title of the street is in the municipality or in the abutting owner.⁵³ An abutting owner has no right of action for an infringement of the right which he has, in common with all others of the community, to use the street as a highway.⁵⁴ It is not enough that he has suffered more damages than others, but the damages must be of a different character than those sustained by the public in order to constitute a special injury.⁵⁵ However, a recovery is not precluded by the fact that there are others who suffer the same kind of damage.⁵⁶

It is not necessary that the obstruction be immediately in front of the premises of complainant.⁵⁷ Although there is authority to the contrary,⁵⁸ it has been held that plaintiff may be entitled to damages, even though access to his property from one di-

45. Cal.—Fitzgerald v. Smith, 271 P. 507, 94 Cal.App. 480.
N.J.—823 Broad St. v. Marcus, 3 A. 2d 589, 17 N.J. Misc. 25.
44 C.J. p 961 note 67.

46. Md.—Weyler v. Gibson, 73 A. 261, 110 Md. 636, 17 Ann. Cas. 731.

Issue not raised

In an action in which the right of an abutting owner to maintain ejectment against a municipality was not discussed, ejectment was granted in behalf of the abutting owner.—Faulks v. Borough of Allenhurst, 180 A. 877, 115 N.J. Law 456

47. Md.—Weyler v. Gibson, 73 A. 261, 110 Md. 636, 17 Ann. Cas. 731.

48. N.J.—French v. Robb, 51 A. 509, 67 N.J. Law 260, 91 Am. S.R. 433, 57 L.R.A. 956.

49. Md.—Weyler v. Gibson, 73 A. 261, 110 Md. 636, 17 Ann. Cas. 731.
44 C.J. p 962 note 71.

50. Md.—Weyler v. Gibson, *supra*.

51. Cal.—Lane v. San Diego Electric Ry. Co., 280 P. 109, 208 Cal. 29—Fitzgerald v. Smith, 271 P. 507, 94 Cal.App. 480.
N.J.—823 Broad St. v. Marcus, 3 A.2d 589, 17 N.J. Misc. 25.

Va.—McClintock v. Richlands Brick Corporation, 145 S.E. 425, 152 Va. 1, 61 A.L.R. 1033.

Wash.—Kemp v. City of Seattle, 370

P. 431, 149 Wash. 197, appeal, error and certiorari dismissed 49 S. Ct. 482, 279 U.S. 825, 73 L.Ed. 978
44 C.J. p 962 note 74.

Actions for damages by municipality and private individuals other than abutting owners see *infra* § 1754.

Right to damages not shown

One planting vegetables after notice to take fences off street has no right to damages because fences were removed and vegetables destroyed by traffic.—Cook v. City of Opelousas, 4 La. App. 300.

52. Cal.—Lane v. San Diego Electric Ry. Co., 280 P. 109, 208 Cal. 29.
Ga.—Scott v. Reynolds, 29 S.E.2d 88, 70 Ga.App. 545.

Ill.—People ex rel. Calumet Federal Savings & Loan Ass'n of Chicago v. City of Chicago, 55 N.E.2d 391, 323 Ill.App. 295.

Ind.—Woodsmall v. Carr Tire Co., 185 N.E. 163, 98 Ind.App. 446.
Me.—Yates v. Tiffany, 136 A. 668, 126 Me. 128.

N.Y.—Farrell v. Rose, 170 N.E. 498, 253 N.Y. 73, 68 A.L.R. 1505.
S.C.—Brown v. Hendricks, 45 S.E.2d 603, 211 S.C. 395.
44 C.J. p 962 note 75.

Irrespective of whether alley is private or public if maintenance of obstruction constitutes a public nuisance and materially interferes with

abutting lot owner's right of passage for access to property, injury to lot owner caused special damage and gave her a right of action.—Scott v. Reynolds, 29 S.E.2d 88, 70 Ga.App. 545.

Occupant of premises held entitled to maintain action.—City of Rome v. Lecroy, 1 S.E.2d 759, 59 Ga.App. 644.

53. N.C.—Staton v. Atlantic Coast Line R. Co., 61 S.E. 455, 147 N.C. 128, 17 L.R.A., N.S., 919.

54. Ill.—People ex rel. Calumet Federal Savings & Loan Ass'n of Chicago v. City of Chicago, 55 N.E.2d 391, 323 Ill.App. 295.
44 C.J. p 962 note 77.

55. Cal.—Richardson v. O'Hanrahan, 256 P. 1103, 83 Cal.App. 415.
Tex.—American Constr. Co. v. Caswell, Civ.App., 141 S.W. 1013.

56. Ill.—Gibbons v. Paducah, etc., R. Co., 211 Ill.App. 138.
Mo.—Ellis v. St. Louis, etc., R. Co., 111 S.W. 839, 131 Mo.App. 395.

57. Ill.—People ex rel. Calumet Federal Savings & Loan Ass'n of Chicago v. City of Chicago, 55 N.E.2d 391, 323 Ill.App. 295.
44 C.J. p 962 note 80.

58. N.Y.—In re Cox, 250 N.Y.S. 528, 140 Misc. 313.

rection only is cut off by the obstruction of the street,⁵⁹ and although he has streets on other sides of his property,⁶⁰ and the fact that other means of access to the property are available merely affects the amount of damages and not the right of recovery.⁶¹ On the other hand, an abutter has been held not to suffer special injury where a street is obstructed at such a distance from his property that he is not deprived of access to it through other streets.⁶²

The owner has been regarded as suffering special injury where access to his premises is completely cut off,⁶³ where the value of the premises is decreased by a diversion of public travel,⁶⁴ or loss of profits has been occasioned to an established business.⁶⁵

Liability of municipality or agent. A municipality has no more right to erect or maintain an obstruction than a private individual possesses, and an action may be maintained against the corporation for damages occasioned by such a nuisance, for which it is responsible, in any case in which, under like circumstances, an action could have been maintained against an individual under similar circumstances.⁶⁶ However, a city, or a person acting for a city, may temporarily obstruct a public street as far as it may be necessary to enable the city or its agent to construct a public improvement, without becoming liable for damages to an abutting owner on the street.⁶⁷

Injury to sidewalk. An abutter may sue for damages for injury to his sidewalk.⁶⁸

Personal annoyance. A person in possession, although not the owner, may sue for personal annoyance from a nuisance in the unlawful use of the street on which the property abuts.⁶⁹

Damage to curbing. An abutting owner may recover from the municipal corporation for an arbitrary and capricious destruction of curbing in front of his premises which does not encroach on the traveled way.⁷⁰

Closing street. Where the closing of a street results in special damage to an abutting property owner, it has been held that the municipality authorizing such closing is liable for the damage⁷¹ and not a person or corporation benefited by the closing of the street unless collusive fraud is apparent from all the facts and circumstances surrounding the transaction.⁷² However, it has also been held that a person or corporation closing a street pursuant to a void ordinance is liable in damages to abutting owners injured thereby.⁷³ Damages to parcels of realty because of the closing of an abutting street beyond the nearest cross street giving access to other streets have been held to be of the same kind as those sustained by the general public, and hence not recoverable at law,⁷⁴ and diversion of customers from a place of business on certain property and depreciation of the value of other property through loss of advertising because of a

59. Ill.—People ex rel. Calumet Federal Savings & Loan Ass'n of Chicago v. City of Chicago, 55 N.E. 2d 391, 323 Ill.App. 295.

44 C.J. p 963 note 81.

Nature and extent of easement of access see supra § 1703.

60. Mo.—Ellis v. St. Louis, etc., R. Co., 111 S.W. 839, 131 Mo.App. 395.

61. S.C.—Brown v. Hendricks, 45 S.E.2d 603, 211 S.C. 395.

62. Ill.—People ex rel. Calumet Federal Savings & Loan Ass'n of Chicago v. City of Chicago, 55 N.E. 2d 391, 323 Ill.App. 295.

44 C.J. p 963 note 83.

63. Cal.—Cushing-Wetmore Co. v. Gray, 92 P. 70, 152 Cal. 118, 125 Am.S.R. 47.

Mo.—Ellis v. St. Louis, etc., R. Co., 111 S.W. 839, 131 Mo.App. 395.

64. Minn.—Fitzer v. St. Paul City R. Co., 117 N.W. 434, 105 Minn. 221, 127 Am.S.R. 557, 18 L.R.A., N.S., 268.

44 C.J. p 963 note 85.

65. Tex.—American Constr. Co. v. Caswell, Civ.App., 141 S.W. 1013.

66. Iowa.—Pettit v. Grand Junction, 93 N.W. 381, 119 Iowa 352.

R.I.—Redford v. Coggeshall, 36 A. 89, 19 R.I. 313.

Failure to remove buildings from lands taken for street purposes obstructing property gives abutting owner right to damages—Carpenter v. City of Buffalo, 244 N.Y.S. 224, 137 Misc. 618, affirmed 249 N.Y.S. 929, 232 App.Div. 868.

Liability of municipality for unreasonable use of a street usually involves the creation by active or passive conduct of a continuing condition of maintenance causing damage to adjoining property—Gilman v. City of Concord, 195 A. 672, 89 N.H. 182.

Negligent invasion of rights

Municipalities are liable for negligent invasion of an adjoining owner's property rights by their use of highways.—Gilman v. City of Concord, supra.

67. N.Y.—Farrell v. Rose, 170 N.E. 498, 253 N.Y. 73, 68 A.L.R. 1505.

44 C.J. p 963 note 88.

68. N.Y.—Parish v. Baird, 54 N.E. 724, 160 N.Y. 302.

44 C.J. p 963 note 89.

69. D.C.—Hopkins v. Baltimore, etc., R. Co., 17 D.C. 311.

70. Minn.—Johnson v. Gibbon, 213 N.W. 15, 170 Minn. 12, 13.

44 C.J. p 963 note 91.

71. Cal.—Constantine v. City of Sunnyvale, App., 204 P.2d 922.

Ill.—People ex rel. Calumet Federal Savings & Loan Ass'n of Chicago v. City of Chicago, 55 N.E.2d 391, 323 Ill.App. 295.

Ind.—Hankins v. State ex rel. Miller, 27 N.E.2d 365, 217 Ind. 225.

Injunction against vacation of street see supra § 1675.

Persons liable for compensation for taking of property see Eminent Domain § 195.

Vacation of street as taking of property requiring compensation see Eminent Domain § 126.

72. Cal.—Constantine v. City of Sunnyvale, App., 204 P.2d 922.

73. Tex.—Bowers v. City of Taylor, Com.App., 24 S.W.2d 816.

Power to vacate street see supra § 1665.

74. Ill.—People ex rel. Calumet Federal Savings & Loan Ass'n of Chicago v. City of Chicago, 55 N.E.2d 391, 323 Ill.App. 295.

decrease in the number of people passing such property are not proper elements of damages to such property arising from the closing of a street adjacent thereto.⁷⁵ On the other hand, it has been held that the diversion of traffic on which the business of an abutting owner is dependent, virtually destroying the value of the business, constitutes a special injury.⁷⁶

b. Conditions Precedent

There must be a compliance with statutory conditions precedent to actions by abutting owners against a municipal corporation for damages arising from a wrongful obstruction or encroachment of a street.

There must be a compliance with statutory conditions precedent to actions by abutting owners against a municipal corporation for damages arising from a wrongful obstruction or encroachment of a street.⁷⁷ A statutory requirement of notice as a condition precedent to an action against the city for damages to person or property has been held applicable to an action for damages occasioned by an obstruction of the street by a railroad under authorization of the city,⁷⁸ and, where the claim has not been filed within the time required by the statute, a judgment for the city will be affirmed.⁷⁹

c. Defenses

The fact that a particular use of the streets is authorized by the municipal corporation, the signing of a petition asking for an improvement, and various other matters have been held not to bar recovery by abutting owners for damages because of special injuries suffered by reason of a use or obstruction of the streets.

The signing of a petition asking for an improvement will not estop an abutting owner from recovering for a wrongful and unlawful excavation cutting off his access,⁸⁰ and the fact that such an owner was at a meeting of the council, where an improvement was discussed, and saw the work progress without protest will not work an estoppel to sue a contractor for his unlawful act where there is no showing that such conduct had anything to do with the unauthorized acts or the owner knew of the defects making them such;⁸¹ nor will the ac-

tion of property owners in paying the bill for an improvement affect the liability of a contractor for a former trespass.⁸² The fact that a particular use of the streets is authorized by the municipality does not affect claims of abutting property owners for damages because of special injuries suffered by them.⁸³ In an action against a contractor for injuries to property by cutting off an abutting owner's access, invalid proceedings of the municipal council under which the work was done afford no justification for defendant's acts.⁸⁴ Although a statute provides that damages shall be paid before a plat is vacated, a judgment, vacating a portion of a plat, not including plaintiff's property, will not bar an action for damages for obstructing a street giving access to plaintiff's land.⁸⁵

§ 1713. — Proceedings and Relief

- a. Pleadings
- b. Evidence
- c. Trial
- d. Damages

a. Pleadings

The complaint in an action to recover damages for the unlawful use or obstruction of a street, in order to be sufficient, must allege every fact essential to the right of the plaintiff to recover.

In accordance with the general rules of pleading, which apply in actions to recover damages for the unlawful use or obstruction of a street,⁸⁶ the complaint should allege every fact essential to plaintiff's right of recovery.⁸⁷ An interference with the right of access should be averred in the complaint in such a manner as to show a claim for damages based on an injury different in kind from that suffered by the public in general,⁸⁸ but it is not necessary to aver that plaintiff had no other means of ingress or egress than that cut off,⁸⁹ or the use to which an alley was put before the injury.⁹⁰ In an action against a municipal corporation for negligently obstructing a street, a demurrer will be overruled if any cause of action is stated in the com-

75. Ill.—People ex rel. Calumet Federal Savings & Loan Ass'n of Chicago v. City of Chicago, *supra*.

76. Md.—Johnson v. Oakland, 129 A. 648, 148 Md. 432.
44 C.J. p 963 note 85 [a].

77. Kan.—Campbell v. Wichita Union Terminal R. Co., 168 P. 833, 101 Kan. 817.

78. Kan.—Campbell v. Wichita Union Terminal R. Co., *supra*.

79. Kan.—Griffith v. Atchison, etc., R. Co., 169 P. 546, 102 Kan. 23.

80. Mo.—Ford v. Phillip, 141 S.W. 907, 159 Mo.App. 482.
44 C.J. p 963 note 95.

81. Mo.—Ford v. Phillip, *supra*.

82. Mo.—Ford v. Phillip, *supra*.

83. Ind.—Woodsmall v. Carr Tire Co., 185 N.E. 163, 98 Ind.App. 446 —Ewbank v. Yellow Cab Co., 149 N.E. 647, 84 Ind.App. 144.

84. Mo.—Ford v. Phillip, 141 S.W. 907, 159 Mo.App. 482.

85. Minn.—Maletta v. Oliver Iron Min. Co., 160 N.W. 771, 135 Minn. 175.

86. Pa.—Steward v. Columbia Foundation Co., Com.Pl., 48 Dauph.Co. 184.

87. Allegations held sufficient Ga.—Scott v. Reynolds, 29 S.E.2d 88, 70 Ga.App. 545.

88. Ala.—Birmingham R., etc., Co. v. Long, 59 So. 382, 5 Ala.App. 510.
44 C.J. p 964 note 1.

89. Ala.—Birmingham R., etc., Co. v. Long, *supra*.

90. Ala.—Birmingham R., etc., Co. v. Long, *supra*.

plaint, however artificially expressed,⁹¹ and a complaint, in such an action, alleging that the municipality, by and through its "so-called" board of commissioners, did the work, sufficiently alleges that the commissioners were acting under authority from defendant.⁹² A variance between pleadings and proof of such a character that defendant was not misled thereby will be disregarded.⁹³

b. Evidence

In an action to recover damages for the unlawful use or obstruction of a street, the plaintiff must establish the facts essential to his cause of action; competent, relevant, and material evidence is admissible; and the sufficiency of the evidence is to be determined by the circumstances of the particular case.

Under the general rules as to presumptions, the regularity of official proceedings and acts may be presumed.⁹⁴ It may be presumed that lots with convenient cross streets are more valuable than they would be without such cross streets.⁹⁵

The burden is on plaintiff to show the facts essential to his cause of action,⁹⁶ and to show that the damage was special as to him,⁹⁷ and proximately resulted from defendant's acts.⁹⁸

Subject to the general rules as to competency, any evidence is admissible which tends to show facts essential to plaintiff's cause of action⁹⁹ or the

existence and amount of damages.¹ Plaintiff's deed is admissible to show the extent and character of the possession of the property.² In an action for the obstruction of access to property, based on but one ground, it is error to permit proof of another ground.³

Weight and sufficiency of evidence. The weight and sufficiency of evidence are to be determined by the circumstances of the particular case.⁴

c. Trial

In an action to recover damages for the wrongful use or obstruction of a street, questions of fact should be submitted to the jury under proper instructions from the court. General rules as to verdicts and findings apply.

In actions to recover damages for the wrongful use or obstruction of a street, disputed questions of fact should be submitted to the jury,⁵ but, where there is no factual dispute, the court should direct a verdict for the party entitled thereto.⁶

The court should fully and correctly instruct the jury on the law applicable to the issues and evidence.⁷ An instruction, predicating a recovery on the fact that the obstruction was willfully and maliciously built, and ignoring a count of the complaint which did not charge malicious conduct, is

91. N.C.—Jones v. Henderson, 60 S. E. 894, 147 N.C. 120.

44 C.J. p 964 note 4.

92. N.C.—Jones v. Henderson, supra.

93. Minn.—Maletta v. Oliver Iron Min. Co., 160 N.W. 771, 135 Minn. 175.

94. Ill.—Lefkowitz v. Chicago, 87 N. E. 58, 238 Ill. 23.

44 C.J. p 964 note 8.

95. Ga.—Scott v. Reynolds, 29 S.E. 2d 88, 70 Ga.App. 545.

96. N.Y.—Farrell v. Rose, 170 N.E. 498, 253 N.Y. 73, 68 A.L.R. 1505.

44 C.J. p 964 note 9.

Acceptance of street held not required to be shown where plaintiff established public easement therein.—Tolliver v. Louisville & N. R. Co., 10 S.W.2d 623, 226 Ky. 132.

97. Ala.—Alabama Terminal R. Co. v. Bennis, 66 So. 589, 189 Ala. 590.

Mo.—Sheedy v. Union Press Brick Works, 26 Mo.App. 527.

98. Ala.—Alabama Terminal R. Co. v. Bennis, 66 So. 589, 189 Ala. 590.

99. Ga.—Scott v. Reynolds, 29 S.E. 2d 88, 70 Ga.App. 545.

Establishment of way

Plaintiff suing for obstruction of street was entitled to show that way was established by prescription before organization of town.—Tolliver

v. Louisville & N. R. Co., 10 S.W.2d 623, 226 Ky. 132.

1. Ala.—Alabama Terminal R. Co. v. Bennis, 66 So. 589, 189 Ala. 590. 44 C.J. p 964 note 14.

Punitive damages

Ga.—Scott v. Reynolds, 29 S.E.2d 88, 70 Ga.App. 545.

Evidence of amount saved by defendant by use of conveyor in tunnel under alley, in order to establish abutting owner's damage, has been held properly excluded.—Ober v. City of Minneapolis, 229 N.W. 794, 179 Minn. 495.

2. Ala.—Birmingham R., etc., Co. v. Long, 59 So. 382, 5 Ala.App. 510.

3. Kan.—Griffith v. Atchison, etc., R. Co., 169 P. 546, 102 Kan. 23.

4. *Evidence sufficient*

Minn.—Ober v. City of Minneapolis, 229 N.W. 794, 179 Minn. 495. 44 C.J. p 964 note 16 [a].

Evidence insufficient to show that plaintiff had suffered the damages as alleged.—Swilley v. J. I. Case Threshing Mach. Co., Tex.Civ.App., 197 S.W. 1001.

5. *Questions held for jury*

Ga.—Scott v. Reynolds, 29 S.E.2d 88, 70 Ga.App. 545.

Ind.—Woodsmall v. Carr Tire Co., 185 N.E. 163, 98 Ind.App. 446.

Mo.—Artz v. Bannan, App., 71 S. W.2d 795.

44 C.J. p 964 note 18 [a].

6. N.J.—Faulks v. Borough of Allenhurst, 180 A. 877, 115 N.J.Law 456.

Nonsuit held improper

N.J.—Faulks v. Borough of Allenhurst, supra.

7. *Charge held based on evidence* Ga.—Scott v. Reynolds, 29 S.E.2d 88, 70 Ga.App. 545.

Obstruction of alley

In an action for obstructing an alley, in which plaintiff claimed an easement, an instruction, permitting a finding for plaintiff only if the alley was a public one for a certain distance, was properly refused, for it might have been a public alley at the point of the obstruction, although it was not a public alley throughout such distance.—Beard v. Hicks, 50 So. 232, 163 Ala. 329.

Right of access

An instruction that no aesthetic or unreasonable desire of plaintiff for convenience of way should be permitted to give him a right of access beyond that essential to a fairly convenient way is defective.—Meighan v. Birmingham Terminal Co., 51 So. 775, 165 Ala. 591—44 C.J. p 965 note 23.

properly refused,⁸ as is an instruction confining plaintiff to actual damages where the evidence authorized punitive damages.⁹

General rules as to verdicts and findings in civil actions apply in actions to recover damages for unlawful use or obstruction of a street.¹⁰ Thus, a finding that one of the defendants committed the acts which obstructed travel in a street does not relieve another defendant from liability therefor, in view of another finding that the obstruction was part of an enterprise in which both were engaged.¹¹

d. Damages

The damages recoverable by an abutting property owner for the unlawful obstruction of a street are such as will compensate for the loss which directly and naturally resulted from the injury.

The damages recoverable by an abutting owner for the unlawful obstruction of a street are such as will compensate for the loss which, in the judgment of the jury, directly and naturally resulted from the injury, and are the same without regard to the form of action.¹² The damages allowed must be special to plaintiff, and damages common to the public cannot be included.¹³ The measure of a property owner's damages for the unlawful permanent obstruction of a street is the diminished market value of the property in proximate consequence thereof,¹⁴ but depreciation in the value of the property is not the test for, or even an element in the assessment of, damages for a temporary obstruction.¹⁵ Depreciation is not the proper measure of damages where the obstruction is subject to abatement,¹⁶ and the damages for which defendant is liable are only the damages actually sustained prior to the commencement of the suit.¹⁷ Successive actions may be maintained as long as the nuisance continues,¹⁸ and, if the party against whom a verdict is

recovered does not abate the nuisance, it has been held that increased exemplary damages can be recovered in each succeeding action.¹⁹ Where, however, the court at the suit of an abutting owner refuses to abate the obstruction, he is entitled to recover in the action all the damage sustained.²⁰ While in general the measure of damages for a temporary obstruction of access is the diminution in the value of the use of plaintiff's premises during the time the obstruction is continued,²¹ or, where the property is rented and there is no physical injury to the property, the difference in rental value during the continuance of the obstruction,²² a recovery may be had for loss of profits to a business conducted on the premises²³ if reasonably capable of ascertainment.²⁴ In any event, defendant cannot be made liable for any losses other than those which he has occasioned;²⁵ and, where a corporation has recovered the whole loss suffered by it by reason of loss of profits, expenses incurred, and injury to it resulting from an obstruction, it cannot also recover the value of the time of certain of its officers consumed in defending the corporation against defendant's actions.²⁶

Punitive damages. An owner is not confined to actual or compensatory damages when there is evidence in the case which authorizes vindictive or punitive damages.²⁷

§ 1714. Actions for Abatement or Injunction

- a. In general
- b. Adequacy of remedy at law
- c. Relative convenience and injury
- d. Laches and estoppel

a. In General

An abutter may ordinarily enjoin the obstruction of

8. Ala.—Beard v. Hicks, 50 So. 232, 163 Ala. 329.

9. Ala.—Beard v. Hicks, *supra*.

10. Inconsistent findings

A finding that a depression in a street rendered the passage of teams into another street impossible, and a finding that it was practicable for teams to pass from one street, are inconsistent and contradictory, and cannot stand.—Griffith v. Atchison, etc., R. Co., 169 P. 546, 102 Kan. 23.

11. Kan.—Griffith v. Atchison, etc., R. Co., *supra*.

12. U.S.—Hetzel v. Baltimore, etc., R. Co., App.D.C., 18 S.Ct. 255, 169 U.S. 26, 42 L.Ed. 648.

13. Me.—Yates v. Tiffany, 136 A. 668, 126 Me. 128.

44 C.J. p 965 note 28.

14. N.C.—Elizabeth City v. Gregory, 164 S.E. 354, 202 N.C. 759.
44 C.J. p 965 note 29.

15. Mo.—Wright v. Wabash R. Co., 160 S.W. 549, 174 Mo.App. 446.
44 C.J. p 965 note 30.

16. Cal.—Hopkins v. Western Pac. R. Co., 50 Cal. 190.
44 C.J. p 965 note 31.

17. Iowa.—Pettit v. Grand Junction, 93 N.W. 381, 119 Iowa 352.
44 C.J. p 965 note 32.

18. Iowa.—Cain v. Chicago, etc., R. Co., 3 N.W. 736, 6 N.W. 268, 54 Iowa 255.

19. Cal.—Hopkins v. Western Pac. R. Co., 50 Cal. 190.

20. Utah.—Lewis v. Pingree Nat. Bank, 151 P. 558, 47 Utah 35, L.R. A.1916C 1260.

44 C.J. p 965 note 35.

21. Ky.—Bannon v. Rohmeiser, 34 S.W. 1084, 35 S.W. 280, 17 Ky.L. 1378.

44 C.J. p 965 note 36.

22. Ky.—Bannon v. Rohmeiser, *supra*.

44 C.J. p 965 note 37.

23. Ind.—Woodsmall v. Carr Tire Co., 185 N.E. 163, 98 Ind.App. 446.
44 C.J. p 965 note 38.

24. R.I.—Fugere v. Cook, 69 A. 555.
44 C.J. p 965 note 39.

25. N.Y.—Schleicher v. Mt. Vernon, 95 N.Y.S. 326, 107 App.Div. 584.
44 C.J. p 966 note 40.

26. Cal.—Cushing-Wetmore Co. v. Gray, 92 P. 70, 152 Cal. 118, 125 Am.S.R. 47.

27. Ala.—Beard v. Hicks, 50 So. 232, 163 Ala. 329.

a street in front of or near his property where he suffers special injury therefrom different from that suffered by the general public.

An abutter may ordinarily enjoin the obstruction of a street in front of or near his property where he suffers special injury therefrom different from that suffered by the public in general, as where his easement of access or the value of his property or possession is impaired;²⁸ but the act complained of must be clearly shown to be an obstruction.²⁹ An action by an abutting owner is not precluded by

the fact that there is a criminal statute or ordinance prohibiting such an obstruction,³⁰ or that the same obstruction constitutes an injury to his public right of travel,³¹ and is a public nuisance.³² A statute requiring the board of public works to supervise all public works of the city, and giving it exclusive power over the streets, does not deprive an abutting property owner of his right to injunction against obstructions in streets, if he would otherwise be entitled to such relief.³³ The maintenance of similar structures throughout the city does not

22. U.S.—George W. Armbruster, Jr., Inc., v. City of Wildwood, D.C. N.J., 41 F.2d 823.
- Ark.—Lincoln v. McGehee Hotel Co., 29 S.W.2d 668, 181 Ark. 1117—Langford v. Griffin, 17 S.W.2d 296, 179 Ark. 574.
- Cal.—Lane v. San Diego Electric Ry. Co., 280 P. 109, 208 Cal. 29—Marshall v. Standard Oil Co. of California, 61 P.2d 520, 17 Cal.App.2d 19—Baldocchi v. Four Fifty Sutter Corporation, 18 P.2d 682, 129 Cal App. 383—Fitzgerald v. Smith, 271 P. 507, 94 Cal.App. 480—Richardson v. O'Hanrahan, 256 P. 1103, 83 Cal.App. 415.
- Fla.—Shamhart v. Morrison Cafeteria Co., 32 So 2d 727, 159 Fla. 629.
- Ga.—City of Statesboro v. Dorman, 45 S.E.2d 403, 203 Ga. 25—City of Rome v. First Nat. Bank, 3 S.E. 2d 653, 188 Ga. 279.
- Ky.—Rudd v. Kittinger, 217 S.W.2d 651, 309 Ky. 315—Jones v. Ramsey, 190 S.W.2d 37, 300 Ky. 692—Morrow v. Richardson, 128 S.W.2d 560, 278 Ky. 233—City of Covington v. Averbeck, 50 S.W.2d 50, 244 Ky. 117—*Corpus Juris* cited in Cartmell v. City of Maysville, 22 S.W. 2d 102, 104, 231 Ky. 666.
- La.—Cucchiara v. Robinson, App., 34 So.2d 84.
- Md.—Huebschmann v. Grand Co., 172 A. 227, 166 Md. 615—Metaxas v. Easton Pub. Co., 140 A. 603, 154 Md. 393.
- Mich.—Long v. New York Cent. R. Co., 227 N.W. 739, 248 Mich. 437.
- N.J.—Livingston v. Stoddard, 136 A. 205, 100 N.J.Eq. 578.
- N.Y.—People ex rel. Neary Memorials v. Harvey, 274 N.Y.S. 789, 242 App.Div. 831—Tompkins v. City of New York, 254 N.Y.S. 209, 234 App. Div. 79, affirmed 184 N.E. 72, 260 N.Y. 513.
- N.D.—Cummings v. City of Minot, 271 N.W. 421, 67 N.D. 214—Dunn v. Hughes, 211 N.W. 594, 54 N.D. 814.
- Ohio.—Dinninger v. Village of Plymouth, 52 N.E.2d 865, 72 Ohio App. 469.
- Okl.—Siegenthaler v. Newton, 50 P. 2d 192, 174 Okl. 216.
- Or.—Lowell v. Pendleton Auto Co., 261 P. 415, 123 Or. 383.

- Pa.—Wilson v. McGill, 42 Pa.Dist. & Co. 74.
- R.I.—Trafton v. Downey, 151 A. 4, 51 R.I. 87.
- S.C.—Brown v. Hendricks, 45 S.E.2d 603, 211 S.C. 395.
- Tex.—Quannah Acme & P. Ry. Co. v. Swearingen, Civ.App., 4 S.W.2d 136, error refused.
- Va.—McClintock v. Richlands Brick Corporation, 145 S.E. 425, 152 Va. 1, 61 A.L.R. 1033.
- Wash.—Anderson v. Nichols, 278 P. 161, 152 Wash. 315—Young v. Nichols, 278 P. 159, 152 Wash. 306—Kemp v. City of Seattle, 270 P. 431, 149 Wash. 197, appeal, error and certiorari dismissed 49 S.Ct. 482, 279 U.S. 825, 73 L.Ed. 978—Denman v. Mattson, 268 P. 1045, 148 Wash. 321.
- W.Va.—Huddleston v. Deans, 21 S.E. 2d 352, 124 W.Va. 313—Sommerville v. Carpenter, 157 S.E. 160, 110 W.Va. 167.
- Wis.—Whitehead & Matheson Co. v. Jensen, 233 N.W. 546, 203 Wis. 12, 44 C.J. p 966 note 44.
- Proceedings for abatement or injunction by municipality or individual other than abutter see *infra* § 1753.
- Restraining making of improvement see *supra* § 1137.
- Erection of permanent structures or closing in part or in whole any public street or alley entitles abutting owners to abate it by injunction.**—Lincoln v. McGehee Hotel Co., 29 S.W.2d 668, 181 Ark. 1117.
- The sale of food on city streets by private individuals for their own purposes and profits is not a public use or a public function of those streets or highways, so that an adjoining property owner or lessee, whose property right runs to center of street or highway, may properly object to such use.**—Hindin v. Samuel, 45 A.2d 370, 158 Pa.Super. 539.
- Statute authorizing suit to remove walls**
- A statute authorizing proceedings to compel removal of walls encroaching on streets, governing procedure applicable where front or exterior wall is part of building erected after certain date, has been held applicable to buildings erected after that

date without regard to whether such buildings were erected prior, or subsequent, to the effective date of statute, and, hence, statute authorized notice served on city by aggrieved individuals to compel removal of wall of building erected subsequent to effective date.—City of New York v. Venezia, 81 N.Y.S.2d 545, 193 Misc. 249.

Abutter's consent to construction of boardwalk, subject to right of access, did not preclude realty company's enjoining maintenance of boardwalk by city not performing its part of agreement.—George W. Armbruster, Jr., Inc., v. City of Wildwood, D.C.N.J., 41 F.2d 823.

Granting of interlocutory injunction held not error.—State Highway Board v. Baxter, 144 S.E. 796, 167 Ga. 124.

29. U.S.—Klaber v. Lakenan, C.C.A. Mo., 64 F.2d 86, 90 A.L.R. 783.
- Ky.—City of Covington v. Averbeck, 50 S.W.2d 50, 244 Ky. 117.
- Okl.—Smile v. Taft Stadium Board of Control, 205 P.2d 301.
- Pa.—Wilson v. McGill, 42 Pa.Dist. & Co. 74.
- 44 C.J. p 967 note 45.

Authorized installation of parking meters

Fact that city procuring parking meters did not comply with city charter did not entitle owner of property in front of which some meters were installed to compel their removal where the city authorities were authorized under statutes to install the meters.—Cassidy v. City of Waterbury, 33 A.2d 142, 130 Conn. 237.

30. N.C.—Crawford v. Marion, 69 S. E. 763, 154 N.C. 73, 35 L.R.A., N.S., 193.
- Or.—Bernard v. Willamette Box & Lumber Co., 129 P. 1039, 64 Or. 223.
31. Cal.—Fitzgerald v. Smith, 271 P. 507, 94 Cal.App. 480.
32. Cal.—Marshall v. Standard Oil Co. of California, 61 P.2d 520, 17 Cal.App.2d 19.
33. Ala.—Louisville, etc., R. Co. v. Cowley, 50 So. 1015, 164 Ala. 331.

justify denying relief to an abutting owner injured by a public nuisance.³⁴

Ownership or title. An abutting owner who is the owner of the fee in the street may maintain an action to enjoin an encroachment interfering with his rights,³⁵ but ownership of the fee is not requisite.³⁶ Plaintiff need not show perfect title to the abutting property in himself in fee simple,³⁷ but he need show only such interest in the land as abutting owner as entitled him to ingress to, and egress from, the property.³⁸ The easements of an abutter in the street are appurtenant to the land and cannot be reserved to him on a sale of the property so as to enable him to enjoin the commission of trespass thereon occurring after the sale.³⁹

Necessity and sufficiency of special damages. It is necessary that complainant shall have sustained an individual or specific damage in addition to that suffered by the public at large.⁴⁰ An abutter is not entitled to an injunction where he is merely injured in common with the rest of the community,⁴¹ even though in a greater degree.⁴² However, an ob-

struction interfering with access to property abutting a street may constitute a special injury notwithstanding the abutting owner has other means of access,⁴³ and it has been held that the deprivation of any entrance to, or exit from, one's property is a special or peculiar damage to it not suffered by the public in general.⁴⁴ It is not necessary that his property shall abut on the obstructed portion of the way,⁴⁵ although it has been held in some jurisdictions that, where the obstruction is of the street in a portion of a city platted into blocks, only those owning property in the particular block can be said to suffer an injury distinct from that suffered by the general public.⁴⁶

Remote danger will not suffice, but it must be threatened and probable,⁴⁷ and the injury must be material.⁴⁸ Equity will not interfere to prevent slight injuries to technical rights but only to prevent serious damage to substantial rights.⁴⁹

Continuity of obstruction. It is not necessary that the interference with plaintiff's right of access be

34. N.Y.—Brown-Brand Realty Co. v Saks, 214 N.Y.S. 230, 126 Misc. 336, affirmed 218 N.Y.S. 706, 218 App Div. 827.

35. Cal.—Richardson v O'Hanrahan, 256 P. 1103, 83 Cal.App. 415.

N.Y.—Bradley v. Degnon Contracting Co., 140 N.Y.S. 825, 80 Misc. 90, affirmed 141 N.Y.S. 852, 157 App. Div. 237.

36. Ala.—Nashville, C. & St. L. Ry. Co. v. Hulan, 121 So. 62, 219 Ala. 56.

Ga.—City of Rome v. First Nat. Bank, 3 S.E.2d 653, 188 Ga. 279, 44 C.J. p. 967 note 51.

37. Va.—Shield v. Peninsula Land Co., 133 S.E. 586, 147 Va. 736.

44 C.J. p. 967 note 52.

38. Miss.—Shoemaker v. Coleman, 47 So. 649, 94 Miss. 619.

44 C.J. p. 967 note 53.

39. N.Y.—Pegram v. New York El. R. Co., 41 N.E. 424, 147 N.Y. 135.

40. U.S.—George W. Armbruster, Jr., Inc., v. City of Wildwood, D. C.N.J., 41 F.2d 823.

Ala.—McIntosh v. Moody, 153 So. 182, 228 Ala. 165—Nashville, C. & St. L. Ry. Co. v. Hulan, 121 So. 62, 219 Ala. 56.

Ark.—Langford v. Griffin, 17 S.W.2d 296, 179 Ark. 574.

Ky.—Jones v. Ramsey, 190 S.W.2d 37, 300 Ky. 602—Lee v. Macht, 31 S.W.2d 906, 235 Ky. 509.

Mass.—Centabar v. Selectmen of Wattertown, 167 N.E. 303, 268 Mass. 121.

Miss.—Panhandle Oil Co. v. Trigg, 114 So. 625, 148 Miss. 306.

N.J.—E. M. Harrison Market v. Town of Montclair, 147 A. 502, 105 N.J.Eq. 222.

S.C.—Brown v. Hendricks, 45 S.E.2d 603, 211 S.C. 395.

Tenn.—Wright v. Nashville Gas & Heating Co., 194 S.W.2d 459, 183 Tenn. 594.

Va.—Magee v. Omansky, 46 S.E.2d 443, 187 Va. 422—Fugate v. Carter, 144 S.E. 483, 151 Va. 112.

Wash.—Olsen v. Jacobs, 76 P.2d 607, 193 Wash. 506—Kemp v. City of Seattle, 270 P. 431, 149 Wash. 197, appeal, error and certiorari dismissed 49 S.Ct. 482, 279 U.S. 825, 73 L.Ed. 978.

44 C.J. p. 967 notes 55, 56.

41. Ky.—City of Covington v. Averbeck, 50 S.W.2d 50, 244 Ky. 117.

42. Va.—Magee v. Omansky, 46 S.E.2d 443, 187 Va. 422.

44 C.J. p. 967 note 56.

Obstruction of vacated portion of street

A property owner on a street or alley, a portion of which, other than the part on which he abuts, is vacated by the city, has no right to enjoin the obstruction of the vacated portion, where he has reasonable access to his property by other streets and alleys, although not as convenient as before the vacation.

Ala.—Chichester v. Kroman, 128 So. 166, 221 Ala. 203.

Ohio.—Kinnear Mfg. Co. v. Beatty, 62 N.E. 341, 65 Ohio St. 264, 87 Am. S.R. 600.

43. Ind.—Strunk v. Pritchett, 61 N.E. 973, 27 Ind.App. 582.

Pa.—Dwyer v. Pastuszek, Com.Pl., 29 Del.Co. 244.

S.C.—Brown v. Hendricks, 45 S.E.2d 603, 211 S.C. 395.

44. Ark.—Langford v. Griffin, 17 S.W.2d 296, 179 Ark. 574.

45. Ala.—Alabama Great Southern R. Co. v. Barclay, 59 So. 169, 178 Ala. 124.

44 C.J. p. 968 note 57.

46. Ky.—Alsip v. Hodge, 283 S.W. 392, 214 Ky. 438.

44 C.J. p. 968 note 58.

47. Wash.—Denman v. Mattson, 268 P. 1045, 148 Wash. 321.

44 C.J. p. 968 note 59.

Where there is reasonable apprehension that an unlawful use of the streets will take place, injunctive relief may be granted.—Brough v. Ute Stampede Ass'n, 142 P.2d 670, 105 Utah 446.

48. U.S.—Klaber v. Lakenan, C.C.A. Mo., 64 F.2d 86, 90 A.L.R. 783.

Ky.—Lee v. Macht, 31 S.W.2d 906, 235 Ky. 509.

44 C.J. p. 968 note 60.

49. Iowa.—Randall v. Christiansen, 40 N.W. 703, 76 Iowa 169.

Ky.—City of Covington v. Averbeck, 50 S.W.2d 50, 244 Ky. 117.

Va.—Magee v. Omansky, 46 S.E.2d 443, 187 Va. 422.

44 C.J. p. 968 note 61.

Obstruction to view must be so substantial as to result in serious damage to property in order to warrant an injunction.—Klaber v. Lakenan, C.C.A.Mo., 64 F.2d 86, 90 A.L.R. 783.

continuous and uninterrupted in order to entitle him to injunctive relief.⁵⁰

Existence, opening, or closing of street or highway. Generally speaking, the right of an abutting owner to maintain an action to compel the removal of an obstruction in a street is dependent on the existence of the street.⁵¹ However, a property owner damaged by the failure of the municipality to use land acquired for street purposes may enjoin continuous damage by obstruction of access to his property,⁵² and the fact that the street or highway may have been abandoned by the public will not affect the right of an abutting owner to protection of the easement which he may have in the street for the purpose of ingress to, and egress from, his premises.⁵³ It is immaterial that the city, which had accepted a dedication of the street, had not opened it up its full length when the obstructions were erected,⁵⁴ and an abutting owner may obtain a mandatory injunction to remove a fence from a former dead-end street after a new street connecting therewith has been laid out.⁵⁵ Although a private citizen cannot in his individual right sue to enforce an ordinance, under a statute authorizing a private citizen who finds his property or rights in danger of being injured by the acts of a corporation to challenge the authority of the corporation to

the possession of the right or franchise to do the act from which such alleged injury results, an abutting owner may sue to enjoin acts by a corporation in violation of the conditions of an ordinance under which it acquired the right to use the street.⁵⁶ Persons not interested in land over which a highway was constructed may not assert that the ordinance establishing it did not take effect because the consent of the owners had not been obtained.⁵⁷

Against adjoining owner. Where special damage is shown, the owner or occupant of premises abutting on a street may enjoin the use of adjoining premises in such a way as to constitute an obstruction of a street or sidewalk,⁵⁸ but an adjoining owner is not entitled to an injunction where he suffers no injury, inconvenience, or damage not suffered by the general public.⁵⁹ In order to entitle a lot owner to enjoin an encroachment on a highway by an adjoining owner, it is not necessary that all access to his lot therefrom be cut off.⁶⁰ Where an obstruction constitutes a public nuisance, it has been held that a suit in equity to compel removal may be brought by the prosecuting attorney of the county in the name of the state, at the relation of an adjoining owner.⁶¹

Property sold with respect to plat. The owner of

50. Ohio.—Dinninger v. Village of Plymouth, 52 N.E.2d 865, 72 Ohio App. 469.

Or.—Lowell v. Pendleton Auto Co., 261 P. 415, 123 Or. 383—Baines v. Marshfield, etc., R. Co., 124 P. 672, 62 Or. 510.

Annual carnival

Mere fact that carnival operates only three or four days a year does not preclude injunctive relief.—Brough v. Ute Stampede Ass'n, 142 P. 2d 670, 105 Utah 446.

51. Wis.—Whitehead & Matheson Co. v. Jensen, 233 N.W. 546, 203 Wis. 12.

52. N.Y.—Tompkins v. City of New York, 254 N.Y.S. 209, 234 App.Div. 79, affirmed 184 N.E. 72, 260 N.Y. 513—Carpenter v. City of Buffalo, 244 N.Y.S. 224, 137 Misc. 618, affirmed 249 N.Y.S. 929, 232 App.Div. 868.

53. Utah.—Hague v. Juab County Mill, etc., Co., 107 P. 249, 37 Utah 290.

Injunctive relief against vacation of street see supra § 1675.

Invalid vacation

An invalid ordinance, passed after commencement of suit, purporting to vacate a public way was not a defense to suit by owner to enjoin obstructing travel.—Pederson v. Town of Radcliffe, 284 N.W. 145, 226 Iowa 166.

54. Miss.—Shoemaker v. Coleman, 47 So. 649, 94 Miss. 619.

55. W.Va.—Sommerville v. Carpenter, 157 S.E. 160, 110 W.Va. 167.

56. Pa.—Edwards v. Pittsburg Junction R. Co., 64 A. 798, 215 Pa. 597, 44 C.J. p. 968 note 65.

57. Tex.—Grace v. Walker, 64 S.W. 930, 65 S.W. 482, 95 Tex. 39.

58. U.S.—Fechheimer v. Lakenan, D.C. Mo., 2 F.Supp. 785, affirmed, C.C.A., Klaber v. Lakenan, 64 F.2d 86, 90 A.L.R. 783.

Ark.—Langford v. Griffin, 17 S.W.2d 296, 179 Ark. 574.

Cal.—Baldocchi v. Four Fifty Sutter Corporation, 18 P.2d 682, 129 Cal. App. 383.

Md.—Huebschmann v. Grand Co., 173 A. 227, 166 Md. 615.

N.Y.—Riker Operating Co. v. Martinique Restaurant, 42 N.Y.S.2d 559, 266 App.Div. 487.

R.I.—Trafton v. Downey, 151 A. 4, 61 R.I. 87.

S.C.—Brown v. Hendricks, 45 S.E.2d 603, 211 S.C. 395.

Wash.—Anderson v. Nichols, 278 P. 161, 152 Wash. 315—Denman v. Mattson, 268 P. 1045, 148 Wash. 321.

W.Va.—Sommerville v. Carpenter, 157 S.E. 160, 110 W.Va. 167.

44 C.J. p. 968 note 67.

Part of street vacated

Owners of abutting property on street had special interest entitling them to enjoin maintenance of obstruction on portion of street vacated.—Young v. Nichols, 278 P. 159, 152 Wash. 306.

Recession to building line

An adjoining property owner has the right to invoke the aid of equity to compel the recession of a building to the building line established by ordinance.—Colonial Federal Sav. & Loan Ass'n v. Porreca, 59 Pa. Dist. & Co. 163.

Customers waiting on sidewalk

An abutting owner's use of sidewalk as waiting place for his customers constituted a nuisance, against which adjoining owner specially injured by obstruction of entrances to his store was entitled to injunction.—Shamhart v. Morrison Cafeteria Co., 32 So.2d 727, 159 Fla. 629.

59. Ky.—Maxwell v. Fayette Nat. Bank, 217 S.W. 690, 186 Ky. 625, 44 C.J. p. 969 note 68.

60. Ark.—Langford v. Griffin, 17 S.W.2d 296, 179 Ark. 574, 44 C.J. p. 969 note 69.

61. Mo.—State v. Mulligan, 160 S.W. 9, 173 Mo.App. 718.

land sold with respect to a plat showing a street abutting the land has a private interest in the street authorizing him to maintain a suit to enjoin the obstruction or closing of the street,⁶² even though he may have other means of ingress or egress,⁶³ unless the circumstances are such that the street will be regarded as abandoned as between the parties to the suit.⁶⁴

Grade of street. The manner of a municipality's exercise of power to prescribe the grade of streets may not be directed by the courts at the suit of an abutting owner,⁶⁵ and an abutting owner has no constitutional right to enjoin the authorized alteration of the grade of a street, when such alteration will obstruct ingress to, and egress from, the owner's lot.⁶⁶

Municipal permission, authorizing an obstruction in the street interfering with an abutting owner's easement or rights in the street, has been held to be no defense.⁶⁷ However, it has been held that an abutting owner not owning the fee to the street cannot enjoin the construction of a railroad track in the street in front of his property by a railroad to which the municipality had granted a franchise to build such track.⁶⁸

b. Adequacy of Remedy at Law

An abutting owner may obtain injunctive relief against a street obstruction if, and only if, the remedy at law is not full, adequate, and complete.

Ordinarily an abutting owner is not entitled to injunctive relief where he has an adequate remedy at law.⁶⁹ However, where the circumstances are such that the remedy at law is not full, adequate, and complete, injunctive relief may be had.⁷⁰ So, where the continued use of the street will eventually ripen into a prescriptive right,⁷¹ or where the obstruction is such as to destroy the street or other way as such,⁷² the remedy by way of damages will not be regarded as full, adequate, and complete, and in such a case an abutting owner is not limited to an action for damages, although defendants are amply able to pay them.⁷³

c. Relative Convenience and Injury

The court may, in its discretion, refuse injunctive relief where the complainant's damages and injury are slight in comparison with the loss which the respondents would suffer if the relief prayed for were granted.

In accordance with the rules applicable in the case of injunctions generally, the court may, in its discretion, refuse injunctive relief where complainant's damages and injury are slight in comparison with the loss which respondents would suffer if the relief prayed for were granted,⁷⁴ although such cir-

62. Mo.—Bell v. Walkley, App., 27 S.W.2d 456.

N.Y.—Bode v. Park Hill Estates, 232 N.Y.S. 17, 133 Misc. 515.

N.C.—Gault v. Town of Lake Waccamaw, 158 S.E. 104, 200 N.C. 593.

Pa.—Dwyer v. Pastuszek, Com.Pl., 29 Del.Co. 244.

44 C.J. p 969 note 71.

63. Mo.—Bell v. Walkley, App., 27 S.W.2d 456.

N.Y.—Bode v. Park Hill Estates, 232 N.Y.S. 17, 133 Misc. 515.

64. Va.—Chapin v. Lake, 82 S.E. 89, 116 Va. 364.

65. Ala.—Branyon v. Kirk, 191 So. 345, 238 Ala. 321.

66. Fla.—Gold v. City of Tampa, 130 So. 914, 100 Fla. 1134.

Restraining making of improvements generally see supra § 1137.

Abatement of sidewalk differential

An adjoining property owner has no right to have a differential in levels of a sidewalk abated as a nuisance obstructing the proper use of his property, or for damages, except as provided by constitutional provisions governing taking of property by eminent domain.—Branyon v. Kirk, 191 So. 345, 238 Ala. 321.

67. U.S.—Klaber v. Lakenan, C.C. A.Mo., 64 F.2d 86, 90 A.L.R. 783.

Md.—Huebschmann v. Grand Co., 172 A. 227, 166 Md. 615.

Or.—Lowell v. Pendleton Auto Co., 261 P. 415, 123 Or. 383.

Rights of abutting owner as against use of street by others under grant or permit see supra § 1708 c.

68. Tex.—Guenther v. Thompson, Civ.App., 199 S.W.2d 710.

Grant of right to railroad to use streets see infra § 1726.

69. Ala.—Russell v. Holderness, 112 So. 309, 216 Ala. 95.

Ill.—Calumet Federal Savings & Loan Ass'n of Chicago v. City of Chicago, 29 N.E.2d 292, 306 Ill. App. 524.

Tex.—Smiley v. City of Graham, Civ. App., 37 S.W.2d 289, error dismissed.

Wis.—Randall v. City of Milwaukee, 249 N.W. 73, 212 Wis. 374.

44 C.J. p 969 note 74.

Interference with driveway construction

Property owner was not entitled to enjoin officers from interfering with him in driveway construction and altering grade, since his remedy, if injured by established grade, is an action for damages.—Wilmot v. City of Chicago, 160 N.E. 206, 328 Ill. 552, 62 A.L.R. 394.

70. Ala.—Valenzuela v. Sellers, 20 So.2d 469, 246 Ala. 329.

Md.—Huebschmann v. Grand Co., 172 A. 227, 166 Md. 615—Townsend, Grace & Co. v. Epstein, 49 A. 629, 93 Md. 557.

Or.—Lowell v. Pendleton Auto Co., 261 P. 415, 123 Or. 383—Bernard v. Willamette Box & Lumber Co., 129 P. 1039, 64 Or. 223.

Tex.—Quannah Acme & P. Ry. Co. v. Swearingen, Civ.App., 4 S.W.2d 136, error refused.

44 C.J. p 969 note 76.

Where mandamus and other remedies had been refused, abutting owner was entitled to injunctive relief.—Tompkins v. City of New York, 254 N.Y.S. 209, 234 App.Div. 79, affirmed 184 N.E. 72, 260 N.Y. 513.

71. Cal.—Lane v. San Diego Electric Ry. Co., 280 P. 109, 208 Cal. 29.

72. Ala.—Valenzuela v. Sellers, 20 So.2d 469, 246 Ala. 329.

44 C.J. p 969 note 75.

73. Cal.—Schaufele v. Doyle, 24 P. 834, 86 Cal. 107.

44 C.J. p 969 note 77.

74. U.S.—Beals v. City of Atlanta, C.C.A.Ga., 61 F.2d 439.

44 C.J. p 969 note 79.

Long delay and relative convenience and injury were held to warrant denial of equitable relief.—Barger v. City of Tekamah, 260 N.W. 366, 128 Neb. 805.

cumstances will not of necessity demand a denial of relief.⁷⁵

d. Laches and Estoppel

While it has been held that delay does not preclude injunctive relief in the case of a continuing nuisance, as a general rule an unreasonable delay in seeking injunctive relief may bar the right of the abutting owner.

While an abutting owner's suit for injunctive relief will not be precluded where it is brought within a reasonable time,⁷⁶ and although it has been held that delay does not preclude relief in the case of a continuing nuisance,⁷⁷ as a general rule an unreasonable delay in seeking injunctive relief may bar the right of the abutting owner.⁷⁸ Accordingly, it has been held that the abutting owner must act promptly before the construction which constitutes the obstruction is complete,⁷⁹ or before large sums of money have been expended,⁸⁰ although under such circumstances complainant has been held not chargeable with laches where defendant knew at all times that he was proceeding in violation of law.⁸¹ Laches cannot be imputed to one who has been justifiably ignorant of the facts creating his right or cause of action,⁸² and an abutter is not guilty of laches by reason of the fact that he did not commence an action until after the erection of the obstruction where, until its completion, he was not in a position to ascertain the amount of interference that would result therefrom.⁸³ The fact that an abutting owner has himself encroached on the street does not preclude his obtaining injunctive relief against others obstructing the street,⁸⁴ and the fact that an abutting owner has acquiesced in a partial use of the street by his tenant will not pre-

clude him from asserting his rights as against other persons closing or obstructing the street.⁸⁵ An abutter, however, cannot obtain injunctive relief where the obstruction is on his own land and was erected under a license or grant in writing.⁸⁶ Any complaint which the general public may have against an obstruction will not be heard in a court of equity when voiced only by an abutting owner who is estopped to complain on his own account.⁸⁷

Where a statute provides that no lapse of time can legalize a public nuisance amounting to an actual obstruction of public rights, the same doctrine applies to a suit for abatement brought by an abutting owner who has sustained special injuries from a public nuisance as to a suit brought by the public authorities.⁸⁸

§ 1715. — Proceedings and Relief

- a. In general
- b. Parties
- c. Pleadings
- d. Evidence
- e. Relief granted

a. In General

General rules governing the practice and procedure in suits for injunctions apply in a suit by an abutting owner specially injured to obtain injunctive relief against an unlawful use or obstruction of a street.

The general rules governing the practice and procedure in suits for injunctions, as discussed in Injunctions §§ 162-223, apply in a suit by an abutting owner specially injured to obtain injunctive relief

75. N.Y.—Stout v. C. Hiltibrant Dry Dock Co., 202 N.Y.S. 648, 207 App. Div. 503.

76. Ky.—Stratton, etc., Co. v. Meriwether, 150 S.W. 381, 150 Ky. 363. 44 C.J. p 969 note 83.

Laches held not shown
Wis.—Hayes v. Hoffman, 211 N.W. 271, 192 Wis. 63.
44 C.J. p 969 note 83 [a].

Merely silence as to rights of record does not work an estoppel.—Louis Sachs & Sons v. Ward, 35 A.2d 161, 182 Md. 385.

77. Or.—Lowell v. Pendleton Auto Co., 261 P. 415, 123 Or. 383.
44 C.J. p 969 note 84.

The doctrine of estoppel will not be applied to an unauthorized continuing obstruction in the absence of extraordinary and compelling equities.—Huebschmann v. Grand Co., 172 A. 227, 166 Md. 615.

78. Ill.—Hoskins v. Chicago Park Dist., 43 N.E.2d 546, 380 Ill. 78.

Neb.—Barger v. City of Tekamah, 260 N.W. 366, 128 Neb. 805.

Tex.—Smiley v. City of Graham, Civ. App., 37 S.W.2d 289, error dismissed.
44 C.J. p 969 note 82.

79. Utah.—Lewis v. Pingree Nat. Bank, 151 P. 558, 47 Utah 35, L.R. A.1916C 1260.
44 C.J. p 970 note 85.

80. U.S.—Lewis v. Pingree Nat. Bank, supra.
44 C.J. p 970 note 86.

Consent

Abutting owner who agreed to construction on street under ordinance and kept silent while builder spent large sums in erecting improvements relying on his consent was estopped to require removal of improvements and to claim damages.—Sigel v. Buccaneer Hotel Co., Tex.Civ.App., 40 S.W.2d 168, error refused.

81. Wis.—Hayes v. Hoffman, 211 N.W. 271, 192 Wis. 63.

82. Ky.—Jones v. Ramsey, 190 S.W. 2d 37, 300 Ky. 692.

83. N.Y.—Brown-Brand Realty Co. v. Saks, 214 N.Y.S. 230, 126 Misc. 336, affirmed 218 N.Y.S. 706, 218 App.Div. 827.

84. Ala.—Jordan v. McLeod, 127 So. 160, 220 Ala. 672.

Resident moving front fence nearer street, but replacing it at complaint of neighbors, may restrain another from moving his fence.—Catlett v. Nooe, 294 S.W. 1083, 220 Ky. 243.

85. Pa.—O'Donnell v. H. K. Porter Co., 86 A. 281, 238 Pa. 495.

86. Wis.—Walterman v. Village of Norwalk, 130 N.W. 479, 145 Wis. 663.

87. Tex.—Sigel v. Buccaneer Hotel Co., Civ.App., 40 S.W.2d 168, error refused.

88. Okl.—Siegenthaler v. Newton, 50 P.2d 192, 174 Okl. 216—Revard v. Hunt, 119 P. 589, 29 Okl. 835.

against an unlawful use or obstruction of a street.⁸⁹

b. Parties

Owners of property abutting on the street obstructed, whose rights, damages, and injuries are of the same kind, may join as plaintiffs, and no one need be joined as defendants other than the alleged trespassers.

Owners of property abutting on the street obstructed, whose rights, damages, and injuries are alleged to be of the same kind, differing only in degree, may join as plaintiffs,⁹⁰ and in an action to enjoin a municipal corporation from removing obstructions from the street claimed to be a private way, persons showing an interest in the subject matter of the suit should be permitted to be made parties defendant.⁹¹ Where an abutting owner sues an individual, he need not join the municipality as a party,⁹² and no one need be joined as defendant other than the alleged trespassers.⁹³ It has been held that nothing short of the grant of an express authority or license to maintain an alleged obstruction, knowing that as maintained it would be a nuisance, or actual participation by the municipality, will authorize injunctive relief against it.⁹⁴

89. Questions for trier of facts

(1) Ordinarily, the question whether the circumstances are such as to justify the issuance of an injunction presents a question of fact for determination by the trier of facts.—Valenzuela v. Sellers, 20 So. 2d 469, 246 Ala. 329.

(2) Where a jury trial may be had in an injunction case, in order to justify or require submitting an issue to the jury there must be sufficient evidence in support thereof.—Harlan v. Hawkins, Tex.Civ.App., 22 S.W.2d 479.

Finding in favor of plaintiff held required as matter of law

Ga.—Henderson v. Ezzard, 44 S.E.2d 397, 75 Ga.App. 724.

90. N.D.—Dunn v. Hughes, 211 N.W. 594, 54 N.D. 814.

44 C.J. p 970 note 93.

91. Ga.—Allen v. Mitchell, 85 S.E. 336, 143 Ga. 476.

92. Ga.—Dennis v. Howell, 139 S.E. 347, 164 Ga. 657.

La.—Howcott v. Ruddock-Orleans Cypress Co., 83 So. 586, 146 La. 318—Life v. Griffith, App., 197 So. 646.

Mo.—Frolichstein v. Cupples' Station Light, Heat & Power Co., 201 S.W. 897, 201 Mo.App. 162.

44 C.J. p 970 note 95.

93. U.S.—Hart v. Buckner, La., 54 F. 925, 5 C.C.A. 1.

44 C.J. p 970 note 96.

Grantors

In suit to enjoin the closing of

an alley on ground that public easement by prescription had been acquired, defendants' grantors, who conveyed property to defendants by warranty deed, would have been proper parties, but were not necessary parties.—Kirby v. City of Harrison, 148 S.W.2d 666, 202 Ark. 1.

94. Ala.—Florence v. Woodruff, 59 So. 435, 178 Ala. 137.

95. Ala.—Russell v. Holderness, 112 So. 309, 216 Ala. 95.
Ga.—City of Rome v. First Nat. Bank, 3 S.E.2d 653, 188 Ga. 279—Rosser v. Styron, 155 S.E. 23, 171 Ga. 238.

Md.—Metaxas v. Easton Pub. Co., 140 A. 603, 154 Md. 393.
44 C.J. p 970 note 99.

96. Ala.—McIntosh v. Moody, 153 So. 182, 228 Ala. 165.

Fla.—Robbins v. White, 42 So. 841, 52 Fla. 613.

Miss.—Panhandle Oil Co. v. Trigg, 114 So. 625, 148 Miss. 306.

Tenn.—Wright v. Nashville Gas & Heating Co., 194 S.W.2d 459, 183 Tenn. 594.

97. Ga.—City of Rome v. First Nat. Bank, 3 S.E.2d 653, 188 Ga. 279.

44 C.J. p 970 note 2.

Allegations held insufficient against special demurrer

Ga.—City of Rome v. First Nat. Bank, supra.

98. Ala.—Montgomery First Nat. Bank v. Tyson, 32 So. 144, 133 Ala. 459, 91 Am.S.R. 46, 59 L.R.A. 399.

c. Pleadings

The complaint must allege all facts necessary to entitle the complainant to an injunction, and matters of defense may and should be raised by proper answer.

In accordance with the rules applicable to injunctions generally, the bill or complaint must allege all the facts necessary to entitle complainant to an injunction,⁹⁵ as, for example, that plaintiff's injury is different in kind from that suffered by the general public,⁹⁶ or that the street or other way is a public one,⁹⁷ and it must allege the facts showing the obstruction⁹⁸ or threatened obstruction.⁹⁹ Where a complainant's right is dependent on ownership, the fact of ownership must be alleged.¹ If the complaint is not sufficiently definite in its statements as to special damages, objections thereto must be raised before trial.² Matters of defense may and should be raised by proper answer,³ and it has been held that the allegations of the answer will be liberally construed.⁴ The defense of laches is waived if it is not invoked by demurrer, plea, or answer.⁵

A special demurrer may be properly overruled when the grounds on which it is urged are not supported by the facts of the case.⁶

Cal.—Brown v. Rea, 88 P. 713, 150 Cal. 171.

Allegations held sufficient

N.D.—Dunn v. Hughes, 211 N.W. 594, 54 N.D. 814.

99. Cal.—Brown v. Rea, 88 P. 713, 150 Cal. 171.

44 C.J. p 970 note 4.

1. Ala.—McIntosh v. Moody, 153 So. 182, 228 Ala. 165.

44 C.J. p 970 note 5.

Allegations held sufficient

Averment that complainants are owners and in possession of lot and building abutting on street at point where public nuisance is maintained was sufficient allegation of ownership as against demurrer challenging averment as being simply conclusion of pleader.—McIntosh v. Moody, supra.

2. N.Y.—Callanan v. Gillman, 14 N. E. 264, 107 N.Y. 360, 1 Am.S.R. 831.

3. Validity of complainant's title

Questions whether mortgage under which complainants claimed title to property was not validly foreclosed, and whether complainants are not in fact owners of abutting property, if material to issue, should be raised by proper answer.—McIntosh v. Moody, 153 So. 182, 228 Ala. 165.

4. Wash.—Shaw v. City of Yakima, 48 P.2d 630, 183 Wash. 200.

5. Ill.—Stejenka v. National Beverage Co., 230 Ill.App. 27.

6. Ga.—City of Rome v. First Nat. Bank, 3 S.E.2d 653, 188 Ga. 279.

Issues. Issues not essential to the proper disposition of the case need not be considered.⁷ Where defendants answer that they propose to, and will, exclude plaintiff from a street, the action cannot be dismissed on the ground that no obstruction is threatened, although defendant testifies that he intends to do nothing illegal.⁸

Variance. The fact that the bill alleged several grounds of special injury, while the proof established only one, does not constitute a variance.⁹

Evidence admissible under pleadings. Under a general denial defendants may offer in evidence a deed of vacation purporting to vacate the street alleged to be obstructed to disprove an allegation that the street was a highway.¹⁰ Testimony that defendants did not intend to dedicate that portion of the street alleged to be obstructed is inadmissible where such a defense is not set forth in the pleadings.¹¹

d. Evidence

The complainant has the burden of proving all facts necessary to entitle him to relief, including special injuries, although the circumstances may be such that

special injury may be presumed. General rules apply in determining the weight and sufficiency of evidence.

Complainant has the burden of proving all facts necessary to entitle him to relief,¹² including the fact of encroachment or obstruction.¹³ Relief against obstruction of a public street cannot be granted without proof that it is a public street.¹⁴ Under general rules as to presumptions, while the circumstances may be such that special injury may be presumed,¹⁵ ordinarily it is incumbent on complainant to sustain an allegation of special damages.¹⁶ In the absence of evidence to the contrary, it will be presumed that permits were duly obtained for the erection of minor privileges in the street.¹⁷

General rules apply in determining the weight and sufficiency of evidence.¹⁸ In a suit by an abutting owner to compel removal of an obstruction from a street or highway, the fact that the place is a street or highway need be proved only by a preponderance of the evidence.¹⁹

e. Relief Granted

The relief granted should be consistent with the theory of the bill as established by the proofs and in accordance with the law applicable thereto, and, if an

7. Md.—Metaxas v. Eastern Pub. Co., 140 A. 603, 154 Md. 393.

8. Wash.—Humphrey v. Krutz, 137 P. 806, 77 Wash. 152.

9. Ala.—First Nat. Bank v. Tyson, 39 So. 560, 144 Ala. 457.

10. Colo.—Gromer v. Papke, 207 P. 862, 71 Colo. 440.

11. Or.—Portland v. Miller, 143 P. 1006, 72 Or. 317.

12. Md.—Louis Sachs & Sons v. Ward, 35 A.2d 161, 182 Md. 385.
Mich.—City of Howell v. McKeever, 225 N.W. 884, 247 Mich. 435.

Evidence admissible under pleadings see supra subsection c of this section.

Defense of adverse possession

While plaintiff had burden of proving in the first instance that defendants were trespassers in the street or alley, burden shifted when defense of adverse possession was raised.—Louis Sachs & Sons v. Ward, 35 A.2d 161, 182 Md. 385.

13. N.Y.—Parsons v. Rye, 140 N.Y. S. 961.

44 C.J. p 971 note 16.

14. N.C.—McLeod v. Town of Wrightsville Beach, 50 S.E.2d 729, 229 N.C. 621.

44 C.J. p 971 note 17.

Use by public for prescriptive period

Mich.—City of Howell v. McKeever, 225 N.W. 884, 247 Mich. 435.

15. Kan.—Highbarger v. Milford, 80 P. 633, 71 Kan. 331.

44 C.J. p 971 note 13.

16. Iowa.—Lytle Inv. Co. v. Gilman, 206 N.W. 108, 201 Iowa 603.

17. Md.—Baltimore City v. Nirdlinger, 102 A. 1014, 131 Md. 600.

18. Ala.—Wheelless v. Burns, 123 So. 25, 219 Ala. 621.

Evidence held sufficient

(1) To warrant injunction.

Ala.—Valenzuela v. Sellers, 20 So. 2d 469, 246 Ala. 329.

Ga.—City of Marietta v. Mozley, 190 S.E. 34, 183 Ga. 875.

Ky.—Jones v. Ramsey, 190 S.W.2d 37, 300 Ky. 692.

Okl.—Coffeyville Vitriified Brick & Tile Co. v. Archer, 288 P. 479, 143 Okl. 270.

Pa.—Commonwealth Trust Co. v. Heh, 99 Pa.Super. 479.

Utah.—Brough v. Ute Stampede Ass'n, 142 P.2d 670, 105 Utah 446.

(2) To show special damage or injury.

Ala.—Nashville, C. & St. L. Ry. Co. v. Hulan, 121 So. 62, 219 Ala. 56.

Cal.—McGinn v. State Board of Harbor Com'rs, 299 P. 100, 113 Cal. App. 695.

Or.—Lowell v. Pendleton Auto Co., 261 P. 415, 123 Or. 383.

(3) To support particular findings.
Cal.—Baldocchi v. Four Fifty Sutter Corporation, 18 P.2d 682, 129 Cal. App. 383.

Ill.—Calumet Federal Savings & Loan Ass'n of Chicago v. City of Chicago, 29 N.E.2d 292, 306 Ill.App. 524.

Iowa.—Pederson v. Town of Radcliffe, 284 N.W. 145, 226 Iowa 166.

Ky.—Jones v. Ramsey, 190 S.W.2d 37, 300 Ky. 692—Williams v. Bryant, 184 S.W.2d 976, 299 Ky. 214—Morrow v. Richardson, 128 S.W.2d 560, 278 Ky. 233.

Ohio.—City of Gallipolis v. Gallia County Fair Co., 170 N.E. 174, 34 Ohio App. 116.

Wash.—Denman v. City of Tacoma, 268 P. 1043, 148 Wash. 314.

44 C.J. p 971 note 19 [a].

Evidence held insufficient

(1) To warrant granting injunction.

Ala.—Wheelless v. Burns, 123 So. 25, 219 Ala. 621.

Ark.—Lincoln v. McGehee Hotel Co., 29 S.W.2d 668, 181 Ark. 1117.

Md.—Feldman v. Stoltz, 144 A. 494, 156 Md. 521.

(2) To require finding that land was public street or alley.—Raines v. Petty, 152 S.E. 44, 170 Ga. 53.

(3) To show public's prescriptive right in way.—City of Howell v. McKeever, 225 N.W. 884, 247 Mich. 435.

(4) To support finding that defendants wholly prevented plaintiff from access to premises.—Fanroth v. Byrne, 189 N.E. 641, 252 N.Y. 447.

(5) To show or support findings as to other matters.—Lane v. San Diego Electric Ry. Co., 280 P. 109, 208 Cal. 29—44 C.J. p 971 note 19 [b].

19. Or.—Bernard v. Willamette Box, etc., Co., 129 P. 1039, 64 Or. 223.

Injunction is granted, it should be directed against only those acts which are illegal and cause some material injury to the complainant.

The relief granted should be consistent with the theory of the bill as established by the proofs,²⁰ and in accordance with the law applicable thereto,²¹ and, if an injunction is granted, it should be directed against only those acts which are illegal,²² and cause some material injury to complainant.²³ The court may award damages without dismissing the bill, although injunctive relief is denied.²⁴ Conversely, a waiver of plaintiff's right to permanent damages does not preclude injunctive relief.²⁵ A plaintiff may not complain where the relief granted sufficiently protects his personal and property rights.²⁶ A decree certain in its terms is not unenforceable for uncertainty because it involves the making of easily ascertainable measurements.²⁷ A judgment directing the abatement of a nuisance consisting of projections of buildings into the street, rendered against a person no longer the owner of the buildings or having any rights in the premises, is ineffectual.²⁸ Where, after the decree is rendered, a state of facts arises which renders the maintenance of the obstruction lawful, the decree may be declared to be no longer binding.²⁹

Preliminary injunction. An interlocutory or preliminary injunction may be granted before a hearing on the merits in order to prevent a further per-

petration of wrong or the doing of any act whereby the right in controversy may be materially injured or endangered.³⁰ Where complainant's title papers show his right to a passageway of a certain width, a preliminary injunction against the erection of a permanent structure depriving complainant of a portion of such way should be continued until the final hearing, notwithstanding defendant would proceed with the construction at his peril.³¹ Where the abutter sues to enjoin an obstruction to an alleyway leading into his property, whereby he is deprived of ingress and egress, a temporary restraining order will not issue where he has been provided with a temporary entrance.³²

Compliance with decree. A judgment directing the removal of a building constituting an obstruction to an alleyway is not complied with by merely opening a passage through the lower story of the building, leaving the second story intact and extending across the way.³³

Mandatory injunction. In the absence of a statute otherwise providing,³⁴ relief, if necessary, may be by mandatory injunction.³⁵

Suit at law to test title. Where it appears that the final determination of the rights of the parties in the suit for injunction will be based largely on the merits of their respective antagonistic titles, plaintiff may be required to bring a suit at law to test title.³⁶

11. GRANT OF RIGHT TO USE STREETS

§ 1716. Power to Grant

Generally grants of rights to use the streets may be given to individuals as well as to corporations.

Generally grants of rights to use the streets may be given to individuals as well as to corporations.³⁷ The validity of a grant to use the streets is not af-

20. Tex.—American Constr. Co. v. Seelig, Civ.App., 131 S.W. 655, affirmed 133 S.W. 429, 104 Tex. 16. 44 C.J. p 971 note 21.

21. Ala.—Branyon v. Kirk, 191 So. 345, 238 Ala. 321.

22. **Parking incident to travel**, not in violation of city ordinances or state laws, should not be restrained. —Lowell v. Pendleton Auto Co., 261 P. 415, 123 Or. 383.

23. Cal.—Baldocchi v. Four Fifty Sutter Corporation, 18 P.2d 682, 129 Cal.App. 383.

24. Ala.—Folmar Mercantile Co. v. Luverne, 83 So. 107, 203 Ala. 363.

25. Ga.—Hendricks v. Jackson, 84 S.E. 440, 143 Ga. 106. 44 C.J. p 971 note 23.

26. Wash.—Ostant v. Pacific Grocery Co., 200 P. 1032, 117 Wash. 103.

44 C.J. p 971 note 24.

Removal of canopy, except for certain hours during night, was direct-

ed.—Riker Operating Co. v. Martini-que Restaurant, 42 N.Y.S.2d 559, 266 App.Div. 487.

27. Utah.—Hague v. Juab County Mill, etc., Co., 107 P. 249, 37 Utah 290.

28. N.Y.—Ackerman v. True, 105 N.Y.S. 12, 120 App.Div. 172.

29. Ga.—Marietta Chair Co. v. Henderson, 49 S.E. 312, 121 Ga. 399, 104 Am.S.R. 156.

30. Md.—Metaxas v. Easton Pub. Co., 140 A. 603, 154 Md. 393.

Relative convenience and injury
In suit for temporary mandatory injunction compelling respondents to remove obstructions placed in street where less inconvenience, annoyance, and damage would result to respondents by maintaining the status ante litem motam than would be caused by refusing temporary injunction, granting a temporary mandatory injunction was not an abuse of discre-

tion.—Coffey v. Edgill, Ala., 39 So.2d 223.

31. Pa.—Provost v. Davidowitz, 69 Pa.Super. 429.

32. N.C.—Crawford v. Marion, 69 S.E. 763, 154 N.C. 73, 35 L.R.A., N.S., 193.

33. N.C.—Croom v. Groves, 104 S.E. 173, 180 N.C. 134.

34. **Order held not erroneous as grant of mandatory injunction in violation of statute.**—Rosser v. Styron, 155 S.E. 23, 171 Ga. 238—44 C.J. p 966 note 44 [a].

35. U.S.—George W. Armbruster, Jr., Inc., v. City of Wildwood, D.C. N.J., 41 F.2d 823.

Abutter not required to seek mandatory injunction
La.—Life v. Griffith, App., 197 So. 646.

36. Md.—Metaxas v. Easton Pub. Co., 140 A. 603, 154 Md. 393.

37. Mich.—Citizens' Electric Light,

fectured by the fact that the exercise of such right may impose an additional burden on the fee of the streets, since, if such burden is imposed, the person exercising the franchise may be required to pay damages therefor.³⁸

§ 1717. — Power of State

- a. In general
- b. Delegation

a. In General

Within constitutional limitations a franchise to use the streets of a municipal corporation can be granted only by the state legislature or its duly authorized agent.

In accordance with the usual rule respecting power to grant franchises, and in the absence of constitutional provisions providing otherwise, the state has jurisdiction to grant rights or franchises to use the streets of a municipal corporation.³⁹ Within constitutional limitations a franchise to use the streets can be granted only by the state legislature or its duly authorized agent,⁴⁰ and the state legislature has the paramount and plenary power to declare the purposes to which streets may be appropriated.⁴¹ In the exercise of its power it may allow barriers, such as tollgates, to be erected on the streets.⁴²

b. Delegation

The state may delegate its power to grant franchises to use the streets to a municipal corporation, and it may

prescribe the terms under which such power shall be exercised.

The state may delegate its power to grant franchises to use the streets to a municipal corporation,⁴³ and it may prescribe the terms under which such power shall be exercised;⁴⁴ but delegation will not be presumed where such an implication can be avoided.⁴⁵ When such a grant has been made by the legislature, it may delegate to the municipality the power to regulate the maintenance of the privilege.⁴⁶

Revocation. The state may withdraw from a municipality delegated power to grant use of its streets and redelegate such power to another agency.⁴⁷ The withdrawal of such power previously conferred will not be presumed in the absence of a clearly expressed intent,⁴⁸ and whether or not such power has been withdrawn from a municipality and re-delegated to another agency in any particular instance will depend on the particular facts and statutory provisions involved.⁴⁹

§ 1718. — Power of Municipality

- a. In general
- b. Delegation

a. In General

A municipal corporation has no inherent power to grant franchises or privileges to use its streets, but such power may be conferred on it by charter, statutory, or constitutional provisions.

etc., *Co. v. Sands*, 55 N.W. 452, 95 Mich. 551, 20 L.R.A. 411.

38. *Tenn.—Patton v. Chattanooga*, 65 S.W. 414, 108 Tenn. 197.

39. *U.S.—City of Roswell, N. M., v. Mountain States Telephone & Telegraph Co.*, C.C.A.N.M., 78 F.2d 379.

Mich.—City of Niles v. Michigan Gas & Electric Co., 262 N.W. 900, 273 Mich. 255.

N.Y.—Green v. Miller, 162 N.E. 593, 249 N.Y. 88.

Wis.—Wisconsin Telephone Co. v. City of Milwaukee, 270 N.W. 336, 223 Wis. 251.

43 C.J. p 285 note 12.

Power of state legislature to grant franchises generally see *Franchises* § 14.

Grant of franchise to another city

Legislature's authority over highways is sufficient to warrant it in granting franchise to city to use streets of another city.—*City of Los Angeles v. City of Southgate*, 291 P. 654, 108 Cal.App. 398.

40. *Ala.—City of Mobile v. Farrell*, 158 So. 539, 229 Ala. 582, followed in *City of Mobile v. Nelson*, 158 So. 543, 229 Ala. 587 and *City of Mo-*

bile v. Mouraites, 158 So. 543, 229 Ala. 588.

N.Y.—Penn-York Natural Gas Corporation v. Maltbie, 299 N.Y.S. 1004, 164 Misc. 569.

44 C.J. p 972 note 36.

41. *S.C.—Chapman v. Greenville Chamber of Commerce*, 120 S.E. 584, 127 S.C. 173.

44 C.J. p 972 note 37.

Power of state to control and regulate streets see *supra* § 1686.

As long as private rights are not invaded, legislative authority may permit use of public streets for any purpose not incompatible with object for which they were established.—*Ferguson Coal Co. v. Thompson*, 174 N.E. 896, 343 Ill. 20.

42. *Or.—Milarkey v. Foster*, 6 Or. 378, 25 Am.R. 531.

Pa.—Stormfeltz v. Manor Turnp. Co., 13 Pa. 555.

43. *U.S.—City of Roswell, N. M., v. Mountain States Telephone & Telegraph Co.*, C.C.A.N.M., 78 F.2d 379.

Mich.—City of Niles v. Michigan Gas & Electric Co., 262 N.W. 900, 273 Mich. 255.

N.Y.—Green v. Miller, 162 N.E. 593, 249 N.Y. 88—*Blanshard v. City of New York*, 253 N.Y.S. 419, 141 Misc.

609, affirmed 257 N.Y.S. 973, 236 App.Div. 663, affirmed 186 N.E. 29, 262 N.Y. 5.

44 C.J. p 972 note 39—43 C.J. p 286 note 15.

44. *N.J.—Eastern Tel., etc., Co. v. Public Utility Comrs. Board*, 89 A. 924, 85 N.J.Law 511, affirmed 93 A. 1084, 87 N.J.Law 318, 319

N.Y.—Blanshard v. City of New York, 253 N.Y.S. 419, 141 Misc. 609, affirmed 257 N.Y.S. 973, 236 App.Div. 663, affirmed 186 N.E. 29, 262 N.Y. 5.

45. *N.Y.—People v. New York R. Co.*, 112 N.E. 49, 217 N.Y. 310.

44 C.J. p 973 note 41.

46. *N.Y.—Schuster v. Forty-Second St., etc., R. Co.*, 85 N.E. 670, 192 N. Y. 403.

47. *Mass.—Cambridge v. Boston El. R. Co.*, 135 N.E. 313, 241 Mass. 374.

44 C.J. p 973 note 43.

48. *Wis.—State v. Milwaukee Electric R., etc., Co.*, 172 N.W. 230, 169 Wis. 183.

49. *Ind.—Central Union Tel. Co. v. Indianapolis Tel. Co.*, 126 N.E. 628, 189 Ind. 210.

44 C.J. p 973 note 45.

Strictly speaking, a municipal corporation has no inherent power to grant franchises or privileges to use its streets, but the power must be derived from the constitution or from the state legislature.⁵⁰ Ordinarily, under charter, statutory, or constitutional provisions a municipality has power to authorize any proper use of its streets,⁵¹ provided they have been opened.⁵² The extent of its power will depend primarily on the terms of the grant,⁵³ which may delegate a broad discretion⁵⁴ or may retain a supervisory power in the state,⁵⁵ and the municipality cannot exceed the limits of the power granted.⁵⁶ A grant by the municipality cannot bind the state beyond the authority granted to the city.⁵⁷ A municipal grant made without authority is void,⁵⁸ although a franchise so granted may amount to a license.⁵⁹ Another municipality may be granted the right to use streets,⁶⁰ unless the statute restricts the

power of the municipality to grant the use of streets to individuals or private corporations.⁶¹

In granting rights to use the streets a municipality acts as a governmental agency of the state and not in its private or proprietary capacity,⁶² and is exercising legislative rather than contractual powers.⁶³ Its officials are not bound by the votes of the municipality in respect thereof.⁶⁴ Where the power is vested in the municipal authorities to grant a right to use the streets, its exercise cannot be defeated or restrained by considerations of policy or expediency or mere regard for the wishes and preferences of property owners.⁶⁵

Construction of provisions. In determining the authority of a city to grant the use of its streets, the various charter or statutory provisions pertaining to the subject will be construed together.⁶⁶

50. U.S.—Continental Illinois Nat. Bank & Trust Co. of Chicago v. City of Middlesboro, C.C.A. Ky., 109 F.2d 960—City of Roswell, N. M. v. Mountain States Telephone & Telegraph Co., C.C.A.N.M., 78 F.2d 379.
- Ala.—Phenix City v. Alabama Power Co., 195 So. 894, 239 Ala. 547—*Corpus Juris* cited in City of Birmingham v. Holt, 194 So. 538, 239 Ala. 248.
- Ky.—Frederick v. City of Louisville, 212 S.W.2d 267, 307 Ky. 740.
- Ohio.—City of Cincinnati ex rel. Ott v. Union Gas & Electric Co., 195 N.E. 488, 49 Ohio App. 166.
- 44 C.J. p 973 note 48.
- Power of municipality to grant franchises generally see supra § 1082.
- Right to authorize abutting owner to encroach on street see supra § 1708.

Lease

- In the absence of legislative authority a city is without power to lease its streets—City of Pella v. Fowler, 244 N.W. 734, 215 Iowa 90.
51. Ala.—City of Birmingham v. Hood-McPherson Realty Co., 172 So. 114, 233 Ala. 352, 108 A.L.R. 1140.
- Cal.—Salinas v. Pacific Tel. & Tel. Co., 164 P.2d 905, 72 Cal.App.2d 494.
- Mo.—State ex inf. McKittrick, ex rel. City of Springfield v. Springfield City Water Co., 131 S.W.2d 525, 345 Mo. 6.
- 43 C.J. p 286 note 15—44 C.J. p 974 note 50.
- Power of municipality to control and regulate streets see supra § 1687.
- Power to grant use of streets to public utilities see infra § 1726.
52. Kan.—Wichita, etc., R. Co. v. Fechheimer, 12 P. 362, 36 Kan. 45.
- 44 C.J. p 974 note 51.
53. Del.—Eastern Shore Public Service Co. v. Town of Seaford, 2

- A.2d 265, 23 Del.Ch. 199, appeal dismissed 59 S.Ct. 483, 306 U.S. 616, 83 L.Ed. 1024, rehearing denied 59 S.Ct. 589, 306 U.S. 668, 83 L.Ed. 1063.
- 44 C.J. p 974 note 52
54. Ala.—City of Mobile v. Farrell, 158 So. 539, 229 Ala. 582, followed in City of Mobile v. Nelson, 158 So. 543, 229 Ala. 587 and City of Mobile v. Mouraites, 158 So. 543, 229 Ala. 588.
- 44 C.J. p 974 note 53.
55. Ind.—Winfield v. Public Service Commission, 118 N.E. 531, 187 Ind. 53.
- 44 C.J. p 974 note 54.
56. Tex.—Terrell v. Terrell Electric Light Co., Civ.App., 187 S.W. 966.
- 44 C.J. p 974 note 55.
- Charter prohibition**
- An ordinance purporting to authorize peddlers in city to sell and display Christmas trees, holiday decorations, and toys on sidewalks during December is violative of charter prohibition against enactment of local laws authorizing encroachment or obstruction of streets or sidewalks—People, on Complaint of McLees v. Berner, 10 N.Y.S.2d 339, 170 Misc. 501.
57. Ind.—Winfield v. Public Service Commission, 118 N.E. 531, 187 Ind. 53.
58. N.J.—Hill Dredging Co. v. Ventnor City, 78 A. 677, 77 N.J.Eq. 467.
- 44 C.J. p 974 note 62.
59. Iowa.—State v. Des Moines City R. Co., 140 N.W. 437, 159 Iowa 259.
- 44 C.J. p 974 note 63.
60. Ill.—Berwynd v. Berglund, 99 N.E. 705, 255 Ill. 498.
- 44 C.J. p 975 note 67.
61. Iowa.—Central States Electric Co. v. Incorporated Town of Randall, 297 N.W. 804, 230 Iowa 376.
- Use for operation of public utility see infra § 1726 a.

62. Mo.—State ex inf. McKittrick, ex rel. City of Springfield v. Springfield City Water Co., 131 S.W.2d 525, 345 Mo. 6—State on Inf. of Jones v. West End Light & Power Co., 152 S.W. 67, 246 Mo. 618.
- Tenn.—Kentucky-Tennessee Light & Power Co. v. City of Paris, 114 S.W.2d 815, 173 Tenn. 123, 118 A.L.R. 1025
- 44 C.J. p 974 note 64.
63. Ill.—People v. Commonwealth Edison Co., 32 N.E.2d 902, 376 Ill. 70.
- Ky.—Hatcher v. Kentucky & West Virginia Power Co., 133 S.W.2d 910, 280 Ky. 583—Groover v. City of Irvine, 300 S.W. 904, 222 Ky. 366
- N.Y.—Village of Bronxville v. Maltbie, 30 N.E.2d 475, 284 N.Y. 206—Greenberg v. O'Brien, 269 N.Y.S. 458, 149 Misc. 866.
- 44 C.J. p 975 note 65.
64. Mass.—Southborough v. Boston, etc., R. Co., 145 N.E. 422, 250 Mass. 234.
65. Md.—Jeffers v. Annapolis, 68 A. 361, additional opinion 68 A. 553, 107 Md. 268.
66. Minn.—City of St. Paul v. Twin City Motor Bus Co., 250 N.W. 572, 189 Minn. 612.
- Tenn.—Franklin Light & Power Co. v. Southern Cities Power Co., 47 S.W.2d 86, 164 Tenn. 171.
- Right of way**
- In interpreting provision of charter of city granting common council authority to grant right of way that may be necessary to private utilities, court assumed that the term "right of way" was used in same legal sense as it had been used in earlier provision of same section with respect to railroad companies and street railroad companies.—Continental Illinois Nat. Bank & Trust

Powers given a municipal corporation, to grant the use of its streets, by statute⁶⁷ or charter⁶⁸ will be strictly construed; and, when such powers are enumerated, all powers not enumerated are excluded.⁶⁹ On the other hand, it has been held that the constitutional restrictions on the powers of the municipal council and the method in which they shall be exercised are to be strictly construed.⁷⁰

b. Delegation

A municipal corporation having the power to grant the use of its streets cannot delegate such power to others, but it may delegate the exercise of administrative details, and it may delegate to particular boards or offices a reasonable discretion to grant or refuse permits to use the streets.

A municipal corporation having the power to grant the use of its streets cannot delegate such power to others;⁷¹ nor can it alienate the streets,⁷² or abdicate its power over them.⁷³ It may, however, delegate the exercise of administrative details,⁷⁴ or confer on a different body the right to grant the use of its streets as to matters of more than local concern.⁷⁵

Ordinances delegating to particular boards or officers an uncontrolled discretion to grant or refuse permits to use the streets have been held void as an unauthorized delegation of municipal power,⁷⁶ but the validity of ordinances which delegate to

particular boards or officers a reasonable discretion to grant or refuse permits has been upheld.⁷⁷ The action of the authorities in granting or refusing permits for the use of the street must be reasonable, and not arbitrary, or governed by whim or caprice.⁷⁸

§ 1719. — Power of Boards

The legislature has the power to authorize a board of municipal officers to permit or license any use of streets which the legislature could itself authorize by statute.

The legislature has the power to authorize a board of municipal officers to permit or license any use of streets which the legislature could itself authorize by statute.⁷⁹ Under charter and statutory provisions the power to grant the right to use certain streets may be vested jointly in two different boards or officials,⁸⁰ or the power may be divided according to the nature of the use involved.⁸¹ Where the grant or license must come from a particular board or officer, a grant or license by others does not constitute legal authority,⁸² and it is immaterial that such unauthorized licenses may have been given customarily and acted on.⁸³

The extent of the power of the board is dependent on the terms of the statute.⁸⁴ A board's authority will include incidental powers necessarily

Co. of Chicago v. City of Middleboro, C.C.A.Ky., 109 F.2d 960.

67. Ky.—Frederick v. City of Louisville, 212 S.W.2d 267, 307 Ky. 740 —Eastern Kentucky Home Tel. Co. v. Hatcher, 179 S.W. 7, 166 Ky. 176.

68. Cal.—San Diego v. Kerckhoff, 193 P. 801, 49 Cal.App. 473.

69. Cal.—San Diego v. Kerckhoff, supra.

Ga.—Savannah v. Markowitz, 118 S.E. 558, 155 Ga. 870.

70. Va.—Victoria v. Victoria Ice, etc., Co., 114 S.E. 89, 134 Va. 124.

71. Ill.—Sullivan v. Cloe, 115 N.E. 185, 277 Ill. 56.

44 C.J. p 975 note 72.

72. Ky.—Frederick v. City of Louisville, 212 S.W.2d 267, 307 Ky. 740.

73. Cal.—St. Helena v. San Francisco, etc., R. Co., 140 P. 600, 24 Cal.App. 71, 74.

44 C.J. p 975 note 74.

74. Ill.—Chicago, etc., R. Co. v. Dunbar, 100 Ill. 110.

44 C.J. p 975 note 75.

75. Cal.—Van de Water v. Pridham, 164 P. 1136, 33 Cal.App. 252.

44 C.J. p 975 note 76.

76. W.Va.—Lynch v. North View, 81 S.E. 833, 78 W.Va. 609, 52 L.R.A.N.S., 1038.

44 C.J. p 975 notes 78, 80.

77. Cal.—Ex parte Graham, 269 P. 183, 93 Cal App. 88.

Me.—Chapman v. City of Portland, 160 A. 913, 131 Me. 242.

44 C.J. p 975 note 79.

78. N.Y.—People v. Atwell, 188 N.Y.S. 803, 197 App.Div. 225, affirmed 133 N.E. 364, 232 N.Y. 96.

44 C.J. p 975 note 81.

79. Mass.—In re Opinion of Justices, 95 N.E. 930, 208 Mass. 625.

Streets leading to public parks

Where no private rights are involved, the legislature may authorize the transfer to the board of park commissioners of the control of streets leading to public parks for the purpose of improvements.—Chicago v. Pittsburg, C. C. & St. L. R. Co., 89 N.E. 648, 242 Ill. 30.

Temporary tramways over streets

The legislature has power to delegate to rapid transit commissioners the authority to permit a contractor acting under a contract made in pursuance of the rapid transit act to construct, over the surface of streets, temporary tramways to be used for the transportation of materials.—Turl v. New York Contracting Co., 93 N.Y.S. 1103, 46 Misc. 164.

Board of estimate and apportionment may be delegated by the leg-

islature with power to grant franchises.—Wilcox v. McClellan, 77 N.E. 986, 185 N.Y. 9.

80. N.Y.—Sheehy v. Clausen, 55 N.Y.S. 1000, 26 Misc. 269, affirmed 59 N.Y.S. 1114, 42 App.Div. 622.

44 C.J. p 975 note 86.

81. Ill.—Chicago City R. Co. v. South Park Com'rs, 101 N.E. 201, 257 Ill. 602.

44 C.J. p 976 note 87.

Minor privilege

Right to construct extension to theater building in bed of adjoining public way was held a "minor privilege," not "franchise;" hence, if right could be granted at all, it could be granted by board of estimates rather than by mayor and city council.—Huebschmann v. Grand Co., 172 A. 227, 166 Md. 615.

82. Cal.—Western States Gas, etc., Co. v. Bayside Lumber Co., 187 P. 735, 182 Cal. 140.

44 C.J. p 976 note 88.

83. N.H.—Concord v. Burleigh, 86 A. 606, 67 N.H. 106.

Pa.—Boyle v. Hazleton Borough, 33 A. 142, 171 Pa. 167.

84. N.Y.—McCutcheon v. Terminal Station Commission, 111 N.E. 661, 217 N.Y. 127.

44 C.J. p 976 note 97.

implied,⁸⁵ but a board authorized to grant the use of the streets for one purpose cannot grant their use for a different purpose.⁸⁶ A board on whom is conferred merely supervisory functions has no power to grant a right to use the streets.⁸⁷ A statute empowering commissioners as agents of the state to grant permits to occupy a public way does not authorize a surrender by them of the full use of the public highway.⁸⁸ The "municipal authorities," as that term is used in statutes delegating authority to grant use of the streets, ordinarily means the governing body of the municipality.⁸⁹ "Proper authorities of the city," as used in such a statute, does not include a county court.⁹⁰

Personal interest of members of the board in an application to use streets may invalidate a grant in which such members participated.⁹¹

§ 1720. — Conflicting Powers

Within constitutional limitations, the state may exercise its power to grant the use of streets without the consent, or against the dissent, of the municipal corporation.

Within constitutional limitations, the state may exercise its power to grant the use of streets without the consent, or against the dissent, of the municipal corporation,⁹² and, where the state has exercised the power, a purported grant of the use of streets by the municipality to the grantee of the state is of no legal effect.⁹³ A constitutional provi-

sion which requires the consent of the municipality to the grant of a franchise involving the use of streets transfers a portion of the legislative power to the municipality,⁹⁴ and it is a restriction on legislative authority,⁹⁵ but it does not divest the state of its power to grant franchises subject to the consent of the municipality,⁹⁶ and the legislature may regulate the manner in which the consent of the municipality shall be given.⁹⁷ Where a condition of a grant of a franchise by the legislature is that consent of the municipality must be obtained, the legal result for practical purposes is the same as though the franchise were granted by the municipality.⁹⁸

Where the right of a state-franchised utility to use city streets is made conditional on the consent of the municipality, it is ordinarily held that the latter has power to refuse its consent entirely,⁹⁹ although there are decisions holding the contrary on the theory that, if the municipality had the power absolutely to forbid the use of its streets by the company, it would practically have the power to nullify what the legislature has expressly authorized.¹ Where the facts are not within the terms of a statute requiring municipal consent under prescribed conditions, no such consent need be secured.² The consent of a municipality may be implied,³ and in any event a municipality cannot lie by and see a public service company expend large sums in preparation and then refuse the company the right to use the streets.⁴

85. N.Y.—Rapid Transit Subway Constr. Co. v. Celer, 105 N.Y.S. 824, 121 App.Div. 250.
44 C.J. p 976 note 90.

86. Ill.—McCarthy v. Chicago, 53 Ill. 38.
44 C.J. p 976 note 91.

87. N.J.—Trenton Presb. Church v. Electrical Subway Com'rs, 27 A. 809, 55 N.J.Law 436.

88. Mass.—Union Sav. Inst. v. Boston, 112 N.E. 637, 224 Mass. 286.

89. N.Y.—Farnsworth v. Boro Oil, etc. Co., 109 N.E. 860, 216 N.Y. 40.
44 C.J. p 976 note 95.

Municipal assembly

N.Y.—Ghee v. Northern Union Gas Co., 53 N.E. 692, 158 N.Y. 510.

90. Mo.—Union Depot Co. v. St. Louis, 76 Mo. 393.

91. N.Y.—Hough v. Smith, 75 N.Y. S. 451, 87 Misc. 363.
44 C.J. p 976 note 94.

92. U.S.—City of Tulsa v. Southwestern Bell Telephone Co., C.C.A. Okl., 75 F.2d 343, certiorari denied 55 S.Ct. 656, 295 U.S. 744, 79 L.Ed. 1690.

Tenn.—Lewis v. Nashville Gas &

Heating Co., 40 S.W.2d 409, 162 Tenn. 268.

44 C.J. p 976 note 1.

Repeal of statute requiring municipality's consent

N.J.—Jersey City v. Jersey City, etc., R. Co., 20 N.J.Eq. 360.

93. Cal.—Western Union Tel. Co. v. Visalia, 87 P. 1023, 149 Cal. 744.

94. N.Y.—Blanshard v. City of New York, 253 N.Y.S. 419, 141 Misc. 609, affirmed 257 N.Y.S. 973, 236 App.Div. 663, affirmed 186 N.E. 29, 262 N.Y. 5.

95. Ala.—Phenix City v. Alabama Power Co., 195 So. 894, 239 Ala. 547.

96. Ala.—Phenix City v. Alabama Power Co., supra—City of Mobile v. Farrell, 158 So. 539, 229 Ala. 582, followed in City of Mobile v. Nelson, 158 So. 543, 229 Ala. 587 and City of Mobile v. Mouraites, 158 So. 543, 229 Ala. 588.

97. N.Y.—Blanshard v. City of New York, 253 N.Y.S. 419, 141 Misc. 609, affirmed 257 N.Y.S. 973, 236 App.Div. 663, affirmed 186 N.E. 29, 262 N.Y. 5.

98. Del.—Town of Seaford v. Eastern Shore Public Service Co., 2 A.

2d 258, 22 Del.Ch. 288, sustained Eastern Shore Public Service Co. v. Town of Seaford, 2 A.2d 265, 23 Del.Ch. 199, appeal dismissed, 59 S.Ct. 483, 306 U.S. 616, 83 L.Ed. 1024, rehearing denied 59 S.Ct. 589, 306 U.S. 668, 83 L.Ed. 1063.

99. Ala.—City of Mobile v. Farrell, 158 So. 539, 229 Ala. 582, followed in City of Mobile v. Nelson, 158 So. 543, 229 Ala. 587 and City of Mobile v. Mouraites, 158 So. 543, 229 Ala. 588.
44 C.J. p 977 note 4.

1. Wis.—State v. Sheboygan, 86 N. W. 657, 111 Wis. 23.
44 C.J. p 977 note 5.

2. Ky.—Louisville v. Louisville Water Co., 49 S.W. 766, 105 Ky. 754, 20 Ky.L. 1529.
44 C.J. p 977 note 6.

3. Del.—Eastern Shore Public Service Co. v. Town of Seaford, 2 A.2d 265, 23 Del.Ch. 199, appeal dismissed 59 S.Ct. 483, 306 U.S. 616, 83 L.Ed. 1024, rehearing denied 59 S.Ct. 589, 306 U.S. 668, 83 L.Ed. 1063.

4. Ga.—Atlanta v. Gate City Gas Light Co., 71 Ga. 106.

A municipality cannot refuse a license to one complying with regulatory requirements where the power to determine the grant of rights to use its streets is vested in a different governmental agency.⁵

§ 1721. — Imposing Conditions

On granting the privilege to use a street, the state or municipal corporation ordinarily has the power, in its legislative discretion, to impose conditions.

On granting the privilege to use a street, the state or municipal corporation ordinarily has the power, in its legislative discretion, to impose conditions,⁶ including the payment of particular fees or charges, as considered *infra* § 1737, and it may require restoration of the street to its natural condition fol-

lowing excavations.⁷ Where the use of streets is by constitutional, charter, or statutory provisions made dependent on consent of the municipality, it is ordinarily held that the municipality may impose conditions on the giving of its consent,⁸ although there is authority holding that, where the power delegated to a city council by statute in respect of certain public service corporations is merely to give or withhold its consent, it has no power to couple its assent with any condition or restriction not imposed by the statute.⁹ A municipality cannot impose conditions as to localities beyond its territorial jurisdiction,¹⁰ except contingently on annexation of such localities.¹¹

The conditions or restrictions imposed must be lawful¹² and reasonable.¹³ A municipality may im-

5. N.Y.—*People v. Leonard*, 190 N. Y.S. 400, 115 Misc. 591.
44 C.J. p 977 note 2.

6. U.S.—*Capitol Taxicab Co. v. Cermak*, D.C.Ill., 60 F.2d 608—*Todd v. Citizens' Gas Co. of Indianapolis*, C.C.A.Ind., 46 F.2d 855, certiorari denied 51 S.Ct. 561, 283 U.S. 852, 75 L.Ed. 1459.

Me.—*Chapman v. City of Portland*, 160 A. 913, 131 Me. 242.

Mich.—*City of Niles v. Michigan Gas & Electric Co.*, 262 N.W. 900, 273 Mich. 255.

N.D.—*Chrysler Light & Power Co. v. City of Belfield*, 224 N.W. 871, 58 N.D. 33, 63 A.L.R. 1337.

Pa.—*Philadelphia Electric Co. v. City of Philadelphia*, 152 A. 23, 301 Pa. 291, appeal dismissed 51 S.Ct. 349, 283 U.S. 786, 75 L.Ed. 1414.

Tenn.—*Lewis v. Nashville Gas & Heating Co.*, 40 S.W.2d 409, 162 Tenn. 268.

Tex.—*Community Natural Gas Co. v. Northern Texas Utilities Co.*, Civ. App., 13 S.W.2d 184, error dismissed.

Wash.—*City of Spokane v. Spokane Gas & Fuel Co.*, 26 P.2d 1034, 175 Wash. 103.

Wis.—*State v. Railroad Commission of Wisconsin*, 220 N.W. 390, 196 Wis. 410.

44 C.J. p 977 note 10.

Conditions on grant of use of streets to common carrier see *infra* § 1760.

Police power

(1) The right of a municipality to impose conditions on a grant of the use of streets arises under the police power.

Ala.—*City of Mobile v. Farrell*, 158 So. 539, 229 Ala. 582, followed in *City of Mobile v. Nelson*, 158 So. 543, 229 Ala. 587 and *City of Mobile v. Mouraites*, 158 So. 543, 229 Ala. 588.

Ill.—*People v. Commonwealth Edison Co.*, 32 N.E.2d 902, 376 Ill. 70.

(2) It is no objection to an ordinance that it combines contractual and police regulations in granting use of public streets to a utility and in imposing terms and conditions on exercise of such grant, and fact that contract provisions are found therein does not change the result or effect of the essential character of the "police power" exercised—*People v. Commonwealth Edison Co.*, *supra*.

Particular conditions

(1) Option to purchase utility at fair value.—*State ex inf. McKittick ex rel. City of Springfield v. Springfield City Water Co.*, 131 S.W.2d 525, 345 Mo. 6.

(2) Condition subjecting grantee's right to lease its excess facilities to others to limitation that the lessee should have permit to use streets.—*Owl Protective Co. v. Public Service Commission of Pennsylvania*, 187 A. 229, 123 Pa.Super. 382.

(3) Other conditions see 44 C.J. p 978 note 13.

Violation of conditions

Where a public service corporation violates the provisions of its franchise granted by a municipality, it is presumed that the violation will result in oppression of the citizens.—*City of Louisville v. Louisville Home Telephone Co.*, 148 S.W. 13, 149 Ky. 234, Ann.Cas.1914A 1240.

7. Wis.—*Wisconsin Telephone Co. v. City of Milwaukee*, 270 N.W. 336, 223 Wis. 251.

44 C.J. p 978 note 14.

8. Del.—*Eastern Shore Public Service Co. v. Town of Seaford*, 2 A.2d 265, 23 Del.Ch. 199, appeal dismissed 59 S.Ct. 483, 306 U.S. 616, 83 L.Ed. 1024, rehearing denied 59 S.Ct. 589, 306 U.S. 668, 83 L.Ed. 1063.

Ky.—*Benzinger v. Union Light, Heat & Power Co.*, 170 S.W.2d 38, 293 Ky. 747.

44 C.J. p 978 note 20.

Acceptance of conditions see *infra* § 1733.

Express statutory authorization

Under statutes making public utility's franchise dependent on consent of municipal government and on terms and conditions municipality might impose, city had right to make terms and impose conditions.—*Lewis v. Nashville Gas & Heating Co.*, 40 S.W.2d 409, 162 Tenn. 268.

9. Pa.—*Appeal of Pittsburgh*, 7 A. 778, 115 Pa. 4.

10. Tex.—*Dallas Power, etc., Co. v. Carrington*, Civ.App., 245 S.W. 1046.

44 C.J. p 978 note 22.

11. Ohio.—*Interurban R., etc., Co. v. Cincinnati*, 112 N.E. 186, 93 Ohio St. 108.

44 C.J. p 978 note 23.

12. N.J.—*Atlantic Coast Electric R. Co. v. Public Utility Com'rs.*, 104 A. 218, 92 N.J.Law 168, 12 A.L.R. 737.

44 C.J. p 978 note 24.

Public policy

The conditions imposed by a municipality must not be against public policy.—*Todd v. Citizens' Gas Co. of Indianapolis*, C.C.A.Ind., 46 F.2d 855, certiorari denied 51 S.Ct. 561, 283 U.S. 852, 75 L.Ed. 1459.

13. Tex.—*Municipal Gas Co. v. City of Wichita Falls*, Civ.App., 88 S.W.2d 608, error dismissed.

Wis.—*Wisconsin Telephone Co. v. City of Milwaukee*, 270 N.W. 336, 223 Wis. 251.

44 C.J. p 978 note 25.

Reasonableness of regulations relative to use of streets see *supra* § 1690.

Regulations as to excavations in streets see *supra* § 1694.

Conditions held reasonable

Ill.—*People v. City of Chicago*, 182 N.E. 419, 349 Ill. 304.

pose obligations which otherwise would be beyond its general charter powers,¹⁴ but it may not impose conditions which are in derogation of any right which a public utility may have under its franchise granted by the state.¹⁵

§ 1722. — Duration of Grant

- a. In general
- b. Perpetual grants
- c. Validity of grants for unauthorized period

a. In General

Where the time for which a use of the streets may be granted is prescribed by statutory, charter, or constitutional provisions, the authorities cannot grant a use for a longer period.

Where the time for which a use of the streets may be granted is prescribed by statutory, charter, or constitutional provisions, the authorities cannot grant a use for a longer period,¹⁶ and periods so prescribed have been held to include the time of construction as well as that of the operation of the utility.¹⁷ A constitutional prohibition against granting, extending, or renewing a franchise to use the streets for longer than a specified period does not forbid a mere extension of facilities.¹⁸ Limitations on the period for which a municipality may grant franchises involving an obligation on the munici-

pality do not apply to franchises respecting which the municipality assumes no obligation,¹⁹ and a constitutional provision limiting the time for which a municipality may grant the use of its streets does not apply to a grant by the legislature with the consent of the municipality.²⁰

In the absence of statutory, charter, or constitutional restrictions, a municipality having the power to grant franchises or permits to use its streets may fix the duration thereof²¹ for a specified period of a reasonable length,²² during the corporate existence of the grantee,²³ until the happening of a specified future event,²⁴ or until revoked by the municipality.²⁵ The franchise or easement of way in the streets need not necessarily be limited to the period of years for which the grantee has been incorporated.²⁶ Where a municipality is authorized to impose conditions for its consent to the use of its streets by a public utility franchised by the state, the municipality may limit the period for which its consent is given.²⁷

A franchise to use the streets cannot be granted to begin at a period several years after the date of the grant.²⁸

b. Perpetual Grants

As a general rule, charter, constitutional, or statutory provisions giving a municipal corporation general

14. U.S.—*Todd v. Citizens' Gas Co. of Indianapolis*, C.C.A.Ind., 46 F. 2d 855, certiorari denied 51 S.Ct. 561, 283 U.S. 852, 75 L.Ed. 1459.

15. U.S.—*Todd v. Citizens' Gas Co. of Indianapolis*, supra.

Del.—*Eastern Shore Public Service Co. v. Town of Seaford*, 2 A.2d 265, 23 Del.Ch. 199, appeal dismissed 59 S.Ct. 483, 306 U.S. 616, 83 L.Ed. 1024, rehearing denied 59 S.Ct. 589, 306 U.S. 668, 83 L.Ed. 1063.

Wis.—*Wisconsin Telephone Co. v. City of Milwaukee*, 270 N.W. 336, 223 Wis. 251.

16. Ala.—*City of Mobile v. Farrell*, 158 So. 539, 229 Ala. 582, followed in *City of Mobile v. Nelson*, 158 So. 543, 229 Ala. 587 and *City of Mobile v. Mouraites*, 158 So. 543, 229 Ala. 588.

Mich.—*City of Niles v. Michigan Gas & Electric Co.*, 262 N.W. 900, 273 Mich. 255.

44 C.J. p 979 note 27.

Duration of franchises generally see *Franchises* § 26.

Purpose of Limitation

Constitutional provisions providing that a franchise to a public utility for the use of streets must be limited to a specified number of years were for protection of municipalities and public generally and not

for protection of individuals—*City of Decatur v. Meadors*, 180 So. 550, 235 Ala. 544.

17. Ky.—*Hamilton v. Bastin*, 224 S.W. 430, 188 Ky. 764.

44 C.J. p 979 note 28.

18. Okl.—*Overholser v. Oklahoma Interurban Tract. Co.*, 119 P. 127, 29 Okl. 571.

44 C.J. p 979 note 29.

19. Ind.—*Hester v. Greenwood*, 88 N.E. 498, 172 Ind. 279.

44 C.J. p 979 note 30

20. Ala.—*Atkinson v. City of Gadsden*, 192 So. 510, 238 Ala. 556.

21. Ala.—*Phenix City v. Alabama Power Co.*, 195 So. 894, 239 Ala. 547.

Mo.—*State ex inf. McKittrick ex rel. City of Springfield v. Springfield City Water Co.*, 131 S.W.2d 525, 345 Mo. 6.

Tex.—*Texas-New Mexico Utilities Co. v. State ex rel. City of Teague*, Civ.App., 174 S.W.2d 57, error refused.

44 C.J. p 979 note 31.

22. Tex.—*Houston v. Houston City St. R. Co.*, 19 S.W. 127, 83 Tex. 548.

44 C.J. p 979 note 32.

23. Ala.—*Phenix City v. Alabama Power Co.*, 195 So. 894, 239 Ala. 547.

24. U.S.—*Indianapolis v. Consumers' Gas Trust Co., Ind.*, 144 F. 640, 75 C.C.A. 442, certiorari denied 27 S.Ct. 779, 203 U.S. 592, 51 L.Ed. 331.

44 C.J. p 979 note 33.

25. Utah—*Stringham v. Salt Lake City*, 201 P.2d 758.

26. U.S.—*Detroit v. Detroit Citizens' St. R. Co.*, Mich., 22 S.Ct. 410, 184 U.S. 368, 46 L.Ed. 592.

Extension of corporate life

When the city makes the duration of a franchise contract dependent on corporate existence of the grantee and stipulates that such existence may be extended by the power that created it, the city is not thereby delegating legislative authority to such power to fix the duration of its enactments in violation of law.—*Phenix City v. Alabama Power Co.*, 195 So. 894, 239 Ala. 547.

27. Del.—*Eastern Shore Public Service Co. v. Town of Seaford*, 2 A.2d 265, 23 Del.Ch. 199, appeal dismissed 59 S.Ct. 483, 306 U.S. 616, 83 L.Ed. 1024, rehearing denied 59 S.Ct. 589, 306 U.S. 668, 83 L.Ed. 1063.

28. Ky.—*Princeton v. Princeton Electric Light, etc., Co.*, 179 S.W. 1074, 166 Ky. 730.

power to grant use of its streets are not construed as giving it power to grant a perpetual franchise or a permanent license to occupy the streets.

As a general rule, charter, constitutional, or statutory provisions giving a municipal corporation general power to grant use of its streets are not construed as giving it power to grant a perpetual franchise²⁹ or a permanent license to occupy the streets,³⁰ but such general power has been construed as including the power to grant a perpetual franchise for use of the streets.³¹ There is authority to the effect that the municipality may grant a franchise perpetual as far as it is concerned but subject to the reserved power of the state to revoke,³² and other authority holding that a municipality may grant a franchise perpetual except where the city revokes it under the power of eminent domain.³³

The municipality possesses power to grant a perpetual franchise for use of its streets where expressly authorized.³⁴

c. Validity of Grants for Unauthorized Period

Where statute or constitution prescribes a time limit for street franchises, an indefinite franchise is valid as presumptively for the time limit allowed.

Where statute or constitution prescribes a time limit for street franchises, an indefinite franchise is valid as presumptively for the time limit al-

lowed,³⁵ but a franchise for a definite time in excess of the limit set is wholly invalid according to some authority,³⁶ although according to other authority it is invalid only as to the excess.³⁷ The fact that a grant in terms perpetual and void as to the perpetual phase is valid for the period fixed by law as a proper duration has been affirmed by some authorities³⁸ and denied by others.³⁹

§ 1723. — Limitations on Exercise of Power Generally

- a. In general
- b. Necessity of consideration for grant

a. In General

Neither the state nor a municipal corporation may grant the right to use streets in a manner inconsistent with the purpose for which they have been dedicated, or in a manner which will unreasonably interfere with the right of public travel.

Neither the state nor a municipal corporation may grant the right to use streets in a manner inconsistent with the purpose for which they have been dedicated,⁴⁰ or in a manner which will exclude the public,⁴¹ be inconsistent with the use of the streets for proper public purposes,⁴² or unreasonably interfere with the right of public travel;⁴³ and only a reasonable use of the streets may be granted.⁴⁴ In

29. Tex.—Texas-New Mexico Utilities Co. v. State ex rel. City of Teague, Civ.App., 174 S.W.2d 57, error refused.

44 C.J. p 979 note 40.

Construction as to perpetual character of grant see *infra* § 1739.

30. N.Y.—Green v. Miller, 162 N.E. 593, 249 N.Y.S. 88.

31. Mo.—State ex inf. McKittrick ex rel. City of Springfield v. Springfield City Water Co., 131 S.W.2d 525, 345 Mo. 6.

44 C.J. p 979 note 41.

32. Ohio.—State v. Columbus R. Co., 1 Ohio Cir.Ct., N.S., 145, 24 Ohio Cir.Ct. 609.

33. Wash.—Seattle v. Columbia, etc., R. Co., 33 P. 1048, 6 Wash. 379.

34. Tex.—Texarkana Gas, etc., Co. v. Texarkana, 123 S.W. 213, 58 Tex.Civ.App. 109.

44 C.J. p 980 note 42.

35. U.S.—Boise Artesian Hot, etc., Water Co. v. Boise City, Idaho, 33 S.Ct. 997, 230 U.S. 84, 57 L.Ed. 1400.

36. U.S.—Boise Artesian Hot, etc., Water Co. v. Boise City, *supra*.

37. Ky.—Schaff v. La Grange, 195 S.W. 1097, 176 Ky. 548.

38. U.S.—Levis v. Newton, C.C. Iowa, 75 F. 884, affirmed 79 F. 715, 25 C.C.A. 161.

39. N.Y.—Blaschko v. Wurster, 51 N.E. 303, 156 N.Y. 437.

44 C.J. p 980 note 55.

40. Mo.—Stout v. Frick, 62 S.W.2d 1057, 333 Mo. 826, transferred, see, App., 69 S.W.2d 677.

44 C.J. p 980 note 57.

Grant interfering with rights of abutting owners see *supra* § 1708.

41. Ill.—Sundstrom v. Village of Oak Park, 30 N.E.2d 58, 374 Ill. 632, 131 A.L.R. 1465.

Ky.—Chesapeake & O. Ry. Co. v. Eastham, 60 S.W.2d 361, 249 Ky. 136—Watson v. Chesapeake & O. Ry. Co., 36 S.W.2d 641, 238 Ky. 31

—Chesapeake & O. Ry. Co. v. Wadsworth Electric Mfg. Co., 29 S.W.2d 650, 234 Ky. 645.

N.Y.—Village of East Rochester v. Rochester Gas & Electric Corporation, 46 N.E.2d 334, 289 N.Y. 391.

Wis.—Chicago & Milwaukee Elec. Ry. Co. v. Public Service Commission of Wis., 37 N.W.2d 42, 254 Wis. 551.

Grants of exclusive franchises to use streets see *infra* § 1724.

42. Mo.—Stout v. Frick, 69 S.W.2d 677, transferred 62 S.W.2d 1057, 333 Mo. 826.

43. Ark.—State v. City of Marianna, 39 S.W.2d 301, 183 Ark. 927.

Ill.—Sundstrom v. Village of Oak Park, 30 N.E.2d 58, 374 Ill. 632, 131 A.L.R. 1465.

La.—Cogswell v. Texas & N. O. R. Co., 8 So.2d 645, 200 La. 696.

Neb.—Tiernan v. Thorp, 130 N.W. 280, 88 Neb. 662, 32 L.R.A., N.S., 1034.

44 C.J. p 980 note 58.

Trust for inhabitants

Power to grant franchise, whether under constitution or statute, is to be exercised as municipal function, as trust for benefit of inhabitants.—Blanshard v. City of New York, 253 N.Y.S. 419, 141 Misc. 609, affirmed 257 N.Y.S. 973, 236 App.Div. 663, affirmed 186 N.E. 29, 262 N.Y. 5.

Sidewalks

(1) Municipal corporations have no authority to grant individuals the use of sidewalks which would in any way interfere with their use by the public.—Salt Lake City v. Schubach, United Pac. Ins. Co., Intervener, 159 P.2d 149, 108 Utah 266, 160 A.L.R. 809.

(2) A municipality may not grant such a use of a sidewalk as would make it dangerous or unsafe.—Roper v. Wadleigh, Mo.App., 219 S.W. 982.

44. Ind.—Indianapolis Water Co. v. Schoenemann, 20 N.E.2d 671, 107 Ind.App. 308.

Injury to private rights

Occupation of streets of city, if injurious to private rights, is not within legislative power.—Green v. Miller, 162 N.E. 593, 249 N.Y. 88.

accordance with these rules courts have held invalid grants to use streets for buildings,⁴⁵ a loading platform over a sidewalk,⁴⁶ storage of railroad cars,⁴⁷ abutments for overhead structures,⁴⁸ or any other obstruction unnecessarily interfering with the public use of streets.⁴⁹ Where, however, the nature of the use granted is such that its exercise will not unnecessarily interfere with public travel, the grant is properly upheld.⁵⁰

b. Necessity of Consideration for Grant

The state may grant a right to use a street without requiring that compensation be paid to the municipal corporation.

The state may grant a right to use a street without requiring that compensation be paid to the municipal corporation,⁵¹ and a charter provision forbidding the mayor and city council to grant any franchises in the streets of the city without requiring adequate compensation to be paid therefor does not affect the right of the legislature to make such grants in the streets of the city without compensation.⁵² It has been held that a municipality can-

not give away,⁵³ or grant for a nominal⁵⁴ or inadequate⁵⁵ consideration, a franchise to use its streets.

§ 1724. — Grants of Exclusive Privileges

Within constitutional limitations the state, or the municipal corporation acting under authority from the state, may grant exclusive franchises to use streets.

Within constitutional limitations the state,⁵⁶ or the municipal corporation acting under authority from the state,⁵⁷ may grant exclusive franchises to use streets, but, in the absence of statutory, constitutional, or charter authorization the general power of a municipality to grant the use of its streets does not include the power to grant exclusive franchises or privileges.⁵⁸ In order to infer such a power from other powers, it is not enough that the authority be convenient to them, but it must be indispensable.⁵⁹ A statute conferring exclusive privileges on private corporations on compliance with specified conditions does not confer on municipalities the right to grant exclusive privileges to such corporations.⁶⁰

Where the exclusive character of the privilege

45. Ill.—Chicago, etc., R. Co. v. People, 78 N.E. 790, 222 Ill. 427.
41 C.J. p 981 note 60.

46. Ill.—Chicago Cold Storage Warehouse Co. v. People, 79 N.E. 692, 224 Ill. 287.
N.J.—Union Towel Supply Co. v. Jersey City, 123 A. 254, 99 N.J.Law 52.

Refusal of consent

City had right to refuse consent to railroad to maintain loading platform across alley dedicated to public—Quannah Acme & P. Ry. Co. v. Swearingen, Tex.Civ.App., 4 S.W.2d 136, error refused.

47. Mo.—Wright v. Wabash R. Co., 160 S.W. 549, 174 Mo.App. 446.

48. Ohio.—Cincinnati v. Louisville, etc., R. Co., 16 Ohio S. & C.P. 628, 4 Ohio N.P.,N.S., 217, affirmed 17 Ohio S. & C.P. 689, 4 Ohio N.P.,N.S., 497.
44 C.J. p 981 note 63.

49. Ky.—Commonwealth v. Frankfort, 17 S.W. 287, 92 Ky. 149, 13 Ky.L. 705.
44 C.J. p 981 note 64.

50. Wash.—Detamore v. Hindley, 145 P. 462, 83 Wash. 322.
44 C.J. p 981 note 65.

Platted street on outskirts of city

A statute which provides that a city shall not lease any street for oil exploration contemplates a thoroughfare, and it is not violated by the execution of an oil lease on a platted street on the outskirts of the city which has never been used as a thoroughfare and will not be used as

a thoroughfare in the foreseeable future.—Town of Refugio v. Strauch, Tex.Com.App., 29 S.W.2d 1041.

51. Md.—Purnell v. Ocean City, 159 A. 359, 162 Md 169—Dulaney v. United Rys. & Electric, etc., Co., 65 A. 45, 104 Md. 423.

52. Md.—Dulaney v. United Rys. & Electric Co., supra.

53. Ill.—People v. Wolper, 183 N.E. 451, 350 Ill. 461.
44 C.J. p 981 note 68

Consideration for franchise generally see Franchises § 16

Right of municipality to rental or other compensation for use of streets see infra § 1737.

54. Ind.—Clarke v. Evansville Boat Club, 88 NE 100, 44 Ind.App. 426.
44 C.J. p 981 note 69.

55. Ga.—Daly v. Georgia, etc., R. Co., 7 SE 146, 80 Ga. 793, 12 Am. S.R. 286
44 C.J. p 981 note 70.

56. U.S.—New Orleans Water Works Co. v. Rivers, La., 6 S.Ct. 273, 115 U.S. 674, 29 L.Ed. 525.

Grant of use excluding, or interfering with, public use of streets see supra § 1723.

Monopolies created by franchises see Monopolies §§ 4-14.

57. U.S.—City of York v. Iowa-Nebraska Light & Power Co., C.C. A.Neb., 109 F.2d 683, certiorari denied 60 S.Ct. 893, 309 U.S. 690, 84 L.Ed. 1032.

Ala.—City of Mobile v. Farrell, 158 So. 539, 229 Ala. 582, followed in

City of Mobile v. Nelson, 158 So. 543, 229 Ala. 587, and City of Mobile v. Mouraites, 158 So. 543, 229 Ala. 588.

Ark.—Arkansas Power & Light Co. v. West Memphis Power & Water Co., 58 S.W.2d 206, 187 Ark. 41.

Ill.—People v. Chicago Transit Authority, 64 N.E.2d 4, 392 Ill. 77.
44 C.J. p 981 note 75.

58. U.S.—West Tennessee Power & Light Co. v. City of Jackson, C.C. A.Tenn., 97 F.2d 979, certiorari denied 59 S.Ct. 87, 305 U.S. 625, 83 L.Ed. 400.

Ala.—City of Decatur v. Meadors, 180 So. 550, 235 Ala. 544—City of Mobile v. Farrell, 158 So. 539, 229 Ala. 582, followed in City of Mobile v. Nelson, 158 So. 543, 229 Ala. 587 and City of Mobile v. Mouraites, 158 So. 543, 229 Ala. 588.

Okl.—City of Tulsa v. Thomas, 214 P. 1070, 89 Okl. 188.

Tex.—Texas-New Mexico Utilities Co. v. State ex rel. City of Teague, Civ.App., 174 S.W.2d 57, error refused.

44 C.J. p 982 note 76.

Grant held nonexclusive

Mo.—State v. West Missouri Power Co., 281 S.W. 709, 313 Mo. 283.

59. U.S.—Nelson v. Murfreesboro, C.C.Tenn., 179 F. 905.

60. Fla.—Capital City Light, etc., Co. v. Tallahassee, 28 So. 810, 42 Fla. 462, affirmed 22 S.Ct. 866, 186 U.S. 401, 46 L.Ed. 1219.
44 C.J. p 982 note 78.

has been granted for a short period of time in order to enable the utility company to become established, it has been construed as not violating the rule against a grant of exclusive franchises.⁶¹ A municipality lacking power to grant exclusive privileges cannot grant an exclusive right in its streets in the sense that every other company is excluded to whom similar rights might be granted,⁶² or that the municipality itself is precluded from competing with the grantee.⁶³ Even though a municipality is authorized to grant an exclusive franchise, it cannot grant to a private corporation the exclusive right to use the streets at the option of the corporation so as to allow the corporation to refrain from use and likewise prevent other corporations from supplying the public service involved.⁶⁴

Gas company. Apart from statutory authority it is not within the power of a municipal corporation to grant to a gas company an exclusive privilege to lay gas pipes in the streets.⁶⁵ Such power must be expressly given,⁶⁶ or, if inferred from other powers, must be indispensable to them.⁶⁷

Effect of invalid exclusive grants. Where a municipality lacking power to grant exclusive privileges purports to grant such a franchise, it cannot

be compelled to comply therewith.⁶⁸ A grant invalid as to its exclusive features may nevertheless be valid as to separable nonexclusive features.⁶⁹

§ 1725. — Private Use

- a. In general
- b. Private railroads

a. In General

Within constitutional limitations, and provided public use is not unreasonably interfered with, the legislature may authorize a private use of streets. A municipal corporation has no power to authorize the use of its streets for a private purpose, other than for necessary and temporary uses, unless it has been granted the power by constitutional, charter, or statutory provisions.

Within constitutional limitations, and provided public use is not unreasonably interfered with, the legislature may authorize a private use of streets,⁷⁰ and may permit structures in the street for business conveniences that, in the absence of such authority, would be considered obstructions or nuisances.⁷¹ Where acting under constitutional or delegated legislative authorization, a municipality may grant a private use of its streets,⁷² such as a use for business purposes,⁷³ and it may permit constructions

61. Pa.—Meadville Natural Gas Co. v. Meadville Fuel Gas Co., 1 Pa. Co. 448.

62. Ohio.—Cincinnati St. R. Co. v. Smith, 29 Ohio St. 291.
44 C.J. p 982 note 82
Construction and effect of grant see infra § 1735.

63. U.S.—West Tennessee Power & Light Co. v. City of Jackson, C.C. A.Tenn., 97 F.2d 979, certiorari denied 59 S.Ct. 87, 305 U.S. 625, 83 L.Ed. 400.

Knowledge of limitations

A public utility corporation was charged with knowledge of statutory limitations on powers of city to give exclusive grants and would be deemed to have entered into contract for allegedly exclusive franchises at its peril.—West Tennessee Power & Light Co. v. City of Jackson, *supra*.

64. U.S.—Citizens' St. R. Co. v. Jones, C.C.Ark., 34 F. 579, appeal dismissed 12 S.Ct. 979, 145 U.S. 633, 36 L.Ed. 855.

65. W.Va.—Wheeling v. Natural Gas Co., 82 S.E. 345, 74 W.Va. 372. 28 C.J. p 555 note 25.

66. U.S.—Hutchinson Water, etc., Co. v. Hutchinson, Kan., 28 S.Ct. 135, 207 U.S. 385, 52 L.Ed. 257.
Ohio.—State v. Cincinnati Gas Light, etc., Co., 18 Ohio St. 262.

67. U.S.—Hutchinson Water, etc.,

Co. v. Hutchinson, Kan., 28 S.Ct. 135, 207 U.S. 385, 52 L.Ed. 257.
28 C.J. p 555 note 27.

68. N.Y.—Rhinehart v. Redfield, 87 N.Y.S. 789, 93 App.Div. 410, affirmed 72 N.E. 1150, 179 N.Y. 569.
44 C.J. p 983 note 85.

69. Mo.—State v. West Missouri Power Co., 281 S.W. 709, 313 Mo. 283.
44 C.J. p 983 note 86.

70. N.Y.—Green v. Miller, 162 N.E. 593, 249 N.Y. 88.—In re Langley, 250 N.Y.S. 124, 140 Misc. 203.—People v. Friedman, 16 N.Y.S.2d 925.

N.C.—Corpus Juris quoted in Clayton v. Liggett & Myers Tobacco Co., 35 S.E.2d 691, 693, 225 N.C. 563.
44 C.J. p 983 note 87.

71. N.C.—Corpus Juris quoted in Clayton v. Liggett & Myers Tobacco Co., 35 S.E.2d 691, 693, 225 N.C. 563.
44 C.J. p 983 note 88.

72. Cal.—Salinas v. Pacific Tel. & Tel. Co., 164 P.2d 905, 72 Cal.App. 2d 494.—People v. Galena, 70 P.2d 724, 24 Cal.App.2d Supp. 770.

Fla.—Jarrell v. Orlando Transit Co., 167 So. 664, 123 Fla. 776.
Mich.—People of City of Dearborn v. Dmytro, 273 N.W. 400, 280 Mich. 82, 111 A.L.R. 128.

N.C.—Corpus Juris quoted in Clayton v. Liggett & Myers Tobacco

Co., 35 S.E.2d 691, 693, 225 N.C. 563.

44 C.J. p 983 note 89.

Charter provisions construed

(1) Custom and practice may be considered in construing charter respecting use of streets for private purposes.—Green v. Miller, 162 N.E. 593, 249 N.Y. 88.

(2) Charter provision authorizing mayor and city council to grant "franchises" by ordinance and provision authorizing board of estimates to grant "minor privilege" in use of streets may be construed together as *in pari materia*, and as so construed "franchise" is limited to grants of privileges in highways in furtherance of public convenience or welfare.—Huebschmann v. Grand Co., 172 A. 227, 166 Md. 615.

(3) A provision in charter authorizing city to grant right to construct pipes, tubes, conduits, wires, and other electric, telegraph, and mechanical apparatus in city streets and highways, authorized city to grant franchises for use of city streets for gas, oil, water, and steam pipes, and police, fire, or private intercommunicating wires and apparatus.—Salinas v. Pacific Tel. & Tel. Co., 164 P.2d 905, 72 Cal.App.2d 494.

73. Cal.—People v. Galena, 70 P.2d 724, 24 Cal.App.2d Supp. 770.

Fla.—Jarrell v. Orlando Transit Co., 167 So. 664, 123 Fla. 776.

thereon,⁷⁴ or it may give the right to a private individual to use the space under streets for private purposes;⁷⁵ but the city may not grant a private use which would unreasonably interfere with public use,⁷⁶ which would make the street dangerous or unsafe,⁷⁷ or which would destroy another's property.⁷⁸ In the grant of the right to use the street for a private purpose the city may prescribe the manner in which the right shall be exercised.⁷⁹

In the absence of constitutional, charter, or statutory provisions so permitting, a municipality has no power to authorize, other than for necessary and

temporary uses,⁸⁰ the use of its streets for a private purpose,⁸¹ from which neither the municipality nor its citizens derive any consideration or benefit;⁸² but grants for public purposes are not invalid, even though they involve an incidental private benefit.⁸³ In doubtful cases the courts will presume that the use granted is public rather than private.⁸⁴

Particular uses held private or public. Uses which have been held private within the rule forbidding a municipality to grant a private use of streets include use of the streets for advertising purposes,⁸⁵ business stands or booths,⁸⁶ erection and

Me—Chapman v. City of Portland, 160 A. 913, 131 Me. 242.

74. La.—Hebert v. Badon, App., 167 So. 862.

75. La.—Hebert v. Badon, App., 167 So. 862.

Wash.—Lanham v. Forney, 81 P.2d 777, 196 Wash. 62.

Tunnel

A city may properly authorize private use of a tunnel under a street where the rights of travel of the public or rights of abutting owners are not interfered with.—Ober v. City of Minneapolis, 229 N.W. 794, 179 Minn. 495.

Water pipe

City had authority to permit property owner to lay water pipe under street.—Witty v. Corpus Christi Plumbing Co., Tex.Civ.App., 35 S.W. 2d 169.

76. Fla.—Sanders v. City of Daytona Beach, 116 So. 23, 95 Fla. 279.

N.C.—Corpus Juris quoted in Clayton v. Liggett & Myers Tobacco Co., 35 S.E.2d 691, 693, 225 N.C. 563.

Okl.—City of Stillwater v. Lovell, 15 P.2d 12, 159 Okl. 214.

Wash.—Lanham v. Forney, 81 P.2d 777, 196 Wash. 62.
44 C.J. p 983 note 90.

Interference with right of public travel generally see supra § 1723.

Future use

A city may not authorize the use of its streets by a private person inconsistent with the future legitimate use of the street by the city.—Yellow Cab Taxi Service v. City of Twin Falls, 190 P.2d 681, 68 Idaho 145.

77. La.—Blanks v. Saenger Theaters, 138 So. 883, 19 La.App. 305.

Unguarded cable

Defendant was held unauthorized, notwithstanding police chief's alleged approval, to create unknown and nonapparent danger in street by leaving stretched along street, unguarded, cable which rose when drawn taut by capstan.—Rogge v. Casero, 131 So. 207, 15 La.App. 565, appeal dismissed 134 So. 909, 15 La. App. 565.

78. U.S.—Fechheimer v. Lakenan,

D.C.Mo., 2 F.Supp. 785, affirmed, C.C.A., Klaber v. Lakenan, 64 F.2d 86, 90 A.L.R. 783.

79. Fla.—Jarrell v. Orlando Transit Co., 167 So. 664, 123 Fla. 776.
44 C.J. p 986 note 19.

80. Ind.—Wood v. Mears, 12 Ind. 515, 74 Am.D. 222—City of Indianapolis v. Link Realty Co., 179 N.E. 574, 94 Ind.App. 1.

N.Y.—O'Neill v. City of Port Jervis, 171 N.E. 694, 253 N.Y. 423.

N.C.—Swinson v. Cutter Realty Co., 156 S.E. 545, 200 N.C. 276.

Okl.—City of Stillwater v. Lovell, 15 P.2d 12, 159 Okl. 214.
44 C.J. p 984 note 94.

81. U.S.—George W. Armbruster, Jr., Inc., v. City of Wildwood, D.C. N.J., 41 F.2d 823.

Ala.—Corpus Juris cited in City of Birmingham v. Holt, 194 So. 538, 541, 239 Ala. 248.

Ill.—Gerstley v. Globe Wernicke Co., 172 N.E. 829, 340 Ill. 270.

Ind.—City of Indianapolis v. Link Realty Co., 179 N.E. 574, 94 Ind. App. 1.

Iowa—Cowan v. City of Waterloo, 21 N.W.2d 705, 237 Iowa 202.

N.Y.—O'Neill v. City of Port Jervis, 171 N.E. 694, 253 N.Y. 423—American Dock Co. v. City of New York, 21 N.Y.S.2d 943, 174 Misc. 813, affirmed 26 N.Y.S.2d 704, 261 App. Div. 1063, affirmed 36 N.E.2d 696, 286 N.Y. 658—In re Langley, 250 N.Y.S. 124, 140 Misc. 203—City of New York v. Aviation Distributors, 84 N.Y.S.2d 84.

N.C.—Swinson v. Cutter Realty Co., 156 S.E. 545, 200 N.C. 276.

Okl.—Stillwater v. Lovell, 15 P.2d 12, 159 Okl. 214—Hover v. Oklahoma City, 271 P. 162, 133 Okl. 71.

Tex.—Elston v. City of Panhandle, Civ.App., 46 S.W.2d 420, error refused 50 S.W.2d 1090, 121 Tex. 553—J. M. Radford Grocery Co. v. City of Abilene, Civ.App., 20 S.W.2d 255, affirmed, Com.App., 34 S.W.2d 830—Malott v. City of Brownsville, Civ.App., 292 S.W. 608, affirmed, Com.App., 298 S.W. 540, modified on other grounds 300 S.W. 29, corrected 4 S.W.2d 965.

Utah.—Brough v. Ute Stampede Ass'n, 142 P.2d 670, 105 Utah 446.

Va.—McClintock v. Richlands Brick Corporation, 145 S.E. 425, 152 Va. 1, 61 A.L.R. 1033.

44 C.J. p 983 note 91.

Private business

Ohio.—Rowe v. City of Cincinnati, 159 N.E. 492, 26 Ohio App. 87, petition dismissed 159 N.E. 365, 117 Ohio St. 382.

Or.—Lowell v. Pendleton Auto Co., 261 P. 415, 123 Or. 383.

82. N.J.—Union Towel Supply Co. v. Jersey City, 123 A. 254, 99 N.J.Law 52.

44 C.J. p 984 note 92.

83. Wis.—Sutter v. Milwaukee Fire Underwriters, 160 N.W. 57, 1034, 164 Wis. 532.

44 C.J. p 984 note 93.

84. U.S.—Levis v. Newton, C.C.Iowa, 75 F. 884, affirmed 79 F. 715, 25 C. C.A. 161.

44 C.J. p 984 note 95.

85. Ala.—City of Birmingham v. Holt, 194 So. 538, 239 Ala. 248.

44 C.J. p 984 note 97.

Signs with safety warnings

The fact that portions of advertising signs, placed and maintained on posts in city sidewalks under contract with city commission, contained safety warnings, did not prevent such signs from being unlawful obstructions amounting to subordination of public right to private use, so as to invalidate contract.—City of Birmingham v. Holt, 194 So. 538, 239 Ala. 248.

Signs on traffic signals

City was held without power to authorize private corporation to maintain, without expense to city, traffic signals on back of which was sloping plate to be used for advertising, for which installing corporation was to receive compensation from advertisers.—State ex rel. Beck v. City of Hutchinson, 62 P.2d 865, 144 Kan. 700.

86. Ga.—Magrill v. Atlanta, 122 S. E. 641, 32 Ga.App. 6.

44 C.J. p 984 note 98.

maintenance of private scales,⁸⁷ and similar other purposes.⁸⁸ Particular grants which have been sustained as involving a public use include the grant of the right to use a street for erecting water tanks,⁸⁹ maintaining a market,⁹⁰ and other uses.⁹¹

b. Private Railroads

Where authorized by statute, charter or constitution, the franchise-granting authorities have the power to grant the use of streets for private railways, but, in the absence of such authorization, a grant of the use of streets for a private railway cannot be sustained.

Where authorized by statute, charter, or constitution, the franchise-granting authorities have the power to grant the use of streets for private railways,⁹² although they may not exercise such power in an unreasonable way.⁹³ The authorities agree that, in the absence of such authorization, a grant of the use of streets for a private railway cannot be sustained,⁹⁴ but they differ as to whether a switch or spur track from a public railroad to a private business establishment is a private railroad within the meaning of the rule, the courts of most jurisdictions so holding it,⁹⁵ although there is authority to the contrary.⁹⁶ Irrespective of this conflict,

spur tracks to public establishments are held public rather than private railroads,⁹⁷ and a municipality may lawfully permit a railroad and a manufacturer who are abutters directly opposite each other and owning the fee in the street to connect by a spur track run across the street and so used as not to interfere with public travel.⁹⁸ Power to regulate streets for railroads or street railways does not empower a municipality to authorize their use for private railroads.⁹⁹

A privately owned terminal delivery railroad is not a private railway,¹ even though it happens, at the time the question comes up, to be serving only one business establishment.²

§ 1726. — Use by Public Utilities

- a. In general
- b. Street railroads
- c. Railroads
- d. Poles and wires
- e. Underground conduits

a. In General

Under constitutional, charter, or statutory provisions

87. Ind.—*Tell City v. Bielefeld*, 49 N.E. 1090, 20 Ind.App. 1.

44 C.J. p 984 note 1.

88. N.J.—*Union Towel Supply Co. v. Jersey City*, 123 A. 254, 99 N.J. Law 52.

44 C.J. p 984 note 2.

89. Or.—*Savage v. Salem*, 31 P. 882, 23 Or. 381, 37 Am.S.R. 688, 24 L. R.A. 787.

44 C.J. p 985 note 4.

90. N.Y.—*People v. Hylan*, 194 N.Y. S. 179, 118 Misc. 341, affirmed 194 N.Y.S. 969, 202 App.Div. 745.

44 C.J. p 985 note 5.

91. Or.—*Morris v. City of Salem*, 174 P.2d 192, 179 Or. 666.

Moving houses see *infra* § 1773.

Parking meters

Or.—*Morris v. City of Salem*, *supra*.

Patrol of fire underwriters

If services rendered by the patrol of a board of fire underwriters be governmental in their nature, the fact that their performance was primarily induced by private interest cannot affect the question of the power of a city to pass an ordinance giving the patrol rights of way when going to and returning from a fire.—*Sutter v. Milwaukee Fire Underwriters*, 160 N.W. 57, 1034, 164 Wis. 532.

92. Wash.—*De Kay v. North Yakima & V. Ry. Co.*, 129 P. 574, 71 Wash. 648.

44 C.J. p 985 note 8.

93. N.J.—*Seaman v. Perth Amboy*, 116 A. 22, 97 N.J. Law 76.

44 C.J. p 985 note 9.

94. Ind.—*City of Indianapolis v. Link Realty Co.*, 179 N.E. 574, 94 Ind.App. 1.

N.J.—*Hamilton Lumber & Manufacturing Co. v. City of Paterson*, 1 A.2d 311, 121 N.J. Law 95.

44 C.J. p 985 note 10.

Street created by common-law dedication

A town had no power to pass an ordinance authorizing the use of a street which had been created by a common-law dedication for the construction of a switch track for a purely private purpose. The building of the switch track would create an obstruction which would be in violation of rights of abutting property owners, and it would make no difference that track was built on one side of the street instead of down the middle, since a city's duty with respect to a street under a common-law dedication is with respect to the whole street and not only to a portion of it.—*Greenlee Foundry Co. v. Borin Art Products Corporation*, 41 N.E.2d 532, 379 Ill. 494.

95. Ind.—*Corpus Juris cited in City of Indianapolis v. Link Realty Co.*, 179 N.E. 574, 579, 94 Ind.App. 1.

44 C.J. p 985 note 11.

96. Okl.—*Oklahoma Tool, etc., Co. v. Bartlesville*, 223 P. 637, 101 Okl. 103.

44 C.J. p 985 note 12.

In Illinois

(1) In accordance with constitutional provisions it has been held that a railroad track in a public

street connecting a private industry with a railway system does not remain merely a private track but becomes a part of the main track with which it is connected, and becomes a public highway open to public use.—*People v. Block*, 67 N.E. 809, 203 Ill. 363—*Chicago Dock, etc., Co. v. Garrity*, 3 N.E. 448, 115 Ill. 155.

(2) But it has also been held that the construction of a switch track by defendants along a street created by common-law dedication, intended to extend from railroad company's right of way to defendants' property, would be for a "private purpose" and would not conform to a "public use," and defendants could not construct track in reliance on a town ordinance authorizing use of street for track.—*Greenlee Foundry Co. v. Borin Art Products Corporation*, 41 N.E.2d 532, 379 Ill. 494.

97. Utah.—*Whitmeyer v. Salt Lake, etc., R. Co.*, 151 P. 48, 46 Utah 491.

44 C.J. p 985 note 13.

98. Ga.—*Hanbury v. Woodward Lumber Co.*, 26 S.E. 477, 98 Ga. 54.

99. Ind.—*City of Indianapolis v. Link Realty Co.*, 179 N.E. 574, 94 Ind.App. 1.

44 C.J. p 986 note 17.

1. N.Y.—*Stanley v. Jay St. Connecting R. Co.*, 169 N.Y.S. 530, 182 App. Div. 399, affirmed 126 N.E. 922, 227 N.Y. 639.

2. N.Y.—*Stanley v. Jay St. Connecting R. Co.*, *supra*.

44 C.J. p 986 note 18.

conferring the power, a municipality may grant the use of its streets to public utilities, but, in the absence of authority conferred by the constitution or by the state legislature, a municipal corporation may not make such a grant.

Under constitutional, charter, or statutory provisions conferring the power, a municipal corporation may grant the use of its streets to public utilities,³ or it may withhold such use from utilities,⁴ but, in the absence of authority conferred by the constitution or by the state legislature, a municipality may not make such a grant.⁵ Under some statutes the approval of the public utilities commission is necessary to make the grant effective,⁶ but a statute which merely gives the power of regulation and control of utilities to a public utility commission does not necessarily deprive municipalities of the power to grant or refuse local franchises to public utilities.⁷ The legislature may enlarge the powers of a public service corporation as to use of streets as against the city, except where the constitution provides otherwise.⁸ A municipality may grant a public service franchise before the expiration of a similar franchise then in operation,⁹ and it may refuse to renew an existing franchise and grant a similar franchise to another utility.¹⁰

Authority given to a municipality to control its

streets with power to improve them,¹¹ or authority given to a municipality to grant public utilities such rights of way in the streets as may be necessary,¹² has been held not to confer on the municipality the power to grant a franchise to use the streets to a public utility. Where a municipality possesses the power to own and operate a public utility in its streets, it has been held that the incidental power to permit use of its streets by a privately owned corporation will be implied;¹³ but authority to use the streets itself for such purposes will not be implied from legislative delegation of authority to grant such franchises to others.¹⁴ A statute authorizing a municipality to grant franchises for the use of streets to individuals or private corporations for the operation of a public utility does not empower it to grant such a franchise to another municipality.¹⁵

b. Street Railroads

Unless otherwise provided by the constitution, the state legislature may grant a street railway company the right to use the streets of a municipal corporation. A municipal corporation has power to make such a grant where it has been conferred on the municipality by the constitution or by the state legislature.

Unless otherwise provided by the constitution, the state legislature may, without the consent of the

2. US—City of York v. Iowa-Nebraska Light & Power Co., C.C.A. Neb., 109 F.2d 683, certiorari denied 60 S.Ct. 893, 309 U.S. 690, 84 L.Ed. 1032—City of Roswell, N. M., v. Mountain States Telephone & Telegraph Co., C.C.A.N.M., 78 F.2d 379—Todd v. Citizens' Gas Co. of Indianapolis, C.C.A.Ind., 46 F.2d 855, certiorari denied 51 S.Ct. 561, 283 U.S. 852, 75 L.Ed. 1459.

Cal.—Salinas v. Pacific Tel. & Tel. Co., 164 P.2d 905, 72 Cal.App.2d 494.

Ill.—City of Geneseo v. Illinois Northern Utilities Co., 39 N.E.2d 26, 378 Ill. 506, certiorari denied Illinois Northern Utilities Co. v. City of Geneseo, Ill., 62 S.Ct. 1046, 316 U.S. 670, 86 L.Ed. 1746—Village of Heyworth v. Central Illinois Electric & Gas Co., 39 N.E.2d 26, 378 Ill. 506, certiorari denied Central Illinois Electric & Gas Co. v. Village of Heyworth, Ill., 62 S.Ct. 1046, 316 U.S. 670, 86 L.Ed. 1746.

Ky.—Kentucky Utilities Co. v. City of Paris, 179 S.W.2d 676, 297 Ky. 440.

Mich.—City of Niles v. Michigan Gas & Electric Co., 262 N.W. 900, 273 Mich. 255.

N.Y.—Thompson v. Orange & Rockland Electric Co., 173 N.E. 224, 254 N.Y. 366, followed in 173 N.E. 889, 254 N.Y. 612.

Tenn.—Franklin Light & Power Co. v. Southern Cities Power Co., 47 S.W.2d 86, 164 Tenn. 171.

Tex.—Eldridge v. Fort Worth Transit Co., Civ.App., 136 S.W.2d 955, error dismissed, judgment correct.

4. Ill.—City of Geneseo v. Illinois Northern Utilities Co., 39 N.E.2d 26, 378 Ill. 506, certiorari denied Illinois Northern Utilities Co. v. City of Geneseo, Ill., 62 S.Ct. 1046, 316 U.S. 670, 86 L.Ed. 1746—Village of Heyworth v. Central Illinois Electric & Gas Co., 39 N.E.2d 26, 378 Ill. 506, certiorari denied Central Illinois Electric & Gas Co. v. Village of Heyworth, Ill., 62 S.Ct. 1046, 316 U.S. 670, 86 L.Ed. 1746.

Tenn.—Franklin Light & Power Co. v. Southern Cities Power Co., 47 S.W.2d 86, 164 Tenn. 171.

Utility of state-wide concern

Maintenance of telephone system within municipality was held matter of state-wide concern, in view of long-distance connections, and hence ordinance purporting to require franchise for use of streets must yield to statute authorizing use thereof for telephone systems.—City of Tulsa v. Southwestern Bell Telephone Co., C.C.A.Okl., 75 F.2d 343, certiorari denied 55 S.Ct. 656, 295 U.S. 744, 79 L.Ed. 1690.

5. U.S.—Continental Illinois Nat.

Bank & Trust Co. of Chicago v. City of Middlesboro, C.C.A.Ky., 109 F.2d 960.

Ala.—Phenix City v. Alabama Power Co., 195 So. 894, 239 Ala. 547.

6. Tenn.—Holston River Electric Co. v. Hydro Electric Corporation, 12 Tenn.App. 556.

7. Tenn.—Franklin Light & Power Co. v. Southern Cities Power Co., 47 S.W.2d 86, 164 Tenn. 171.

8. Pa.—Valley R. Co. v. Harrisburg, 124 A. 644, 280 Pa. 385.

9. Ky.—Hatcher v. Kentucky & West Virginia Power Co., 133 S.W. 2d 910, 280 Ky. 583.

10. Tenn.—Franklin Light & Power Co. v. Southern Cities Power Co., 47 S.W.2d 86, 164 Tenn. 171.

11. U.S.—Continental Illinois Nat. Bank & Trust Co. of Chicago v. City of Middlesboro, C.C.A.Ky., 109 F.2d 960.

12. U.S.—Continental Illinois Nat. Bank & Trust Co. of Chicago v. City of Middlesboro, *supra*.

13. Ill.—Quincy v. Bull, 106 Ill. 337.

14. N.Y.—Brooklyn City R. Co. v. Whalen, 182 N.Y.S. 283, 191 App. Div. 737, affirmed 126 N.E. 215, 229 N.Y. 570.

15. Iowa.—Central States Electric Co. v. Incorporated Town of Randall, 297 N.W. 804, 230 Iowa 376.

municipal corporation, grant a street railway company the right to use the streets of the municipal corporation,¹⁶ and, in the absence of constitutional or legislative authority, a municipality has no power to make such a grant.¹⁷ However, the legislature may properly delegate this power to a municipality,¹⁸ and it may require that the street railway companies obtain their franchises from the municipalities concerned,¹⁹ although the legislature retains the right of regulation.²⁰ Where the delegation of the power specifies to whom the grant may be made, all others are excluded.²¹

Under constitutional, charter, or statutory provisions conferring the power, a municipality may grant the use of its streets to a street railway,²² although the street has previously been paved at the expense of abutters,²³ and even though the ordinary public use of the street for the width thus occupied is destroyed,²⁴ and the tracks cross those of another railroad;²⁵ and may grant an extension of a franchise to the original holder thereof,²⁶ although an extension cannot be granted to a stranger.²⁷ The power must be delegated to the municipality in clear and unmistakable language,²⁸ and it has been held that power to grant the use of a

street by a street railway,²⁹ or to compel a relocation of tracks,³⁰ will not be implied from the power to regulate streets.

On the other hand power to grant the use of streets by a street railway has been implied from the power to grant or refuse a location of tracks,³¹ from an express legislative grant to regulate street-cars,³² and from power to grant the use of streets to utilities generally;³³ and there is authority to the effect that the general powers vested in the municipality to open, control, manage, and regulate the manner in which the streets shall be used and enjoyed sufficiently authorize the municipality to permit use by a street railway,³⁴ especially where the railway is not operated by steam.³⁵ The operation of a street railway on the streets of a municipality is largely a municipal matter,³⁶ and the municipality in consenting to the operation of a street railway on the streets acts for a local purpose.³⁷

Provision for arbitration of disputes. When so provided by charter, the municipality must include in a street railway franchise efficient provisions for the compulsory arbitration of all disputes arising between the grantees of the franchise and its employees, as to any matter of employment or wages.³⁸

16. Mont.—*Helena v. Helena Light, etc., Co.*, 207 P. 337, 63 Mont. 108.
N.Y.—*Brooklyn City, etc., R. Co. v. Coney Island, etc., R. Co.*, 35 Barb. 364.

43 C.J. p 286 note 20.

Necessity and sufficiency of grants of franchises to street railroads see the C.J.S. title Street Railroads §§ 27-52, also 60 C.J. p 178 note 66 —p 204 note 59.

Subway

Mass.—*Prince v. Crocker*, 44 N.E. 446, 166 Mass. 347, 32 L.R.A. 610.

17. Iowa—*Anhalt v. Waterloo, etc., R. Co.*, 147 N.W. 928, 166 Iowa 479 —*Stanley v. Davenport*, 2 N.W. 1064, 6 N.W. 706, 54 Iowa 463, 37 Am.R. 216.

44 C.J. p 987 note 33.

18. N.Y.—*People v. New York R. Co.*, 112 N.E. 49, 217 N.Y. 310.

19. Pa.—*Brode v. Philadelphia*, 79 A. 659, 230 Pa. 434.
43 C.J. p 286 note 18.

20. Ill.—*People v. City of Chicago*, 182 N.E. 419, 349 Ill. 304.

43 C.J. p 286 note 19.

21. Wis.—*Allen v. Clausen*, 90 N.W. 181, 114 Wis. 244.

22. Ohio.—*Parks v. Cleveland Ry. Co.*, 176 N.E. 472, 38 Ohio App. 315, affirmed 177 N.E. 28, 124 Ohio St. 79.

44 C.J. p 986 note 25.

Park commissioners

In accordance with statutory provisions it has been held that board

of park commissioners had ample statutory authority to reserve space in parkway, constituting "roadway or boulevard," for use of street railways.—*Pritchard v. Boston Elevated Ry.*, 5 N.E.2d 29, 296 Mass. 197.

Temporary permit

Statute empowering legislative authority of city to grant authority for construction, maintenance, and operation of electric railroads on streets was held to authorize granting of temporary permit to operate street railroad after expiration of an original franchise, and not to limit legislative authority to granting of formal franchises.—*Neils v. City of Seattle*, 53 P.2d 848, 185 Wash. 269.

23. Pa.—*Lockhart v. Craig St. R. Co.*, 21 A. 26, 139 Pa. 419.

24. Wash.—*State v. Thurston County Super. Ct.*, 120 P. 514, 67 Wash. 10.

25. Mo.—*St. Louis, etc., R. Co. v. Lindell R. Co.*, 88 S.W. 634, 190 Mo. 246.

44 C.J. p 986 note 28.

26. Wis.—*Linden Land Co. v. Milwaukee Electric R., etc., Co.*, 83 N.W. 851, 107 Wis. 493.

44 C.J. p 986 note 29.

27. Ohio.—*Raynolds v. Cleveland*, 21 Ohio Cir.Ct., N.S., 228.

28. N.Y.—*People v. New York R. Co.*, 112 N.E. 49, 217 N.Y. 310.

29. N.Y.—*People v. New York R. Co.*, supra.

Ohio.—*Raynolds v. Cleveland*, 2 Ohio Cir.Ct., N.S., 139, 24 Ohio Cir.Ct. 215.

30. N.Y.—*People v. New York R. Co.*, 112 N.E. 49, 217 N.Y. 310
44 C.J. p 987 note 35.

31. N.J.—*Atlantic Coast Electric R. Co. v. Public Utility Comrs.*, 104 A. 218, 92 N.J.Law 168, 12 A.L.R. 737.
44 C.J. p 987 note 37.

32. La.—*Shreveport Tract. Co. v. Shreveport*, 47 So. 40, 122 La. 1, 129 Am.S.R. 345.

33. N.C.—*Turner v. North Carolina Public-Serv. Co.*, 86 S.E. 1033, 170 N.C. 172.

44 C.J. p 987 note 39.

34. Ill.—*Chicago City R. Co. v. South Park Commissioners*, 101 N.E. 201, 257 Ill. 602.

44 C.J. p 987 note 40.

35. Fla.—*State v. Jacksonville St. R. Co.*, 10 So. 590, 29 Fla. 590.

Mo.—*State v. Corrigan Cons. St. R. Co.*, 85 Mo. 263, 55 Am.R. 361.

36. Ky.—*Poggel v. Louisville Ry. Co.*, 10 S.W.2d 305, 225 Ky. 784.

37. N.Y.—*Blanshard v. City of New York*, 253 N.Y.S. 419, 141 Misc. 609, affirmed 257 N.Y.S. 973, 236 App.Div. 663, affirmed 186 N.E. 29, 262 N.Y. 5.

38. Wash.—*Wood v. Seattle*, 62 P. 135, 23 Wash. 1, 52 L.R.A. 369.

44 C.J. p 987 note 42.

Joint use of tracks. Under statutes so providing two lines of street railway may be permitted to use the same street for a limited distance,³⁹ and such provisions do not necessarily mean that the city can permit only one track for both roads.⁴⁰

c. Railroads

The state legislature, subject to constitutional restrictions or limitations, may grant a railroad company the right to use the streets of a municipal corporation. A municipality has power to make such a grant where it has been conferred on the municipality by the constitution or by the state legislature.

The state legislature, subject to constitutional restrictions or limitations, may grant a railroad company the right to use the streets of a municipal corporation⁴¹ irrespective of consent by the municipality,⁴² and, in the absence of constitutional or legislative authority, a municipality has no power to

make such a grant.⁴³ Under constitutional, charter, or statutory provisions conferring the power a municipality may consent to or grant the use of its streets by a railroad,⁴⁴ and in this connection may permit overhead structures,⁴⁵ railroad sidings,⁴⁶ or relocation of railroad tracks,⁴⁷ and may execute a lease for railroad purposes.⁴⁸ It is ordinarily held that power to grant to a railroad a use of its streets will not be implied from a municipality's general power to establish, care, and regulate them,⁴⁹ although there is authority to the contrary.⁵⁰ A municipality has the power to permit a use of its streets by a railroad under a statute providing that railroads may use streets on obtaining the municipality's consent.⁵¹ A statute authorizing municipalities to grant franchises to railroads may be read in connection with a statute enumerating the powers of a railroad corporation; and, when such powers in-

39. U.S.—San Jose-Los Gatos Interurban R. Co. v. San Jose R. Co., Cal., 156 F. 455, 84 C.C.A. 265, 13 Ann Cas 571.

44 C.J. p 987 note 46

40. U.S.—San Jose-Los Gatos Interurban R. Co. v. San Jose R. Co., supra.

41. Ga.—Athens Terminal Co. v. Athens Foundry & Machine Works, 58 S.E. 891, 129 Ga. 393.

Pa.—Harnish v. Quarryville R. Co., 92 A. 501, 246 Pa. 426.

51 C.J. p 580 notes 4-6.

Merger of companies

Where a city consents to an entrance into it by a railway company, the legislature may authorize the merger of such company with others, and clothe the merged company with all rights of the constituent companies as to the use of streets.—Valley R. Co. v. Harrisburg, 124 A. 644, 280 Pa. 385.

42. N.Y.—New York v. New York Cent. R. Co., 136 N.E. 311, 234 N.Y. 113.—People v. Public Service Commission, 183 N.Y.S. 473, 193 App.Div. 445, affirmed 130 N.E. 911, 230 N.Y. 604.

Or.—Portland, etc., Co. v. Portland, 12 P. 265, 14 Or. 188, 58 Am.R. 299.

43. Ga.—Davis v. East Tennessee, etc., R. Co., 13 S.E. 567, 87 Ga. 605.

N.Y.—Coleman v. Second Ave. R. Co., 38 N.Y. 201, 6 Transcr.A. 146.—People ex rel. New York Cent. & H. R. R. Co. v. Woodbury, 125 N.Y.S. 728, 140 App.Div. 848, reversed on other grounds 102 N.E. 565, 208 N.Y. 421, followed in 125 N.Y.S. 780, 140 App.Div. 945, modified on other grounds 102 N.E. 566, 208 N.Y. 421.

44 C.J. p 988 note 54.

44. U.S.—Grand Trunk Western R.

Co. v. City of South Bend, Ind., 33 S.Ct. 303, 227 U.S. 544, 57 L.Ed. 633, 44 L.R.A.N.S. 405.

Ga.—Shiver v. Tift, 85 S.E. 1031, 143 Ga. 791, L.R.A.1918A 622.

Ill.—Sundstrom v. Village of Oak Park, 30 N.E.2d 58, 374 Ill. 632, 131 A.L.R. 1465.

44 C.J. p 987 note 49.

Private railroads see supra § 1725 b
Necessity and propriety of grants of right to use streets by municipalities to railroads see the C.J.S. title Railroads §§ 104, 105, also 51 C.J. p 581 note 17-p 586 note 90.

Encroachment on sidewalk

A city may authorize a railroad company to construct tracks along its streets, even though proposed tracks will encroach on part of street reserved for sidewalk purposes.—P. Bannon Pipe Co. v. Illinois Cent. R. Co., 262 S.W. 1110, 203 Ky. 659.

Unopened street

A municipality may permit a railroad company to operate over its streets where public interests would be subserved thereby, and it is immaterial that such streets have not actually been opened to general use, it being for municipal authorities to say when they should be opened for that purpose.—Richard v. City of New Orleans, 197 So. 594, 195 La. 898.

45. Wash.—Detamore v. Hindley, 145 P. 462, 83 Wash. 322.
44 C.J. p 988 note 50.

46. Mich.—Harding Coal Co. v. Pol-lack, 232 N.W. 231, 251 Mich. 457.
Switch or spur track as private railroad see supra § 1725 b.

Presumption of permission

Spur sidetrack constructed by railroad in street and in front of abutting owners' mill must be presumed to have been constructed and maintained by authority of city.

—Stout v. Frick, 62 S.W.2d 1057, 333 Mo. 826, transferred, see, App., 69 S.W.2d 677.

47. Tex.—Galveston, etc., R. Co. v. Galveston, Civ App., 155 S.W. 273.
44 C.J. p 988 note 51

48. Ohio.—Cleveland Terminal, etc., R. Co. v. State, 97 N.E. 967, 85 Ohio St. 251, 39 L.R.A.N.S. 1219

44 C.J. p 988 note 52.

49. Ala.—Louisville & N. R. Co. v. Mobile, J. & K C R. Co., 26 So. 895, 124 Ala. 162

Ga.—Daly v. Georgia, S & F. R. Co., 7 S.E. 146, 80 Ga. 793.

N.J.—Tallon v. City of Hoboken, 37 A. 895, 60 N.J. Law 212.—Thompson v. Ocean City R. Co., 36 A. 1087, 60 N.J. Law 74.

Ohio.—Louisville, etc., R. Co. v. Cincinnati, 81 N.E. 983, 76 Ohio St. 481.

44 C.J. p 988 note 55

Authority to permit connection of railroads

A legislative grant of authority to a city council "to permit the connection by common depots, tracks, or otherwise, of all railroads in said city, or any of them, upon such terms and conditions as may be fixed and agreed on between the city council and them," does not give to the municipal authorities the power to confer on any railroad company using steam locomotives the right to construct and operate a railway longitudinally along and over the streets of the city.—Augusta & S., etc., R. Co. v. City Council of Augusta, 28 S.E. 126, 100 Ga. 701.

50. Ind.—Town of New Castle v. Lake Erie & W. R. Co., 57 N.E. 516, 155 Ind. 18.

44 C.J. p 988 note 56.

51. N.C.—Griffin v. Southern R. Co., 64 S.E. 16, 150 N.C. 312.

44 C.J. p 988 note 57.

clude the carrying of property, the municipality may grant a franchise to a railroad to carry freight as well as passengers.⁵²

Limitations on exercise of power. Where a municipality has been given power to grant the use of its streets to railroads, it can exercise such power only within the conditions and limits imposed,⁵³ and such grants are subject to the existing right of public travel.⁵⁴ In applying this rule the courts have held invalid grants to use streets for permanent railroad trackage,⁵⁵ for permanent railroad bridge piers,⁵⁶ or for the construction of a railroad station building.⁵⁷

Joint use of tracks. A stipulation in a grant by the municipality that more than one road can use the tracks of the grantee is not invalid as depriving the municipality of any of its chartered powers.⁵⁸

Arbitration. An ordinance granting the right to use railroad tracks which provides for the appointment of arbitrators to determine any questions arising with other roads in regard to rules and regulations relative to the movement of trains on such tracks is not damaging to any of the substantial rights of the municipality.⁵⁹

d. Poles and Wires

Ordinarily under constitutional, charter, or statutory provisions, a municipal corporation has power to grant public utilities the use of its streets for necessary poles and wires, but, in the absence of authority conferred by the constitution or by the legislature, a municipality does not possess the power.

Ordinarily under constitutional, charter, or statutory provisions a municipal corporation has power to grant public utilities the use of its streets for necessary poles and wires,⁶⁰ and statutes enlarging the municipality's power to grant the use of its streets will not be construed as repealing prior given powers to grant such a use.⁶¹ In the absence of authority conferred by the constitution or by the legislature, a municipality does not possess the power,⁶² and an ordinance granting such a franchise without the authority of the legislature cannot be sustained as an exercise of the police power.⁶³ The power may be implied from general power to regulate the streets.⁶⁴

Joint use. The right of a company using poles in its business to use the street may be made conditional on its permitting the use of such poles to be shared by another company,⁶⁵ or reserving positions on the poles for the municipality.⁶⁶

52. Cal.—Albany v. U. S. Fidelity, etc., Co., 176 P. 705, 38 Cal.App. 466.

53. Cal.—Los Angeles v. Southern Pac. R. Co., 108 P. 65, 157 Cal. 363. 44 C.J. p 988 note 63.

54. Ill.—Sundstrom v. Village of Oak Park, 30 N.E.2d 58, 374 Ill. 632, 131 A.L.R. 1465.

La.—Cogswell v. Texas & N. O. R. Co., 8 So.2d 645, 200 La. 696.

Mo.—Stout v. Frick, App., 69 S.W.2d 677.

Ohio.—Cincinnati v. Pittsburgh, etc., R. Co., 24 Ohio Cir.Ct.N.S., 305.

44 C.J. p 989 note 64—20 C.J. p 1249 note 29 [c].

55. Ill.—Chicago, etc., R. Co. v. People, 78 N.E. 790, 222 Ill. 427. 44 C.J. p 981 note 59.

56. La.—City of Shreveport v. Kansas City, S. & G. Ry. Co., 120 So. 290, 167 La. 771, 62 A.L.R. 1512.

57. Ill.—Sundstrom v. Village of Oak Park, 30 N.E.2d 58, 374 Ill. 632, 131 A.L.R. 1465.

58. Ill.—Chicago, etc., R. Co. v. Dunbar, 100 Ill. 110. 44 C.J. p 988 note 60.

59. La.—Capdevielle v. New Orleans, etc., R. Co., 34 So. 868, 110 La. 904.

60. U.S.—City of Roswell, N. M., v. Mountain States Telephone & Telegraph Co., C.C.A.N.M., 78 F.2d 379

—West Texas Utilities Co. v. City of Spur, C.C.A.Tex., 38 F.2d 466—Griffin v. Oklahoma Natural Gas Corporation, C.C.A.Kan., 37 F.2d 545.

Ala.—City of Bessemer v. Birmingham Elec. Co., 27 So.2d 565, 248 Ala. 345.

Md.—Purnell v. Ocean City, 159 A. 359, 162 Md. 169.

Mo.—State ex inf. Shartel, ex rel. City of Sikeston v. Missouri Utilities Co., 53 S.W.2d 394, 331 Mo. 337, 89 A.L.R. 607. 44 C.J. p 989 note 65.

Distribution system

The statute providing that municipal corporations may grant to individuals or private corporations the authority to erect electric light or power plants with necessary poles, etc., contemplates the granting of a franchise for the operation of a distribution system.—Central States Electric Co. v. Incorporated Town of Randall, 297 N.W. 804, 230 Iowa 376.

The word "electric" in charter, authorizing city to grant right to construct pipes, tubes, conduits, wires, and other electric, telegraph, and mechanical apparatus in city streets and highways did not exclusively connote light, heat and power.—Salinas v. Pacific Tel. & Tel. Co., 164 P. 2d 905, 72 Cal.App.2d 494.

The word "mechanical" in charter, authorizing city to grant right to construct pipes, tubes, conduits,

wires, and other electric telegraph and mechanical apparatus in city streets and highways, meant such mechanical apparatus as was similar to or of the same general character as the things theretofore mentioned in the provision.—Salinas v. Pacific Tel. & Tel. Co., supra.

61. La.—Mandeville Ice, etc., Co. v. Mandeville, 71 So. 512, 139 La. 286. 44 C.J. p 989 note 66.

62. Okl.—South McAlester-Eufaula Tel. Co. v. State, 106 P. 962, 25 Okl. 524. 44 C.J. p 989 note 68.

63. Wis.—State v. Milwaukee Independent Tel. Co., 114 N.W. 108, 315, 133 Wis. 588.

64. Mo.—State on Inf. of McKittrick ex rel. City of Trenton v. Missouri Public Service Corporation, 174 S. W.2d 871, 351 Mo. 961, certiorari denied State of Missouri ex rel. McKittrick v. Missouri Public Service Corporation, 64 S.Ct. 786, 321 U.S. 793, 88 L.Ed. 1082.

Tenn.—City of Chattanooga v. Tennessee Electric Power Co., 112 S. W.2d 385, 172 Tenn. 624. 44 C.J. p 989 note 70.

65. Ohio.—Toledo Electric St. R. Co. v. Western Electric Light, etc., Co., 10 Ohio Cir.Ct. 531, 4 Ohio Cir. Dec. 43.

66. U.S.—Western Union Tel. Co. v. Richmond, Va., 32 S.Ct. 449, 224 U.S. 160, 56 L.Ed. 710.

e. Underground Conduits

Ordinarily under constitution, charter, or statute a municipal corporation has the power to grant to public utilities the use of its streets for necessary underground conduits, but it does not possess the power where it has not been conferred by the constitution or by the state legislature.

Ordinarily under constitution, charter, or statute a municipal corporation has the power to grant to public utilities the use of its streets for necessary underground conduits.⁶⁷ A municipality has no inherent power to grant such a use,⁶⁸ and it does not possess the power where it has not been conferred by the constitution or by the state legislature.⁶⁹ The power may be implied from a statutory requirement that no company shall occupy the streets of a municipality unless the corporate authorities have assented thereto,⁷⁰ or from the general power given by the legislature to a municipality to control its streets and regulate the manner of their use.⁷¹

The power to prescribe the manner in which any privilege granted for digging up streets to lay pipes shall be exercised does not authorize a municipality to make an original grant of such privileges,⁷² and a statute authorizing municipalities to grant the use of streets for light, heat, and power will not authorize a grant for the laying of pneumatic tubes used to carry packages by compressed air.⁷³ A grant to an individual is void where the statute provides only for grants to domestic pipe-line corporations.⁷⁴

Under statute a public utility may be given power to lay underground conduits in the streets without obtaining municipal consent.⁷⁵ The grant of privileges to lay underground conduits has been held invalid where the ordinance failed to reserve to the municipality the privilege of regulating and limiting charges.⁷⁶

§ 1727. — Miscellaneous Uses

In accordance with the rule that a municipal corporation has no inherent power to grant franchises or privileges to use its streets, it has been held that a municipality has no power to grant the use of its streets for various purposes in the absence of general or special authorization by constitutional, charter, or statutory provisions.

In accordance with the rule that a municipal corporation has no inherent power to grant franchises or privileges to use its streets, as discussed supra § 1718, it has been held that a municipality, in the absence of general or special authorization by constitutional, charter, or statutory provisions, has no power to grant the right to use its streets for newsstands,⁷⁷ or garbage incinerators,⁷⁸ or to authorize the use of the public streets for the purpose of holding thereon a carnival or street fair,⁷⁹ especially when features are included which might endanger persons lawfully on the streets.⁸⁰ On the other hand, where such authorization has been conferred, a municipality may grant the right to use its streets

67. Cal.—*Salinas v. Pacific Tel. & Tel. Co.*, 164 P.2d 905, 72 Cal.App.2d 494.

Kan.—*State ex rel. Grant v. City of Coffeyville*, 28 P.2d 1032, 138 Kan. 909.

La.—*Richland Gas Co. v. Hale*, 125 So. 130, 169 La. 300.

Mass.—*Metropolitan Home Tel. Co. v. Emerson*, 88 N.E. 670, 202 Mass. 402.

S.C.—*Glenn v. Woodworth*, 14 S.E.2d 555, 197 S.C. 56.

44 C.J. p 989 note 73.

Water for fire protection

Council and officers of town had power under statute to issue franchise for the furnishing of water for public fire protection.—*Mountain State Water Co. v. Town of Kingwood*, 1 S.E.2d 395, 121 W.Va. 66.

Necessity of grant

A company had no right to lay its pipe lines in and across streets and alleys of a city without permission of the city, which had a right to know the purpose for which the franchise was sought, and was not compelled to grant a franchise.—*Consolidated Water Co. v. City of Talco*, Tex.Civ.App., 116 S.W.2d 411.

68. U.S.—*New Orleans Gas Light Co. v. Louisiana Light, etc., Co.*, La., 6 S.Ct. 252, 115 U.S. 650, 29 L.Ed. 516.

Inherent powers of municipality to grant use of streets generally see supra § 1718.

69. N.C.—*Elizabeth City v. Banks*, 64 S.E. 189, 150 N.C. 407, 22 L.R.A., N.S., 925.

44 C.J. p 990 note 76.

70. Mo.—*Holland Realty, etc., Co. v. St. Louis*, 221 S.W. 51, 282 Mo. 180.

Va.—*Commonwealth v. Portsmouth Gas Co.*, 112 S.E. 792, 132 Va. 480.

71. Mo.—*State on Inf. of McKittrick ex rel. City of Trenton v. Missouri Public Service Corporation*, 174 S.W.2d 871, 351 Mo. 961, certiorari denied *State of Missouri ex rel. McKittrick v. Missouri Public Service Corporation*, 64 S.Ct. 786, 321 U.S. 793, 88 L.Ed. 1032.

44 C.J. p 990 note 80.

72. N.J.—*Fogg v. Ocean City*, 65 A. 885, 74 N.J.Law 362.

73. Ohio.—*Ampt v. Cincinnati*, 21 Ohio Cir.Ct. 300, 11 Ohio Cir.Dec.

805, 9 Ohio S. & C.P. 394, 6 Ohio N.P. 401.

74. Okl.—*Henry v. Bartlesville Gas, etc., Co.*, 126 P. 725, 33 Okl. 473, Ann Cas 1914B 487.

75. Pa.—*Allegheny v. Chartiers Valley Gas Co.*, 11 A 658, 9 Pa.Cas. 22.

44 C.J. p 990 note 82.

76. Ohio.—*Ampt v. Cincinnati*, 21 Ohio Cir.Ct. 300, 11 Ohio Cir.Dec. 805, 9 Ohio S. & C.P. 394, 6 Ohio N.P. 401.

77. Iowa.—*Cowin v. City of Waterloo*, 21 N.W.2d 705, 237 Iowa 202. Particular uses held private or public see supra § 1725.

78. N.Y.—*McCarthy v. Mills*, 211 N. Y.S. 352, 214 App.Div. 70.

44 C.J. p 990 note 93.

79. Ga.—*Augusta v. Reynolds*, 50 S.E. 998, 122 Ga. 754, 106 Am.S.R. 147, 69 L.R.A. 564.

44 C.J. p 990 note 89.

80. Ga.—*Augusta v. Jackson*, 93 S. E. 304, 20 Ga.App. 710.

Ga.—*Augusta v. Jackson*, supra.

for markets,⁸¹ newsstands,⁸² drinking fountains,⁸³ wharves,⁸⁴ or carnivals or street fairs.⁸⁵

The use of streets for automobile races or for filling or service stations is considered in Motor Vehicles §§ 571, 774, and the use of streets for hack stands is discussed *infra* § 1766.

§ 1728. Proceedings to Obtain Grant or License

The legislature may prescribe the manner in which a municipal franchise or license to use streets shall be granted, and a statute prescribing such procedure is usually mandatory and exclusive.

The legislature may prescribe the manner in which a municipal franchise or license to use streets shall be granted,⁸⁶ and a statute prescribing such procedure is usually mandatory and exclusive,⁸⁷ rendering a franchise or license otherwise granted invalid.⁸⁸ So statutory or charter provisions as to

the application for the right to use the street must be strictly followed.⁸⁹ Statutes providing for a petition or consent by abutting owners⁹⁰ or public notice of the petition for leave to use the streets⁹¹ are generally construed as mandatory; and licenses granted without substantial compliance with such requirements are void.⁹²

In accordance with charter or statutory provisions, a grant by ordinance is the proper or necessary method for conferring the right to use the streets,⁹³ and, where the charter or statute gives power to the municipality to grant franchises in its streets by ordinance, the right cannot be conferred by resolution.⁹⁴ Charter or statutory provisions which prescribe the procedure for the enactment of the ordinance, such as how it must be introduced, advertised, passed, or the like, must be followed in order to make the grant or license valid;⁹⁵ but presumptions favor official compliance with sworn

81. N.Y.—*People v. Hylan*, 194 N.Y. S. 179, 118 Misc. 341, affirmed 194 N.Y.S. 969, 202 App. Div. 745.

82. N.Y.—*People v. Keating*, 61 N.E. 637, 168 N.Y. 390—*People v. Roseman*, 295 N.Y.S. 882, 164 Misc. 11.

83. N.J.—*Levy v. Elizabeth*, 75 A. 312, 79 N.J. Law 456, reversed on other grounds 80 A. 498, 81 N.J. Law 643.

44 C.J. p 990 note 87.

84. R.I.—*Narragansett Real Est Co. v. Mackenzie*, 82 A. 804, 34 R. I. 103.

44 C.J. p 990 note 88.

85. Ind.—*State v. Stoner*, 79 N.E. 399, 39 Ind. App. 104.

44 C.J. p 990 note 90.

86. Cal.—*Suisan City v. Pacific Gas, etc., Co.*, 170 P. 1078, 35 Cal. App. 380.

44 C.J. p 991 note 95.

87. U.S.—*Continental Illinois Nat. Bank & Trust Co. of Chicago v. City of Middlesboro, C.C.A.Ky.*, 109 F.2d 960.

Kan.—*Gas Service Co. v. Consolidated Gas Utilities Corporation*, 65 P. 2d 584, 145 Kan. 423.

44 C.J. p 991 note 96.

Recognition of rights granted by county

Recognition by city of rights of utility under franchises granted by county prior to city's incorporation, by dealing with the utility while in the possession of such rights, did not thereby convert the county-granted rights into city-granted rights which would be binding on city.—*State ex rel. City of Jasper v. Gulf States Utilities Co.*, 189 S.W.2d 693, 144 Tex. 184.

88. U.S.—*U. S. v. 53½ Acres of Land in Borough of Brooklyn*,

Kings County, N. Y., D.C.N.Y., 47 F.Supp. 887, reversed on other grounds, C.C.A., Brooklyn Eastern Dist. Terminal v. City of New York, 139 F.2d 1007, certiorari denied 64 S.Ct. 1158, 322 U.S. 747, 88 L.Ed. 1579.

44 C.J. p 991 note 97.

89. N.J.—*New York, etc., Water Co. v. North Arlington Borough*, 74 A. 973, 76 N.J. Eq. 514.

44 C.J. p 991 note 7.

90. Ill.—*McGann v. People*, 62 N.E. 941, 194 Ill. 526.

44 C.J. p 991 note 4.

Time for securing consent

A statute requiring consent of abutting owners as a condition precedent to a grant of the use of streets does not require the securing of such consent prior to the introduction of the ordinance.—*Cincinnati v. Hillenbrand*, 133 N.E. 556, 103 Ohio St. 286.

Vehicle stands

An ordinance requiring the consent of an abutting owner to the establishment of a vehicle stand on the street does not confer on abutting owners power to grant or refuse use of vehicle stands when established in street in front of their premises.—*Chapman v. City of Portland*, 160 A. 913, 131 Me. 242.

91. Iowa.—*Van Horn v. Des Moines*, 191 N.W. 144, 195 Iowa 840.

44 C.J. p 991 note 5.

92. Ill.—*McGann v. People*, 62 N.E. 941, 194 Ill. 526—*Metropolitan City R. Co. v. Chicago*, 96 Ill. 620.

93. U.S.—*Continental Illinois Nat. Bank & Trust Co. of Chicago v. City of Middlesboro, C.C.A.Ky.*, 109 F.2d 960.

44 C.J. p 991 note 98.

94. U.S.—*Continental Illinois Nat.*

Bank & Trust Co. of Chicago v. City of Middlesboro, *supra*.

Tex.—*Community Natural Gas Co. v. Northern Texas Utilities Co.*, Civ. App., 13 S.W.2d 184, error dismissed.

44 C.J. p 991 note 99.

95. Kan.—*Gas Service Co. v. Consolidated Gas Utilities Corporation*, 65 P.2d 584, 145 Kan. 423.

Minn.—*Union Public Service Co. v. Village of Minnesota*, 2 N.W.2d 555, 212 Minn. 92.

44 C.J. p 991 note 2, p 992 note 8.

Phrase "granting franchise" in statutes governing method of passage of ordinances granting franchises has been held to be synonymous with "defining" or "creating" franchise.—*Union Light, Heat & Power Co. v. City of Covington*, 55 S.W.2d 667, 246 Ky. 663.

Reading

An ordinance extending a street railway grant which relates to but one road and involves no expenditure of money belonging to the city, is not within a statute requiring reading on three different days of an ordinance of a general and permanent nature.—*State v. Oakwood St. R. Co.*, 30 Ohio Cir.Ct. 632.

Purpose of publication

Purpose of statute providing that public hearing on petition for franchise must be "published" at least twice in two newspapers in borough affected is to give to the public most affected publicity of the proposed franchise with due regard to widespread and regular circulation of newspapers.—*Loos v. City of New York*, 9 N.Y.S.2d 760, 170 Misc. 14, 104, reversed on other grounds 13 N.Y.S.2d 119, 257 App. Div. 219.

Publication held sufficient

Tex.—*Texas Power & Light Co. v.*

duty.⁹⁶ Permission to use the streets need not be granted by ordinance in the absence of charter or statutory requirement,⁹⁷ and, where the statute authorizes action by the municipal legislative body without referring to ordinances, the grant or license may be conferred by a vote on motion or by the passage of a resolution.⁹⁸

Statutory or charter provisions prescribing the procedure for granting a franchise do not apply where the grant or permit to use the streets does not constitute a franchise.⁹⁹

Directory requirements. A failure to comply strictly with merely directory requirements will not invalidate the grant.¹

Waiver. Where the ordinance granting a franchise requires the permission of certain officials to be first obtained, such requirement may be waived by the municipality.²

§ 1729. — Award on Competitive Bidding

A constitutional or statutory provision that a fran-

chise for the use of the streets or other public ways of a municipal corporation can be granted only by award to the highest or highest and best bidder after advertisement is mandatory and exclusive of all other methods of granting franchises.

In some jurisdictions it is provided by the constitution or by statute that a franchise for the use of the streets or other public ways of a municipal corporation can be granted only by award to the highest or highest and best bidder after advertisement, and such a requirement is mandatory and exclusive of all other methods of granting franchises.³ Provisions for competitive bidding must be strictly complied with,⁴ and the conditions attached to the sale or the requirements demanded of the bidder must not be so unreasonable as to preclude competitive bidding.⁵ The city council may not arbitrarily or corruptly reject all bids and thereby escape the obligation to award the franchise to the highest and best bidder.⁶ A statute requiring a sale to the highest bidder must, in the absence of anything to the contrary in the statute, be held to contemplate the

Brownwood Public Service Co., Civ. App., 111 S.W.2d 1225, error refused.

96. N.J.—West Jersey Traction Co. v Camden Horse R. Co., 29 A. 333, 52 N.J.Eq. 452.

S.C.—Town of Brookland v Broad River Power Co., 173 S.E. 71, 172 S.C. 115.

97. U.S.—Femmer v. City of Juneau, C.C.A. Alaska, 97 F.2d 649.

98. U.S.—Femmer v. City of Juneau, supra.

44 C.J. p 991 note 1.

99. Cal.—Winkie v. Turlock Irr. Dist., 74 P.2d 302, 24 Cal.App.2d 1.

Use for business of utility

(1) Charter provision requiring three-fourths vote of board of estimates to grant a "franchise" uses quoted word as meaning use of streets by public service companies in connection with sale of services or facilities to public generally.—Goldstein v. LaGuardia, 43 N.Y.S.2d 202, 180 Misc. 738.

(2) A "franchise" within charter of city providing that no franchise or right to occupy or use streets shall be granted except by ordinance, submitted to voters, connotes the right of a public utility to make use of the city streets for the purpose of carrying on the business in which it is generally engaged.—Washington Fruit & Produce Co. v. City of Yakima, 100 P.2d 8, 8 Wash.2d 152, 128 A.L.R. 159, opinion adhered to 103 P.2d 1106, 8 Wash.2d 152.

Right to collect garbage

An ordinance granting plaintiff exclusive right to collect garbage with-

in city for a certain period did not grant a franchise, within statute providing that an ordinance granting a franchise shall not be passed less than thirty days after its introduction, and, therefore, ordinance was not invalid because it was passed less than thirty days after its introduction.—City Sanitary Service Co. v. Rausch, 117 P.2d 225, 10 Wash.2d 446.

Slum clearance project necessitating closing and taking over by redevelopment company of streets within the area and authorizing company to construct and use conduits under streets for heat and other utilities did not involve granting of a franchise for which charter requires three-fourths vote of board of estimate.—Goldstein v. LaGuardia, 43 N.Y.S.2d 202, 180 Misc. 738.

Exclusive franchise

Ordinance granting public utility right to use streets was held not invalid because not enacted in compliance with statute governing granting of exclusive franchises, where franchise granted was not exclusive.—Town of Brookland v. Broad River Power Co., 173 S.E. 71, 172 S.C. 115.

1. Va.—Victoria v. Victoria Ice, etc., Co., 114 S.E. 89, 134 Va. 124.

44 C.J. p 992 note 9.

2. Ill.—McWethy v. Aurora Electric Light, etc., Co., 67 N.E. 9, 202 Ill. 218.

3. Ky.—Rockport Coal Co.'s Trustee in Bankruptcy v. Telford, 300 S.W. 898, 222 Ky. 288.

44 C.J. p 992 note 13.

Purpose of constitutional provision relating to sale of franchise was to protect municipality against loss of valuable rights in granting of franchises and privileges, and, by sale of franchise, after due advertisement to highest and best bidder, to protect rights of citizens to receive value of privilege to be granted away and to prevent their councils from granting valuable privileges to favorites without sufficient consideration.—Hatcher v. Kentucky & West Virginia Power Co., 133 S.W.2d 910, 280 Ky. 583.

4. Cal.—San Diego v. Kerckhoff, 193 P. 801, 49 Cal.App. 473.

44 C.J. p 992 note 14.

5. U.S.—Petroleum Exploration v. Joseph Greenspon's Sons Iron & Steel Co., C.C.A. Ky., 62 F.2d 944.

Test of reasonableness

Requirements demanded of bidder at sale of franchise by city are reasonable, if affording standard for service which city may reasonably establish.—Petroleum Exploration v. Joseph Greenspon's Sons Iron & Steel Co., supra.

Conditions held reasonable

U.S.—Petroleum Exploration v. Joseph Greenspon's Sons Iron & Steel Co., C.C.A. Ky., 62 F.2d 944.

6. Ky.—Hatcher v. Kentucky & West Virginia Power Co., 133 S.W.2d 910, 280 Ky. 583.—Norris v. Kentucky State Telephone Co., 30 S.W.2d 960, 235 Ky. 234.—Groover v. City of Irvine, 300 S.W. 904, 222 Ky. 366.

Presumption of good faith see infra § 1743.

highest bidder for cash.⁷

Constitutional or statutory provisions requiring due advertisement of the sale are intended to afford every person who desires to bid a full opportunity to do so,⁸ but such provisions should be liberally construed.⁹ Although a sale is made after the time fixed by ordinance, it may be ratified and accepted by a subsequent resolution.¹⁰ An ordinance granting a franchise is not invalidated by the fact that, after proposals for the franchise have been advertised and a bid accepted, the city with the consent of the successful bidder substitutes in the ordinance a rate lower than that contained in the proposals and more favorable to consumers.¹¹

A statute which requires the sale of a franchise to the highest bidder is invalid where the state constitution prohibits the grant of an exclusive franchise, for if a grant were made to the highest bidder such bidder would necessarily secure an exclusive right to the exercise of the franchise.¹²

Existing franchises. A constitutional or statutory provision which requires competitive bidding before a municipality is authorized to grant a franchise does not require an advertisement for bids before a town can make a contract with reference to an existing franchise.¹³ The enactment of an ordinance relieving the company from an obligation

imposed by its franchise¹⁴ or amending an existing franchise so as to increase the rates which the company is authorized to charge during the existence of the franchise¹⁵ is not the granting of a franchise within a provision requiring an advertisement for bids before any franchise is granted.

Some statutes require that on or before the expiration of a franchise the city shall conduct a sale, on competitive bidding, of a similar franchise,¹⁶ and the validity of such statutes has been upheld.¹⁷ Under such a statute the city must offer a franchise nearly corresponding to, resembling, or having a general likeness to, the old franchise,¹⁸ but the statute does not prevent a change in the terms of the new franchise to meet new conditions in the city.¹⁹ A provision as to the time the sale should be conducted before the expiration of the existing franchise has been held to be merely directory,²⁰ but other provisions are held to be mandatory.²¹

The proceeds of the sale of a franchise are to be regarded as proceeds of a sale of property of the municipal corporation,²² and are to be disposed of as provided by law in the case of funds so derived.²³

§ 1730. — Submission to Vote

Where a statute or the constitution requires ordinances authorizing certain uses of streets by public

7. Cal.—Thompson v. Alameda County, 44 P. 230, 111 Cal. 553.

Per cent of receipts

An offer to pay a per cent of the gross receipts, or to do or provide any other things in consideration of such franchise, cannot be considered.—Thompson v. Alameda County, supra.

8. U.S.—Petroleum Exploration v. Joseph Greenspon's Sons Iron & Steel Co., C.C.A.Ky., 52 F.2d 944.

9. U.S.—City of Corbin, Ky., v. Joseph Greenspon's Sons Iron & Steel Co., C.C.A.Ky., 52 F.2d 939.

Notice held sufficient

Where the statute required the sale to be advertised for a period of not less than thirty days, an advertisement in four issues, not consecutive, of weekly newspaper of sale of franchise, by city authorizing use of streets, was held sufficient notice.—City of Corbin, Ky., v. Joseph Greenspon's Sons Iron & Steel Co., supra.

10. U.S.—City of Corbin, Ky., v. Joseph Greenspon's Sons Iron & Steel Co., supra.

11. U.S.—Saginaw Power Co. v. Saginaw, C.C.Mich., 193 F. 1008.

12. Cal.—Pereria v. Wallace, 62 P. 61, 129 Cal. 397.

Grants of exclusive privileges see supra § 1724.

13. Ky.—Johnson County Gas Co. v. Stafford, 248 S.W. 515, 198 Ky. 208.

14. Va.—Commonwealth v. Richmond, etc., R. Co., 80 S.E. 796, 115 Va. 756.

15. Ky.—Johnson County Gas Co. v. Stafford, 248 S.W. 515, 198 Ky. 208 —People's Electric Light, etc., Co. v. Capital Gas, etc., Co., 75 S.W. 280, 116 Ky. 76, 25 Ky.L. 327.

16. Ky.—City of Paris v. Kentucky Utilities Co., 133 S.W.2d 559, 280 Ky. 492.

Rights created

Statute requiring governing boards of cities to provide for sale of franchise similar to expiring franchise, unless no public necessity for utility exists and discontinuance of service is desired, created public right for benefit of inhabitants of city and private right for benefit of utility holding expiring franchise.—City of Paris v. Kentucky Utilities Co., supra.

17. Ky.—Kentucky Utilities Co. v. Board of Com'rs of City of Paris, 71 S.W.2d 1024, 254 Ky. 527.

Consent

The statute is not violative of constitutional provision that no public service company shall use streets without consent of city.—Kentucky

Utilities Co. v. Board of Com'rs of City of Paris, supra.

Limitations on duration of franchise

The statute is not violative of constitutional provision prohibiting granting franchises for more than twenty years since, even though the old franchise holder is the successful bidder, the franchise granted is not the same franchise.—Kentucky Utilities Co. v. Board of Com'rs of City of Paris, supra.

18. Ky.—Kentucky Utilities Co. v. City of Paris, 179 S.W.2d 676, 297 Ky. 440.

19. Ky.—Kentucky Utilities Co. v. City of Paris, supra.

20. Ky.—Hatcher v. Kentucky & West Virginia Power Co., 133 S.W.2d 910, 280 Ky. 583—Norris v. Kentucky State Telephone Co., 30 S.W.2d 960, 235 Ky. 234.

21. Ky.—Hatcher v. Kentucky & West Virginia Power Co., 133 S.W.2d 910, 280 Ky. 583—Norris v. Kentucky State Telephone Co., 30 S.W.2d 960, 235 Ky. 234.

22. La.—Board of Liquidation v. New Orleans, 32 La. Ann. 915.

23. La.—Board of Liquidation v. New Orleans, supra.

service corporations to be submitted to the people, the ratification by the electors is a condition precedent to the right of such corporations to occupy the streets.

Where a statute or the constitution requires ordinances authorizing certain uses of streets by public service corporations to be submitted to the people, the ratification by the electors is a condition precedent to the right of such corporations to occupy the streets.²⁴ Such provisions, being intended to protect the interests of the people, should be liberally construed to effectuate their intention.²⁵ Only a grant of the nature specified by the charter or statute need be submitted to popular vote,²⁶ and a charter or statutory provision requiring a referendum in case of grant of a franchise does not apply to a grant which amounts to no more than a mere revocable license or privilege²⁷ or to a contract which is not a franchise.²⁸ Such a requirement applies to an original franchise, or to a renewal or extension of the period for which a grant has been made,²⁹ but does not apply to a mere extension or enlargement of the facilities which the franchise holder employs in exercising a power previously granted,³⁰ although, on the other hand, a provision expressly made applicable to any extension or enlargement of powers previously granted has been held to require submission of any modification of

the terms of the grant which may make its exercise more valuable to the grantee or more onerous to the city or its citizens.³¹

Petition for election. The term "property owners" in a statute which requires the granting of a franchise to be submitted to the electors on the petition of a certain number of property owners has been construed to include owners of personalty as well as owners of real estate.³² Where the constitution rests the right to prescribe the regulations for franchise elections in the legislature, a statute specifying the number of voters required to sign the petition for a franchise election has been held to control over conflicting provisions of a home-rule charter.³³ Signers of a petition for a franchise election may withdraw their names before final action on the petition,³⁴ but, under a statute requiring a franchise election to be called if petitioned for by a stated proportion of the legal electors within a certain number of days from a fixed time, it has been held that signatures to such petition cannot be withdrawn at the pleasure of the signers after the expiration of such period.³⁵ A statute relating to election contests generally has been held to be inapplicable in an action to enjoin a franchise elec-

24. Iowa.—Groenendyk v. Fowler, 215 N.W. 718, 204 Iowa 598.

Kan.—City of Manhattan v. United Power & Light Corporation, 283 P. 919, 129 Kan. 592.

La.—Wachsen v. Commission Council of Lake Charles, 111 So. 177, 162 La. 823.

Wash.—Washington Water Power Co. v. Rooney, 101 P.2d 580, 3 Wash.2d 642, 127 A.L.R. 1044—State v. Spokane County Super. Ct., 152 P. 11, 87 Wash. 582.

44 C.J. p. 992 note 21.

Extensions of a franchise must be submitted to the voters when required by statute.—State v. Wauwatosa, 102 N.W. 894, 124 Wis. 451.

25. Colo.—Ward v. Colorado Eastern R. Co., 125 P. 567, 22 Colo. App. 332.

26. Mich.—City of Niles v. Michigan Gas & Electric Co., 262 N.W. 900, 273 Mich. 255.

Mo.—State ex inf. McKittrick ex rel. City of Springfield v. Springfield City Water Co., 131 S.W.2d 525, 345 Mo. 6.

Wash.—Washington Water Power Co. v. Rooney, 101 P.2d 580, 3 Wash.2d 642, 127 A.L.R. 1044.

The word "franchise," in statute prohibiting city from granting franchise without first submitting application therefor to resident freeholders, is used in same sense as in state constitution, classifying franchise as property subject to taxation as such,

and signifies special privilege, conferred by government on certain person, association, or corporation, as distinguished from privileges conferred on people generally.—Glodt v. City of Missoula, Mont., 190 P.2d 545.

Proposed ordinance rejected by council

Where the statute provides for the submission of an ordinance granting a franchise to popular vote, a proposed ordinance which the city council has refused to pass may not be submitted to popular vote.—McCutcheon v. Wozencraft, 294 S.W. 1105, 116 Tex. 440.

27. U.S.—McPhee, etc., Co. v. Union Pac. R. Co., Colo., 158 F. 5, 87 C.C. A. 619.

Tex.—Ex parte Polite, Civ.App., 260 S.W. 1048.

Revocable franchise

Constitutional provision that municipality could not grant irrevocable public utility franchise except by vote of people does not require that a revocable franchise be submitted to the people.—City of Niles v. Michigan Gas & Electric Co., 262 N.W. 900, 273 Mich. 255.

28. Mich.—Drain Com'r of Oakland County v. City of Royal Oak, 10 N.W.2d 435, 306 Mich. 124.

City's contract to purchase parking meters, to be installed at locations determined by city, used and

operated under its control, and paid for by rentals from revenues thereof collected by city, was not invalid as granting franchise to vendor without first submitting matter to city's resident freeholders in violation of statute.—Glodt v. City of Missoula, Mont., 190 P.2d 545.

29. Okl.—Overholser v. Oklahoma Interurban Tract. Co., 119 P. 127, 29 Okl. 571.

30. Okl.—Overholser v. Oklahoma Interurban Tract. Co., supra.

31. U.S.—Birmingham Waterworks Co. v. Birmingham, D.C. Ala., 211 F. 497, affirmed 213 F. 450, 130 C.C.A. 96.

32. Iowa.—Groenendyk v. Fowler, 215 N.W. 718, 204 Iowa 598.

33. Tex.—Stahl v. Miller, Civ.App., 63 S.W.2d 578, error refused.

Provisions held conflicting

Where, at last election, only nine hundred and three votes were cast, home-rule charter, requiring only ten per cent of voters at last election to sign petition for franchise election was held in conflict with statute requiring five hundred signatures.—Stahl v. Miller, supra.

34. Tex.—Stahl v. Miller, supra.

35. Kan.—State v. Independence, 221 P. 245, 114 Kan. 837.

tion on the ground that the petition was not signed by the requisite number of voters.³⁶

§ 1731. Requisites and Validity of Grant in General

The grant or license must be in strict conformity with the provisions of the statute or charter authorizing it.

The grant or license must be in strict conformity with the provisions of the statute or charter authorizing it,³⁷ and, where based on the petition of property owners, it must not exceed the privilege sought by the petition.³⁸ Franchises granted to public utilities should be formal and definite.³⁹ A grant to a utility to use the streets to furnish services which the utility has no power under its charter to furnish has been held to be void.⁴⁰ The invalidity of an ordinance carries with it a provision requiring the municipality to take and pay for certain things to be furnished.⁴¹

Acceptance. A grant of a franchise does not become operative until the grantee has accepted it.⁴² If a permit amounts to no more than a municipal license, it becomes binding on the municipality when acted on by the licensee by constructing its structures in the streets.⁴³

Bribery. Consent of borough authorities to the use of its streets by a public utility company obtained by bribery is invalid.⁴⁴

§ 1732. Bond for Compliance with Franchise

A statute providing that a bond in favor of the mu-

nicipal corporation shall be filed by the grantee of a franchise or right to use the streets has been construed to be directory.

A statute providing that a bond in favor of the municipal corporation shall be filed by the grantee of a franchise or right to use the streets has been construed to be directory because not of the essence of the grant.⁴⁵ A bond executed by a person other than the grantee of a franchise does not comply with an ordinance requiring the grantee to execute a bond.⁴⁶ Failure of the grantee to file a bond as required by the ordinance granting the franchise may render the franchise voidable at the discretion of the city.⁴⁷

§ 1733. Construction and Operation

- a. In general
- b. Terms and conditions as contractual

a. In General

Grants of rights in streets are to be construed in accordance with the reasonable meaning of the language in which they are expressed. Ambiguities will be construed against the grantee and in favor of the public.

Grants of rights in streets are to be construed in accordance with the reasonable meaning of the language in which they are expressed,⁴⁸ and are not to be construed as including permission to do acts outside the rights conferred;⁴⁹ but the express grant of a distinct right or privilege implies license to do whatever is reasonably necessary to its enjoyment.⁵⁰ The rules governing construction of municipal contracts in general are applicable to the construction

36. Ala.—Birmingham Gas Co. v. City of Bessemer, 33 So.2d 475, 250 Ala. 137.

37. Kan.—Gas Service Co. v. Consolidated Gas Utilities Corporation, 65 P.2d 584, 145 Kan. 423
44 C.J. p 993 note 26.

38. Ill.—Chester v. Wabash, etc., R. Co., 55 N.E. 524, 182 Ill. 382.

39. Minn.—Union Public Service Co. v. Village of Minneota, 2 N.W.2d 555, 212 Minn. 92.

40. Ky.—People's Electric Light, etc., Co. v. Capital Gas, etc., Light Co., 75 S.W. 280, 116 Ky. 76, 25 Ky. L. 327.

Grant to proposed corporation see Corporations § 127 b.

Light

A franchise to use the streets to furnish gas and other illuminating light is void as to the latter where the charter of the company only authorizes it to furnish gas.—People's Electric Light, etc., Co. v. Capital Gas, etc., Light Co., supra.

41. Ind.—Meyer v. Boonville, 70 N. E. 146, 182 Ind. 165.

42. Or.—Portland v. Public Service Commission, 173 P. 1178, 89 Or. 325.

43. Ill.—People v. Block, 67 N.E. 809, 203 Ill. 363.

44. Pa.—Keogh v. Pittston, etc., R. Co., 5 Lack Leg N. 242, affirm d 45 A. 672, 195 Pa. 131.

45. Va.—Victoria v. Victoria Ice, etc., Co., 114 S.E. 89, 134 Va. 124.

46. Wash.—Aberdeen v. Honey, 35 P. 1097, 8 Wash. 251.

47. Ga.—South Georgia Power Co. v. Baumann, 151 S.E. 513, 169 Ga. 649.

48. N.Y.—Morenken Bldg. Corporation v. Long Island Water Co., 244 N.Y.S. 605, 137 Misc. 303.

S.C.—Glenn v. Woodworth, 14 S.E.2d 555, 197 S.C. 56.

44 C.J. p 993 note 35.

Impossibility of performance

Where public utility contracted with municipality to restore streets and alleys to as good condition as before they were disturbed, public utility after blasting out solid rock was not required to perform the impossible by replacing solid rock, but

to comply with obligation the best it could.—Commonwealth Public Service Corporation v. Town of Bluefield, 187 S.E. 521, 167 Va. 82.

Use of switch track

Use of switch track in street was held not a matter controllable by reservation or exception in deed for extent of right to maintain switch is to be measured by permission granted by city.—Stout v. Frick, Mo.App., 69 S.W.2d 677.

49. Tex.—Consolidated Water Co. v. City of Talco, Civ.App., 116 S.W. 2d 411.

44 C.J. p 993 note 36.

Material transported through pipes

The transporting of water through pipe lines into city by a company under a franchise permitting the company only to transport oil or gas amounted to wrongful use of the franchise.—Consolidated Water Co. v. City of Talco, supra.

50. Mass.—Prince v. Crocker, 44 N. E. 446, 166 Mass. 347, 32 L.R.A. 610.

44 C.J. p 994 note 37.

of a franchise granting the use of the streets, in so far as conditions are the same.⁵¹ A contract between a municipality and a public service corporation granting the use of streets must be construed in the light of its judicial and legislative history,⁵² and such a contract must be construed and enforced according to the standards of law in force at the time it was entered into.⁵³ Conditions at the time of the making of the contract,⁵⁴ and also changed conditions,⁵⁵ should, in proper cases, be considered by the court. When the language is reasonably susceptible to a construction that renders the franchise valid, such construction should be adopted.⁵⁶

Ambiguities, if any, in the grant of the use of the streets, will be construed strictly against the grantee and liberally in favor of the public,⁵⁷ what is not unequivocally granted being withheld, and nothing passing by implication save what is necessary to effect the obvious intent of the grant.⁵⁸ However, a

city ordinance restrictive of the use of streets by a public service corporation, and penal in its nature, as one prescribing a fine for its violation, must be strictly construed.⁵⁹ An ordinance granting the use of streets can only give such rights as the common council has power to grant.⁶⁰ A grant of the right to use the streets is taken subject to the implied condition that the city has the full and unconditional power to make improvements in its streets⁶¹ and to make such use of the streets as might be necessary to protect the public health and safety,⁶² and it is taken subject to the concurrent use of the streets by the public.⁶³

Statutes as part of contract. Existing statutes or charter provisions become a part of the contract between cities and public service corporations which have been granted a franchise to use the streets,⁶⁴ and in the construction of the grant it is proper to consider the existing state of the statutory law.⁶⁵

51. Wash.—City of Spokane v. Spokane Gas & Fuel Co., 26 P.2d 1034, 175 Wash. 103.

52. Ala.—Greil v. Stollenwerck, 78 So. 79, 201 Ala. 303.

Failure to comply with statutory requirements for granting of franchise for use of streets indicated that city and terminal company entering into contract regarding construction of freight terminal did not contemplate grant of franchise.—U. S. v. 53¼ Acres of Land in Borough of Brooklyn, Kings County, N. Y., D.C.N.Y., 47 F.Supp. 887, reversed on other grounds, C.C.A., Brooklyn Eastern Dist. Terminal v. City of New York, 139 F.2d 1007, 152 A.L.R. 296, certiorari denied 64 S.Ct. 1158, 322 U.S. 747, 88 L.Ed. 1579.

53. Ohio.—Columbus v. Public Utilities Commission, 133 NE 800, 103 Ohio St. 79.

54. N.J.—State v. Trenton, 23 A. 281, 54 N.J.Law 92.

Streets not dedicated to public use

Where streets in market area were never laid out on official map as required by city charter before dedicating street to public use, such fact justified conclusion that terminal company did not receive grant or right to public streets under contract from city conferring right to construct and operate public freight terminal in the market area.—U. S. v. 53¼ Acres of Land in Borough of Brooklyn, Kings County, N. Y., D.C.N.Y., 47 F.Supp. 887, reversed on other grounds, C.C.A., Brooklyn Eastern Dist. Terminal v. City of New York, 139 F.2d 1007, certiorari denied 64 S.Ct. 1158, 320 U.S. 747, 88 L.Ed. 1579.

55. Wash.—Wylde v. City of Seattle, 299 P. 385, 163 Wash. 583.

56. Tex.—City of Baird v. West Texas Utilities Co., Civ.App., 174 S.W.2d 649.

57. U.S.—Arkansas-Missouri Power Corp. v. City of Rector, Ark., C.C.A. Ark., 164 F.2d 938—Continental Illinois Nat. Bank & Trust Co. of Chicago v. City of Middlesboro, C. C.A. Ky., 109 F.2d 960—City of Roswell, N. M., v. Mountain States Telephone & Telegraph Co., C.C.A. N.M., 78 F.2d 379—Southern Pacific Co. v. Portland, C.C.Or., 177 F. 958, affirmed 33 S.Ct. 308, 227 U.S. 559, 57 L.Ed. 642.

Ark.—Citizens Pipe Line Co. v. Twin City Pipe Line Co., 10 S.W.2d 493, 178 Ark. 309—City of El Dorado v. Coats, 299 S.W. 355, 175 Ark. 289.

Ill.—People v. City of Chicago, 182 NE 419, 349 Ill. 304.

Mich.—City of Benton Harbor v. Michigan Fuel & Light Co., 231 N.W. 52, 250 Mich. 614, 71 A.L.R. 114.

Mont.—Nord v. Butte Water Co., 30 P.2d 809, 96 Mont. 311.

W.Va.—Mountain State Water Co. v. Town of Kingwood, 9 S.E.2d 532, 122 W.Va. 374.

44 C.J. p 994 note 38.

58. U.S.—City of Roswell, N. M., v. Mountain States Telephone & Telegraph Co., C.C.A.N.M., 78 F.2d 379.

Mont.—Nord v. Butte Water Co., 30 P.2d 809, 96 Mont. 311.

Or.—Joseph v. Joseph Water Works Co., 111 P. 864, 112 P. 1083, 57 Or. 586.

59. Wash.—Clark v. Pacific Power, etc., Co., 157 P. 462, 91 Wash. 130.

60. Wis.—Lange v. La Crosse, etc., R. Co., 95 N.W. 952, 118 Wis. 558.

61. Ill.—People v. Chicago City Ry. Co., 155 N.E. 781, 324 Ill. 618.

Wash.—Pacific Telephone & Telegraph Co. v. Slezak, 276 P. 904, 151 Wash. 457.

Grant as subject to power of city to regulate use of streets see supra § 1692.

62. Ky.—Louisville Gas & Electric Co. v. Commissioners of Sewerage of Louisville, 33 S.W.2d 344, 236 Ky. 376.

63. La.—Cogswell v. Texas & N O R. Co., 8 So.2d 645, 200 La. 696.

Mich.—Bator v. Ford Motor Co., 257 N.W. 906, 269 Mich. 648.

Ohio—Black v. City of Berea, 32 N. E.2d 1, 137 Ohio St. 611, 132 A.L. R. 1391.

Restoration for use of public

(1) As a part of the grant, there remains the duty of the grantor primarily and of the grantee to maintain or restore the public way for the use of the traveling public—Indianapolis Water Co. v. Schoenemann, 20 N.E.2d 671, 107 Ind App 308.

(2) Statutes, ordinances, charters, or franchises requiring persons who are granted the use of the streets for specified purposes to restore portions so used and keep them in repair during such use, are merely declaratory of the common law.—In re Madison Rys. Co., C.C.A.Wis., 115 F.2d 586.

64. Ark.—Pocahontas v. Central Power, etc., Co., 244 S.W. 712, 152 Ark. 276, certiorari dismissed 43 S.Ct. 94, 260 U.S. 755, 67 L.Ed. 498.

Ill.—People v. City of Chicago, 182 N.E. 419, 349 Ill. 304.

N.C.—Boyce v. City of Gastonia, 41 S.E.2d 355, 227 N.C. 139.

65. N.Y.—Electric Power Co. v. New York, 60 N.Y.S. 590, 29 Misc. 48

Acts with respect to the same subject matter, although of different dates and by different general assemblies, are *pari materia* and must be construed together.⁶⁶ Statutes will not be construed as retrospective so as to apply to franchises in existence at the time of the enactment of the statutes in the absence of an expressed intention of the legislature that the statutes shall operate retrospectively.⁶⁷

Legislative character. The grant of a right to use the public streets is directly or indirectly the act of the state,⁶⁸ and being of a governmental or legislative character is, where made by the city under a charter power, to be construed as though it were direct from the legislature.⁶⁹

b. Terms and Conditions as Contractual

The grant and acceptance of a franchise for the use of streets constitute a contract.

The grant and acceptance of a franchise for the use of streets constitute a contract,⁷⁰ and on acceptance conditions attached to the grant become bind-

ing on the grantee,⁷¹ subject to restrictions imposed by the constitution or statutes.⁷² So if the company petitions for the right to use a street on certain terms, and the terms are accepted by the city, it constitutes a contract.⁷³ A grant of a right to use the streets may be a contract on acceptance, although it is not a franchise.⁷⁴ The breach by the municipality of terms for the benefit of both parties releases a licensee from the duty to comply with such conditions.⁷⁵

A grant on acceptance is binding, according to some authorities, even though the municipality was without power to exact such conditions;⁷⁶ but according to other authorities an attempt to impose an *ultra vires* condition is regarded as a mere nullity,⁷⁷ and if it is divisible the unlawful or invalid part of the condition may be disregarded, leaving the remaining part unaffected.⁷⁸ The fact that the city has construed an ambiguous contract in a certain manner does not necessarily preclude it from subsequently contending that the contract should be construed in another manner.⁷⁹

66. Ind.—Meyer v. Boonville, 70 N. E. 146, 162 Ind. 165.

Tex.—Texarkana v. Southwestern Tel., etc., Co., 106 S.W. 915, 48 Tex. Civ.App. 16.

67. Kan.—City of Wichita v. Wichita R. & Light Co., 152 P. 768, 96 Kan. 606

Statute relating to access to records of public utility corporation

Kan.—City of Wichita v. Wichita R. & Light Co., *supra*.

68. U.S.—City R. Co. v. Citizens' St. R. Co., Ind., 17 S.Ct. 653, 166 U.S. 557, 563, 41 L.Ed. 1114.

44 C.J. p 994 note 47.

Municipality as governmental agency of state in granting rights to use streets see *supra* § 1718 a.

69. Tex.—Whitcomb v. Houston, 130 S.W. 215, 61 Tex.Civ.App. 555.

70. U.S.—City of Corbin, Ky., v. Joseph Greenspon's Sons Iron & Steel Co., C.C.A.Ky., 52 F.2d 939—Washington v. Seattle, etc., R. Co., D.C.Wash., 1 F.2d 605—Mercantile Trust, etc., Co. v. Collins Park, etc., R. Co. C.C.Ga., 101 F. 347, 350.

Ala.—Phenix City v. Alabama Power Co., 195 So. 894, 239 Ala. 547.

Ark.—City of El Dorado v. Coats, 299 S.W. 355, 175 Ark. 289.

Ga.—Georgia Power Co. v. City of Rome, 157 S.E. 283, 172 Ga. 14.

Ill.—People v. City of Chicago, 182 N.E. 419, 349 Ill. 304.

N.Y.—Tilton v. City of Utica, 60 N. Y.S.2d 249.

Ohio.—Parks v. Cleveland Ry. Co., 177 N.E. 28, 124 Ohio St. 79.

Wash.—City of Spokane v. Spokane

Gas & Fuel Co., 26 P.2d 1034, 175 Wash. 103.

44 C.J. p 994 note 50.

Sufficiency of acceptance

An acceptance is not rendered insufficient by a declaration in the instrument of acceptance that the grantee waives none of its vested rights under its charter.—Trenton v. Trenton Horse R. Co., N.J.Ch., 19 A. 263.

71. Md.—Mayor and City Council of Baltimore v. Baltimore Steam Packet Co., 164 A. 878, 164 Md. 284.

Pa.—Philadelphia Electric Co. v. City of Philadelphia, 152 A. 23, 301 Pa. 291, appeal dismissed 51 S.Ct. 349, 283 U.S. 786, 75 L.Ed. 1414.

Wash.—City of Spokane v. Spokane Gas & Fuel Co., 26 P.2d 1034, 175 Wash. 103.

44 C.J. p 995 note 51.

Condition as precedent or subsequent

Nature of condition to exercise of franchise granted by municipality to occupy public streets, whether precedent or subsequent, is question of intention, depending on terms of enabling statute and language of grant.—People ex rel. Village of Chateaugay v. Public Service Commission of New York, 174 N.E. 637, 255 N.Y. 232, reargument denied 177 N.E. 172, 256 N.Y. 637.

Necessity for consideration

Where municipality gives its consent to exercise of franchise by a public utility, consideration is not necessary to make the limitations on the granted consent binding on the utility.—Town of Seaford v. Eastern Shore Public Service Co., 2 A.2d 288, 22 Del.Ch. 288, sustained Eastern

Shore Public Service Co. v. Town of Seaford, 2 A.2d 265, 23 Del.Ch. 199, appeal dismissed Eastern Shore Public Service Co. v. Town of Seaford, 59 S.Ct. 483, 306 U.S. 616, 83 L.Ed. 1024, rehearing denied 59 S.Ct. 589, 306 U.S. 668, 83 L.Ed. 1063.

72. Ala.—Phenix City v. Alabama Power Co., 195 So. 894, 239 Ala. 547.

Mich.—City of Niles v. Michigan Gas & Electric Co., 262 N.W. 900, 273 Mich. 255.

44 C.J. p 995 note 52.

73. N.J.—Barr v. New Brunswick, 33 A. 477, 58 N.J.Law 255.

74. Ill.—People v. Central Union Tel. Co., 61 N.E. 428, 192 Ill. 307, 85 Am.S.R. 338.

26 C.J. p 1022 note 20.

75. Ohio.—Newark Gas, etc., Co. v. Newark, 8 Ohio S. & C.P. 418, 7 Ohio N.P. 76.

76. U.S.—Todd v. Citizens' Gas Co. of Indianapolis, C.C.A.Ind., 46 F.2d 855, certiorari denied 51 S.Ct. 561, 283 U.S. 852, 75 L.Ed. 1459.

Conn.—City of Hartford v. Connecticut Co., 140 A. 734, 107 Conn. 312.

Tex.—Stahl v. Miller, Civ.App., 63 S. W.2d 578, error refused.

44 C.J. p 995 note 54.

77. W.Va.—Wheeling v. Natural Gas Co., 82 S.E. 345, 74 W.Va. 372.

78. W.Va.—Wheeling v. Natural Gas Co., *supra*.

79. Neb.—City of Scottsbluff v. Western Public Service Co., 254 N.W. 712, 127 Neb. 160.

Payments made under contract

Where contract between city and public utility was ambiguous, prac-

§ 1734. — Nature of Right Conferred

A grant by the state or the municipal corporation to a private corporation of a right to use the streets of the municipality in a way not common to the public at large may constitute the grant of a franchise.

A grant by the state or the municipal corporation to a private corporation of a right to use the streets of the municipality in a way not common to the public at large may constitute the grant of a franchise.⁸⁰ A franchise for the use of the streets is in the nature of a special privilege;⁸¹ it is the right to use the street in a way which, except for the grant, would be a trespass⁸² or a public nuisance,⁸³ and it may include any right to use the streets which

the duly constituted authorities may lawfully confer.⁸⁴ The rule has been announced that the franchise consists in the right to occupy the streets for a public purpose as distinguished from the actual occupancy thereof.⁸⁵ Not every right or privilege to use public streets is a franchise,⁸⁶ and a privilege to use the streets temporarily for a private purpose is a license rather than a franchise.⁸⁷ A grant of a privilege in two separate railroad companies to connect their tracks with a street track is a joint license.⁸⁸

Property right. A franchise to use the streets is a property right⁸⁹ according to the decisions

tical construction placed thereon by city council whereby certain monthly payments were made to utility was held not to estop new city administration to contend that contract did not require such payments.—City of Scottsbluff v. Western Public Service Co., *supra*.

80. U.S.—City of Tulsa v. Southwestern Bell Telephone Co., C.C.A. Okl., 75 F.2d 343, certiorari denied 55 S.Ct. 656, 295 U.S. 744, 79 L.Ed. 1690.—Griffin v. Oklahoma Natural Gas Corporation, C.C.A.Kan., 37 F.2d 545

Ariz.—Northeast Rapid Transit Co. v. City of Phoenix, 15 P.2d 951, 41 Ariz. 71.

Colo.—People v. Begole, 56 P.2d 931, 98 Colo. 354.

Md.—Huebschmann v. Grand Co., 172 A. 227, 166 Md. 615.

Utah—Utah Light & Traction Co. v. Public Service Commission, 118 P.2d 683, 101 Utah 99.

Wash.—Washington Water Power Co. v. Rooney, 101 P.2d 580, 583, 3 Wash.2d 642, 127 A.L.R. 1044.—Washington Fruit & Produce Co. v. City of Yakima, 100 P.2d 8, 3 Wash.2d 152, 128 A.L.R. 159, opinion adhered to 103 P.2d 1106, 3 Wash.2d 152.

26 C.J. p 1012 notes 59-63, p 1018 note 60.

Nature of franchises generally see Franchises §§ 4-8.

Proprietary interest

Since the state has no proprietary interest in the streets of a city dedicated to public use, and its power to grant to a private corporation an easement over streets not common to the public at large is limited to such power as it possesses in its sovereign capacity to grant a franchise, a grant by the state does not confer a proprietary interest but only a franchise.—San Francisco v. Spring Valley Water Works, 48 Cal. 493.

81. Ala.—City of Mobile v. Farrell, 158 So. 539, 229 Ala. 582, followed in City of Mobile v. Nelson, 158 So. 543, 229 Ala. 587 and City of

Mobile v. Mouraites, 158 So. 543, 229 Ala. 588.

N.Y.—People ex rel Central Hudson Gas & Electric Co. v. State Tax Commission, 160 N.E. 371, 247 N.Y. 281.

82. Utah—Utah Light & Traction Co. v. Public Service Commission, 118 P.2d 683, 101 Utah 99.

Street crossing franchise consists of the right to cross a street, and to use it, when but for the grant of the right to do so from competent public authority it would be a trespass.—People ex rel. Central Hudson Gas & Electric Co. v. State Tax Commission, 160 N.E. 371, 247 N.Y. 281.

83. Ariz.—Northeast Rapid Transit Co. v. City of Phoenix, 15 P.2d 951, 41 Ariz. 71.

84. N.Y.—Loos v. City of New York, 9 N.Y.S.2d 760, 170 Misc. 14, 104, reversed on other grounds 13 N.Y.S.2d 119, 257 App.Div. 219.

85. Md.—United R., etc., Co. v. Baltimore, 73 A. 633, 111 Md. 264.—Consolidated Gas Co. v. Baltimore, 61 A. 532, 101 Md. 541, 109 Am.S.R. 584, 1 L.R.A.N.S., 263.

86. Wash.—Washington Fruit & Produce Co. v. City of Yakima, 100 P.2d 8, 3 Wash.2d 152, 128 A.L.R. 159, opinion adhered to 103 P.2d 1106, 3 Wash.2d 152.

Electric utility

(1) Contract whereby utility was to furnish city electric current, to be delivered and metered at city's power plant, and in which the use of the streets was merely incidental to the performance of the contract was held not to be a franchise within charter restrictions on granting franchises.—Northern States Power Co. v. City of Granite Falls, 242 N.W. 714, 186 Minn. 209.

(2) Where a city undertakes to supply a public need, and to that end purchases the necessary service from a utility, the city is regarded as merely authorizing the use of the streets as an incident to the delivery of service to itself, and not as granting the utility a franchise to

use the streets for general business purposes.—Washington Fruit & Produce Co. v. City of Yakima, 100 P.2d 8, 3 Wash.2d 152, 128 A.L.R. 159, opinion adhered to 103 P.2d 1106, 3 Wash.2d 152.

Right to construct and operate terminal

A contract by which the city granted terminal company right to construct and operate public freight terminal at public market, was held not a franchise.—U. S. v. 53¼ Acres of Land in Borough of Brooklyn, Kings County, N. Y., D.C.N.Y., 47 F. Supp. 887, reversed on other grounds, C.C.A., Brooklyn Eastern Dist. Terminal v. City of New York, 139 F.2d 1007, 152 A.L.R. 296, certiorari denied 64 S.Ct. 1158, 322 U.S. 747, 88 L.Ed. 1579.

Maintenance of sewer

Granting to county by city of right to construct and maintain a connecting sewer in certain street for fifty years, in connection with contract between city and county for disposal of sewage of a district in county through city's sewage treatment plant, was not under the constitution, the grant of a franchise.—Drain Com'r of Oakland County v. City of Royal Oak, 10 N.W.2d 435, 306 Mich. 124.

87. U.S.—McPhee, etc., Co. v. Union Pac. R. Co., Colo., 158 F. 5, 87 C.C. A. 619.

26 C.J. p 1017 notes 43 [a], 48 [a].

88. Pa.—Philadelphia v. River Front R. Co., 34 A. 60, 173 Pa. 334.

89. U.S.—City of York v. Iowa-Nebraska Light & Power Co., C. C.A.Neb., 109 F.2d 683, certiorari denied 60 S.Ct. 893, 309 U.S. 690, 84 L.Ed. 1032.

Ala.—Phenix City v. Alabama Power Co., 195 So. 894, 239 Ala. 547.

N.Y.—People v. Bleecker St. & F. F. R. Co., 124 N.Y.S. 782, 67 Misc. 577, affirmed 125 N.Y.S. 1045, 140 App.Div. 611, 95 N.E. 1136, 201 N.Y. 594.

Real property

Cal.—South Pasadena v. Pasadena

on the question, in the nature of an easement.⁹⁰ A person using a street under a revocable license acquires no property right therein.⁹¹

§ 1735. — Exclusiveness of Right

A grant or license to use streets will be construed as exclusive only where an exclusive right is granted by clear and explicit terms or by necessary implication.

A grant or license to use streets will be construed as exclusive only where an exclusive right is granted by clear and explicit terms or by necessary implication.⁹² Where a franchise to a private corporation has not expressly or clearly conferred an exclusive right to use the streets as against competitors, the grant of the franchise will not prevent the city from constructing and operating a like public utility of its own⁹³ or from granting a similar franchise to some other person or corporation.⁹⁴

Although a franchise is not exclusive in the sense that another similar franchise cannot be granted to

others, the rights and privileges conferred on the grantee are exclusive in their nature against all persons on whom similar rights have not been conferred,⁹⁵ and a void grant of an exclusive privilege does not give another company a right to use the streets without the consent of the municipality.⁹⁶ A valid exclusive franchise will be protected by the courts,⁹⁷ and, where an exclusive franchise has in fact and in law been granted, the granting authority cannot thereafter violate its agreement by granting a similar franchise to another.⁹⁸ Conferring an exclusive privilege does not deprive the municipality of the right to subscribe to the stock of a new company whose object is to compete with the company granted an exclusive privilege.⁹⁹

A grant for a private use may not be shared by others than the grantee without the consent of the grantee.¹

Conditions as to use by others. Grants to a public service corporation of the right to use the streets

Land, etc., Co., 93 P 490, 152 Cal 579.

26 C.J. p 1021 note 3 [a].

90. U.S.—City of York v. Iowa-Nebraska Light & Power Co., C.C. A.Neb., 109 F.2d 683, certiorari denied 60 S.Ct. 893, 309 U.S. 690, 84 L.Ed. 1032.

Cal.—Stockton Gas, etc., Co. v. San Joaquin County, 83 P 54, 148 Cal. 313, 5 L.R.A., N.S., 174, 7 Ann.Cas. 511.

Md.—United R., etc., Co. v. Baltimore, 73 A. 633, 111 Md 264.

26 C.J. p 1017 note 39 [a].

91. Okl.—Hover v. Oklahoma City, 271 P. 162, 133 Okl. 71.

Loading platform

Fact that city permitted wholesale grocery to construct loading platform to curb, occupying sidewalk space, did not confer permanent property right in street.—J. M. Radford Grocery Co. v. City of Abilene, Com App., 34 S.W.2d 830.

Sign

Granting of permission to erect sign encroaching on adjacent street vests owner with no right to its continued maintenance, but his only right is under a revocable license, and exists only as long as municipality continues the permission.—Mallory, Inc., v. City of New Rochelle, 53 N.Y.S.2d 643, 184 Misc 66, affirmed 51 N.Y.S.2d 91, 268 App.Div. 878, appeal denied 51 N.Y.S.2d 758, 268 App.Div. 914, appeal denied 62 N.E.2d 391, 294 N.Y. 839, and affirmed 65 N.E.2d 455, 295 N.Y. 712.

92. U.S.—Western Public Service Co. v. City of Minatare, C.C.A. Neb., 99 F.2d 644.

Ark—City of El Dorado v. Coats, 299 S.W. 355, 175 Ark. 289.

44 C.J. p 995 note 64.

Construction of franchises as:

Creating monopoly see Monopolies § 13.

Exclusive generally see Franchises § 22.

Power to grant exclusive privileges see supra § 1724.

Narrow construction

Public grants will be narrowly construed so as to negative any exclusive rights that would operate to prejudice of the grantor or to the public generally.—Glenn v. Woodworth, 14 S.E.2d 555, 197 S.C. 56.

93. U.S.—Knoxville Water Co. v. Knoxville, Tenn., 26 S.Ct. 224, 200 U.S. 22, 50 L.Ed 353.

44 C.J. p 996 note 65.

94. Ga.—South Georgia Power Co. v. Baumann, 151 S.E. 513, 169 Ga. 649.

Okl.—Sapulpa v. Sapulpa Oil, etc., Co., 97 P. 1007, 22 Okl. 347.

26 C.J. p 1034 note 25 [d].

Impairment of value of franchise

Where town granted franchise not in terms exclusive, it could grant another franchise, although latter greatly impaired value of former.—Richland Gas Co. v. Hale, 125 So. 130, 169 La. 300.

Interference with property

Right of public utility company, under statute, to use highway running through village was merely that competitor's occupancy should not be allowed to interfere with utility company's physical property.—Arkansas Power & Light Co. v. West Memphis Power & Water Co., 41 S.W.2d 755, 184 Ark. 206, certiorari de-

nied 52 S.Ct. 310, 285 U.S. 536, 76 L.Ed. 930.

Exclusive franchise to serve city

Where the grant of the use of streets to a utility company by the state before the incorporation of the city is not exclusive, the city may grant the use of the streets to a competing utility on whom it confers an exclusive franchise to serve the inhabitants of the city.—Arkansas Power & Light Co. v. West Memphis Power & Water Co., 58 S.W.2d 206, 187 Ark. 41.

95. Okl.—Bartlesville Electric Light, etc., Co. v. Bartlesville Interurban R. Co., 109 P. 228, 26 Okl. 453, 29 L.R.A., N.S., 77.

96. Ind.—Citizens' Gas, etc., Co. v. Elwood, 16 N.E. 624, 114 Ind. 332.

97. Mass.—Attorney General v. Walworth Light, etc., Co., 31 N.E. 482, 157 Mass. 86, 16 L.R.A. 398.

44 C.J. p 996 note 68.

98. N.J.—Atlantic City Water Works Co. v. Atlantic City, 39 N.J.Eq. 367.

44 C.J. p 982 note 84.

99. U.S.—Memphis v. Dean, Tenn., 8 Wall. 64, 19 L.Ed. 326.

1. Tex.—Witty v. Corpus Christi Plumbing Co., Civ.App., 25 S.W.2d 169.

Connecting water pipes

Fact that franchise to lay water pipes was not granted by ordinance did not justify trespassers in connecting with pipes without owner's consent, and property owner laying water pipe with city's consent could enjoin others from connecting with water pipes, where they refused to pay.—Witty v. Corpus Christi Plumbing Co., supra.

are often made conditional on the allowing other like companies to use the grantee's tracks, conduits, poles, etc., as the case may be.² Such a condition is not a contract with the latter companies, but only a contract between the first company and the municipality,³ from which the municipality may release the first company;⁴ and the right of the other companies to use such tracks, etc., is dependent on the consent of the municipality.⁵ A subsequent grant by the municipality to a new company of the right to use the poles of another company is unreasonable and void where the limits of such use are not fixed.⁶ Where the grantee is required to permit the use of its poles by other companies to which permits have been granted by the municipality, it cannot question the charter powers of companies holding such permits.⁷ Where a grant is invalid for want of authority, the grantee cannot complain of a later ordinance authorizing the occupation of its property by another company on payment of a fair proportion of the original cost and a monthly rental.⁸

Conflicting grants or licenses. The right of the grantee under a license to use the streets is subject to the right of the municipal authorities to permit a subsequent, usual, and necessary use of the street in the interest of the public,⁹ but cannot be impaired by the grant of a right to a private person to make an extraordinary use of the street.¹⁰ As between two corporations exercising similar franchises on the same street, priority, although it does not create monopoly, carries superiority of rights, and equity will adjust conflicting interests, as far as possible, so that each company may exercise its own franchise as fully as is compatible with the necessary rights of another; but, where interference is unavoidable, the later occupant must give way.¹¹

Where the grant to one company of a right to use the streets does not necessarily interfere with or impair a prior grant to another company, it cannot be objected to by the first company;¹² and licenses are not invalid for slight incidental interferences with a prior privilege granted another.¹³ Where an exclusive right is granted, injunction lies as against a subsequent competing company to preserve the franchise granted to the first company.¹⁴ A subsequent conflicting contract may be made valid by a termination of a prior contract by agreement on the day the later contract is to take effect.¹⁵

§ 1736. Assignment or Transfer

A grant to a person or corporation and his or its assigns or successors of the right or privilege to use a street for a public purpose is assignable and alienable.

A grant to a person or corporation and his or its assigns or successors of the right or privilege to use a street for a public purpose is assignable and alienable.¹⁶ While ordinarily a mere personal license to use streets is not assignable without the consent of the municipality,¹⁷ there is authority for the view that, even if the consent is regarded as a mere license, it may be transferred where it is coupled with an interest.¹⁸ Under a statutory provision permitting a certain type of corporation to acquire from a corporation of the same type the latter's rights, property, and franchises, it has been held that rights and privileges in streets can thus be acquired.¹⁹ A provision in an ordinance granting the right to build a railroad to be used by the grantee in connection with the construction of a public building that the privilege conferred should not be sold or transferred is not violated by an agreement giving a subcontractor a right to use the road while

2. U.S.—Chicago, etc., R. Co. v. Kansas City, etc., R. Co., C.C.Mo., 52 F. 178.

44 C.J. p 996 note 70.

3. N.J.—Jersey City & Bergen R. Co. v. Jersey City & Hoboken Horse R. Co., 20 N.J.Eq. 61, reversed on other grounds 21 N.J.Eq. 550.

4. N.J.—Jersey City & Bergen R. Co. v. Jersey City & Hoboken Horse R. Co., supra.

5. Ohio.—Hauss Electric Lighting Power Co. v. Jones Bros. Electric Co., 10 Ohio Dec. (Reprint) 709, 23 Cinc.L.Bul. 137.

6. Mich.—Citizens' Electric Light, etc., Co. v. Sands, 55 N.W. 452, 95 Mich. 551, 20 L.R.A. 411.

44 C.J. p 996 note 74.

7. Ohio.—Brush Electric Light Co. v. Jones Bros. Electric Co., 5 Ohio Cir.Ct. 340, 3 Ohio Cir.Dec. 168.

8. Ohio.—Brush Electric Light Co. v. Jones Bros. Electric Co., supra.

9. N.D.—Northwestern Tel. Exch. Co. v. Anderson, 98 N.W. 706, 12 N.D. 585, 102 Am.S.R. 580, 65 L.R.A. 771, 1 Ann.Cas. 110.

Grant as subject to concurrent use of streets by public see supra § 1733 a.

10. N.D.—Northwestern Tel. Exch. Co. v. Anderson, 98 N.W. 706, 12 N.D. 585, 102 Am.S.R. 580, 65 L.R.A. 771, 1 Ann.Cas. 110.

44 C.J. p 996 note 78.

11. Minn.—Northwestern Tel. Exch. Co. v. Twin City Tel. Co., 95 N.W. 460, 89 Minn. 495.

44 C.J. p 996 note 80.

12. Ga.—Savannah, etc., R. Co. v. Coast-Line R. Co., 49 Ga. 202.

13. Conn.—New Hartford Water Co.

v. Village Water Co., 87 A. 358, 87 Conn. 183.

44 C.J. p 996 note 82.

14. Ky.—People's Electric Light, etc., Co. v. Capital Gas, etc., Co., 75 S.W. 280, 116 Ky. 76, 25 Ky.L. 327.

44 C.J. p 996 note 83.

15. Mich.—Plainwell v. Easley Light, etc., Co., 183 N.W. 66, 214 Mich. 461.

16. Ill.—Village of West City v. Illinois Commercial Telephone Co., 24 N.E.2d 352, 372 Ill. 493.

44 C.J. p 997 notes 87, 88.

17. Ind.—Coverdale v. Edwards, 58 N.E. 495, 155 Ind. 374.

18. Neb.—State v. Citizens' St. R. Co., 114 N.W. 429, 80 Neb. 357.

44 C.J. p 997 note 90.

19. Ill.—Quincy v. Chicago, etc., R. Co., 94 Ill. 537.

engaged in such construction.²⁰ It has been held that, where a company was authorized to use the streets with the consent of the municipal authorities, and afterward transferred its property to another company, the consent of the municipality was not thereby transferred to the latter company.²¹ The municipality has such an interest in a franchise granted by it that it may maintain an action to question the transfer or attempted transfer by the grantee.²²

Construction of instrument of transfer. The mere fact that a franchise to use the streets is not expressly mentioned in a deed transferring the property, together with the appurtenances, of the grantee of the franchise does not prevent the transfer of such franchise,²³ and an instrument by which the grantee of a franchise which includes the use of streets grants the sole and exclusive right and privilege to operate for all purposes under a franchise has been construed as affecting a transfer of the franchise.²⁴

Option to acquire public utility plant. The municipality may assign or transfer an option to acquire a public utility plant constructed under a grant

from the municipality.²⁵

§ 1737. Rental, Tolls, or Fees

A municipal corporation may impose a reasonable charge as compensation for the space in streets which is occupied by the operator of a public utility, or for the use of streets.

The courts have recognized the right of municipal corporations to impose a reasonable charge as compensation for the space in streets which is occupied by the operator of a public utility,²⁶ or for the use of streets.²⁷ The legislature may expressly authorize municipalities to exact a rental or fee for the purpose of revenue from the use of their streets,²⁸ or it may prohibit such rental or fee,²⁹ and it may limit the amount which may be charged.³⁰ A municipality may impose fees in connection with the regulation and supervision of structures or equipment in the street used in the operation of public utilities,³¹ but the fee must be reasonable in amount.³²

The charge for the occupation of the street has been considered to be in the nature of rental,³³ and not a tax.³⁴ While the view has been taken that the power under which the city may collect such

20. Tex.—Taylor v. Dunn, 16 S.W. 732, 80 Tex. 652.

21. N.Y.—Brooklyn v. Fulton Municipal Gas Co., 7 Abb.N.Cas. 19.

22. Ga.—Georgia Power Co. v. City of Rome, 157 S.E. 283, 172 Ga. 14.

23. U.S.—Wichita v. Old Colony Trust Co., Kan., 132 F. 641, 66 C. C.A. 19.

24. N.Y.—Matter of Long Acre Electric Light, etc., Co., 102 N.Y. S. 242, 117 App.Div. 80, affirmed 80 N.E. 1101, 188 N.Y. 361.

25. Ky.—Covington Gas Light Co. v. Covington, 58 S.W. 805, 22 Ky. L. 796.

26. Tex.—Fleming v. Houston Lighting & Power Co., 138 S.W.2d 520, 135 Tex. 463, rehearing denied Fleming v. Houston Lighting & Power Co., 143 S.W.2d 923, 135 Tex. 463, certiorari denied Houston Lighting & Power Co. v. City of West University Place, 61 S.Ct. 836, 313 U.S. 560, 85 L.Ed. 1520.

Wash.—City of Spokane v. Spokane Gas & Fuel Co., 26 P.2d 1034, 175 Wash. 103.

44 C.J. p 997 note 98.

Consideration for franchises in general see Franchises § 16.

Necessity of consideration for grant of right to use streets see *supra* § 1723.

27. Ill.—People v. City of Chicago, 182 N.E. 419, 349 Ill. 304.

La.—City of Gretna v. South New Orleans Light & Traction Co., 4 La.App. 480.

Tex.—Gulf Refining Co. v. City of Fort Worth, Civ.App., 36 S.W.2d 285, reversed on other grounds, Com App., City of Fort Worth v. Gulf Refining Co., 55 S.W.2d 792, and reversed on other grounds 83 S.W.2d 610, 125 Tex. 512.

44 C.J. p 978 note 15, p 997 note 99. Review by court of reasonableness of charge see *infra* § 1743.

Contract

City may make valid and binding contract to receive compensation for use of its streets—Danville Traction & Power Co. v. City of Danville, 191 SE 592, 168 Va. 430.

28. U.S.—City of Portland v. Pacific Telephone & Telegraph Co., D.C.Or., 5 F.Supp. 79.

Ill.—Harder's Fireproof Storage, etc., Co. v. Chicago, 85 N.E. 245, 235 Ill. 58, 14 Ann.Cas. 536.

29. Miss.—Hodges v. Western Union Tel. Co., 18 So. 84, 72 Miss. 910, 29 L.R.A. 770.

Utility of state-wide concern

Maintenance of telephone system within municipality held matter of state-wide concern, in view of long-distance connections, and hence ordinance purporting to require compensation for use of streets must yield to statute authorizing use thereof for telephone systems.—City of Tulsa v. Southwestern Bell Telephone Co., C.C.A.Okla., 75 F.2d 343, certiorari denied 55 S.Ct. 656, 295 U.S. 744, 79 L.Ed. 1690.

30. Tex.—City of Beaumont v. Gulf

States Utilities Co., Civ.App., 163 S.W.2d 426, error refused.

Home-rule amendment

Statute limiting the rental to be charged by municipal corporation for the use of its streets and alleys by public utility to the equivalent of two per cent of the gross receipts of utility within the municipality was not unconstitutional as being in violation of the home-rule amendment to state constitution.—City of Beaumont v. Gulf States Utilities Co., *supra*.

31. U.S.—Atlantic, etc., Tel. Co. v. Philadelphia, Pa., 23 S.Ct. 817, 190 U.S. 160, 47 L.Ed. 995.

44 C.J. p 997 note 6.

32. U.S.—Postal Tel.-Cable Co. v. New Hope, Pa., 24 S.Ct. 204, 192 U.S. 55, 48 L.Ed. 338.

44 C.J. p 998 note 8.

33. Mo.—*Corpus Juris* cited in City of St. Louis v. Laclede Power & Light Co., 152 S.W.2d 23, 25, 347 Mo. 1066.

Pa.—City of Philadelphia v. Holmes Electric Protective Co. of Philadelphia, 6 A.2d 884, 335 Pa. 273.

Wash.—City of Spokane v. Spokane Gas & Fuel Co., 26 P.2d 1034, 175 Wash. 103.

44 C.J. p 997 note 1.

34. Mo.—*Corpus Juris* cited in City of St. Louis v. Laclede Power & Light Co., 152 S.W.2d 23, 25, 347 Mo. 1066.

Pa.—City of Philadelphia v. Holmes

compensation is the police power,³⁵ there is authority for the view that the fixing of a charge for the occupation of the street is not the exercise of any governmental power, but is the exercise of the proprietary power of the municipality.³⁶ The operator of a public utility is not liable for payments for a period during which the municipality has wrongfully prevented it from enjoying the use of streets.³⁷

Imposition of charge or fee after acceptance of grant. Where a grant to use or occupy streets for a public purpose is duly accepted, the right of the municipality, acting under a subsequent ordinance,³⁸ or, according to some cases, under a prior general ordinance,³⁹ to impose a charge for the use or occupation of streets, not provided for or authorized by the grant, has been denied. However, under a constitutional provision preventing the municipality from granting irrevocable or uncontrollable special privileges, the validity of a charge for the use or occupation of the street, imposed after the acceptance of, and action under, the original grant, has been upheld.⁴⁰ Moreover, it has been held that the municipality, after acceptance, can lawfully impose a tax or fee on the business of the grantee,⁴¹ or for the purpose of supervision or regulation,⁴²

where no exemption from such tax or fee is contained in the grant or contract.

Priority for past-due rentals. A city has no priority over other creditors for past-due rentals on a franchise.⁴³

§ 1738. Modification or Alteration

Ordinarily a municipal corporation cannot arbitrarily make substantial changes in a contract involving the right to use streets for a public purpose, and likewise the grantee company cannot modify the terms and conditions except with the consent of the municipality.

Ordinarily a municipal corporation cannot arbitrarily make substantial changes in a contract involving the right to use streets for a public purpose,⁴⁴ but it may, in the due exercise of its power to regulate the use of streets, make certain changes as to the use of the street under the contract.⁴⁵ By virtue of constitutional provisions a municipality is sometimes prevented from making certain contracts as to the use or occupation of the streets which may not be modified by appropriate action of the municipality.⁴⁶ A reservation of the right to alter and amend has been construed as authorizing such alterations and amendments as are reasonable and necessary.⁴⁷

Electric Protective Co. of Philadelphia, 6 A.2d 884, 335 Pa. 273.

Wash.—City of Spokane v. Spokane Gas & Fuel Co., 26 P.2d 1034, 175 Wash. 103.

44 C.J. p 997 note 2.

35. U.S.—Denver v. Stenger, C.C.A. Colo., 295 F. 809.

36. Tenn.—Corpus Juris cited in Lewis v. Nashville Gas & Heating Co., 40 S.W.2d 409, 412, 162 Tenn. 268.

Wash.—City of Spokane v. Spokane Gas & Fuel Co., 26 P.2d 1034, 175 Wash. 103.

44 C.J. p 997 note 4.

37. Mo.—National Subway Co. v. St. Louis, 69 S.W. 290, 169 Mo. 319.

38. Ill.—Village of West City v. Illinois Commercial Telephone Co., 24 N.E.2d 352, 372 Ill. 493.

Ohio.—City of Cincinnati ex rel. Ott v. Union Gas & Electric Co., 195 N.E. 488, 49 Ohio App. 168.

Pa.—City of Philadelphia v. Holmes Electric Protective Co. of Philadelphia, 42 Pa. Dist. & Co. 513, reversed on other grounds 31 A.2d 723, 347 Pa. 69.

44 C.J. p 998 note 10.

39. Ill.—Springfield v. Inter-State Independent Tel., etc., Co., 116 N.E. 631, 279 Ill. 324.

44 C.J. p 998 note 11.

40. Tex.—Municipal Gas Co. v. City of Wichita Falls, Civ.App., 88 S.W.2d 608, error dismissed—South-

western Tel., etc., Co. v. Dallas, Civ.App., 174 S.W. 636, error dismissed 39 S.Ct. 7, 248 U.S. 590, 63 L.Ed. 435.

41. Kan.—Wyandotte v. Corrigan, 10 P. 99, 35 Kan. 21.

La.—New Orleans v. New Orleans City, etc., R. Co., 4 So. 512, 40 La. Ann. 587.

Pa.—City of Philadelphia v. Holmes Electric Protective Co. of Philadelphia, 42 Pa. Dist. & Co. 513, reversed on other grounds 31 A.2d 723, 347 Pa. 69.

42. Pa.—Edison Electric Illum. Co. v. Tamaqua, 13 Pa. Dist. 86.

44 C.J. p 998 note 15.

43. U.S.—Murray v. Roberts, C.C.A. N.Y., 103 F.2d 889, motion granted Murray v. City of New York, 60 S.Ct. 383, 308 U.S. 528, 84 L.Ed. 446, and Roberts v. Murray, 60 S.Ct. 383, 308 U.S. 529, 84 L.Ed. 446, certiorari dismissed 60 S.Ct. 1106, 311 U.S. 720, 85 L.Ed. 469, and Murray v. City of New York, 60 S.Ct. 1106, 311 U.S. 720, 85 L.Ed. 469.

44. Del.—Eastern Shore Public Service Co. v. Town of Seaford, 2 A.2d 265, 23 Del.Ch. 199, appeal dismissed 59 S.Ct. 483, 306 U.S. 616, 83 L.Ed. 1024, rehearing denied 59 S.Ct. 589, 306 U.S. 668, 83 L.Ed. 1063.

N.Y.—Eighth Avenue Coach Corporation v. City of New York, 10 N.Y.S.2d 170, 170 Misc. 248, affirmed 20 N.Y.S.2d 402, 259 App.Div. 870,

appeal granted 20 N.Y.S.2d 986, 259 App.Div. 1002, affirmed 35 N.E.2d 907, 286 N.Y. 84; McCarthy v. City of New York, 10 N.Y.S.2d 170, 170 Misc. 243, affirmed 20 N.Y.S.2d 401, 259 App.Div. 870, appeal granted 20 N.Y.S.2d 986, 259 App.Div. 1002, affirmed 36 N.E.2d 684, 286 N.Y. 636.

Wash.—City of Spokane v. Spokane Gas & Fuel Co., 26 P.2d 1034, 175 Wash. 103.

44 C.J. p 998 note 19.

Grant or franchise as contract see supra § 1733.

45. U.S.—Baltimore v. Baltimore Trust Co., Md., 17 S.Ct. 696, 166 U.S. 673, 41 L.Ed. 1160.

44 C.J. p 998 note 21.

Power of municipality to regulate streets see supra § 1687.

Market stalls and stands

The occupancy of streets of a city by market stalls and stands is a right subject to such changes and modifications in the market, during its existence, as the public needs may require, and city ordinance changing limits of market on city streets was a proper exercise of the city's police power—Liberto v. Mayor and Council of City of Baltimore, 23 A.2d 43, 180 Md. 105.

46. U.S.—Houston v. Southwestern Bell Tel. Co., Tex., 42 S.Ct. 486, 259 U.S. 518, 66 L.Ed. 961.

44 C.J. p 998 note 22.

47. U.S.—Chicago, etc., R. Co. v.

Except where the constitution provides otherwise, the legislature may modify the terms of an agreement by a municipality with a public service corporation respecting use of streets.⁴⁸ The grantee company cannot modify the terms and conditions except with the consent of the municipality.⁴⁹

Modification by mutual agreement. The right of the municipality and the grantee to modify by mutual agreement a contract under which certain rights and privileges are granted has been upheld or recognized.⁵⁰

Method of modifying or altering. Where the original franchise was granted by ordinance but was not required by statute to be so granted, it may be modified by resolution.⁵¹ A statute providing that no ordinance may be altered or amended except by repeal has no application to a franchise ordinance,⁵² and private rights obtained thereunder may be changed or annulled by agreement.⁵³

§ 1739. Duration and Termination

Ordinarily a right or privilege to use or occupy streets terminates at the time fixed in the grant or ordinance conferring such right or privilege.

Ordinarily a right or privilege to use or occupy streets terminates at the time fixed in the grant or ordinance conferring such right or privilege,⁵⁴ and the failure of the municipality to fulfill its contract to take and pay for the plant of the company which is using or occupying the street at the expiration of

the time so fixed does not prolong the rights of such company.⁵⁵ Rights in streets are not necessarily extinguished by the failure of the grantee to exercise other rights contained in the same grant, which under the grant the grantee is not required to exercise.⁵⁶ A franchise for the use of streets granted by the state and consented to by the municipality does not expire at the end of the period of time for which the municipality was incorporated.⁵⁷

Where a municipal corporation grants to a utility corporation the right to use streets without a time limit as to duration of the right, such grant has been held not to be construable as perpetual, although the municipality has power to grant such a franchise,⁵⁸ but to be construable as a license or franchise for the life of the grantee corporation.⁵⁹ According to other authority, a grant by ordinance to a utility of the right to occupy the streets of a city for the conduct of its business has been held a grant of a right in perpetuity, unless limited in duration by the grant itself, or by the general law of the state, or by the corporate powers of the city making the grant.⁶⁰ Such a grant is not perpetual where the statute or municipal charter limits the term of years for which a franchise may be granted,⁶¹ and in that case it has been construed as a license revocable at any time by the city,⁶² or as a grant for the term of years which is specified in the statute or municipal charter.⁶³ A license from both the state and the municipality has been held

Minnesota Cent. R. Co., C.C.Minn., 14 F. 525, 4 McCrary 606.

48. Mont.—Helena v. Helena Light, etc., Co., 207 P. 337, 63 Mont. 108, 43 C.J. p 286 note 21.

49. Pa.—Allegheny City v. People's Natural Gas, etc., Co., 33 A. 704, 172 Pa. 632.

50. U.S.—City of Corbin, Ky., v. Joseph Greenspon's Sons Iron & Steel Co., C.C.A Ky., 52 F.2d 939.

44 C.J. p 999 note 24.

51. Mo.—State v. Cowgill, etc., Milling Co., 57 S.W. 1008, 156 Mo. 620.

52. Ky.—Gathright v. Byllesby, 157 S.W. 45, 154 Ky. 106.

53. Ky.—Gathright v. Byllesby, supra.

43 C.J. p 562 note 73.

54. Del.—Town of Seaford v. Eastern Shore Public Service Co., 191 A. 892, 22 Del Ch. 1.

Mich.—Drain Com'r of Oakland County v. City of Royal Oak, 10 N.W.2d 435, 306 Mich. 124.

44 C.J. p 999 note 27.

Duration and termination of franchises in general see Franchises § 26.

Effect of detachment or annexation of territory see supra § 78.

Power of municipality with respect to duration of grant see supra § 1722.

Limitations on period of consent

Where a municipality is authorized to limit to a definite period of time its consent to a grant of the use of its streets by the state to a public utility, the right of the utility to use the streets expires at the end of the period of time for which consent was given.—Eastern Shore Public Service Co. v. Town of Seaford, 2 A.2d 265, 23 Del.Ch. 199, appeal dismissed 59 S.Ct. 483, 306 U.S. 616, 83 L.Ed. 1024, rehearing denied 59 S.Ct. 589, 306 U.S. 468, 83 L.Ed. 1063.

Time specified in charter

The franchise of a public service corporation or other grantee, granted by a municipality, expires at the end of the specified time where the charter of the municipal corporation expressly provides that all franchises and privileges granted by it shall be limited to a specified number of years.—Boyce v. City of Gastonia, 41 S.E.2d 355, 227 N.C. 139.

55. La.—Canal, etc., St. R. Co. v. New Orleans, 2 So. 388, 39 La. Ann. 709.

56. Ohio—Cincinnati v. Covington, etc., Bridge Co., 20 Ohio Cir.Ct. 396, 10 Ohio Cir.Dec. 792.

57. Tenn.—City of Chattanooga v. Tennessee Electric Power Co., 112 S.W.2d 385, 172 Tenn. 524.

58. Ill.—Sullivan v. Central Illinois Public Serv. Co., 122 N.E. 58, 287 Ill. 19.—Rock Island v. Central Union Tel. Co., 132 Ill.App. 248.

59. Ill.—Village of West City v. Illinois Commercial Telephone Co., 24 N.E.2d 352, 372 Ill. 493.

44 C.J. p 980 note 45.

60. Mo.—State ex inf. McKittrick ex rel. City of Springfield v. Springfield City Water Co., 131 S.W.2d 525, 345 Mo. 6.

44 C.J. p 980 notes 47, 48.

61. U.S.—Boise City v. Boise Artesian Hot, etc., Water Co., Idaho, 186 F. 705, 108 C.C.A. 523, certiorari denied 31 S.Ct. 720, 220 U.S. 616, 55 L.Ed. 611, and appeal dismissed 33 S.Ct. 1003, 230 U.S. 98, 57 L.Ed. 1409.

62. U.S.—Boise City v. Boise Artesian Hot, etc., Water Co., supra.

63. N.C.—Boyce v. City of Gastonia, 41 S.E.2d 355, 227 N.C. 139.

to be presumptively perpetual,⁶⁴ and the phrase "so long as this contract shall remain inviolate" has been construed as attempting to confer a perpetual franchise.⁶⁵ A grant for an indefinite period of time does not expire at the end of the initial period of the grantee's corporate life where the grantee has the power to extend its corporate life beyond the initial period.⁶⁶

Extension or renewal. The period for the use of the street may be extended by an implied agreement or continued recognition of the right to use the street after the time originally fixed.⁶⁷ In such case the right ordinarily continues for an indefinite period.⁶⁸ Continued service by a public service corporation after the expiration of its contract and acceptance and payment for such continued service by the city does not operate as a renewal of the contract,⁶⁹ and such continued service may be terminated by either party on reasonable notice consistent with the duty both owe to the inhabitants of the city.⁷⁰

Where the grant or franchise is invalid and therefore does not bind the municipality, the grantee may discontinue the operation of its plant and thus terminate its rights and privileges in the streets.⁷¹ Where the municipality had no power to authorize the use of any street for a certain purpose, the mere use for such purpose by a public service company under an ordinance for the period limited thereby

does not estop such company thereafter to use the streets under its general powers.⁷²

Rights on termination of franchise. On termination of its franchise to use the streets, a utility company has a right, subject to the interests of the public, to cease operations.⁷³ It has no right to a continued occupation of the streets,⁷⁴ but the municipality may not insist on immediate ejection and the utility should be afforded a reasonable time for withdrawal.⁷⁵ Where a public utility company abandoned the use of the surface of a street on acquiring a right to use the street in a different way, it was held that the land in the street reverted to the municipality for street purposes without a formal release from the company.⁷⁶

§ 1740. — Revocation, Annulment, Forfeiture, or Abandonment; Provisions for Termination

- a. Revocable license
- b. Grants and franchises

a. Revocable License

A mere license to use or occupy a street is revocable by a municipal corporation in the exercise of its discretion.

A mere license to use or occupy a street is revocable by a municipal corporation in the exercise of its discretion,⁷⁷ at least where the licensee has

64. N.J.—Suburban Electric Light, etc., Co. v. East Orange Tp., N.J. Ch., 41 A. 865.

65. Or.—Newsom v. Rainier, 185 P. 296, 94 Or. 199.

66. Mich.—City of Benton Harbor v. Michigan Fuel & Light Co., 231 N.W. 52, 260 Mich. 614, 71 A.L.R. 114.

67. N.C.—Elizabeth City Water, etc., Co. v. Elizabeth City, 124 S.E. 611, 188 N.C. 278.

44 C.J. p 999 note 31.

68. U.S.—Denver v. Denver Union Water Co., Colo., 38 S.Ct. 278, 246 U.S. 178, 190, 62 L.Ed. 649.

44 C.J. p 999 note 32.

69. N.C.—Elizabeth City Water, etc., Co. v. Elizabeth City, 124 S.E. 611, 188 N.C. 278.

44 C.J. p 979 note 37.

70. Del.—Town of Seaford v. Eastern Shore Public Service Co., 194 A. 92, 22 Del.Ch. 92.

44 C.J. p 979 note 38, p 999 note 33.

71. S.D.—Lead v. Western Gas, etc., Co., 184 N.W. 244, 44 S.D. 510.

72. Mo.—Atlantic, etc., R. Co. v. St. Louis, 66 Mo. 228.

73. Del.—Town of Seaford v. Eastern Shore Public Service Co., 194 A. 92, 22 Del.Ch. 92.

Authorization for removal of property

Where franchise from municipal corporation to public service company has expired, authorization by corporation commission for discontinuance of the service and removal of property used in operating service from streets and alleys is not required by law.—Incorporated Town of Pittsburg v. Cochrane, 159 P.2d 534, 195 Okl. 593.

74. Del.—Town of Seaford v. Eastern Shore Public Service Co., 194 A. 92, 22 Del.Ch. 92.

Okl.—Incorporated Town of Pittsburg v. Cochrane, 159 P.2d 534, 195 Okl. 593.

75. Del.—Town of Seaford v. Eastern Shore Public Service Co., 194 A. 92, 22 Del.Ch. 92.

76. N.Y.—Tocci v. New York, 25 N.Y.S. 1089, 73 Hun 46.

77. Ala.—McCraney v. City of Leeds, 1 So.2d 894, 241 Ala. 198—City of Mobile v. Farrell, 158 So. 539, 229 Ala. 582, followed in City of Mobile v. Nelson, 158 So. 543, 229 Ala. 587 and City of Mobile v. Mouraites, 158 So. 543, 229 Ala. 588.

Fla.—Jarrell v. Orlando Transit Co., 167 So. 664, 128 Fla. 776.

N.Y.—Green v. Miller, 162 N.E. 593, 249 N.Y. 88—Mallory, Inc., v. City of New Rochelle, 53 N.Y.S.2d 643, 184 Misc. 66, affirmed 51 N.Y.S.2d 91, 268 App.Div. 878, appeal denied 51 N.Y.S.2d 758, 268 App. Div. 914, appeal denied 62 N.E.2d 391, 294 N.Y. 839, and affirmed 65 N.E.2d 425, 295 N.Y. 712.

Okl.—Hover v. Oklahoma City, 271 P. 162, 133 Okl. 71.

44 C.J. p 999 note 39.

Revocation of license to abutting owner see supra § 1708.

Change of conditions since grant

City board of public works may order removal of switch track, laid by private corporation pursuant to ordinance granting privilege, without ordering removal of all other switch tracks similarly situated, although conditions have not changed since granting of right.—City of Indianapolis v. Link Realty Co., 179 N.E. 574, 94 Ind.App. 1.

Enjoining revocation

Court of equity was without power to enjoin revocation of permit for driveway across street, in connection with filling station.—Standard Oil Co. of New Jersey v. City of Charlottesville, C.C.A.Va., 42 F.2d 88.

not acted under such license⁷⁸ or where the right to revoke is expressly reserved;⁷⁹ and long-continued possession under a mere license ordinarily does not affect the right to revoke it.⁸⁰ The right of the municipality to waive a provision in a mere license, on the performance of which the right to use or occupy streets depends, has been upheld.⁸¹

A license to use the streets may properly be revoked by ordinance⁸² or by notice of revocation.⁸³

Compensation on revocation. There is authority for the view that a municipality which has granted a license to occupy a street for a public purpose cannot revoke the license so as to deprive the licensee of the benefit of expenditures he has made under the license in the absence of any showing that the structure involved is unlawful.⁸⁴

b. Grants and Franchises

- (1) In general
- (2) Who may revoke or claim forfeiture
- (3) Grounds for revocation, annulment, or forfeiture
- (4) Waiver or loss of right to revoke or claim forfeiture

(5) Method of enforcement; affirmative action

(1) In General

A municipal corporation cannot arbitrarily revoke or otherwise terminate a grant or franchise to use streets for public purposes after the grant or franchise has become a contract by reason of the grantee's acceptance thereof, except where the franchise is granted under a statute which confers such right of revocation on the municipality or where the right to revoke is reserved by the municipality.

A municipal corporation may revoke or repeal, before acceptance, an ordinance conferring grants or franchises to use streets for a public purpose,⁸⁵ but after the grant of such rights has become a contract by reason of the grantee's acceptance thereof the municipality cannot arbitrarily revoke or otherwise terminate the grant,⁸⁶ except where the franchise is granted under a statute which confers such right of revocation on the municipality⁸⁷ or where the right to revoke is reserved by the municipality.⁸⁸ The reservation of the right to revoke must be clear and explicit.⁸⁹ Where a municipality has granted a franchise by an ordinance providing for a deposit to be made to become the property of the municipality at any time that the franchise is forfeited, and subsequently passes an ordinance revok-

78. Tex.—Galveston City R. Co. v. Galveston City St. R. Co., 63 Tex. 529.

79. Ind.—Coverdale v. Edwards, 68 N.E. 495, 155 Ind. 374.

44 C.J. p 1000 note 41.

The word "deem" in ordinance reserving right to revoke licenses permitting advertising signs in parking between sidewalk and curb whenever city commissioners "deem" it to be to best interest of city, means consider, judge, decide, or conclude, and commissioner's instruction to bureau of mechanical inspections to notify owners to remove signs and resolution to make effective proposed amendment to ordinance reciting that prohibition of such signs was necessary to public safety sufficiently disclosed that commissioners had decided for good reason that removal was in best interest of city.—Stringham v. Salt Lake City, Utah, 201 P.2d 758.

Good faith

City presumptively acted in good faith in exercising reserved right to revoke licenses permitting advertising signs in parking between sidewalk and curb.—Stringham v. Salt Lake City, supra.

80. U.S.—Seaboard Air Line R. Co. v. Raleigh, N. C., 37 S.Ct. 8, 242 U. S. 15, 461 L.Ed. 121.

44 C.J. p 1000 note 42.

81. Ill.—Chicago City R. Co. v. People, 73 Ill. 541.

82. Mich.—1426 Woodward Ave. Corp. v. Wolff, 20 N.W.2d 217, 312 Mich. 352.

Ordinance prohibiting projecting signs and marquees

Where permits for erection of marquees and projecting signs were revocable at will by common council of city, adoption of ordinance prohibiting all projecting signs and all marquees projecting more than a specified distance on the street was a sufficient revocation of prior permits.—1426 Woodward Ave. Corp. v. Wolff, supra.

83. Utah.—Stringham v. Salt Lake City, 201 P.2d 758.

Notice to remove signs

Utah.—Stringham v. Salt Lake City, supra.

84. Or.—Savage v. Salem, 31 P. 832, 23 Or. 381, 37 Am.S.R. 688, 24 L. R.A. 787.

Vt.—Barre v. Perry, 73 A. 574, 82 Vt. 301.

85. Wis.—Waukesha Hygeia Mineral Spring Co. v. Waukesha, 53 N.W. 675, 83 Wis. 475.

43 C.J. p 564 note 1 [a]—44 C.J. p 1000 note 47.

Forfeiture or revocation of franchises in general see Franchises §§ 26, 27.

86. U.S.—City of York v. Iowa-Ne-

braska Light & Power Co., C.C.A. Neb., 109 F.2d 683, certiorari denied 60 S.Ct. 893, 309 U.S. 690, 84 L.Ed. 1032—City of Corbin, Ky., v. Joseph Greenspon's Sons Iron & Steel Co., C.C.A.Ky., 52 F.2d 939.

Del.—Eastern Shore Public Service Co. v. Town of Seaford, 2 A.2d 265, 23 Del.Ch. 199, appeal dismissed 59 S.Ct. 483, 306 U.S. 616, 83 L.Ed. 1024, rehearing denied 59 S.Ct. 589, 306 U.S. 668, 83 L.Ed. 1063.

Ill.—Village of West City v. Illinois Commercial Telephone Co., 24 N.E. 2d 852, 372 Ill. 493.

Tenn.—City of Chattanooga v. Tennessee Electric Power Co., 112 S. W.2d 385, 172 Tenn. 524.

44 C.J. p 1000 note 50.

Franchise to use streets as contract see supra § 1734.

Protection of grants or franchises by Constitution see Constitutional Law §§ 241, 311.

87. Ala.—Phenix City v. Alabama Power Co., 195 So. 894, 239 Ala. 547—City of Decatur v. Meadors, 180 So. 550, 235 Ala. 544.

44 C.J. p 1000 note 53.

88. Ala.—Phenix City v. Alabama Power Co., 195 So. 894, 239 Ala. 547.

44 C.J. p 1000 note 54.

89. U.S.—Owensboro v. Cumberland Tel., etc., Co., Ky., 33 S.Ct. 938, 230 U.S. 56, 57 L.Ed. 1389.

44 C.J. p 1000 note 55.

ing the franchise for failure to comply with its terms but providing for the return of the deposit, the grantee cannot successfully claim both that the franchise is valid and also that the deposit should be returned,⁹⁰ but the grantee company is entitled to the deposit where it has accepted the revoking ordinance, even though there was not an express acceptance.⁹¹

The grantee of a franchise may not, without proper or sufficient reason, terminate or rescind the contract⁹² or abandon the franchise without the concurrence of the grantor.⁹³

The forfeiture of rights in respect of the use of streets is not favored,⁹⁴ and the court will not permit enforcement of an alleged condition subsequent, where the contract does not clearly compel such action.⁹⁵

Grant to railroad. As a general rule a legislative or municipal grant to a railroad company of the right to use a public street for railroad purposes cannot, after acceptance by the railroad company, be revoked by the municipality,⁹⁶ at least not without reasonable notice to the company,⁹⁷ unless there is a constitutional or statutory provision prohibiting irrevocable grants of such privileges⁹⁸

or authority to make such revocation is reserved by ordinance or statute.⁹⁹

(2) Who May Revoke or Claim Forfeiture

For a sufficient and proper reason the state, or a municipal corporation acting under powers expressly or impliedly delegated to it by the state, may claim a forfeiture of a grant or franchise to use streets; but where the right to use or occupy streets is derived directly from the state it cannot be revoked by a municipality.

For a sufficient and proper reason the state,¹ or a municipal corporation acting under powers expressly or impliedly delegated to it by the state,² may claim a forfeiture of a grant or franchise to use streets. Where the right to use or occupy streets is derived directly from the state and not from the municipality, it cannot be revoked by the municipality,³ even though the consent of the city is a condition precedent to the right to locate the equipment or structures or to operate;⁴ and a like view has been taken where the municipality is empowered by the legislature to grant rights to use the streets, but is not empowered to revoke the grant,⁵ or where the power to revoke the grant has been expressly withdrawn from the municipality by the legislature.⁶ Moreover, it has been held that, where the state has not conferred the right to sue, the munici-

90. Ohio.—Cincinnati Union Depot, etc., Co. v. Cincinnati, 137 N.E. 14, 105 Ohio St. 311.

91. Ohio.—Cincinnati Union Depot, etc., Co. v. Cincinnati, supra.

92. N.Y.—Rubel Corp. v. City of New York, 73 N.Y.S.2d 813, affirmed 84 N.Y.S.2d 898, 274 App.Div. 925.

93. Wis.—Wright v. Milwaukee Electric R., etc., Co., 69 N.W. 791, 95 Wis. 29, 60 Am.S.R. 74, 36 L.R.A. 47.

94. Iowa.—State v. Iowa Tel. Co., 154 N.W. 678, 175 Iowa 607, Ann. Cas.1917E 539.

95. U.S.—Chicago, etc., R. Co. v. Minnesota Cent. R. Co., C.C.Minn., 14 F. 525, 4 McCrary 606.

96. U.S.—Grand Trunk Western R. Co. v. City of South Bend, Ind., 33 S.Ct. 803, 227 U.S. 544, 57 L.Ed. 633—Chicago, M. & St. P. R. Co. v. Minnesota Cent. R. Co., C.C. Minn., 14 F. 525, 4 McCrary 606.

Ala.—Port of Mobile v. Louisville & N. R. Co., 4 So. 106, 84 Ala. 115, 5 Am.S.R. 342.

Cal.—Workman v. Southern Pac. R. Co., 62 P. 185, 129 Cal. 536—Town of Arcata v. Arcata & M. R. Co., 28 P. 676, 92 Cal. 639.

Ill.—East St. Louis Union R. Co. v. East St. Louis, 39 Ill.App. 398.

La.—Alexandria v. Morgan's Louisiana & T. R. & S. S. R. Co., 33 So. 65, 109 La. 50.

N.Y.—City of New York v. New York Cent. R. Co., 136 N.E. 311, 234 N.Y. 113—People of the State of New York ex rel. Hudson and Manhattan R. Co. v. State Tax Com'rs, 96 N.E. 435, 203 N.Y. 119—Delaware L. & W. R. Co. v. Buffalo, 20 N.Y.S. 448, 65 Hun 464.

Okla.—Oklahoma Tool & Supply Co. v. City of Bartlesville, 223 P. 637, 101 Okl. 103.

Pa.—Hestonville M. & F. Pass. R. Co. v. City of Philadelphia, 89 Pa. 210.

Tex.—Rio Grande R. Co. v. Brownsville, 45 Tex. 88.

Wis.—Sinnott v. Chicago & N. W. R. Co., 50 N.W. 1097, 81 Wis. 95.

Validity of ordinance attempting revocation

Where a city, by ordinance, has granted the right to a railroad corporation to lay its tracks through the streets of the city, an ordinance attempting to repeal such ordinance is void.—Port of Mobile v. Louisville, etc., R. Co., 4 So. 106, 84 Ala. 115, 5 Am.S.R. 342.

97. La.—Alexandria v. Morgan's Louisiana, etc., R., etc., Co., 33 So. 65, 109 La. 50.

Wis.—Sinnott v. Chicago & M. W. R. Co., 50 N.W. 1097, 81 Wis. 95.

98. Ala.—Port of Mobile v. Louisville & N. R. Co., 4 So. 106, 5 Am.S.R. 342, 74 Ala. 115.

99. Mass.—Medford and Charles-

town, etc., R. Co. v. Inhabitants of Somerville, 111 Mass. 232.

N.Y.—Troy v. Troy & L. R. Co., 49 N.Y. 657—Delaware L. & W. R. Co. v. Oswego, 86 N.Y.S. 1027, 92 App. Div. 551.

1. Mo.—State v. West End Light, etc., Co. 152 S.W. 76, 246 Mo. 653. 44 C.J. p 1001 note 64.

2. U.S.—R. E. Duvall Co. v. Washington, B. & A. Electric R. Co., D. C.Md., 60 F.2d 315.

44 C.J. p 1001 notes 70, 71.

3. N.Y.—In re International Ry. Co., 275 N.Y.S. 5, 242 App.Div. 800.

44 C.J. p 1001 note 65.

4. Tenn.—City of Chattanooga v. Tennessee Electric Power Co., 117 S.W.2d 385, 172 Tenn. 524.

44 C.J. p 1001 note 66.

5. Mo.—State v. St. Louis Light, etc., Co., 152 S.W. 67, 246 Mo. 618.

Constitutional prohibition

The constitutional provision that every grant or franchise shall remain subject to revocation, alteration, or amendment does not prohibit the legislature from conferring on a city the right to grant a franchise without the power of the city to revoke it.—Phenix City v. Alabama Power Co., 195 So. 894, 239 Ala. 547.

6. Ill.—City of Geneseo v. Illinois Northern Utilities Co., 1 N.E.2d 392, 363 Ill. 89.

pality cannot maintain a suit for the forfeiture of a franchise for misuser or nonuser,⁷ even though the municipality is the agent of the state in making the grant.⁸ A perpetual franchise granted by the state cannot be revoked by a municipality under subsequently adopted state constitutional provisions limiting the time for which street franchises may be granted and subsequent statutes transferring to the municipality the right to grant franchises.⁹

There is authority for the view that a breach of a condition subsequent in the contract between the municipality and the grantee of the right to use a street can be taken advantage of only by the municipality,¹⁰ and that in the absence of action by the municipality an owner of property abutting on the street in question cannot complain;¹¹ but it has been held that an abutting owner may rely on the grantee's failure to exercise a franchise within the time specified therein, which by its terms was to cease and determine for such failure.¹² The loss of the right to use streets under a permit, by a failure to exercise it, may be taken advantage of, as against the grantee, by the municipality¹³ and its officers,¹⁴ and also by a public utility corporation whose equipment the grantee claims the right to use.¹⁵

The legislature has power to consent, without a city's approval, to the surrender of a franchise granted by the city to a public service corporation to use the city streets.¹⁶

Approval of public service commission. In accordance with charter or statutory provisions, a city may terminate the right of a public service corporation to use the streets of the city without the approval of the public service commission,¹⁷ but under other statutes it has been held that the city must obtain the consent of the commission.¹⁸

(3) Grounds for Revocation, Annulment, or Forfeiture

Proper or sufficient grounds for annulment, forfeiture, or revocation of a grant or franchise to use the streets may include a failure by the grantee to comply with the terms of the grant, nonuser or abandonment, abuse of the right, the fact that the safety, health, or morals of the public require termination of the grant or franchise, or reasons which are expressly stated as grounds for termination by statute.

Proper or sufficient grounds for annulment, forfeiture, or revocation of a grant or franchise to use the streets may include a failure by the grantee to comply with the terms of the grant,¹⁹ nonuser or abandonment,²⁰ the abuse of the right,²¹ the fact that the safety, health, or morals of the public require termination of the grant or franchise,²² or reasons which are expressly stated as grounds for termination by statute.²³ A default in performance is sometimes made a ground for termination by the express terms of the grant²⁴ or by virtue of statute.²⁵ A failure to comply with a condition as to the time within which the grantee's system shall be completed and in operation has been regarded as ground for annulment or forfeiture,²⁶ but it has

7. Wis.—Milwaukee Electric R., etc., Co. v. Milwaukee, 69 N.W. 794, 95 Wis. 39, 60 Am.S.R. 81, 36 L.R. A. 45.

8. Wis.—Milwaukee Electric R., etc., Co. v. Milwaukee, *supra*.

9. U.S.—Louisville v. Cumberland Tel., etc., Co., Ky., 32 S.Ct. 572, 224 U.S. 649, 56 L.Ed. 934.

10. Mo.—Knight v. Kansas City, etc., R. Co., 70 Mo. 231.

11. Mo.—Hovelman v. Kansas City Horse R. Co., 79 Mo. 632, 44 C.J. p 1001 note 73.

12. N.Y.—Manton v. South Shore Tract. Co., 106 N.Y.S. 82, 121 App. Div. 410.

13. N.Y.—New York Electric Lines Co. v. Gaynor, 113 N.E. 519, 218 N.Y. 417.

14. N.Y.—New York Electric Lines Co. v. Gaynor, *supra*.

15. N.Y.—New York Electric Lines Co. v. Gaynor, *supra*.

16. Ind.—State v. Lewis, 120 N.E. 129, 187 Ind. 564.

17. U.S.—R. E. Duvall Co. v. Washington, B. & A. Electric R. Co., D. C.Md., 40 F.2d 315.

18. Ohio.—State ex rel. Wear v. Cincinnati & L. E. R. Co., 190 N.E. 224, 128 Ohio St. 95—Lake Shore Electric Ry. Co. v. State, 180 N.E. 640, 125 Ohio St. 81.

Estoppel

City seeking to compel utilities company to remove poles and equipment from streets could not invoke doctrine of estoppel on ground that company contracted with city and that city executed its part of contract, where state withdrew title of streets from city and placed it in commerce commission.—City of Geneseo v. Illinois Northern Utilities Co., 1 N.E.2d 392, 363 Ill. 89.

19. U.S.—Gas, etc., Securities Co. v. Manhattan, etc., Tract. Corp., C.C. A.N.Y., 266 F. 625, appeal dismissed Begg v. New York, 43 S.Ct. 513, 262 U.S. 196, 67 L.Ed. 946, 44 C.J. p 1000 note 51.

20. N.Y.—New York Electric Lines Co. v. Gaynor, 113 N.E. 519, 218 N.Y. 417, 44 C.J. p 1001 note 79.

Railroad

A franchise for operating a railroad through public streets may be forfeited for failure to exercise it.

—People v. Bleecker St. & F. F. R. Co., 124 N.Y.S. 782, 67 Misc. 577, affirmed 125 N.Y.S. 1045, 140 App.Div. 611, questions certified to court of appeals 127 N.Y.S. 1136, 142 App.Div. 934, affirmed 95 N.E. 1136, 201 N.Y. 594.

21. U.S.—Old Colony Trust Co. v. Omaha, Neb., 33 S.Ct. 967, 230 U.S. 100, 57 L.Ed. 1410.

22. Md.—Chesapeake, etc., Tel. Co. v. Baltimore, 43 A. 784, 44 A. 1033, 89 Md. 689.

44 C.J. p 1001 note 81.

23. N.J.—Newark Gen. Omnibus Co. v. Newark, 114 A. 152, 96 N.J.Law 37.

44 C.J. p 1000 note 53.

24. Pa.—Minersville Borough v. Schuylkill Electric R. Co., 64 A. 1050, 205 Pa. 394.

44 C.J. p 1002 note 83.

25. N.J.—Newark Gen. Omnibus Co. v. Newark, 114 A. 152, 96 N.J.Law 37.

44 C.J. p 1002 note 84.

26. Pa.—Plymouth Tp. v. Chestnut Hill, etc., R. Co., 32 A. 19, 168 Pa. 181.

44 C.J. p 1002 note 82.

been held that the court will not enforce a forfeiture for failure to comply with a provision as to the time of completion of the plant in question where there are no strong and cogent reasons which require it.²⁷

The grantee's failure to complete the work within the time limit may be excused by the fact that such completion was prevented by a suit to prohibit the performance of the work.²⁸ Where an exclusive privilege in the streets for a term of years is granted on condition that the municipality shall have the right to purchase the plant at a certain time, the municipality may treat the contract as annulled as far as the grant of exclusive privileges is concerned on the refusal by the company to sell at the specified time.²⁹ In order that there may be a forfeiture for abandonment by nonuser, the abandonment must be a clear, unequivocal, and decisive act showing a determination not to use or to claim the benefit of the franchise.³⁰

Fraud or misrepresentation affecting the enactment of the granting ordinance,³¹ or matters which are extraneous to the grant or its exercise,³² have been held not to constitute grounds for revocation of the grant.

(4) Waiver or Loss of Right to Revoke or Claim Forfeiture

The state may waive a forfeiture, and a municipal corporation may waive the performance of provisions which it has inserted for its own benefit.

The state may waive a forfeiture,³³ and a municipal corporation may waive the performance of provisions in the contract for the use of the street which it has inserted for its own benefit.³⁴ More-

over, where the municipality is authorized to grant franchises as an agent of the state, the municipal body in which the right to act in this respect is vested may, according to some cases, waive a forfeiture for nonuser as against the state,³⁵ but municipal administrative officers who have no power to act on behalf of the state cannot make such waiver or, by their conduct, effect an estoppel.³⁶ A statute which provides that a franchise shall expire and become void unless business has been commenced within a certain period of time from the date of the grant of the franchise does not preclude an extension of time by the municipality.³⁷

What constitutes waiver or estoppel. Acquiescence in the continued activities of the grantee may be the basis of an estoppel against the municipality in respect of the claim that the municipality had no authority to grant the franchise because the grantee corporation was not properly organized,³⁸ that there has not been a compliance with requirements as to obtaining consents of abutting owners,³⁹ that there has been an unauthorized change in the location of the grantee's plant;⁴⁰ or that there had not been a formal renewal after expiration of the original grant.⁴¹ Moreover, acquiescence in the completion of work pursuant to a grant,⁴² or other conduct indicating the recognition of the continued effectiveness of the grant,⁴³ may estop the municipality to revoke, or to enforce a forfeiture of, the grant because of the failure of the grantee to install its system within the specified time limit; but mere delay on the part of the municipal authorities as a matter of indulgence, which does not lead to a change in the situation to the prejudice of the grantee, does not work an estoppel.⁴⁴ An attempted waiver by

27. Ariz.—Bisbee v. Bisbee Impr. Co., 157 P. 228, 18 Ariz. 126.

28. La.—State v. Cockrem, 25 La. Ann. 356.

29. Ala.—Montgomery Gas-Light Co. v. Montgomery, 6 So. 113, 87 Ala. 245, 4 L.R.A. 616.

30. Neb.—State v. Citizens' St. R. Co., 114 N.W. 429, 80 Neb. 357.

31. N.J.—Phillipsburg Electric Lighting, etc., Co. v. Phillipsburg, 49 A. 445, 66 N.J.Law 505.

32. N.J.—Phillipsburg Electric Lighting, etc., Co. v. Phillipsburg, supra.

44 C.J. p 1002 note 86.

33. Cal.—People v. Los Angeles Electric R. Co., 27 P. 673, 91 Cal. 338.

34. Ill.—Chicago City R. Co. v. People, 73 Ill. 541.

Time for completion of work

Ill.—Chicago City R. Co. v. People, supra.

35. Mo.—State v. West End Light, etc., Co., 152 S.W. 76, 246 Mo. 653

36. Mo.—State v. West End Light, etc., Co., supra—State v. St. Louis Light, etc., Co., 152 S.W. 67, 246 Mo. 618.

37. U.S.—City of Corbin, Ky., v. Joseph Greenspon's Sons Iron & Steel Co., C.C.A. Ky., 52 F.2d 939

Term "void" in statute held to mean voidable only.—City of Corbin, Ky., v. Joseph Greenspon's Sons Iron & Steel Co., supra.

Phrase "shall expire," in statute held to import nothing more than "void."—City of Corbin, Ky., v. Joseph Greenspon's Sons Iron & Steel Co., supra.

Consideration for extension held sufficient

U.S.—City of Corbin, Ky., v. Joseph

Greenspon's Sons Iron & Steel Co., supra.

38. Mich.—Wyandotte Electric Light Co. v. Wyandotte, 82 N.W. 821, 124 Mich. 43.

39. Ill.—People v. Union Gas, etc., Co., 103 N.E. 245, 260 Ill. 392.

44 C.J. p 1002 note 94.

40. U.S.—Columbus v. Union Pac. R. Co., Neb., 137 F. 869, 70 C.C.A. 207.

41. N.Y.—Wakefield v. Theresa, 109 N.Y.S. 414, 125 App.Div. 38.

44 C.J. p 1002 note 96.

42. Ariz.—Bisbee v. Bisbee Impr. Co., 157 P. 228, 18 Ariz. 126.

43. Pa.—United Electric Light Co. v. East Pittsburg, 79 A. 229, 230 Pa. 65.

44 C.J. p 1002 note 98.

44. Pa.—Minersville Borough v. Schuylkill Electric R. Co., 64 A. 1050, 205 Pa. 394.

municipal authorities of such a provision as to time, made after the expiration of the time limit, is ineffectual.⁴⁵

(5) Method of Enforcement; Affirmative Action

The breach of a condition does not *ipso facto* terminate rights under a grant of the use or occupation of streets and the mere fact that a municipal corporation reserves the right to declare a forfeiture does not affect the rights of the grantee in the absence of action by the municipal corporation.

The breach of a condition subsequent or of a provision in the nature of a condition subsequent does not *ipso facto* terminate rights under a grant of the use or occupation of streets,⁴⁶ and the mere fact that the municipality reserves the right to declare a forfeiture does not affect the rights of the grantee in the absence of action by the municipality.⁴⁷ According to some cases, there must be a resort to the courts for the purpose of declaring a termination or forfeiture,⁴⁸ and such rights cannot be terminated by *ex parte* action on the part of the municipality;⁴⁹ but there is also authority for the view that the failure to comply with a provision for completion of the work involved within a specified time limit permits the municipality to terminate the grant.⁵⁰ Where a statute contains a provision declaring a termination or forfeiture for failure to complete the work involved within a specified time, an appeal to the courts is unnecessary,⁵¹ and a like rule applies where the grant expressly authorizes revocation or forfeiture by the municipality.⁵² A provision that the rights and franchises granted shall "cease and

determine" in case of default has been construed as requiring the judgment of a court in order to render it effective;⁵³ but there is authority for the view that such a provision for termination is self-operating.⁵⁴

A resolution of a municipality terminating for breach of condition a franchise to occupy public streets need not follow a particular form and it is sufficient if the intention to terminate the franchise is reasonably apparent.⁵⁵ An ordinance granting a franchise to occupy the streets is not impliedly repealed by a later ordinance which is not so inconsistent with, or repugnant to, the former ordinance that both cannot stand together.⁵⁶ A franchise ordinance cannot be revoked or repealed by a single resolution.⁵⁷

Form of proceeding; hearing. A proceeding in equity is not, according to some cases, a proper remedy to enforce a forfeiture of a franchise to use the streets of a city,⁵⁸ but where, after a valid revocation for breach of condition, the grantee proceeds with the use of the streets, the municipality may enjoin further operations.⁵⁹

In some jurisdictions before the municipality can revoke, annul, or declare forfeited a grant or franchise for the use of streets, under which property rights have arisen, it must give the grantee notice and an opportunity to be heard,⁶⁰ and it must also take action, quasi-judicial in character, declaring the forfeiture.⁶¹ In the absence of such notice, opportunity to be heard, and declaration, the municipality cannot appeal to the courts for a declaration

45. N.Y.—Manton v. South Shore Tract. Co., 106 N.Y.S. 82, 121 App. Div. 410.

44 C.J. p 1002 note 1.

46. Mo.—Hovelman v. Kansas City Horse R. Co., 79 Mo. 632.

N.Y.—Brooklyn Cent. R. Co. v. Brooklyn City R. Co., 32 Barb. 358.

47. Ky.—Louisville, etc., R. Co. v. Bowling Green R. Co., 63 S.W. 4, 110 Ky. 788, 23 Ky.L. 273.

48. Cal.—Arcata v. Arcata, etc., R. Co., 28 P. 676, 92 Cal. 639.

44 C.J. p 1002 note 3.

49. N.Y.—In re Kings County El. R. Co., 13 N.E. 18, 105 N.Y. 97.

44 C.J. p 1003 note 4.

50. Pa.—Plymouth Tp. v. Chestnut Hill, etc., R. Co., 32 A. 19, 168 Pa. 181.

51. Del.—Wilmington City R. Co. v. Wilmington, etc., R. Co., 46 A. 12, 8 Del.Ch. 468.

44 C.J. p 1003 note 6.

52. Ill.—Belleville v. Citizens'

Horse R. Co., 38 N.E. 584, 152 Ill. 171, 26 L.R.A. 681.

44 C.J. p 1003 note 7.

53. U.S.—Foster v. Joliet, C.C.Ill., 27 F. 899.

44 C.J. p 1003 note 9.

54. N.Y.—Manton v. South Shore Tract. Co., 106 N.Y.S. 82, 121 App. Div. 410.

44 C.J. p 1003 note 10.

55. N.Y.—People ex rel. Village of Chateaugay v. Public Service Commission of New York, 174 N.E. 637, 255 N.Y. 232, reargument denied 177 N.E. 172, 256 N.Y. 637.

56. Mo.—State on Inf. of McKittrick ex rel. City of Trenton v. Missouri Public Service Corporation, 174 S.W.2d 871, 351 Mo. 961, certiorari denied State of Missouri ex rel. McKittrick v. Missouri Public Service Corporation, 64 S.Ct. 786, 321 U.S. 793, 88 L.Ed. 1082.

43 C.J. p 566 note 34 [a].

Repeal of ordinances generally see supra §§ 435-438.

57. U.S.—Consumers Power Co. v.

Krause, C.C.A.Mich., 89 F.2d 565, certiorari denied 58 S.Ct. 16, 302 U.S. 698, 82 L.Ed. 539.

58. Mo.—State v. East Fifth St. R. Co., 41 S.W. 955, 140 Mo. 539, 62 Am.S.R. 742, 38 L.R.A. 218.

59. Pa.—Plymouth Tp. v. Chestnut Hill, etc., R. Co., 32 A. 19, 168 Pa. 181.

Franchise granted by county

Village could enjoin defendants from laying pipe lines and digging ditches in its streets under franchise issued by board of county commissioners previous to incorporation of village, where village was not required under evidence to recognize franchise by virtue of commencement of erection or construction of works or system authorized.—Village of Hobbs v. Mann, 89 F.2d 1025, 39 N.M. 76.

60. N.J.—United Electric Co. v. Bayonne, 63 A. 996, 73 N.J.Law 410.

44 C.J. p 1003 note 11.

61. N.J.—Passaic v. Public Serv. Corp., 73 A. 123, 75 N.J.Eq. 379.

of forfeiture.⁶² Where a municipal corporation is authorized by the terms of the grant to terminate the rights granted on notice, a notice which fails to fix the date on which such rights are to terminate is not sufficient.⁶³

Where the city seeks to revoke a franchise for false representations, it must show by clear and convincing evidence that the representations related to a material fact, were known to be false by the grantee, not known to be false by the city, and were relied on by the city.⁶⁴ Where a grantee of a franchise seeks to avoid the obligations thereof on the ground that he was induced by mistake of fact or by duress to enter into the contract which merely granted a right to use the streets which he already possessed, he must prove such charges of mistake of fact⁶⁵ or duress.⁶⁶

§ 1741. Right to Question Validity; Method of Attack

As a general rule the validity of a grant of a right to use streets made by the state cannot be inquired into at the suit in equity of a private individual. In some jurisdictions a grant to use the streets made by the municipality may be inquired into at the suit of a private individual who shows special damage.

Where a grant to use the streets is made by the state, its validity cannot as a rule be inquired into at the suit in equity of a private individual.⁶⁷ Moreover, the view has been taken that a municipality or an officer representing it is the proper party to sue to test the right to maintain an obstruction in the nature of a public improvement placed in the streets by permission of the city,⁶⁸ and that a private individual cannot in a court of equity question the regularity of the proceedings by which a municipality has under duly delegated au-

thority made a grant,⁶⁹ at least where the grantee is in de facto exercise and enjoyment of the grant;⁷⁰ but the right of an abutting owner to sue in equity has been upheld where the alleged invalidity of the ordinance granting the right or privilege is the lack of the requisite petition of the owners of a certain amount of the abutting properties.⁷¹

An action to test the validity of a franchise to use city streets may be prosecuted by the state although the city fails or refuses to join.⁷² Where the grant to use the street is one which the municipality is without power to make, such fact may be inquired into at the suit of an abutting owner, who suffers special injury, to prevent a private injury to his property.⁷³ There is authority for the view that, where the right is one which the local authorities have power to grant, and they have assumed to grant it, the state is not concerned.⁷⁴ Where a village is annexed to a city, the rights of the city with respect to obtaining an injunction against the operation of a public utility on the ground that the consent of the municipal authorities had not been obtained are the same as those of the village.⁷⁵ A statutory requirement that a franchise sold on the expiration of a former franchise shall be similar to the original franchise is for the benefit of the owner of the expiring franchise, and he is the only one who can complain if the municipality offers to sell a new franchise different from the one that has expired.⁷⁶

The right of a taxpayer to question the validity of franchises or grants is considered *infra* § 2135.

Injury or loss. Ordinarily the person who attacks the validity of a grant must be able to show special damage.⁷⁷ Thus the view has been taken

62. N.J.—*Passaic v. Public Serv. Corp.*, *supra*.

63. U.S.—*Wichita v. Old Colony Trust Co.*, Kan., 132 F. 641, 66 C.C. A. 19.

64. U.S.—*City of Corbin, Ky., v. Joseph Greenspon's Sons Iron & Steel Co.*, C.C.A.Ky., 52 F.2d 939.

65. *Difference of opinion by counsel* The fact that counsel subsequently employed by brewing company interpreted the facts and the law differently than did earlier counsel, and was of the opinion that company had right to maintain structures under and over street without obtaining a franchise from the city, provided no warrant for rescinding or setting aside the franchise and the recovery of money paid by company to city pursuant to the franchise.—*Rubel Corp. v. City of New York*, 78 N.Y.S. 2d 813, affirmed 84 N.Y.S.2d 898, 374 App.Div. 925.

66. N.Y.—*Rubel Corp. v. City of New York*, *supra*.

67. Wis.—*Allen v. Clausen*, 90 N.W. 181, 114 Wis. 244. Questioning validity of franchises in general see *Franchises* § 29.

68. Ill.—*Hill v. St. Louis, etc., R. Co.*, 90 N.E. 676, 243 Ill. 344. 44 C.J. p 1003 note 19.

69. N.Y.—*Meth v. City of New York*, 253 N.Y.S. 248, 142 Misc. 203. 44 C.J. p 1003 note 20.

Remedy at law

Special rights granted in streets by municipality to private persons should be tested at law.—*Junction Water Co. v. Riddle*, 155 A. 887, 108 N.J.Eq. 623.

70. Wis.—*Allen v. Clausen*, 90 N.W. 181, 114 Wis. 244. 44 C.J. p 1004 note 21.

71. U.S.—*General Electric R. Co. v.*

Chicago, etc., R. Co., Ill., 98 F. 907, 39 C.C.A. 345, 58 L.R.A. 231.

Suit of abutting owner to enjoin establishment or maintenance of encroachments or obstructions see *supra* §§ 1714, 1715.

72. Okl.—*State v. Consumers' Gas Co.*, 293 P. 1019, 147 Okl. 18.

73. N.J.—*Fogg v. Ocean City*, 65 A. 885, 74 N.J.Law 362. 44 C.J. p 1004 note 23.

74. Mich.—*People v. Ft. Wayne, etc., R. Co.*, 52 N.W. 1010, 92 Mich. 522, 16 L.R.A. 752. 44 C.J. p 1004 note 24.

75. Ohio.—*Cincinnati v. Columbia, etc., St. R. Co.*, 9 Ohio Dec., Reprint, 782, 17 Cinc.L.Bul. 192.

76. Ky.—*Gathright v. Byllesby*, 157 S.W. 45, 154 Ky. 106.

77. Ark.—*Citizens Pipe Line Co. v. Twin City Pipe Line Co.*, 10 S.W. 2d 493, 178 Ark. 309.

that, even though an ordinance giving the consent of the municipality to the use of a street is ultra vires, an individual cannot attack it by certiorari unless he suffers a special injury beyond that which will affect him in common with the remainder of the public.⁷⁸ So it has been held that a municipality cannot enjoin the construction of a railroad in a street because of irregularities in the grant where no wrong or injury to the city is shown to have resulted therefrom.⁷⁹

Exclusive right. The validity of a grant of an exclusive right or privilege cannot, according to some cases, successfully be attacked by one who does not,⁸⁰ or who is not entitled to,⁸¹ assert a right in conflict with such exclusive grant; and the rule has even been applied against the municipality, after substantial performance by the grantee of the exclusive privilege.⁸²

Objection by prior occupant or user. In some jurisdictions one possessing a grant of a right to use the streets cannot assert the invalidity of a subsequent grant to, or the use of streets by, another where the earlier grant is not exclusive,⁸³ at least in the absence of any showing that the power of the city is abused to the oppression of the holder of the earlier grant.⁸⁴ In other jurisdictions the right of the prior occupant to question the validity of the grant to, or use by, another is recognized, even though the earlier grant is not exclusive as against persons claiming under a valid grant.⁸⁵

Collateral attack. The act of a municipality in making a grant or license cannot be attacked collaterally.⁸⁶ Thus, where the only valid objection to a contract which involves the use of streets is that its duration is for too long a period, and in that

respect is ultra vires, that fact does not constitute a defense to an action against the municipality to recover the value of a commodity actually furnished under the contract.⁸⁷ A like rule has been applied where the objection in such action was that the ordinance granting the privilege was void because it gave an exclusive⁸⁸ and perpetual right.⁸⁹

Estoppel. A property owner may be estopped by his acquiescence during the expenditure of large sums of money,⁹⁰ and an abutter who petitions for the allowance of the use of a street by a public service company is estopped to assert that the petition did not contain sufficient signatures where the company has incurred large expense in consequence of the passage of the ordinance allowing such use of the streets.⁹¹ A utility company is not estopped by laches to challenge the validity of a franchise to defendant utility where the latter's conduct in expending money under the franchise was not influenced by any conduct, concealment, or positive action on the part of plaintiff utility.⁹²

Questions as to estoppel against a municipality with respect to grants or licenses to use streets are considered in Estoppel § 145, and estoppel of the beneficiary of a grant or license who has acquiesced therein and received valuable property under it in Estoppel § 112.

§ 1742. Curative Statutes or Ordinances

Grants of the use of streets invalid either from lack of power on the part of the municipal corporation or from irregularities or defects in connection with making such grants may be validated by subsequent statutes.

Grants of the use of streets invalid either from lack of power on the part of the municipal corporation⁹³ or from irregularities or defects in connection

N.J.—Hamilton Lumber & Manufacturing Co. v. City of Paterson, 1 A.2d 311, 121 N.J.Law 95.

44 C.J. p 1004 note 27.

78. N.J.—Schaefer v. Moore, Sup., 107 A. 52.

44 C.J. p 1004 note 28.

79. Ohio.—Sloane v. People's Electric R. Co., 7 Ohio Cir.Ct. 84, 3 Ohio Cir.Dec. 674.

80. U.S.—Illinois Trust, etc., Bank v. Arkansas City, Kan., 76 F. 271, 22 C.C.A. 171, 34 L.R.A. 518.

44 C.J. p 1004 note 30.

81. Pa.—Larimer, etc., St. R. Co. v. Larimer St. R. Co., 20 A. 570, 137 Pa. 533.

82. U.S.—Illinois Trust, etc., Bank v. Arkansas City, Kan., 76 F. 271, 22 C.C.A. 171, 34 L.R.A. 518.

44 C.J. p 1004 note 32.

83. Ark.—Arkansas Power & Light Co. v. West Memphis Power & Wa-

ter Co., 41 S.W.2d 755, 184 Ark. 206, certiorari denied 52 S.Ct. 310, 285 U.S. 536, 76 L.Ed. 930—Citizens Pipe Line Co. v. Twin City Pipe Line Co., 10 S.W.2d 493, 178 Ark. 309.

N.J.—Junction Water Co. v. Riddle, 155 A. 887, 108 N.J.Eq. 523.

44 C.J. p 1004 note 33.

84. Ill.—Chicago Tel. Co. v. Northwestern Tel. Co., 65 N.E. 329, 199 Ill. 324.

44 C.J. p 1004 note 34.

85. Neb.—Lincoln Tract. Co. v. Omaha, etc., R. Co., 187 N.W. 790, 108 Neb. 154, 28 A.L.R. 960.

44 C.J. p 1005 note 35.

86. N.Y.—Greenberg v. City of New York, 274 N.Y.S. 4, 152 Misc. 488.

44 C.J. p 1005 note 36.

87. Ill.—East St. Louis v. East St. Louis Gas Light, etc., Co., 98 Ill. 415, 38 Am.R. 97.

88. Idaho.—Bellevue Water Co. v. Bellevue, 35 P. 693, 3 Idaho, Hasb., 739.

Ill.—Decatur Gaslight, etc., Co. v. Decatur, 24 Ill.App. 544, affirmed 11 N.E. 406, 120 Ill. 67.

89. Ill.—Decatur Gaslight, etc., Co. v. Decatur, supra.

90. Pa.—Daffinger v. Pittsburg, etc., Tel. Co., 31 Pittsb.Leg.J., N.S., 37, 14 York Leg.Rec. 46.

91. Ill.—Joyce v. East St. Louis Electric St. R. Co., 43 Ill.App. 157.

92. Kan.—Gas Service Co. v. Consolidated Gas Utilities Corporation, 65 P.2d 584, 145 Kan. 423.

93. Cal.—People v. Los Angeles Electric R. Co., 27 P. 673, 91 Cal. 333.

44 C.J. p 1005 note 45.

Confirmation or ratification of municipal acts generally see supra § 196.

tion with making such grants⁹⁴ may be validated by subsequent statutes. A municipal corporation which, without express authority in its charter, grants a franchise, may subsequently ratify its act by passing another ordinance recognizing the validity of the grant after its charter is amended and the power expressly conferred.⁹⁵

§ 1743. Judicial Control and Review

Where a municipal corporation is given control of the streets, the courts ordinarily will not interfere with the exercise of its discretion in granting or withholding privileges unless the exercise of such power is abused or is fraudulent or grossly wrong or unjust.

Where a municipal corporation is given control of the streets, the courts ordinarily will not interfere with the exercise of its discretion in granting or withholding privileges unless the exercise of such power is abused or is fraudulent or grossly wrong or unjust.⁹⁶ For instance, ordinarily a grant is not subject to review by the courts as to expedi-

ency,⁹⁷ and the court may not go behind official records to determine the correctness of the procedure.⁹⁸ However, where the act of the municipal authorities is illegal or unauthorized⁹⁹ or there is an abuse of discretion,¹ the courts may interfere at the suit of proper parties.

Where the action of the city council in rejecting all bids for a franchise to use the streets is attacked in the courts, the presumption will be indulged that the council has acted reasonably and in good faith for the public benefit,² and the person challenging the council's discretion must allege and prove facts showing that the council acted arbitrarily or corruptly.³

Reasonableness of charge or fee. The reasonableness of a charge for the occupation or use of the street⁴ and also of a license tax or fee⁵ is reviewable by the court, although it has also been held that a grant is not subject to review with respect to the adequacy of the consideration.⁶

12. OBSTRUCTIONS AND ENCROACHMENTS

a. In General

§ 1744. As a Nuisance

Any unreasonable and unauthorized obstruction or encroachment of a street is a nuisance.

Since the public has the paramount right to the

use of a street as a highway, as discussed *infra* § 1758, the public is entitled to use of the street free of all obstructions which tend to interfere with its use as a highway.⁷ Hence, any unreasonable and unauthorized obstruction of, or encroachment on,

94. N.J.—*Passaic v. Public Serv. Corp.*, 73 A. 122, 75 N.J.Eq. 379.

95. U.S.—*Denver v. Mercantile Trust Co.*, Colo., 201 F. 790, 120 C. C.A. 100.

96. Ala.—*City of Decatur v. Meadors*, 180 So. 550, 235 Ala. 544.
Ky.—*Kentucky Utilities Co. v. City of Paris*, 179 S.W.2d 676, 297 Ky. 440—*Hatcher v. Kentucky & West Virginia Power Co.*, 133 S.W.2d 910, 280 Ky. 583—*Norris v. Kentucky State Telephone Co.*, 30 S.W.2d 960, 235 Ky. 234—*Groover v. City of Irvine*, 300 S.W. 904, 222 Ky. 366.
Md.—*Purnell v. Ocean City*, 159 A. 359, 162 Md. 169.

N.Y.—*Greenberg v. City of New York*, 274 N.Y.S. 4, 152 Misc. 488.
Pa.—*Souder v. Souderton Borough Council*, 13 Pa.Dist. & Co. 32.
44 C.J. p 1005 note 49.

Judicial supervision of powers of municipality in general see *supra* §§ 199–209.

Proceedings to effect revocation or forfeiture of grant see *supra* § 1740.

Suits or actions to abate or enjoin obstructions or encroachments see *infra* §§ 1751–1753.

97. Wis.—*Lange v. La Crosse, etc.*, R. Co., 95 N.W. 952, 118 Wis 558.

98. N.Y.—*Greenberg v. City of New York*, 274 N.Y.S. 4, 152 Misc 488

99. Mich.—*Cooper v. Alden, Harr.*, 72.

N.Y.—*Negus v. Brooklyn*, 10 Abb N. Cas. 180, 62 How.Pr. 291, 1 N.Y. Civ.Proc. 471.

1. N.Y.—*People v. Atwell*, 133 NE 364, 232 N.Y. 96, 25 A.L.R. 107.
44 C.J. p 1005 note 53.

2. Ky.—*Hatcher v. Kentucky & West Virginia Power Co.*, 133 S.W. 2d 910, 280 Ky. 583—*Groover v. City of Irvine*, 300 S.W. 904, 222 Ky. 366.

Award on competitive bidding see *supra* § 1729.

3. Ky.—*Hatcher v. Kentucky & West Virginia Power Co.*, 133 S.W. 2d 910, 280 Ky. 583—*Groover v. City of Irvine*, 300 S.W. 904, 222 Ky. 366.

Abuse of discretion not shown
Ky.—*Groover v. City of Irvine*, *supra*.

4. Tex.—*Fleming v. Houston Lighting & Power Co.*, 138 S.W.2d 520, 135 Tex. 468, rehearing denied 143

S.W.2d 923, 135 Tex. 463, certiorari denied *Houston Lighting & Power Co. v. City of West University Place*, 61 S.Ct. 836, 313 U. S. 560, 85 L.Ed. 1520.

44 C.J. p 998 note 16.
Right of municipality to impose charge or fee for use of street see *supra* § 1737.

5. U.S.—*Postal Tel-Cable Co. v. Taylor, Pa.*, 24 S.Ct. 208, 192 U.S. 64, 48 L.Ed. 342.

6. N.Y.—*Greenberg v. City of New York*, 274 N.Y.S. 4, 152 Misc. 488.
44 C.J. p 1005 note 51.

7. Ga.—*Harbuck v. Richland Box Co.*, 49 S.E.2d 883, 204 Ga. 352.

Ill.—*City of Chicago v. Rhine*, 2 N. E.2d 905, 363 Ill 619, 105 A.L.R. 1045—*People v. Wolper*, 183 N.E. 451, 350 Ill. 461—*Gerstley v. Globe Wernicke Co.*, 172 N.E. 829, 340 Ill. 270.

Interference with use

Streets may not be interfered with by anyone in a way affecting their use or their relation to other authorized uses without the city's consent—*City of New Rochelle*, on Complaint of Conlon, v. Burke, 43 N.E.2d 463, 288 N.Y. 406.

a street is a nuisance⁸ and a purpresture,⁹ regardless of whether or not the fee of the street is in the public or in the abutting owners,¹⁰ and whether it is actually a nuisance at the time it is erected, or becomes so by lapse of time or changed conditions.¹¹ Acts which would constitute a nuisance in connection with public highways are not necessarily a nuisance in a street of a municipality;¹² and an obstruction is not unlawful as to a municipality where it has neither a fee nor an easement in the alleged street claimed to be obstructed.¹³

Vacated street. If the vacation of a street is duly authorized, an obstruction in accordance with such

authority is not a nuisance,¹⁴ since whatever is lawful cannot be a nuisance.¹⁵

Sidewalk. An obstruction of the use of a sidewalk is as much a nuisance as the obstruction of any other part of the street.¹⁶

Alleys. Ordinarily the obstruction or encroachment of a public alley is a public nuisance,¹⁷ although it has been held that an alley is not such a public street that an obstruction thereof will be regarded as a public wrong.¹⁸

The grant of power to a municipality to declare what shall constitute a nuisance, and remove it, em-

8. U.S.—George W. Armbruster, Jr., Inc., v. City of Wildwood, D.C.N.J., 41 F.2d 823.

Ala.—Duckworth v. Town of Robertsedale, 28 So.2d 182, 248 Ala. 96—McCraney v. City of Leeds, 194 So. 151, 239 Ala. 143—McIntosh v. Moody, 153 So. 182, 228 Ala. 165.

Cal.—Nagel v. Dorrington, 262 P. 718, 202 Cal. 698—Robbins v. Hercules Gasoline Co., 251 P. 697, 80 Cal. App. 271.

Del.—Miller v. Town of Seaford, 194 A. 37, 22 Del.Ch. 159.

Ill.—People v. Wolper, 183 N.E. 451, 350 Ill. 461.

Iowa.—Incorporated Town of Ackley v. Central States Electric Co., 214 N.W. 879, 204 Iowa 1246, 54 A.L.R. 474.

Me.—Yates v. Tiffany, 136 A. 668, 126 Me. 128.

N.Y.—Allen v. New York Cent. R. Co., 239 N.Y.S. 140, 228 App.Div. 382.

Or.—McGowan v. City of Burns, 137 P.2d 994, 172 Or. 63.

Pa.—City of Pottsville v. Thompson, Com.Pl., 42 Sch.Leg.Rec. 188.

S.C.—Brown v. Hendricks, 45 S.E.2d 603, 211 S.C. 395.

44 C.J. p 1006 note 55.

Highways not within municipality see Highways § 217 et seq.

Obstructions and encroachments by: Abutting owners see supra §§ 1707-1709.

Railroads and street railroads see the C.J.S. title Nuisances § 67, also 46 C.J. p 719 note 21-p 722 note 53; 60 C.J. p 262 note 86-p 263 note 41.

Telegraph or telephone companies see the C.J.S. title Telegraphs and Telephones § 40, also 62 C.J. p 53 note 39-p 54 note 40.

Railroad construction as creating nuisance see the C.J.S. title Railroads § 190, also 51 C.J. p 735 note 82-p 736 note 12.

Nuisance per se

Cal.—Fitzgerald v. Smith, 271 P. 507, 94 Cal.App. 480.

Ind.—Steele v. Fowler, 41 N.E.2d 678, 111 Ind.App. 364.

Pa.—Corpus Juris cited in Valmont Development Co. v. Rosser, 146 A. 557, 561, 297 Pa. 140.

44 C.J. p 1006 note 56.

Private as well as public nuisance
Street obstruction may be private nuisance as well as public nuisance where individual can show special injury.—Robbins v. White, 42 So. 841, 52 Fla. 613—44 C.J. p 1006 note 55 [a].

Any object placed in the street without public authority is a nuisance if it obstructs the street or renders travel on it dangerous, irrespective of whether the object is merely a nuisance or a nuisance per se, since the essential characteristic of a nuisance is that it imperils travel.—McGowan v. City of Burns, 137 P.2d 994, 172 Or. 63.

Presumption

Unexplained obstructions in a public street or public grounds presumptively constitute a public nuisance within statute requiring municipality to keep public grounds free from nuisance.—Dinninger v. Village of Plymouth, 52 N.E.2d 865, 72 Ohio App. 469.

9. Ill.—People v. Wolper, 183 N.E. 451, 350 Ill. 461.

Iowa.—Lacy v. Oskaloosa, 121 N.W. 542, 143 Iowa 704, 31 L.R.A., N.S., 853.

44 C.J. p 1006 note 57.

Purprestures as nuisances see the C.J.S. title Nuisances § 66, also 46 C.J. p 719 notes 4-13.

"Purpresture" is erection by private individual of obstruction in public highway, removable on complaint of public authority for benefit of public at large. Hence, obstruction of avenue by city's erection thereon of boardwalk, if illegal, is nuisance rather than purpresture.—George W. Armbruster, Jr., Inc., v. City of Wildwood, D.C.N.J., 41 F.2d 823.

10. N.D.—Kennedy v. Fargo, 169 N. W. 424, 40 N.D. 475.

Pa.—Corpus Juris cited in Valmont Development Co. v. Rosser, 146 A. 557, 561, 297 Pa. 140.

Fee of street as affecting right to sue for abatement of obstruction see infra § 1753.

11. N.Y.—Allen v. New York Cent. R. Co., 239 N.Y.S. 140, 228 App.Div. 382.

12. Iowa.—Haight v. Keokuk, 4 Iowa 199.

13. Tex.—Smith v. Gulf, etc., R. Co., Civ.App., 64 S.W. 943.

14. Ala.—Chichester v. Kroman, 128 So. 166, 221 Ala. 203.

15. Ala.—Chichester v. Kroman, supra.

16. Del.—Miller v. Town of Seaford, 194 A. 37, 22 Del.Ch. 159.

44 C.J. p 1007 note 68.

17. Cal.—Curtis v. Kastner, 30 P. 2d 26, 220 Cal. 185—Harniss v. Mulpitt, 81 P. 1022, 1 Cal.App. 140.

Ga.—Hendricks v. Jackson, 84 S.E. 440, 143 Ga. 106—Henderson v. Ezard, 44 S.E.2d 397, 75 Ga.App. 724.

Iowa.—Pederson v. Town of Radcliffe, 284 N.W. 145, 226 Iowa 166

—Dugan v. Zurmuehlen, 211 N.W. 986, 203 Iowa 1114.

S.C.—Brown v. Hendricks, 45 S.E. 2d 603, 211 S.C. 395.

44 C.J. p 1007 note 69.

Trespass
Placing of structure across alley is a trespass.—Louis Sachs & Sons v. Ward, 35 A.2d 161, 182 Md. 385.

Occupancy thereof or encroachment thereon does not deprive the public of the right to have the alley open throughout its length, where alley has been determined to be public way.—Huddleston v. Deans, 21 S. E.2d 352, 124 W.Va. 313.

Presumption

Unexplained obstructions in public alley presumptively constitute public nuisance within statute requiring municipality to keep public grounds free from nuisance.—Dinninger v. Village of Plymouth, 52 N.E.2d 865, 72 Ohio App. 469.

18. Mich.—Bagley v. People, 5 N.W. 415, 43 Mich. 355, 38 Am.R. 192.

44 C.J. p 1007 note 70.

powers it to declare a nuisance anything which by reason of location or use may become a dangerous obstruction.¹⁹

§ 1745. Persons Obstructing

No person has the right permanently to obstruct a street for private purposes.

No person has the right permanently to obstruct a street for private purposes,²⁰ and a person continuing a street obstruction nuisance is responsible therefor, and may be required to abate it or pay damages.²¹ The dedicator of the land comprised in a street has no greater right than anyone else to obstruct it,²² and an obstruction cannot be justified on the ground that the obstructor is a common carrier,²³ or an officer removing goods from a house in obedience to an execution.²⁴

§ 1746. What Constitutes an Unlawful Obstruction

- a. In general
- b. Authorized obstructions
- c. Particular obstructions held lawful or unlawful

a. In General

An unlawful obstruction or encroachment may consist

of anything rendering the street less commodious or convenient for public use, even though it is located outside of the ordinary traveled part, but incidental or partial obstructions may not be illegal if they do not unreasonably interfere with the rights of the public and are not unduly prolonged.

The right of the public to the free and unobstructed use of a street is subject to reasonable and necessary limitations,²⁵ and every obstruction, encroachment, or purpresture is not unlawful and a public nuisance.²⁶ Streets are subject to such incidental or partial obstructions as necessity requires provided they do not unreasonably interfere with the rights of the public and are not unduly prolonged.²⁷ It is impossible to lay down any general rule as to what is a proper obstruction based on a reasonable and necessary use, since the right so to obstruct a street springs from the necessities of each particular case and is limited by the necessity existing.²⁸ However, an obstruction cannot be justified on the ground of necessity where there are other methods, although more expensive, of accomplishing the desired result.²⁹

Ordinarily an obstruction of a temporary character is not illegal per se and a nuisance,³⁰ as where persons other than abutting owners temporarily obstruct the streets in connection with business purposes,³¹ and such an obstruction becomes a nuisance

19. Okl.—Duncan Electric, etc., Co. v. Duncan, 186 P. 1048, 64 Okl. 211.

20. U.S.—Kennedy v. City of Moscow, D.C. Idaho, 39 F.Supp. 26.
Ala.—Nashville, C. & St. L. Ry. Co. v. Hulgán, 121 So. 62, 219 Ala. 56.
Ind.—House-Wives League v. City of Indianapolis, 185 N.E. 511, 204 Ind. 685.

Iowa.—Cowin v. City of Waterloo, 21 N.W.2d 705, 237 Iowa 202.
Miss.—City of Ellisville v. State Highway Commission, 191 So. 274, 186 Miss. 473.

N.Y.—Allen v. New York Cent. R. Co., 239 N.Y.S. 140, 228 App.Div. 382.

Right of abutter to obstruct street see *supra* § 1707.

Anyone can use streets for ordinary purposes, even to conducting such business thereon as does not permanently occupy and obstruct street to exclusion of others, subject to right of people by appropriate legislation to regulate or prohibit such operation in public interest by license or permit.—People ex rel. Foley v. Begole, 56 P.2d 931, 98 Colo. 354.

21. N.Y.—Village of Stillwater v. Hudson Valley Ry. Co., 241 N.Y.S. 569, 229 App.Div. 41, modified 174 N.E. 306, 255 N.Y. 144.

Persons liable for obstruction of highways see *Highways* § 221.

22. Mo.—Foudry v. St. Louis, etc. R. Co., 109 S.W. 80, 130 Mo.App. 104.

23. N.Y.—Hoey v. Gilroy, 14 N.Y.S. 158, reversed on other grounds 29 N.E. 85, 129 N.Y. 132.

24. Mass.—Commonwealth v. Lennon, 52 N.E. 521, 172 Mass. 434.

25. Ga.—Harbuck v. Richland Box Co., 49 S.E.2d 883, 204 Ga. 352—Simon v. City of Atlanta, 67 Ga. 618, 44 Am.R. 739.

Idaho—Rief v. Mountain States Telephone & Telegraph Co., 120 P.2d 823, 63 Idaho 418.

W.Va.—Johnson v. Huntington, 92 S.E. 344, 80 W.Va. 178.

26. Ga.—Southeastern Pipe Line Co. v. Garrett ex rel. Le Sueur, 16 S.E. 2d 753, 192 Ga. 817.

Idaho—Rief v. Mountain States Telephone & Telegraph Co., 120 P.2d 823, 63 Idaho 418.

W.Va.—Johnson v. Huntington, 92 S.E. 344, 80 W.Va. 178.

Determination as to character of nuisance

Whether or not purpresture is a nuisance will be determined according to the particular facts, and unless the public sustains or may sustain some degree of inconvenience or annoyance in the use of a public highway or street, or other public

property, there is no public nuisance.—Southeastern Pipe Line Co. v. Garrett ex rel. Le Sueur, 16 S.E.2d 753, 192 Ga. 817.

Free from nuisance

A public street is free from nuisance when it is in a reasonably safe condition for travel in the ordinary mode.—U S Bung Mfg Co v City of Cincinnati, 11 Ohio Supp. 37, affirmed 54 N.E.2d 432, 73 Ohio App. 80.

27. Ga.—Harbuck v. Richland Box Co., 49 S.E.2d 883, 204 Ga. 352—Simon v. City of Atlanta, 67 Ga. 618, 44 Am.R. 739.

Idaho—Rief v. Mountain States Telephone & Telegraph Co., 120 P.2d 823, 63 Idaho 418.
44 C.J. p 1007 note 76.

28. Ga.—Harbuck v. Richland Box Co., 49 S.E.2d 883, 204 Ga. 352.

29. Iowa.—Young v. Rothrock, 96 N.W. 1105, 121 Iowa 588.

30. Ala.—City of Birmingham v. Hood-McPherson Realty Co., 172 So. 114, 233 Ala. 352, 108 A.L.R. 1140.
44 C.J. p 1008 note 87.

31. N.Y.—Callanan v. Gilman, 14 N.E. 264, 107 N.Y. 360, 1 Am.S.R. 831.
44 C.J. p 1008 note 89.

Temporary obstruction of streets by abutters see *supra* § 1709.

only from unnecessary delay in removal.³² Thus, a municipality may lawfully authorize a temporary and reasonable obstruction of streets,³³ and such an obstruction does not constitute a purpresture.³⁴

In general it may be said that an unlawful obstruction or encroachment may consist of anything, permanent in nature or continuously maintained, which renders the street less commodious or convenient for the use of the public,³⁵ or which will in the future interfere with or impede the right of the public to the use of any part of the street,³⁶ such as buildings or other structures,³⁷ fences,³⁸ or walls,³⁹ whether or not actually interfering with travel by the public,⁴⁰ whether or not the street has been opened to its full width,⁴¹ and regardless of the question of the comparative benefit of the obstruc-

tion and the street to the public;⁴² and the balance-of-convenience theory or the question of comparative damages has no relevancy.⁴³ Thus, where an ordinance is violated and the encroachment is a purpresture, it is no defense that the encroachment does no injury.⁴⁴

An obstruction placed anywhere within the street limits,⁴⁵ even though not on the part of the street ordinarily used for travel,⁴⁶ or placed in the air over a street,⁴⁷ may constitute a nuisance. Since no person has the right permanently to obstruct a street for private purposes, as discussed supra § 1745, notwithstanding such an obstruction does not interfere with traffic,⁴⁸ the obstruction is not justified because sufficient room is left for the passage of the public,⁴⁹ and no individual has the right thus to

32. Ala.—City of Birmingham v. Hood-McPherson Realty Co., 172 So. 114, 233 Ala. 352, 108 A.L.R. 1140.

33. Ark.—Owens v. Atkins, 259 S.W. 396, 163 Ark. 82.

Wash.—Gerritsen v. City of Seattle, 2 P.2d 1092, 164 Wash. 459.

44 C.J. p 1008 note 90.

34. Ark.—Owens v. Atkins, 259 S.W. 396, 163 Ark. 82, 34 A.L.R. 267.

51 C.J. p 105 note 93 [b] (1).

35. Ga.—Harbuck v. Richland Box Co., 49 S.E.2d 883, 204 Ga. 352—Southeastern Pipe Line Co. v. Garrett ex rel. Le Sueur, 16 S.E.2d 753, 192 Ga. 817.

Ill.—People v. Wolper, 183 N.E. 451, 350 Ill. 461—People v. Harris, 67 N.E. 785, 203 Ill. 272, 96 Am.S.R. 304.

Mich.—Long v. New York Cent. R. Co., 227 N.W. 739, 248 Mich. 437.

N.J.—Sacco v. Hall, 63 A.2d 887, 1 N.J. J. 377.

Tex.—Sitas v. City of San Angelo, Civ.App., 177 S.W.2d 85, affirmed 183 S.W.2d 417, 143 Tex. 154—Joseph v. City of Austin, Civ.App., 101 S.W.2d 381, error refused—Dozier v. City of Austin, Civ.App., 253 S.W. 554.

Encroachment naturally means something which illegally narrows the street, and which the municipal authorities may remove.—Bloom v. City of Orange, 103 A. 395, 91 N.J. Law 376.

"Obstruction" means the placing of obstacles or impediments in the street, so as to prevent free passage along it and render it difficult for travel.—People v. Eckerson, 117 N.Y. S. 418, 133 App.Div. 220.

Nuisance

(1) Any unlawful act or omission which interferes with, obstructs, or renders dangerous for passage, street or highway, constitutes public nuisance.—Gleason v. Hillcrest Golf Course, 265 N.Y.S. 886, 148 Misc. 246.

(2) An obstruction in a city street must, in order to constitute a public nuisance, be an actual or threatened interference with the primary right of the public to use the street.—Pattison v. Lutz, 30 Ohio N.P.N.S., 371.

(3) Anything which does not amount to a substantial obstruction of a street or an inherent interference with the free or comfortable enjoyment of life or property within meaning of statute is not a public nuisance per se.—Rief v. Mountain States Telephone & Telegraph Co., 120 P.2d 823, 63 Idaho 418.

Under indictment for maintaining a common-law nuisance, by constructing a building across a public alley, it has been held that there must be a substantial interference with, or obstruction of, the public right to make an obstruction a public nuisance.—Leitchfield Mercantile Co. v. Commonwealth, 136 S.W. 639, 143 Ky. 162.

36. Tex.—Joseph v. City of Austin, Civ.App., 101 S.W.2d 381, error refused.

37. Pa.—Presbyterian Hospital in Philadelphia v. City of Philadelphia, 198 A. 53, 329 Pa. 337.

Tex.—Sitas v. City of San Angelo, Civ.App., 177 S.W.2d 85, affirmed 183 S.W.2d 417, 143 Tex. 154—Joseph v. City of Austin, Civ.App., 101 S.W.2d 381, error refused.

38. Tex.—Sitas v. City of San Angelo, Civ.App., 177 S.W.2d 85, affirmed 183 S.W.2d 417, 143 Tex. 154—Joseph v. City of Austin, Civ. App., 101 S.W.2d 381, error refused.

39. Tex.—Sitas v. City of San Angelo, Civ.App., 177 S.W.2d 85, affirmed 183 S.W.2d 417, 143 Tex. 154—Joseph v. City of Austin, Civ. App., 101 S.W.2d 381, error refused.

40. W.Va.—Davis v. Spragg, 79 S.E. 652, 72 W.Va. 672, 48 L.R.A.N.S., 178.

41. N.J.—Atlantic City v. Snee, 52 A. 372, 68 N.J.Law 39.

44 C.J. p 1007 note 60.

42. Iowa.—Lacy v. Oskaloosa, 121 N.W. 542, 143 Iowa 704, 31 L.R.A., N.S., 853.

Wash.—West Seattle v. West Seattle Land, etc., Co., 80 P. 549, 38 Wash. 359.

43. Tex.—Dozier v. Austin, Civ.App., 253 S.W. 554.

44. Ill.—Hibbard v. Chicago, 50 N.E. 256, 173 Ill. 91, 40 L.R.A. 621

45. Iowa.—Cowin v. City of Waterloo, 21 N.W.2d 705, 237 Iowa 202. Tex.—Jenkins v. State, 60 S.W.2d 1040, 124 Tex.Cr. 92.

46. Ky.—Corpus Juris cited in Lipscomb v. Cincinnati, N. & C. St. Ry. Co., 39 S.W.2d 991, 992, 239 Ky. 587.

44 C.J. p 1007 note 66.

47. Iowa.—Wheeler v. Ft. Dodge, 108 N.W. 1057, 131 Iowa 566, 9 L.R.A.N.S., 146.

44 C.J. p 1007 note 67.

The public right goes to the full width of the street and extends indefinitely upward and downward as far at least as to prohibit encroachment on such limits by any person by any means by which the enjoyment of such public right is or may be in any manner hindered or obstructed or made inconvenient or dangerous.

Iowa.—Wheeler v. Ft. Dodge, supra. Ohio.—Corpus Juris quoted in Yackee v. Village of Napoleon, 21 N.E. 2d 111, 115, 130 Ohio St. 344.

Beneficial use of street vested in public includes unobstructed use of air above and ground beneath surface.—People ex rel. Jeffrey v. Murphy, 254 Ill.App. 109.

48. Ala.—Nashville, C. & L. Ry. Co. v. Hulan, 121 So. 62, 219 Ala. 56.

49. Ala.—McCraney v. City of Leeds, 1 So.2d 894, 241 Ala. 198.

limit or abridge the paramount right of the public in the entire street.⁵⁰ Under this rule permanent obstructions, or encroachments, unauthorized and of a substantial nature, are ordinarily a nuisance⁵¹ per se,⁵² unless incidental to a public utility.⁵³

b. Authorized Obstructions

An obstruction in the street may be authorized by the legislature or by a municipal corporation where so empowered by statute or constitution, and, where an obstruction is properly authorized, it is not a nuisance.

The power to continue existing obstructions on streets without municipal interference rests in the legislature,⁵⁴ and, except where so empowered by charter, statute, or constitution,⁵⁵ a municipal cor-

poration has no authority to authorize obstructions in streets,⁵⁶ even though the municipality owns the fee of the street.⁵⁷ The authority of the municipal corporation to authorize an obstruction of the street will be strictly construed,⁵⁸ and it will not be assumed that the legislature intended to authorize the municipality to grant an encroachment amounting to a public nuisance.⁵⁹ However, it has been held that a municipal corporation may have power to legalize a nuisance when it is reasonably necessary to the performance of a public service.⁶⁰ Furthermore, municipal authorities may permit an encroachment on streets or sidewalks where it is not of such a nature as necessarily to prevent the rea-

Ga.—Harbuck v. Richland Box Co., 49 S.E.2d 883, 204 Ga. 352.

Ill.—People v. Wolper, 183 N.E. 451, 350 Ill. 461—People v. Harris, 67 N.E. 786, 203 Ill. 272, 96 Am.S.R. 304.

Mich.—Long v. New York Cent. R. Co., 227 N.W. 739, 248 Mich. 437.

Tex.—Joseph v. City of Austin, Civ. App., 101 S.W.2d 381, error refused—Dozier v. City of Austin, Civ. App., 253 S.W. 554.

50. Ala.—McCraney v. City of Leeds, 1 So.2d 894, 241 Ala. 198.

51. Ala.—McCraney v. City of Leeds, supra—City of Birmingham v. Hood-McPherson Realty Co., 172 So. 114, 233 Ala. 352, 108 A.L.R. 1140.

Mo.—Boyle v. Neisner Bros., 87 S. W.2d 227, 230 Mo.App. 90.

Tex.—J. M. Radford Grocery Co. v. City of Abilene, Civ.App., 20 S.W. 2d 255, affirmed, Com.App., 34 S.W. 2d 830.

44 C.J. p 1008 note 92.

Trees as obstructions see supra § 1693.

Easement

Permanent or habitual obstruction of a public street, although room enough is left to pass, is a nuisance.—Lake Sand Co. v. State, 120 N.E. 714, 68 Ind.App. 439.

52. Ga.—Harbuck v. Richland Box Co., 49 S.E.2d 883, 204 Ga. 352—Williamson v. Souter, 157 S.E. 463, 172 Ga. 364—Rider v. Porter, 95 S.E. 284, 147 Ga. 760.

Ill.—People v. Wolper, 183 N.E. 451, 350 Ill. 461.

Ind.—Valparaiso v. Bozarth, 55 N.E. 439, 153 Ind. 536, 47 L.R.A. 487.

Kan.—City of Emporia v. Humphrey, 297 P. 712, 132 Kan. 682, rehearing denied 299 P. 950, 133 Kan. 176.

Mich.—Long v. New York Cent. R. Co., 227 N.W. 739, 248 Mich. 437.

Or.—McGowan v. City of Burns, 127 P.2d 994, 172 Or. 63.

Tex.—Joseph v. City of Austin, Civ. App., 101 S.W.2d 381, error refused.

Rule established

"Appellant's fundamental proposi-

tion is that any private use of a street amounting to a permanent physical encroachment is a nuisance per se. He is able to cite eminent authority to this sweeping contention. Isolated statements by text-writers support it. Much judicial statement is also available. It is our impression, however, that in its full import it is generally obiter, due to the laying of an unnecessarily broad foundation of principle for the particular decision called for or rule laid down."—Dunn v. Town of Gallup, 29 P.2d 1053, 1054, 38 N.M. 197.

Effect of license or permit

(1) A permanent encroachment by private interests on public use of streets will not be permitted. However, where the encroachment is not permanent in character, as in the case, where it is under a permit or license which is revocable by the municipality, and is so slight as to be of no consequence, it may be permitted.—State ex rel. Bigler v. City of Miami, Fla., 40 So.2d 207.

(2) Encroachment or obstruction by abutters under license or permit see supra § 1708.

53. Mo.—Atchison v. St. Joseph, 113 S.W. 679, 133 Mo.App. 563.

44 C.J. p 1008 note 93.

54. N.Y.—Leo N. Levy Corp. v. Dick, 190 N.Y.S. 238, 116 Misc. 145.

44 C.J. p 1008 note 79.

Legislature has power to control encroachments on or over public highways, from house line to house line.—Walnut & Quince Streets Corporation v. Mills, 154 A. 29, 303 Pa. 25, appeal dismissed 62 S.Ct. 16, 284 U.S. 573, 76 L.Ed. 498.

55. N.J.—Levy v. Elizabeth, 75 A. 312, 79 N.J.Law 456, reversed on other grounds 80 A. 498, 81 N.J. Law 643.

44 C.J. p 1008 note 80.

56. Ala.—Chichester v. Kroman, 128 So. 166, 221 Ala. 203—Nixon v. City

of Anniston, 121 So. 514, 219 Ala. 219.

Colo.—Wood v. People ex rel. Stonebraker, 43 P.2d 1001, 96 Colo. 431.

Ga.—Harbuck v. Richland Box Co., 49 S.E.2d 883, 204 Ga. 352.

N.Y.—Allen v. New York Cent. R. Co., 239 N.Y.S. 140, 228 App.Div. 382.

44 C.J. p 1008 note 81.

Barricading unvacated street

Municipal corporation did not have authority to barricade a street, which had not been vacated, and close it to public travel.—Cabell v. City of Cottage Grove, 130 P.2d 1013, 170 Or. 256, 144 A.L.R. 286.

Powers of highway commission construed

Jurisdiction of state highway commission over city streets which constitute a part of state highway system does not include authority to construct barricades at edge of highway at street intersections so as to shut off access by vehicular traffic to the highway from the streets so intersected.—Cabell v. City of Cottage Grove, 130 P.2d 1013, 170 Or. 256.

57. N.Y.—Allen v. New York Cent. R. Co., 239 N.Y.S. 140, 228 App.Div. 382.

58. Ga.—Harbuck v. Richland Box Co., 49 S.E.2d 883, 204 Ga. 352.

59. Ga.—Harbuck v. Richland Box Co., supra.

60. Tex.—Sitas v. City of San Angelo, Civ.App., 177 S.W.2d 85, affirmed 183 S.W.2d 417, 143 Tex. 154.

Requisites

Before it could be held that ordinance intended to legalize a permanent obstruction of sidewalk and a nuisance, it must appear that the ordinance either pointed out the place where objectionable structure was to be built or operated, or left to one operating it the power to make arbitrary selection.—Sitas v. City of San Angelo, supra.

sonable and proper use by the public and does not constitute a common nuisance.⁶¹

Obstructions are not nuisances if duly permitted or licensed by the proper authorities⁶² of the state⁶³ or, where it possesses the power, of the municipality.⁶⁴ However, an unauthorized or invalid license⁶⁵ or one which has been duly revoked⁶⁶ will not prevent an obstruction from being a nuisance.

c. Particular Obstructions Held Lawful or Unlawful

Various street obstructions have been held to be lawful or unlawful depending on the circumstances of the case.

Street obstructions which, under the circumstances of the case, have been held nuisances or other-

wise unlawful include a band stand;⁶⁷ bridges;⁶⁸ a ditch unbridged;⁶⁹ electric poles;⁷⁰ wires;⁷¹ or lamps⁷² erected or maintained without due authority; a fair;⁷³ a fence;⁷⁴ a fruit stand;⁷⁵ the act of horse racing;⁷⁶ a lumber pile;⁷⁷ a lunch wagon;⁷⁸ a railroad flagman's shanty;⁷⁹ a rope connecting traveling vehicles;⁸⁰ stands on the sidewalk;⁸¹ a stock market;⁸² taxicab telephones suspended above sidewalks;⁸³ tents, booths, and platforms;⁸⁴ a tool shed;⁸⁵ a wire stretched across the street so as to obstruct travel;⁸⁶ a guy wire and supporting pole;⁸⁷ and wagon or platform scales.⁸⁸

Particular street obstructions held not unlawful or a nuisance under the circumstances of particular cases include a flagstaff;⁸⁹ gasoline, in a small quantity and in a properly protected can, kept on

61. Ark.—*State v. City of Marianna*, 39 S.W.2d 301, 183 Ark. 927.

"*Purpresture*" is an encroachment on street which municipality may or may not tolerate at its option, if it is not also a public nuisance—*State v. City of Marianna*, 39 S.W.2d 301, 183 Ark. 927—51 C.J. p 105 note 95 [b].

62. Pa.—*Conestoga, etc., Turnp. Road Co. v. Lancaster City*, 24 A. 1092, 151 Pa. 543.
44 C.J. p 1008 note 82.

Municipal art jury's statutory power of supervision over structures on highway does not adversely affect use of private property.—*Walnut & Quince Streets Corporation v. Mills*, 154 A. 29, 303 Pa. 25, appeal dismissed 52 S.Ct. 16, 284 U.S. 573, 76 L.Ed. 498.

63. Or.—*Baker City Mut. Ins. Co. v. Baker City*, 110 P. 392, 113 P. 9, 58 Or. 306.

Tex.—*City of San Angelo v. Sitas*, 183 S.W.2d 417, 143 Tex. 154.

64. Cal.—*Marini v. Graham*, 7 P. 442, 67 Cal. 130.
44 C.J. p 1008 note 84.

65. Ill.—*Ginter-Wardein Co. v. City of Alton*, 17 N.E.2d 976, 370 Ill. 101.
44 C.J. p 1008 note 85.

66. Ill.—*Snyder v. Mt. Pulaski*, 52 N.E. 62, 176 Ill. 397, 44 L.R.A. 407.
44 C.J. p 1008 note 86.

67. Mo.—*Atterbury v. West*, 122 S. W. 1106, 139 Mo.App. 180.

68. Ill.—*Gerstley v. Globe Wernicke Co.*, 172 N.E. 829, 340 Ill. 270.

69. Idaho.—*Boise City v. Boise Rapid Transit Co.*, 59 P. 716, 6 Idaho 779.

70. N.Y.—*Hempstead v. Ball Electric Light Co.*, 41 N.Y.S. 124, 9 App.Div. 48.

44 C.J. p 1009 note 98.

71. Iowa.—*Incorporated Town of Ackley v. Central States Electric*

Co., 214 N.W. 879, 204 Iowa 1246, 54 A.L.R. 474.

44 C.J. p 1009 note 99.

72. N.Y.—*Hempstead v. Ball Electric Light Co.*, 41 N.Y.S. 124, 9 App. Div. 48.

73. Ga.—*Augusta v. Reynolds*, 50 S.E. 998, 122 Ga. 754, 106 Am.S.R. 147, 69 L.R.A. 564.
44 C.J. p 1009 note 3.

74. Iowa.—*Pederson v. Town of Radcliffe*, 284 N.W. 145, 226 Iowa 166—*Dugan v. Zurmuehlen*, 211 N. W. 986, 203 Iowa 1114.
44 C.J. p 1009 note 4.

75. Mich.—*Pastorino v. Detroit*, 148 N.W. 231, 182 Mich. 5, L.R.A.1915A 1221, Ann.Cas.1916D 768.

76. Pa.—*Lehman v. Roulette Tp.*, 22 Pa.Dist. 125.

77. Pa.—*Pittsburgh, etc., Bridge Co. v. Commonwealth*, 8 A. 217, 4 Pa. Cas 153.
44 C.J. p 1009 note 7.

78. Mass.—*Commonwealth v. Morrison*, 83 N.E. 415, 197 Mass. 199, 125 Am.S.R. 338, 14 L.R.A., N.S., 194.
44 C.J. p 1009 note 8.

79. Mich.—*Long v. New York Cent. R. Co.*, 227 N.W. 739, 248 Mich. 437.

80. N.Y.—*Young v. Herrmann*, 104 N.Y.S. 72, 119 App.Div. 445, affirmed 85 N.E. 1118, 192 N.Y. 554.
44 C.J. p 1009 note 9.

81. N.Y.—*People v. Friedman*, 16 N.Y.S.2d 925.

44 C.J. p 1009 note 10.

Newsstand

(1) A newsstand has been held a nuisance.

Iowa.—*Cowin v. City of Waterloo*, 21 N.W.2d 705, 237 Iowa 202.

N.J.—*D. A. Schulte, Inc. v. Londrigan*, 133 A. 702, 4 N.J.Misc. 574.

N.Y.—*Hofeler v. Buck*, 180 N.Y.S. 563, 110 Misc. 402, affirmed 184 N.

Y.S. 210, 193 App.Div. 262, affirmed 130 N.E. 913, 230 N.Y. 608.

(2) The sale of newspapers on the streets and the maintenance of newsstands for that purpose, since they are requisite to the circulation of newspapers and have become a well-established custom meeting an urgent public need, do not constitute a nuisance when conducted on a public sidewalk. Therefore, maintenance of a newsstand on a public sidewalk at a busy corner does not, per se, constitute a public nuisance as long as there is no actual interference with travel on the sidewalk or with any other bona fide public use thereof.—*Wilson v. McGill*, 42 Pa. Dist. & Co. 74.

Use of sidewalks for market purposes on certain days a week, while not a continuous obstruction, was such a permanent and habitual obstruction as to constitute a "nuisance."—*House-Wives League v. City of Indianapolis*, 185 N.E. 511, 204 Ind. 685.

82. N.Y.—*Broad Exch. Co. v. Curb Stock, etc., Market*, 191 N.Y.S. 534, 117 Misc. 82.

44 C.J. p 1009 note 12.

83. Ga.—*City of Dalton v. Staten*, 41 S.E.2d 145, 201 Ga. 754.

84. Ill.—*St. John v. North Utica*, 157 Ill.App. 504.

85. N.Y.—*Bates v. Holbrook*, 64 N. E. 181, 753, 171 N.Y. 460, 688.

86. Iowa.—*Wheeler v. Ft. Dodge*, 108 N.W. 1057, 131 Iowa 566, 9 L. R.A., N.S., 146.

87. Mont.—*Lundeen v. Livingston Electric Light Co.*, 41 P. 99, 17 Mont. 32.

88. Iowa.—*Polk City v. Gemricher*, 170 N.W. 378, 185 Iowa 278.

44 C.J. p 1009 note 17.

89. Pa.—*Allegheny v. Zimmerman*, 95 Pa. 287, 40 Am.R. 649.

the street in connection with work being done there;⁹⁰ mortar beds⁹¹ or quicklime in barrels⁹² placed in the street in connection with construction work; a market cart;⁹³ a mill race built before platting of an addition to the city;⁹⁴ the act of peddling on the street;⁹⁵ a toll bridge approach;⁹⁶ a steam traction engine and trailers;⁹⁷ and water pipes already laid underground.⁹⁸ Use of the streets

by a circus acting under municipal license is not an obstruction constituting a nuisance.⁹⁹

The erection of a suitable monument by a municipal corporation in a public place, so situated as not to interfere with the free and reasonable use of the highway by the public, is not a purpresture or unlawful invasion of the public highway.¹

b. Removal and Regulation

§ 1747. Existence and Extent of Power

Ordinarily under constitutional, charter, or statutory provisions a municipal corporation has power to remove, regulate, and prohibit obstructions and encroachments on its streets. Such regulations should be reasonable.

Ordinarily under constitutional, charter, or statutory provisions a municipal corporation has power to remove, regulate and prohibit obstructions and

encroachments on its streets,² and regulations which prohibit the establishing or continuing of certain obstructions in the street have been held a valid exercise of the police power.³ Such power has been exercised so as to prevent obstruction or encroachment on the streets by mercantile business or equipment,⁴ or other things tending to interfere with the use of the streets.⁵ An ordinance for the re-

90. N.Y.—Cullo v. New York Edison Co., 147 N.Y.S. 14, 85 Misc. 6. 44 C.J. p 1009 note 19.

91. Ky.—Strauss v. Louisville, 55 S.W. 1075, 108 Ky. 155.

92. N.Y.—Beetz v. Brooklyn, 41 N.Y.S. 1009, 10 App Div. 382.

44 C.J. p 1009 note 21.

93. N.C.—State v. Edens, 85 N.C. 522.

44 C.J. p 1009 note 22.

94. Colo.—Denver v. Mullen, 3 P. 693, 7 Colo 345.

95. Ark.—Conway v. Waddell, 118 S.W. 398, 90 Ark. 127.

96. Pa.—Commonwealth v. Pittston Ferry Bridge Co., 24 A. 87, 148 Pa. 621.

97. N.J.—McCarter v. Ludlum Steel, etc., Co., 63 A. 761, 71 N.J.Eq. 330.

98. N.J.—Brigantine v. Holland Trust Co., Ch., 37 A. 438.

Wash.—Lanham v. Forney, 81 P.2d 777, 196 Wash. 62.

99. Iowa.—Carlisle v. Sells-Floto Shows Co., 163 N.W. 380, 180 Iowa 649.

1. N.Y.—Wallace v. Canandaigua, 117 N.Y.S. 912, reversed on other grounds 138 N.Y.S. 1147, 153 App. Div. 938, affirmed 119 N.E. 1084, 223 N.Y. 543.

51 C.J. p 105 note 93 [b] (2).

2. Ariz.—Hughes v. City of Phoenix, 170 P.2d 297, 64 Ariz. 831.

Ark.—City of Dumas v. Edington, 147 S.W.2d 997, 201 Ark. 1021—State v. City of Marianna, 39 S.W.2d 301, 183 Ark. 927.

Cal.—Laura Vincent Co. v. City of Selma, 111 P.2d 17, 43 Cal.App.2d 473.

Idaho.—Rief v. Mountain States Telephone & Telegraph Co., 120 P.2d 823, 63 Idaho 418.

Kan.—City of Emporia v. Humph-

rey, 297 P. 712, 182 Kan. 682, rehearing denied 299 P. 950, 133 Kan. 176.

Mich.—1426 Woodward Ave. Corp. v. Wolff, 20 N.W.2d 217, 312 Mich. 352.

Pa.—Commonwealth v. Trimmer, Quar. Sess., 53 Dauph.Co. 91.

44 C.J. p 1009 note 30.

Broad powers

A city council has broad general powers to maintain streets and sidewalks for public use, prevent encroachments or obstructions, and provide for removal of obstructions.—Laura Vincent Co. v. City of Selma, 111 P.2d 17, 43 Cal.App.2d 473.

Power to remove includes the power to prevent by reasonable regulations.—Portland v. Yates, 199 P. 184, 203 P. 319, 102 Or. 513.

Immunities

With respect to right of town to remove steps which extended over sidewalk and constituted a nuisance, the town was entitled to all rights and immunities appertaining to state, a branch of whose sovereignty over public highways has been duly bestowed by the state on it.—Miller v. Town of Seaford, 194 A. 37, 22 Del.Ch. 159.

Implied power to compel observance

The statute empowering city and town councils to prevent encumbering sidewalks with obstacles and material carries implied power to compel observance of such regulations.—Lazich v. City of Butte, 154 P.2d 260, 116 Mont. 386.

Inaction

Authority to cause structures encroaching on streets and sidewalks to be removed is not lost because of inaction of city for long period of time.—State v. City of Marianna, 39 S.W.2d 301, 183 Ark. 927.

Proprietary function

Statutes pertaining to the removal of obstructions of streets by municipalities constitute merely regulatory measures calling into exercise "private or proprietary functions," rather than "governmental functions."—Houston Lighting & Power Co. v. Fleming, Civ.App., 128 S.W.2d 487, reversed on other grounds Fleming v. Houston Lighting & Power Co., 138 S.W.2d 520, 135 Tex. 463, rehearing denied 143 S.W.2d 923, 135 Tex. 463, cert. denied Houston Lighting & Power Co. v. City of West University Place, 61 S.Ct. 836, 313 U.S. 560, 85 L.Ed. 1520.

Statutory power

Power of city board of public works to direct removal of structures in streets is derived from statute and not from any contract which city might make.—City of Indianapolis v. Link Realty Co., 179 N.E. 574, 94 Ind.App. 1.

3. Okl.—Palace Garage v. Oklahoma City, 268 P. 240, 131 Okl. 122.

Removal of encroachment

Ordinance, ordering removal of encroachment from street, was legitimate exertion of police power.—City of Shreveport v. Kansas City, S. & G. Ry. Co., 120 So. 290, 167 La. 771, 62 A.L.R. 1512.

4. Okl.—Palace Garage v. Oklahoma City, 268 P. 240, 131 Okl. 122. Regulation of hawkers and peddlers see Hawkers and Peddlers § 6 b.

5. N.Y.—People v. Van Houten, 35 N.Y.S. 186, 13 Misc. 603, affirmed 36 N.Y.S. 1130, 91 Hun 638. 44 C.J. p 1010 note 40.

Mass picketing

City had right to take reasonable steps to break up mass picketing demonstration which blocked sidewalk.—People v. Garvey, 79 N.Y.S. 2d 456.

removal of obstructions from the sidewalks must be of general application.⁶ Under the power to regulate and prohibit, a municipal corporation may fix a penalty for violation of its regulations or directions respecting obstructions, as discussed *infra* § 1755.

Such regulations should not be arbitrary⁷ or discriminatory,⁸ but should be reasonable,⁹ and have a just relation to the object in view.¹⁰ Thus regulations prohibiting street obstructions are valid provided there is reasonable ground for the prohibition.¹¹ Furthermore, such regulations should be definite and certain,¹² and, in order to satisfy this requirement, regulations must either expressly or by clear implication classify the obstructions on which the regulations operate.¹³ Thus, a classification of street obstructions into temporary and permanent, and a provision that an ordinance shall operate only on temporary obstructions, is reasonable and valid.¹⁴ However, in the construction of such regulations the doctrine of *noscitur a sociis* may not be so applied as to render meaningless the general words used in an ordinance prohibiting the obstruction of a street.¹⁵

The limited extent of a street obstruction is immaterial as affecting the right to remove it,¹⁶ and the power to cause the removal of obstructions in streets is not confined to keeping them in safe condition for travel, but extends as fully to keeping them clean and attractive in appearance.¹⁷ Al-

though a particular ordinance with respect to obstructions may not be enforced against a person acting under a grant of authority, the ordinance may be enforced as against one not within the grant.¹⁸

Municipal authorities are usually vested with a wide discretion as to regulation of obstructions,¹⁹ and, in the absence of a clear abuse of discretion, their action will not be reviewed by the courts.²⁰ The municipal power to prevent the obstruction of streets and alleys does not extend, however, to settling the title to lands or fixing the proper location of the street lines,²¹ except in so far as may be necessary in order to determine whether a structure does obstruct or encroach on a street.²²

Annexed territory. Since the power of the municipality over annexed territory is the same as over the old territory, in proceeding to remove an obstruction of the street, the existence of the obstruction prior to annexation does not affect the power.²³

Duty. The municipality is under a duty to remove obstructions and encroachments materially interfering with the public use of the streets,²⁴ and may be required to execute its power to remove obstructions encroaching on streets and sidewalks.²⁵

Relinquishment of power. The general rule that a municipal corporation cannot relinquish its power to control and regulate its streets, as discussed *supra* § 1688, applies to relinquishment of the power to remove obstructions and encroachments.²⁶

6. Pa.—*Gitt v. Hanover Borough*, 4 Pa. Dist. 606.

7. Okl.—*Palace Garage v. Oklahoma City*, 268 P. 240, 131 Okl. 122.

8. Okl.—*Palace Garage v. Oklahoma City*, *supra*.

9. Cal.—*Laura Vincent Co. v. City of Selma*, 111 P.2d 17, 43 Cal. App. 2d 473.

La.—*New Orleans Gas-Light Co. v. Hart*, 4 So. 215, 40 La. Ann. 474, 8 Am. S.R. 544.

Regulations held reasonable

Mich.—1426 Woodward Ave. Corp. v. Wolff, 20 N.W.2d 217, 312 Mich. 352.

Wis.—*City of Neenah v. Krueger*, 240 N.W. 402, 206 Wis. 473.

10. Cal.—*Laura Vincent Co. v. City of Selma*, 111 P.2d 17, 43 Cal. App. 2d 473.

11. Mass.—*French v. Jones*, 78 N. E. 118, 191 Mass. 522, 7 L.R.A.N. S., 525.

12. Conn.—*State v. Clarke*, 37 A. 975, 69 Conn. 371, 61 Am. S.R. 45, 39 L.R.A. 670.

13. Ohio.—*Xenia v. Schmidt*, 130 N. E. 24, 101 Ohio St. 437.

14. Ohio.—*Xenia v. Schmidt*, *supra*.

15. Wis.—*City of Neenah v. Krueger*, 240 N.W. 402, 206 Wis. 473.

Washing machines are not excluded under rule of *noscitur a sociis* from operation of ordinance prohibiting obstruction of street by ashes, refuse, or dirt.—*City of Neenah v. Krueger*, *supra*.

16. Ill.—*People ex rel. Jeffrey v. Murphy*, 254 Ill. App. 109, 44 C.J. p 1010 note 44.

17. Ky.—*Lagrange v. Overstreet*, 132 S.W. 169, 141 Ky. 43, 48, 31 L. R.A.N.S., 951.

44 C.J. p 1010 note 45.

18. Ill.—*Sullivan v. Best*, 121 N.E. 565, 286 Ill. 315.

44 C.J. p 1011 note 46.

19. Kan.—*Slocum v. Wichita*, 217 P. 297, 114 Kan. 260.

44 C.J. p 1011 note 47.

City council's refusal to abate partial obstruction in sidewalk where no special damages were shown was held a proper exercise of discretion.—*State v. City of Marianna*, 39 S. W.2d 301, 183 Ark. 927.

20. Cal.—*Laura Vincent Co. v. City of Selma*, 111 P.2d 17, 43 Cal. App. 2d 473.

44 C.J. p 1011 note 48.

21. Mich.—*Beecher v. People*, 38 Mich. 289, 31 Am. R. 316.

N.J.—*Dawes v. Hightstown*, 45 N. J. Law 501.

22. N.J.—*Lathrop v. Morristown*, 47 A. 450, 65 N.J. Law 467, affirmed 51 A. 852, 67 N.J. Law 247, 44 C.J. p 1011 note 50.

23. Ga.—*Hendricks v. Carter*, 94 S. E. 807, 21 Ga. App. 527.

24. N.Y.—*Village of Stillwater v. Hudson Valley Ry. Co.*, 241 N.Y.S. 569, 229 App. Div. 41, modified on other grounds 174 N.E. 306, 255 N. Y. 144—*People v. Garvey*, 79 N.Y. S.2d 456.

Tex.—*Joseph v. City of Austin*, Civ. App., 101 S.W.2d 381, error refused.

44 C.J. p 1011 note 54.

25. Colo.—*People v. Wood*, 10 P.2d 331, 90 Colo. 506.

Mandamus to compel municipal officers to remove street obstructions see *Mandamus* § 179 d.

26. Cal.—*Red Bluff v. Southern Pac. Co.*, 187 P. 152, 44 Cal. App. 667, 44 C.J. p 1011 note 56.

§ 1748. Exercise of Power in General

Where the method of exercising the power of removal of an obstruction or encroachment is prescribed by the statute conferring it, such method is exclusive and must be followed, but, if not specifically prescribed, the municipal corporation should pursue a method which is adequate and best adapted to effect the desired result.

Where the method of exercising the power of removal of an obstruction or encroachment is prescribed by the statute conferring it, such method is exclusive and must be followed;²⁷ but, if not specially prescribed, the municipal corporation should under its general powers pursue such course consistent with fundamental law as is adequate and best adapted, with respect to the rights of persons interested, to effect the desired result, and protect the rights of the public in the street.²⁸ All methods may be classified under two heads, ordinary and summary, the former being those invoking judicial power on due notice and hearing,²⁹ and the latter being by rapid and forcible means without hearing and judgment.³⁰

A suit to compel specific performance of a contract to open a street is not the proper proceeding to remove an obstruction thereon.³¹

§ 1749. Prescription and Limitations

The right to maintain a street obstruction or encroachment amounting to a nuisance cannot be acquired by prescription.

The right to maintain a street obstruction or encroachment amounting to a nuisance cannot be acquired by prescription.³² Where a statute gives a municipal corporation the right to remove street encroachments and expressly provides that no lapse of time shall bar such right, the municipality will not be precluded from removing an encroachment

by the statute of limitations.³³ A street obstruction has been held a public nuisance within the meaning of a code provision to the effect that no lapse of time can legalize a public nuisance amounting to an actual obstruction of a public right.³⁴

The availability of general statutes of limitation to bar actions arising out of governmental functions by a municipality with respect to streets is discussed in Limitations of Actions § 17 b.

§ 1750. Summary Removal

- a. In general
- b. Particular obstructions or encroachments subject to summary removal
- c. Damages for, or expenses of, removal

a. In General

Ordinarily a municipal corporation may, in a proper case, summarily abate a substantial obstruction or encroachment on a public street. A private person may summarily remove an obstruction amounting to a nuisance where he is specially injured thereby.

Ordinarily a municipal corporation, under its general powers as public trustee and governmental agent, may, in a proper case, summarily abate a substantial obstruction or encroachment amounting to such on a public street, by removing it,³⁵ provided it is done with reasonable care and prudence.³⁶ The right is not affected by a power to impose a penalty for the violation of an ordinance prohibiting obstructions,³⁷ and the adoption by a municipal corporation of an ordinance providing a procedure for enforcing orders to remove obstructions from streets does not limit the exercise of a general power, given by statute, to do so in a summary way, and the procedure provided by the ordinance need not be followed.³⁸

27. N.J.—*Avis v. Vineland*, 26 A. 149, 55 N.J.Law 285—*Brigantine v. Holland Trust Co.*, Ch., 35 A. 344.

28. Or.—*Eugene v. Garrett*, 169 P. 649, 170 P. 731, 87 Or. 435.
44 C.J. p 1011 note 61.

29. Mass.—*White v. Godfrey*, 97 Mass. 472.

30. Kan.—*Bitzer v. Leverton*, 57 P. 1045, 9 Kan.App. 76.

31. Ind.—*Mather v. Simonton*, 73 Ind. 595.

32. Ala.—*Nixon v. City of Anniston*, 121 So. 514, 219 Ala. 219.

Cal.—*Laura Vincent Co. v. City of Selma*, 111 P.2d 17, 43 Cal.App.2d 473.

Del.—*Miller v. Town of Seaford*, 194 A. 37, 22 Del.Ch. 159.

Idaho.—*Yellow Cab Taxi Service v. City of Twin Falls*, 190 P.2d 681, 68 Idaho 145.

Iowa.—*Cowin v. City of Waterloo*, 21 N.W.2d 705, 237 Iowa 202.

44 C.J. p 1011 note 66.

33. Ark.—*Paragould v. Lawson*, 115 S.W. 379, 88 Ark. 478.

34. Cal.—*Nerio v. Maestretti*, 98 P. 860, 154 Cal. 580.

44 C.J. p 1012 note 70.

35. Ala.—*Corpus Juris* cited in *McLaurine v. City of Birmingham*, 24 So.2d 755, 758, 247 Ala. 414, 163 A.L.R. 962.

Kan.—*Corpus Juris* cited in *City of Emporia v. Humphrey*, 297 P. 712, 716, 132 Kan. 582, rehearing denied 299 P. 350, 133 Kan. 176.

Tex.—*Joseph v. City of Austin*, Civ. App., 101 S.W.2d 381, error refused—*City of McAllen v. Humphreys*, Civ.App., 40 S.W.2d 241—*J. M. Radford Grocery Co. v. City of Abilene*, Civ.App., 20 S.W.2d 255, affirmed, Com.App., 34 S.W.2d 830.

44 C.J. p 1012 note 72.

Summary abatement of nuisances by municipality in general see *supra* § 281.

Trespass

City which removed wall encroaching on street and placed material therefrom on property owner's premises was not guilty of trespass in so doing, since city had right, in removing wall and material from street, of reasonable entry on property owner's premises to place his wall and material thereon—*Joseph v. City of Austin*, Tex.Civ.App., 101 S.W.2d 381, error refused.

36. Tex.—*City of McAllen v. Humphreys*, Civ.App., 40 S.W.2d 241.

37. N.Y.—*Guilmond v. Monticello*, 192 N.Y.S. 827, affirmed 194 N.Y.S. 941, 202 App.Div. 859.

38. Del.—*Murden v. Lewes*, 108 A. 74, 30 Del. 428.

A municipality cannot, by a mere declaration that a structure is a nuisance, subject it to removal by any person supposed to be aggrieved or by the municipality itself, where it is in fact not a nuisance;³⁹ and ordinarily the power summarily to remove an obstruction can be legally exercised only where the right so to do is clear and from the nature of the obstruction it need not first be determined by resort to the courts.⁴⁰ Summary removal is not proper where the legal existence of the street is in dispute,⁴¹ or where the question of encroachment involves the ascertainment of the true location of the line of the highway.⁴² Although municipal authorities are authorized by statute summarily to remove an obstruction, where its maintenance had originally been by permission, they do not have the right to remove it until such permission has been revoked.⁴³ Furthermore, it has been held that, where an encroachment on a street has been constructed under license of a general ordinance, the city cannot, under a special ordinance directed to the abutting owner alone, cause its removal.⁴⁴ Where rights in a street have been reserved in a grant of a highway, a municipality which has taken over the highway cannot remove alleged obstructions, maintained in the exercise of such rights, on the ground that they constitute a nuisance.⁴⁵ In some jurisdictions a resolution directing a removal of obstructions is insufficient, and the power is exercisable only by ordinance.⁴⁶ There is authority holding

that a municipality cannot summarily remove an obstruction in an alley to which it has no title.⁴⁷

Some authorities draw a distinction between obstructions and encroachments,⁴⁸ holding that a municipality may summarily abate or remove the former⁴⁹ but not the latter.⁵⁰

The particular municipal officer who may remove or order the removal of an obstruction depends on charter or statutory provisions.⁵¹

By private person. A private person may summarily remove a street obstruction amounting to a nuisance⁵² where specially injured thereby,⁵³ but not before the street or alley is opened for public use.⁵⁴ If not specially injured, a private person may not remove the obstruction.⁵⁵

Direction of municipal officers. An individual cannot justify a trespass, in removing an obstruction in the street, under the claim that he did so under the direction of municipal officers where it does not appear that the direction was in the form of an ordinance as required by a statute providing for the removal of encroachments on streets.⁵⁶

Notice and hearing. Where the obstruction is one which is by the law expressly declared to be a nuisance or which is undisputedly so per se, notice is not necessary before summary removal.⁵⁷ Where the obstruction is not a nuisance per se, ordinarily notice to remove should be given prior to summary

39. Md.—Mayor and Councilmen of Frostburg v. Sleeman, 45 A.2d 113, 185 Md. 393.

44 C.J. p 1012 note 75.

40. Tex.—Humphreys v. City of McAllen, Civ.App., 29 S.W.2d 420.

44 C.J. p 1012 note 76.

Authority same as that of individual

Municipality has no more authority than individual to invade citizen's legal rights in summarily removing a street obstruction.—Humphreys v. City of McAllen, supra.

41. N.J.—New York, etc., R. Co. v. South Amboy, 30 A. 628, 57 N.J. Law 252.

44 C.J. p 1012 note 77.

42. N.J.—Hitchner v. Richman, 65 A. 856, 74 N.J. Law 234.

44 C.J. p 1012 note 78.

43. Del.—Murden v. Lewes, 96 A. 506, 29 Del. 48.

44 C.J. p 1012 note 79.

44. La.—Cross v. Baton Rouge, 109 So. 742, 161 La. 921.

45. Cal.—Hill v. Oxnard, 189 P. 825, 46 Cal.App. 624.

44 C.J. p 1013 note 81.

46. N.J.—Avis v. Vineland, 28 A. 149, 55 N.J. Law 285.

47. Md.—Frostburg v. Hitchins, 59 A. 49, 99 Md. 617.

44 C.J. p 1013 note 83.

48. Minn.—Mueller v. Duluth, 188 N.W. 205, 152 Minn. 159.

44 C.J. p 1013 note 84.

49. Minn.—Mueller v. Duluth, supra.

44 C.J. p 1013 note 85.

50. Minn.—Mueller v. Duluth, supra.

44 C.J. p 1013 note 86.

51. N.Y.—People v. Gross, 122 N.Y. S. 135, 137 App.Div. 77.

44 C.J. p 1013 note 87.

Chief of police

Ga.—City of Dalton v. Staten, 41 S. E.2d 145, 201 Ga. 754.

52. Ky.—Walter v. Louisville R. Co., 150 S.W. 824, 150 Ky. 652, 43 L.R.A., N.S., 126, Ann.Cas.1914D 441.

44 C.J. p 1013 note 89.

Removal of trees by private person see supra § 1693.

53. N.J.—Hitchner v. Richman, 65 A. 856, 74 N.J. Law 234.

44 C.J. p 1013 note 90.

54. Minn.—Haramon v. Krause, 101 N.W. 791, 93 Minn. 455.

Pa.—Maffett v. Perry, 3 Pittsb. S.

55. La.—Lambert v. American Box Co., 81 So. 95, 144 La. 604, 3 A.L. R. 612.

44 C.J. p 1013 note 92.

56. N.J.—Hitchner v. Richman, 65 A. 856, 74 N.J. Law 234.

57. N.J.—Cape May v. Cape May, etc., R. Co., 37 A. 892, 60 N.J. Law 224, 39 L.R.A. 609.

Tex.—Joseph v. City of Austin, Civ. App., 101 S.W.2d 881, error refused.

Wis.—Chase v. Oshkosh, 51 N.W. 560, 81 Wis. 313, 29 Am.S.R. 898, 15 L.R.A. 553.

Notice immaterial

Since notice is not necessary to remove nuisance per se, where city authorities notified property owner more than twenty days before city removed wall that it was in street, and requested him three times in writing to remove wall, city had right to remove wall summarily, although removal took place only one day after property owner received notice of resolution of city council directing city manager to remove wall.—Joseph v. City of Austin, Tex. Civ.App., 101 S.W.2d 881, error refused.

removal⁵⁸ and also an opportunity to be heard in defense of the right to maintain the alleged obstruction.⁵⁹

Review by courts. The existence of an obstruction or encroachment is generally a question for the proper municipal authorities, and their determination will not be reviewed by the courts except where an abuse of discretion is shown.⁶⁰

Injunction against removal. Equity will not ordinarily restrain the removal of an obstruction.⁶¹

b. Particular Obstructions or Encroachments Subject to Summary Removal

Various obstructions or encroachments have been held subject to summary removal by a municipal corporation.

A municipal corporation may summarily remove a private business stand,⁶² houseboat,⁶³ doorsteps,⁶⁴ a wall,⁶⁵ or trees, as discussed supra § 1693, which are unlawfully and unreasonably obstructing the streets.

Awnings. An awning may be summarily removed where it is so maintained as to endanger the traveling public,⁶⁶ or where it is erected without proper authority,⁶⁷ and an ordinance requiring removal of stationary awnings is within the general powers of a municipality over its streets.⁶⁸ However power to regulate its streets does not authorize a municipality summarily to remove an awning which does not interfere with public travel.⁶⁹

Buildings. A building will not ordinarily be subject to summary removal because of a slight encroachment on the street,⁷⁰ but may be removed where the encroachment or obstruction is substantial,⁷¹ especially where defendant was warned of encroachment during construction,⁷² or where it is being moved along the street without proper authority.⁷³

Fences. Ordinarily a municipality may summarily remove fences which are constructed so as to inclose part of the street,⁷⁴ and may remove a

58. N.J.—United New Jersey R. etc., Co. v. Jersey City, 61 A. 460, 72 N.J.Law 233.

44 C.J. p 1013 note 94.

59. N.J.—Cape May v. Cape May, etc., R. Co., 37 A. 892, 60 N.J.Law 224, 39 L.R.A. 609.

44 C.J. p 1013 note 95.

60. Kan.—City of Emporia v. Humphrey, 297 P. 712, 132 Kan. 682, rehearing denied 299 P. 950, 133 Kan. 176.

Wis.—Chase v. Oshkosh, 51 N.W. 560, 81 Wis. 313, 29 Am.S.R. 898, 15 L.R.A. 553.

Extent of encroachment

If building encroaches on street, court at instance of city should require abatement, unless extent of encroachment is so small that court can say as matter of law that determination of governing body of city is arbitrary and unreasonable.—City of Emporia v. Humphrey, 299 P. 950, 133 Kan. 176, denying rehearing 297 P. 712, 132 Kan. 682.

61. S.C.—Grady v. Greenville, 123 S.E. 494, 129 S.C. 89.

44 C.J. p 1013, note 97.

Absence of title in plaintiff

Allegations of petition that strip of land between two lots owned by plaintiff had never been public street, had always been held by owners of plaintiff's property, that city asserted no claim thereto, and that resolution of aldermen to that effect was ratification of plaintiff's title, were insufficient to show title of plaintiff which would entitle him to enjoin city from requiring removal of obstructions from strip which it proposed to open as a street.—Mayor and Council of City of For-

syth v. Hooks, 184 S.E. 724, 182 Ga. 78.

Burden of proof

In action to enjoin city officials from removing concrete wall and concrete wings attached thereto from portion of street, plaintiff had burden of proving that such structures were placed in street because boundaries thereof were unknown, or through mistake regarding location of property line, or that representations by city officials induced such location, construction, or maintenance of the structures.—Steele v. Fowler, 41 N.E.2d 678, 111 Ind.App. 364.

Evidence held admissible

Ind.—Steele v. Fowler, supra

62. Mich.—Pastorino v. Detroit, 148 N.W. 231, 182 Mich. 5, L.R.A.1915A 1221, Ann.Cas.1916D 768.

44 C.J. p 1014 note 1.

Summary abatement of:

Railroad or railway tracks, see the C.J.S. title Railroads § 191, also 44 C.J. p 1014 notes 18-22. Telegraph and telephone poles see the C.J.S. title Telegraphs and Telephones § 40, also 44 C.J. p 1014 notes 23-25.

63. Del.—Murden v. Lewes, 108 A. 74, 30 Del. 428.

64. Del.—Miller v. Town of Seaford, 194 A. 37, 22 Del.Ch. 159.

65. Tex.—Joseph v. City of Austin, Civ.App., 101 S.W.2d 381, error refused.

66. Kan.—Bitzer v. Loverton, 57 P. 1045, 9 Kan.App. 76.

67. Ill.—Hibbard v. Chicago, 50 N.E. 256, 173 Ill. 91, 40 L.R.A. 621.

44 C.J. p 1014 note 6.

68. N.C.—Small v. Edenton, 60 S.E. 413, 146 N.C. 527, 20 L.R.A.N.S., 145.

44 C.J. p 1014 note 7.

69. Mo.—Hisey v. Mexico, 61 Mo. App. 248.

44 C.J. p 1014 note 8.

70. N.J.—Manko v. Chambersburgh, 25 N.J.Eq. 168.

44 C.J. p 1014 note 9.

Distinction between obstructions and encroachments as respects right of summary removal see supra subdivision a of this section.

71. Tex.—City of McAllen v. Humphreys, Civ.App., 40 S.W.2d 241.

44 C.J. p 1014 note 10.

Loading platform

City had power to remove summarily loading platform erected by private establishment over sidewalk. The fact that the platform was necessary for conducting its business and was erected at considerable expense did not prevent city from requiring removal thereof as nuisance.—J. M. Radford Grocery Co. v. City of Abilene, Tex.Civ.App., 20 S.W.2d 255, affirmed, Com.App., 34 S.W.2d 830.

72. La.—Daublin v. New Orleans, 1 Mart. 100.

73. N.H.—Concord v. Burlleigh, 36 A. 606, 67 N.H. 106.

74. Wis.—Childs v. Nelson, 33 N.W. 587, 69 Wis. 125.

44 C.J. p 1014 note 14.

Hedge has been held a fence within this rule.—Philbrick v. University Place, 55 N.W. 345, 38 Iowa 354.

fence built along the side of a street line where it is of a character rendering it a nuisance,⁷⁵ although there is authority holding that a fence slightly encroaching on the street without seriously obstructing public travel may not be summarily removed.⁷⁶

c. Damages for, or Expenses of, Removal

The owner of property removed from a street as an obstruction or encroachment is not entitled to compensation if it was properly removed under the police power. The lawful expenses incurred by a municipal corporation removing obstructions is chargeable to the obstructor or encroacher.

The owner of property removed from a street as an obstruction or encroachment is not entitled to recover compensation if it was properly removed under the police power.⁷⁷ However, if a municipality assumes to exercise the summary power of removal, it does so at its own risk and is liable in damages if the removal was unauthorized.⁷⁸ The right summarily to remove a street obstruction constituting a nuisance does not include the right unnecessarily to injure it,⁷⁹ and a municipality⁸⁰ or an individual⁸¹ is liable in damages for infliction of wanton or unnecessary injury in removing a street obstruction.

Exemplary damages may be imposed for wanton

injury,⁸² and evidence of good faith may be considered on the question of punitive damages.⁸³

Expense of removal. An adjoining owner may be compelled to remove an obstruction within highway limits at his own expense, if it becomes an obstruction to public travel,⁸⁴ and the lawful expenses incurred by a municipality in removing obstructions is chargeable to the obstructor or encroacher.⁸⁵

§ 1751. Removal by Judicial Proceedings

Municipal corporations may, at their election, resort to the courts to abate a street obstruction or encroachment constituting a public nuisance.

Although municipal corporations are authorized to declare by general ordinance what constitutes a nuisance and to prevent, abate, or remove them, they may also at their election resort to the courts to abate a street obstruction or encroachment constituting a public nuisance.⁸⁶

§ 1752. — Ejectment

Ordinarily a municipal corporation may maintain ejectment to recover possession of a street from an obstructor. The question whether ownership of the fee of the street is necessary in order to maintain this action is the subject of conflicting authority.

75. Pa.—Bower v. Watsonstown Borough, 1 Pa Dist. 116, 11 Pa Co. 110. 44 C.J. p 1014 note 16.

76. Wis.—Jennings v. Johannott, 135 N.W. 170, 149 Wis. 660.

77. Tex.—Joseph v. City of Austin, Civ.App., 101 S.W.2d 381, error refused—City of McAllen v. Humphreys, Civ.App., 40 S.W.2d 241. 44 C.J. p 1015 note 28.

Removal of rubbish

In the absence of evidence that property allegedly taken over by city under provision of administrative code authorizing the removal of obstructions from public streets had any value when it came into city's possession, whereas city's proof showed that at such time alleged property had been reduced to rubbish, property owner was not entitled to recovery against the city.—Chartock v. City of New York, 38 N. Y.S.2d 335, 265 App Div. 915.

78. Minn.—Johnson v. Gibbon, 212 N.W. 15, 170 Minn. 12. 44 C.J. p 1015 note 29.

Petition

Petition alleging that defendant's agents forcibly tore down portions of plaintiffs' house, which had stood in alley for ten years with city's tacit permission, stated cause of action for damages.—Humphreys v. City of McAllen, Tex.Civ.App., 29 S.W.2d 420.

Instructions

In action against town for dam-

ages for tearing down wire fence which plaintiff erected to inclose tract of land which town claimed was part of street, instruction that, if such land was dedicated by plaintiff's predecessor as public street, or even if there was no form of dedication, but owner caused land to be platted and sold off property by blocks and lots in recognition of plat, plaintiff could not recover unless plaintiff had right to hold land by adverse possession was proper.—Parker v. Batson, 82 S.W.2d 20, 190 Ark. 880.

Jury question

In action against town for damages for tearing down of wire fence which plaintiff erected to inclose tract of land, question whether such land was plaintiff's property or was part of street was for jury.—Parker v. Batson, 82 S.W.2d 20, 190 Ark. 880.

79. Tex.—City of McAllen v. Humphreys, Civ.App., 40 S.W.2d 241.

44 C.J. p 1015 note 30.

80. Del.—Murden v. Lewes, 96 A. 506, 29 Del. 48, 52, affirmed 108 A. 74, 30 Del. 428.

44 C.J. p 1015 note 31.

Evidence held insufficient

Tex.—Joseph v. City of Austin, Civ. App., 101 S.W.2d 381, error refused.

81. Ohio.—Amelia v. Hicks, 7 Ohio App. 132.

44 C.J. p 1015 note 32.

82. Md.—Frostburg v. Hitchins, 59 A. 49, 99 Md. 617.

44 C.J. p 1015 note 33.

Recovery precluded as matter of law

In property owner's action against city and city manager for damages allegedly caused by summary removal of stucco wall encroaching on street, evidence was held to show as matter of law that neither city nor city manager acted with violence, malice, or unnecessary force in removing wall from street and placing it on plaintiff's premises, precluding recovery of exemplary damages.—Joseph v. City of Austin, Tex.Civ.App., 101 S.W.2d 381, error refused.

83. Wis.—Jennings v. Johannott, 135 N.W. 170, 149 Wis. 660.

44 C.J. p 1015 note 34.

84. Conn.—Rogers v. New London, 94 A. 364, 89 Conn. 343.

85. N.H.—Concord v. Burleigh, 36 A. 606, 67 N.H. 106.

44 C.J. p 1015 note 36.

86. Ind.—Carlisle v. Pirtle, 114 N.E. 705, 63 Ind.App. 475.

Kan.—Corpus Juris cited in City of Emporia v. Humphrey, 297 P. 712, 716, 132 Kan. 682, rehearing denied 299 P. 950, 133 Kan. 176.

Ordinarily a municipal corporation may maintain ejectment to recover possession of a street from an obstructor,⁸⁷ without having previously passed an ordinance relating to the removal of the obstructions therein.⁸⁸ However, the general rule is not applicable to the case of a turnpike in control of a private corporation, even though the municipality may have, over the turnpike, certain prescribed powers, which, if possessed over an ordinary highway, would create by implication a right to maintain that action.⁸⁹

Some authorities hold that the municipality may maintain ejectment irrespective of whether it owns the fee of the street,⁹⁰ while other authority is to the contrary.⁹¹

The burden is on plaintiff of introducing evidence sufficient to establish that defendant's possession encroaches on a street, the title of which is said to be in the state.⁹²

Defenses. Where the municipal corporation had no power to grant a permit for the private use of a street, action of municipal authorities in issuing purported permit does not estop the city from seeking removal in ejectment,⁹³ and unauthorized permit constituted no defense to city's action in ejectment.⁹⁴ The general statute of limitation does not apply to an action by the municipality for the recovery of the title or possession of a public way.⁹⁵

§ 1753. — Proceedings for Abatement or Injunction

a. In general

b. Persons entitled to sue

c. Defenses

d. Proceedings and relief

a. In General

An obstruction of a street constituting a public nuisance may be abated and enjoined by action, but it must clearly appear to be a nuisance.

An obstruction of a street constituting a public nuisance may be abated and enjoined by action,⁹⁶ but it must clearly appear to be a nuisance.⁹⁷ Although a bill seeks damages for a period barred by the statute of limitations, it is nevertheless maintainable to abate a continuing street nuisance.⁹⁸ Where title to the land is in dispute, it must be determined at law before a court of equity will interfere.⁹⁹ Furthermore, it has been held that, if the municipal right is doubtful, a court of equity will give consideration to the inconvenience and damage that would result to defendant, as well as to the benefits that will accrue to the municipality in enjoining defendant from closing an alleged street.¹ Thus, where a street has for a long time been abandoned, and it does not appear that the public will suffer any inconvenience because of such abandonment, remedy by injunction will not be granted.²

The mere existence of a legal remedy will not preclude equitable relief to a municipality,³ although it has been held that relief will not be awarded a municipality where there is an adequate remedy at law.⁴ In an action by a private person relief will not ordinarily be awarded where there is an adequate remedy at law,⁵ but in some cases equity will relieve without inquiring whether the injury will be irreparable,⁶ or whether the legal remedy is inadequate.⁷ Insolvency of defendant is not necessary to

⁸⁷ Fla.—*Lorenz v. City of Hollywood*, 198 So. 17, 144 Fla. 324.

44 C.J. p 1015 note 39.

Right of abutter to maintain ejectment against a street obstruction see *supra* § 1711.

Right of municipality to bring ejectment to maintain public easement see Ejectment § 14.

⁸⁸ N.J.—*Hawkshurst v. Asbury Park*, 56 A. 697, 65 N.J.Eq. 496.

⁸⁹ N.J.—*Chambersburg v. Manko*, 39 N.J.Law 496.

⁹⁰ Ala.—*Lorenz v. City of Hollywood*, 198 So. 17, 144 Ala. 324.

44 C.J. p 1015 note 42.

⁹¹ Pa.—*Summerhill v. Sherbine*, 88 Pa.Super. 419.

44 C.J. p 1015 note 43.

⁹² Cal.—*People v. Southern Pac. Co.*, 171 P. 294, 177 Cal. 555.

⁹³ N.Y.—*City of New York v. Aviation Distributors*, 84 N.Y.S.2d 84.

⁹⁴ N.Y.—*City of New York v. Aviation Distributors*, *supra*.

⁹⁵ Neb.—*Lincoln v. McLaughlin*, 112 N.W. 363, 79 Neb. 74.

⁹⁶ Ala.—*McIntosh v. Moody*, 153 So. 182, 228 Ala. 165.

Pa.—*Spring Grove Borough v. Wentz*, Com.Pl., 58 York Leg.Rec. 38.

44 C.J. p 1016 note 47.

⁹⁷ S.C.—*Cheraw v. Seaboard Air Line R. Co.*, 71 S.E. 40, 88 S.C. 480.

44 C.J. p 1016 note 48.

⁹⁸ Ala.—*Louisville, etc., R. Co. v. Mauter*, 74 So. 932, 199 Ala. 387.

⁹⁹ N.J.—*Ridgefield Park v. West Shore R. Co., Ch.*, 82 A. 319.

44 C.J. p 1016 note 49.

Doubtful claim

If there is any doubt as to the existence of public easement in street, municipality must resort to law action against persons in possession of land subject to easement.—*Lorenz v.*

City of Hollywood, 198 So. 17, 144 Fla. 324.

1. Wash.—*City of Spokane v. Catholic Bishop of Spokane*, 206 P.2d 277.

2. Ill.—*Pana v. Central Washed Coal Co.*, 102 N.E. 992, 260 Ill. 111, 48 L.R.A., NS., 244.

3. Ala.—*Demopolis v. Webb*, 6 So. 408, 87 Ala. 659.

Ky.—*Keystone Commercial Co. v. Maysville*, 157 S.W. 25, 154 Ky. 239.

4. N.J.—*Brigantine v. Holland Trust Co., Ch.*, 37 A. 438.

5. Ky.—*Wallace v. Jackson*, 3 S.W. 2d 766, 224 Ky. 25.

44 C.J. p 1016 note 55.

6. Ill.—*Carter v. Chicago*, 57 Ill. 283.

7. Pa.—*Garvey v. Harbison-Walker Refractories Co.*, 62 A. 778, 213 Pa. 177.

authorize equitable relief.⁸

Preliminary or temporary injunction. The granting or refusal of a temporary or preliminary injunction restraining the obstruction or encroachment of a street is a matter of discretion with the court,⁹ and does not constitute an adjudication of the controversy.¹⁰ It may be granted in a proper case,¹¹ although the evidence is conflicting as to whether plaintiff will sustain special damages;¹² but it should be denied where the granting thereof would work greater hardship to defendant than its refusal would to plaintiff.¹³ Generally, it will be granted only where there is a clear legal right,¹⁴ and a pressing necessity,¹⁵ to prevent an irreparable injury,¹⁶ and this is especially true as to a mandatory interlocutory injunction.¹⁷ It has been held that a temporary injunction will not be granted if the ultimate relief sought is doubtful of attainment,¹⁸ or where an immediate trial is possible.¹⁹

b. Persons Entitled to Sue

- (1) Municipal corporation
- (2) Private person

(1) Municipal Corporation

A municipal corporation may sue to restrain the continuance of a street obstruction.

A municipal corporation may sue to restrain the continuance of an obstruction of a street,²⁰ notwithstanding it has power summarily to remove the obstruction,²¹ or to impose a penalty for violation of ordinances prohibiting encroachment,²² although it has no title to the street,²³ or although a statute gives another agency power to sue for injunction or abatement of street obstructions.²⁴ Suit may be brought by it even before the acceptance in the statutory form of a street whose dedication has been tendered to the public,²⁵ and without first giving the obstructor a chance to remove the obstruction.²⁶ Such proceedings are ordinarily authorized by resolution of the municipal legislative body.²⁷

8. Ky.—Ellison v. Louisville, 31 S. W. 723, 17 Ky.L. 593.

9. N.Y.—New York v. Knickerbocker Trust Co., 83 N.Y.S. 576, 41 Misc. 17.

10. N.Y.—Village of Mamaroneck v. Lichtle, 72 N.Y.S.2d 686.

11. Ga.—Williamson v. Souter, 157 S.E. 463, 172 Ga. 364.

Pa.—Clifton Heights Borough v. Thomas, 61 A. 817, 212 Pa. 117.

Tex.—Coombs v. City of Houston, Civ.App., 35 S.W.2d 1066.

W.Va.—Kennedy v. Klammer, 139 S. E. 713, 104 W.Va. 198.

44 C.J. p 1016 note 67, p 1019 note 90.

Remedy by trespass to try title did not preclude city from securing temporary injunction restraining adverse claimant from interfering with improvement of claimed strip of street, where undisputed facts disclosed dedication.—Coombs v. City of Houston, Tex.Civ.App., 35 S.W.2d 1066.

12. Ga.—Savannah, etc., R. Co. v. Woodruff, 13 S.E. 156, 86 Ga. 94.

13. N.Y.—New York v. Knickerbocker Trust Co., 83 N.Y.S. 576, 41 Misc. 17.

44 C.J. p 1019 note 92.

Absence of hardship

Motion by plaintiff village for order restraining defendant pendente lite from continuing construction and erection of a stone wall on property alleged to be a public highway in plaintiff village was denied, where plaintiff village could suffer no hardship by denial of the motion inasmuch as wall was not located so as to obstruct traffic on or adjacent to paved portion of highway, and defendant in continuing with construc-

tion was proceeding at his peril.—Village of Mamaroneck v. Lichtle, 72 N.Y.S.2d 686.

14. N.Y.—Village of Mamaroneck v. Lichtle, supra.

Tex.—Coombs v. City of Houston, Civ.App., 35 S.W.2d 1066.

15. Tex.—Coombs v. City of Houston, supra.

16. U.S.—Whitman v. Hubbell, C.C. N.Y., 42 F. 633.

N.Y.—Village of Mamaroneck v. Lichtle, 72 N.Y.S.2d 686.

17. Ohio—Cincinnati Northern R. Co. v. Cincinnati, 8 Ohio Dec. (Reprint) 554, 8 Cinc.L.Bul. 334.

W.Va.—Kennedy v. Klammer, 139 S. E. 713, 104 W.Va. 198.

18. N.Y.—Village of Mamaroneck v. Lichtle, 72 N.Y.S.2d 686.

19. N.Y.—Village of Mamaroneck v. Lichtle, supra.

20. Ala.—Duckworth v. Town of Robertsedale, 28 So.2d 182, 248 Ala. 432—Fuller v. Knight, 2 So.2d 606, 241 Ala. 257, 135 A.L.R. 760—City of Birmingham v. Holt, 194 So. 538, 239 Ala. 248.

Fla.—Henry L. Doherty & Co. v. Joachim, 200 So. 238, 146 Fla. 50.

Iowa.—Incorporated Town of Lamoni v. Smith, 251 N.W. 706, 217 Iowa 264—Incorporated Town of Ackley v. Central States Electric Co., 220 N.W. 315, 206 Iowa 533.

Kan.—City of Russell v. Russell County Building & Loan Ass'n, 118 P.2d 121, 154 Kan. 154.

Pa.—City of Pottsville v. Thompson, Com.Pl., 42 Sch.Leg.Rec. 188.

Wis.—State v. Jewell, 28 N.W.2d 314, 250 Wis. 165.

44 C.J. p 1016 note 58.

Without showing damage, city may enjoin stretching of wires across street.—Incorporated Town of Ackley v. Central States Electric Co., 214 N.W. 879, 204 Iowa 1246, 54 A.L.R. 474.

Subsequent incorporation

City incorporated after recording of plat which reserved certain rights in streets could nevertheless maintain action to enjoin use of streets without franchise.—City of Middleboro v. Kentucky Utilities Co., 35 S.W.2d 877, 237 Ky. 523.

Restoration of sidewalk

City may sue to require abutting owner to restore sidewalk to former grade and condition.—Bass v. City of Louisville, 26 S.W.2d 1039, 233 Ky. 734.

21. Wis.—State v. Jewell, 28 N.W.2d 314, 250 Wis. 165.

44 C.J. p 1017 note 59.

22. N.Y.—New York v. Knickerbocker Trust Co., 93 N.Y.S. 937, 104 App.Div. 223.

23. Ky.—Owensboro v. Hope, 110 S.W. 272, 33 Ky.L. 426.

Vt.—Montpelier v. McMahon, 81 A. 977, 85 Vt. 275.

24. N.Y.—Wellsville v. Hallock, 139 N.Y.S. 961.

25. Ohio—Winslow v. Cincinnati, 9 Ohio S. & C.P. 89, 6 Ohio N.P. 47.

Or.—Eugene v. Garrett, 169 P. 649, 170 P. 731, 87 Or. 435.

26. Wis.—Wauwatosa v. Dreutzer, 92 N.W. 551, 116 Wis. 117.

44 C.J. p 1017 note 64.

27. Wis.—Chippewa Falls v. Hopkins, 85 N.W. 553, 109 Wis. 611.

44 C.J. p 1017 note 65.

An ordinance declaring a particular obstruction to be a nuisance, and for its prevention or removal, may be required where such a condition is imposed by the charter of the municipality.²⁸

Where the obstruction constitutes a public nuisance, and no individual rights are specially injured, the remedy has been held to be through public authorities only,²⁹ and the action can be prosecuted only by the municipality.³⁰

(2) Private Person

An individual may maintain an action to enjoin or abate a street obstruction or encroachment constituting a nuisance where he has sustained or will sustain special injury, if the injury is irreparable and the remedy at law inadequate.

An individual may maintain an action to enjoin or abate a street obstruction or encroachment constituting a nuisance where he has sustained or will sustain special injury,³¹ as where the obstruction cuts off the view from plaintiff's premises,³² but not where no special injury exists.³³ In order to enjoin or abate a street obstruction, a private person must show injury not only greater in degree,

but also different in kind, from that suffered by the general public,³⁴ particular to plaintiff,³⁵ and distinct from that suffered by citizens generally.³⁶ If complainant is the real obstructor, he has no standing to invoke equitable aid in his behalf.³⁷

A municipal official, not charged with the duty of suing for the municipality, cannot enjoin a street obstruction without showing the same special injury essential to any other private person's right of action.³⁸

Suit by taxpayer. Ordinarily a taxpayer cannot sue to enjoin or abate a street obstruction causing him no special private injury,³⁹ although there is authority holding that he may do so on refusal of the municipality to act.⁴⁰

Existence of other remedy. The injury must be irreparable,⁴¹ and the remedy at law inadequate;⁴² but the right to sue for an injunction is not necessarily precluded by the fact that there has been a recovery at law.⁴³ An individual who suffers special injury from an obstruction is not precluded from maintaining an action for its abatement by

28. N.J.—Brigantine v. Holland Trust Co., Ch., 35 A. 344.

44 C.J. p 1017 note 66.

29. Fla.—Richard v. Gulf Theatres, 21 So.2d 715, 155 Fla. 626.

Ky.—City of Middlesboro v. Kentucky Utilities Co., 35 S.W.2d 877, 237 Ky 523.

30. Ky.—City of Middlesboro v. Kentucky Utilities Co., supra.

31. Ala.—Chichester v. Kroman, 128 So. 166, 221 Ala. 203.

Ga.—Harbuck v. Richland Box Co., 49 S.E.2d 833, 204 Ga. 352—City of Rome v. First Nat. Bank, 3 S.E.2d 653, 188 Ga. 279—Henderson v. Ezzard, 44 S.E.2d 397, 75 Ga. App. 799.

Ill.—Ginter-Wardein Co. v. City of Alton, 17 N.E.2d 976, 370 Ill. 101.

Neb.—Chizek v. City of Omaha, 253 N.W. 441, 126 Neb. 333.

S.C.—Brown v. Hendricks, 45 S.E.2d 603, 211 S.C. 395.

44 C.J. p 1017 note 68.

Abatement of obstructions by abutting owner see supra §§ 1714, 1715.

Authority vested in municipal officers over roads does not prevent court from abating nuisance violating private rights.—Fitzgerald v. Smith, 271 P. 607, 94 Cal.App. 480.

Effect of legislative control

Where the legislative power to control encroachments into or over public highways has been delegated to the city, the use of a sidewalk for the purpose of selling newspapers may not, in the absence of action on the subject by city council, be enjoined in equity by a citizen.—

Wilson v. McGill, 42 Pa. Dist. & Co. 74.

32. Del.—Poole v. Rehoboth, 80 A. 683, 9 Del.Ch. 192.

44 C.J. p 1017 note 69.

33. S.C.—Brown v. Hendricks, 45 S.E.2d 603, 211 S.C. 395.

Wash.—Lanham v. Forney, 81 P.2d 777, 196 Wash. 62—Kemp v. City of Seattle, 270 P. 431, 149 Wash. 197.

44 C.J. p 1018 note 70.

34. Ark.—Kennedy v. Crouse, 218 S.W.2d 375.

Fla.—Richard v. Gulf Theatres, 21 So.2d 715, 155 Fla. 626—Henry L. Doherty & Co. v. Joachim, 200 So. 233, 146 Fla. 50—Bozeman v. City of St. Petersburg, 76 So. 894, 74 Fla. 336.

Mont.—Faucett v. Dewey Lumber Co., 266 P. 646, 82 Mont. 250.

Neb.—Chizek v. City of Omaha, 253 N.W. 441, 126 Neb. 333—World Realty Co. v. City of Omaha, 203 N.W. 574, 113 Neb. 396, 10 A.L.R. 1313.

N.J.—J. M. Lehmann Co. v. S. B. Penick Co., 49 A.2d 427, 24 N.J. Misc. 375.

Tex.—Whitis v. Penry, Civ.App., 41 S.W.2d 736—Sigel v. Buccanecr Hotel Co., Civ.App., 40 S.W.2d 168, error refused.

Wash.—Olsen v. Jacobs, 76 P.2d 607, 193 Wash. 508.

44 C.J. p 1018 note 71.

Statutes defining "public nuisance" and "private nuisance," and authorizing action by private person for

public nuisance, such as street obstruction, only if specially injurious to him, are but crystallizations of common law.—Faucett v. Dewey Lumber Co., 266 P. 646, 82 Mont. 250.

35. La.—Lambert v. American Box Co., 81 So. 95, 144 La. 604, 3 A.L.R. 612.

44 C.J. p 1018 note 72.

36. Ky.—Alsip v. Hodge, 283 S.W. 392, 214 Ky 438, 440.

44 C.J. p 1018 note 73.

37. Fla.—Price v. Stratton, 33 So. 644, 45 Fla. 535.

38. Wis.—Warden v. Hart, 156 N.W. 466, 162 Wis 495.

44 C.J. p 1018 note 75.

39. Wash.—State v. Oldham, 287 P. 680, 156 Wash. 484—State ex rel. Vandervort v. Grant, 286 P. 63, 156 Wash. 96.

44 C.J. p 1018 note 76.

40. Ohio.—Alexander v. Cincinnati, etc., R. Co., 14 Ohio S. & C.P. 102, 2 Ohio N.P.N.S. 59.

44 C.J. p 1018 note 77.

41. Ky.—Wallace v. Jackson, 3 S.W.2d 766, 224 Ky. 25.

44 C.J. p 1019 note 78.

42. Ala.—Chichester v. Kroman, 128 So. 166, 221 Ala. 203.

S.C.—Bethel M. E. Church v. City of Greenville, 45 S.E.2d 841, 211 S.C. 442.

44 C.J. p 1019 note 79.

43. Miss.—Canton Cotton Warehouse Co. v. Potts, 10 So. 448, 69 Miss. 31.

the fact that an indictment would lie to prevent the encroachment, and that on conviction the court might order a removal,⁴⁴ and a person sustaining a peculiar injury may enjoin such nuisance without first applying to the city authorities for relief.⁴⁵

Contemplated obstruction. An admittedly intended street obstruction which will specially injure a private person may be enjoined at his suit prior to construction.⁴⁶

Breach of private contract. Where the act of defendant in making use of a street constitutes a breach of a private contract between plaintiff and defendant, an action for an injunction may be maintained,⁴⁷ subject to the rules applicable to the protection of contract rights by injunctions generally, as discussed in Injunctions §§ 77-95.

c. Defenses

The facts that similar obstructions have been permitted or that others are violating the regulations do not constitute a defense to proceedings to remove a street obstruction. Ordinarily laches will not constitute a defense to an action by the municipality but it may be a defense to an action by an individual.

It is no defense in proceedings relative to removal of street obstructions that permission was given by the abutting owner;⁴⁸ that similar obstructions have been permitted to remain in the streets for a considerable time;⁴⁹ that other persons are violating the regulations,⁵⁰ or have been permitted so to encroach.⁵¹ An unauthorized agreement between

the municipality and the obstructor is no defense.⁵² Where the title to the property is in a married woman, her husband is not liable, although he acted as the agent of his wife.⁵³

Laches and estoppel. Mere lapse of time, without any other element of estoppel, will not bar the right of a municipality to remove a street obstruction,⁵⁴ and past failure to enforce ordinances against the obstruction of sidewalks does not estop a municipal corporation from subsequently removing all obstructions therefrom.⁵⁵ However, although there is authority to the contrary,⁵⁶ it has been held that long-continued municipal acquiescence in the maintenance of street obstructions of a permanent nature will estop the municipality from removing them,⁵⁷ but mere forbearance to remove an obstruction of a street does not constitute acquiescence working an estoppel against the municipality,⁵⁸ and, where defendant has not been misled to his injury, there can be no estoppel.⁵⁹ A municipality is not estopped to remove an unlawful obstruction by having made a proposition to permit its use for a money consideration where such proposition is not accepted,⁶⁰ but the fact that such offer was made tends to show that the municipality did not regard the structure as an obstruction of the street or as a menace to public health, and a nuisance.⁶¹

An action by an individual may be barred by laches,⁶² or by estoppel,⁶³ but, where a statute provides that no lapse of time can legalize a public

44. Del.—Poole v. Rehoboth, 80 A. 683, 9 Del Ch. 192.

45. Ala.—Montgomery First Nat. Bank v. Tyson, 32 So. 144, 133 Ala. 459, 91 Am.S.R. 46, 59 L.R.A. 399.

Governing authority disqualified

Right of private citizen suffering special injury to sue for abatement of street obstruction is not affected by statute providing for summary abatement of nuisances by governing authorities in designated towns and cities, which is inapplicable because governing authority is disqualified from acting—Harbuck v. Richland Box Co., 49 S.E.2d 883, 204 Ga. 352.

46. Md.—Brauer v. Baltimore Refrigerating, etc., Co., 58 A. 21, 99 Md. 367, 105 Am.S.R. 304, 66 L.R.A. 403.

47. Ark.—Ft. Smith Light, etc., Co. v. Kelley, 127 S.W. 975, 94 Ark. 461.

44 C.J. p 1019 note 84.

48. Ill.—Chicago v. Pooley, 112 Ill. App. 343.

44 C.J. p 1019 note 99.

49. Ala.—Hamilton v. Warrior, 112 So. 136, 215 Ala. 670.

Minn.—Mueller v. Duluth, 188 N.W. 205, 152 Minn. 159.

50. Ala.—McCrane v. City of Leeds, 1 So.2d 894, 241 Ala. 198. 44 C.J. p 1019 note 2.

51. Ohio.—Columbus v. Philbrick, 5 Ohio N.P., N.S., 449. W.Va.—Martinsburg v. Miles, 121 S. E. 285, 95 W.Va. 391.

52. Pa.—Mahoney v. Bissell, 9 Pa. Co. 469.

53. Wis.—Cook v. Bellack, 85 N.W. 325, 109 Wis. 391.

54. Ala.—Nixon v. City of Anniston, 121 So. 514, 219 Ala. 219—Hamilton v. Town of Warrior, 112 So. 136, 215 Ala. 670.

Kan.—City of Emporia v. Humphrey, 297 P. 712, 132 Kan. 682, rehearing denied 299 P. 950, 133 Kan. 176.

44 C.J. p 1020 note 9.

Estoppel of municipality generally as to use of streets see Estoppel § 145.

Laches by municipality as bar to equitable relief generally see Equity § 114.

55. Neb.—Chapman v. Lincoln, 121 N.W. 596, 84 Neb. 534, 25 L.R.A., N.S., 400.

56. Ala.—City of Birmingham v. Hood-McPherson Realty Co., 172 So. 114, 233 Ala. 352, 108 A.L.R. 1140—Nixon v. City of Anniston, 121 So. 514, 219 Ala. 219—Webb v. City of Demopolis, 13 So. 289, 95 Ala. 116, 21 L.R.A. 62.

57. Pa.—Pittsburgh v. Pittsburgh, etc., R. Co., 106 A. 724, 263 Pa. 294. 44 C.J. p 1020 note 11.

Public acquiescence in permanent street improvements as raising equitable estoppel see Estoppel § 145.

58. Wash.—Starwick v. Ernst, 170 P. 584, 100 Wash. 198.

59. Or.—Newberg v. Kienle, 120 P. 3, 60 Or. 486.

44 C.J. p 1020 note 13.

60. Ill.—Rothschild v. Chicago, 81 N.E. 407, 227 Ill. 205.

61. Ill.—Rothschild v. Chicago, supra.

62. Va.—St. Clair v. Edgewood Water Works Co., 144 S.E. 452, 151 Va. 274.

44 C.J. p 1019 note 86.

63. N.J.—J. M. Lehmann Co. v. S. B. Penick Co., 49 A.2d 427, 24 N. J.Misc. 375.

nuisance amounting to an actual obstruction of public rights, the doctrine that mere lapse of time will not prevent suit, which is applicable to municipal plaintiffs, applies also to individual plaintiffs.⁶⁴ A party suing as executor is not estopped to have obstructions on certain streets removed by the fact that his testator had closed a part of a street not involved in the suit.⁶⁵

d. Proceedings and Relief

Subject to statutory variations, the general rules of equity are applicable to proceedings for abatement, or to restrain the maintenance, of a street obstruction.

Subject to statutory variations, the general rules of equity are applicable to proceedings for abatement, or to restrain the maintenance, of a street obstruction.⁶⁶

Process. Under a statute providing for service by publication in actions which relate to, or the subject matter of which is, real or personal property within the state, a nonresident owner of abutting property on which a building has been erected encroaching on a street may be served by publication in a proceeding for a mandatory injunction to compel the removal of the encroachment.⁶⁷

Parties. General rules apply in determining who are necessary and proper parties in a proceeding to enjoin or abate a street obstruction.⁶⁸ Where, in a suit to enjoin a street obstruction, the public right is involved, the public must be a party to the suit.⁶⁹

A proceeding by the municipality may be brought

in its name as plaintiff⁷⁰ or in the name of particular officers,⁷¹ in accordance with charter and statutory provisions. Although it is provided by statute that, if the street obstruction is merely a public nuisance and no private individual suffers special damages, the proceedings to abate should be in the name of the city acting on the motion of the corporate body itself, or in the name of the city on the application of some citizen, where the city authorities are disqualified from acting as triers of the question whether such obstruction is a nuisance, the court has jurisdiction of a suit brought in the name of the solicitor general at the instance, and on the information, of a citizen.⁷²

An action may be brought in the name of the people of the state⁷³ or an attorney general may sue in the name of the state,⁷⁴ and the right is not affected by a statute⁷⁵ or an ordinance⁷⁶ imposing a fine on one obstructing a public road. However, it has been held that, where there is no allegation of demand on, or refusal of, the city officials to act in the matter, courts of equity will hesitate to enjoin encroachments on public highways in a proceeding by the attorney general.⁷⁷

In an action to enjoin an obstruction or encroachment in a street, the person in possession and control of the obstruction or encroachment is a necessary and proper party.⁷⁸ An abutting lot owner and the municipality are proper defendants in a suit to set aside an ordinance vacating part of a street and to require the removal of a building thereon.⁷⁹ In an action by a municipality to compel by manda-

64. Okl.—*Revard v. Hunt*, 119 P. 589, 29 Okl. 835.

65. Ga.—*Adair v. Spellman Seminary*, 79 S.E. 589, 13 Ga.App. 600.

66. Ky.—*Chicago, etc., R. Co. v. Dixon*, 284 S.W. 1091, 215 Ky. 353.

67. Ohio.—*Columbus v. Philbrick*, 5 Ohio N.P., N.S., 449.

68. Ky.—*Chicago, etc., R. Co. v. Dixon*, 284 S.W. 1091, 215 Ky. 353. 44 C.J. p 1020 note 19.

69. N.J.—*United New Jersey R., etc., Co. v. Crucible Steel Co.*, 95 A. 243, 85 N.J.Eq. 7, 28. 44 C.J. p 1020 note 20.

70. N.D.—*Lamoure v. Lasell*, 145 N.W. 577, 26 N.D. 638. 44 C.J. p 1020 notes 21, 22.

71. N.J.—*Newark v. Delaware, etc., R. Co.*, 7 A. 123, 42 N.J.Eq. 196. 44 C.J. p 1020 note 22.

72. Ga.—*Calhoun ex rel. Chapman v. Gulf Oil Corporation*, 5 S.E.2d 902, 189 Ga. 414.

Waiver of right to sue

Where citizen, after receiving assurances that council considered itself qualified to determine whether encroachment in street by a corporation was a nuisance, invoked the statutory procedure for abatement by city authorities, he thus waived disqualification of the city authorities resulting from their having made lease to the corporation, and renounced his right to continue suit to enjoin the encroachment as a public nuisance, previously brought by him in name of solicitor general on ground of disqualification of city authorities; and, hence, he could not resume such suit after adverse decision by city authorities, irrespective of any declaration or intimation of such intention in his statutory demand on city authorities. After adverse decision by city authorities in statutory proceeding for abatement of nuisance, complaining citizen's remedy is certiorari to be maintained in the name of the city on citizen's application and at his instance.—*Calhoun ex rel. Chapman v. Gulf Oil Corporation*, supra.

73. Cal.—*People v. Southern Pac. R. Co.*, 228 P. 726, 68 Cal.App. 153.

44 C.J. p 1019 note 93.

74. Mo.—*State v. Franklin*, 113 S.W. 652, 133 Mo.App. 486.

44 C.J. p 1020 note 94.

75. Mo.—*State v. Franklin*, supra.

76. Ky.—*Leitchfield Mercantile Co. v. Commonwealth*, 136 S.W. 639, 143 Ky. 162.

44 C.J. p 1020 note 96.

77. Mich.—*Attorney General v. Murray*, 196 N.W. 446, 225 Mich. 170.

78. N.Y.—*Village of Skaneateles v. Barber*, 78 N.Y.S.2d 79.

Grantors

In suit to enjoin the closing of an alley on ground that public easement by prescription had been acquired, defendants' grantors, who conveyed property to defendants by warranty deed, would have been proper parties, but were not necessary parties.—*Kirby v. City of Harrison*, 148 S.W.2d 666, 202 Ark. 1.

79. Wash.—*Fry v. O'Leary*, 252 P. 111, 141 Wash. 465, 49 A.L.R. 1249.

tory injunction the removal from the sidewalk of as much of a building as encroaches thereon, the owner of the property, as well as the lessee who erected the building, is a necessary party,⁸⁰ and the lessee is a proper party and the real party in interest where he persists in encroaching after notification that the structure being erected encroaches on the sidewalk, especially where the lease provides that the lessee is responsible for any violation of law.⁸¹ Where a city by ordinance merely abandons the claim to land as a public street and permits owners of an adjacent lot to close it, the city is not a necessary, even though it may be a proper, party defendant in a suit to enjoin the obstruction of the street;⁸² and, where an individual erects an obstruction in a street and the only offense of the municipality is its neglect of duty to make him vacate, it is not a necessary party to an action by the prosecuting attorney of the county to abate the nuisance.⁸³

Where the action is brought by the municipality, the state need not be joined as a party.⁸⁴ Property owners on one street cannot join the property owners on another street to enjoin a use of the street by a public service corporation,⁸⁵ but any property holders injuriously affected may be joined as

plaintiffs.⁸⁶ Several persons who are encroaching on a public street, but who are in no way connected with, or dependent on, each other in such action need not be joined as defendants in a suit to remove an obstruction maintained by one of them.⁸⁷

Complaint. In accordance with the ordinary rules of equity pleading the complaint must set forth every fact clearly necessary to obtain the relief sought.⁸⁸ Thus, the complaint must set forth facts showing an obstruction,⁸⁹ and the nature of the place obstructed.⁹⁰ A complaint is not defective on the ground that it combines inconsistent causes of action because it seeks at the same time to abate a nuisance and to recover real property in ejectment,⁹¹ or because it incidentally requests a money judgment.⁹² The prayer for relief may be general or special.⁹³

In a suit by the municipality to abate an obstruction, damages need not be alleged,⁹⁴ and an allegation that plaintiff is a municipal corporation in a certain county is sufficient without alleging how or when it was created.⁹⁵ In a suit by a private person the bill or complaint must allege facts showing that plaintiff's injury is different in kind from that suffered by the general public.⁹⁶

80. Ohio.—Columbus v. Philbrick, 5 Ohio N.P., N.S., 449.

81. La.—City of Gretna v. Gulf Distilling Corporation, App., 17 So.2d 739.

Ownership of structure held immaterial

La.—City of Gretna v. Gulf Distilling Corporation, supra.

Trial of exceptions

In city's suit for mandatory injunction to compel removal of tank encroaching on sidewalk, plea that defendant was not a proper party defendant because another owned tank was a defense addressed to the merits, and evidence thereof was inadmissible on trial of exceptions.—City of Gretna v. Gulf Distilling Corporation, supra.

82. Tex.—Bowers v. Machir, Civ. App., 191 S.W. 758.

83. Mo.—State v. Franklin, 113 S. W. 652, 133 Mo.App. 486.

84. Pa.—Philadelphia v. Crump, 1 Brewst. 320.

85. Ohio.—Glidden v. Cincinnati, 11 Ohio Dec. (Reprint) 853, 30 Cinc. L.Bul. 213.

86. Ill.—Maywood Co. v. Maywood, 6 N.E. 866, 118 Ill. 61.

Pa.—Philadelphia v. Thirteenth St., etc., Pass. R. Co., 8 Phila. 648.

87. Mich.—Grandville v. Jenison, 47 N.W. 600, 84 Mich. 54.

88. Fla.—Roney v. City of Miami Beach, 3 So.2d 701, 148 Fla. 52.

Complaint held insufficient

Md.—Mayor and Councilmen of Frostburg v. Sleeman, 45 A.2d 113, 185 Md. 393.

89. Ind.—Cumberland Tel., etc., Co. v. Mt. Vernon, 94 N.E. 714, 176 Ind. 177.

44 C.J. p 1021 note 34.

90. Ky.—Keystone Commercial Co. v. Maysville, 157 S.W. 25, 154 Ky. 239.

44 C.J. p 1021 note 35.

Dedication

(1) Generally.—Buffalo v. Harling, 52 N.W. 931, 50 Minn. 551—44 C.J. p 1021 note 35 [c].

(2) A bill of complaint to enjoin obstruction of a drive shown on a plat to have been dedicated to public use, and accepted by the public more than twenty years prior to filing of the bill, was sufficient as against motion to dismiss on ground that there was no equity in the bill, and that it did not affirmatively appear that there was a dedication and acceptance of the easement, and that city had been guilty of laches.—Roney v. City of Miami Beach, 3 So. 2d 701, 148 Fla. 52.

Invalid vacation of streets

In suits by city to enjoin private companies from obstructing certain streets, complaints were held sufficient to charge abuse of discretion

in passage of ordinances vacating streets and that discretion of officials in adoption of ordinances was exercised arbitrarily and without regard to rights and necessities of public.—Roney Inv. Co. v. City of Miami Beach, 174 So. 26, 127 Fla. 773.

Ownership

In action by city to recover possession of portion of street, allegation of ownership of street by city was construed, in light of other averments in petition, to show that town did not claim fee-simple title to property in controversy.—Wood v. Town of Lewisport, 299 S.W. 197, 221 Ky. 566.

91. N.Y.—New York v. Knickerbocker Trust Co., 93 N.Y.S. 937, 104 App.Div. 223.

44 C.J. p 1021 note 36.

92. N.Y.—Village of Skaneateles v. Barber, 78 N.Y.S.2d 79.

93. Ga.—Kavanagh v. Mobile, etc., R. Co., 4 S.E. 113, 78 Ga. 303.

94. Tex.—Dozier v. Austin, Civ. App., 253 S.W. 554.

95. Ala.—Rudolph v. Elyton, 50 So. 80, 161 Ala. 525.

96. Fla.—Henry L. Doherty & Co. v. Joachim, 200 So. 238, 146 Fla. 50.

Neb.—Chizek v. City of Omaha, 253 N.W. 441, 126 Neb. 333.

Wash.—Peterson v. City of Seattle, 71 P.2d 668, 191 Wash. 587.

Plea or answer. Defendant in his answer must meet the allegations of the complaint.⁹⁷ In an action by the municipality to compel the removal of a fence inclosing an alley, which the municipality claimed had been rededicated after ten years' title against the municipality had been perfected by limitation, defendant may show that there was no new dedication of the alley, under a plea of not guilty.⁹⁸

Motion to dismiss. In some jurisdictions the sufficiency of the bill of complaint to enjoin the obstruction of a street may be tested by a motion to dismiss,⁹⁹ and such a motion is the equivalent of a demurrer and is subject to the same rules,¹ such as the admission of the truth of all material and relevant facts which are well pleaded.²

Evidence. Under rules applicable to evidence in civil actions generally, the burden is on complainant to establish the facts essential to his cause of action,³ such as the character of the encroachment as a nuisance⁴ and the location of street lines where in dispute.⁵ General rules also apply as to the

admissibility and weight and sufficiency of the evidence.⁶

Questions for jury. In cases wherein a jury trial is had, the existence of an obstruction is ordinarily a question of fact for the jury.⁷

Judgment or decree. The relief granted must be in proportion to the nature or extent of the injury done or likely to be sustained and not in excess thereof, and must be consistent with the theory of the bill as established by the proofs.⁸ An abatement of the obstruction cannot be decreed where the pleadings and verdict are indefinite as to its location.⁹

Costs. In a proper case, it has been held, a complainant municipality may be allowed reasonable counsel fees as costs.¹⁰ Costs may be denied a successful complainant where at the time of commencement of the action the situation is such that it is well for both parties that the questions involved should be settled by judicial determination rather than by a resort to summary proceedings.¹¹

c. Damages, Penalties, and Criminal Responsibility

§ 1754. Actions for Damages

A municipal corporation has a cause of action for damages against a person causing an unauthorized obstruction of a street, and a private person suffering special injury through such an obstruction has a cause of action for damages against the obstructor.

An unauthorized obstruction in a street gives a cause of action for damages to a municipal corpora-

tion against the obstructor.¹² A county cannot sue for the obstruction of a city street over which the city is vested with authority and control.¹³

A private person suffering special injury through an unauthorized street obstruction has a cause of action against the obstructor for damages.¹⁴ However, there is authority holding that one under a

Complaint held sufficient

Mont.—Faucett v. Dewey Lumber Co., 266 P. 646, 82 Mont. 250.

Complaint held insufficient

Fla.—Richard v. Gulf Theatres, 21 So.2d 715, 155 Fla. 626—Henry L. Doherty & Co. v. Joachim, 200 So. 238, 146 Fla. 50.

97. Vt.—Montpellier v. McMahon, 81 A. 977, 85 Vt. 275.

44 C.J. p 1021 note 40.

98. Tex.—Pearsall v. Crawford, Civ. App., 213 S.W. 327.

99. Fla.—Roney v. City of Miami Beach, 3 So.2d 701, 148 Fla. 52.

1. Fla.—Roney v. City of Miami Beach, *supra*.

2. Fla.—Roney v. City of Miami Beach, *supra*.

3. Ind.—Carlisle v. Pirtle, 114 N.E. 705, 63 Ind.App. 475.

44 C.J. p 1021 notes 44, 45.

Private person seeking injunction must prove special injury.

Neb.—Chizek v. City of Omaha, 253 N.W. 441, 136 Neb. 333.

Wash.—Petersen v. City of Seattle, 71 P.2d 688, 191 Wash. 587.

4. Ind.—Carlisle v. Pirtle, 114 N.E. 705, 63 Ind.App. 475.

5. Pa.—Mt. Oliver v. Goldbach, 90 A. 435, 244 Pa. 56.

6. Mont.—City of Billings v. Pierce Packing Co., 161 P.2d 636, 117 Mont. 255.

Pa.—Pittsburgh v. Weinman, 134 A. 382, 286 Pa. 587—Trimmer v. Van Dyke, Com.Pl., 46 Dauph.Co. 222. 44 C.J. p 1021 note 46

Evidence held immaterial

Mont.—City of Billings v. Pierce Packing Co., 161 P.2d 636, 117 Mont. 255.

Evidence held sufficient

Cal.—City Inv. Co. v. Racik, 263 P. 555, 88 Cal.App. 383.

Ky.—Bass v. City of Louisville, 26 S.W.2d 1039, 233 Ky. 734.

Neb.—Chizek v. City of Omaha, 253 N.W. 441, 136 Neb. 333.

Pa.—City of Hazleton v. Lehigh Valley Coal Co., 16 A.2d 23, 339 Pa. 565—Barnes v. Walters, 157 A. 49, 103 Pa.Super. 443.

Evidence held insufficient

N.J.—J. M. Lehmann Co. v. S. B.

Penick Co., 49 A.2d 427, 24 N.J. Misc. 427.

7. Cal.—San Francisco v. Clark, 1 Cal. 386.

8. Pa.—Barnes v. Walters, 157 A. 49, 103 Pa.Super. 443—Spring Grove Borough v. Wentz, Com.Pl., 58 York Leg Rec 38. 44 C.J. p 1022 note 49

9. Ind.—American Furniture Co. v. Batesville, 38 N.E. 408, 139 Ind. 77.

10. N.H.—Manchester v. Hodge, 77 A. 76, 75 N.H. 602.

11. N.Y.—New Rochelle v. New Rochelle Coal, etc., Co., 144 N.Y.S. 852, 83 Misc. 194, affirmed 158 N. Y.S. 1111, 173 App.Div. 953, reversed on other grounds 121 N.E. 270, 224 N.Y. 696.

12. Vt.—Shrewsbury v. Brown, 25 Vt. 197.

44 C.J. p 1022 note 54.

13. Ky.—Powell County v. Kentucky Lumber Co., 24 S.W. 114, 15 Ky.L. 577.

14. Ala.—Chichester v. Kroman, 128 So. 166, 221 Ala. 203.

contractual obligation to repair streets cannot recover against an obstructor whose obstructions increase the cost of street repair.¹⁵ An action for damages cannot be maintained by one seeking to use the street for an unreasonable purpose or in such a manner as to constitute a nuisance,¹⁶ or suffering no special injury different from that of the general public.¹⁷

The right to sue is not barred by the abatement of the nuisance,¹⁸ and a subsequent lease of the structure constituting the nuisance complained of or its occupation by others is no defense,¹⁹ especially where such lease is merely colorable.²⁰

Existence of public street. As in other proceedings involving obstructions and encroachments, it must appear that the street is an existing public street,²¹ and where it appears that the strip of land involved was never accepted or worked by public authorities as a street or alley there can be no recovery as a matter of law.²²

Persons liable. All persons are liable who cause or maintain a street obstruction constituting a nuisance,²³ and an action may be brought against the municipality for damages caused by an unlawful street obstruction for which it is responsible.²⁴

Pleadings. The complaint should state facts sufficient to show the unlawful character of the obstruction²⁵ and the lawful character of the street use by plaintiff.²⁶ The complaint, in order to state a cause of action, need not negative the existence of facts which defendant may assert in justification of the obstruction.²⁷

Questions for jury. In a suit for damage to conduits of a lighting and heating company, running through a public alley, it is a question for the jury whether defendant had notice of the presence of such conduits.²⁸

Damages recoverable. The damages recoverable by a private person are all damages directly resulting from the unlawful obstruction, and not suffered in common by the public generally.²⁹ Punitive damages may be awarded where the obstructor willfully refuses to abate the nuisance.³⁰

§ 1755. Penalties

- a. In general
- b. Proceedings

a. In General

Ordinarily municipal corporations have the power to prescribe the penalty for the violation of ordinances relating to street obstructions.

Where a valid statute or ordinance so provides, a penalty may be exacted for unlawfully obstructing a street.³¹ Although municipal power to impose penalties for encroachments and obstructions will not exist through avoidable implication,³² municipal corporations, in connection with their general delegated power to control streets and prohibit obstructions therein, ordinarily have power to prescribe punishment by fine or imprisonment for the violation of ordinances relating to obstructions.³³ An ordinance which is repugnant to the laws of the state is invalid.³⁴ A licensee is not liable for such penalties where the work is being done by an

Cal.—Phillips v. City of Pasadena, 162 P.2d 625, 27 Cal.2d 104.

44 C.J. p 1022 note 56.

Action for damages by abutting owner for obstruction of street see supra §§ 1712, 1713.

15. Ohio.—Daly v. Cincinnati St. R. Co., 8 Ohio Dec. (Reprint) 742, 9 Cinc.L.Bul. 270.

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16. Ala.—Ex parte Ashworth, 86 So. 84, 204 Ala. 391.

17. Wis.—Zettell v. West Bend, 48 N.W. 379, 79 Wis. 316, 24 Am.S.R. 715.

44 C.J. p 1022 note 59.

18. N.Y.—Pierce v. Dart, 7 Cow. 609.

19. Mass.—New Salem v. Eagle Mill Co., 138 Mass. 8.

20. Mass.—New Salem v. Eagle Mill Co., supra.

21. U.S.—Summerville v. Duke Power Co., C.C.A.N.C., 115 F.2d 440.

22. U.S.—Summerville v. Duke Power Co., supra.

23. Wash.—Wilson v. West, etc., Mill Co., 68 P. 716, 28 Wash. 312.

44 C.J. p 1022 note 60.

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25. Ala.—Birmingham R., etc., Co. v. Ashworth, 86 So. 82, 17 Ala. App. 451, certiorari denied 86 So. 84, 204 Ala. 391.

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In action for damages caused by closing of street leading to plaintiff's resort, complaint which stated facts relative to barricading of street and which alleged that closing was unlawful was sufficient as against a general demurrer, notwithstanding failure to allege that street

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28. Mich.—Edison Illum. Co. v. Misch, 166 N.W. 944, 200 Mich. 114.

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44 C.J. p 1023 note 72.

independent contractor³⁵ or where he has been granted a temporary private use of a street, although it amounts to a temporary obstruction, at least until a demand by the municipality to relinquish the use.³⁶ Furthermore, a municipal servant acting under charter power is not liable to the statutory penalty for obstructing streets.³⁷ Statutes and ordinances imposing a penalty afford no right of action to a private individual where the act does not amount to a nuisance.³⁸

Statutes and ordinances imposing penalties for street obstructions are to be strictly construed,³⁹ although ordinances subjecting "any person" to a penalty are held to include a corporation.⁴⁰ A statute imposing a penalty for obstructing a sidewalk with a vehicle applies to a hand truck.⁴¹ An ordinance imposing a penalty on any person who shall spread an awning over a sidewalk has been held not to apply to one who continues to maintain an awning erected prior to the passage of the ordinance.⁴² A statute which declares a penalty as to one who obstructs a public road and an additional forfeiture for every day he suffers the obstruction to remain after notice from the overseer has been held not to apply to city streets where the overseer is an officer whose duties are peculiar to country roads.⁴³ However, it has been held that, although a village has no overseer of highways, a statute imposing a penalty for obstructing highways and providing that the overseer of the proper district shall cause such obstruction to be removed applies to a village wherein another officer performs the functions of an overseer.⁴⁴

Defenses. A municipal corporation is not estopped to bring an action for violation of an ordinance relative to the obstruction of streets by the fact that a committee of the municipal council had agreed that defendant should have the use of the obstructed street for its business.⁴⁵ In like man-

ner the municipality cannot be estopped to recover a penalty for the obstruction of a street crossing by reason of the fact that it allowed defendant to expend money on the assumption that the street was vacated where the record of the council shows that the vacating ordinance was not passed as required by law.⁴⁶

b. Proceedings

As a general rule, actions to recover penalties for the obstruction of a street are civil, and not criminal, proceedings.

As a general rule, actions to recover penalties for the obstruction of a street are civil, and not criminal, proceedings.⁴⁷ Where a statute provides that a claim to the penalty shall be cognizable by the mayor or other officer of the city, such officer must necessarily inquire into the fact whether the place where the obstruction is put is a public street, and he has jurisdiction to try the fact whether a claim set up by defendant to the freehold is bona fide made,⁴⁸ but in such a case, if the claim is bona fide made, the jurisdiction of the officer is ousted, and he cannot inquire into the validity of the claim and he has no power in such case to proceed to a summary conviction.⁴⁹

Complaint. Where the circumstances of the case fall within a particular and narrow section of an ordinance, the complaint should be instituted under that section exclusively and not under a broader one.⁵⁰

Proof. Proof of all the elements of the offense must be made in order to warrant a recovery.⁵¹ The burden of showing the encroachment is on the municipality.⁵²

Questions for jury. In an action by a municipality against an owner of land abutting on a street to recover a penalty for obstructing the street, it is a question for the jury whether the acts of the pub-

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Under statute providing that, before street is paved, notice may be given to companies to make excavations before the paving and providing for penalties for subsequent excavations, statutory penalties

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Questions for jury. In an action by a municipality against an owner of land abutting on a street to recover a penalty for obstructing the street, it is a question for the jury whether the acts of the pub-

35. Pa.—Williamsport v. Williamsport Water Co., 7 Pa. Dist. 206

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Under statute providing that, before street is paved, notice may be given to companies to make excavations before the paving and providing for penalties for subsequent excavations, statutory penalties

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51. N.C.—State v. Higgs, 35 S.E. 473, 126 N.C. 1014, 48 L.R.A. 446.

52. N.Y.—New York v. Childs, 84 N. Y.S. 164.

lic in traveling the inclosed strip were sufficient to justify an inference that the landowner had notice of the adverse character.⁵³

Judgments. A judgment against defendant without stating on which charge judgment was given is void for uncertainty where there are two distinct charges.⁵⁴

Amount of penalty. Where a limitation is imposed on the amount of penalty to be inflicted by the city for the infraction of its ordinances, the city cannot exceed the limitation directly,⁵⁵ nor can it do so indirectly by multiplying what is substantially one offense into several, or subdividing one transaction or violation into a number of offenses and annexing a penalty to each.⁵⁶

§ 1756. Criminal Responsibility

- a. In general
- b. Prosecution and punishment

a. In General

Any street encroachment or obstruction amounting to a nuisance is indictable at common law and in many jurisdictions by express statute. Statutes and ordinances defining and punishing offenses of this character are to be strictly construed, and in order to impose liability the prescribed elements of the offense must concur.

Any street encroachment or obstruction amounting to a nuisance is indictable at common law⁵⁷ and in many jurisdictions by express statute.⁵⁸ In order to make an obstruction an indictable offense at common law, it must injuriously affect some public right, that is, some right in which the public, in its aggregate capacity, has a common interest, as

distinguished from a mere individual or private right.⁵⁹ Under statutes or ordinances defining and punishing offenses of this character the prescribed elements of the offense must concur in order to impose liability.⁶⁰

Statutes or ordinances of the character under consideration are to be strictly construed.⁶¹ Under a statute punishing acts or omissions rendering a street dangerous for passage, a conviction cannot be had for an act which merely tends with reasonable certainty to set in motion other causes which would render the street dangerous.⁶² An ordinance is not void for uncertainty because it gives the mayor the discretion to impose a punishment of either fine or imprisonment.⁶³ A statute penalizing the obstruction of public roads and highways has been held to apply to city streets,⁶⁴ although a similar statute was held inapplicable to city streets because of statutory provisions placing all roads and streets within a municipality in the absolute control of the municipality.⁶⁵

An indictment may lie, although the street obstructed has not been entirely opened and made fit for all uses.⁶⁶ However, an obstruction has been held not to be an indictable offense where the street has never been opened or is not used by the public,⁶⁷ although there is also authority to the contrary.⁶⁸

Persons liable. Where an officer, in executing a writ of restitution, places on the sidewalk goods removed from the premises, allowing them to remain there is the offense of the owner of the goods, and the officer is not guilty of a violation of an ordi-

53. Ill.—Middletown v. Glenn, 115 N.E. 847, 278 Ill. 149.

54. Pa.—Carlisle v. Baker, 1 Yeates 471.

55. Pa.—Williamsport v. Williamsport Water Co., 7 Pa. Dist. 206.

56. Pa.—Williamsport v. Williamsport Water Co., supra.
44 C.J. p 1024 note 93.

57. Ill.—McEniry v. Tri-City R. Co., 98 N.E. 227, 254 Ill. 99.
44 C.J. p 1024 note 95.

58. Me.—State v. Goldberg, 158 A. 364, 131 Me. 1.
44 C.J. p 1024 note 96.

59. Mich.—People v. Jackson, 7 Mich. 432, 74 Am.D. 729.
44 C.J. p 1024 note 97.

60. W.Va.—State v. Seaman, 85 S. E. 470, 76 W.Va. 467.
44 C.J. p 1024 note 98.

Willfulness

Under some statutes willfulness is an essential element of the offense.
—Town of Refugio v. Strauch, Tex. Com.App., 39 S.W.2d 1041—Jenkins

v. State, 60 S.W.2d 1040, 124 Tex.Cr. 92.

61. N.Y.—People v. Cohen, 203 N.Y. S. 604.
44 C.J. p 1024 note 4.

Standing or sitting on sidewalk

Under ordinance declaring it unlawful to stand or sit on sidewalk, so as to impede pedestrians' progress, one shown by all evidence to have been moving, not standing or sitting, on sidewalk while picketing certain place during strike, was not guilty of violating ordinance, in view of statute requiring court to give words not specifically defined meaning in which understood in common language.—Fierro v. State, 121 S.W. 2d 597, 135 Tex.Cr.R. 483.

62. N.Y.—People v. Eckerson, 117 N.Y.S. 418, 133 App.Div. 220.
44 C.J. p 1025 note 6.

63. N.C.—State v. Higgs, 35 S.E. 473, 126 N.C. 1014, 48 L.R.A. 446.

64. Fla.—State ex rel. Frazier v.

Coleman, 20 So.2d 911, 155 Fla. 555.

Not limited to permanent obstructions

Statute penalizing willful obstructions of a public road or highway which is applicable to city streets is not limited to permanent obstructions.—State ex rel. Frazier v. Coleman, supra.

65. Miss.—Magers v. Okolona, Houston & Calhoun City R. Co., 165 So. 416, 174 Miss. 860.

66. S.C.—State v. Lythgoe, 40 S.C. L. 112.

67. Mich.—People v. McNamara, 106 N.W. 698, 143 Mich. 71—People v. Wolverine Mfg. Co., 104 N. W. 725, 141 Mich. 455, 113 Am.S.R. 544.

68. Ohio.—Harbor Land Co. v. Village of Fairport, App., 49 N.E.2d 194.

nance prohibiting the placing or leaving of any obstruction on the street.⁶⁹

Compelling prosecution. A prosecution for violation of an ordinance may not be compelled by private individuals for the purpose of having a disputed civil right determined at the cost of the municipality.⁷⁰

Defenses. It is no defense that others against whom prosecutions have not been brought are violating the same statute or ordinance,⁷¹ that part of the structure or thing obstructing the street was not within the street,⁷² that the act was committed on the advice of third persons,⁷³ or that the municipality had refused to fulfill another agreement.⁷⁴ Furthermore, it is no defense that authority to encroach on a street was granted by an invalid ordinance.⁷⁵ It is no defense to attack the validity of a statute other than the one under which the prosecution is brought.⁷⁶

b. Prosecution and Punishment

An indictment or complaint charging the obstruction of a street must allege the facts showing the commission of the offense. General rules of criminal procedure as to evidence and to issues, proof, and variance are applicable.

Obstructions which are misdemeanors are punishable, under indictment, information, or complaint, brought in the name of the state.⁷⁷ Questions of boundary or servitude are not involved so as to deprive inferior courts of jurisdiction.⁷⁸

The indictment or complaint must allege facts showing the commission of the offense defined by

the statute or ordinance on which the prosecution is based.⁷⁹ Since a street is a public highway, it is unnecessary, when using the word "street," to add the words "public highway."⁸⁰ Ordinarily it need not be alleged that the town in which the street lies is an incorporated town,⁸¹ but, where the statute prohibits the willful obstruction of a street in an incorporated town, such an allegation is required.⁸² It has also been held that the complaint must show on its face that the offense was committed prior to the filing of the complaint.⁸³

Issues, proof, and variance. On the trial the proof must accord with the charges of the indictment, information, or complaint, and the issues in the case,⁸⁴ and a material variance between the allegations and the proof adduced in support thereof is fatal.⁸⁵ However, a failure to prove the allegation to the extent charged does not necessarily result in a fatal variance,⁸⁶ as where it is not a question of the identity of the obstruction, but only to the extent of the obstruction.⁸⁷

Evidence. The burden of proof is on the prosecution to show that the way obstructed was a public street or alley,⁸⁸ and in a prosecution for violating an ordinance prohibiting wires and poles in streets and alleys defendant has the burden of showing that his employer had a franchise so to use the streets, if that is the fact.⁸⁹ The general rules of criminal procedure as to admissibility and sufficiency of evidence apply in prosecutions for the obstruction of a street,⁹⁰ including the necessity of establishing guilt of accused beyond a reasonable doubt.⁹¹

69. D.C.—Williams v. District of Columbia, 22 App.D.C. 471.

70. Or.—Collins v. Grant, 116 P. 334, 59 Or. 77.

71. Neb.—Chapman v. Lincoln, 121 N.W. 596, 84 Neb. 534, 25 L.R.A., N.S., 400.

Pa.—Commonwealth v. Kembel, 30 Pa. Super. 199.

72. Me.—State v. Goldberg, 158 A. 364, 131 Me. 1.

73. Minn.—Chute v. State, 19 Minn. 271.

74. Mass.—Commonwealth v. Smyth, 14 Gray 33.

75. N.Y.—People, on Complaint of McLees, v. Berner, 10 N.Y.S.2d 339, 170 Misc. 501.

76. N.Y.—People v. Friedman, 16 N.Y.S.2d 925.

77. Del.—Dover v. Tawressey, 43 A. 170, 16 Del. 285.
44 C.J. p 1025 note 8.

Obstruction by municipality

Remedy against maintenance by city of public nuisance by constructing boardwalk over avenue, as af-

fecting people deprived of use of highway or right of light, air, and view, is by indictment or information.—George W. Armbruster, Jr., Inc. v. City of Wildwood, D.C.N.J., 41 F.2d 823.

78. La.—State v. Lochte, 14 So. 215, 45 La. Ann 1405.

79. Miss.—Giardina v. Greenville, 13 So. 241, 70 Miss. 896.
44 C.J. p 1025 note 12.

80. Pa.—Commonwealth v. Walter, 26 Pa. Dist. 851.

81. Tex.—State v. Junker, 37 Tex. 478.

82. Tex.—Martin v. State, 162 S.W. 1145, 72 Tex. Cr. 454.

83. Tex.—Martin v. State, supra.

84. Me.—State v. Beal, 48 A. 124, 94 Me. 520.

85. Me.—State v. Beal, supra.

86. Me.—State v. Beal, supra.
46 C.J. p 820 note 59 [a].

87. Me.—State v. Beal, supra.

88. Mo.—Mexico v. Jones, 27 Mo. App. 534.

N.Y.—People ex rel. Bushnell v. Midland Terrace Corporation, 45 N.Y.S.2d 642.

89. Ill.—Sullivan v. Best, 121 N.E. 565, 286 Ill. 315.
44 C.J. p 1025 note 19.

90. Me.—State v. Goldberg, 158 A. 364, 131 Me. 1.

N.Y.—People ex rel. Bushnell v. Midland Terrace Corporation, 45 N.Y.S.2d 642.

Tex.—Jenkins v. State, 60 S.W.2d 1040, 124 Tex. Cr. 92.

Evidence held sufficient

Ga.—Thompson v. City of Rockmart, 185 S.E. 363, 53 Ga. App. 275.

Evidence held insufficient

N.Y.—People ex rel. Bushnell v. Midland Terrace Corporation, 45 N.Y.S.2d 642.

91. Me.—State v. Goldberg, 158 A. 364, 131 Me. 1.

N.Y.—People ex rel. Bushnell v. Midland Terrace Corporation, supra.

Location and boundaries of street
Me.—State v. Goldberg, 158 A. 364, 131 Me. 1.

Evidence that the act complained of as an obstruction was done under the advice of the officials of a municipality is admissible on the question of willfulness,⁹² and the fact that a complaint refers to an obstruction of the street does not make inadmissible evidence that water accumulated and obstructed the sidewalk, where the complaint also charges the obstruction of a sidewalk.⁹³ However, accused cannot show that no employee of any other company had been arrested for a violation of a particular ordinance for the purpose of showing that the ordinance was directed against his employer alone,⁹⁴ and evidence that accused in asking the authorities for a privilege referred to the land alleged to have been obstructed as a street is inadmissible against him where the privilege asked for was refused.⁹⁵ The information cannot be sustained on inference, but only on sufficient legal proof.⁹⁶

Questions of fact. With the exception of a nuisance per se, the existence or nonexistence of which is a question of law,⁹⁷ as a general rule whether or not the particular structure erected or maintained

is an obstruction is a question of fact for the court or jury trying the cause.⁹⁸ It is a question for the jury whether accused was a principal to the crime within the statutory definition thereof.⁹⁹

Findings. The findings must include every essential ingredient of the offense.¹

Costs. Where the structure is shown to be on the private property of accused, no costs are taxable against him.²

Review. Under general rules the findings of the trial court as to the facts will not be reviewed where there is evidence on which they may be supported.³

Abatement on conviction. As a general rule, on conviction for obstructing a street, an abatement of the obstruction may be required as part of the judgment.⁴ However, it has been held that whether or not there shall be an abatement rests in the discretion of the court⁵ and that the court is not required to order an abatement if for any reason it cannot properly or lawfully be carried into effect.⁶

13. USE AS HIGHWAY

a. In General

§ 1757. Right and Mode of Use in General

Streets of a municipal corporation are established as passageways for pedestrian and vehicular traffic.

Streets are established to serve as passageways for pedestrian and vehicular traffic,⁷ and should be administered primarily for such purpose.⁸ Neither an individual nor a corporation has any natural or inherent right to use the streets except for traf-

fic,⁹ and any right to make special use of the streets must be specially conferred by way of a franchise.¹⁰

§ 1758. — By Public Generally

The primary use to which the public streets of a municipality may be put is for public travel and transportation.

Subject to some exceptions,¹¹ the primary purpose

92. Tex.—Martin v. State, 162 S.W. 1145, 72 Tex.Cr. 454.

93. Mo.—Caruthersville v. Sickles, App., 247 S.W. 471.

94. Ill.—Sullivan v. Best, 121 N.E. 565, 286 Ill. 315.

95. Ill.—People v. Johnson, 86 N.E. 676, 237 Ill. 237.

96. N.Y.—People ex rel. Bushnell v. Midland Terrace Corporation, 45 N.Y.S.2d 642.

44 C.J. p 1025 note 26.

97. Pa.—Commonwealth v. Kembel, 30 Pa.Super. 199.

46 C.J. p 821 note 91 [a].

98. Ind.—Bybee v. State, 94 Ind. 443, 48 Am.R. 175.

Pa.—Pittsburgh, etc., Bridge Co. v. Commonwealth, 8 A. 217, 4 Pa. Cas. 153.

99. N.Y.—People v. Eckerson, 117 N.Y.S. 418, 133 App.Div. 220.

1. Pa.—Philadelphia v. Hughes, 4 Phila. 148.

2. Pa.—Commonwealth v. Weaver, 2 Pa.Co. 455.

3. N.J.—Sidelsky v. Atlantic City, 86 A. 531, 84 N.J.Law 198.

4. Me.—State v. Beal, 48 A. 124, 94 Me. 520.

Judgment of abatement on conviction for obstructing a highway see Highways § 231.

5. Me.—State v. Beal, supra.

6. Me.—State v. Beal, supra.

7. Mo.—State ex rel. State Highway Commission v. Cox, 77 S.W. 2d 116, 336 Mo. 271.

Streets are dedicated solely to public use and the passing and re-passing of the public upon entire width of highway or street unobstructed and uninterrupted.—People ex rel. Hunter v. Department of Sanitation, 86 N.Y.S.2d 437, 193 Misc. 233.

8. U.S.—Hague v. Committee for Industrial Organization, C.C.N.J., 101 F.2d 774, modified on other grounds 59 S.Ct. 954, 307 U.S. 496, 83 L.Ed. 1423.

9. Mo.—State ex inf. McKittrick ex rel. City of Springfield v. Springfield City Water Co., 131 S.W.2d 525, 345 Mo. 6.

10. Mo.—State ex inf. McKittrick ex rel. City of Springfield v. Springfield City Water Co., supra. Grant of right to use streets generally see supra §§ 1716–1743.

11. Street as storm barrier

The right of public to use Seawall Boulevard as a street or highway within City of Galveston is subordinate to right of its use as an integral part of the barrier erected against storm waters from the Gulf of Mexico.—City of Galveston v. Galveston County, Tex.Civ.App., 159 S.W.2d 976, error refused.

for which streets are established is for the use of the public as a highway for travel and transportation,¹² and an easement of a street for highway purposes gives the public the right to pass over the street for every purpose of travel and traffic and to move property thereover in a reasonable manner, as long as it does not impose an additional servitude on the fee.¹³ Everyone is entitled to enjoy this right to use the streets in a reasonable and customary way in pursuit of his lawful business, convenience, or pleasure on terms of equality with oth-

ers,¹⁴ and without hindrance or annoyance from others.¹⁵

It is not a mere privilege¹⁶ which a municipality may permit or prohibit at will;¹⁷ it is an inherent and inalienable right of the general public¹⁸ and of every citizen of the state,¹⁹ which neither the state nor the municipality may take away or unreasonably abridge,²⁰ and which may only be controlled by reasonable regulation.²¹ The right to use the streets of a municipality as a highway belongs to

12. U.S.—*Schneider v. State of New Jersey*, (Town of Irvington), N.J., 60 S.Ct. 146, 308 U.S. 147, 84 L.Ed. 155—*Young v. People of State of California*, Cal., 60 S.Ct. 146, 308 U.S. 147, 84 L.Ed. 155—*Snyder v. City of Milwaukee*, Wis., 60 S.Ct. 146, 308 U.S. 147, 84 L.Ed. 155—*Nichols v. Commonwealth of Massachusetts*, Mass., 60 S.Ct. 146, 308 U.S. 147, 84 L.Ed. 155—*Mickey v. Kansas City, Mo.*, D.C.Mo., 43 F.Supp. 739—*Borchert v. City of Ranger*, Tex., D.C.Tex., 42 F.Supp. 577.

Ariz.—*Beltram v. Stroud*, 160 P.2d 765, 63 Ariz. 249.

Cal.—*People v. Uffindell*, Super., 202 P.2d 874.

Ga.—*Jones v. City of Moultrie*, 27 S.E.2d 39, 196 Ga. 526—*Schlesinger v. Atlanta*, 129 S.E. 861, 161 Ga. 148—*Fitts v. Atlanta*, 49 S.E. 793, 121 Ga. 567, 67 L.R.A. 803—*Ferguson v. City of Moultrie*, 29 S.E.2d 786, 71 Ga.App. 15, followed in *Csikl v. City of Moultrie*, 29 S.E. 2d 791, 71 Ga.App. 23—*Jewel Tea Co. v. City Council of Augusta*, 200 S.E. 503, 59 Ga.App. 260.

Ill.—*City of Elmhurst v. Buettgen*, 68 N.E.2d 278, 394 Ill. 248—*City of Chicago v. Rhine*, 2 N.E.2d 905, 363 Ill. 619, 105 A.L.R. 1045.

Iowa.—*Pugh v. City of Des Moines*, 156 N.W. 892, 176 Iowa 953, L.R.A. 1917F 345.

Ky.—*Consolidated Coach Corporation v. Kentucky River Coach Co.*, 60 S.W.2d 127, 249 Ky. 65.

Mo.—*Jones v. Walker*, 209 S.W.2d 147, 357 Mo. 476—*State ex rel. State Highway Commission v. Cox*, 77 S.W.2d 116, 336 Mo. 271.

N.J.—*Thomas v. Casey*, 1 A.2d 866, 121 N.J.Law 185, affirmed 9 A.2d 294, 123 N.J.Eq. 447.

N.Y.—*Good Humor Corporation v. City of New York*, 49 N.E.2d 153, 290 N.Y. 312—*O'Neill v. City of Port Jervis*, 171 N.E. 694, 253 N.Y. 423—*Decker v. Goddard*, 251 N.Y. S. 440, 233 App.Div. 139.

Okl.—*Smille v. Taft Stadium Board of Control*, 205 P.2d 301—*Greiner v. City of Yale*, 139 P.2d 606, 77 Okl.Cr. 135.

Or.—*Morris v. City of Salem*, 174 P. 2d 192, 179 Or. 666—*Cabell v. City*

of Cottage Grove, 130 P.2d 1013, 170 Or. 256, 144 A.L.R. 286.

Pa.—*Commonwealth v. Hessler*, 15 A. 2d 486, 141 Pa.Super. 421.

R.I.—*Allen & Reed v. Presbrey*, 144 A. 888, 50 R.I. 53, appeal dismissed 50 S.Ct. 66, 280 U.S. 518, 74 L.Ed. 588.

Tex.—*Corpus Juris* quoted in *Harper v. City of Wichita Falls*, Civ.App., 105 S.W.2d 743, 751, error refused.

Wis.—*Chicago & Milwaukee Electric Ry. Co. v. Public Service Commission of Wisconsin*, 37 N.W.2d 42, 254 Wis. 551—*City of Milwaukee v. Milwaukee Electric Ry. & Light Co.*, 180 N.W. 339, 173 Wis. 400, 13 A.L.R. 802.

44 C.J. p 1026 note 34.

Right and mode of use of highways see *Highways* § 233.

Paramount right of public to the use of the street in all its parts is the right of all persons to pass over it freely and without impediment whenever they have occasion to do so.—*City of Chicago v. McKinley*, 176 N.E. 261, 344 Ill. 297—*Tolman & Co. v. City of Chicago*, 88 N.E. 488, 240 Ill. 268, 24 L.R.A., N.S., 97.

13. Tex.—*Corpus Juris* quoted in *Harper v. City of Wichita Falls*, Civ.App., 105 S.W.2d 743, 751, error refused.

44 C.J. p 1026 note 35.

Title and rights of municipality in general see *supra* §§ 1681-1685.

14. Cal.—*People v. Galena*, 70 P.2d 724, 24 Cal.App.2d Supp. 770.

Ga.—*Jewel Tea Co. v. City Council of Augusta*, 200 S.E. 503, 59 Ga. App. 260.

Md.—*Gitomir v. United Rys. & Electric Co. of Baltimore City*, 146 A. 279, 157 Md. 464.

Tex.—*Town of Refugio v. Strauch*, Com.App., 29 S.W.2d 1041—*Corpus Juris* quoted in *Harper v. City of Wichita Falls*, Civ.App., 105 S.W.2d 743, 751, error refused.

Va.—*Thompson v. Smith*, 154 S.E. 579, 155 Va. 367, 71 A.L.R. 604.

Wis.—*Chicago & Milwaukee Electric Ry. Co. v. Public Service Commission of Wisconsin*, 37 N.W.2d 42, 254 Wis. 551.

44 C.J. p 1026 note 36—37 C.J. p 228 note 6.

Reciprocal rights and duties as to motor vehicles see *Motor Vehicles* § 246.

15. U.S.—*Niles-Bement-Pond Co. v. Iron Molders' Union Local No. 68*, D.C.Ohio, 246 F. 851, reversed on other grounds 258 F. 408, 169 C.C. A. 424, affirmed 41 S.Ct. 39, 254 U.S. 77, 65 L.Ed. 145.

Ill.—*Martens v. Northern Illinois Public Serv. Co.*, 219 Ill.App. 160, 37 C.J. p 228 note 6.

16. Va.—*Thompson v. Smith*, 154 S.E. 579, 155 Va. 367, 71 A.L.R. 604.

17. Va.—*Thompson v. Smith*, *supra*.

18. Fla.—*Ocean Beach Hotel Co. v. Town of Atlantic Beach*, 2 So.2d 879, 147 Fla. 445.

N.C.—*Swinson v. Cutter Realty Co.*, 156 S.E. 545, 200 N.C. 276.

Constitutional and common-law right Me.—*Chapman v. City of Portland*, 160 A. 913, 131 Me. 242.

19. Cal.—*Bay Cities Transit Co. v. City of Los Angeles*, 108 P.2d 435, 16 Cal.2d 772.

Fla.—*Ocean Beach Hotel Co. v. Town of Atlantic Beach*, 2 So.2d 879, 147 Fla. 445—*Florida Motor Lines v. Ward*, 137 So. 163, 102 Fla. 1105—*State v. Quigg*, 114 So. 859, 94 Fla. 1056.

Okl.—*Corpus Juris* quoted in *City of Tulsa v. Ensign*, 117 P.2d 1013, 1017, 189 Okl. 507.

Tex.—*Parsons v. City of Galveston*, Civ.App., 53 S.W.2d 160, affirmed 34 S.W.2d 996, 125 Tex. 568.

44 C.J. p 1026 note 39.

20. Fla.—*State ex rel. Harkow v. McCarthy*, 171 So. 314, 126 Fla. 433—*Florida Motor Lines v. Ward*, 137 So. 163, 102 Fla. 1105—*State v. Quigg*, 114 So. 859, 94 Fla. 1056.

Okl.—*Corpus Juris* quoted in *City of Tulsa v. Ensign*, 117 P.2d 1013, 1017, 189 Okl. 507.

Pa.—*Commonwealth v. Hessler*, 15 A.2d 486, 141 Pa.Super. 421.

Tex.—*Corpus Juris* quoted in *Harper v. City of Wichita Falls*, Civ.App., 105 S.W.2d 743, 751, error refused.

44 C.J. p 1026 note 40.

21. Fla.—*State ex rel. Harkow v. McCarthy*, 171 So. 314, 126 Fla. 433—*Florida Motor Lines v. Ward*, 137

the general public,²² whether resident or nonresident,²³ and not only to its citizens²⁴ or the abutting owners.²⁵

Although free and unobstructed passage is not the sole use to which the streets may be put,²⁶ the right of the public to use the streets for travel and transportation is paramount to that of an individual to use them for any other purpose,²⁷ and unau-

thorized use of the streets by individuals is illegal.²⁸ The municipal authorities hold the city streets in trust for the purpose of public travel,²⁹ subject to the right of the state to direct the method and manner by which such trust shall be administered,³⁰ and they have the duty to keep them open and available for such purpose.³¹

Method of travel. The right to travel is not lim-

So. 163, 102 Fla. 1105—State v. Quigg, 114 So. 859, 94 Fla. 1056.

Okl.—*Corpus Juris* quoted in City of Tulsa v. Ensign, 117 P.2d 1013, 1017, 189 Okl. 507.

Tex.—Davis v. Houston, Civ.App., 264 S.W. 625.

Particular regulations generally see *infra* §§ 1762-1774.

"Regulatory power never extends to unreasonable interference with public or private rights."—Decker v. Goddard, 251 N.Y.S. 440, 444, 233 App.Div. 139.

22. Ala.—McCraney v. City of Leeds, 194 So. 151, 239 Ala. 143.

Cal.—Bay Cities Transit Co. v. City of Los Angeles, 108 P.2d 435, 16 Cal.2d 772—People v. Galena, 70 P.2d 724, 24 Cal.App.2d Supp. 770.

Ga.—Jones v. City of Moultrie, 27 S.E.2d 39, 196 Ga. 526—Williamson v. Souter, 157 S.E. 463, 172 Ga. 364—Schlesinger v. Atlanta, 129 S.E. 861, 161 Ga. 148—Ferguson v. City of Moultrie, 29 S.E.2d 786, 71 Ga. App. 15, followed in Cski v. City of Moultrie, 29 S.E.2d 791, 71 Ga. App. 23—Jewel Tea Co. v. City Council of Augusta, 200 S.E. 503, 59 Ga.App. 260.

Idaho.—Foster's, Inc., v. Boise City, 118 P.2d 721, 63 Idaho 201.

Ill.—City of Elmhurst v. Buettgen, 68 N.E.2d 278, 394 Ill. 248—City of Chicago v. Rhine, 2 N.E.2d 905, 363 Ill. 619, 105 A.L.R. 1045—People v. Wolper, 183 N.E. 451, 350 Ill. 461—Brewster v. Rockford Public Service Co., 357 Ill.App. 182.

Ind.—House-Wives League v. City of Indianapolis, 185 N.E. 511, 204 Ind. 685.

Ky.—Consolidated Coach Corporation v. Kentucky River Coach Co., 60 S.W.2d 127, 249 Ky. 65.

Mont.—Gilligan v. City of Butte, 166 P.2d 797, 118 Mont. 350.

Ohio.—State ex rel. Copland v. City of Toledo, 62 N.E.2d 256, 75 Ohio App. 378.

Okl.—*Corpus Juris* quoted in City of Tulsa v. Ensign, 117 P.2d 1013, 1017, 189 Okl. 507.

S.C.—Southern Fruit Co. v. Porter, 199 S.E. 537, 188 S.C. 422.

Utah.—Stringham v. Salt Lake City, 201 P.2d 758.

Wis.—Chicago & Milwaukee Electric Ry. Co. v. Public Service Commis-

sion of Wisconsin, 37 N.W.2d 42, 254 Wis. 551.

44 C.J. p 1026 note 38.

Persons of all ages

(1) Streets are open to persons of all ages.—Gilligan v. City of Butte, 166 P.2d 797, 118 Mont. 350.

(2) "The public includes the young and old, without necessary reference to physical or mental ability or their means of locomotion."—Reynolds v. Kinyon, Mo., 222 S.W. 476, 478.

Individual has no proprietary interest in streets, save as member of public.—City of Pineville v. Marshall, 299 S.W. 1072, 222 Ky. 4.

23. Idaho.—Foster's Inc. v. Boise, 118 P.2d 721, 63 Idaho 201.

Ill.—City of Elmhurst v. Buettgen, 68 N.E.2d 278, 394 Ill. 248.

Wis.—Chicago & Milwaukee Electric Ry. Co. v. Public Service Commission of Wisconsin, 37 N.W.2d 42, 254 Wis. 551—City of Milwaukee v. Milwaukee Electric Ry. & Light Co., 180 N.W. 339, 173 Wis. 400, 13 A.L.R. 802.

24. Okl.—*Corpus Juris* quoted in City of Tulsa v. Ensign, 117 P.2d 1013, 1017, 189 Okl. 507.

44 C.J. p 1026 note 38.

25. Idaho.—Foster's Inc., v. Boise City, 118 P.2d 721, 63 Idaho 201.

Ill.—City of Elmhurst v. Buettgen, 68 N.E.2d 278, 394 Ill. 248.

26. Or.—Cabell v. City of Cottage Grove, 130 P.2d 1013, 170 Or. 256, 144 A.L.R. 286.

27. Ariz.—Beltran v. Stroud, 160 P.2d 765, 63 Ariz. 249.

Md.—Etchison v. Frederick City, 91 A. 161, 123 Md. 283, L.R.A.1916C 561.

Prohibiting nonpublic use

Public highways and streets are held by the state in trust for all the people as a means of ordinary transportation, and in such capacity the state may altogether prohibit their nonpublic use.—Good Humor Corporation v. City of New York, 33 N.Y.S.2d 905, affirmed 36 N.Y.S.2d 85, 264 App.Div. 620, reversed on other grounds 49 N.E.2d 153, 290 N.Y. 312.

28. N.Y.—Green v. Miller, 162 N.E. 593, 249 N.Y. 38.

29. U.S.—Schneider v. State of New Jersey, (Town of Irvington), N.J., 60 S.Ct. 146, 308 U.S. 147, 84 L.Ed.

155—Young v. People of State of California, Cal., 60 S.Ct. 146, 308 U.S. 147, 84 L.Ed. 155—Snyder v. City of Milwaukee, Wis., 60 S.Ct. 146, 308 U.S. 147, 84 L.Ed. 155—Nichols v. Commonwealth of Massachusetts, Mass., 60 S.Ct. 146, 308 U.S. 147, 84 L.Ed. 155—Mickey v. Kansas City, Mo., D.C.Mo., 43 F.Supp. 739—Borchert v. City of Ranger, Tex., D.C.Tex., 42 F.Supp. 577.

Ga.—City of Dalton v. Staten, 41 S.E.2d 145, 201 Ga. 754—Jones v. City of Moultrie, 27 S.E.2d 39, 196 Ga. 526.

Ill.—City of Elmhurst v. Buettgen, 68 N.E.2d 278, 394 Ill. 248.

N.Y.—Green v. Miller, 162 N.E. 593, 249 N.Y. 88.

Ohio.—Yackee v. Village of Napoleon, 21 N.E.2d 111, 135 Ohio St. 344.

Pa.—Commonwealth v. Hessler, 15 A.2d 486, 141 Pa.Super. 421.

Tex.—City of Dallas v. Harris, Civ. App., 157 S.W.2d 710, error refused.

30. Ohio.—Yackee v. Village of Napoleon, 21 N.E.2d 111, 135 Ohio St. 344.

31. U.S.—Schneider v. State of New Jersey, (Town of Irvington), N.J., 60 S.Ct. 146, 308 U.S. 147, 84 L.Ed. 155—Young v. People of State of California, Cal., 60 S.Ct. 146, 308 U.S. 147, 84 L.Ed. 155—Snyder v. City of Milwaukee, Wis., 60 S.Ct. 146, 308 U.S. 147, 84 L.Ed. 155—Nichols v. Commonwealth of Massachusetts, Mass., 60 S.Ct. 146, 308 U.S. 147, 84 L.Ed. 155—Mickey v. Kansas City, Mo., D.C.Mo., 43 F.Supp. 739—Borchert v. City of Ranger, Tex., D.C.Tex., 42 F.Supp. 577—Kennedy v. City of Moscow, D.C.Idaho, 39 F.Supp. 26.

Cal.—People v. Uffindell, Super., 202 P.2d 874.

Ga.—Jones v. City of Moultrie, 27 S.E.2d 39, 196 Ga. 526—Ferguson v. City of Moultrie, 29 S.E.2d 786, 71 Ga.App. 15, followed in Cski v. City of Moultrie, 29 S.E.2d 791, 71 Ga.App. 23.

Ill.—City of Chicago v. Rhine, 2 N.E.2d 905, 363 Ill. 619, 105 A.L.R. 1045.

Ohio.—Yackee v. Village of Napoleon, 21 N.E.2d 111, 135 Ohio St. 344.

Pa.—Commonwealth v. Hessler, 15 A.2d 486, 141 Pa.Super. 421.

ited to any particular method, but includes the right to travel by any ordinary method of locomotion⁸² or even by an extraordinary method if it is not such as is likely to prevent a reasonably safe use of the streets by others;⁸³ it applies to the use of new classes of vehicles as they come into use, as well as to those existing when the street was opened,⁸⁴ except any new use which tends to destroy the street as a means of travel common to all.⁸⁵

Limitations on right. The right to use the streets for travel and passage is not absolute and unrestricted, but is relative,⁸⁶ and must be exercised in subordination to the general comfort and convenience and be consonant with peace and good order.⁸⁷ Thus the right of a person to use a street for travel or transportation must be exercised with due regard to the safety and use of others,⁸⁸ and in a mode consistent with the equal rights of others to use the

streets,⁸⁹ and must give way at all times to the safety of the public.⁴⁰ It is subject to temporary interruption or inconvenience occasioned by the use of the street by others for lawful purposes,⁴¹ such as by the use of adjoining property for business purposes;⁴² and is also subject to reasonable restrictions and limitations prescribed by the state or municipality,⁴³ or by the law of the road, discussed infra § 1779.

Extent of use. Subject to the limitations set forth above, the right of the public to pass over streets extends over every part thereof, from side to side and end to end;⁴⁴ it extends to any portion of the street not in actual use by some other traveler.⁴⁵

§ 1759. — By Pedestrians

a. In general

b. Regulations and restrictions

Va.—Robert v. City of Norfolk, 49 S.E.2d 697, 188 Va. 413.

Duty goes with police powers delegated to municipalities and cannot in turn be delegated or impaired.—People v. Uffindell, Cal.Super., 202 P.2d 874.

32. Ill.—Chicago v. Collins, 51 N.E. 907, 175 Ill. 445, 67 Am.S.R. 224, 49 L.R.A. 408.

Va.—Thompson v. Smith, 154 S.E. 579, 155 Va. 367, 71 A.L.R. 604.

Wis.—Chicago & Milwaukee Electric Ry. Co. v. Public Service Commission of Wisconsin, 37 N.W.2d 42, 254 Wis. 551—City of Milwaukee v. Milwaukee Electric Ry. & Light Co., 180 N.W. 339, 173 Wis. 400, 13 A.L.R. 802.

Means or method secondary

Wis.—Chicago & Milwaukee Electric Ry. Co. v. Public Service Commission of Wisconsin, 37 N.W.2d 42, 254 Wis. 551—City of Milwaukee v. Milwaukee Electric Ry. & Light Co., 180 N.W. 339, 173 Wis. 400, 13 A.L.R. 802.

33. Ill.—Chicago v. Collins, 51 N.E. 907, 175 Ill. 445, 67 Am.S.R. 224, 49 L.R.A. 408.

34. Ky.—Cartmell v. City of Maysville, 22 S.W.2d 102, 231 Ky. 666.

Wis.—Chicago & Milwaukee Electric Ry. Co. v. Public Service Commission of Wisconsin, 37 N.W.2d 42, 254 Wis. 551.

44 C.J. p 1026 note 43.

Restriction as to kinds of vehicles see infra § 1763.

Right of motor vehicles to use highways see Motor Vehicles § 10.

Extension of use

Use of city streets must be extended to meet new means of locomotion.—Decker v. Goddard, 249 N.Y.S. 381, 139 Misc. 824, reversed on

other grounds 251 N.Y.S. 440, 233 App.Div. 139

35. Ala.—Cloverdale Homes v. Cloverdale, 62 So. 712, 182 Ala. 419, 47 L.R.A.N.S., 607—Birmingham R., etc. Co. v. Smyer, 61 So. 354, 181 Ala. 121, 47 L.R.A.N.S., 597, Ann Cas.1915C 863.

36. Ill.—City of Chicago v. McKinley, 176 N.E. 261, 344 Ill. 297.

Pa.—Commonwealth v. Hessler, 15 A.2d 486, 141 Pa.Super. 421.

Public utility

As against right of municipality to permit occupancy of portion of street by equipment of public utility, right of pedestrian and vehicular traveler are not exclusive, but at all times relative and subject to common-law doctrine that one shall not use his property so as to injure that of another.—Fiechter v. City of Corbin, 71 S.W.2d 423, 254 Ky. 178.

37. U.S.—Hague v. Committee for Industrial Organization, N.J., 59 S.Ct. 954, 307 U.S. 496, 83 L.Ed. 1423.

Pa.—Commonwealth v. Hessler, 15 A.2d 486, 141 Pa.Super. 421.

38. Md.—Gitomir v. United Rys. & Electric Co. of Baltimore City, 146 A. 279, 157 Md. 464.

44 C.J. p 1027 note 45.

Abutting owner

Persons driving through public alley may not run against walls of abutting property and injure them without rendering themselves liable.—Cartmell v. City of Maysville, 22 S.W.2d 102, 231 Ky. 666.

39. N.Y.—Good Humor Corporation v. City of New York, 49 N.E.2d 153, 290 N.Y. 312.

Use by peddlers

N.Y.—Good Humor Corporation v. City of New York, supra.

40. N.Y.—Butterly v. Freeman, 188 N.Y.S. 428.

41. Idaho—Rief v. Mountain States Telephone v. Telegraph Co., 120 P.2d 823, 63 Idaho 418

Ill.—City of Chicago v. McKinley, 176 N.E. 261, 344 Ill. 297

Me.—Smith v. Preston, 71 A. 653, 104 Me. 156.

42. Me.—Smith v. Preston, supra. Use of streets for business purposes generally see infra § 1774.

43. Fla.—State ex rel Harkow v. McCarthy, 171 So. 314, 126 Fla. 433.

Ill.—City of Bloomington v. Wirrick, 45 N.E.2d 852, 381 Ill. 347, certiorari denied 63 S.Ct. 1175, 319 U.S. 756, 87 L.Ed. 1709—Chicago Park Dist. v. Lattipee, 4 N.E.2d 86, 364 Ill. 182.

N.Y.—Decker v. Goddard, 251 N.Y.S. 440, 233 App.Div. 139.

Tex.—Parsons v. City of Galveston, Civ.App., 53 S.W.2d 160, affirmed 84 S.W.2d 996, 125 Tex. 568. Regulation by state or municipality generally see infra § 1761.

44. Ala.—McCraney v. City of Leeds, 194 So. 151, 239 Ala. 143.

Ill.—City of Elmhurst v. Buettgen, 68 N.E.2d 278, 394 Ill. 248—City of Chicago v. McKinley, 176 N.E. 261, 344 Ill. 297—Gerstley v. Globe Wernicke Co., 172 N.E. 829, 340 Ill. 270—Tolman & Co. v. City of Chicago, 88 N.E. 488, 240 Ill. 268, 24 L.R.A.N.S., 97.

Utah.—Stringham v. Salt Lake City, 201 P.2d 758.

44 C.J. p 1027 note 51.

45. Tex.—J. M. Radford Grocery Co. v. City of Abilene, Civ.App., 20 S.W.2d 255, affirmed, Com.App., 34 S.W.2d 830.

a. In General

As a general rule pedestrians may use any part of the streets for purposes of travel.

In the absence of any governmental regulation restricting his rights in this respect, discussed *infra* subdivision b of this section, a pedestrian has the right to use any part of a street for the purpose of travel, consistent with the other legal uses to which it is devoted,⁴⁶ and subject to the condition that it does not unreasonably abridge or interfere with the exercise of a similar right in others;⁴⁷ this rule applies in a district which is largely, if not entirely, a manufacturing one.⁴⁸ In the absence of such restrictions a pedestrian may cross a street diagonally,⁴⁹ and is not restricted to regular crossing places, but may cross at any other place,⁵⁰ especially where the street crossing is obstructed or in a dangerous condition.⁵¹

In the absence of a sidewalk the rights of pedestrians on the paved roadway are equal to those of vehicles.⁵²

b. Regulations and Restrictions

The right of pedestrians to use the streets for travel is subject to reasonable regulation under the police power.

A regulation is valid as being within the police power of a municipality, which imposes reasonable restrictions on pedestrians in their use of the streets,⁵³ as where, in densely populated cities, or in congested parts thereof, it prohibits pedestrians from crossing streets except at regular crossing places,⁵⁴ and provides that they shall cross only at

right angles, and not diagonally.⁵⁵ A regulation giving pedestrians the right of way over vehicular traffic at certain crossings has been upheld as valid, although it changes the common-law rule giving pedestrians and vehicles equal rights.⁵⁶ However, where the regulation of pedestrian traffic is intended to be fully occupied by state legislation on the subject, which in part provides that pedestrians crossing at a point other than the crosswalk shall give the right of way to vehicles, an ordinance prohibiting pedestrians from crossing at places other than crosswalks is invalid.⁵⁷

An ordinance giving vehicles the right of way between intersections does not prohibit pedestrians from using the street between such points;⁵⁸ and an ordinance which prohibits the crossing of streets by pedestrians at other than designated crossings, and provides that the director of public service shall designate such crossings by mark, is inoperative until such designation has been made by the authorized official.⁵⁹ An ordinance making the right of pedestrians between intersections inferior to that of vehicles,⁶⁰ or giving the pedestrians the right of way at street crossings and vehicles the right of way at other points in the street,⁶¹ does not make it unlawful for a pedestrian to cross the street between intersections. An ordinance requiring pedestrians to cross street intersections in congested districts at the same time as vehicles going in the same direction, and not to use the street unnecessarily, does not prohibit pedestrians from crossing elsewhere than at street intersections.⁶² An ordinance

46. Md.—Gitomir v. United Rys. & Electric Co. of Baltimore City, 146 A. 279, 157 Md. 464.

Mo.—State ex rel. State Highway Commission v. Cox, 77 S.W.2d 116, 336 Mo. 271.

44 C.J. p 1027 note 54, p 1066 note 77. Reciprocal rights and duties see *infra* § 1778.

47. Md.—Gitomir v. United Rys. & Electric Co. of Baltimore City, 146 A. 279, 157 Md. 464.

48. N.Y.—Stanley v. Jay St. Connecting R. Co., 166 N.Y.S. 119, 100 Misc. 493, reversed on other grounds 169 N.Y.S. 530, 182 App. Div. 399.

49. La.—Weber v. Union Dev., etc., Co., 42 So. 652, 118 La. 77, 12 Ann. Cas. 1012.

Pa.—Lowers v. Zuker, 157 A. 339, 102 Pa.Super. 581.

50. Ala.—Corpus Juris cited in City of Tuscaloosa v. Fair, Ala., 167 So. 276, 232 Ala. 129.

Cal.—Broedlow v. Le Gros, 263 P. 1027, 88 Cal.App. 671.

Mont.—Carey v. Guest, 258 P. 286, 78 Mont. 415.

Pa.—Schulte v. Yellow Cab Co. of Philadelphia, 158 A. 184, 104 Pa. Super. 130—Lowers v. Zuker, 157 A. 339, 102 Pa.Super. 581.

44 C.J. p 1027 note 57. Pedestrian leaving sidewalk as negligence see *infra* § 1789.

Grass plot or parkway

Ala.—City of Tuscaloosa v. Fair, Ala., 167 So. 276, 232 Ala. 129.

51. Pa.—Watts v. Plymouth, 99 A. 470, 255 Pa. 185, 3 A.L.R. 1110.

52. Pa.—King v. Brillhart, 114 A. 515, 271 Pa. 301—Petrie v. E. A. Myers Co., 112 A. 240, 269 Pa. 134.

Use of sidewalks see *infra* §§ 1775, 1776.

53. Ill.—Benison v. Dembinsky, 241 Ill.App. 530.

44 C.J. p 1027 note 61. Governmental regulations and restrictions generally see *infra* § 1761.

Regulation of loitering see *supra* § 275.

Violation as contributory negligence see *infra* § 1788.

54. Cal.—Raymond v. Hill, 143 P. 743, 168 Cal. 473.

44 C.J. p 1027 note 62.

55. Ill.—Benison v. Dembinsky, 241 Ill.App. 530.

56. N.Y.—Castro v. New York Rys. Corporation, 231 N.Y.S. 649, 224 App.Div. 623.

57. Cal.—Pipoly v. Benson, Cal., 125 P.2d 482, 20 Cal.2d 366—Hearn v. Gunther, 134 P.2d 3, 57 Cal.App. 2d 82—Ryan v. San Diego Electric Ry. Co., 126 P.2d 401, 52 Cal.App. 2d 460.

58. Wash.—Collins v. Nelson, 191 P. 819, 112 Wash. 71.

59. Ohio.—Whitaker v. Luebbering, 128 N.E. 76, 101 Ohio St. 292.

60. Va.—Green v. Ruffin, 125 S.E. 742, 127 S.E. 486, 141 Va. 628.

44 C.J. p 1069 note 98.

61. Wash.—Wickman v. Lundy, 206 P. 842, 120 Wash. 69—Hoffman v. Hansen, 203 P. 53, 118 Wash. 73.

62. Ind.—Craft v. Stone, 124 N.E. 473, 74 Ind.App. 71.

pertaining to the rights and duties of pedestrians in their use of the streets and prohibiting jaywalking was held not to prohibit the use of the streets by pedestrians, even though sidewalks are maintained specifically for their benefit.⁶³

§ 1760. — By Common Carriers

A common carrier for hire has no inherent or vested right to use the streets.

The right to operate vehicles on the streets of a municipality as a common carrier for hire is not an inherent or vested right,⁶⁴ but is in the nature of a special right or privilege which may be exercised only by license or permission of the state,⁶⁵ or of the municipality, under its delegated powers,⁶⁶ and an individual conducting such a business without such permission may be deprived of such right without compensation, as long as his right to pass over

streets and do anything incident to their use for purposes of travel is not interfered with.⁶⁷

As a mere privilege, the use of streets by common carriers is subject to reasonable control and regulation,⁶⁸ and, since such a right or privilege is special, unusual, and extraordinary, the power to regulate and restrict such use of the streets is broader than in respect of their use by the general public.⁶⁹ The state or municipality, within the limits of its delegated powers, may determine to what extent or on what streets such an extraordinary use as encroaches on the paramount rights of the public at large will be permitted,⁷⁰ and it may discriminate against those making such use of the streets,⁷¹ and may either grant or withhold the right or privilege of operating vehicles for such a purpose,⁷² and may grant it to some and refuse it to others,⁷³

63. La.—Neyrey v. Maillet, App., 21 So.2d 158.

64. Ga.—City of Savannah v Knight, 157 S.E. 309, 172 Ga. 371, 73 A.L.R. 1289.

Ky.—Bell Bros. Trucking Co. v. Kelley, 127 S.W. 831, 277 Ky. 781.

Me.—Chapman v. City of Portland, 160 A. 913, 131 Me. 242.

Minn.—State v. Palmer, 3 N.W.2d 666, 212 Minn. 388.

44 C.J. p 1028 note 67.

Ordinary use distinguished

"The right of a citizen to travel upon the highway and transport his property thereon, in the ordinary course of life and business, differs radically and obviously from that of one who makes the highway his place of business and uses it for private gain, in the running of a stage coach or omnibus. The former is the usual and ordinary right of a citizen, a common right, a right common to all, while the latter is special, unusual and extraordinary. As to the former, the extent of legislative power is that of regulation; but, as to the latter, its power is broader. The right may be wholly denied, or it may be permitted to some and denied to others, because of its extraordinary nature. This distinction, elementary and fundamental in character, is recognized by all the authorities."

Fla.—City of Coral Gables v. City of Miami, 190 So. 427, 429, 138 Fla. 881—State v. Quigg, 114 So. 859, 863, 94 Fla. 1056.

W.Va.—Ex parte Dickey, 85 S.E. 781, 782, 76 W.Va. 576, 579, L.R.A.1915F 840.

Superior right of citizen

Inherent right of citizen to use highways, including streets, is in degree superior to right of common carrier.—Florida Motor Lines v. Ward, 137 So. 163, 102 Fla. 1105.

65. U.S.—People's Transit Co. v. Henshaw, CCA Okl., 20 F.2d 87, certiorari denied 48 S.Ct. 115, 275 U.S. 553, 72 L.Ed. 422.

Ala.—City of Mobile v. Farrell, 158 So. 539, 229 Ala. 582, followed in City of Mobile v. Nelson, 158 So. 543, 229 Ala. 587 and City of Mobile v. Mouraites, 158 So. 543, 229 Ala. 588.

Fla.—Florida Motor Lines v. Ward, 137 So. 163, 102 Fla. 1105.

Ky.—Bell Bros. Trucking Co. v. Kelley, 127 S.W.2d 831, 277 Ky. 781—Consolidated Coach Corporation v. Kentucky River Coach Co., 60 S.W.2d 127, 249 Ky. 65.

NY—Corpus Juris cited in Village of Bronxville v. Maltbie, 30 N.E.2d 475, 478, 284 N.Y. 206

66. Ky.—Bell Bros. Trucking Co. v. Kelley, 127 S.W.2d 831, 277 Ky. 781—Consolidated Coach Corporation v. Kentucky River Coach Co., 60 S.W.2d 127, 249 Ky. 65.

NY—Corpus Juris cited in Village of Bronxville v. Maltbie, 30 N.E.2d 475, 478, 284 N.Y. 206.

44 C.J. p 1028 note 69—12 C.J. p 917 note 12.

License of vehicles for hire or profit generally see Licenses § 10.

67. Ind.—Frick v. Gary, 135 N.E. 346, 192 Ind. 76.

68. Minn.—State v. Palmer, 3 N.W.2d 666, 212 Minn. 388—Schultz v. City of Duluth, 203 N.W. 449, 163 Minn. 65.

NY.—People v. Welsberger, 14 N.Y.S.2d 297, 171 Misc. 970, reversed on other grounds 24 N.E.2d 721, 282 N.Y. 1.

Ohio.—Motor Transport & Truck Co. v. Public Utilities Commission of Ohio, 181 N.E. 665, 125 Ohio St. 374, followed in Bradley, D. B. A. Wolverine Motor Freight Lines, v. Public Utilities Commission of Ohio, 181 N.E. 668, 125 Ohio St. 381, affirmed Bradley v. Public

Utilities Commission of Ohio, 53 S.Ct. 577, 289 U.S. 92, 77 L.Ed. 1053, 85 A.L.R. 1131.

Tenn.—City Transp. Co. v. Pharr, 209 S.W.2d 15, 186 Tenn. 217.

Wyo.—Weaver v. Public Service Commission of Wyoming, 278 P. 542, 40 Wyo. 462.

Routes may be established

Mass.—Commonwealth v. Stodder, 2 Cush 562, 48 Am.D. 679.

N.M.—Whitfield v. City Bus Lines, 187 P.2d 947, 51 N.M. 433

69. Fla.—Florida Motor Lines v. Ward, 137 So. 163, 102 Fla. 1105

Ky.—Bell Bros. Trucking Co. v. Kelley, 127 S.W.2d 831, 277 Ky. 781, 44 C.J. p 1028 note 71.

Regulation of use by public service corporation generally see supra § 1692.

70. Tex.—Parsons v. City of Galveston, 84 S.W.2d 996, 125 Tex. 568.

44 C.J. p 1028 note 72

71. Fla.—City of Coral Gables v. City of Miami, 190 So. 427, 138 Fla. 881.

72. Fla.—Florida Motor Lines v. Ward, 137 So. 163, 102 Fla. 1105

Ga.—City of Savannah v. Knight, 157 S.E. 309, 172 Ga. 371, 73 A.L.R. 1289

Minn.—State v. Palmer, 3 N.W.2d 666, 212 Minn. 388—Schultz v. City of Duluth, 203 N.W. 449, 163 Minn. 65.

N.M.—Whitfield v. City Bus Lines, N.M., 187 P.2d 947, 51 N.M. 433.

Wyo.—Weaver v. Public Service Commission of Wyoming, 278 P. 542, 40 Wyo. 462.

44 C.J. p 1028 note 73.

Grant of right to use streets generally see supra §§ 1716-1743.

73. Fla.—Florida Motor Lines v. Ward, 137 So. 163, 102 Fla. 1105—State v. Quigg, 114 So. 859, 94 Fla. 1056.

Minn.—State v. Palmer, 3 N.W.2d

without violating the constitution,⁷⁴ except that a license or permission cannot be granted to some and refused to others who are willing to comply with the terms and conditions of the regulation providing for such license or permission.⁷⁵ However, the power of a municipality to regulate its streets does not authorize it to prohibit the use of all of its streets by carriers for hire;⁷⁶ and it has been held that a grant of authority to a municipal corporation to license persons operating as common carriers on the streets is an implied grant to use the streets for the purposes of common carriers.⁷⁷

Conditions. In granting the right to make such use of the public streets, the municipality may impose such reasonable terms and conditions as it deems fair and just,⁷⁸ or as the legislature may prescribe,⁷⁹ and it may exact reasonable compensation.⁸⁰ Individuals desiring to avail themselves of such privilege must comply with such terms and conditions whether they are reasonable or unreasonable.⁸¹ Thus a municipality has the right within reasonable limits to prescribe the nature of the securities to be given by those operating vehicles for hire on its public streets;⁸² and an ordinance requiring an

indemnity bond, and giving persons damaged through the carrier's fault a right of action against the surety, must be read into the bond, and fixes the rights, as well as the obligations, of its surety.⁸³ It has been held that a bond so given is not an original obligation or indemnity contract, but is merely a collateral undertaking.⁸⁴

§ 1761. Regulation of Use in General

- a. In general
- b. By municipality
- c. Construction of regulations in general

a. In General

The use of the streets for travel and transportation is generally subject to reasonable regulation by the state.

The right to use streets for purposes of travel and transportation is not absolute and unrestricted, but is subject to such reasonable regulations as to the traffic thereon or the manner of using them as the state, in the exercise of its police power, may impose for the safety, convenience, and welfare of the public,⁸⁵ since the regulation of such traffic is

- 666, 212 Minn. 388—*Schultz v. City of Duluth*, 203 N.W. 449, 163 Minn. 65.
- 44 C.J. p 1028 note 74.
74. Ga.—*Schlesinger v. Atlanta*, 129 S.E. 861, 161 Ga. 148.
- Va.—*Taylor v. Smith*, 124 S.E. 259, 140 Va. 217.
- Regulation of common carriers under due process clause generally see Constitutional Law § 698.
75. Ga.—*Schlesinger v. Atlanta*, 129 S.E. 861, 161 Ga. 148.
76. Tex.—*Fort Worth v. Lillard*, 294 S.W. 831, 116 Tex. 509—*Arlington v. Lillard*, 294 S.W. 829, 116 Tex. 446.
77. W.Va.—*Ex parte Dickey*, 85 S.E. 781, 76 W.Va. 576, L.R.A.1915F 840.
78. Ga.—*Schlesinger v. Atlanta*, 129 S.E. 861, 161 Ga. 148.
- 44 C.J. p 1028 note 80.
- Conditions to operation of public service motor vehicles see Motor Vehicles §§ 109-118.
- Power to impose conditions generally see supra § 1721.
79. Ill.—*Weksler v. Collins*, 147 N.E. 797, 317 Ill. 132.
80. Ky.—*Town of Fleming v. Wright*, 7 S.W.2d 832, 225 Ky. 129.
- Rental, tolls, or fees on grant of right to use streets generally see supra § 1737.
- Cost of construction and maintenance**
- Power of state to compel users of highways to contribute to cost of

- construction and maintenance of highways may be delegated in part to municipality by appropriate legislation.
- U.S.—*Sprout v. City of South Bend*, Ind., 48 S.Ct. 502, 277 U.S. 163, 72 L.Ed 833, 62 A.L.R. 45.
- N.Y.—*People, on Complaint of Conklin, v. Madden*, 9 N.Y.S.2d 64, 169 Misc. 745.
81. Ga.—*Schlesinger v. Atlanta*, 129 S.E. 861, 161 Ga. 148.
82. Cal.—*Kruger v. California Highway Indemn. Exch.*, 258 P. 602, 201 Cal. 672—*Severns v. California Highway Indemnity Exchange*, 280 P. 213, 100 Cal.App. 384.
- Bond or insurance policy**
- Ordinance requiring operator of vehicle for hire on public streets to protect public by bond or insurance policy is not unreasonable.—*Severns v. California Highway Indemnity Exchange*, supra.
83. La.—*Horsthemke v. National Surety Co.*, 91 So. 544, 151 La. 55.
84. La.—*Hopkins v. National Surety Co.*, 103 So. 314, 157 La. 1035.
85. U.S.—*Jamison v. State of Texas*, 63 S.Ct. 669, 318 U.S. 413, 87 L.Ed. 869—*People's Transit Co. v. Henshaw*, C.C.A.Okla., 20 F.2d 87, certiorari denied 48 S.Ct. 115, 275 U.S. 553, 72 L.Ed. 422.
- Cal.—*Bay Cities Transit Co. v. City of Los Angeles*, 108 P.2d 435, 16 Cal.2d 772—*Key System Transit Co. v. City of Oakland*, 13 P.2d 979,

- 124 Cal.App. 733—*Ex parte Meyers*, 94 P. 870, 7 Cal.App. 528.
- Fla.—*State v. Quigg*, 114 So. 859, 94 Fla. 1056.
- Ga.—*Schlesinger v. Atlanta*, 129 S.E. 861, 161 Ga. 148—*Ferguson v. City of Moultrie*, 29 S.E.2d 786, 71 Ga.App. 15, followed in *Calki v. City of Moultrie*, 29 S.E.2d 791, 71 Ga.App. 23.
- Idaho.—*Corpus Juris cited in Foster's, Inc. v. Boise City*, 118 P.2d 721, 725, 63 Idaho 201.
- Ill.—*City of Elmhurst v. Buettgen*, 68 N.E.2d 278, 394 Ill. 248.
- N.Y.—*People v. Finkelstein*, 9 N.Y.S.2d 941, 170 Misc. 188—*People, on Complaint of Mullaly, v. Banks*, 6 N.Y.S.2d 41, 168 Misc. 515—*Hinman v. Clark*, 100 N.Y.S. 1068, 51 Misc. 252, affirmed 105 N.Y.S. 725, 121 App.Div. 105, affirmed 86 N.E. 1125, 193 N.Y. 640.
- Okl.—*Ex parte Duncan*, 65 P.2d 1015, 179 Okl. 355.
- R.I.—*State v. Goldberg*, 1 A.2d 101, 61 R.I. 461.
- 44 C.J. p 1029 note 89.
- Exclusive power**
- N.C.—*Suddreth v. City of Charlotte*, 27 S.E.2d 650, 223 N.C. 630.
- Streets held "highways" within statute regulating use of highways.**
- Guinn v. Kemp*, 136 So. 764, 18 La. App. 8.
- State highway commission**
- The jurisdiction over city streets, which have become part of state highway system, vested in the state highway commission was held not

not merely a municipal affair.⁸⁶ Regulations which have for their purpose the keeping open of public streets for travel and transportation are for a proper legislative purpose and should be upheld,⁸⁷ unless adjudged arbitrary or discriminatory,⁸⁸ or unduly burdensome or unreasonable.⁸⁹ State traffic regulations are sometimes made inapplicable to specific municipalities adopting ordinances regulating traffic within the municipal limits.⁹⁰ It has been held that the power of appropriate public authority over streets is not confined to their use for the sole purpose of travel, but extends to the use thereof for many other purposes required by public convenience.⁹¹

b. By Municipality

Power to regulate the use of the streets as highways is generally conferred on municipal corporations.

The power of a municipal corporation to impose restrictions on the public for the use of streets must be found in some legislative enactment by which such power is conferred on the municipality,⁹² expressly or impliedly,⁹³ since such regulation is not a municipal affair.⁹⁴ However, the power of the legislature to regulate the use of city streets as highways may be, and frequently has been, delegated to municipalities,⁹⁵ or specified departments thereof,⁹⁶ and a municipal corporation, under its delegated police power and power to control and

to embrace the power to impose traffic regulations—*Cabell v. City of Cottage Grove*, 130 P.2d 1013, 170 Or. 256.

General highway traffic laws of state applied without modification to traffic in unincorporated village—*Cantrell v. Roberts*, La.App., 12 So. 2d 491.

Revision of traffic laws

Highway Traffic Regulation Act was held a general and systematic revision of all traffic laws and repeals all preëxisting and irreconcilable city ordinances pertaining to the same subject matter or classification.—*LeVasseur v. Minneapolis St. Ry. Co.*, 21 N.W.2d 522, 221 Minn. 205.

86. Cal.—*Ex parte Daniels*, 192 P. 442, 183 Cal. 636, 639, 21 A.L.R. 1172.

44 C.J. p 1029 note 90.

87. Cal.—*People v. Uffindell*, Super., 202 P.2d 874.

Preservation of public right of travel in streets against annoyance of any kind is a proper subject of legislative action.—*Commonwealth v. Nichols*, 18 N.E.2d 166, 301 Mass. 584, reversed on other grounds *Nichols v. Com of Mass.*, 60 S.Ct. 146, 308 U.S. 147, 84 L.Ed. 155.

88. Cal.—*People v. Uffindell*, Super., 202 P.2d 874.

89. Cal.—*People v. Uffindell*, supra.

90. La.—*Stortz v. New Orleans Public Service*, App. 141 So. 814.

91. N.Y.—*Gilsey Buildings v. Incorporated Village of Great Neck Plaza*, 11 N.Y.S.2d 694, 174 Misc. 945, affirmed 16 N.Y.S.2d 832, 258 App.Div. 901.

92. Ill.—*City of Bloomington v. Wirrick*, 45 N.E.2d 852, 381 Ill. 347, certiorari denied 63 S.Ct. 1175, 819 U.S. 756, 87 L.Ed. 1709.

Ky.—*City of Ashland v. Ashland Supply Co.*, 7 S.W.2d 833, 275 Ky. 123.

Wyo.—*Western Auto Transports v. City of Cheyenne*, 120 P.2d 590, 57 Wyo. 351.

Delegation of state's police power

(1) The authority of the municipality is based on a delegation of the state's police power.

Conn.—*Cassidy v. City of Waterbury*, 33 A.2d 142, 130 Conn. 237.
N.Y.—*City of Buffalo v. Stevenson*, 100 N.E. 798, 207 N.Y. 258.

(2) Police powers of a municipality are not implied from sovereignty imparted for governmental purposes but are conferred by statute, and their exercise, where matters of common right are involved, are subject to strict construction.—*M. H. Rhodes, Inc. v. City of Raleigh*, 9 S.E.2d 389, 217 N.C. 627, 130 A.L.R. 311.

93. Pa.—*Commonwealth v. Kennedy*, 195 A. 770, 129 Pa.Super. 149.

94. Cal.—*Ex parte Daniels*, 192 P. 442, 183 Cal. 636, 21 A.L.R. 1172 —*Sandstoe v. Atchison, T. & S. F. Ry. Co.*, 82 P.2d 216, 28 Cal.App.2d 215—*Lossman v. City of Stockton*, 44 P.2d 397, 6 Cal.App.2d 324—*Key System Transit Co. v. City of Oakland*, 13 P.2d 979, 124 Cal.App. 733.

95. U.S.—*People's Transit Co. v. Henshaw*, C.C.A.Okl., 20 F.2d 87, certiorari denied 48 S.Ct. 115, 275 U.S. 553, 72 L.Ed. 422.

Ark.—*Merchants' Transfer & Warehouse Co. v. Gates*, 21 S.W.2d 406, 180 Ark. 96.

Cal.—*Key System Transit Co. v. City of Oakland*, 13 P.2d 979, 124 Cal. App. 733.

Fla.—*State v. Quigg*, 114 So. 859, 94 Fla. 1056.

Ga.—*Gardner v. City of Brunswick*, 28 S.E.2d 135, 197 Ga. 135.

Idaho.—*Foster's, Inc. v. Boise City*, 118 P.2d 721, 63 Idaho 201.

Ill.—*Chicago Park Dist. v. Lattippee*, 4 N.E.2d 86, 364 Ill. 182.

Minn.—*State v. Palmer*, 3 N.W.2d 666, 212 Minn. 388.

Miss.—*Meridian Coca-Cola Co. v. Watson*, 134 So. 824, 161 Miss. 108.

Mont.—*Carey v. Guest*, 258 P. 236, 78 Mont. 415.

N.J.—*Thomas v. Casey*, 1 A.2d 866,

121 N.J.Law 185, affirmed 9 A.2d 294, 123 N.J.Law 447—*Garneau v. Eggers*, 174 A. 250, 113 N.J.Law 245.

N.Y.—*Good Humor Corporation v. City of New York*, 49 N.E.2d 153, 290 N.Y. 312—*Cherubino v. Meenan*, 171 N.E. 708, 253 N.Y. 462—*Decker v. Goddard*, 251 N.Y.S. 440, 233 App.Div. 139.

Okl.—*Ex parte Duncan*, 65 P.2d 1015, 179 Okl. 355.

R.I.—*State v. Goldberg*, 1 A.2d 101, 61 R.I. 461.

S.C.—*Southern Fruit Co. v. Porter*, 199 S.E. 537, 188 S.C. 422.

Utah.—*Slater v. Salt Lake City*, 206 P.2d 153.

Wyo.—*Western Auto Transports v. City of Cheyenne*, 120 P.2d 590, 57 Wyo. 351.

Statutory authority held not repealed by implication—*City of Springfield v. Stevens*, Mo., 216 S.W. 2d 450.

Effect of later statutes

Statutes giving cities the power to regulate the use of their streets were held not limited by later enactments having to do with motor vehicles and motor vehicular traffic.—*State ex rel. Dreyer v. Brekke*, N. D., 28 N.W.2d 598.

96. N.Y.—*Cherubino v. Meenan*, 171 N.E. 708, 253 N.Y. 462.

Police commissioner

(1) Police commissioner was held to have power to make traffic regulations.—*People v. Kearns*, 5 N.Y.S. 2d 590, 168 Misc. 264—*People v. Lewis*, 3 N.Y.S.2d 508, 167 Misc. 139.

(2) Charter provision vesting in police commissioner power to regulate movement of vehicular and pedestrian traffic held valid.—*Schwartzberg v. Wallander*, 73 N.Y. S.2d 675, 190 Misc. 236.

(3) Such a provision was held not an unconstitutional "delegation of legislative power" to the police commissioner, an administrative officer.—*Cherubino v. Meenan*, 171 N.E. 708, 253 N.Y. 462—*People v. Berkowitz*, 39 N.Y.S.2d 236.

regulate its streets and other public places, as discussed supra § 1687 may, by ordinance or local law, direct travel on its streets, having due regard for the convenience and safety of the public,⁹⁷ regu-

late the conduct of those using the streets to the end that they may be kept open for the use of the public,⁹⁸ and impose reasonable traffic regulations on such use of its streets and public places.⁹⁹ The

Public safety commissioner

Traffic law empowering city authorities to make additional traffic regulations does not give commissioner of public safety any more power than that of administering law enacted by common council.—*People v. Sullivan*, 238 N.Y.S. 253, 135 Misc. 705.

Traffic commission

(1) Under statute conferring on traffic commission full and exclusive legislative authority to adopt and publish traffic regulations, the authority is both administrative and quasi-legislative, with rules and regulations having the force of ordinances when ratified and approved by a general or specific ordinance of a city council.—*Houck v. Minton*, Tenn., 212 S.W.2d 891.

(2) Under act giving traffic commission authority to adopt traffic regulations, commission's rule whereby certain street was closed to westbound traffic was not invalid for want of notice to complainant who owned property abutting on street.—*Houck v. Minton*, supra.

Parkways

Term "streets, squares and avenues" in provision authorizing police commissioner to regulate traffic thereon was held used in a generic sense and to include every type of public way used for vehicular traffic, including "parkways."—*People*, on Complaint of McGuire v. Perry, 23 N.Y.S.2d 769.

Concurrent jurisdiction

Police commissioner and the park commissioner have concurrent jurisdiction over regulation of vehicular traffic on parkways within the city.—*People*, on Complaint of McGuire, v. Perry, supra.

Invalid local law

Statute empowering police commissioner appointed by governor to make traffic rules for specified city was held "local law" within constitutional inhibition.—*State v. Stewart*, 137 A. 39, 152 Md. 419.

97. Cal.—*Ex parte Meyers*, 94 P. 870, 7 Cal.App. 528.

Fla.—*Douglass v. Sapotnick*, 171 So. 765, 126 Fla. 753, followed in 173 So. 326, 131 Fla. 246—*State ex rel. Harkow v. McCarthy*, 171 So. 314, 126 Fla. 433.

Ind.—*Poparad v. Indianapolis Railways*, 39 N.E.2d 781, 111 Ind.App. 814.

Iowa.—*Fisher v. Cedar Rapids, etc., R. Co.*, 157 N.W. 860, 177 Iowa 406.

Neb.—*State v. Hind*, 10 N.W.2d 258, 143 Neb. 479.

N.Y.—*Good Humor Corporation v. City of New York*, 49 N.E.2d 153, 290 N.Y. 312—*Dinino v. Valentine*, 54 N.Y.S.2d 800.

Tex.—*Dallas Ry. & Terminal Co. v. Bankston*, Com.App., 51 S.W.2d 304—*City of Galveston v. Galveston County*, Civ.App., 159 S.W.2d 976, error refused.

Main objective of statutory grant of power to cities to regulate the use of streets by vehicles is the protection and safety of the citizens.—*Miller v. City of Georgetown*, 191 S.W.2d 403, 301 Ky. 241.

Traffic congestion

Regulation and prevention of traffic congestion are matters affecting safety and welfare of city, and, hence, are within legislative power of municipality to regulate by ordinance.—*McKelley v. City of Murfreesboro*, 36 S.W.2d 99, 162 Tenn. 304.

Approval of commission rules

Council had authority formally to approve traffic rules adopted by traffic commission by reference and prescribe a penalty for their violation, but they must be in aid of general law or ordinances enacted in interest of public safety, and, when ratified, and a penalty was fixed for their violation, they derived their force from the general ordinance of the municipality.—*Houck v. Minton*, Tenn., 212 S.W.2d 891.

98. U.S.—*Young v. People of State of California*, Cal., 60 S.Ct. 146, 308 U.S. 147, 84 L.Ed. 155—*Nichols v. Commonwealth of Massachusetts*, Mass., 60 S.Ct. 146, 308 U.S. 147, 84 L.Ed. 155—*Schneider v. State of New Jersey*, Town of Irvington, N.J., 60 S.Ct. 146, 308 U.S. 147, 84 L.Ed. 155—*Snyder v. City of Milwaukee*, Wis., 60 S.Ct. 146, 308 U.S. 147, 84 L.Ed. 155.

Okl.—*Greiner v. City of Yale*, 139 P.2d 606, 77 Okl.Cr. 135—*Ex parte Walrod*, 120 P.2d 783, 73 Okl. 299—*Herrington v. City of Pryor Creek*, 110 P.2d 906, 188 Okl. 483.

Tex.—*City of Dallas v. Harris*, Civ. App., 157 S.W.2d 710, error refused.

Va.—*Robert v. City of Norfolk*, 49 S.E.2d 697, 188 Va. 413.

99. Ala.—*Jackson v. City of Prichard*, 137 So. 469, 24 Ala.App. 532.

Cal.—*Ex parte Bodkin*, 194 P.2d 588, 86 Cal.App.2d 208—*Ex parte Meyers*, 94 P. 870, 7 Cal.App. 528.

Conn.—*Cassidy v. City of Waterbury*, 33 A.2d 142, 130 Conn. 237.

Fla.—*Ocean Beach Hotel Co. v. Town of Atlantic Beach*, 2 So.2d 879, 147 Fla. 445—*Town of At-*

lantic Beach v. Oosterhoudt, 172 So. 687, 127 Fla. 159—*Douglas v. Sapotnick*, 171 So. 765, 126 Fla. 753, followed in 173 So. 326, 131 Fla. 246—*State ex rel. Harkow v. McCarthy*, 171 So. 314, 126 Fla. 433.

Ga.—*Gardner v. City of Brunswick*, 38 S.E.2d 135, 197 Ga. 167—*Howell v. Board of Com'rs for City of Quitman*, 149 S.E. 779, 169 Ga. 74.

Ill.—*City of Chicago v. McKinley*, 176 N.E. 261, 344 Ill. 297—*Haggengos v. City of Chicago*, 168 N.E. 661, 336 Ill. 573—*Huyler v. City of Chicago*, 62 N.E.2d 574, 326 Ill. App. 555.

Ind.—*Poparad v. Indianapolis Railways*, 39 N.E.2d 781, 111 Ind.App. 314.

Ky.—*Bell Bros. Trucking Co. v. Kelley*, 127 S.W.2d 831, 277 Ky. 781—*Lindig v. Breen*, 103 S.W.2d 941, 268 Ky. 153—*City of Pineville v. Marshall*, 299 S.W. 1072, 222 Ky. 4—*Commonwealth v. Nolan*, 224 S.W. 506, 189 Ky. 34, 11 A.L.R. 202.

La.—*City of Shreveport v. Breazeale*, 187 So. 33, 191 La. 1088.

Minn.—*Automatic Signal Advertising Co. v. Babcock*, 208 N.W. 132, 166 Minn. 416.

Mont.—*Carey v. Guest*, 258 P. 236, 78 Mont. 415.

Neb.—*State v. Hind*, 10 N.W.2d 258, 143 Neb. 479.

N.Y.—*Cherubino v. Meenan*, 171 N.E. 708, 253 N.Y. 462—*City of Buffalo v. Stevenson*, 100 N.E. 798, 800, 207 N.Y. 258—*Anguiera v. Brooklyn & Queens Transit Corporation*, 31 N.Y.S.2d 168, 263 App. Div. 43.

Ohio.—*Tolliver v. City of Newark*, 62 N.E.2d 357, 145 Ohio St. 517, 161 A.L.R. 1391—*Hoyne v. Wurster*, App., 63 N.E.2d 229—*City of Cincinnati v. Baumgartner*, 25 Ohio N.P.N.S., 20.

Okl.—*Herrington v. City of Pryor Creek*, 110 P.2d 906, 188 Okl. 483—*Ex parte Duncan*, 65 P.2d 1015, 179 Okl. 355.

Pa.—*Arronson v. City of Philadelphia*, 16 Pa.Dist. & Co. 427—*Commonwealth v. Fleming*, 8 Pa.Dist. & Co. 708.

Tenn.—*Stell v. City of Chattanooga*, 152 S.W.2d 624, 177 Tenn. 670.

Tex.—*Harper v. City of Wichita Falls*, Civ.App., 105 S.W.2d 743, error refused—*City of Ballinger v. Nichols*, Civ.App., 297 S.W. 480.

Wash.—*Stewart v. Nelson*, 23 P.2d 412, 173 Wash. 414, affirmed 25 P.2d 1119, 173 Wash. 414.

44 C.J. p 1029 note 94.

Street not on city map

Tenn.—*City of Galveston v. Galveston*

power so to regulate implies the power to prohibit, except on observance of authorized regulation.¹

Limitation of municipal power. The municipality has only such powers to regulate the use of the streets as are delegated to it.² Such power is subject to constitutional or statutory restrictions or limitations,³ such as a statutory provision that its traffic regulations shall not materially interfere with the general efficiency of a utility authorized by the public utilities commission.⁴ Its power to regulate the use of its thoroughfares for ordinary and

usual purposes should be sparingly exercised,⁵ and only when necessary in the public interest.⁶ Such regulations must be reasonable,⁷ and not arbitrary, oppressive, or discriminatory;⁸ they must operate with equality,⁹ and have some tendency to accomplish the object in view.¹⁰ The municipality, in regulating the right to travel, may not unreasonably or arbitrarily prohibit or restrict it,¹¹ or deprive the public of the right to use the streets for travel by any ordinary or reasonable method of locomotion;¹² nor may it permit one, and refuse another of like qualification and under like conditions, to exercise

County, Civ.App., 159 S.W.2d 976, error refused

Effect of federal aid

Contribution from federal government, under Federal Aid Road Act, to cost of public highway running through city was held not, in absence of legislation by congress, to prevent city from adopting ordinance regulating traffic on such highway for public safety and welfare—Garneau v. Eggers, 174 A. 250, 113 N.J.Law 245.

Review by courts

(1) Power granted to cities to control use of streets is an administrative one which is subject to review by the courts unless otherwise prohibited by statute—Moore v. Cox, Tex.Civ.App., 215 SW 2d 666

(2) Courts may inquire as to reasonableness of exercise of power conferred on city to regulate use of streets, precise manner of exercise of power not having been specified—Haggenjos v. City of Chicago, 168 N.E. 661, 336 Ill. 573.

(3) Determination of city, council as to means for removing causes of traffic congestion cannot be disturbed, unless means adopted are unreasonable.—City of Chicago v. McKinley, 176 N.E. 261, 344 Ill. 297.

Filing ordinance with secretary of state

City's clerk's failure to file certified copy of amendatory traffic ordinance with secretary of state was held not to invalidate ordinance passed after repeal of highway law provision for filing of official copies of local ordinances with secretary of state, where basic ordinance, although directing filing of copy of ordinance, was silent as to filing of amendments.—People v. Merrill, 282 N.Y.S. 809, 156 Misc. 537.

1. Ill.—Haggenjos v. City of Chicago, 168 N.E. 661, 336 Ill. 573.

2. N.Y.—Good Humor Corporation v. City of New York, 33 N.Y.S.2d 905, affirmed 36 N.Y.S.2d 85, 264 App.Div. 620, reversed on other grounds 49 N.E.2d 153, 290 N.Y. 312—Decker v. Goddard, 251 N.Y. S. 440, 233 App.Div. 139.

Okl.—Ex parte Duncan, 65 P.2d 1015, 179 Okl. 355.

Wyo.—Blumenthal v. City of Cheyenne, 186 P.2d 556—Western Auto Transports v. City of Cheyenne, 120 P.2d 590, 57 Wyo. 351.

Special limitations unauthorized by statute cannot be imposed—Titus v. Stouffer, Ohio App., 40 N.E.2d 178.

Use by intoxicated persons

State must determine whether use of streets by intoxicated person is of general statewide concern or of purely municipal concern—Clayton v. State, 297 P. 1037, 38 Ariz. 135, rehearing denied 300 P. 1010, 38 Ariz. 466, followed in Price v. State, 3 P. 2d 1114, 39 Ariz. 59.

3. U.S.—Schneider v. State of New Jersey, Town of Irvington, N.J., 60 S.Ct. 146, 308 U.S. 147, 84 L.Ed. 155—Young v. People of State of California, Cal., 60 S.Ct. 146, 308 U.S. 147, 84 L.Ed. 155—Snyder v. City of Milwaukee, Wis., 60 S.Ct. 146, 308 U.S. 147, 84 L.Ed. 155—Nichols v. Commonwealth of Massachusetts, Mass., 60 S.Ct. 146, 308 U.S. 147, 84 L.Ed. 155.

Cal.—Ex parte Bodkin, 194 P.2d 588, 86 Cal.App.2d 208.

Minn.—Automatic Signal Advertising Co. v. Babcock, 208 N.W. 132, 166 Minn. 416.

N.Y.—People v. Gorman, 231 N.Y.S. 85, 133 Misc. 161.

Okl.—Ex parte Walrod, 120 P.2d 783, 73 Okl.Cr. 299.

Tex.—Miks v. Leath, Civ.App., 26 S.W.2d 726.

Va.—Robert v. City of Norfolk, 49 S.E.2d 697, 188 Va. 413.

4. Ohio.—Lorain St. R. Co. v. Public Utilities Commn., 148 N.E. 577, 113 Ohio St. 68.

44 C.J. p 1029 note 1.

Regulation of public utilities generally see supra § 1692.

5. Mich.—People of City of Dearborn v. Dmytro, 273 N.W. 400, 280 Mich. 82, 111 A.L.R. 128—Melconian v. City of Grand Rapids, 188 N.W. 521, 218 Mich. 397.

6. Mich.—People of City of Dearborn v. Dmytro, 273 N.W. 400, 280 Mich. 82, 111 A.L.R. 128—Melconian

an v. City of Grand Rapids, 188 N.W. 521, 218 Mich. 397.

7. Cal.—Ex parte Bodkin, 194 P.2d 588, 86 Cal.App.2d 208.

Ky.—City of Ashland v. Ashland Supply Co., 7 S.W.2d 833, 225 Ky. 623—City of Pineville v. Marshall, 299 S.W. 1072, 222 Ky. 4.

N.Y.—Bus Depot Holding Corporation v. Valentine, 25 N.Y.S.2d 901, affirmed 29 N.Y.S.2d 509, case one, 262 App.Div. 841, modified on other grounds 41 N.E.2d 913, 288 N.Y. 115, appeal dismissed 29 N.Y.S.2d 509, case two, 262 App.Div. 841—Weiner v. Valentine, 17 N.Y.S.2d 355, affirmed 23 N.Y.S.2d 866, 260 App.Div. 999, appeal denied 25 N.Y.S.2d 780, 261 App.Div. 818

Wyo.—Weaver v. Public Service Commission of Wyoming, 278 P. 542, 40 Wyo. 462.

8. Ky.—City of Ashland v. Ashland Supply Co., 7 S.W.2d 833, 225 Ky. 123—City of Pineville v. Marshall, 299 S.W. 1072, 222 Ky. 4.

9. Wyo.—Weaver v. Public Service Commission of Wyoming, 278 P. 542, 40 Wyo. 462.

10. Wyo.—Weaver v. Public Service Commission of Wyoming, supra.

11. Pa.—Shuck v. Borough of Ligonier, 22 A.2d 735, 343 Pa. 265

Va.—Thompson v. Smith, 154 S.E. 579, 155 Va. 367, 71 A.L.R. 684.

Test of validity of ordinance pertaining to use of streets is whether regulation is reasonable or whether it necessarily constitutes an abridgment of constitutional rights.—Ex parte Bodkin, 194 P.2d 588, 86 Cal. App.2d 208.

12. Mont.—Carey v. Guest, 258 P. 236, 78 Mont. 415.

44 C.J. p 1029 note 97.

Exclusion and restriction of motor vehicles as to streets see Motor Vehicles §§ 26–57.

Bond or liability insurance

Ga.—Jewel Tea Co. v. City Council of Augusta, 200 S.E. 503, 59 Ga. App. 260.

it.¹³ The municipality may not, under the guise of regulating traffic and use of the streets, lay a license or privilege tax on the use of the streets.¹⁴

Streets on private property. An ordinance regulating the control of vehicles on the street has no application to such vehicles when on private property.¹⁵ However, traffic regulations do apply to privately owned streets which the owners have opened to public travel,¹⁶ and they are applicable alike to members of the general public and owners of the street and their families,¹⁷ since the municipality may regulate the use of vehicles or other means of transportation on all streets rightfully made use of by the public within its limits, regardless of the legal status of such streets¹⁸ or the fee-simple ownership thereof,¹⁹ although in the case of a street over land the fee of which is in the adjoining owner the control is limited to such as is necessary for regulating the easement of public travel thereon.²⁰ A private street open to the public is subject to police regulations while so used, although it may be closed off at regular intervals for the purpose of protecting the title of its owners.²¹

c. Construction of Regulations in General

Traffic regulations should be construed to accomplish their fair and legitimate purposes.

A traffic ordinance or regulation should be interpreted according to the ordinary meaning of the words used²² in connection with other portions of such ordinance or regulation,²³ and so as to make it harmonize with other regulations, taking into consideration the purpose it seeks to accomplish.²⁴ Unequivocal and clear language must be given effect.²⁵ While traffic regulations intended to promote safety of travel ought to be so construed as to accomplish their fair and legitimate purposes,²⁶ they ought not to be given an interpretation which will be opposed to common experience,²⁷ and make them an unnatural and unjustifiable burden on travel,²⁸ or so as to make them absurd or unreasonable.²⁹ Ordinances regulating the use of streets as highways are to be construed with respect to changing methods of locomotion³⁰ and environment,³¹ and the constraint of overpowering necessity,³² and, where such an ordinance has been validly enacted, and is not in conflict with the general laws, it must be given full force and effect as a law of the locality to which it applies.³³

General and specific regulation. An ordinance establishing general rules for traffic must give way to specific regulation for congested districts in charge of traffic officers.³⁴

13. Va.—Thompson v. Smith, 154 S. E. 579, 155 Va. 367, 71 A.L.R. 604.

14. N.J.—Board of Com'rs of City of Newark v. Local Government Bd. of N. J., 45 A.2d 139, 133 N.J. Law 513.

15. Me.—Briggs v. Lake Auburn Crystal Ice Co., 92 A. 185, 112 Me. 344.

44 C.J. p 1029 note 2.

16. Mo.—City of Clayton v. Nemours, 182 S.W.2d 57, 353 Mo. 61, appeal dismissed 65 S.Ct. 560, two cases, 323 U.S. 684, 89 L.Ed. 554—City of Clayton v. Nemours, 164 S.W.2d 935, 237 Mo.App. 167.

17. Mo.—Nemours v. City of Clayton, 175 S.W.2d 60, 237 Mo.App. 497.

18. Idaho.—Crossler v. Safeway Stores, 6 P.2d 151, 51 Idaho 413, 80 A.L.R. 463.

Mo.—Nemours v. City of Clayton, 175 S.W.2d 60, 237 Mo.App. 497—City of Clayton v. Nemours, 164 S.W.2d 935, 237 Mo.App. 167.

19. Ariz.—Hughes v. City of Phoenix, 170 P.2d 297, 64 Ariz. 331.

N.Y.—People v. Garland, 84 N.Y.S. 2d 72, 193 Misc. 664.

Public use as test

Where private street was devoted, although not dedicated, to public use by owners, owners constituted street a de facto, although not a de jure, "public street" within stat-

utory and ordinance provisions, so as to make street subject to police power regulations, word "public," when applied to highways, not being restricted to connote ownership alone, but in proper instances being employed to describe use.—City of Clayton v. Nemours, 182 S.W.2d 57, 353 Mo. 61, appeal dismissed 65 S.Ct. 560, two cases, 323 U.S. 684, 89 L.Ed. 554.

20. Wis.—Chicago & Milwaukee Elec. Ry. Co. v. Public Service Commission of Wis., 37 N.W.2d 42, 254 Wis. 551.

21. N.Y.—People v. Garland, 84 N.Y.S.2d 72, 193 Misc. 664.

22. Ill.—City of Chicago v. McKinley, 176 N.E. 261, 344 Ill. 297.

23. Ill.—City of Chicago v. McKinley, supra.

24. Ohio.—F. D. Lawrence Electric Co. v. Enterprise Lumber Co., 162 N.E. 434, 28 Ohio App. 30.

25. Wash.—Stewart v. Nelson, 23 P.2d 412, 173 Wash. 414, affirmed 25 P.2d 1119, 178 Wash. 414.

26. N.Y.—Kupelian v. Andrews, 135 N.E. 502, 233 N.Y. 278.

Right of way to federal troops or militia

Statute providing that federal forces or the militia should have right of way in street was intended to establish prior right to use streets

between persons each of whom would otherwise have right to use and occupy them, but was not intended to confer on anyone a right to proceed against the absolute prohibition of some other law.—Neu v. McCarthy, 33 N.E.2d 570, 309 Mass. 17, 133 A.L.R. 1291.

27. N.Y.—Kupelian v. Andrews, 135 N.E. 502, 233 N.Y. 278.

28. N.Y.—Kupelian v. Andrews, supra.

29. Cal.—Klopper v. D. J. & T. Sullivan Co., 13 P.2d 839, 124 Cal.App. 769.

Colo.—Crosby v. Canino, 3 P.2d 792, 89 Colo. 434, 78 A.L.R. 1202.

Mo.—Felber v. Union Electric Light & Power Co., 100 S.W.2d 494, 340 Mo. 201—Stack v. General Baking Co., 223 S.W. 89, 283 Mo. 396.

30. Ind.—Frank Bird Transfer Co. v. Morrow, 72 N.E. 189, 36 Ind. App. 305.

31. Ind.—Frank Bird Transfer Co. v. Morrow, supra.

32. Ind.—Indianapolis St. R. Co. v. Slifer, 72 N.E. 1055, 74 N.E. 19, 35 Ind.App. 700.

S.C.—North State Lumber Co. v. Charleston Cons. R., etc., Co., 105 S.E. 406, 115 S.C. 267.

33. Ohio.—State v. O'Mara, 136 N.E. 885, 105 Ohio St. 94.

44 C.J. p 1029 note 6.

34. S.C.—North State Lumber Co.

b. Particular Uses and Regulations

§ 1762. Vehicular Traffic

Vehicular traffic on the streets is subject to reasonable regulation by a municipal corporation.

While as a general rule the right of a person to drive a vehicle on a public street without let or hindrance is common to all citizens who have occasion to use the street for pleasure, profit, or advantage,³⁵ ordinarily municipal corporations have power to regulate the traffic of vehicles of all kinds, commonly used within the corporate limits,³⁶ as an exercise of their police powers,³⁷ not inherent,³⁸ but granted to the corporation expressly or impliedly.³⁹ However, such regulations must be reasonable,⁴⁰ definite and certain,⁴¹ and not arbitrary or discriminatory,⁴² and they must comply and not be inconsistent with the statutes conferring the power,⁴³ or with other statutes.⁴⁴ Vehicles merely

passing through the municipality may not be included;⁴⁵ but those may be included which belong to nonresidents if publicly used in the municipality,⁴⁶ or if the route terminus is within it.⁴⁷ The power to regulate vehicular traffic over the streets necessarily implies restriction in some respects, and partial prohibition,⁴⁸ and includes the power to impose reasonable conditions and the power to promote the general welfare and prevent accidents.⁴⁹ Regulations which have been upheld as within the power of the municipality include those which create safety zones;⁵⁰ designate main thoroughfares or highways and through streets;⁵¹ designate a portion of a street for the use of foot travelers and a portion for the use of vehicles,⁵² and confine the operation of vehicles on certain streets or parts of streets to travel in one direction;⁵³ es-

v. Charleston Cons. R., etc., Co. 105 S.E. 406, 115 S.C. 267.

35. Miss.—Scott v. Hart, 91 So. 17, 128 Miss. 353.

37 C.J. p 228 note 6.

36. Cal.—Key System Transit Co. v. City of Oakland, 13 P.2d 979, 124 Cal.App. 733.

Colo.—Staley v. Vaughn, 17 P.2d 299, 92 Colo. 6.

La.—Corpus Juris cited in City of Shreveport v. Breazeale, 187 So. 33, 34, 191 La. 1088.

N.Y.—People v. Harden, 179 N.Y.S. 732, 110 Misc. 72.

Pa.—Municipal Regulation of Vehicular Traffic, 10 Pa.Dist. & Co. 390 S.C.—City of Columbia v. Tatum, 177 S.E. 541, 174 S.C. 366.

Tex.—Miks v. Leath, Civ.App., 26 S.W.2d 726.

Wash.—City of Tacoma v. Roe, 68 P.2d 1028, 190 Wash. 444.

44 C.J. p 1010 note 39—43 C.J. p 440 note 97.

37. La.—Corpus Juris cited in City of Shreveport v. Breazeale, 187 So. 33, 34, 191 La. 1088.

Or.—Morris v. City of Salem, 174 P.2d 192, 179 Or. 666.

43 C.J. p 441 note 98.

38. Pa.—Commonwealth v. Wagner, 9 Pa.Co. 625.

43 C.J. p 441 note 99.

39. Pa.—Borough of Gettysburg v. Zeigler, 2 Pa.Co. 326.

43 C.J. p 441 note 1.

Conflicting grants of power

Statute empowering police commissioner to make rules for vehicular traffic was held unconstitutional as an attempt to legislate on a subject contained in a special grant of power to the municipality, where the special grant had not been repealed or amended.—State v. Stewart, 137 A. 39, 152 Md. 419.

40. Kan.—Kansas City v. McDonald, 57 P. 123, 60 Kan. 481, 45 L.R.A. 429.

43 C.J. p 441 note 2.

Test of reasonableness is not necessarily what is best, but what is fairly appropriate under all circumstances.—People v. Thompson, 173 N.E. 137, 341 Ill. 166—Weckler v. Collins, 147 N.E. 797, 137 Ill. 132

Movement of traffic

Regulations which tend to facilitate the movement of traffic are generally upheld as reasonable.—City of Tacoma v. Roe, 68 P.2d 1028, 190 Wash. 444.

41. Tex.—Ex parte Meadows, 109 S.W.2d 1061, 133 Tex.Cr. 292

42. Ohio—Hogans v. Columbus, 14 Ohio N.P., N.S., 33—Columbus v. Jeffrey, 1 Ohio N.P., N.S., 265.

43. Cal.—Key System Transit Co. v. City of Oakland, 13 P.2d 979, 124 Cal.App. 733.

N.Y.—People v. Gorman, 231 N.Y.S. 85, 133 Misc. 161.

44. Cal.—Key System Transit Co. v. City of Oakland, 13 P.2d 979, 124 Cal.App. 733.

45. Pa.—Bennett v. Birmingham, 31 Pa. 15.

46. Ind.—Tomlinson v. Indianapolis, 43 N.E. 9, 144 Ind. 142, 36 L.R.A. 413.

43 C.J. p 441 note 7.

47. Cal.—Sacramento v. California Stage Co., 12 Cal. 134.

48. Wyo.—Blumenthal v. City of Cheyenne, 186 P.2d 556.

49. Ill.—People v. Thompson, 173 N.E. 137, 341 Ill. 166.

50. Colo.—City and County of Denver v. Forster, 1 P.2d 922, 89 Colo. 246.

Ohio.—City of Cleveland v. Gustafson, 180 N.E. 59, 124 Ohio St. 607,

79 A.L.R. 1325—Coleman v. New York Cent. R. Co., App., 39 N.E.2d 157.

Purpose

Safety zone established in street is place designed for pedestrians to be safe from collision with vehicular traffic, and not as place of safety from normal overhang of streetcar, either on straight track, or as car rounds a curve.—Ferguson v. Kansas City Public Service Co., 156 P.2d 869, 159 Kan. 520.

Nuisance

Obstruction in street caused by creation of safety zones pursuant to ordinance was held not to constitute nuisance, invalidating ordinance.—City of Cleveland v. Gustafson, 180 N.E. 59, 124 Ohio St. 607, 79 A.L.R. 1325.

51. Kan.—Taneyhill v. Kansas City, 3 P.2d 645, 133 Kan. 725.

Miss.—People v. Gorman, 231 N.Y.S. 85, 133 Misc. 161.

Ohio.—Titus v. Stouffer, App., 40 N.E.2d 178.

Terms synonymous

Ohio.—Titus v. Stouffer, *supra*.

Number of traffic ways

Ordinance establishing arterial traffic way was held not objectionable because resulting in more than ten traffic ways in city, including those existing when act was passed, or because several streets were included.—Taneyhill v. Kansas City, 3 P.2d 645, 133 Kan. 725.

52. Ky.—Home Laundry Co. v. Louisville, 182 S.W. 645, 168 Ky. 499. 44 C.J. p 1029 note 95.

53. Mo.—Cavanaugh v. Gerk, 280 S.W. 51, 313 Mo. 375.

N.Y.—Eighth Avenue Coach Corporation v. City of New York, 10 N.Y.S.2d 170, 170 Misc. 243, affirmed 20 N.Y.S.2d 402, 259 App.Div. 870, af-

establish or set up signal lights and signs and require obedience thereto;⁵⁴ specify the right of way of vehicles at intersections,⁵⁵ and those which require vehicles to stop at the rear of a streetcar which has stopped to take on or to discharge passengers.⁵⁶ However, an ordinance, requiring drivers at all times to comply with any direction of any member of the police force, was held invalid as putting citizens in the arbitrary power of the officer regardless of the circumstances of the case.⁵⁷

Whereas some of the traffic regulations of the use of streets are applicable only to the operation of motor vehicles, and are treated in Motor Vehicles §§ 14-57, many are of a more general nature and apply to other kinds of vehicular traffic as well, such as regulations as to the right of way at street intersections;⁵⁸ as to the carrying of lights on vehicles after dark;⁵⁹ and as to stopping for standing streetcars.⁶⁰

Keeping to right. A municipality, under its power to regulate its streets, may require vehicles to

confine themselves to the right-hand side of the center line of the street,⁶¹ with respect to the directions in which they are severally moving,⁶² and to drive as near as possible to the right-hand curb⁶³ or require slowly moving vehicles to keep as close as practicable to the right-hand curb⁶⁴ but a regulation of this nature must be definite and certain.⁶⁵ An ordinance to this effect is not inconsistent with a statute requiring travelers on the highways to turn to the right.⁶⁶

Delegation of authority by municipality. A municipality may vest on designated officials or officers certain powers of discretion to carry into effect the regulations under consideration,⁶⁷ and in doing so may authorize police officers to require drivers to obey their directions in regard to the places which vehicles may occupy.⁶⁸ So, specified officers may be empowered by ordinance to adopt and install traffic control signs and devices where violations of such signs and devices are prohibited by ordinance.⁶⁹ However, the municipality cannot confer on such officials unlimited discretion in prescribing the rules

affirmed 35 N.E.2d 907, 286 N.Y. 84—*McCarthy v. City of New York*, 10 N.Y.S.2d 170, 170 Misc. 243, affirmed 20 N.Y.S.2d 401, 259 App. Div. 870, affirmed 36 N.E.2d 684, 286 N.Y. 636.

Ohio.—*City of Cincinnati v. Baumgartner*, 25 Ohio N.P., N.S., 20 Pa.—*Thompson v. Philadelphia Transp. Co.*, 53 A.2d 120, 357 Pa. 3 As to motor vehicles see Motor Vehicles § 33.

Absence of designation

Where a street has not been officially designated as a one-way street, but streetcars thereon run in one direction only, a vehicle may lawfully travel on such street in a direction opposite to that which streetcars travel.—*Osterheldt v. Peoples*, 57 A. 703, 208 Pa. 310, 315—42 C.J. p 614 note 84.

Posting of signs

Posting of one-way traffic signs on a southbound street at the north side of each intersecting street was held sufficient to make ordinance for one-way traffic effective.—*Thompson v. Philadelphia Transp. Co.*, 53 A.2d 120, 357 Pa. 3.

Inconvenience or loss of business to some does not render regulation invalid, if it is in the interest of the people as a whole.—*City of Cincinnati v. Baumgartner*, 25 Ohio N.P., N.S., 20.

54. Pa.—*Municipal Regulation of Vehicular Traffic*, 10 Pa. Dist. & Co. 390.

Utah.—*Thorpe v. Bamberger R. Co.*, 153 P.2d 541, 107 Utah 265.

Stop signs

Ohio.—*Tolliver v. City of Newark*,

62 N.E.2d 357, 145 Ohio St. 517, 161 A.L.R. 1391.

55. Cal.—*Lindenbaum v. Barbour*, 2 P.2d 161, 213 Cal. 277.

La.—*Philip Schick & Sons v. Pixley*, 135 So. 106, 17 La. App. 469.

Provision held not superseded

Ohio.—*Langdon v. Cincinnati St. Ry. Co.*, 62 N.E.2d 380, 75 Ohio App. 482.

In the absence of municipal or statutory regulation, all vehicles traveling along and on public streets have equal and reciprocal rights and duties in respect of the use of the crossing at intersections.—*Buys v. Third Ave. R. Co.*, 61 N.Y.S. 113, 45 App. Div. 11.

56. Ohio.—*Nicholls v. Cleveland*, 128 N.E. 164, 101 Ohio St. 39.

57. Mo.—*St. Louis v. Allen*, 204 S.W. 1083, 275 Mo. 501, L.R.A. 1918F 1110.

58. Minn.—*Bruce v. Ryan*, 164 N.W. 982, 138 Minn. 264. 44 C.J. p 1030 note 12.

59. N.Y.—*Vadney v. United Tract Co.*, 183 N.Y.S. 926, 193 App. Div. 329, affirmed 135 N.E. 952, 233 N.Y. 643.

44 C.J. p 1030 note 13.

Lights on bicycles see *infra* § 1768.

60. Ohio.—*Nicholls v. Cleveland*, 128 N.E. 164, 101 Ohio St. 39.

44 C.J. p 1030 note 14.

61. Cal.—*Weihe v. Rathjen Mercantile Co.*, 167 P. 287, 34 Cal. App. 302.

44 C.J. p 1049 note 23.

62. W.Va.—*Beck v. Cox*, 87 S.E. 492, 77 W.Va. 442.

63. Tex.—*Yarborough v. Dallas Railway & Terminal Co.*, 97 S.W. 2d 169, 128 Tex. 445. 44 C.J. p 1050 note 24.

64. Cal.—*Mauchle v. Panama-Pac. International Exposition Co.*, 174 P. 400, 37 Cal. App. 715. 44 C.J. p 1050 note 25.

65. Tex.—*Yarborough v. Dallas Railway & Terminal Co.*, 97 S.W.2d 169, 128 Tex. 445.

Regulation held uncertain and indefinite

Ordinance requiring vehicle to keep as near as practicable to right-hand curb, "the slower the speed the nearer the curb," was held unenforceable for indefiniteness and uncertainty.—*Yarborough v. Dallas Railway & Terminal Co.*, *supra*.

66. Wash.—*Hiscock v. Phinney*, 142 P. 461, 81 Wash. 117, Ann. Cas. 1916E 1044.

67. Colo.—*Staley v. Vaughn*, 17 P. 2d 299, 92 Colo. 6.

Ohio.—*City of Cleveland v. Gustafson*, 180 N.E. 59, 124 Ohio St. 607, 79 A.L.R. 1325.

43 C.J. p 442 note 25.

Safety zones

Ohio.—*City of Cleveland v. Gustafson*, *supra*.

68. Fla.—*Taylor v. Roberts*, 94 So. 874, 84 Fla. 654.

Ind.—*Veneman v. Jones*, 20 N.E. 644, 118 Ind. 41, 10 Am.S.R. 100.

69. Ohio.—*Miller v. Cincinnati Wholesale Grocery Co.*, 29 Ohio N.P., N.S., 43.

for the regulation of vehicles on the streets or other public places.⁷⁰ An ordinance authorizing specified officers to designate through-traffic streets has been upheld as a delegation of administrative power,⁷¹ but it has also been held that the city council cannot delegate to an official the authority to designate arterial streets, but must designate them by ordinance.⁷²

§ 1763. — Kinds of Vehicles and Equipment

- a. In general
- b. Weight of vehicles or loads
- c. Traction engines
- d. Tires

a. In General

Where the power has been duly conferred on a municipal corporation, it may reasonably classify vehicular traffic and restrict certain vehicles to specified streets or parts thereof.

In the control and regulation of the use of its streets a municipal corporation may make any reasonable classification of vehicular traffic,⁷³ and may restrict particular classes of vehicles to certain parts

of the streets.⁷⁴ Subject to the limitation that the regulation must not be such as will deprive a citizen of access to his home or business house,⁷⁵ and provided such regulations are reasonable and not discriminatory,⁷⁶ certain classes of vehicles may be excluded from particular streets or driveways,⁷⁷ such as traffic teams from streets set apart for pleasure driving only.⁷⁸ However, the power to regulate vehicles using the streets does not authorize prohibition;⁷⁹ nor does the power to regulate traffic authorize a regulation prohibiting all vehicular travel on certain streets or ways,⁸⁰ or closing all the streets to vehicles of a specified description,⁸¹ unless the municipality has plenary and exclusive power of its streets and alleys.⁸² Where the power to do so is expressly granted, a municipality may prohibit all vehicles of a particular class from operating on its streets or other public places,⁸³ as, for example, advertising vehicles.⁸⁴

The state under its control and authority over public streets, as discussed supra § 1686, may set apart a particular way for a peculiar vehicular use, as long as the public is accorded the privilege of exercising that use;⁸⁵ and, if such use is accorded to

70. La.—Shreveport v. Herndon, 105 So. 244, 159 La. 113.

71. Colo.—Staley v. Vaughn, 17 P.2d 299, 92 Colo. 6.

72. N.Y.—People v. Gorman, 231 N.Y.S. 85, 133 Misc. 161.

73. Ohio.—Murphy v. Toledo, 140 N.E. 626, 108 Ohio St. 342.

Utah.—Dixon v. Bergin, 228 P. 744, 64 Utah 195.

74. Ind.—Denny v. Muncie, 149 N.E. 639, 197 Ind. 28.

Utah.—Dixon v. Bergin, 228 P. 744, 64 Utah 195.

75. Ill.—Illinois Malleable Iron Co. v. Lincoln Park Comrs., 105 N.E. 336, 263 Ill. 446, 51 L.R.A., N.S., 1203.

44 C.J. p 1030 note 19.

Rights of abutting owners see supra §§ 1701-1709.

76. N.J.—Garneau v. Eggers, 174 A. 250, 113 N.J.Law 245.

Wyo.—Blumenthal v. City of Cheyenne, 186 P.2d 556.

Ordinance held valid

N.J.—Garneau v. Eggers, 174 A. 250, 113 N.J.Law 245.

77. Fla.—Noel v. Griffin, 129 So. 511, 100 Fla. 152.

N.J.—Garneau v. Eggers, 174 A. 250, 113 N.J.Law 245.

Wyo.—Blumenthal v. City of Cheyenne, 186 P.2d 556.

44 C.J. p 1030 note 20.

Commercial vehicles

N.J.—Garneau v. Eggers, 174 A. 250, 113 N.J.Law 245.

Steep grades

A city neighborhood's steep grades which were dangerous to all traffic at certain seasons of year and its residential character warranted a reasonable discrimination in use of its streets by certain forms of traffic most likely to result in injury to life and property where other reasonably convenient routes were available to excluded traffic.—Commonwealth v. Kennedy, 195 A. 770, 129 Pa Super. 149.

78. Ill.—Illinois Malleable Iron Co. v. Lincoln Park Comrs., 105 N.E. 336, 263 Ill. 446, 51 L.R.A., N.S., 1203.

44 C.J. p 1030 note 21.

79. Fla.—Quigg v. State, 93 So. 139, 84 Fla. 164.

80. N.Y.—Peace v. McAdoo, 96 N.Y.S. 1039, 110 App.Div. 13.

44 C.J. p 1030 note 22.

81. N.Y.—Sperling v. Valentine, 28 N.Y.S.2d 753, 176 Misc. 826.

82. Tex.—Dallas v. Ingram, Civ. App., 284 S.W. 345.

44 C.J. p 1030 note 23.

83. Neb.—State v. Hind, 10 N.W.2d 258, 143 Neb. 479.

84. U.S.—Fifth Ave. Coach Co. v. New York, N.Y., 31 S.Ct. 709, 221 U.S. 467, 55 L.Ed. 815.

N.Y.—People v. Kearns, 5 N.Y.S.2d 590, 168 Misc. 264.

Usual business

A city ordinance prohibiting use

of streets and alleys by vehicles engaged primarily in advertising, but permitting ordinary business vehicles to bear business notices as long as vehicle is engaged in usual business or regular work of owner, is not arbitrary and unreasonable but constitutes a valid exercise of city's "police power."—State v. Hind, 10 N.W.2d 258, 143 Neb. 479.

Duty of police commissioner

Police commissioner had duty under charter to restrict use of streets so as to prevent use thereof by covered wagon drawn by team of burros for advertising purposes, thereby impeding traffic by forcing the faster moving motor-driven vehicles to go around and inevitably cause traffic congestion.—People v. Berkowitz, 39 N.Y.S.2d 236.

Vehicles operating under franchise

The charter powers to regulate the use of the streets authorized the local authorities to prevent the display of advertisement on the outside of stage coaches operating under a franchise which did not authorize their use for advertising purposes.—Fifth Ave. Coach Co. v. New York, 111 N.Y.S. 759, 58 Misc. 401, affirmed 110 N.Y.S. 1037, 126 App.Div. 657, 86 N.E. 824, 194 N.Y. 19, 21 L.R.A., N.S., 744, affirmed 31 S.Ct. 709, 221 U.S. 467, 55 L.Ed. 815.

85. N.Y.—Strauss v. Enright, 174 N.Y.S. 113, 105 Misc. 367, affirmed 174 N.Y.S. 922, 187 App.Div. 946.

44 C.J. p 1031 note 26.

a few designated persons exclusively, it is improper.⁸⁶

b. Weight of Vehicles or Loads

The weight of vehicles using the streets may be regulated by municipal corporations.

A municipal corporation, under its power to control and regulate the use of its streets, may limit the weight of the vehicles or loads that may be transported over its streets,⁸⁷ within the weight limits prescribed by state statute.⁸⁸ It may prohibit the operation of any vehicle which, with or without its load, because of the weight, destroys or permanently injures the streets;⁸⁹ and a statutory provision, exempting a city from the provision of a traffic law forbidding the use of all trucks that permanently injure the streets, does not prevent such city from enacting a traffic ordinance forbidding such use.⁹⁰ It may prohibit the hauling of heavy loads weighing more than a certain number of pounds on wagons having tires of less than a certain width,⁹¹ or over specified streets of the city,⁹² or it may so limit the weight of the load that may be hauled unless the load consists of an article which cannot be divided.⁹³ It may also restrict excessive loads to a certain portion of the street,⁹⁴ and the question whether such a regulation is reasonable and valid with respect to a particular way and locality depends on whether the portion of the street which may be used by heavily loaded vehicles is reasonably suitable for the purpose.⁹⁵ The fact that the ordinance increases the cost of deliveries to abutting

owners by compelling heavy vehicles to take an indirect route to avoid the restricted streets does not make it unreasonable.⁹⁶

Permission of board. An ordinance forbidding the use of heavy vehicles on a driveway except "upon special permission" of a board, without prescribing any general conditions on which such permission shall be granted, is unreasonable and invalid as vesting the board with arbitrary power.⁹⁷

c. Traction Engines

The use of the streets by traction engines is generally subject to reasonable regulation by municipal corporations.

The exclusive power of a municipal corporation over its streets as conferred on it by statute does not include power to prohibit the running of a traction engine on the streets,⁹⁸ nor is such power included in its power to regulate the use of coaches, hacks, drays, and other vehicles for hire;⁹⁹ and, therefore, an ordinance is unreasonable and void which prohibits the operation of such a vehicle on the streets,¹ especially where it arbitrarily deprives a person of an opportunity to carry on his business.² However, under its power to control, regulate, and protect its streets, a municipality may place reasonable restrictions on the operation of such vehicles on its streets, with the view of protecting such streets from destruction or injury.³ It may prohibit the operation of such vehicles, unless precautions are taken by the use of planks to prevent injury to the paved street,⁴ or unless the tires are properly

86. N.Y.—*Strauss v. Enright*, supra.

87. Ill.—*City of Chicago v. Foley*, 167 N.E. 779, 335 Ill. 584.

Ky.—*City of Ashland v. Ashland Supply Co.*, 7 S.W.2d 833, 225 Ky. 123—*Home Laundry Co. v. Louisville*, 182 S.W. 645, 168 Ky. 499.

Mass.—*Commonwealth v. Mulhall*, 39 N.E. 188, 162 Mass. 496, 44 Am.S.R. 387.

44 C.J. p 1031 notes 30-36.

As to motor vehicles see *Motor Vehicles* § 32.

Test of reasonableness

Determination whether ordinance limiting loads of vehicles using streets is reasonable depends on requirement of locality, age, construction, and durability of street pavements and need for traffic regulations.—*Ferguson Coal Co. v. Thompson*, 174 N.E. 896, 343 Ill. 20.

Independent of statute, city having general authority to construct, maintain, and repair streets has authority to fix maximum loads.—*City of Ashland v. Ashland Supply Co.*, 7 S.W.2d 833, 225 Ky. 123.

88. Ill.—*Ferguson Coal Co. v.*

Thompson, 174 N.E. 896, 343 Ill. 20.

Statute held not applicable to city streets.—*City of Ashland v. Ashland Supply Co.*, 7 S.W.2d 833, 225 Ky. 123.

89. W.Va.—*Chittum v. Morgantown*, 122 S.E. 740, 96 W.Va. 260.

44 C.J. p 1031 note 30.

90. Wash.—*White v. Turner*, 195 P. 240, 197 P. 609, 114 Wash. 405.

91. Ky.—*Home Laundry Co. v. Louisville*, 182 S.W. 645, 168 Ky. 499. 44 C.J. p 1031 note 32.

92. Ill.—*Ferguson Coal Co. v. Thompson*, 174 N.E. 896, 343 Ill. 20.

Mass.—*Wilbur v. City of Newton*, 16 N.E.2d 86, 301 Mass. 97, 121 A.L.R. 570.

N.Y.—*People v. Wilson*, 16 N.Y.S. 583, 172 Misc. 855.

93. Mass.—*Commonwealth v. Mulhall*, 39 N.E. 183, 162 Mass. 496, 44 Am.S.R. 387.

94. Me.—*State v. Boardman*, 44 A. 118, 93 Me. 73, 46 L.R.A. 750.

Mass.—*Wilbur v. City of Newton*, 16

N.E.2d 86, 301 Mass. 97, 121 A.L.R. 570.

44 C.J. p 1031 note 35.

95. Me.—*State v. Boardman*, 44 A. 118, 93 Me. 73, 46 L.R.A. 750.

96. Ill.—*Ferguson Coal Co. v. Thompson*, 174 N.E. 896, 343 Ill. 20.

Damage not excessive

Mass.—*Wilbur v. City of Newton*, 16 N.E.2d 86, 301 Mass. 97, 121 A.L.R. 570.

97. Ill.—*Cicero Lumber Co. v. Cicero*, 51 N.E. 758, 176 Ill. 9, 68 Am.S.R. 155, 42 L.R.A. 696.

98. Ind.—*Bogue v. Bennett*, 60 N.E. 143, 156 Ind. 478, 83 Am.S.R. 212.

99. Ind.—*Bogue v. Bennett*, supra.

1. Ind.—*Bogue v. Bennett*, supra.

2. Kan.—*Brown v. Nichols*, 145 P. 561, 93 Kan. 737, L.R.A.1915D 327. 44 C.J. p 1031 note 43.

3. Pa.—*Steelton Borough v. Durz*, 40 Pa.Co. 510.

44 C.J. p 1031 notes 45-47,

4. Ill.—*Macomb v. Jones*, 153 Ill. App. 271.

protected,⁵ and may delegate to a particular officer the authority to determine whether such protection is sufficient.⁶

Under its power to control and regulate the location and use of steam engines for the public safety, and to exercise exclusive control over the streets, a city may adopt an ordinance making it unlawful to operate any steam engine over the streets, except on a railroad track,⁷ and on special permit from the mayor;⁸ and, where such an ordinance applies alike to all persons engaged in the operation of steam rollers and engines, it is neither discriminatory nor unreasonable;⁹ nor is it invalid as giving absolute power to a particular officer arbitrarily and oppressively to refuse to issue a permit, since he is required to exercise his discretion in the enforcement of the ordinance for the benefit of the general public.¹⁰ However, an ordinance restricting the use of such vehicles is invalid when repugnant to the provisions of a statute declaring the state's policy in such matters.¹¹

Precautions as to travelers. In the absence of statute the owner of a traction engine passing along a street need not send a man ahead to assist in emergencies and to prevent accidents.¹² A statute requiring persons in charge of steam engines to take certain precautions to avoid injury to travelers, being penal in character, must be strictly construed,¹³ and, hence, a requirement that one in charge of a traction engine shall stop at a prescribed distance from travelers with horses or other stock does not apply to one taking a traction engine across a vacant block, although the way used by the engine is used permissively by the public.¹⁴ It has been held that a statute that any person using a traction or road engine on a street shall send a person in ad-

vance to warn approaching teams does not apply to a steam roller used in making or repairing city streets;¹⁵ but on the other hand it has been held that a like provision as to a steam engine applies to a steam road roller.¹⁶

d. Tires

A municipal corporation may generally regulate the width of the tires on vehicles passing over the streets.

Under its power to locate, establish, and protect its streets, a municipal corporation may regulate the width of the tires of vehicles passing over the streets;¹⁷ and an ordinance regulating the width of tires to be used on all kinds of vehicles used on the streets is not unreasonable,¹⁸ or discriminatory,¹⁹ or in derogation of common right.²⁰ However, where the power expressly given to the municipality in this respect is to regulate "the width of the tires of all vehicles for heavy transportation," it means vehicles constructed for carrying heavy loads; and an ordinance regulating the width of tires of all vehicles in accordance with the size of the axles exceeds the power of the city since it makes no discrimination between vehicles for light and heavy transportation,²¹ even though the city charter empowers it to regulate the use of its streets.²² A municipality may forbid the use of the streets by vehicles with certain objectionable tires.²³

§ 1764. — Speed

The speed of vehicles using the streets is subject to reasonable regulation by municipal corporations.

The state legislature, under its power to control public streets, as discussed supra § 1686, may limit the rate of speed for riding or driving on the streets of a municipality,²⁴ or it may delegate its power so

Iowa.—Hedrick v. Lanz, 152 N.W. 610, 170 Iowa 437.

44 C.J. p 1031 note 45.

5. Pa.—Steelton Borough v. Durz, 40 Pa.Co. 510.

44 C.J. p 1031 note 46.

6. Pa.—Steelton Borough v. Durz, supra.

7. Tex.—Municipal Pav. Co. v. Donovan Co., Civ.App., 142 S.W. 644.

8. Tex.—Municipal Pav. Co. v. Donovan Co., supra.

44 C.J. p 1032 note 49.

9. Tex.—Municipal Pav. Co. v. Donovan Co., supra.

10. Tex.—Municipal Pav. Co. v. Donovan Co., supra.

11. Iowa.—Randolph v. Gee, 201 N.W. 587, 199 Iowa 181.

44 C.J. p 1032 note 52.

12. Iowa.—Burke v. Mally, 120 N.W. 305, 141 Iowa 555.

Care required in use of streets see infra §§ 1777-1789.

13. Iowa.—Burke v. Mally, supra.

14. Iowa.—Burke v. Mally, supra.

15. Ind.—New Albany v. Stier, 72 N.E. 275, 34 Ind.App. 615.

16. N.Y.—Buchanan's Sons v. Cranford Co., 98 N.Y.S. 378, 112 App. Div. 278—Mullen v. Glens Falls, 42 N.Y.S. 113, 11 App.Div. 275.

17. Ohio.—Froelich v. Cleveland, 124 N.E. 212, 99 Ohio St 376.

Width required by weight of load see supra subdivision b of this section.

18. Mo.—St. Louis v. St. Louis Transfer Co., 165 S.W. 1077, 256 Mo. 476.

44 C.J. p 1032 note 61.

19. Mo.—St. Louis v. Cool, 128 S.W. 759, 228 Mo. 209—State v. Clif-

ford, 128 S.W. 755, 228 Mo. 194, 21 Ann.Cas. 1218.

20. Mo.—St. Louis v. Cool, 128 S.W. 759, 228 Mo. 209—State v. Clifford, 128 S.W. 755, 228 Mo. 194, 21 Ann.Cas. 1218.

21. Mo.—St. Louis v. St. Louis Transfer Co., 165 S.W. 1077, 256 Mo. 476—State v. Clifford, 128 S.W. 755, 228 Mo. 194, 21 Ann.Cas. 1218.

22. Mo.—St. Louis v. St. Louis Transfer Co., 165 S.W. 1077, 256 Mo. 476.

23. Ill.—City of Mascoutah v. Donner, 245 Ill.App. 233.

Tires with projections

Ill.—City of Mascoutah v. Donner, supra.

24. Minn.—Terrill v. Virginia Brewing Co., 153 N.W. 136, 130 Minn.

to do to the municipality;²⁵ but a statute regulating the speed of vehicles approaching a highway crossing has no application to city street crossings.²⁶ A municipal corporation, also, under its police power, and within the limits of the power delegated to it,²⁷ may prohibit fast driving,²⁸ but not slow driving,²⁹ and may fix a maximum speed for riding or driving on the city streets,³⁰ provided such speed is not in excess of that provided by statute,³¹ or the regulation does not otherwise conflict with the state regulation of the same matter.³² An ordinance regulating the speed of all vehicles is not an attempt to interfere with the reasonable exercise of the right of passage over a public highway, but is merely an endeavor to regulate and prevent abuse in the exercise of that right;³³ and, although the speed limit is fixed at a high rate, such an ordinance is not invalid on the theory that only motor vehicles can make such a speed, and hence that the provision discriminates against the operators of motor vehicles;³⁴ nor is a statute or ordinance regulating speed invalid because different rates of speed are

allowed in different portions of the prescribed territory.³⁵

Reasonableness. A regulation prescribing such rate of speed must be reasonable,³⁶ and regulations have been held reasonable which limit the rate of speed to from six to eight miles an hour,³⁷ to "an ordinary trot,"³⁸ a "common traveling pace,"³⁹ or "a moderate footpace."⁴⁰

§ 1765. — Turning and Crossing

Vehicles using the streets are subject to regulation by municipal corporations with respect to turning and crossing.

Regulations have been enacted and held reasonable and valid⁴¹ which prescribe the manner in which vehicles may turn or cross from one side of the street to the other side,⁴² and the warnings or signals to be given to others of the intention to turn or cross;⁴³ or which prohibit vehicles from crossing the street elsewhere than at an intersection;⁴⁴ or which prescribe the manner of crossing intersections⁴⁵ when pedestrians are crossing;⁴⁶

46. L.R.A.1915E 1028, Ann.Cas. 1917C 453.

12 C.J. p 917 note 13.

Speed:

As negligence see infra § 1781.

Of motor vehicles see Motor Vehicles § 29.

Of privileged vehicles see infra § 1767.

25. Mont.—Carey v. Guest, 258 P. 236, 78 Mont. 415.

26. S.C.—Cirosky v. Smathers, 122 S.E. 864, 128 S.C. 358.

27. Mass.—Commonwealth v. Roy, 4 N.E. 814, 140 Mass. 432.

12 C.J. p 917 note 13.

28. Mo.—Bluedorn v. Missouri Pac. R. Co., 18 S.W. 1103, 108 Mo. 439, 32 Am.S.R. 615.

43 C.J. p 441 note 16.

29. D.C.—Stephens v. District of Columbia, 16 App.D.C. 279.

30. Tex.—Northern Texas Tract. Co. v. Smith, Civ.App., 223 S.W. 1013.

44 C.J. p 1032 note 71.

31. Tex.—Northern Texas Tract. Co. v. Smith, supra.

32. Cal.—Ex parte Snowden, 107 P. 724, 12 Cal.App. 521.

33. Cal.—Ex parte Snowden, supra.

34. Cal.—Ex parte Snowden, supra.

35. Mich.—Scovel v. Detroit, 109 N.W. 20, 146 Mich. 93.

44 C.J. p 1033 note 76.

36. Cal.—Ex parte Snowden, 107 P. 724, 12 Cal.App. 521.

Mo.—City of Mexico v. Sharp, 300 S.W. 308, 221 Mo.App. 195.

44 C.J. p 1033 notes 78–81.

Review by court

An ordinance regulating the speed

of streetcars may not be set aside by the court merely because it is an anachronism or because it is harsh, inconvenient, or inappropriate at times.—Marczuk v. St. Louis Public Service Co., 196 S.W.2d 1000, 355 Mo. 536.

37. Mass.—Commonwealth v. Crowninshield, 72 N.E. 963, 187 Mass. 221, 68 L.R.A. 245.

44 C.J. p 1033 note 78.

38. Ind.—Nealis v. Hayward, 48 Ind. 19.

39. R.I.—State v. Smith, 69 A. 1061, 29 R.I. 245.

40. Mass.—Commonwealth v. Worcester, Thach Cr. 100.

44 C.J. p 1033 note 81.

41. Ill.—Johnson Oil Refining Co. v. Galesburg R., etc., 200 Ill.App. 392.

Pa.—Chambersburg v. Slaughenaupt, 44 Pa.Co. 170.

Conflict with statute

Ordinances of this nature which impose a different penalty for violations thereof than that imposed by statute defining the same offense have been held invalid.—El Paso Electric Co. v. Collins, Tex.Civ.App., 10 S.W.2d 397, reversed on other grounds, Com.App., 23 S.W.2d 295, rehearing denied 25 S.W.2d 807.

42. Wis.—Kramer v. Chicago & M. Electric Ry. Co., 190 N.W. 907, 179 Wis. 453.

44 C.J. p 1033 note 84.

At street end

Ordinance providing that it should be unlawful to operate vehicle in crossing or turning about on a crossing other than at street intersection, except when at street end, was held

not unreasonable.—Stack v. L. J. Dowell, Inc., 19 P.2d 125, 172 Wash. 9.

43. Ill.—Johnson Oil Refining Co. v. Galesburg R., etc., Co., 200 Ill.App. 392.

44 C.J. p 1033 note 85.

Purpose of signal

Ordinance requiring left-hand turn signal was held intended to warn following and not oncoming traffic.—Felber v. Union Electric Light & Power Co., 100 S.W.2d 494, 340 Mo. 201.

44. Iowa.—Ford v. Des Moines Ice, etc., Co., 174 N.W. 486, 187 Iowa 729.

44 C.J. p 1033 note 86.

45. Cal.—People v. Ausen, 105 P.2d 321, 46 Cal.App.2d Supp. 831.

Nature of intersection

Where parkway had grass strip in its center which divided the traffic proceeding in opposite directions, the presence of the grass strip did not transform what would otherwise be one "intersection" into two intersections within traffic laws and ordinances.—City of Cincinnati v. Peacock, 51 N.E.2d 906, 72 Ohio App. 321.—Schmidt v. City Ice & Fuel Co., 19 N.E.2d 514, 60 Ohio App. 29.

46. N.Y.—Cherubino v. Meenan, 171 N.E. 708, 253 N.Y. 462.

Power of police commissioner

Traffic regulation, requiring vehicles to slow down and stop, if necessary, to permit pedestrians on crossings to pass, was within power conferred on police commissioner.—Cherubino v. Meenan, supra.

or which prescribe the manner in which vehicles shall turn when entering an intersecting street to the right⁴⁷ or to the left.⁴⁸ An ordinance requiring the driver of a vehicle, in crossing from one side of the street to the other side, to turn to the left, so as to head in the direction in which traffic is moving, does not require such a traveler to cross at an intersection or at any particular point in the street.⁴⁹

§ 1766. — Stopping and Standing

- a. Right to stop or park
- b. Regulation and control

a. Right to Stop or Park

Parking of vehicles on the streets for a reasonable time is an incident of the right to travel and a privilege to be exercised with due regard to the primary right of the public to unobstructed passage and subject to reasonable regulation.

Ordinarily, in the absence of contrary regulation, a person riding or driving in a vehicle may stop or park for a reasonable time at any point on a street where he chooses,⁵⁰ such as at the curb,⁵¹ although some traffic congestion is caused thereby,⁵²

as long as sufficient room is left for passage of other vehicles,⁵³ and private rights are not interfered with,⁵⁴ and, if he stops temporarily to repair his vehicle, he is not a trespasser, but is entitled to the rights of a traveler.⁵⁵ Parking on the streets, however, is a mere privilege,⁵⁶ in derogation of the common-law easement of travel and transport,⁵⁷ and the abutting owner's qualified right of ingress and egress,⁵⁸ and must be exercised under the conditions imposed by municipal regulation.⁵⁹ Accordingly, a person has no right to obstruct traffic unduly by standing or parking his vehicle on a street for an unreasonable length of time,⁶⁰ or while he goes into a neighboring building to transact business.⁶¹

b. Regulation and Control

The parking of vehicles in the streets is subject to reasonable regulation by municipal corporations.

A municipal corporation, under its general powers to control and protect its streets, may enact ordinances to secure unobstructed passage thereon by vehicles,⁶² and, with this end in view, in the exercise of the police powers conferred on it,⁶³ it may regulate or prohibit parking,⁶⁴ according to the

47. Iowa.—Withey v. Fowler Co., 145 N.W. 923, 164 Iowa 377.
44 C.J. p 1033 note 87.

48. Mo.—Felber v. Union Electric Light & Power Co., 100 S.W.2d 494, 340 Mo. 201.
44 C.J. p 1033 note 88.

Keeping right of center of intersection

(1) An ordinance requiring left turns to be made to the right of center does not require a vehicle to go beyond the mathematical center of the intersection where the streets meet at angles and it would be impractical to do so.—Felber v. Union Electric Light & Power Co., *supra*.

(2) Under an ordinance requiring vehicles when turning to the left from one street into another to keep to the right of the center of the intersection, where one side of the street is so obstructed as to be impracticable for use in ordinary travel, a vehicle is required only to keep to the right of the center of the intersection of two currents of travel as defined and determined for practicable purposes by customary use of a street.—Karpeles v. City Ice Delivery Co., 73 So. 642, 198 Ala. 449.

49. Iowa.—Fisher v. Cedar Rapids, etc., R. Co., 157 N.W. 860, 177 Iowa 406.

50. Miss.—City of Ellisville v. State Highway Commission, 191 So. 274, 186 Miss. 473.
44 C.J. p 1033 note 91.

Incident of right of travel

Ind.—Andrews v. City of Marion, 47 N.E.2d 968, 221 Ind. 422.
Ky.—Allsmiller v. Johnson, 218 S.W.2d 28, 309 Ky. 695.

Okl.—Smille v. Taft Stadium Board of Control, 205 P.2d 301.
Or.—Morris v. City of Salem, 174 P.2d 192, 179 Or. 666—Lowell v. Pendleton Auto Co., 261 P. 415, 123 Or. 383.

R.I.—Allen & Reed v. Presbrey, 144 A. 888, 50 R.I. 53, appeal dismissed 50 S.Ct. 66, 280 U.S. 518, 74 L.Ed. 588.

51. Okl.—Smille v. Taft Stadium Board of Control, 205 P.2d 301.
R.I.—Allen & Reed v. Presbrey, 144 A. 888, 50 R.I. 53, appeal dismissed 50 S.Ct. 66, 280 U.S. 518, 74 L.Ed. 588.

52. Okl.—Smille v. Taft Stadium Board of Control, 205 P.2d 301.

53. N.Y.—Decker v. Goddard, 249 N.Y.S. 381, 139 Misc. 824, reversed on other grounds 251 N.Y.S. 440, 233 App.Div. 139.

54. N.Y.—Decker v. Goddard, 251 N.Y.S. 440, 233 App.Div. 139.

55. Mass.—Reynolds v. Murphy, 135 N.E. 119; 241 Mass. 225.

56. Ind.—Andrews v. City of Marion, 47 N.E.2d 968, 221 Ind. 422.
Ky.—Allsmiller v. Johnson, 218 S.W.2d 28, 309 Ky. 695.

Mo.—Jones v. Walker, 209 S.W.2d 147, 357 Mo. 476.

N.J.—Board of Com'rs of City of Newark v. Local Government

Board of New Jersey, 45 A.2d 139, 133 N.J. Law 513.

Or.—Morris v. City of Salem, 174 P.2d 192, 179 Or. 666.

57. N.J.—Board of Com'rs of City of Newark v. Local Government Board of New Jersey, 45 A.2d 139, 133 N.J. Law 513.

58. N.J.—Board of Com'rs of City of Newark v. Local Government Board of New Jersey, *supra*.

59. Mo.—Maher v. Donk Bros. Coal & Coke Co., 20 S.W.2d 888, 323 Mo. 799—Lindman v. Altman, 271 S.W. 512, 308 Mo. 187.

60. Ill.—City of Chicago v. McKinley, 176 N.E. 261, 344 Ill. 297.
44 C.J. p 1033 note 93.

61. Ill.—City of Chicago v. McKinley, *supra*.

62. Okl.—McGuire v. Wilkerson, 209 P. 445, 22 Okl. Cr. 36.

Tex.—Ex parte Battis, 48 S.W. 513, 40 Tex. Cr. 112, 76 Am.S.R. 708, 43 L.R.A. 863.

63. Mo.—Wilhoit v. City of Springfield, 171 S.W.2d 95, 237 Mo.App. 775.

N.H.—State v. Sweeney, 5 A.2d 41, 90 N.H. 127.

Or.—Morris v. City of Salem, 174 P.2d 192, 179 Or. 666.

Pa.—Commonwealth v. Fleming, 8 Pa. Dist. & Co. 708.

64. Cal.—People v. Galena, 70 P.2d 724, 24 Cal.App.2d Supp. 770.

Ill.—City of Bloomington v. Wirrick, 45 N.E.2d 852, 381 Ill. 347, certiorari denied 63 S.Ct. 1175, 319

decisions on the question, in its discretion,⁶⁵ as long as such regulation is reasonable and necessary for public safety⁶⁶ and does not transcend constitutional bounds,⁶⁷ or conflict with a statute.⁶⁸ Within this power and sustained as valid are regulations which provide that no vehicle shall remain on specified streets in such a manner as to obstruct traffic,⁶⁹ which define zones where parking is limited or prohibited,⁷⁰ which forbid the leaving of any vehicle standing on a street elsewhere than on the right hand side thereof with respect to the direction in which it fronts,⁷¹ or which forbid standing or parking on any street other than parallel to, and

within a specified distance of, the curb.⁷²

An ordinance prohibiting vehicles from stopping in the streets for more than a prescribed length of time has been held valid;⁷³ but such a regulation applies to a voluntary, as distinguished from an involuntary, stoppage.⁷⁴ It has also been held to apply to licensed peddlers as well as to others;⁷⁵ but an ordinance prohibiting the leaving or placing of any carts in the street has been held not violated by a licensed pushcart peddler remaining half an hour with the cart at one place on a busy street for the purpose of selling his wares.⁷⁶

U.S. 756, 87 L.Ed. 1709—City of Chicago v. McKinley, 176 N.E. 261, 344 Ill. 297—Haggens v. City of Chicago, 168 N.E. 661, 326 Ill. 578.

Ind.—Andrews v. City of Marion, 47 N.E.2d 968, 221 Ind. 422.

Ky.—Allsmiller v. Johnson, 218 S.W.2d 28, 309 Ky. 695—Miller v. City of Georgetown, 191 S.W.2d 403, 301 Ky. 241.

N.Y.—Decker v. Goddard, 251 N.Y.S. 440, 233 App.Div. 139.

Okl.—Ex parte Duncan, 65 P.2d 1015, 179 Okl. 355.

As to motor vehicles see Motor Vehicles §§ 28, 49–51.

In whom power lies

(1) Stadium board of control and board of education was held to have no control over streets of city or power to prohibit parking thereon.—Smille v. Taft Stadium Board of Control, Okl., 205 P.2d 301.

(2) Legislature could give power to permanently designate avenue as no-parking street to commissioner of public safety rather than common council.—People v. Sullivan, 238 N.Y.S. 253, 135 Misc. 705.

Parking in "loading zone" may be prohibited.—Allsmiller v. Johnson, 218 S.W.2d 28, 309 Ky. 695.

Traffic regulation

Control of parking thereof is intimately identified with traffic regulation in its larger aspect and is related to the essential public welfare.—Board of Com'rs of City of Newark v. Local Government Board of N. J., 45 A.2d 139, 133 N.J.Law 513.

65. Ga.—Borough of Atlanta v. Kirk, 165 S.E. 69, 175 Ga. 395.

Ill.—City of Chicago v. McKinley, 176 N.E. 261, 344 Ill. 297.

Wide discretion

Mo.—Wilhoit v. City of Springfield, 171 S.W.2d 95, 237 Mo.App. 775.

66. Mo.—Cavanaugh v. Gerk, 280 S.W. 51, 313 Mo. 375—Wilhoit v. City of Springfield, 171 S.W.2d 95, 237 Mo.App. 775—City of Clayton v. Nemours, 164 S.W.2d 935, 237 Mo.App. 167.

67. Del.—De Pace v. Mayor and

Council of Wilmington, Super., 58 A.2d 742.

In determining constitutionality of regulation prohibiting all-night street parking, court will not consider the regulation as a legislative body would do from standpoint of feasibility or desirability, but would permit regulation to stand unless it is found to transcend constitutional bounds of legislative discretionary power reposed in the enacting body.—De Pace v. Mayor and Council of Wilmington, supra.

68. N.Y.—City of Rochester v. Quine, 11 N.Y.S.2d 918, 171 Misc. 598.

Parking confined to motor vehicles

City parking ordinance, relating to all vehicles, is void as contrary to state vehicle and traffic law with respect to other vehicles than motor vehicles included in definition of parking by such law, and, hence, is inapplicable to parking of pushcart.—City of Rochester v. Quine, supra.

Statute not applicable to streets

Statutory regulations as to parking on state roads, highways, or parkways do not apply to streets unless made applicable by their terms. Ga.—Payne v. A. B. C. Truck Lines, 5 S.E.2d 241, 189 Ga. 112, answers to certified questions conformed to 5 S.E.2d 590, 61 Ga.App. 36.

Ohio.—Townley v. Union Fork & Hoe Co., 22 N.E.2d 211, 60 Ohio App. 544, appeal dismissed 19 N.E.2d 511, 135 Ohio St. 96.

69. N.Y.—People v. Harden, 179 N.Y.S. 732, 110 Misc. 72.

70. Mo.—City of Clayton v. Nemours, 164 S.W.2d 935, 237 Mo. App. 167.

71. W.Va.—Beck v. Cox, 37 S.E. 492, 77 W.Va. 442.

43 C.J. p 441 note 20.
Rule or regulation of keeping to right generally see *infra* § 1779.

72. Cal.—Dennis v. Gonzales, App., 205 P.2d 55.

73. Mass.—Commonwealth v. Brooks, 99 Mass. 355.

N.Y.—People v. Harden, 179 N.Y.S. 732, 110 Misc. 72.

Pa.—Borkowski v. Borough of Conshohocken, Com.Pl., 55 Montg. Co. 381, 31 Mun.L.R. 149, 9 Som.Leg. J. 395.

44 C.J. p 1034 note 1—12 C.J. p 917 note 10 [a].

Purpose

Ordinance restricting parking of vehicles for more than one hour in business district has for its purpose the providing of convenient parking facilities for those who wish to make short visits at stores and business offices.—State v. Sweeney, 5 A.2d 41, 90 N.H. 127.

In congested areas

Fla.—State ex rel. Harkow v. McCarthy, 171 So. 314, 126 Fla. 433.

Successive uses

In interpretation of ordinance restricting parking of vehicles for more than one hour in business district, wherein there is no definite minimum interval of time between successive uses of same or near-by parking spaces provided, it must be assumed some interval was intended to effectuate purposes of ordinance.—State v. Sweeney, 5 A.2d 41, 90 N.H. 127.

"Parking space" is not established by regulation prohibiting parking for more than a specified number of hours.—Decker v. Goddard, 251 N.Y.S. 440, 233 App.Div. 139.

74. Mass.—Commonwealth v. Brooks, 99 Mass. 434.

Words "cause" and "permit" in ordinance providing that no person shall cause or permit vehicle to stand on street beyond specified time indicate voluntary and intentional action.—City of Chicago v. McKinley, 176 N.E. 261, 344 Ill. 297.

75. Mass.—Commonwealth v. Brooks, 99 Mass. 434.

Regulation of hawkers and peddlers generally see *Hawkers and Peddlers* § 6.

76. Minn.—State v. Rayantia, 56 N.W. 586, 55 Minn. 126.

Delegation of power by municipality. Where the right to regulate parking has been conferred on the city council, it may delegate administration of its regulations to specified administrative officers,⁷⁷ and may even confer power on such officers to regulate parking in times of emergency.⁷⁸ However, power to designate permanent no-parking streets cannot be so delegated since such designation is a legislative act.⁷⁹

Providing parking space. As a necessary adjunct to the right to regulate traffic, the municipality may furnish parking space.⁸⁰

Leaving vehicle unattended. A regulation is reasonable and valid which prohibits the leaving of a team of horses, or horse and vehicle, unattended in the street.⁸¹ Such a regulation applies only where the horse and vehicle are deserted or abandoned, without anyone in charge, for the time;⁸² it does not apply where there is a mere stopping of the horse and a vehicle in a street,⁸³ or where, as expressly excepted by some regulations, there is such a temporary abandonment of the reins as is reason-

ably incident to loading and unloading.⁸⁴ An ordinance prohibiting leaving a vehicle on the streets was held applicable only to a more or less permanent occupation of the streets by vehicles when not in use,⁸⁵ and not to the leaving of a vehicle on the street while making deliveries therefrom.⁸⁶ Under some regulations unattended horses or draft animals must be hitched or fastened in the prescribed manner when left unattended on the streets.⁸⁷

Parking meters; fees. The power to regulate the parking of vehicles on city streets implies the power to exact a fee sufficient to cover the expenses of maintaining the regulations,⁸⁸ and includes the right to install parking meters in congested areas.⁸⁹

Public vehicles for hire; hack stands. With a view to securing unobstructed passage of vehicles, regulations have been upheld as valid traffic regulations, which prescribe where hacks or public vehicles for hire may or may not park or stand,⁹⁰ such as at railroad depots,⁹¹ the number of hacks that may use a stand⁹² or which forbid hackmen to stand or solicit patronage on the street,⁹³ or in any

77. N.Y.—People v. Sullivan, 238 N. Y.S. 253, 135 Misc. 705.

78. N.Y.—People v. Sullivan, supra.

Cessation of emergency

Ordinance authorizing commissioner of public safety to regulate parking when emergency existed did not authorize commissioner to continue no-parking regulation when emergency ceased to exist.—People v. Sullivan, supra.

79. N.Y.—People v. Sullivan, supra.

80. Ky.—Miller v. City of Georgetown, 191 S.W.2d 403, 301 Ky. 241.

81. Ky.—Rowe v. Reneer, 99 S.W. 250, 30 Ky.L. 545.

N.Y.—Koffler v. American R. Express Co., 214 N.Y.S. 787, 126 Misc. 838.

82. Ala.—Excelsior Steam Laundry Co. v. Lomax, 52 So. 347, 166 Ala. 612.

44 C.J. p 1034 note 8.

83. Va.—Standard Oil Co. v. Roberts, 107 S.E. 838, 130 Va. 532.

44 C.J. p 1034 note 9.

84. Ala.—Excelsior Steam Laundry Co. v. Lomax, 52 So. 347, 166 Ala. 612.

44 C.J. p 1034 note 10.

85. N.Y.—Russell v. James Butler Grocery Co., 267 N.Y.S. 136, 239 App.Div. 169, motion denied 268 N.Y.S. 668, 240 App.Div. 31, reversed on other grounds 193 N.E. 281, 265 N.Y. 482.

86. N.Y.—Russell v. James Butler Grocery Co., supra.

87. N.M.—Valdez v. Azar Bros., 264 P. 962, 33 N.M. 230.

Repeal by implication

Ordinance defining proper hitching of horses left on street, alley, or public place was held to repeal by implication former ordinance requiring hitching with sufficient halter or other apparatus.—Valdez v. Azar Bros., supra.

88. Okl.—Ex parte Duncan, 65 P.2d 1015, 179 Okl. 355.

"Free use of highways," within statute prohibiting passage of city ordinances requiring fee for free use of highways or excluding any vehicle from such use, was held to mean only use incident to travel and not to include right to park.—Ex parte Duncan, supra.

89. Tex.—City of Galveston v. Galveston County, Civ.App., 159 S.W. 2d 976, error refused.

Regulations as to motor vehicles see Motor Vehicles § 28 e.

90. Me.—Chapman v. City of Portland, 160 A. 913, 131 Me. 242.

Or.—McGuire v. Wilkerson, 209 P. 445, 22 Okl.Cr. 36.

43 C.J. p 441 note 12—44 C.J. p 1033 note 95, p 1010 note 33.

Whether driver may leave hack

Tex.—Ex parte Vance, 62 S.W. 568, 42 Tex.Cr. 619.

Hack stands

(1) Ordinarily under constitutional, charter, or statutory provisions a municipality has power to grant the use of its streets for hack stands.—Pennsylvania Co. v. Chicago, 54 N.E. 825, 181 Ill. 289, 53 L.R.A. 223.

go. 54 N.E. 825, 181 Ill. 289, 53 L.R.A. 223—44 C.J. p 990 note 85.

(2) This power is subject to the limitation that no nuisance may be created by such grant.—Odell v. Bretney, 78 N.Y.S. 67, 38 Misc. 603, modified on other grounds 87 N.Y.S. 655, 93 App.Div. 607—44 C.J. p 990 note 86.

(3) Privilege of maintaining taxicab stand can be granted only under proper regulation, which may be confided to discretion of municipal administrative board or officer.—Ex parte Graham, 269 P. 183, 93 Cal. App. 88.

91. Fla.—Taylor v. Roberts, 94 So. 874, 84 Fla. 654.

44 C.J. p 1034 note 96.

Access to, or egress from, depot must not be prejudicially interfered with by the establishment of a hack stand in front of the depot.—Pennsylvania Co. v. Chicago, 54 N.E. 825, 181 Ill. 289, 53 L.R.A. 223.

Consent of station supervisor

An ordinance making it unlawful for the driver of a vehicle to stand in front of a specified station between designated points without the permission of the station supervisor was held invalid as an unlawful delegation of power.—Cincinnati v. Cook, 140 N.E. 555, 107 Ohio St. 223.

92. Ala.—Montgomery v. Parker, 21 So. 452, 114 Ala. 118, 62 Am.S.R. 95.

Me.—Chapman v. City of Portland, 160 A. 913, 131 Me. 242.

93. N.Y.—People v. Saratoga

place other than the place assigned to them.⁹⁴ On the other hand, an ordinance has been held unreasonable and invalid which forbids the stopping or standing of any vehicle for hire, on certain named streets or in front of a public hotel, except when actually engaged in receiving or discharging passengers or freight.⁹⁵ An ordinance providing that cabs shall stand on certain parts of certain streets and that any violation thereof shall be a misdemeanor does not make a person standing a cab elsewhere than as provided guilty of a misdemeanor.⁹⁶

Private property. A municipality may not prohibit parking on private property,⁹⁷ and an ordinance which purports to regulate traffic on public streets does not prohibit such parking.⁹⁸ However, parking may be regulated or prohibited on private streets which the owners have voluntarily permitted the general public to use for public travel.⁹⁹

Damage from prohibition of parking. Property owners cannot recover against the municipality for losses resulting from the maintenance of no-parking signs in front of their property.¹

§ 1767. — Vehicles Having Special Privileges

- a. In general
- b. Right of way

a. In General

Traffic regulations have been held not to apply to public officials engaged in the performance of a public duty where speed and right of way are essential.

Springs Sewer, etc, Commn., 86 N.Y.S. 445, 90 App.Div. 555.
44 C.J. p 1034 note 97.

Power to regulate soliciting patronage generally see supra § 299.

94. Mass.—Commonwealth v. Matthews, 122 Mass. 60.

44 C.J. p 1034 note 98—43 C.J. p 441 note 12 [a].

95. Tex.—Ex parte Battis, 48 S.W. 513, 40 Tex.Cr. 112, 76 Am.S.R. 708, 43 L.R.A. 863.

44 C.J. p 1034 note 5.

96. Mont.—Helena v. Gray, 17 P. 564, 7 Mont. 486.

97. Mo.—City of Clayton v. Nemours, 164 S.W.2d 935, 237 Mo. App. 167.

98. Mo.—City of Clayton v. Nemours, supra.

Street use as matter of right

A private street, title to which rested in trustees for benefit of lot owners of a city addition, public use of which did not arise by dedication, condemnation, or prescription, but which was used by public, was not a "public street" under ordinance pro-

hibiting parking on way or place open to use of public as a matter of right—City of Clayton v. Nemours, 182 S.W.2d 57, 353 Mo. 61, appeal dismissed 65 S.Ct. 560, two cases, 323 U.S. 684, 89 L.Ed. 554.

99. Mo.—City of Clayton v. Nemours, supra—Nemours v. City of Clayton, 175 S.W.2d 60, 237 Mo. App. 497—City of Clayton v. Nemours, 164 S.W.2d 935, 237 Mo. App. 167.

"Public street" within statutory definition

Mo.—City of Clayton v. Nemours, 164 S.W.2d 935, 237 Mo.App. 167.

1. N.C.—Thompson v. City of Reidsville, 166 S.E. 389, 203 N.C. 502.

2. U.S.—Lilly v. State of West Virginia, C.C.A.W.Va., 29 F.2d 61.

Prohibition agent

U.S.—Lilly v. State of West Virginia, supra.

3. Kan.—Kansas City v. McDonald, 57 P. 123, 60 Kan. 481, 45 L.R.A. 429.

44 C.J. p 1034 note 13.

It has been held that traffic regulations are not to be construed as applying to public officials engaged in the performance of a public duty where speed and right of way are a necessity.² It is generally held that regulations limiting the rate of speed for riding or driving on streets, as discussed supra § 1764, do not apply to the vehicles of the fire department when responding to an alarm of fire,³ or to a salvage corps,⁴ or to police officers in the performance of their duties.⁵ In accordance with these principles a speed regulation is not invalid because it makes speed limitations inapplicable to vehicles operated by the fire and police departments;⁶ and, on the other hand, an ordinance, making it a misdemeanor for any person intentionally to ride or drive any horse, mule, or other beast faster than an ordinary traveling gait in any of the streets of the city, is unreasonable when sought to be applied to the fire department in driving to a fire.⁷

Ambulances. An ambulance is within the terms and scope of an ordinance limiting the rate of speed for driving a horse or vehicle through the streets,⁸ and a regulation giving ambulances the right of way over other vehicles does not authorize the driver of an ambulance to exceed the speed limit.⁹

b. Right of Way

Vehicles operated by the municipal fire and police departments may be accorded the right of way over other vehicles using the streets.

There is no common-law right of way of vehicles of a municipal fire department over other vehi-

cles As to motor vehicles see Motor Vehicles § 372.

4. Minn.—State v. Sheppard, 67 N.W. 62, 64 Minn. 287, 36 L.R.A. 305.
44 C.J. p 1034 note 14.

5. Minn.—Edberg v. Johnson, 184 N.W. 12, 149 Minn. 395.
Application of regulations as to motor vehicles see Motor Vehicles § 374.

6. Cal.—Ex parte Snowden, 107 P. 724, 12 Cal.App. 521.

7. Kan.—Kansas City v. McDonald, 57 P. 123, 60 Kan. 481, 45 L.R.A. 429.

8. Mich.—People v. Little, 48 N.W. 693, 86 Mich. 125.
44 C.J. p 1035 note 19.

As to motor vehicles see Motor Vehicles § 376.

9. Mich.—People v. Little, supra.
N.Y.—Kellogg v. Long Island Church Charity Foundation, 96 N.E. 406, 203 N.Y. 191, 88 L.R.A., N.S., 481, Ann.Cas.1913A 883.

cles;¹⁰ but it has been considered that the right of way should be given to such vehicles when a destructive fire is, or is supposed to be, in progress,¹¹ and regulations expressly granting this right or privilege have been frequently enacted by statute or ordinance, which have been upheld.¹² Regulations have been held reasonable and valid which give a fire insurance patrol the right of way in the streets over all vehicles,¹³ except vehicles carrying the United States mail,¹⁴ and under such a regulation a fire patrol wagon has the right of way over one riding a motorcycle,¹⁵ notwithstanding a statute giving the owners of motorcycles the same rights on the public streets as all other persons;¹⁶ and the driver of such a patrol wagon may assume that persons approaching a street crossing will yield the right of way to him.¹⁷ Generally, ordinances of this nature must not be inconsistent or conflict with constitutional or statutory provisions,¹⁸ and a general law covering the subject takes precedence over an inconsistent ordinance.¹⁹

Ambulances. Ordinances have been upheld which give ambulances the right of way at street intersections.²⁰

Mail wagons. An ordinance which gives the United States mail wagons, when used in collecting mail, a right of way over other vehicles is valid only as a police regulation to insure such mail a free

course;²¹ and it does not create a right of action in favor of mail collectors against one who violates the ordinance.²²

Physician's vehicle. An ordinance giving physicians, with police permits, the right of way at intersections, without any qualifying and safeguarding provisions, directly tends to jeopardize the public safety which a statutory right of way rule was intended to promote, and is invalid.²³

Police. A statute giving police officers in the exercise of due care for the safety of the public the right of way is applicable to a city street.²⁴

§ 1768. — Bicycles

The use of the streets by bicycles is subject to reasonable regulation by a municipal corporation.

Bicycles on the street are generally subject to all just and reasonable requirements for the safety and convenience of other users of such streets;²⁵ and a regulation has been held valid which requires a bicyclist to ring a bell when approaching a crossing or crosswalk;²⁶ but a municipal regulation of the use of such vehicles must be consistent with statutory regulations thereof.²⁷ Local authorities have been held to have power to provide for one-way traffic of bicycles.²⁸

Lights. Under a statute giving a city council

10. Ind.—Indianapolis Tract, etc. Co. v. Hensley, 105 N.E. 474, superseded 115 N.E. 934, 186 Ind. 479, rehearing denied and dissenting opinion 117 N.E. 854, 186 Ind. 479.

44 C.J. p 1035 note 22.

Motor vehicles see Motor Vehicles § 372.

11. Fla.—Maxwell v. Miami, 100 So. 147, 87 Fla. 107, 33 A.L.R. 682.

12. Tex.—Dallas Ry. & Terminal Co. v. Allen, Civ.App., 43 S.W.2d 165, error refused.

Motor vehicle fire apparatus see Motor Vehicles § 19.

General laws

Use of city streets by police and fire equipment is matter of public concern, amenable to general law.—Lossman v. City of Stockton, 44 P. 2d 397, 6 Cal.App.2d 324.

13. Tex.—Dallas Ry. & Terminal Co. v. Allen, Civ.App., 43 S.W.2d 165, error refused.

44 C.J. p 1035 note 25.

14. N.Y.—Duffghe v. Metropolitan St. R. Co., 96 N.Y.S. 324, 109 App. Div. 603, affirmed 79 N.E. 1104, 187 N.Y. 522.

15. Wis.—Sutter v. Milwaukee Fire Underwriters, 160 N.W. 57, 1034, 164 Wis. 532.

16. Wis.—Sutter v. Milwaukee Fire Underwriters, supra.

17. Wis.—Sutter v. Milwaukee Fire Underwriters, supra.

18. Tex.—Dallas Ry. & Terminal Co. v. Allen, Civ.App., 43 S.W.2d 165, error dismissed.

Conflict not shown

Tex.—Dallas Ry. & Terminal Co. v. Allen, supra.

19. Tex.—Dallas Ry. & Terminal Co. v. Allen, supra.

20. N.Y.—Buys v. Third Ave. R. Co., 61 N.Y.S. 113, 45 App. Div. 11, 44 C.J. p 1035 note 33.

Motor vehicle ambulances see Motor Vehicles § 19.

21. Ark.—Bain v. Ft. Smith Light, etc., Co., 172 S.W. 843, 116 Ark. 125, L.R.A.1915D 1021.

22. Ark.—Bain v. Ft. Smith Light, etc., Co., supra.

23. Md.—Kidd v. Chissell, 126 A. 82, 146 Md. 169, 173, 38 A.L.R. 20, 44 C.J. p 1035 note 34.

24. Tex.—Hobb Digs Co. v. Bell, 293 S.W. 808, 116 Tex. 427.

25. Iowa.—Des Moines v. Keller, 88 N.W. 827, 116 Iowa 648, 93 Am.S.R. 268, 57 L.R.A. 243.

43 C.J. p 440 note 97 [b].

Use of sidewalk see infra § 1776.

26. Kan.—Emporia v. Wagoner, 49 P. 701, 6 Kan.App. 659.

44 C.J. p 1035 note 37.

27. N.J.—Massinger v. Millville, 43 A. 443, 63 N.J. Law 123.

44 C.J. p 1035 note 38.

Compliance with statute

Posting of a one-way street is sufficient to comply with the requirements of a statute, if a sign is erected at each intersection on that side of the street opposite to the direction of traffic.—Thompson v. Philadelphia Transp. Co., 58 Pa. Dist. & Co. 334, affirmed 53 A.2d 120, 357 Pa. 3.

28. Pa.—Thompson v. Philadelphia Transp. Co., 53 A.2d 120, 357 Pa. 3.

Ordinance held valid when applied to bicycles.—Thompson v. Philadelphia Transp. Co., 53 A.2d 120, 357 Pa. 3.

Application of ordinance to bicycles

Ordinance which applied by its title to bicycles, and defined "vehicle" as every device by which person or property may be transported on a public street and which included provision regulating one-way streets as to all vehicular traffic, provided for regulation of bicycles as well as automobiles, when it made particular street a one-way street.—Thompson v. Philadelphia Transp. Co., 53 A.2d 120, 357 Pa. 3.

power to provide for the safety of its inhabitants, the city has authority to pass an ordinance requiring bicycles on the streets after dark to carry lights.²⁹ Such an ordinance is not contrary to a constitutional provision requiring all laws of a general nature to have a uniform operation, although it applies only to bicycles, and not to riders of other silently running vehicles;³⁰ nor is such ordinance contrary to the provision of the federal constitution forbidding a state to abridge any of the privileges or immunities of citizens.³¹

Rate of speed. The speed of a bicycle cannot be regulated by an ordinance which was clearly intended to apply only to animal-drawn vehicles³² or by a statute fixing the speed of motor vehicles.³³

License fee. In the absence of statute so authorizing, a municipal corporation may not require the payment of a license fee for the use of a bicycle on the city streets.³⁴

§ 1769. Processions

The use of streets for parades or processions is a legitimate subject of municipal regulation.

The ordinary obstruction of a street by a parade or procession does not of itself constitute a nuisance;³⁵ but the use of streets for conducting parades or processions thereon is a legitimate subject of municipal regulation,³⁶ under the powers delegated to the municipality,³⁷ although ordinances for

that purpose must be in general terms and apply to all alike.³⁸ In the exercise of this power, the municipality has authority to give consideration, without unfair discrimination, to time, place, and manner in relation to the other proper uses of the streets.³⁹ Ordinances prohibiting parades on the city streets without a permit have been upheld as valid,⁴⁰ although the power to issue the permit⁴¹ and designate the time and place for the parade⁴² is conferred on specified officers; the issuance of a requisite permit under such an ordinance rests in the sound discretion of the designated official.⁴³

On the other hand, it has been held that an ordinance forbidding parades with music without first having obtained the permission of the city council,⁴⁴ the mayor, or in his absence, the president of the city council, city clerk, or city marshal, in the order named,⁴⁵ the mayor or council,⁴⁶ or the chief of police,⁴⁷ is unreasonable because it leaves the power of permitting or restraining processions and their courses to an unregulated, official discretion, when the whole matter, if regulated at all, must be by permanent and legal provisions, and must operate generally and impartially.

§ 1770. Causing Crowd to Collect

The use of the streets for the assembly of persons thereon is subject to reasonable regulation to prevent obstruction of the right of passage.

29. Iowa.—Des Moines v. Keller, 88 N.W. 827, 116 Iowa 648, 93 Am.S.R. 268, 57 L.R.A. 243.

44 C.J. p 1036 note 39.

"Lamp" is any device for producing artificial light.—Kercher v. City of Conneaut, 65 N.E.2d 272, 76 Ohio App. 491.

"Equipped" with lamp

The word "equipped" in city ordinance requiring that bicycle be equipped with good lamp did not require attachment thereof to bicycle.—Kercher v. City of Conneaut, supra.

30. Iowa.—Des Moines v. Keller, 88 N.W. 827, 116 Iowa 648, 93 Am.S.R. 268, 57 L.R.A. 243.

31. Iowa.—Des Moines v. Keller, supra.

32. Okl.—Shawnee v. Landon, 106 P. 652, 3 Okl.Cr. 440.

33. Iowa.—Dice v. Johnson, 175 N.W. 38, 187 Iowa 1134.

34. Wash.—State v. Bruce, 63 P. 519, 23 Wash. 777.

35. Ill.—Trotter v. Chicago, 38 Ill. App. 206, affirmed 26 N.E. 359, 186 Ill. 430.

44 C.J. p 1036 note 45.

36. U.S.—Cox v. State of New

Hampshire, N.H., 61 S.Ct. 762, 312 U.S. 569, 85 L.Ed. 1049, 133 A.L.R. 1396.

Mass.—Commonwealth v. Frishman, 126 N.E. 838, 235 Mass. 449, 9 A.L.R. 549.

44 C.J. p 1036 note 46.
Regulation of public meetings see supra § 291.

37. N.J.—Thomas v. Casey, 1 A.2d 866, 121 N.J.Law 185, affirmed 9 A.2d 294, 123 N.J.Law 447.

Creation of licensing authority

Statute authorizing appointment by city of licensing authority for licensing of parades and processions was not an improper "delegation of power" because licensing authority could not only administer the act but could also prescribe such rules and regulations for its due enforcement as it might think proper to adopt.—State v. Cox, 16 A.2d 508, 91 N.H. 137, affirmed Cox v. State of New Hampshire, 61 S.Ct. 762, 312 U.S. 569, 85 L.Ed. 1049, 133 A.L.R. 1396.

38. U.S.—Cox v. State of New Hampshire, N.H., 61 S.Ct. 762, 312 U.S. 569, 85 L.Ed. 1049, 133 A.L.R. 1396.

44 C.J. p 1036 note 47.

39. U.S.—Cox v. State of New Hampshire, supra.

40. N.J.—Thomas v. Casey, 1 A.2d 866, 121 N.J.Law 185, affirmed 9 A.2d 294, 123 N.J.Law 447.

Pa.—Commonwealth v. Hessler, 15 A.2d 486, 141 Pa.Super. 421.

Held not vague or indefinite

Pa.—Commonwealth v. Hessler, supra.

41. Cal.—In re Flaherty, 38 P. 981, 105 Cal. 558.

42. Pa.—Commonwealth v. Hessler, 15 A.2d 486, 141 Pa.Super. 421.

43. N.J.—Thomas v. Casey, 1 A.2d 866, 121 N.J.Law 185, affirmed 9 A.2d 294, 123 N.J.Law 447.

44. Ill.—Rich v. Naperville, 42 Ill. App. 222.

45. Kan.—Anderson v. Wellington, 19 P. 719, 40 Kan. 173, 10 Am.S.R. 175, 2 L.R.A. 110.

46. Mich.—In re Frazee, 80 N.W. 72, 68 Mich. 396, 6 Am.S.R. 310.
44 C.J. p 1036 note 50.

47. Colo.—Corpus Juris cited in Trujillo v. City of Walsenburg, 118 P.2d 1081, 1083, 108 Colo. 427.
Ill.—Chicago v. Trotter, 36 N.E. 359, 136 Ill. 430.

Streets are intended for the purpose of passage, as discussed supra § 1758, and not for assemblage,⁴⁸ and, although the fact that a person by reason of his speaking, preaching, or other conduct collects a crowd in the street, does not of itself constitute a nuisance,⁴⁹ if one carries on his business or in any way conducts himself so as to collect a crowd of people in a highway and thereby unduly interfere with traffic, he is guilty of creating a nuisance.⁵⁰ In accordance with these principles, regulations, by statute or ordinance, have been upheld as a valid exercise of the police power, which have for their object the keeping of the streets free for public travel,⁵¹ such as an ordinance which prohibits persons from "idly standing, loafing or congregating" on the streets;⁵² or which prohibits an assemblage of

persons on the street, without a permit from a specified municipal officer, so as to obstruct traffic;⁵³ and the requiring of such a permit does not take away the constitutional rights of the people to assemble.⁵⁴

The issuance of the requisite permit rests in the sound discretion of the official designated.⁵⁵ Under a statutory power to permit assemblages on streets, a city may limit the use of the street for such purpose to proper times and places,⁵⁶ but the action of the authorities in granting or refusing permits for such use of the streets must be reasonable, and not arbitrary or governed by whim or caprice.⁵⁷ Such a regulation, however, must not interfere with the personal liberty of a citizen as guaranteed to him by the constitution and laws.⁵⁸ Where there is a

48. Pa.—Duquesne v. Fincke, 112 A. 130, 269 Pa. 112.

49. Pa.—Fairbanks v. Kerr, 70 Pa. 86, 92, 10 Am.R. 664.

44 C.J. p 1036 note 54.

50. N.J.—Thomas v. Casey, 1 A.2d 866, 121 N.J.Law 185, affirmed 9 A.2d 294, 123 N.J.Law 447.

44 C.J. p 1036 note 55.

No one is justified in obstructing the public streets by collecting thereon a large assemblage of people even for the purpose of delivering an address to them.—Thomas v. Casey, supra—Harwood v. Trembley, 116 A. 430, 97 N.J.Law 173.

51. Minn.—State v. Sugarman, 148 N.W. 466, 126 Minn. 477, 52 L.R.A., N.S., 999.

44 C.J. p 1036 note 57, p 1037 notes 58–62.

Delegation of power

(1) Legislature may delegate to a city the power to regulate the use of its public highways for public addresses and assemblies.

N.J.—Thomas v. Casey, 1 A.2d 866, 121 N.J.Law 185, affirmed 9 A.2d 294, 123 N.J.Law 447.

N.Y.—People ex rel. Doyle v. Atwell, 133 N.E. 364, 232 N.Y. 96, 25 A.L.R. 107, error dismissed 43 S.Ct. 410, 261 U.S. 590, 67 L.Ed. 814.

(2) Under its delegated powers the municipality may entirely forbid public meetings and speaking on the streets, or limit their use to certain purposes.—People, on Complaint of O'Connor, v. Smith, 188 N.E. 745, 263 N.Y. 255, appeal dismissed Smith v. People of State of New York on Complaint of O'Connor, 54 S.Ct. 775, 292 U.S. 606, 78 L.Ed. 1468.

Obstruction as question of fact

Under ordinance requiring persons composing a crowd obstructing a street or sidewalk to move on at direction of a police officer, whether free passage of street or sidewalk was obstructed is a question of fact.

—Ex parte Bodkin, 194 P.2d 588, 86 Cal.App.2d 208.

52. Minn.—State v. Sugarman, 148 N.W. 466, 126 Minn. 477, 52 L.R.A., N.S., 999.

44 C.J. p 1036 note 57.

Loitering after command to move

(1) Ordinance prohibiting loitering on streets after command by police officer to move on and prescribing punishment for violation was held valid under general power to regulate streets and to promote general welfare and peace.—Benson v. City of Norfolk, 177 S.E. 222, 163 Va. 1037.

(2) Regulating loitering in general see supra § 275.

53. N.J.—Thomas v. Casey, 1 A.2d 866, 121 N.J.Law 185, affirmed 9 A.2d 294, 123 N.J.Law 447—Harwood v. Trembley, 116 A. 430, 97 N.J.Law 173.

N.Y.—People, on Complaint of O'Connor, v. Smith, 188 N.E. 745, 263 N.Y. 255, appeal dismissed Smith v. People of State of New York on Complaint of O'Connor, 54 S.Ct. 775, 292 U.S. 606, 78 L.Ed. 1468—People ex rel. Doyle v. Atwell, 133 N.E. 364, 232 N.Y. 96, 25 A.L.R. 107, error dismissed 43 S.Ct. 410, 261 U.S. 590, 67 L.Ed. 814.

44 C.J. p 1037 note 58.

Regulation of public meetings generally see supra § 291.

Purpose of regulation

It is not aimed against free speech; it is directed toward the manner in which the street may be used.

N.Y.—People, on Complaint of O'Connor v. Smith, 188 N.E. 745, 263 N.Y. 255, appeal dismissed Smith v. People of State of New York on Complaint of O'Connor, 54 S.Ct. 775, 292 U.S. 606, 78 L.Ed. 1468.

54. N.J.—Thomas v. Casey, 1 A.2d 866, 121 N.J.Law 185, affirmed 9 A.2d 294, 123 N.J.Law 447—Harwood

v. Trembley, 116 A. 430, 97 N.J.Law 173.

Ohio.—Canton v. Robertson, 20 Ohio N.P., N.S., 241.

Constitutionality of such regulations generally see Constitutional Law § 214.

Regulations relating to unlawful assembly generally see supra § 304.

55. N.J.—Thomas v. Casey, 1 A.2d 866, 121 N.J.Law 185, affirmed 9 A.2d 294, 123 N.J.Law 447.

Likelihood of disturbance

The officer did not abuse his discretion in refusing a permit under city ordinance to individual to make a speech on a public highway, where many of city's citizens were opposed to individual's political views, and it was apparent that a disturbance might result if individual should make a speech.—Thomas v. Casey, supra.

56. Pa.—City of Duquesne v. Fincke, 112 A. 130, 269 Pa. 112.

Permits for public meetings generally see supra § 291.

57. N.Y.—People ex rel. Doyle v. Atwell, 188 N.Y.S. 803, 197 App.Div. 225, affirmed 133 N.E. 364, 232 N.Y. 96, 25 A.L.R. 107, error dismissed 43 S.Ct. 410, 261 U.S. 590, 67 L.Ed. 814.

44 C.J. p 1037 note 61.

58. Mo.—St. Louis v. Gloner, 109 S.W. 30, 210 Mo. 502, 124 Am.S.R. 750, 15 L.R.A., N.S., 973.

44 C.J. p 1037 note 62.

Obedience to direction to move on

(1) Ordinance, prohibiting persons whose presence interferes with free use of street or sidewalk from remaining thereon after being ordered to disperse by police officers, was held not unconstitutional.

Va.—Benson v. City of Norfolk, 177 S.E. 222, 163 Va. 1037.

Wash.—City of Tacoma v. Roe, 68 P.2d 1028, 190 Wash. 444.

reasonable basis therefor, permits may be required for certain classes of street meetings and not for others.⁵⁹

An assemblage of a moral and religious character has been held to come within the prohibition of such a regulation.⁶⁰

§ 1771. Unusual Noises

The making of noise on the streets which may disturb travelers and lessen the precautions to be taken by them is subject to reasonable regulation by municipal corporations.

Among the activities which may be regulated, or even prohibited, under the police power, is the making of disturbing noises on the public streets whereby travelers thereon are disturbed or their attention diverted so as to lessen the necessary precaution to be exercised by such travelers.⁶¹ However, in the absence of statutory authority therefor, an ordinance prohibiting the making of a noise on the streets of such a character as to annoy and disturb others, and providing for the arrest of a person who fails or refuses to desist from making such a noise, on being ordered to do so, was held invalid, as being unreasonable and not essential or indispensable to carrying into effect any of the municipal purposes,⁶² and as being oppressive and in contravention of common rights.⁶³

The legislature may delegate to a municipality power to make ordinances declaring it unlawful to beat drums or tambourines or make any noise with

instruments on the streets without the written permission of a specified municipal officer;⁶⁴ and it has been held that such an ordinance is authorized by a statute giving power to make ordinances for the preservation of the public peace and to regulate and prevent on the streets any act endangering persons or property.⁶⁵ An ordinance prohibiting any noise or assemblage of persons in the street to the annoyance or disturbance of others is not violated by a Salvation Army parade and singing of religious songs.⁶⁶

Itinerant musicians. If authorized by statute, a municipal corporation may authorize a particular municipal board to adopt rules for regulating and restraining itinerant musicians in the streets and public places of the city;⁶⁷ and such rules when made are not unreasonable or invalid in requiring the taking out of a license, and the payment of a small fee therefor, by such a musician.⁶⁸ A cornet player in a religious organization parade is an "itinerant musician" within such an ordinance,⁶⁹ and such player is not protected by the fact that his act was done as a matter of religious worship only.⁷⁰

§ 1772. Sports in Streets

The use of the streets for purposes of sport is subject to reasonable regulation by a municipal corporation.

The right of the public to use the streets of a city for the purpose of mere sport, if there is such a right, is subject to reasonable regulation or restriction by the city,⁷¹ and regulations have been enacted

Valid ordinance

Ordinance, which related solely to regulation of use of public streets, preserving them for benefit of public against obstructions, and did not impose a restriction on what may be uttered or published, is a valid exercise of the police power and is not unconstitutional, merely because it operated to prevent one from presenting his ideas to as large a number of persons at a given place as he might think desirable.—*Ex parte Bodkin*, 194 P.2d 588, 86 Cal.App.2d 208.

59. N.Y.—*People, on Complaint of O'Connor v. Smith*, 188 N.E. 745, 263 N.Y. 255, appeal dismissed *Smith v. People of State of New York on Complaint of O'Connor*, 54 S.Ct. 775, 292 U.S. 606, 78 L.Ed. 1468.

Practical exigencies and common experience may permit recognition of degrees of harm from conduct of different classes of street meetings and limitation of regulation to classes, where need therefor is deemed clearest by city ordinance.—*People, on Complaint of O'Connor v. Smith*, 188 N.E. 745, 263 N.Y. 255, appeal

dismissed *Smith v. People of State of New York on Complaint of O'Connor*, 54 S.Ct. 775, 292 U.S. 606, 78 L.Ed. 1468.

Religious meetings

Fact that city ordinance, requiring permits for street meetings to preach religion or expound atheism, does not cover all street meetings is no objection to reasonable classification.—*People, on Complaint of O'Connor v. Smith*, 188 N.E. 745, 263 N.Y. 255, appeal dismissed *Smith v. People of State of New York on Complaint of O'Connor*, 54 S.Ct. 775, 292 U.S. 606, 78 L.Ed. 1468.

60. Ohio.—*State v. Spiegel*, 22 Ohio Cir.Ct.N.S., 337, 44 C.J. p 1037 note 63.

61. Ky.—*Maupin v. City of Louisville*, 144 S.W.2d 237, 284 Ky. 195. By motor vehicles see *Motor Vehicles* § 34.

Hospital street

Ordinance prohibiting a person from making any unnecessary noise or driving at a speed faster than a walk on a "hospital street" is intended to regulate noise rather than speed, and is not intended to pro-

vide additional safeguards for those on the street adjacent to the hospital.—*Keane v. Felshin*, 16 N.Y.S.2d 448, 258 App.Div. 269.

62. Okl.—*In re Gribben*, 47 P. 1074, 5 Okl. 379.

63. Okl.—*In re Gribben*, supra

64. N.Y.—*Roderick v. Whitson*, 4 N.Y.S. 112, 51 Hun 620.

65. N.Y.—*Roderick v. Whitson*, supra.

66. N.Y.—*People v. Rochester*, 44 Hun 166, 8 N.Y.St. 291.

67. Mass.—*Commonwealth v. Plaisted*, 19 N.E. 224, 148 Mass. 375, 12 Am S.R. 566, 2 L.R.A. 142.

68. Mass.—*Commonwealth v. Plaisted*, supra.

69. Mass.—*Commonwealth v. Plaisted*, supra.

70. Mass.—*Commonwealth v. Plaisted*, supra.

71. N.J.—*Billington v. Miller*, 67 A. 935, 75 N.J.Law 415.

Regulation of amusements and recreations generally see supra § 211.

Permit to play baseball

A town council's grant to school board of a temporary right to pos-

which forbid games, sports, or amusements in the streets, which have a tendency to interfere with travel thereon;⁷² and as long as the restrictions imposed are reasonable, for a public purpose, and not arbitrary, the courts should not interfere with their enforcement.⁷³

Coasting. Coasting on a public street which is not put to an extended public use, in the absence of an express prohibition by ordinance, is not necessarily such an illegal act as to constitute a nuisance;⁷⁴ and since, under some circumstances, it would be proper to allow it, the licensing of such a use of a street is within the legislative and governmental discretion of the municipal authorities;⁷⁵ and this discretion cannot be judicially reviewed in the absence of any provision that it may be.⁷⁶ However, coasting may be prohibited by statute,⁷⁷ and authority to regulate the use of sleds or other vehicles on the streets for coasting is sometimes expressly conferred on the municipality;⁷⁸ a city having exclusive power over its streets has authority to prohibit or to empower its officers to stop and sup-

press such coasting,⁷⁹ except on designated streets.⁸⁰ An ordinance prohibiting coasting on certain named streets excludes the act of coasting, as far as confined to streets not enumerated, from the operation of a general ordinance prohibiting games, interfering with the free and safe use of the streets, on all streets of the municipality.⁸¹

Roller skating. An ordinance which prohibits roller skating on a street only as a sport does not infringe the right of the public to travel on the street on roller skates;⁸² and, where a portion of a street on which such skating is prohibited had been so given up to the sport as to constitute a serious injury to abutting property owners, if not an unreasonable obstruction of traffic, the ordinance is neither unreasonable nor arbitrary.⁸³ An ordinance is a valid exercise of the city's police power, which prohibits a person on roller skates from grasping any vehicle moving on the street,⁸⁴ even though its terms are regarded as including an inhibition against such act by the owner of the vehicle.⁸⁵

session of two streets for the length of a ball game played by school children, and as much of the street as was sufficient to permit the playing of the game, was not a purpresture, but gave to the school board the possession of that part of the streets for the purpose mentioned, which appellants had no right to interfere with, and in ignoring that right in a recalcitrant manner they were guilty of trespass.—*Owens v. Town of Atkins*, 259 S.W. 396, 163 Ark. 82, 34 A.L.R. 267.

72. Ill.—*Star Brewery Co. v. Houck*, 78 N.E. 827, 222 Ill. 348, 113 Am. S.R. 420.

44 C.J. p 1038 note 77.

73. N.J.—*Billington v. Miller*, 67 A. 935, 75 N.J.Law 415.

74. Mich.—*Burford v. Grand Rapids*, 18 N.W. 571, 53 Mich. 98, 51 Am.R. 105.

44 C.J. p 1038 note 80.

75. Mich.—*Burford v. Grand Rapids*, supra.

44 C.J. p 1038 note 81.

Closing street for coasting held authorized.

N.Y.—*Lockwood v. Hugo*, 61 N.Y.S. 2d 793, 187 Misc. 159.

Pa.—*Commonwealth v. Wagoner*, 9 Pa.Dist. & Co. 361, 18 Mun.L.R. 159.

Reasonableness

Ordinances prohibiting use of street for coasting, generally, leaving to board having charge of ways power to permit such use, was held not unreasonable.—*Richards v. Pass*, 178 N.E. 643, 277 Mass. 372.

76. Mich.—*Burford v. Grand Rap-*

ids, 18 N.W. 671, 98 Mich. 104, 51 Am.R. 105.

77. N.Y.—*Tyne v. B. F. Goodrich Co.*, 297 N.Y.S. 425, 252 App Div 24.

Purpose

Statute prohibiting coasting on public sidewalks or streets is designed to free users of city sidewalks and streets from dangers commonly known to attend coasting as a pastime or sport.—*Tyne v. B. F. Goodrich Co.*, supra.

78. Mass.—*Botelho v. Margarida*, 45 N.E.2d 266, 312 Mass. 429—*Richards v. Pass*, 178 N.E. 643, 277 Mass. 372.

Liability of municipality for failure to prevent coasting see supra § 800.

Effect of grant of power to board or department

(1) Statute giving board having charge of ways power to regulate coasting did not repeal statute giving city authority to make such regulations, or make void ordinances adopted previous thereto.—*Richards v. Pass*, supra.

(2) An ordinance prohibiting skating or coasting on streets was not repealed by ordinance giving police department power and authority in relation to management of traffic.—*Grimsley v. Scott*, 195 S.E. 83, 213 N.C. 110.

79. Ind.—*Faulkner v. Aurora*, 85 Ind. 130, 44 Am.R. 1.

Mass.—*Botelho v. Margarida*, 45 N.E.2d 266, 312 Mass. 429.

Vt.—*Shea v. Pilette*, 189 A. 154, 108

Vt. 446, 109 A.L.R. 933, followed in 189 A. 159, 108 Vt. 457.

Skating

Skating on street was held to fall within ordinance prohibiting coasting or sliding down, across, or along any of the streets or sidewalks on any sled, board, or other vehicle for coasting or sliding except as provided in traffic regulations.—*Reynolds v. Jacobucci*, 58 N.E.2d 838, 317 Mass. 500.

80. Mass.—*Ahmedjian v. Erickson*, 183 N.E. 65, 281 Mass. 6.

Absence of designation

Town by-law prohibiting coasting on streets except those designated by selectmen was held not invalid because no ways were set apart for coasting.—*Ahmedjian v. Erickson*, supra.

Effect of designation

Town by-law prohibiting coasting along streets except those designated by selectmen precluded use for coasting of street not so designated, irrespective of whether street was state highway.—*Ahmedjian v. Erickson*, supra.

81. Mass.—*Cowles v. Springfield Gas Light Co.*, 125 N.E. 589, 234 Mass. 421.

44 C.J. p 1038 note 84.

82. N.J.—*Billington v. Miller*, 67 A. 935, 75 N.J.Law 415.

83. N.J.—*Billington v. Miller*, supra.

84. Ala.—*Renfroe v. Collins & Co.*, 78 So. 395, 201 Ala. 489.

85. Ala.—*Renfroe v. Collins & Co.*, supra.

§ 1773. Moving Building on Streets

- a. In general
- b. Regulation and restriction
- c. Interference with use by others

a. In General

Use of the streets for moving buildings is a special and extraordinary use.

A citizen has a common-law right to make a reasonable use of the streets for the purpose of moving a building across or along the streets from one location to another.⁸⁶ The primary and ordinary use of a street, however, as discussed supra § 1758, is for the purpose of travel and transportation by the general public, and as its use for moving buildings is for the sole benefit of the owner of the building to be moved, it is an unusual and extraordinary use,⁸⁷ and is not within the rights enjoyed by the public as a use of the public streets,⁸⁸ notwithstanding the city charter confers on the city council power to regulate the subject.⁸⁹ However, such a use, although not for the benefit of the municipality or its inhabitants generally, may be considered a public use in the sense that it may be permitted by the municipality.⁹⁰

b. Regulation and Restriction

The use of the streets for moving buildings from one

location to another is subject to regulation by municipal corporations.

Being an unusual or extraordinary use, the moving of a building across or along a public street is subject to such reasonable regulations and restrictions as the municipal corporation, under its power to regulate and control its streets, may impose.⁹¹ It might even be competent for a municipality to prohibit the moving of houses along its streets, at least in populous districts;⁹² but it has been held that, while the common council has the power to enact by general ordinance regulations for the moving of buildings through the public streets, it cannot exercise such power in each case by resolution.⁹³

Permit. Under the powers delegated to the municipality,⁹⁴ regulations have been upheld and enforced which require that, before use of the streets may be made for the moving of a building, a permit or license therefor must be obtained from certain municipal authorities,⁹⁵ and make the issuance of such permit dependent on applicant's compliance with certain conditions or requirements provided by the regulation.⁹⁶ The power of a municipality in this regard is not legislative, but simply administrative;⁹⁷ and such an ordinance comes within the

86. Kan.—Missouri Pac. R. Co. v. Sproul, 162 P. 293, 99 Kan. 608, L.R.A. 1917C 772.

Okl.—Corpus Juris quoted in City of Yale v. Davenport, 54 P.2d 335, 338, 175 Okl. 629.

44 C.J. p 1038 note 91.

Moving buildings through street is street use

N.Y.—White v. Berry, 225 N.Y.S. 155, 130 Misc. 639, affirmed 226 N.Y. S. 923, 222 App.Div. 841.

87. Kan.—Tandy v. City of Wichita, 266 P. 930, 126 Kan. 103.

S.D.—Corpus Juris cited in Evans v. King, 230 N.W. 848, 849, 57 S. D. 109.

44 C.J. p 1038 note 93.

88. S.D.—Corpus Juris cited in Evans v. King, 230 N.W. 848, 849, 57 S.D. 109.

44 C.J. p 1038 note 94.

89. U.S.—Edison Electric Light, etc., Co. v. Blomquist, C.C.Minn., 185 F. 615.

90. Neb.—State v. Omaha, etc., R. Co., 161 N.W. 170, 100 Neb. 716.

91. Neb.—State v. Phillips, 274 N. W. 459, 138 Neb. 209, 111 A.L.R. 1431.

Okl.—City of Yale v. Davenport, 54 P.2d 335, 175 Okl. 629.

44 C.J. p 1038 note 97.

92. Ind.—Indiana R. Co. v. Calvert,

80 N.E. 961, 168 Ind. 321, 10 L.R. A.N.S., 780, 11 Ann.Cas. 635.

93. N.Y.—Hinman v. Clark, 100 N.Y. S. 1068, 51 Misc. 252, affirmed 105 N.Y.S. 725, 121 App.Div. 105, affirmed 86 N.E. 1125, 193 N.Y. 640.

94. Utah.—Eureka v. Wilson, 48 P. 41, 15 Utah 53, affirmed 19 S.Ct. 317, 173 U.S. 32, 43 L.Ed. 603.

95. Cal.—Klopper v. D. J. & T. Sullivan Co., 13 P.2d 839, 124 Cal. App. 769.

Okl.—City of Yale v. Davenport, 54 P.2d 335, 175 Okl. 629.

44 C.J. p 1039 note 1.

As affected by other statutes

San Francisco city charter provisions regarding permits for moving buildings through streets was held not in conflict with or superseded by Vehicle Act.—Klopper v. D. J. & T. Sullivan Co., 13 P.2d 839, 124 Cal. App. 769.

96. Cal.—Robinson v. Otis, 159 P. 441, 30 Cal.App. 769.

44 C.J. p 1039 note 2.

House movers' bond

(1) Under some regulations house movers are required to give a bond to the city indemnifying the city and others from damages resulting from the moving of a house.—Hartford Accident & Indemnity Co. v. Woodruff, 77 P.2d 36, 182 Okl. 330.

(2) Statute authorizing the re-

quirement from one about to move a building over a street or other public highway of a sum of money sufficient to cover the reasonable expense of the removal expresses the general law of the state, and, hence, a village ordinance requiring a substantial sum in excess was ultra vires.—Moore v. Village of Gilbert, 289 N.W. 837, 207 Minn. 75.

(3) The conditions of the regulation are to be read into and made part of the bond.—Hartford Accident & Indemnity Co. v. Woodruff, supra.

(4) The owner of the house being moved cannot recover on such a bond for damage to the house.—Hartford Accident & Indemnity Co. v. Woodruff, supra.

Discretion

Issuance of permits involves some exercise of discretion.—Evans v. King, 230 N.W. 848, 57 S.D. 109.

Payment of taxes

City ordinance, enacted under authority to regulate streets and alleys, which denied right to remove building solely on failure to pay certain taxes, was held void as unreasonable.—City of Yale v. Davenport, 54 P. 2d 335, 175 Okl. 629.

97. Utah.—Eureka v. Wilson, 48 P. 41, 15 Utah 53, affirmed 19 S.Ct. 317, 173 U.S. 32, 43 L.Ed. 603.

police power of the state,⁹⁸ and is not unconstitutional.⁹⁹ If the ordinance requires that such a permit shall issue on certain conditions being complied with, the issuing official cannot refuse a permit, on such compliance being made;¹ nor can he question the character of applicant, where such applicant has been duly licensed to remove buildings as required by the ordinance.²

A permit to move a building of described dimensions through a city street does not justify the moving of a larger building.³ An owner who obtains permission of the municipality to move his building through the city streets is under an obligation to complete the moving within a reasonable time,⁴ and, if he fails to do so and the building is allowed to obstruct travel and become a public nuisance, the municipality may, after notice to the owner, destroy or remove the building without liability therefor, unless its action is so unreasonable or unjust as to be inconsistent with legal principles.⁵

Revocation of permit. Where it appears, after a building had been moved a short distance, that injury to trees has already resulted, and that further injury will result, the permit may be revoked by the municipality under its power to direct the regulating and planting of shade and ornamental trees along the streets and to prevent the injury and defacement of such trees,⁶ and the fact that the holder of the permit has given a bond conditioned that he will not injure the trees does not give him a right to injure them;⁷ nor does the city's failure to ascertain that the moving of the building could not be done without a breach of an ordinance protecting shade trees give him a right to damages for a revocation of the permit.⁸ However, where the moving

of such building is not affected by an ordinance at the time the building is moved into the street, a city department cannot thereafter interfere with its being moved,⁹ and a permanent injunction to this effect may be granted.¹⁰

c. Interference with Use by Others

The use of the streets for moving buildings must be made with reasonable regard to public rights.

Neither the moving of a building nor the operation of a telegraph, telephone, or other public service line along a street is an original or primary use of the street, but both are permissible under proper restrictions and with due regard to the rights of others;¹¹ and the use of a public street to move a building, requiring consent of the proper municipal authorities, also requires exercise of reasonable care so as not to interfere unreasonably with the public right,¹² the question whether the use made of the street is a reasonable one being a question of fact and usage in each particular case.¹³

Even where permission is given to use the streets, such use is subordinate to any other lawful use to which the street was subject when the permit was granted,¹⁴ such as the usual and ordinary running of the cars of a street railroad;¹⁵ and it has been held that a street railway is not under any duty to remove obstructing posts or poles on demand of the mover of the building.¹⁶ However, where the moving of a building, if done with municipal authority, does not unreasonably obstruct public travel, or unduly invade private rights, and the work is done with due expedition, it does not create a nuisance;¹⁷ nor does it give a right of action in damages.¹⁸

98. Utah.—Eureka v. Wilson, *supra*.

99. Utah.—Eureka v. Wilson, *supra*. 44 C.J. p 1039 note 5.

Street regulations as affected by the due process and equal protection clauses see Constitutional Law §§ 534, 704.

1. Ill.—Blocki v. Krueger, 121 Ill. App. 357.

2. Ill.—Blocki v. Krueger, *supra*.

3. Mass.—Commonwealth v. Byard, 86 N.E. 285, 200 Mass. 175, 20 L.R.A., N.S., 814.

4. Conn.—Keating v. Macdonald, 46 A. 871, 73 Conn. 125.

Ind.—Indiana R. Co. v. Calvert, 80 N.E. 961, 168 Ind. 321, 10 L.R.A., N.S., 780, 11 Ann.Cas. 635.

5. Conn.—Keating v. Macdonald, 46 A. 871, 73 Conn. 125.

6. N.Y.—Hickok v. Mt. Vernon, 130 N.Y.S. 254, 145 App.Div. 599, appeal

dismissed 101 N.E. 1105, 207 N.Y. 736.

7. N.Y.—Hickok v. Mt. Vernon, *supra*.

8. N.Y.—Hickok v. Mt. Vernon, *supra*. 44 C.J. p 1040 note 13.

9. N.Y.—Hinman v. Clark, 100 N.Y. S. 1068, 51 Misc. 252, affirmed 105 N.Y.S. 725, 121 App.Div. 105, affirmed 86 N.E. 1125, 193 N.Y. 640.

10. N.Y.—Hinman v. Clark, *supra*. Protection of public property by Injunction generally see Injunctions § 125.

11. Ohio.—Clyde Tel. Co. v. Parmenter, 8 Ohio N.P., N.S., 147.

12. Ala.—Ex parte Ashworth, 86 So. 84, 204 Ala. 391.

N.Y.—Western New York, etc., Tract. Co. v. Stillman, 128 N.Y.S. 363, 143 App.Div. 717.

13. Ind.—Indiana R. Co. v. Calvert,

80 N.E. 961, 168 Ind. 321, 10 L.R.A., N.S., 780, 11 Ann.Cas. 635.

N.Y.—Western New York, etc., Tract. Co. v. Stillman, 128 N.Y.S. 363, 143 App.Div. 717.

14. Minn.—Edison Electric Light, etc., Co. v. Blomquist, 124 N.W. 969, 125 N.W. 895, 110 Minn. 163, 136 Am.S.R. 460.

44 C.J. p 1040 note 19.

15. N.J.—Millville Tract. Co. v. Goodwin, 32 A. 263, 53 N.J.Eq. 448.

16. Ala.—Ex parte Ashworth, 86 So. 84, 204 Ala. 391.

17. N.Y.—Western New York, etc., Tract. Co. v. Stillman, 128 N.Y.S. 363, 143 App.Div. 717.

44 C.J. p 1040 note 22.

18. Ind.—Indiana R. Co. v. Calvert, 80 N.E. 961, 168 Ind. 321, 10 L.R.A., N.S., 780, 11 Ann.Cas. 635.

Wires of public service company. Under the statutes of some jurisdictions, a mover of a building, under permission from the municipal authorities, has the right, on giving a prescribed notice thereof, to cut the wires of a public service company to permit the passage of the building;¹⁹ and regulations have been upheld, as not depriving a public service company of its property without due process of law,²⁰ or by eminent domain,²¹ under which regulations such company may be required to remove its poles and wires temporarily to allow the passage of buildings, when found by the proper authorities to be necessary,²² and to make such removal at the company's own expense.²³ Even in the absence of statutory or municipal regulations as to raising or removing wires or poles, it has been held that the expense thereof should be borne by the company, where the interference is not unreasonable and the expense inconsiderable.²⁴

On the other hand, under other regulations, such wires or poles need not be moved by, or at the expense of, the public service company, but such changes, if necessary to permit of the moving of the building, must be made by, or at the expense of, the house mover;²⁵ and under some regulations house movers are required to furnish bond in a specified sum to pay such expenses before any building may be moved along the streets.²⁶ Where a permit to move a building prohibits the interference with wires for the purpose of moving, the mover may be enjoined except on condition that he give reasonable notice to the company to remove the wires and execute a bond to pay the reasonable ex-

pense thereof.²⁷ It has also been held that a house mover is not justified in cutting wires which do not hang lower than is authorized by the municipality.²⁸

§ 1774. Other Uses and Regulations

- a. In general
- b. Use for business purposes

a. In General

An unusual or exceptional use of the streets may be prohibited.

Subordinate to the primary right of the general public to use the streets for travel and transportation, as discussed supra § 1758, every citizen has a further and secondary right to use the streets²⁹ which is permissive in character,³⁰ and may be restricted, limited, modified, and terminated by ordinance within the powers of the municipality enacted for the public good;³¹ but no individual has the right to make a special or exceptional use of the streets not common to all, except by grant from the sovereign power.³² An unusual or exceptional use of the streets may be regulated or prohibited.³³

Displaying signs and placards. An ordinance prohibiting any person on foot in the streets from carrying and displaying a showcard, placard, or sign except in accordance with a permit issued by a specified officer, has been held not invalid.³⁴ Such an ordinance was held not to conflict with or violate a statute which prohibits punishment for an attempt by printing or otherwise to persuade others to do any lawful act.³⁵ On the other hand, a regulation prohibiting the display on the person or the carry-

19. Mass.—A. M. Richards Bldg. Moving Co. v. Boston Electric Light Co., 74 N.E. 350, 188 Mass. 265.

44 C.J. p 1040 note 24.

20. Neb.—State v. Omaha, etc., St. R. Co., 161 N.W. 170, 100 Neb. 716.

21. Ind.—Indiana R. Co. v. Calvert, 80 N.E. 961, 168 Ind. 321, 10 L.R.A., N.S., 780, 11 Ann.Cas. 635.

44 C.J. p 1040 note 26.

22. Neb.—State v. Omaha, etc., St. R. Co., 161 N.W. 170, 100 Neb. 716.

44 C.J. p 1040 note 27.

23. Ind.—Indiana R. Co. v. Calvert, 80 N.E. 961, 168 Ind. 321, 10 L.R.A., N.S., 780, 11 Ann.Cas. 635.

44 C.J. p 1041 note 28.

24. Kan.—Missouri Pac. R. Co. v. Sproul, 162 P. 293, 99 Kan. 603, L.R.A.1917C 772.

25. Pa.—Central Dist., etc., Tel. Co. v. Davis, 17 Pa.Dist. 1036.

44 C.J. p 1041 note 30.

26. Kan.—Tandy v. City of Wichita, 266 P. 930, 126 Kan. 103.

27. Minn.—Edison Electric Light, etc., Co. v. Blomquist, 124 N.W. 969, 125 N.W. 895, 110 Minn. 163, 136 Am.S.R. 460.

28. N.J.—New York, etc., Tel. Co. v. Dexheimer, 14 N.J.Law J. 295.

44 C.J. p 1041 note 32.

29. N.Y.—Decker v. Goddard, 251 N.Y.S. 440, 233 App.Div. 139.

Tex.—Harper v. City of Wichita Falls, Civ.App., 105 S.W.2d 743, error refused.

Municipality has right to devote sides of streets to other useful public purposes, provided it leaves unobstructed driveway of ample width for passage of vehicles.—Dougherty v. Trustees of Village of Horseheads, 53 N.E. 799, 159 N.Y. 154—Decker v. Goddard, 249 N.Y.S. 381, 139 Misc. 824, reversed on other grounds 251 N.Y.S. 440, 233 App.Div. 139.

30. Tex.—Harper v. City of Wichita Falls, Civ.App., 105 S.W.2d 743, error refused.

31. Tex.—Harper v. City of Wichita Falls, supra.

32. Pa.—Philadelphia Co. v. Borough of Freeport, 31 A. 571, 167 Pa. 279—Owl Protective Co. v. Public Service Commission of Pennsylvania, 187 A. 229, 123 Pa.Super. 382.

33. Tex.—City of Dallas v. Harris, Civ.App., 157 S.W.2d 710, error refused.

Test

Whether street user is an ordinary or extraordinary one, and not the element of private gain, is the determining factor in determining extent of city's power to control use of streets under provision in City Home Rule Law authorizing city to adopt local laws in relation to use of streets.—Good Humor Corporation v. City of New York, 36 N.Y.S.2d 85, 264 App.Div. 620, reversed on other grounds 49 N.E.2d 153, 390 N.Y. 312.

34. Mass.—Commonwealth v. Hafer, 180 N.E. 615, 279 Mass. 73.

35. Mass.—Commonwealth v. Hafer, supra.

ing of any advertising sign on the person or on any vehicle on the streets, but exempting from its application persons exercising a lawful right to picket, was held invalid.³⁶

Driving animals through streets. Power to regulate and control the driving of cattle through the streets will not sustain an ordinance effectually prohibiting such driving.³⁷

Free speech and assembly. While, as discussed supra § 1758, the streets of a city should be administered primarily for use of the people for travel, the streets must be kept open for the use of the people in order that they may exercise their rights of free speech and assembly.³⁸

Picketing. Mass picketing is subject to the paramount right of the public to a safe and convenient use of the streets even where there is no violence or blocking of access to the employer's place of business.³⁹ Any right to picket on the streets is necessarily qualified by the rights of the traveling public;⁴⁰ it cannot be exercised in a manner which interferes with or obstructs traffic.⁴¹ While the state or municipality may regulate the methods of publicity as well as the use of the streets by pickets in a labor dispute,⁴² it cannot, under the guise of reg-

ulation, entirely prohibit such means or use.⁴³

Soliciting for labor union. A single act of soliciting a man on the street to join a labor union and pay membership fees therein is not subject to prohibition by ordinance as preventing free use of the streets by the general public.⁴⁴

Wearing masks or disguises. A regulation prohibiting persons from appearing on the streets wearing masks or other disguises which conceal their identity, has been upheld as valid.⁴⁵

Communicating information and disseminating opinion. The public streets have been held to be proper places for the exercise of the freedom of communicating information and disseminating opinion,⁴⁶ and, while the state and municipality may appropriately regulate the privilege in the public interest,⁴⁷ they may not unduly burden or proscribe it.⁴⁸ Accordingly, one may not throw literature broadcast in the streets,⁴⁹ and, in carrying out its duty to keep the streets open for the movement of traffic, the municipality may regulate the conduct of those using the streets to distribute literature,⁵⁰ provided such regulations do not abridge the liberty of those on the streets to make known information by such distribution.⁵¹ The distribution of

36. N.Y.—Walters v. Valentine, 12 N.Y.S.2d 612, 172 Misc. 264.

37. N.J.—McConvill v. Jersey City, 39 N.J.Law 38.
Driving animals on sidewalks see infra § 1775.

38. U.S.—Hague v. Committee for Industrial Organization, C.C.A.N.J., 101 F.2d 774, modified on other grounds 59 S.Ct. 954, 307 U.S. 496, 83 L.Ed. 1423.

Constitutional right of freedom of speech and assembly see Constitutional Law §§ 213, 214.

39. N.Y.—People v. Garvey, 79 N.Y.S.2d 456.

40. Wash.—City of Yakima v. Gorham, 94 P.2d 180, 200 Wash. 564.

41. Wash.—City of Yakima v. Gorham, supra.

42. U.S.—Senn v. Tile Layers Protective Union, Local No. 5, Wis., 57 S.Ct. 857, 301 U.S. 468, 81 L.Ed. 1229.

Nev.—City of Reno v. Second Judicial District Court in and for Washoe County, 95 P.2d 994, 59 Nev. 416.

43. U.S.—United Elec., Radio & Mach. Workers of America, CIO, v. Baldwin, D.C.Conn., 67 F.Supp. 235.

Nev.—City of Reno v. Second Judicial District Court in and for Washoe County, 95 P.2d 994, 59 Nev. 416, 125 A.L.R. 948.

Reason for rule

Peaceful picketing in a labor dis-

pute has no tendency to provoke disorder and impede traffic so as to authorize the legislature or a municipality to legislate against all picketing.—City of Reno v. Second Judicial District Court in and for Washoe County, supra.

Closing streets

The barring of pickets from closed street leading to employer's plant at which a strike was in progress was in derogation of rights of unions and union members, since the mere inconvenience of administration cannot be considered sufficient grounds for closing off the street as long as the picketing is peaceful.—United Elec., Radio & Mach. Workers of America, CIO, v. Baldwin, D.C.Conn., 67 F.Supp. 235.

44. Fla.—Pittman v. Nix, 11 So.2d 791, 152 Fla. 378, 144 A.L.R. 1311.

45. Ky.—City of Pineville v. Marshall, 299 S.W. 1072, 222 Ky. 4.

46. U.S.—Valentine v. Chrestensen, N.Y., 62 S.Ct. 920, 316 U.S. 52, 86 L.Ed. 1262.

By pickets during strike

U.S.—United Elec., Radio & Mach. Workers of America, CIO, v. Baldwin, D.C.Conn., 67 F.Supp. 235.

47. U.S.—Valentine v. Chrestensen, N.Y., 62 S.Ct. 920, 316 U.S. 52, 86 L.Ed. 1262—Hague v. Committee for Industrial Organization, N.J., 59 S.Ct. 954, 307 U.S. 496, 83 L.Ed. 1423.

48. U.S.—Valentine v. Chrestensen, N.Y., 62 S.Ct. 920, 316 U.S. 52, 86 L.Ed. 1262—Hague v. Committee for Industrial Organization, N.J., 59 S.Ct. 954, 307 U.S. 496, 83 L.Ed. 1423.

N.Y.—People ex rel. Gordon v. McDermott, 9 N.Y.S.2d 795, 169 Misc. 743.

49. U.S.—Kennedy v. City of Moscow D.C.Idaho, 39 F.Supp. 26.

50. U.S.—Young v. People of State of California, Cal., 60 S.Ct. 146, 308 U.S. 147, 84 L.Ed. 155—Nichols v. Commonwealth of Massachusetts, Mass., 60 S.Ct. 146, 308 U.S. 147, 84 L.Ed. 155—Schneider v. State of New Jersey, Town of Irvington, N.J., 60 S.Ct. 146, 308 U.S. 147, 84 L.Ed. 155—Snyder v. City of Milwaukee, Wis., 60 S.Ct. 146, 308 U.S. 147, 84 L.Ed. 155—Hague v. Committee for Industrial Organization, N.J., 59 S.Ct. 954, 307 U.S. 496, 83 L.Ed. 1423—Mickey v. Kansas City, D.C.Mo., 43 F.Supp. 739—Borchert v. City of Ranger, D.C.Tex., 42 F.Supp. 577—Kennedy v. City of Moscow, D.C.Idaho, 39 F.Supp. 26.

Va.—Robert v. City of Norfolk, 49 S.E.2d 697, 188 Va. 413.

Validity as affected by constitutional guaranty of free speech see Constitutional Law § 213.

51. U.S.—Young v. People of State of California, Cal., 60 S.Ct. 146, 308 U.S. 147, 84 L.Ed. 155—Nichols

commercial advertising on the city streets does not come within this category and may be entirely prohibited⁵² as an undesirable invasion of, or interference with, the full and free use of the streets by the public for the purposes to which the streets are dedicated,⁵³ and this is true, although such advertising matter has a civic appeal or a moral platitude appended thereto;⁵⁴ but an ordinance merely prohibiting such distribution as an incident to the conduct of a lawful business when such distribution has no tendency to obstruct a free flow of traffic has been held invalid.⁵⁵

It has been held that a municipality, in the exercise of its police power, may prohibit the distribution of handbills which tend to annoy travelers and obstruct the streets,⁵⁶ or which will naturally be

thrown by the receiver into the streets and tend to frighten horses,⁵⁷ but as to this there is authority to the contrary.⁵⁸ An ordinance prohibiting the depositing of advertising matter on vehicles parked on the city streets was held to be for a proper legislative purpose,⁵⁹ and not unreasonable when applied to prevent the advertising of a business by affixing handbills to vehicles of others parked on the streets.⁶⁰

b. Use for Business Purposes

There is no inherent or vested right to use the public streets as a place of business for private gain. Such a use is subject to regulation and even prohibition.

There is no vested or constitutional right to use the public streets as a place of business for private gain;⁶¹ nor is there any natural⁶² or inherent⁶³

v. Commonwealth of Massachusetts, 60 S.Ct. 146, 308 U.S. 147, 84 L.Ed. 155—Schneider v. State of New Jersey, Town of Irvington, N.J., 60 S.Ct. 146, 308 U.S. 147, 84 L.Ed. 155—Snyder v. City of Milwaukee, Wis., 60 S.Ct. 146, 308 U.S. 147, 84 L.Ed. 155—Hague v. Committee For Industrial Organization, N.J., 59 S.Ct. 954, 307 U.S. 496, 83 L.Ed. 1423—Mickey v. Kansas City, D.C.Mo., 43 F.Supp. 739—Borchert v. City of Ranger, D.C.Tex., 42 F.Supp. 577—Kennedy v. City of Moscow, D.C.Idaho, 39 F.Supp. 26.

N.Y.—People v. Finkelstein, 9 N.Y.S. 2d 941, 170 Misc. 188.

Okl.—Greiner v. City of Yale, 139 P.2d 606, 77 Okl.Cr. 135—Ex parte Walrod, 120 P.2d 783, 73 Okl.Cr. 299.

Pa.—Commonwealth v. Hessler, 15 A. 2d 486, 141 Pa.Super. 421.

Va.—Robert v. City of Norfolk, 49 S.E.2d 697, 188 Va. 413.

52. Cal.—Pittsford v. City of Los Angeles, 122 P.2d 535, 50 Cal.App. 2d 25—People v. Uffindell, Super., 202 P.2d 874.

Ohio.—In re Thornburg, 9 N.E.2d 516, 55 Ohio App. 229.

Commercial advertising distinguished

(1) With respect to the validity of ordinances, prohibiting distribution of circulars on the ground of protecting streets against being littered, there is a distinction between non-commercial and commercial or advertising matter, in view of the greater tendency to throw away commercial matter.

U.S.—Committee for Industrial Organization v. Hague, D.C.N.J., 25 F.Supp. 127, modified on other grounds, C.C.A., Hague v. Committee for Industrial Organization, 101 F.2d 774, modified on other grounds 59 S.Ct. 954, 307 U.S. 496, 83 L.Ed. 1423.

N.J.—Coughlin v. Sullivan, 126 A. 177, 100 N.J.Law 42.

(2) Use of streets in sale and distribution of literature in the dissemination of information is not measured by the same standards which govern sales by hucksters or other merchants, or by occupations purely commercial and without basic connection with the exercise of the constitutional freedoms.—Robert v. City of Norfolk, 49 S.E.2d 697, 188 Va. 413.

53. U.S.—Jamison v. State of Texas, Tex., 63 S.Ct. 669, 318 U.S. 413, 87 L.Ed. 869—Valentine v. Chrestensen, N.Y., 62 S.Ct. 920, 316 U.S. 52, 86 L.Ed. 1262.

Obstruction of traffic

A city may prohibit distribution of handbills, circulars, cards, or other advertisements incidental to conduct of a lawful business as a measure of traffic regulation when distribution has a tendency to obstruct free flow of traffic.—In re Thornburg, 9 N.E.2d 516, 55 Ohio App. 229.

54. U.S.—Jamison v. State of Texas, Tex., 63 S.Ct. 669, 318 U.S. 413, 87 L.Ed. 869—Valentine v. Chrestensen, N.Y., 62 S.Ct. 920, 316 U.S. 52, 86 L.Ed. 1262.

55. Ohio.—In re Thornburg, 9 N.E. 2d 516, 55 Ohio App. 229.

56. Mass.—Commonwealth v. Kimball, 13 N.E.2d 18, 299 Mass. 353, 114 A.L.R. 1440.

Regulation of distribution of pamphlets and circulars generally see supra § 248.

Advertising matter

Pa.—Commonwealth v. Ash, 81 Pa. Dist. & Co. 369, 54 Montg.Co. 45, 29 Mun.L.R. 142.

Isolated acts

Ordinance prohibiting distribution of circulars, etc., was held intended to forbid general circulation of such matter rather than isolated acts.—

City of Milwaukee v. Kassen, 234 N. W. 352, 203 Wis. 383.

57. Colo.—Wettengel v. Denver, 39 P. 343, 20 Colo. 552.

58. Mich.—People v. Armstrong, 41 N.W. 275, 73 Mich. 388, 16 Am.S.R. 578, 2 L.R.A. 721.

44 C.J. p 1042 note 42.

59. Cal.—People v. Uffindell, Super., 202 P.2d 874.

60. Cal.—People v. Uffindell, supra.

61. Cal.—Pittsford v. City of Los Angeles, 122 P.2d 535, 50 Cal.App. 2d 25—People v. Galena, 70 P.2d 724, 24 Cal.App.2d Supp. 770.

Fla.—State v. Quigg, 114 So. 859, 94 Fla. 1056.

Me.—Chapman v. City of Portland, 160 A. 913, 131 Me. 242.

Tex.—Davis v. City of Houston, Civ. App., 264 S.W. 625.

Reason for rule

Such use imposes an added easement or burden on the street which is not comparable to the right to conduct lawful business on private property.—People v. Galena, 70 P.2d 724, 24 Cal.App.2d Supp. 770.

Not a private right

Cal.—People v. Uffindell, Super., 202 P.2d 874.

62. Cal.—Ex parte Graham, 269 P. 183, 93 Cal.App. 88.

Ky.—Bell Bros. Trucking Co. v. Kelley, 127 S.W.2d 831, 837, 277 Ky. 781.

Wash.—Hadfield v. Lundin, 168 P. 516, 98 Wash. 657, L.R.A.1918B 909, Ann.Cas.1918C 942.

63. Fla.—Jarrell v. Orlando Transit Co., 167 So. 664, 123 Fla. 776—State v. Quigg, 114 So. 859, 94 Fla. 1056.

Ga.—City of Nashville v. Snow, 49 S. E.2d 808, 204 Ga. 371—Atlanta Veterans Transp. v. Jenkins, 47 S. E.2d 324, 203 Ga. 457—Clem v. City of La Grange, 149 S.E. 338, 169 Ga. 51—Bunn v. City of Atlanta, 19 S. E.2d 553, 67 Ga.App. 147, certiorari

rights so to use the streets, whether such business be principally conducted on such streets⁶⁴ or whether the use thereof be only incidental but essential to the business.⁶⁵ On the contrary, generally the use of the streets for carrying on business or for the purpose of inducing business is unauthorized.⁶⁶ Such use is special and extraordinary,⁶⁷ and differs fundamentally and radically from the ordinary use for travel and transportation in the ordinary course of life.⁶⁸ The right so to use the streets is a priv-

ilege⁶⁹ which can be acquired only by permission⁷⁰ which the municipality may grant or withhold,⁷¹ and in granting permission for such use the city may prescribe such terms and conditions as it sees fit.⁷²

Regulation. The use of the streets for business purposes is subject to reasonable regulation⁷³ under the police power,⁷⁴ for the purpose of preserving and protecting their use by the public as thoroughfares.⁷⁵ Such use may be even wholly or partially prohibited⁷⁶ where it renders the use of the streets

denied 63 S.Ct. 73, 317 U.S. 666, 87 L.Ed. 535, rehearing denied 63 S.Ct. 323, 317 U.S. 711, 87 L.Ed. 566.

Ill.—City of Chicago v. Rhine, 2 N. E.2d 905, 363 Ill. 619, 105 A.L.R. 1045—People ex rel. Johns v. Thompson, 173 N.E. 137, 344 Ill. 166.

Me.—Chapman v. City of Portland, 160 A. 913, 131 Me. 242.

Mo.—Ex parte Lockhart, 171 S.W. 2d 660, 350 Mo. 1220.

S.C.—Huffman v. City of Columbia, 144 S.E. 157, 146 S.C. 436.

Tex.—Fletcher v. Bordelon, Civ.App., 56 S.W.2d 313, error refused—Davis v. City of Houston, Civ.App., 264 S.W. 625.

64. Ga.—City of Nashville v. Snow, 49 S.E.2d 808, 204 Ga. 371—Derst Baking Co. v. Mayor and Aldermen of City of Savannah, 179 S.E. 763, 180 Ga. 510.

65. Ga.—City of Nashville v. Snow, 49 S.E.2d 808, 204 Ga. 371—Derst Baking Co. v. Mayor and Aldermen of City of Savannah, 179 S.E. 763, 180 Ga. 510.

66. N.Y.—People, on Complaint of Crennan, v. Patrick, 14 N.Y.S.2d 249, 171 Misc. 705.

Va.—Robert v. City of Norfolk, 49 S.E.2d 697, 188 Va. 413.

67. Ga.—Jones v. City of Moultrie, 27 S.E.2d 39, 196 Ga. 526—Ferguson v. City of Moultrie, 29 S.E.2d 786, 71 Ga.App. 15, followed in Csiki v. City of Moultrie, 29 S.E.2d 791, 71 Ga.App. 23.

68. Ky.—Bell Bros. Trucking Co. v. Kelley, 127 S.W.2d 831, 837, 277 Ky. 831.

Miss.—Scott v. Hart, 91 So. 17, 128 Miss. 353.

Use for pleasure distinguished

The distinction between the use of the streets by the public in the usual way for pleasure or business and as a place or instrumentality for carrying on a business for private gain is fundamental. While, as to the former, the power to regulate must be sparingly exercised and only when necessary in the public interest, as to the latter the right to use may be given or withheld.—People of City of Dearborn v. Dmytro, 273 N.W. 400, 280 Mich. 82, 111 A.L.R.

128—Melconian v. City of Grand Rapids, 188 N.W. 521, 218 Mich. 397.

69. Cal.—People v. Galena, 70 P.2d 724, 24 Cal.App.2d Supp. 770.

Me.—Chapman v. City of Portland, 160 A. 913, 131 Me. 242.

70. Fla.—State v. Quigg, 114 So. 859, 94 Fla. 1056.

Tex.—Davis v. City of Houston, Civ. App., 264 S.W. 625.

Grant of use of street for private purposes generally see supra § 1725.

71. Cal.—People v. Galena, 70 P.2d 724, 24 Cal.App.2d Supp. 770.

Fla.—State v. Quigg, 114 So. 859, 94 Fla. 1056.

Ga.—Jones v. City of Moultrie, 27 S.E.2d 39, 196 Ga. 526—Derst Baking Co. v. Mayor and Aldermen of City of Savannah, 179 S.E. 763, 180 Ga. 510.

Me.—Chapman v. City of Portland, 160 A. 913, 131 Me. 242.

Tex.—Davis v. City of Houston, Civ. App., 264 S.W. 625.

Peddling without permit on specified streets

Statute regarding the use and occupation of public streets for purpose of sale, storage, and display of merchandise or other articles, and authorizing the police commissioner to designate certain streets, parts of streets, or sections of city wherein, and not elsewhere in city, hawkers and peddlers may stop or stand for purpose of selling merchandise on specified days and within specified hours without license has been held constitutional, and this statute refers to hawkers and peddlers' licenses, and not to licenses for use of specified parts of streets required by another statute regarding use of streets for purchase, sale, storage, or display of merchandise or other articles.—Commonwealth v. Pascone, 33 N.E.2d 522, 308 Mass. 591, certiorari denied Pascome v. Commonwealth of Massachusetts, 62 S.Ct. 82, 314 U.S. 641, 86 L.Ed. 514.

72. Cal.—People v. Galena, 70 P.2d 724, 24 Cal.App.2d Supp. 770.

Ga.—City of Nashville v. Snow, 49 S.E.2d 808, 204 Ga. 371—Jones v. City of Moultrie, 27 S.E.2d 39, 196 Ga. 526—Ferguson v. City of Moultrie, 29 S.E.2d 786, 71 Ga.App.

15, followed in Csiki v. City of Moultrie, 29 S.E.2d 791, 71 Ga.App. 23.

Me.—Chapman v. City of Portland, 160 A. 913, 131 Me. 242.

Conditions imposed must be observed in exercising privilege.—Huffman v. City of Columbia, 144 S.E. 157, 146 S.C. 436.

73. Fla.—Pittman v. Nix, 11 So.2d 791, 152 Fla. 378, 144 A.L.R. 1341.

N.Y.—New York State Rys. v. Monroe Cab Corporation, 236 N.Y.S. 6, 134 Misc. 664—Campbell v. Quigley, 215 N.Y.S. 677, 127 Misc. 261.

N.Y.—Allen v. City of Cincinnati, 174 N.E. 795, 37 Ohio App. 339.

Tex.—Dallas Taxicab Co. v. City of Dallas, Civ.App., 68 S.W.2d 359.

Regulation of:

Business and occupations under police power in general see supra §§ 234–239.

Hawkers and peddlers in general see Hawkers and Peddlers § 6.

74. Ga.—City of Dalton v. Staten, 41 S.E.2d 145, 201 Ga. 754.

Use by tradesmen

Regulation of use of public streets by tradesmen to prevent it from becoming a nuisance is a proper exercise of police power.—Commonwealth v. Pascone, 33 N.E.2d 522, 308 Mass. 591, certiorari denied Pascome v. Commonwealth of Massachusetts, 62 S.Ct. 82, 314 U.S. 641, 86 L.Ed. 514.

75. Ga.—City of Dalton v. Staten, 41 S.E.2d 145, 201 Ga. 754.

76. Cal.—People v. Galena, 70 P.2d 724, 24 Cal.App.2d Supp. 770.

Ga.—City of Nashville v. Snow, 49 S.E.2d 808, 204 Ga. 371—Derst Baking Co. v. Mayor and Aldermen of City of Savannah, 179 S.E. 763, 180 Ga. 510—Ferguson v. City of Moultrie, 29 S.E.2d 786, 71 Ga.App. 15, followed in Csiki v. City of Moultrie, 29 S.E.2d 791, 71 Ga.App. 23.

Ky.—Maupin v. City of Louisville, 144 S.W.2d 237, 284 Ky. 195.

Tex.—City of Dallas v. Harris, Civ. App., 157 S.W.2d 710, error refused—Dallas Taxicab Co. v. City of Dallas, Civ.App., 68 S.W.2d 359.

—City of Ballinger v. Nichols, Civ. App., 297 S.W. 480—Ex parte Largent, 162 S.W.2d 419, 144 Tex.Cr.

dangerous to the general public,⁷⁷ or interferes unduly with the use of the streets by others for travel,⁷⁸ or impedes the free flow of traffic on the streets.⁷⁹ However, the power to regulate the use of the streets for business has been held not to include the power to prohibit a business which is not an inherently evil occupation, trade, or business⁸⁰ if there is no substantial or reasonable connection between the prohibition and the evils intended to be suppressed.⁸¹ Thus, the power to regulate the use of the streets is not broad enough to permit the prohibition of the use of the streets by a lawful business recognized by statute for the sole purpose of protecting rent payers and taxpayers against competition from others who do not pay rent or taxes.⁸² An ordinance prohibiting the carrying on of any trade or business in any part of a public street, with-

out a permit therefor, unless such trade or business is authorized by statute or ordinance, is a valid regulation,⁸³ and, when reasonably construed, is not unreasonable or oppressive,⁸⁴ notwithstanding the acts prohibited would not of themselves necessarily obstruct travel or in any way create a nuisance.⁸⁵ If a reasonable or sound basis exists therefor, the municipality may classify persons using the streets for private business purposes,⁸⁶ but it may not discriminate against persons in a like business or of the same class.⁸⁷

Public service company. It has been said to be well settled that as a general rule a public service company cannot use the streets of a municipality unless the municipality consents, or unless it has legislative authority to do so.⁸⁸

c. Use of Sidewalk

§ 1775. In General

The public has a right to use the sidewalks of a municipal corporation for passage. Use of the sidewalks is subject to reasonable regulation.

The public has a right to free passage on the

sidewalks,⁸⁹ which it is the duty of the municipal corporation to preserve⁹⁰ as trustees for the public.⁹¹ This primary right to use the sidewalks for the purpose of travel belongs to the public every-

592, certiorari denied *Largent v. Reeves*, 63 S.Ct. 72, 317 U.S. 668, 87 L.Ed. 536, rehearing denied 63 S.Ct. 443, 317 U.S. 713, 87 L.Ed. 568.

Wash.—*Hadfield v. Lundin*, 168 P. 516, 98 Wash. 657, L.R.A.1918B 909, Ann.Cas.1918C 942.

Sales on streets in congested areas may be prohibited—*City of Chicago v. Rhine*, 2 N.E.2d 905, 363 Ill. 619, 105 A.L.R. 1045.

77. Fla.—*Pittman v. Nix*, 11 So.2d 791, 152 Fla. 378, 144 A.L.R. 1341.

78. N.Y.—*Good Humor Corporation v. City of New York*, 49 N.E.2d 153, 290 N.Y. 312.

79. Fla.—*Pittman v. Nix*, 11 So.2d 791, 152 Fla. 378, 144 A.L.R. 1341.

80. Ohio.—*Frecker v. City of Dayton, App.*, 85 N.E.2d 419.

81. Ohio.—*Schul v. King*, Com.Pl., 70 N.E.2d 378.

82. N.Y.—*Good Humor Corporation v. City of New York*, 49 N.E.2d 153, 290 N.Y. 312.

Peddling of merchandise

Peddling merchandise on streets and highways is a lawful vocation, and, although streets and highways are intended primarily for use of pedestrians and vehicles traveling on them, the vending of merchandise by persons who have no fixed place of business and who carry their merchandise in vehicles or on their person, and who seek customers from those passing along streets is a common and traditional use of

the streets.—*Good Humor Corporation v. City of New York*, supra.

83. Me.—*State v. Barbelais*, 64 A. 881, 101 Me. 512, 44 C.J. p 1041 note 34.

84. Me.—*State v. Barbelais*, supra, 44 C.J. p 1041 note 35.

85. Cal.—*Pittsford v. City of Los Angeles*, 122 P.2d 535, 50 Cal.App. 2d 25.

Me.—*State v. Barbelais*, 64 A. 881, 882, 101 Me. 512.

Reason for rule

"The carrying on of trade or business in the public streets by one, or by a few persons, might not be of sufficient consequence to materially obstruct the public travel, while if the same thing should be done by many it might create a serious obstruction and nuisance, and what may be done by one in this respect, all must have an equal right to do." —*State v. Barbelais*, supra.

86. Ill.—*City of Chicago v. Rhine*, 2 N.E.2d 905, 363 Ill. 619, 105 A.L.R. 1045.

Ohio.—*Eastern Ohio Transport Corporation v. Village of Bridgeport*, 185 N.E. 891, 44 Ohio App. 433, error dismissed 184 N.E. 852, 126 Ohio St. 238.

Particular businesses

An ordinance prohibiting transaction of a particular business on public ways of a city is not invalid because it fails to prohibit, or if prohibited it fails to punish all other violations.—*Maupin v. City of Louisville*, 144 S.W.2d 237, 284 Ky. 195.

Adverse effect on business

Fact that regulation of business conducted on public streets may adversely affect certain individuals whose commercial welfare is peculiarly dependent on such uses affords no argument against the validity of the ordinance otherwise bearing a reasonable relation to the public health, safety, and general welfare if the ordinance adopts a sound method of classification.—*Pittsford v. City of Los Angeles*, 122 P.2d 535, 50 Cal.App.2d 25.

87. Ohio.—*Eastern Ohio Transport Corporation v. Village of Bridgeport*, 185 N.E. 891, 44 Ohio App. 433, error dismissed 184 N.E. 852, 126 Ohio St. 238.

88. Fla.—*Miami Bridge Co. v. Miami Beach Ry. Co.*, 12 So.2d 438, 152 Fla. 458.

Regulation of use of streets by public utilities see supra § 1692.

Use of streets by common carriers see supra § 1760.

89. Ky.—*City of Covington v. Gausepohl*, 62 S.W.2d 1040, 250 Ky. 323.

R.I.—*Allen & Reed v. Presbrey*, 144 A. 888, 50 R.I. 53, appeal dismissed 50 S.Ct. 66, 280 U.S. 518, 74 L.Ed. 588.

90. Ky.—*City of Covington v. Gausepohl*, 62 S.W.2d 1040, 250 Ky. 323.

91. U.S.—*Campbell v. City of Chicago*, C.C.A.Ill., 119 F.2d 1014.

where,⁹² not only to the abutting owners.⁹³ The roadway or middle of the street is for the use of animals and vehicles,⁹⁴ the sidewalk is generally reserved exclusively for pedestrians,⁹⁵ and a pedestrian has a right to assume that a sidewalk is safe to walk on even at a point where a private driveway crosses it.⁹⁶

The use of the sidewalk, however, is subject to reasonable regulations and restrictions by the municipality,⁹⁷ under the power delegated to it by the state,⁹⁸ such as the police power.⁹⁹ The governing bodies of municipalities are also generally invested with authority to designate the portion of the street to be used by pedestrians,¹ and, where such designation has been made, abutting owners cannot drive on or along such sidewalk or way,² except to the extent that it is permitted by the regulations.³ However, a municipal regulation which interferes with the lawful use of sidewalks by pedestrians and endangers the safety of pedestrians by permitting vehicles on the sidewalks is unreasonable and invalid.⁴

An ordinance forbidding driving "along" a sidewalk does not apply to passing "across,"⁵ and, even if it did, it would be unreasonable as far as applicable to an abutting owner's rights of ingress or egress.⁶ An ordinance prohibiting the driving,

backing, or leaving of any horse or vehicle on a sidewalk does not prohibit the carting of dirt from excavations across the sidewalk;⁷ but, under some regulations, such carting across the sidewalk is prohibited except on a permit from a designated municipal officer⁸ who may exercise a reasonable discretion in granting such permit.⁹

Business use. Use of the sidewalk for business purposes is subject to reasonable regulation for the purpose of preserving and protecting its use as a public thoroughfare.¹⁰ An ordinance has been held valid which prohibits the exposure of produce and commodities on a sidewalk.¹¹ Likewise, an ordinance prohibiting the sale of goods, pamphlets, and other articles on designated sidewalks between specified hours has been held to be a valid and reasonable regulation for public safety and convenience under the police powers of the city,¹² even as applied to the sale of religious pamphlets.¹³ Such an ordinance, however, has been held not to apply to the sale and distribution of religious pamphlets or literature at the prohibited time and place, which do not interfere with the traffic, safety, comfort, or convenience of the public in the use of the streets.¹⁴

Billboards, placards, or signs. The construction and maintenance of signs over the sidewalks of a municipality are subject to reasonable regulation

92. Ill.—City of Elmhurst v. Buettgen, 68 N.E.2d 278, 394 Ill. 248.

93. Ill.—City of Elmhurst v. Buettgen, supra.

94. La.—Central Glass Co. v. Heiderich, 6 La.App., Orleans, 336. Right and mode of use of street generally see supra §§ 1757-1775.

95. La.—Central Glass Co. v. Heiderich, supra. Rights of pedestrians in use of streets generally see supra § 1769.

Statutory definition

Phrase "intended for the use of pedestrians" as used in provision of the statute defining a sidewalk as that portion of the street between the curb lines or the lateral lines of a roadway, and the adjacent property lines "intended for the use of pedestrians," refers to an area actually in use at the time by pedestrians, rather than to some indefinite strip which may subsequently come into use for a pathway or sidewalk.—St. George v. Lollis, 296 N.W. 523, 209 Minn. 322.

96. Ill.—Crawley v. Jermain, 218 Ill.App. 51. Mass.—Murray v. Liebmann, 120 N. E. 79, 221 Mass. 7.

97. Ill.—City of Elmhurst v. Buettgen, 68 N.E.2d 278, 394 Ill. 248.—Benison v. Dembinsky, 241 Ill.App.

530—Bloomington v. Richardson, 38 Ill.App. 60.

Okla.—Herrington v. City of Pryor Creek, 110 P.2d 906, 188 Okl. 483. 44 C.J. p 1042 note 46.

98. Utah—Slater v. Salt Lake City, 206 P.2d 153.

99. Ga.—City of Dalton v. Staten, 41 S.E.2d 145, 201 Ga. 754.

1. U.S.—Campbell v. City of Chicago, C.C.A.III, 119 F.2d 1014. Ky.—Home Laundry Co. v. Louisville, 182 S.W. 645, 168 Ky. 499.

2. Ky.—Home Laundry Co. v. Louisville, supra. Rights of abutting owner in sidewalks generally see supra § 1704.

3. N.Y.—Merritt v. Fitzgibbons, 7 N.E. 179, 102 N.Y. 362. 44 C.J. p 1042 note 50.

4. Pa.—Ordway v. Cornelius, 23 Pa. Co. 281.

5. Ind.—Indianapolis v. Higgins, 40 N.E. 671, 141 Ind. 1. Pa.—Philadelphia v. Wright, 4 Phila. 138.

6. Pa.—Philadelphia v. Wright, supra. Rights of abutting owners generally see supra § 1703.

7. N.Y.—In re O'Keefe, 19 N.Y.S. 676.

8. N.Y.—Whalen v. Willis, 46 N.Y.S. 52, 18 App.Div. 350.

9. N.Y.—Whalen v. Willis, supra. 44 C.J. p 1042 note 55.

10. Ga.—City of Dalton v. Staten, 41 S.E.2d 145, 201 Ga. 754.

Use by tradesmen

Regulation of use of sidewalks by tradesmen to prevent it from becoming a nuisance is a proper exercise of police powers.—Commonwealth v. Pascone, 33 N.E.2d 522, 308 Mass. 591, certiorari denied Pascome v. Commonwealth of Massachusetts, 62 S.Ct. 641, 86 L.Ed. 514.

11. Minn.—State v. Messolongitis, 77 N.W. 29, 74 Minn. 165. 44 C.J. p 1042 note 47.

12. Ga.—Jones v. City of Moultrie, 27 S.E.2d 39, 196 Ga. 526—Burns v. City of Carrollton, 34 S.E.2d 621, 72 Ga.App. 628—Jones v. City of Moultrie, 33 S.E.2d 561, 72 Ga.App. 282.

Regulation of sales on public streets generally see supra § 1695.

13. Ga.—Jones v. City of Moultrie, 27 S.E.2d 39, 196 Ga. 526—Jones v. City of Moultrie, 33 S.E.2d 561, 72 Ga.App. 282.

14. Ga.—Burns v. City of Carrollton, 34 S.E.2d 621, 72 Ga.App. 628—Jones v. City of Moultrie, 33 S.E.2d 561, 72 Ga.App. 282.

under the police power.¹⁵ Regulations limiting the height of signs which may be so constructed have been held not arbitrary,¹⁶ discriminatory,¹⁷ or unreasonable.¹⁸ A regulation prohibiting the erection and maintenance over the sidewalks of signs of specified types has been upheld as not discriminatory, notwithstanding it excepted therefrom signs erected or maintained on the marquees of theaters, hotels, or public buildings.¹⁹ An ordinance which prohibits the display of any show board, placard, or sign on any sidewalk is reasonable, as applied to the crowded streets of a populous city.²⁰ On the other hand, a regulation prohibiting the display on the person or the carrying of any advertising sign or placard on the person or any vehicle on the sidewalk, but exempting from its application persons exercising a lawful right to picket has been held unreasonable and invalid.²¹

A subsequent ordinance which imposes new conditions as to a sign which was originally constructed under a permit has been held invalid.²² The contrary was also held on the ground that there is no vested right to the maintenance of a sign over the sidewalks,²³ where the original sign was erected by sufferance of the municipality and without a permit.²⁴

Cattle on sidewalks. An ordinance prohibiting any person from permitting cattle under his care to

go on the sidewalk is not void for unreasonableness, because the driver is thereby bound at all hazards to prevent their going on the sidewalk and is not excused by the exercise of reasonable care.²⁵

§ 1776. By Bicycles or Velocipedes

While riding a bicycle on a sidewalk is not of itself unlawful, such use of the sidewalks is subject to regulation and prohibition.

Riding a bicycle or velocipede on a sidewalk is not necessarily an unlawful act at common law;²⁶ nor is it necessarily a nuisance.²⁷ However, although there is some authority to the contrary,²⁸ it is generally held that a bicycle is a vehicle within a statute or ordinance forbidding the riding or driving of a vehicle on the sidewalk,²⁹ except in the necessary act of crossing.³⁰ Being a vehicle, a bicycle's proper place is on the highway or street and not on the sidewalk, unless otherwise provided by statute or ordinance;³¹ and it has been held that, even if a bicycle cannot be considered to be a vehicle, still it is unlawful to ride or drive it along a way set apart for the exclusive use of pedestrians.³² In accordance with these principles the riding of a bicycle, or similar vehicle, on the sidewalk is subject to such reasonable regulations or restrictions as may be imposed by the state legislature,³³ or by a municipality under its general power to regulate and control its streets.³⁴

15. Minn.—State v. Wong Hing, 222 N.W. 639, 176 Minn. 151.

N.Y.—Mallory, Inc. v. City of New Rochelle, 53 N.Y.S.2d 643, 184 Misc. 66, affirmed 51 N.Y.S.2d 91, 268 App.Div. 878, appeal denied 51 N.Y.S.2d 758, 268 App.Div. 914, appeal denied 62 N.E.2d 391, 294 N.Y. 839, and affirmed 65 N.E.2d 425, 295 N.Y. 712—Preferred Tires v. Village of Hempstead, 19 N.Y.S.2d 374, 173 Misc. 1017.

16. Minn.—State v. Wong Hing, 222 N.W. 639, 176 Minn. 151.

17. Minn.—State v. Wong Hing, supra.

18. Minn.—State v. Wong Hing, supra.

19. N.Y.—Mallory, Inc. v. City of New Rochelle, 53 N.Y.S.2d 643, 184 Misc. 66, affirmed 51 N.Y.S.2d 91, 268 App.Div. 878, appeal denied 51 N.Y.S.2d 758, 268 App.Div. 914, appeal denied 62 N.E.2d 391, 294 N.Y. 839, and affirmed 65 N.E.2d 425, 295 N.Y. 712—Preferred Tires v. Village of Hempstead, 19 N.Y.S.2d 374, 173 Misc. 1017.

Size or type of sign

Fact that the regulation does not specify the type, size, or other features of signs permitted on such marquees was held not to render it invalid as arbitrary, capricious,

vague, and indefinite.—Mallory, Inc. v. City of New Rochelle, 53 N.Y.S.2d 643, 184 Misc. 66, affirmed 51 N.Y.S.2d 91, 268 App.Div. 878, appeal denied 51 N.Y.S.2d 758, 268 App.Div. 914, appeal denied 62 N.E.2d 391, 294 N.Y. 839, and affirmed 65 N.E.2d 425, 295 N.Y. 712.

20. Mass.—Commonwealth v. McCafferty, 14 N.E. 451, 145 Mass. 384.

44 C.J. p 1042 note 57.
Regulation of billboards, signs, and other structures or devices for advertising generally see supra § 221.

21. N.Y.—Walters v. Valentine, 12 N.Y.S.2d 612, 172 Misc. 264.

22. Or.—Portland v. Yates, 199 P. 184, 203 P. 319, 102 Or. 513.
44 C.J. p 1042 note 58.

23. N.Y.—Mallory, Inc. v. City of New Rochelle, 53 N.Y.S.2d 643, 184 Misc. 66, affirmed 51 N.Y.S.2d 91, 268 App.Div. 878, appeal denied 51 N.Y.S.2d 758, 268 App.Div. 914, appeal denied 62 N.E.2d 391, 294 N.Y. 839, and affirmed 65 N.E.2d 425, 295 N.Y. 712.

24. N.Y.—Preferred Tires v. Village of Hempstead, 19 N.Y.S.2d 374, 173 Misc. 1017.

25. Mass.—Commonwealth v. Curtis, 9 Allen 266.

26. Mich.—Lee v. Port Huron, 87 N.W. 637, 128 Mich. 533, 55 L.R.A. 308.

44 C.J. p 1042 note 60.

27. Ohio.—Custer v. New Philadelphia, 20 Ohio Cir.Ct. 177, 11 Ohio Cir.Dec. 9.

28. N.D.—Gagnier v. Fargo, 88 N.W. 1030, 11 N.D. 73, 95 Am.S.R. 705.

44 C.J. p 1043 note 62.

29. Ill.—Molway v. Chicago, 88 N.E. 485, 239 Ill. 486, 23 L.R.A., N.S., 543, 16 Ann.Cas. 424.

44 C.J. p 1043 note 63.

30. Ind.—Mercer v. Corbin, 20 N.E. 132, 117 Ind. 450, 10 Am.S.R. 76, 3 L.R.A. 221.

31. Ill.—Molway v. Chicago, 88 N.E. 485, 239 Ill. 486, 23 L.R.A., N.S., 543, 16 Ann.Cas. 424.

32. Ind.—Mercer v. Corbin, 20 N.E. 132, 117 Ind. 450, 454, 10 Am.S.R. 76, 3 L.R.A. 221.

44 C.J. p 1043 note 66.

33. N.H.—State v. Aldrich, 47 A. 602, 70 N.H. 391, 85 Am.S.R. 681.
44 C.J. p 1043 note 67.

Regulations as to bicycles on streets generally see supra § 1768.

34. Iowa.—Wheeler v. Boone, 78 N.

In the absence of statute a municipality generally has the power to permit the riding of bicycles on the sidewalks, where such riding will not constitute a nuisance;³⁵ but it has no power to forbid bicycle riding on that part of a street devoted to the use of vehicles.³⁶ Where a statute prohibits riding a bicycle on sidewalks made of specified materials, the power of the city to permit the riding of bicycles

along sidewalks is limited to sidewalks constructed of materials other than those specified in the statute.³⁷ An ordinance which prohibits the riding of bicycles on sidewalks of certain streets, except by persons who give a bond for a given amount and by policemen and lamplighters, is unreasonable and is not a lawful exercise of the police power.³⁸

d. Liability of Persons Using Street

§ 1777. In General

A person is liable for an injury to another proximately caused by his negligence or other wrongful act in the use of a street or other public way of a municipal corporation.

One whose negligence or other wrongful act in the use of a street or other public way is the proximate cause of an injury to another is liable there-

for,³⁹ as where it results in a collision between the vehicle which he is driving and another vehicle,⁴⁰ or injury to a pedestrian using the street⁴¹ or sidewalk,⁴² or to a person on a streetcar,⁴³ or working on the street.⁴⁴ There can be no recovery when the accident could not have been prevented by the exercise of ordinary care, or no negligence is shown on the part of defendant,⁴⁵ or when precluded by

W. 909, 108 Iowa 235, 44 L.R.A. 821.
 44 C.J. p 1043 note 68.
 35. Mich.—Lee v. Port Huron, 87 N. W. 637, 128 Mich. 533, 55 L.R.A. 308.
 44 C.J. p 1043 note 69.
 36. Kan.—Swift v. Topeka, 23 P. 1075, 43 Kan. 671, 8 L.R.A. 772.
 37. Ind.—Millett v. Princeton, 79 N. E. 909, 167 Ind. 582, 10 L.R.A., N. S., 785.
 44 C.J. p 1043 note 71.
 38. Pa.—Ordway v. Cornelius, 23 Pa.Co. 281.
 44 C.J. p 1043 note 72.
 39. Cal.—Long v. Barbieri, 7 P.2d 1082, 120 Cal.App. 207.
 Iowa.—Gearhart v. Des Moines R. Co., 21 N.W.2d 569, 237 Iowa 213.
 La.—Kahn v. Shreveport Rys. Co., App. 161 So. 636.
 Miss.—Ross v. West, 30 So.2d 810, 202 Miss. 3.
 Mo.—Meyer v. Pevely Dairy Co., 64 S.W.2d 696, 333 Mo. 1109.
 N.J.—Kastner v. Weinstein, 153 A. 538, 107 N.J.Law 254.
 N.C.—Brown v. Postal Telegraph-Cable Co., 153 S.E. 457, 198 N.C. 771.
 Tenn.—Western Union Tel. Co. v. Dickson, 173 S.W.2d 714, 27 Tenn. App. 752.
 Utah.—Staton v. Western Macaroni Mfg. Co., 174 P. 821, 52 Utah 426.
 44 C.J. p 1044 note 74.
 Care required in use of highways see Highways §§ 240-245.
 Injuries from operation of motor vehicle see Motor Vehicles §§ 246-563.
 Liability:
 For injuries from defects or obstructions of:
 Abutters or persons causing defects see supra §§ 857-872.

Municipality see supra §§ 781-856.
 Of:
 Hirer of vehicle and driver for acts of driver:
 Generally see Master and Servant § 566 c.
 Of motor vehicle see Motor Vehicles § 436 c.
 Owner of animal for acts of borrower or hirer see Animals § 13.
 Railroad for injuries at crossings see the C.J.S. title Railroads §§ 710-762, also 52 C.J. p 175 note 22-p 279 note 60.
 Street railroads see the C.J.S. title Street Railroads §§ 224-262, also 60 C.J. p 413 note 55-p 481 note 4.
 Injury caused by employee of third person
 Person moving house along street was held liable for injury caused by brick of chimney falling when dislodged by manipulation by employees of electric company, who were paid by the mover, of electric wires in order to provide clearance for the house.—Danner v. Marquiss, 33 N.E.2d 511, 218 Ind. 441.
 40. La.—Kahn v. Shreveport Rys. Co., App. 161 So. 636.
 Utah.—Staton v. Western Macaroni Mfg. Co., 174 P. 821, 52 Utah 426.
 44 C.J. p 1044 note 75.
 41. Cal.—Long v. Barbieri, 7 P.2d 1082, 120 Cal.App. 207.
 Iowa.—Gearhart v. Des Moines R. Co., 21 N.W.2d 569, 237 Iowa 213.
 Miss.—Ross v. West, 30 So.2d 810, 202 Miss. 3.
 Mo.—Meyer v. Pevely Dairy Co., 64 S.W.2d 696, 333 Mo. 1109.
 N.C.—Brown v. Postal Telegraph-Cable Co., 153 S.E. 457, 198 N.C. 771.

Tenn.—Western Union Tel. Co. v. Dickson, 173 S.W.2d 714, 27 Tenn. App. 752.
 44 C.J. p 1044 note 76.
 42. Ind.—Danner v. Marquiss, 33 N. E.2d 511, 218 Ind. 441.
 43. Mass.—Regan v. John L. Kelly Contracting Co., 114 N.E. 726, 226 Mass. 58.
 44 C.J. p 1045 note 77.
 44. Me.—Stone v. Forest City Express Co., 74 A. 23, 105 Me. 237.
 44 C.J. p 1045 note 78.
 45. La.—Shill v. New Orleans Public Service, App. 175 So 113—Smith v. New Orleans Public Service, App. 174 So 158.
 Md.—Gitomir v. United Rys. & Electric Co. of Baltimore City, 146 A. 279, 157 Md. 464.
 Pa.—Johnson v. American Reduction Co., 158 A. 153, 305 Pa. 537.
 Wash.—Femling v. Star Pub Co., 84 P.2d 1008, 195 Wash. 395.
 44 C.J. p 1045 note 79.
 Skidding of vehicle on street does not of itself establish or constitute negligence.—Johnson v. American Reduction Co., 158 A. 153, 305 Pa. 537.
 Sudden appearance doctrine
 (1) "Sidewalk" as used in sudden appearance doctrine means abutting street side rather than improved walkway along or on such abutting street side.—Fultz' Adm'r v. Williams, 99 S.W.2d 803, 266 Ky. 651.
 (2) Walkway consisting of earth, ashes, and cinders filled in between street curb and retaining wall about eight or ten feet from curb was held "sidewalk" within meaning of term used in sudden appearance doctrine.—Fultz' Adm'r v. Williams, supra.

the contributory negligence of plaintiff, as considered infra §§ 1787-1789. A defendant cannot escape liability for injury to a traveler in a municipal street resulting from his negligence by reason of faultless conduct after he saw the traveler.⁴⁶

Proximate cause. The general rule that a defendant is not liable for negligence unless his negligent act was the proximate cause of injury, considered in the C.J.S. title Negligence §§ 104-105, also 45 C.J. p 901 note 27-p 905 note 36, applies to negligent acts on municipal streets.⁴⁷ In order to constitute proximate cause, imposing liability for negligence, it is not necessary that defendant should have foreseen the particular injury⁴⁸ or that defendant's negligence should have been the sole cause of plaintiff's injury,⁴⁹ and he will not be relieved from liability by what is a mere concurring, and not an independent, act of negligence,⁵⁰ or by an agency which is not in fact independent and intervening.⁵¹ However, where there was in fact an independent, intervening cause of injury, defendant is not liable.⁵² Whether or not defendant's act was the proximate⁵³ or contributing⁵⁴ cause of injury will depend on the particular circumstances of the case.

Joint liability. Where an injury is proximately caused by the concurrent wrongful acts or negligence of two persons in the use of a street, both are liable for the injury.⁵⁵

§ 1778. Mutual Rights and Duties

- a. In general
- b. Of pedestrians and others

a. In General

The rights of all persons lawfully using a highway or street in a municipal corporation, including drivers of vehicles thereon, are mutual and coordinate.

In conformity with the rule discussed in Highways §§ 233, 240, the rights of all persons lawfully using a highway or street in a municipal corporation,⁵⁶ including drivers of vehicles thereon,⁵⁷ are mutual and coordinate; and it is the duty of each to exercise his right so as not to cause injury to another.⁵⁸ Each must exercise that degree of care and vigilance which is reasonable under the circumstances⁵⁹ and commensurate with the known use that is being made of the street.⁶⁰ He is not bound to anticipate the negligence of another,⁶¹ but may assume that the other will perform the duty required of him and may act on that assumption.⁶²

46. Mass.—Bonf v. Goldstein, 177 N. E. 581, 276 Mass. 372.

47. U.S.—Massey-Harris Co. v. Gill, C.C.A.Okl., 64 F.2d 392.

Fla.—Florida Motor Lines v. Ward, 137 So. 163, 102 Fla. 1105.

Pa.—Johnson v. American Reduction Co., 158 A. 153, 305 Pa. 537—Chachkin v. Accommodation Ice & Coal Co., 92 Pa.Super. 416.

44 C.J. p 1046 note 82.

48. Ga.—Williams v. Grier, 26 S.E. 2d 698, 196 Ga. 327, conformed to 27 S.E.2d 352, 70 Ga.App. 75.

44 C.J. p 1046 note 83.

49. Ga.—Williams v. Grier, supra. Ky.—Louisville Taxicab & Transfer Co. v. Reno, 35 S.W.2d 902, 237 Ky. 452.

Tenn.—Western Union Tel. Co. v. Dickson, 173 S.W.2d 714, 27 Tenn. App. 752.

44 C.J. p 1046 note 84.

50. Ky.—Louisville Taxicab & Transfer Co. v. Reno, 35 S.W.2d 902, 237 Ky. 452.

Tenn.—Western Union Tel. Co. v. Dickson, 173 S.W.2d 714, 27 Tenn. App. 752.

44 C.J. p 1046 note 85.

51. Ga.—Bowen v. Smith-Hall Grocery Co., 82 S.E. 23, 141 Ga. 721, L.R.A.1915D 617.

44 C.J. p 1047 note 86.

52. N.Y.—Thompson v. Plath, 60 N. Y.S. 621, 44 App.Div. 291.

44 C.J. p 1047 note 88.

53. Pa.—Boggs v. Jewell Tea Co., 109 A. 666, 266 Pa. 428.

44 C.J. p 1047 note 89.

54. Conn.—Hott v. New Haven, 101 A. 498, 92 Conn. 29.

44 C.J. p 1047 note 90.

55. Ky.—Louisville Taxicab & Transfer Co. v. Reno, 35 S.W.2d 902, 237 Ky. 452.

Joint or several liability

Recovery may be had against all or any one of the responsible parties. —Williams v. Grier, 26 S.E.2d 698, 196 Ga. 327, conformed to 27 S.E.2d 352, 70 Ga.App. 75.

Racing

If defendants' servants in concert race their vehicles in the street, driving so fast as to endanger the safety of foot passengers, both defendants are liable for the death of a pedestrian struck by one vehicle. —De Carvalho v. Brunner, 119 N.E. 563, 223 N.Y. 284.

56. Md.—Gitomir v. United Rys. & Electric Co. of Baltimore City, 146 A. 279, 157 Md. 464.

Miss.—Ross v. West, 30 So.2d 310, 202 Miss. 3.

N.J.—Clarkson v. Ley, 148 A. 745, 106 N.J.Law 380.

57. Md.—Gitomir v. United Rys. & Electric Co. of Baltimore City, 146 A. 279, 157 Md. 464.

44 C.J. p 1048 note 3.

Mutual rights and duties of:

Operators of motor vehicles see Motor Vehicles § 246.

Street railroad company and travelers on street see the C.J.S. title Street Railroads §§ 207-210, also 60 C.J. p 395 note 86-p 405 note 59.

58. Or.—McKeag v. Portland Electric Power Co., 275 P. 667, 128 Or. 614.

59. Md.—Gitomir v. United Rys. & Electric Co. of Baltimore City, 146 A. 279, 157 Md. 464.

44 C.J. p 1048 note 4.

60. Mich.—Van Dyke v. Knoll, 247 N.W. 768, 262 Mich. 644.

Duty to coasters

Where coasting is permitted on street, people using street are bound to exercise reasonable care not to get in the way of those coasting, but there is not an absolute duty not to get in the way. —Van Dyke v. Knoll, supra.

Zone of peril

Zone of peril caused by approach of moving vehicle is always widened beyond the immediate path of such vehicle by obliviousness of person approaching such path. —Crews v. Kansas City Public Service Co., 111 S.W.2d 54, 341 Mo. 1090.

61. Pa.—Maiden v. Philadelphia Transp. Co., 60 A.2d 409, 163 Pa. Super. 189.

62. Fla.—Florida Motor Lines v. Ward, 137 So. 163, 102 Fla. 1105.

Generally it is not negligence in one not to anticipate a failure of duty on the part of those who, in common with him, are making a lawful use of a public street.⁶³ It is the duty, however, of the driver of a vehicle to exercise due care to avoid the results of another's negligence,⁶⁴ and whether he has taken the proper course in a particular situation depends on all the circumstances of the case.⁶⁵

b. Of Pedestrians and Others

In the absence of statute or ordinance providing otherwise, pedestrians and others lawfully using the streets of municipal corporations have equal rights therein and are mutually bound to exercise due care to avoid injury. Pedestrians have a preferential right in the use of sidewalks.

In conformity with the rule discussed in *Highways* §§ 233, 240, foot passengers and drivers of vehicles, in the absence of statute or ordinance providing otherwise, have equal rights on the streets of municipal corporations and both are bound to exercise commensurate care to avoid injury,⁶⁶ and, in the absence of statute or ordinance relative thereto, as discussed *infra* § 1789, the rule applies at public crossings.⁶⁷

The driver of a vehicle within an intersection, or crossing an intersection, must proceed with regard to the rights of pedestrians crossing the street, particularly where the pedestrian has the right of way,

whether his right is preferential or absolute.⁶⁸ The pedestrian, however, should carefully observe traffic conditions before trying to cross a street at a busy intersection,⁶⁹ and before attempting to cross a street should keep in mind and govern his actions in accordance with the right of the operator of a vehicle, as considered *infra* § 1779 c (1), to proceed across it in the face of a red light or stop signal that bars travel in the direction in which he is going.⁷⁰ Under an ordinance giving to pedestrians the right of way at street intersections, pedestrians are not required to stop and yield the right of way as a matter of right to drivers of vehicles.⁷¹ The law, even though it gives precedence at intersections to pedestrians, does not permit them to loiter on or obstruct crossings, but merely gives them the right of reasonable opportunity to pass first.⁷² An ordinance giving pedestrians the right of way at street intersections and crossings has been held not applicable at crossings where traffic is congested.⁷³ In some jurisdictions the driver of a vehicle is required to exercise the greatest care so as not to injure pedestrians at street crossings.⁷⁴ The operator of a vehicle is entitled to assume that traffic signals are understood and will be observed by pedestrians.⁷⁵

Use of sidewalk. Pedestrians on a lane or walk used by foot travelers, such as a sidewalk, have the right to come and go in any direction as they see fit

Ind—*Elgin Dairy Co. v. Shepherd*, 108 N.E. 234, 109 N.E. 353, 183 Ind. 466.

Iowa.—*Gearhart v. Des Moines R. Co.*, 21 N.W.2d 569, 237 Iowa 213.

Md.—*Gitomir v. United Rys. & Electric Co. of Baltimore City*, 146 A. 279, 157 Md. 464.

N.J.—*Clarkson v. Ley*, 148 A. 745, 106 N.J.Law 380.

Pa.—*Maiden v. Philadelphia Transp. Co.*, 60 A 2d 409, 163 Pa Super. 189.

63. Md.—*Gitomir v. United Rys. & Electric Co. of Baltimore City*, 146 A. 279, 157 Md. 464.

64. Cal.—*Anderson v. Dahl*, 8 P.2d 883, 121 Cal.App. 198.

La.—*Preaus v. Western Union Telegraph Co.*, App., 151 So. 813.

Or.—*Marshall v. Olson*, 202 P. 736, 102 Or. 502.

65. Cal.—*Anderson v. Dahl*, 8 P.2d 883, 121 Cal.App. 198.

66. La.—*Neyrey v. Maillet*, App., 21 So.2d 158.

Md.—*Caryl, to Use of Merchants Mut. Cas. Co. v. Baltimore Transit Co.*, 58 A.2d 239.

Mass.—*O'Connor v. Hickey*, 156 N.E. 838, 260 Mass. 110.

Pa.—*Lowers v. Zuker*, 157 A. 339, 102 Pa. Super. 581.

Tenn.—*Western Union Tel. Co. v.*

Dickson, 173 S.W.2d 714, 27 Tenn. App. 752—*Elmore v. Thompson*, 14 Tenn.App. 78.

Wis.—*Rang v. Klawun*, 223 N.W. 121, 198 Wis. 1.

44 C.J. p 1047 note 94.

Mutual rights and duties of operators of motor vehicles and pedestrians see *Motor Vehicles* §§ 383, 389.

Right of pedestrian to use street see *supra* § 1759.

67. Md.—*Caryl, to Use of Merchants Mut. Cas. Co. v. Baltimore Transit Co.*, 58 A 2d 239.

Tenn.—*Western Union Tel. Co. v. Dickson*, 173 S.W.2d 714, 27 Tenn. App. 752.

44 C.J. p 1048 note 96.

Reciprocal rights and duties of street railroad companies and travelers at crossings see the C. J.S. title *Street Railroads* § 209, also 60 C.J. p 400 note 16-p 404 note 41.

Traffic signal changes

Person in intersection when "go" signal changes and persons entering intersection with "go" signal have equal rights subject to regulation of conduct with reference to ability to stop.—*Cleveland Ry. Co. v. Goldman*, 170 N.E. 641, 122 Ohio St. 73.

68. Iowa.—*Gearhart v. Des Moines R. Co.*, 21 N.W.2d 569, 237 Iowa 213.

69. La.—*Preaus v. Western Union Telegraph Co.*, App., 151 So. 813.

70. La.—*Preaus v. Western Union Telegraph Co.*, *supra*.

71. Md.—*Caryl, to Use of Merchants Mut. Cas. Co. v. Baltimore Transit Co.*, 58 A.2d 239, 44 C.J. p 1048 note 97.

72. Iowa.—*Gearhart v. Des Moines R. Co.*, 21 N.W.2d 569, 237 Iowa 213—*Switzer v. Baker*, 160 N.W. 372, 178 Iowa 1063.

73. Wash.—*Cole v. Freidman*, 232 P. 361, 132 Wash. 587.

74. Pa.—*McLaughlin v. American Ice Co.*, 100 Pa. Super. 216.

Horse-drawn vehicle

The rule applies with great force to a horse-drawn vehicle, for the risk is increased by the presence of the horses who are not absolutely under the control of the driver, but capable of independent action.—*McLaughlin v. American Ice Co.*, *supra*.

75. La.—*Buckley v. Featherstone Garage*, 123 So. 446, 11 La.App. 564.

and at any pace or gait that may suit their fancy, aim, or purpose, subject to the requirement that it must be in accordance with the interest of others who may lawfully be thereon.⁷⁶ They and the operators of vehicles on the street owe each other a mutual duty of due care;⁷⁷ but, since a sidewalk is a part of a street set apart for the use of pedestrians, pedestrians have a preferential or superior right to the use thereof,⁷⁸ and no other traveler or user of a public street is privileged to use the sidewalk adjacent thereto either to the exclusion of a pedestrian desiring to use it or in such manner as will render it unsafe for him.⁷⁹

§ 1779. Law of the Road

- a. In general
- b. Duty to keep to right
- c. At intersections
- d. Overtaking and passing
- e. Particular vehicles

a. In General

The law of the road, in the absence of statute, ordinance, or other regulation modifying, restricting, or superseding it, applies to travel on the streets of a municipal corporation.

The law of the road or general custom regulating the mode of travel on public highways, considered in Highways §§ 236-239, applies, in the absence of statute, ordinance, or other regulation modifying, restricting, or superseding it, to travel on the streets of a municipal corporation.⁸⁰ Traffic rules generally, whether based on the law of the road or on ordinance or statute, are not inflexible or exclusive rules, but are relative.⁸¹ They are subject to the common-law doctrine that the rights thus given must be so used as not to injure another,⁸² and

emergencies may arise where, in order to escape from danger to one's self or to prevent injury to others, it is not only excusable, but proper, temporarily to violate the general rule.⁸³ The rules for vehicular travel on streets do not apply to pedestrians.⁸⁴

Streets not public highways are not subject to the law of the road.⁸⁵

Turning or changing course. Under statutes so providing, the operator of a vehicle is required to give a plainly visible or audible sign of his intention to turn or change the course of his vehicle before doing so when the movement or operation of other vehicles may reasonably be affected thereby,⁸⁶ but he may turn or change the course of his vehicle without giving such signal if he first ascertains that there is sufficient space for such movement to be made in safety and that it will not reasonably affect the movement or operation of other vehicles.⁸⁷ Such a statute has been said to be not violated by the failure of the operator of a vehicle, who has given the required signal, to ascertain before making the movement whether or not there is sufficient space to make it in safety and whether or not it will reasonably affect the movement or operation of other vehicles.⁸⁸

b. Duty to Keep to Right

The law of the road requires vehicles on municipal streets to keep to the right.

The law of the road requires vehicles on municipal streets to keep to the right.⁸⁹ The driver of a vehicle has the right, however, in the absence of statute or ordinance to the contrary, to drive on any part of the street,⁹⁰ if there is no travel at that time

76. Cal.—Schedlwy v. McDermott, 298 P. 107, 113 Cal.App. 218.

77. Mass.—Murray v. Liebmman, 120 N.E. 79, 231 Mass. 7.

78. Cal.—Brandes v. Freitas, 2 P. 2d 830, 116 Cal.App. 459.

Ky.—Foreman v. Western Union Telegraph Co., 14 S.W.2d 1079, 228 Ky. 300.

79. Cal.—Brandes v. Freitas, 2 P.2d 830, 116 Cal.App. 459.

Subject to pedestrian's superior right

The right of others to use a sidewalk is subject to the superior right of the pedestrian therein, and they must give timely and appropriate notice or warning of their intention to use it, and then only with such safeguards to the pedestrian as will adequately and reasonably protect him from injury.—Brandes v. Freitas, *supra*.

80. Wash.—Benson v. Anderson, 223 P. 1063, 129 Wash. 19.

44 C.J. p 1049 note 10.

Law of the road as applied to motor vehicles see Motor Vehicles §§ 266-283, 305-338, 350-370.

Violation of statute or ordinance regulating traffic on city streets as negligence see *infra* § 1786.

81. Wyo.—Christensen v. McCann, 282 P. 1061, 41 Wyo. 101.

82. Wyo.—Christensen v. McCann, *supra*.

83. Cal.—Anderson v. Dahl, 8 P.2d 883, 121 Cal.App. 198.

Ind.—Borg v. Larson, 111 N.E. 201, 60 Ind.App. 514.

84. Or.—Yarborough v. Carlson, 202 P. 739, 102 Or. 422.

85. Conn.—Eckert v. Levinson, 99 A. 699, 91 Conn. 338.

44 C.J. p 1049 note 14.

86. Tex.—McMath Co. v. Staten,

Civ.App., 42 S.W.2d 649, error dismissed.

87. Tex.—McMath Co. v. Staten, *supra*.

To establish negligence in failing to signal intention to stop or change course, it must appear that movement of other vehicles would reasonably be affected thereby.—McMath Co. v. Staten, *supra*.

88. Tex.—McMath Co. v. Staten, *supra*.

89. Utah.—Staton v. Western Macaroni Mfg. Co., 174 P. 821, 52 Utah 426.

44 C.J. p 1049 note 15.
Rule as applied to motor vehicles see Motor Vehicles § 275.

90. Ind.—City of Decatur v. Stoops, 52 N.E. 623, 21 Ind.App. 397.
Mo.—Boyer v. North End Drayage Co., App., 67 S.W.2d 769.

on that part of the way,⁹¹ or if the travel is not so heavy as to make it dangerous to do so,⁹² or as long as it does not interfere with the right of other travelers.⁹³ Hence, it is not of itself, or as a matter of law, unlawful or negligence to drive a vehicle along the left-hand or wrong side of a street⁹⁴ or in the middle of a street.⁹⁵ Nevertheless, where the operator of a vehicle uses the left-hand or wrong side of the street, his rights are inferior to those of travelers proceeding in the opposite direction,⁹⁶ and he may not complain of the conduct of others to the same extent as though he were on the proper side.⁹⁷ A rule or regulation requiring vehicles to keep to the right does not prohibit the use of the left-hand side of the street under all circumstances.⁹⁸

Near right-hand curb. Under some statutes or ordinances a vehicle is required to keep as near the right-hand curb as possible.⁹⁹ Such a requirement, however, does not require a vehicle to be driven outside the paved center half of a street.¹

To what vehicles or situations applicable. The rule of keeping to the right applies to motor vehicles, considered in Motor Vehicles § 275, and to bicycles as well as other vehicles,² including horse-drawn vehicles;³ and it has been held to apply not only to vehicles passing in opposite directions, but to vehicles coming together in such a manner that there would be an actual collision or an apparent danger of one if they should pursue their courses without change of direction.⁴ It applies, however,

only to vehicles in motion and not those stopping on the street for business;⁵ and, therefore, in the absence of a regulation to the contrary, it does not apply to a vehicle standing at the left-hand curb,⁶ such as a truck to discharge its load,⁷ or a coach and buggy to allow passengers to alight;⁸ nor does it apply to vehicles on private property.⁹

On one-way street. The rule requiring vehicles to keep to the right of the center does not apply to a one-way street,¹⁰ and hence does not apply to a circular roadway on which vehicles are required, by ordinance, to drive to the right on entering.¹¹ Where an operator of a vehicle lawfully uses a one way drive against traffic he must proceed with more than ordinary care, as traveling in that direction is not to be anticipated by other users.¹² Under statutes so providing, the violation of an ordinance limiting traffic to one way does not render the operator of the vehicle or any occupant a trespasser on such way.¹³

Street divided by parkway. A park bounded on each of its sides by a separate street and not within the boundaries or a part of any one of them is not a "parkway" within a regulation requiring vehicles to keep to the right on streets or boulevards divided longitudinally by a "parkway."¹⁴

Meeting vehicles. Where the drivers of two vehicles on a public street approach each other from opposite directions, it is the duty of each driver to turn out and keep to the right of the center of the

Utah.—Richards v. Palace Laundry Co., 186 P. 439, 55 Utah 409.

91. Utah.—Richards v. Palace Laundry Co., supra.
44 C.J. p 1050 note 47.

Meeting others

Except under special circumstances, such as when meeting another vehicle or person, the driver of a vehicle may use any part of the street.

Ala.—Morrison v. Clark, 72 So. 305, 196 Ala. 670.

Mass.—Johnson v. Shaw, 90 N.E. 518, 204 Mass. 165.

92. Wash.—Segerstrom v. Lawrence, 116 P. 876, 64 Wash. 245.

93. Ind.—City of Decatur v. Stoops, 52 N.E. 623, 21 Ind.App. 397.

94. Cal.—Harris v. Johnson, 161 P. 1155, 174 Cal. 55, L.R.A.1917C 479, Ann.Cas.1918E 560—Anderson v. Dahl, 8 P.2d 883, 121 Cal.App. 198.

95. Mo.—Boyer v. North End Drayage Co., App., 67 S.W.2d 769.
44 C.J. p 1050 note 47 [a].

96. Wash.—Hiscock v. Phinney, 142 P. 461, 81 Wash. 117, Ann.Cas. 1916E 1044.

97. Utah.—Richards v. Palace

Laundry Co., 186 P. 439, 55 Utah 409, 417.

44 C.J. p 1049 note 19.

98. Cal.—Anderson v. Dahl, 8 P.2d 883, 121 Cal.App. 198.
44 C.J. p 1049 note 17.

99. Tenn.—Elmore v. Thompson, 14 Tenn App. 78.

Purpose of ordinance is to protect travelers on the streets of the city.—Elmore v. Thompson, supra.

1. Wash.—Clausen v. Jones, 71 P. 2d 362, 191 Wash. 334.

2. Cal.—Diehl v. Roberts, 66 P. 202, 134 Cal. 164—Wistrom v. Redlick, 92 P. 1048, 6 Cal.App. 671.

Law of road as applicable to bicycles generally see Highways § 236 c.

3. Utah.—Staton v. Western Macaroni Mfg. Co., 174 P. 821, 52 Utah 426.

4. Iowa.—Hubbard v. Bartholomew, 144 N.W. 13, 163 Iowa 58, 49 L.R.A.N.S., 443.

5. Cal.—Bauhofer v. Crawford, 117 P. 931, 16 Cal.App. 676.

44 C.J. p 1050 note 31.

6. Tex.—U. S. Express Co. v. Taylor, Civ App., 156 S.W. 617.

44 C.J. p 1050 note 32.

7. Cal.—Bauhofer v. Crawford, 117 P. 931, 16 Cal.App. 676.

8. Cal.—Bauhofer v. Crawford, supra.

9. Ark.—Bean v. Coffee, 277 S.W. 522, 169 Ark. 1052.

10. Colo.—Hedges v. Mitchell, 194 P. 620, 69 Colo. 285.

11. Colo.—Hedges v. Mitchell, supra.

12. Pa.—Robinson v. American Ice Co., 141 A. 244, 292 Pa. 366.

13. Mass.—Scranton v. Crosby, 9 N.E.2d 391, 298 Mass. 15.

Effect on civil liability

The statute means that, for purpose of civil liability as to both plaintiff and defendant, illegal quality or element is no longer to consist of trespass.—Scranton v. Crosby, supra.

14. N.Y.—Kupelian v. Andrews, 135 N.E. 502, 233 N.Y. 278.

traveled portion of the street;¹⁵ and, even though a statute declaratory of this duty to turn to the right applies only to highways other than streets, the same rule constitutes a custom which, as part of the common law, is applicable to streets.¹⁶ The central line of the roadway within such a rule or regulation means the line that bisects the middle line of the usable road, and is not necessarily the middle line of a paved or dedicated street,¹⁷ and where, because of obstructions, a part thereof is made impassable, the rule or regulation refers to the remaining passable way.¹⁸

Crossing street. The right-hand rule is inapplicable to vehicles crossing from one side of a street to the other.¹⁹

Justification or excuse for driving on wrong side. A driver may under compulsion of circumstances turn left without violating the law of the road,²⁰ as where this is necessary to avoid an obstruction on the right-hand side,²¹ especially under a regulation, declaratory of the common-law rule, which provides that it shall not apply to a case where it is impracticable, from the nature of the ground, for the driver to turn to the right of the beaten track.²²

c. At Intersections

In the absence of statute or ordinance providing otherwise, the rights of vehicles which approach each other at intersections of streets are equal, and the one which first reaches the intersection has the right of way.

Ordinarily when two vehicles approach each other

at intersections of streets, the rights of each are equal.²³ However, in the absence of some regulation to the contrary, and under statutes and ordinances so providing, the one first reaching the crossing has the right of way and it is the duty of the other to allow the first vehicle reasonable opportunity to pass,²⁴ and this rule has been applied to the operator of a vehicle and a pedestrian.²⁵ On the other hand, even though a preference is given to the vehicle nearest the intersection, it does not prevent the vehicle farthest from the intersection from proceeding, if possible, with the exercise of reasonable care.²⁶ The driver of a vehicle is not required to wait until all observable traffic has cleared an intersection before venturing into it;²⁷ nor is he bound to keep his eyes fixed in one direction and keep a known approaching vehicle under constant observation to the exclusion of exercising care for dangers which may arise from other directions.²⁸

Right of way governed by direction of travel. A statute providing that the driver of a vehicle approaching an intersection shall grant the right of way to a vehicle approaching from a particular direction merely adds a factor to common-law rules, whereby negligence may be measured between conflicting claimants exercising a common right.²⁹ Such a statute or an ordinance of like tenor must be given a reasonable and practicable application,³⁰ and the right of way conferred is relative,³¹ and applies only where vehicles approach an intersection

15. Utah.—Staton v. Western Macaroni Mfg. Co., 174 P. 821, 52 Utah 426.

44 C.J. p 1050 note 39.

16. Miss.—Palotta v. Jackson Light & Traction Co., 64 So. 938, 107 Miss. 61.

Statute authorizing recovery of forfeit

It has been held that the law of the road, as found in a statute providing for the recovery of a forfeit for the benefit of the road fund on the failure of the driver of a vehicle to pass to the right when meeting another vehicle, applies only to highways, and not to streets in municipalities.—Decatur v. Stoops, 52 N.E. 623, 21 Ind.App. 397—44 C.J. p 1050 note 40.

17. Mo.—Harmon v. Fowler Packing Co., 108 S.W. 610, 129 Mo.App. 715.

18. Mo.—Harmon v. Fowler Packing Co., supra.

19. Minn.—Lyford v. Jacob Schmidt Brewing Co., 124 N.W. 831, 110 Minn. 158.

44 C.J. p 1050 note 45.

Crossing at street intersections see infra subdivision c of this section.

20. Iowa.—Streeter v. Marshalltown, 99 N.W. 114, 123 Iowa 449.

44 C.J. p 1051 note 49.

Justification or excuse for driving on wrong side as applied to:
Highways generally see Highways § 236 f.
Motor vehicles see Motor Vehicles § 282.

21. Miss.—Palotta v. Jackson Light, etc., Co., 64 So. 938, 107 Miss. 61.

44 C.J. p 1051 note 50.

22. Ill.—Cutright v. Adams Express Co., 175 Ill.App. 269.

44 C.J. p 1051 note 51.

23. Ohio.—Presti v. Cleveland Ry. Co., 160 N.E. 508, 26 Ohio App. 536, affirmed Heidle v. Baldwin, 161 N.E. 44, 118 Ohio St. 375, 58 A.L.R. 1186.

44 C.J. p 1051 note 53.

Right of way of motor vehicles at intersections:
Generally see Motor Vehicles §§ 362-364.

Turning into intersecting street see Motor Vehicles §§ 365-367.

24. Pa.—Frank v. Fleet, 87 Pa.Super. 494.

Wyo.—Christensen v. McCann, 282 P. 1061, 41 Wyo. 101.

44 C.J. p 1051 note 54.

25. Tenn.—Western Union Tel. Co. v. Dickson, 173 S.W.2d 714, 27 Tenn.App. 752.

26. Ohio.—Presti v. Cleveland Ry. Co., 160 N.E. 508, 26 Ohio App. 536, affirmed Heidle v. Baldwin, 161 N.E. 44, 118 Ohio St. 375, 58 A.L.R. 1186.

27. Pa.—Maiden v. Philadelphia Transp. Co., 60 A.2d 409, 163 Pa. Super. 189.

28. Pa.—Maiden v. Philadelphia Transp. Co., supra.

29. N.J.—Paulsen v. Klinge, 104 A. 95, 92 N.J.Law 99.

30. Mass.—Fournier v. Zinn, 154 N.E. 268, 257 Mass. 575.

44 C.J. p 1051 note 56.

31. Wash.—Herndon v. City of Seattle, 118 P.2d 421, 11 Wash.2d 88.

Duty not absolute

The primary, not the absolute, duty of avoiding an accident at an intersection rests on driver on the left, which duty he must perform with reasonable regard to maintenance of

at approximately the same time.³² A driver lacking the right of way may nevertheless proceed if no one is approaching along the intersecting street within a distance reasonably indicating danger of collision.³³

Effect of right of way on degree of care required. While a statute or ordinance giving the right of way to a particular vehicle or to vehicles approaching from a particular direction may affect the quantum of care to be exercised by each driver,³⁴ it does not confer a monopoly of way ad libitum on a person so approaching, regardless of existing conditions and the distance from the intersecting street.³⁵ It does not mean that a vehicle not having the right of way must at its peril avoid collision with a vehicle having the right of way, irrespective of care or negligence of either driver,³⁶ nor does such "right of way" relieve the operators of favored vehicles from the exercise of due care not to injure another at such place.³⁷

*The compass direction may govern the right of way at intersections under statute or ordinance.*³⁸

*The common-law duty of approaching vehicles to keep to the right applies at street intersections.*³⁹

Traffic signal or traffic officer's signal. Traffic signal devices and traffic officers controlling traffic at street intersections are for the safety and protection of those who use the streets and should be obeyed.⁴⁰ The superior right of way at street intersections belongs to that vehicle or pedestrian

whose course is favored by the traffic officer or signal;⁴¹ neither is allowed to enter an intersection on the wrong signal,⁴² and where a traveler who has entered an intersection on a proper or green signal has not cleared the crossing at the time the signal changes it is his right and duty to clear it thereafter and he is not negligent in so doing.⁴³

A "go" signal by a traffic officer or signal device is not a command to go, but a qualified permission, that is, a permission to proceed lawfully and carefully in the direction indicated.⁴⁴ The right of way conferred is subject to the rights of those already in the intersection;⁴⁵ it confers no authority on the one who receives the signal to proceed across the intersection regardless of other persons or vehicles which may already be within it.⁴⁶ It does not give one the right to proceed without regard to circumstances, conditions, or consequences; but, notwithstanding such right, one must exercise due care to prevent injury to himself and others.⁴⁷ The fact that the red light behind the red or stop sign of a traffic signal device at a street intersection is dead is not an invitation to cross or proceed.⁴⁸

*A stop sign at an intersection should be obeyed regardless of whether or not it is a de jure warning sign.*⁴⁹

A street is not a boulevard, within the meaning of a statute relating to the right of way at the intersection of streets of unequal character, unless so designated by ordinance.⁵⁰

a fair margin of safety at all times. —Herndon v. City of Seattle, supra.

32. Wash.—Hoyt v. Wilson, 231 P. 947, 132 Wash. 423.
44 C.J. p 1051 note 57.

33. Wash.—Herndon v. City of Seattle, 118 P.2d 421, 11 Wash.2d 88
44 C.J. p 1051 note 58.

34. Wash.—Shilliam v. Newman, 162 P. 977, 94 Wash. 637.
44 C.J. p 1051 note 59.

35. Wyo.—Christensen v. McCann, 282 P. 1061, 41 Wyo. 101.
44 C.J. p 1051 note 60.

36. Okl.—Lee v. Pesterfield, 188 P. 674, 77 Okl. 317.
44 C.J. p 1051 note 61.

37. Ohio.—Presti v. Cleveland Ry. Co., 160 N.E. 508, 26 Ohio App. 536, affirmed Heidle v. Baldwin, 161 N.E. 44, 118 Ohio St. 375, 58 A.L.R. 1186.

Pa.—Frank v. Pleet, 87 Pa.Super. 494.

Wash.—Herndon v. City of Seattle, 118 P.2d 421, 11 Wash.2d 88.

Wyo.—Christensen v. McCann, 282 P. 1061, 41 Wyo. 101.
44 C.J. p 1051 note 62.

38. N.Y.—Goldman v. Stern, 144 N. E. 494, 238 N.Y. 180.

44 C.J. p 1052 note 63.

39. Ind.—Reitz v. Hodgkins, 112 N. E. 386, 185 Ind. 163.
44 C.J. p 1052 note 64.

40. La.—Buckley v. Featherstone Garage, 123 So. 446, 11 La.App. 564.

41. Conn.—Viggiana v. Connecticut Co., 191 A. 95, 122 Conn. 514.
Pa.—Galliano v. East Penn Electric Co., 154 A. 805, 303 Pa. 498.

42. La.—Buckley v. Featherstone Garage, 123 So. 446, 11 La.App. 564.

43. La.—Preaus v. Western Union Telegraph Co., App., 151 So. 813—Buckley v. Featherstone Garage, 123 So. 446, 11 La.App. 564.
Md.—Caryl, to Use of Merchants Mut. Cas. Co. v. Baltimore Transit Co., 58 A.2d 239.

44. Pa.—Galliano v. East Penn Electric Co., 154 A. 805, 303 Pa. 498.

Duty of motorist to obey traffic officer and traffic signals and degree of care required see Motor Vehicles § 360.

45. Pa.—Galliano v. East Penn Electric Co., supra.

46. Pa.—Galliano v. East Penn Electric Co., supra.

47. Cal.—Coffey v. Slingerland, 50 P.2d 830, 9 Cal.App.2d 731.

La.—Buckley v. Featherstone Garage, 123 So. 446, 11 La.App. 564.

S.C.—North State Lumber Co. v. Charleston Cons. R., etc., Co., 105 S.E. 406, 115 S.C. 267.

Effect of traffic signals or lights on highways generally see Highways § 237 b.

Only qualification

Where traffic signal operates, only qualification of right of driver of vehicle to proceed in accordance with direction of signal is that he must use due care in exercise of it.—Viggiana v. Connecticut Co., 191 A. 95, 122 Conn. 514.

48. Ohio.—Martin v. City of Canton, 180 N.E. 78, 41 Ohio App. 420.

49. Wash.—Comfort v. Penner, 6 P. 2d 604, 166 Wash. 177.

50. Ky.—Newbold v. Brotsge, 272 S. W. 755, 209 Ky. 218.

Turning at intersection. Under a statute requiring vehicles to keep to the right of the center of an intersection, and in turning to the left, to run beyond the center, a vehicle intending to turn must approach the intersection on the proper side of the street.⁵¹ Under a statute or ordinance so providing, a vehicle turning from its course at a street intersection must yield the right of way to other vehicles and pedestrians lawfully within the intersection.⁵²

What constitutes an intersection. Intersecting streets within the meaning of statutes, ordinance, or regulations respecting the law of the road include all intersecting ways, whether they do or do not cross each other,⁵³ dead-end streets meeting a through street at right angles,⁵⁴ and three streets meeting at the same point.⁵⁵ The "point of intersection" is the space common to the crossing streets,⁵⁶ and not necessarily the point at which the paths of two approaching vehicles would cross;⁵⁷ and the "center of intersection" is the point at which the center lines of the intersecting streets cross.⁵⁸ A crosswalk or crossing for pedestrians at an intersection generally is the space within the confines of that portion of the street or highway which would be embraced within the boundaries of the lines of the sidewalk of the street intersecting the other highway at a right angle, if continued across the highway.⁵⁹

d. Overtaking and Passing

The law of the road requires a vehicle overtaking and passing another on municipal streets to pass to the left of the overtaken vehicle, and the driver of the vehicle ahead to keep far enough to the right to permit passing on his left, or to turn to his right when he receives a warning from a vehicle approaching from his rear.

The law of the road requires a vehicle overtaking and passing another on municipal streets to pass to the left of the overtaken vehicle,⁶⁰ and the driver of the vehicle ahead to keep far enough to the right to permit passing on his left,⁶¹ or to turn to his right when he receives a warning from a vehicle approaching from his rear;⁶² and the latter may properly assume that anyone overtaking him will pass to his left.⁶³ The rule, however, is not absolute,⁶⁴ although a divergence imposes the duty to exercise greater care,⁶⁵ and it is neither unlawful or negligent to turn to the right of a vehicle ahead in order to avoid danger,⁶⁶ or, in the absence of contrary statute or ordinance, to pass to the right where for any reason there is insufficient space to permit passage to the left,⁶⁷ or to overtake and pass a vehicle on the right, instead of the left, side on approaching an intersection where a traffic signal and markings on the highway divide it into distinct traffic lanes for travel in the same direction.⁶⁸ A regulation requiring the overtaking vehicle to pass to the left is subject to the conditions existing on the street and does not excuse the driver from ex-

51. Tex.—Thrush v. Lingo Lumber Co., Civ.App., 262 S.W. 551.

Motor vehicles turning into intersecting street see Motor Vehicles §§ 365-367.

52. Md.—Caryl, to Use of Merchants Mut. Cas. Co. v. Baltimore Transit Co., 58 A.2d 239.

Intersection controlled by signal

Statute respecting right of way at traffic controlled intersections has been construed to apply not only to those already in intersection when signal is first shown but to all lawfully within intersection during entire time for which signal is exhibited so that vehicle making left turn must wait until those meeting it have passed and must not cross in front of approaching traffic, either vehicular or pedestrian, in such a way as to interfere with its lawful progress.—Caryl, to Use of Merchants Mut. Cas. Co. v. Baltimore Transit Co., supra.

Violation not authorized

The fact that the driver of the turning vehicle reasonably thought conditions justified violation of the ordinance does not excuse him.—Alamo Iron Works v. Prado, Tex.Civ. App., 220 S.W. 282.

53. Mass.—Fournier v. Zinn, 154 N. E. 268, 257 Mass. 575.

54. N.J.—Clarkson v. Ley, 148 A. 745, 106 N.J.Law 380.
S.C.—Crouch v. Cudd, 155 S.E. 136, 158 S.C. 1.

Tenn.—Western Union Tel. Co. v. Dickson, 173 S.W.2d 714, 27 Tenn. App. 752.

44 C.J. p 1052 note 67.
What constitutes intersection as applied to drivers of motor vehicles see Motor Vehicles § 351.

55. Wash.—Surry v. Seattle Taxicab Co., 201 P. 754, 117 Wash. 559.

56. Mass.—Fournier v. Zinn, 154 N. E. 268, 257 Mass. 575.

Tenn.—Western Union Tel. Co. v. Dickson, 173 S.W.2d 714, 27 Tenn. App. 752.

57. Mass.—Fournier v. Zinn, 154 N. E. 268, 257 Mass. 575.

58. Tex.—Thrush v. Lingo Lumber Co., Civ.App., 262 S.W. 551.

59. N.J.—Clarkson v. Ley, 148 A. 745, 106 N.J.Law 380.

60. Pa.—Johnson v. American Reduction Co., 158 A. 153, 305 Pa. 537.

44 C.J. p 1052 note 76.

Motor vehicles overtaking and passing see Motor Vehicles §§ 324-327. Overtaking and passing on highway see Highways § 238.

61. Neb.—Hackett v. Alamito Sanitary Dairy Co., 133 N.W. 227, 90 Neb. 200, 41 L.R.A.,N.S., 337, Ann. Cas.1913A 829.

62. Pa.—Johnson v. American Reduction Co., 158 A. 153, 305 Pa. 537.

63. Ind.—Borg v. Larson, 111 N.E. 201, 60 Ind.App. 514.

64. Conn.—Viggiana v. Connecticut Co., 191 A. 95, 122 Conn. 514.
44 C.J. p 1052 note 79.

65. Neb.—Hackett v. Alamito Sanitary Dairy Co., 133 N.W. 227, 90 Neb. 200, 41 L.R.A.,N.S., 337, Ann. Cas.1913A 829.

66. Cal.—Squier v. Davis Standard Bread Co., 185 P. 391, 181 Cal. 533, 535.
44 C.J. p 1052 note 81.

67. Pa.—Wright v. Mitchell, 97 A. 478, 252 Pa. 325, 329,
44 C.J. p 1052 note 82.

68. Conn.—Viggiana v. Connecticut Co., 191 A. 95, 122 Conn. 514.

exercising care in ascertaining whether the passing can be done with safety to those on the left side of the street;⁶⁹ and some regulations expressly require that the passing shall not be made unless there is a clear way for a given distance ahead on that side.⁷⁰

A traffic regulation statute applicable to vehicles overtaking and passing others is not intended to provide an exclusively hard-and-fast rule applicable to all hazards and to all situations, regardless of actual conditions.⁷¹ A statute prohibiting the passing of vehicles from the rear while crossing intersections is inapplicable to an unintentional movement because of the sudden stop of the vehicle passed.⁷² Although it is the duty of the driver of a vehicle to pass to the left of another going in the same direction, a driver is not excused in doing so when the consequence of so acting will be the violation of another statute.⁷³

e. Particular Vehicles

In the absence of a statute or ordinance providing otherwise, the law of the road applies equally to all vehicles on municipal streets. The drivers of vehicles engaged in a public service, although entitled to the right of way over ordinary vehicles, are required to use reasonable care in the exercise of their special privileges.

In the absence of a statute or ordinance providing otherwise, the law of the road applies equally to all vehicles on municipal streets,⁷⁴ and hence, as discussed in Motor Vehicles §§ 379-381, cyclists and drivers of horse-drawn vehicles, in the absence of statute or ordinance providing otherwise, have equal rights as to such matters with motorists. A statute relating to automobiles is inapplicable to other vehicles.⁷⁵ The right-hand rule does not apply to vehicles running on fixed tracks.⁷⁶ However, in order to secure the protection of an ordinance providing, as an exception of the law of the road, that any

person driving on any street railroad track, in the direction that the cars are running, shall have the right of way, it must appear that at the time of the accident the one claiming the right of way was following a car.⁷⁷

Vehicles having special privileges. Ordinarily drivers of vehicles engaged in a public service have the right of way over ordinary vehicles in municipal streets, as discussed supra § 1767. Drivers of such vehicles, however, must use reasonable care in the exercise of their special privileges,⁷⁸ and this rule of care has been applied to ambulances,⁷⁹ fire department vehicles,⁸⁰ and police patrols.⁸¹ The right of way given by an ordinance to a police patrol is not restricted to a right of way over vehicles traveling in the same direction by an ordinance providing that all vehicles should be driven to the right of the center of the street.⁸² A statute providing that a salvage corps while on duty shall be subordinate to, and under the control of, the fire department does not give the vehicles of the latter the right of way over the former while being driven to a fire.⁸³ It has been held that, since the maintenance of a fire department is for a wholly public purpose, the right of way given to it by statute is paramount to, and unaffected by, that granted to a fire insurance patrol by a statute providing that the patrol should have the same right of way while going to a fire as the fire department, but that nothing in the act should be construed to affect the authority of the fire department.⁸⁴

Funeral procession. In the absence of a statute to the contrary, funeral processions do not have the right of way to proceed as a single unit.⁸⁵

§ 1780. Care Required in Use of Street or Other Public Way

It is the duty of one using a street or other public

69. N.J.—Pool v. Brown, 98 A. 262, 89 N.J.Law 314.

70. Mass.—Commonwealth v. Gile, 104 N.E. 572, 217 Mass. 18, 44 C.J. p 1052 note 84.

71. N.J.—Jackson v. Geiger, 126 A. 438, 100 N.J.Law 330, 44 C.J. p 1052 note 85.

72. Mo.—Egan v. Palmer, 293 S.W. 460, 221 Mo.App. 823.

73. Mich.—Wilson v. Johnson, 161 N.W. 924, 195 Mich. 94.

74. Iowa.—Buzick v. Todman, 162 N.W. 259, 179 Iowa 1019.

75. Md.—Gitomir v. United Rys. & Electric Co. of Baltimore City, 146 A. 279, 157 Md. 464.

Mutual rights and duties with respect to use of streets see supra § 1778.

Modes of travel to which law of road applies on highways other than municipal streets see Highways § 233 a.

76. Iowa.—Buzick v. Todman, 162 N.W. 259, 179 Iowa 1019, 44 C.J. p 1053 note 91.

77. N.Y.—Iaquinto v. Bauer, 93 N.Y.S. 388, 104 App.Div. 56, 44 C.J. p 1053 note 92.

78. Tex.—May v. Hahn, Civ.App., 97 S.W. 122.

79. Wash.—Hadley v. Arms, 241 P. 26, 136 Wash. 632, 44 C.J. p 1053 note 95.

80. N.Y.—Kelloog v. Church Charity Foundation, 120 N.Y.S. 406, 135 App.Div. 839, reversed on other grounds 96 N.E. 406, 203 N.Y. 191,

Ann.Cas.1913A 883, 38 L.R.A.,N.S., 481.

81. Mass.—Newcomb v. Boston Protective Dept., 16 N.E. 555, 146 Mass. 596, 4 Am.S.R. 354, 44 C.J. p 1053 note 97.

82. Del.—Brown v. Wilmington, 90 A. 44, 27 Del. 492, 44 C.J. p 1053 note 98.

83. Mo.—Hogan v. Fleming, 265 S.W. 875, 218 Mo.App. 172.

84. N.Y.—Farrell v. Fire Ins. Salvage Corps, 179 N.Y.S. 477, 189 App.Div. 795.

85. La.—Coleman v. New Orleans F. Ins. Patrol, 48 So. 130, 122 La. 626, 21 L.R.A.,N.S., 810, 16 Ann. Cas. 1217.

86. Pa.—Davis v. Pittsburgh Rys. Co., 194 A. 402, 128 Pa.Super. 393.

way within a municipal corporation to exercise due or reasonable care to avoid injury to others.

In conformity with the rules applicable in the case of highways generally, considered in Highways § 240, it is the duty, under all circumstances,⁸⁶ of persons using a street or other public way within a municipal corporation,⁸⁷ including pedestrians,⁸⁸ to exercise due care, or ordinary or reasonable care, to avoid injury to others, particularly to those who are lawfully therein.⁸⁹ The amount of care required is dependent on the existing circumstances and conditions,⁹⁰ and is that which the circumstances justly demand.⁹¹ One is required to use care to avoid injury to another as far as it may be reasonably foreseen as something likely to happen if care is not taken;⁹² he is bound to anticipate and guard against that which usually happens, but is not required to anticipate or guard against that which is unusual or unlikely to happen.⁹³

The duty to use due care applies at crossings,⁹⁴

and in passing standing vehicles,⁹⁵ in failing to keep a lookout,⁹⁶ in failing to keep his vehicle under control,⁹⁷ in failing to keep to the right,⁹⁸ in failing to give warning of dangers,⁹⁹ in driving on or across sidewalks,¹ in loading vehicles,² in moving a house along the street,³ in throwing objects from vehicles,⁴ or in avoiding injury to animals.⁵

Care as to equipment. One who drives or causes his servant to drive a horse-drawn vehicle on a public street has the duty to exercise due care to have and to keep the whole outfit in such road-worthy condition as not to cause injury to others.⁶

§ 1781. — Speed

The negligence of a driver on municipal streets, imposing liability for injuries, may be predicated on an unreasonable speed of travel.

The negligence of a driver on municipal streets, imposing liability for injuries, may be predicated on an unreasonable speed of travel,⁷ but driving a team

86. Cal.—Coffey v. Slingerland, 50 P.2d 830, 9 Cal.App.2d 731.

87. Cal.—Coffey v. Slingerland, supra.
Hawaii.—Young v. Honolulu Construction & Draying Co., 34 Hawaii 426.

Md.—Gitomir v. United Rys. & Electric Co. of Baltimore City, 146 A. 279, 157 Md. 464.

Mass.—Conley v. Rosenfield, 171 N. E. 452, 271 Mass. 433.

Mich.—Van Dyke v. Knoll, 247 N.W. 768, 262 Mich. 644.

Miss.—Ross v. West, 30 So.2d 310, 202 Miss. 3.

N.J.—Kastner v. Weinstein, 153 A. 538, 107 N.J.Law 254.

Or.—McKeag v. Portland Electric Power Co., 275 P. 667, 128 Or. 614.

Wyo.—Christensen v. McCann, 282 P. 1061, 41 Wyo. 101.
44 C.J. p 1053 note 4.

Contractor constructing building

General contractor owes pedestrian using fenced-in sidewalk in front of premises of building under construction, duty of so conducting operations as not to cause injury, but such duty does not require him to provide personal guardianship to each pedestrian using the sidewalk and does not extend to acts or operations of others over whom the contractor has no control.—Withey v. Hammond Lumber Co., 35 P.2d 1080, 140 Cal.App. 587.

House mover

Defendant moving house along street was under duty to use reasonable care for the protection of pedestrian rightfully using the sidewalk.—Danner v. Marquiss, 33 N.E. 2d 511, 218 Ind. 441.

88. Cal.—Long v. Barbieri, 7 P.2d 1082, 120 Cal.App. 207.

Determined by common-law principles

Except as pedestrian's conduct is regulated by statute, question of negligence is generally determinable by common-law principles.—Long v. Barbieri, supra.

89. Mass.—Barry v. Stevens, 91 N. E. 997, 206 Mass. 78.
44 C.J. p 1053 note 5.

90. Cal.—Long v. Barbieri, 7 P.2d 1082, 120 Cal.App. 207.

91. Cal.—Schediwy v. McDermott, 298 P. 107, 113 Cal.App. 218.

92. Miss.—Ross v. West, 30 So.2d 310, 202 Miss. 3.

93. Cal.—Schediwy v. McDermott, 298 P. 107, 113 Cal.App. 218.

94. Pa.—McLaughlin v. American Ice Co., 100 Pa.Super. 216.

Those in charge of vehicles on streets must exercise due care not to injure pedestrians at crossings.—McLaughlin v. American Ice Co., supra.

95. Ky.—Southern Express Co. v. Southard, 206 S.W. 773, 182 Ky. 492.

44 C.J. p 1054 note 6.

96. Tenn.—Western Union Tel. Co. v. Dickson, 173 S.W.2d 714, 27 Tenn.App. 752.

44 C.J. p 1054 note 7.

The test in determining whether one operating machinery in the repair of a street was absolved from the duty of maintaining a lookout for persons on the portion of the street where he was working is whether under the facts and circumstances existing at the time of which he was cognizant he could

reasonably have assumed that the street where he was operating would at all times be clear of persons and vehicles, or whether he was bound to anticipate that they might come, or be, on the street in such proximity to his movements as to be endangered thereby.—Haines v. Bridges Asphalt Paving Co., Mo.App., 55 S.W.2d 431.

97. Tenn.—Western Union Tel. Co. v. Dickson, 173 S.W.2d 714, 27 Tenn.App. 752.

98. Cal.—Shupe v. Rodolf, 197 P. 57, 185 Cal. 371.

44 C.J. p 1054 note 9.

99. N.Y.—Young v. Hermann, 104 N.Y.S. 72, 119 App.Div. 445, affirmed 85 N.E. 1118, 192 N.Y. 554.

44 C.J. p 1054 note 10.

1. N.Y.—Goff v. Akers, 21 N.Y.S. 454, 1 Misc. 468, affirmed 35 N.E. 207, 139 N.Y. 653.

44 C.J. p 1054 note 8.

2. Vt.—Ryder v. Hayward, 126 A. 491, 98 Vt. 106, 36 A.L.R. 453.

44 C.J. p 1054 note 11.

3. Ind.—Danner v. Marquiss, 33 N.E.2d 511, 218 Ind. 441.

4. Mo.—Alexander v. Star-Chronicle Pub. Co., 198 S.W. 467, 197 Mo.App. 601.

44 C.J. p 1054 note 12.

5. Pa.—Clement v. Adams Express Co., 43 Pa.Super. 25.

44 C.J. p 1055 note 16.

6. Ind.—Birdsell Mfg. Co. v. Loughman, 59 N.E. 872, 26 Ind.App. 359.
Pa.—McLaughlin v. American Ice Co., 100 Pa.Super. 216.

7. Ga.—McGinnis v. Brumbelow, 80 S.E. 553, 141 Ga. 97.

44 C.J. p 1055 note 18.

at an ordinary trot,⁸ or even at a lively trot,⁹ is not negligence per se, and one so driving is not so limited to any particular rate of speed, but is bound simply to use proper care not to injure other persons lawfully on the street.¹⁰ An ordinance fixing the maximum speed an hour is not a license to go at that speed at all times and places,¹¹ and drivers of vehicles may be negligent in driving at a certain rate of speed, although not exceeding the speed limit fixed by statute or ordinance.¹²

Vehicles given special privileges as to right of way, as considered supra § 1767, are nevertheless bound to avoid a speed dangerous under the circumstances.¹³

At street intersections drivers must keep the speed of their vehicles within limits permitting a stop on the shortest notice,¹⁴ and this is true even though they have the right of way.¹⁵

§ 1782. — Stopping and Standing

It is not unlawful or negligent for a driver who exercises reasonable precautions to stop his vehicle or leave it standing in a municipal street.

Within reasonable limitations it is not unlawful or negligent for a driver to stop his vehicle¹⁶ or leave it standing¹⁷ in municipal streets. A statute providing that it shall be unlawful to leave any vehicle standing on the main traveled portion of any highway has been construed as inapplicable to city

streets¹⁸ on the ground that, if applicable thereto, all parking on streets would be unlawful and the local authorities would be deprived of necessary power to permit parking under proper regulation.¹⁹ However, if a driver so parks his vehicle that a portion thereof²⁰ or a dangerous and unguarded part of its load²¹ obstructs traffic and results in injury to others, he will be held liable for negligence.

Signal of intention to stop vehicle. Under statutes so providing, the operator of a vehicle is required to give a plainly visible or audible sign of his intention to stop his vehicle before doing so when the movement or operation of other vehicles may reasonably be affected thereby,²² but he may stop his vehicle without giving such signal if he first ascertains that there is sufficient space for him to stop in safety and it will not reasonably affect the movement or operation of other vehicles.²³ In order to establish negligence under such a statute it must appear that the operator of a vehicle attempted to stop it without signaling his intention to do so and that there was not sufficient space to stop it in safety or that to stop it would reasonably affect the movement or operation of other vehicles,²⁴ but the operator of a vehicle who has signaled his intention to stop does not violate the statute by failing to ascertain before stopping whether or not there is sufficient space to stop in safety and whether or not it will reasonably affect the movement or operation of other vehicles.²⁵

Reckless driving on highways see Highways § 242.

Speed and control of motor vehicles: Generally see Motor Vehicles §§ 290-299.

At intersections see Motor Vehicles §§ 357-359.

Passing:

Approaching vehicles see Motor Vehicles § 308.

Vehicle traveling in same direction see Motor Vehicles § 326 f.

Turning into intersecting street see Motor Vehicles § 367.

Violation of statute or ordinance see infra § 1786.

Streets not race courses

Thoroughfares of city are not intended for race courses.—Da Ponte v. Uzzo, 5 La.App. 105.

8. Pa.—Henson v. Arthur, 66 A. 256, 217 Pa. 156.

44 C.J. p 1055 note 19.

9. N.Y.—Crocker v. Knickerbocker Ice Co., 92 N.Y. 652.

10. N.Y.—Crocker v. Knickerbocker Ice Co., supra.

11. Cal.—Cook v. Miller, 166 P. 316, 175 Cal. 497.

Iowa.—Livingstone v. Dole, 167 N. W. 639, 184 Iowa 1340.

12. Cal.—Opitz v. Schenck, 174 P. 40, 178 Cal. 636.

13. N.Y.—Kellogg v. Church Charity Foundation, 96 N.E. 406, 203 N. Y. 191, 38 L.R.A., N.S., 481, Ann. Cas 1913A 883.

44 C.J. p 1055 note 25.

14. La.—Da Ponte v. Uzzo, 5 La. App. 105.

Md.—Merrifield v. C. Hoffberger Co., 127 A. 500, 147 Md. 134.

15. Md.—Merrifield v. C. Hoffberger Co., supra.

16. Ala.—Karpeles v. City Ice Delivery Co., 73 So. 642, 198 Ala. 449. Right of driver to stop or stand vehicle in streets see supra § 1766.

17. Wash.—Joseph v. Schwartz, 224 P. 5, 128 Wash. 634.

44 C.J. p 1055 note 30. Leaving horse unattended or unhitched see infra § 1783 b.

Motor vehicles:

Standing or parking see Motor Vehicles §§ 329-338.

Stopping, backing, and turning see Motor Vehicles §§ 300-304.

Test of negligence

Whether parking in street so as to obstruct it is an act of negligence depends on whether such use was reasonably necessary, having due re-

gard for the public convenience and necessity.—Brey v. Rosenfeld, 48 A. 2d 177, 72 R.I. 28, adhered to 50 A. 2d 911, 72 R.I. 316.

18. Wash.—Joseph v. Schwartz, 224 P. 5, 128 Wash. 634.

19. Wash.—Joseph v. Schwartz, supra.

20. U.S.—U. S. Express Co. v. Kraft, Pa., 161 F. 300, 88 C.C.A. 346, 19 L.R.A., N.S., 296.

44 C.J. p 1055 note 33.

Liability of municipality and others for injuries caused by obstructions in city streets generally see supra §§ 781-872.

Obstructions in streets as nuisance or otherwise unlawful see supra §§ 1744-1756.

21. Va.—Judy v. Doyle, 108 S.E. 6, 130 Va. 392.

44 C.J. p 1055 note 34.

22. Tex.—McMath Co. v. Staten, Civ.App., 42 S.W.2d 649, error dismissed.

23. Tex.—McMath Co. v. Staten, supra.

24. Tex.—McMath Co. v. Staten, supra.

25. Tex.—McMath Co. v. Staten, supra.

§ 1783. — Management and Control of Horses and Other Animals

- a. In general
- b. Leaving animal unhitched and unattended
- c. Vicious or dangerous character of animal

a. In General

One who has the management and control of horses or other animals on municipal streets has the duty to exercise ordinary or reasonable care; and he is liable for damages caused by the animal proximately resulting from his negligence in its management and control, but he is not liable for damages caused without negligence on his part.

One driving²⁶ or leading²⁷ an animal along municipal streets must use ordinary or reasonable care, such as the circumstances require;²⁸ and he is lia-

ble for any injury caused by the animal proximately resulting from his negligence in its management and control,²⁹ even though the animal is not vicious.³⁰ On the other hand, a person driving or leading animals through a street is not absolutely bound to keep them under control,³¹ and is not liable for damages caused by them without negligence on his part.³²

The mere fact of a runaway does not of itself establish negligence by the driver or owner,³³ particularly where the team or horse is accompanied by a driver;³⁴ but the unexplained presence on a street of a team of runaway horses, unattended by any person, makes a prima facie case of negligence on the part of the owner or driver.³⁵ A person may not be held liable for damages arising from a runaway which occurred without negligence on his part,³⁶ as where the runaway horse or team was frightened by a third person,³⁷ or was properly

26. N.Y.—Gropp v. Great Atlantic, etc., Tea Co., 126 N.Y.S. 211, 141 App.Div. 372, reversed on other grounds 98 N.E. 1103, 205 N.Y. 617. Tenn.—Thane v. Douglass, 52 S.W. 155, 102 Tenn. 307.

Liability for injuries by animals on public ways or streets to motor vehicles or their occupants see Motor Vehicles § 565.

On highways other than municipal streets see Highways § 244.

Persons liable for injuries inflicted by animals generally see Animals §§ 164-167.

Driving without reins

It is negligence as a matter of law for a coal company, regardless of its custom or the custom of others, to hitch an untied horse, unaccustomed to such use, to steel rails, and without reins or lines attempt to drive him up a hill in the neighborhood of miners' houses—Walke v. Premier Pocahontas Collieries Co., 117 S.E. 905, 94 W.Va. 38.

27. N.J.—Kastner v. Weinstein, 153 A. 538, 107 N.J.Law 254.

44 C.J. p 1054 note 14, p 1055 note 37.

28. N.J.—Kastner v. Weinstein, supra.

29. N.J.—Kastner v. Weinstein, supra.

Tenn.—Thane v. Douglass, 52 S.W. 155, 102 Tenn. 307.

Utah.—Staton v. Western Macaroni Mfg. Co., 174 P. 821, 52 Utah 426.

W.Va.—Walke v. Premier Pocahontas Collieries Co., 117 S.E. 905, 94 W.Va. 38.

44 C.J. p 1055 note 39.

Teams driven along street

Pa.—Romanick v. South Philadelphia Dressed Beef Company, 19 Pa.Dist. & Co. 496.

Contact with runaway

Pedestrian suffering fractured leg,

due either to contact with runaway horse or to effort to avoid being struck, could recover damages.—Maloney v. Knickerbocker Ice Co., 241 N.Y.S. 160, 229 App.Div. 317.

Loss of control is not necessarily shown by proof that the driver had temporarily lost power to bring his horses to a standstill or to a walk.—Johnson v. Marquette, 117 N.W. 658, 154 Mich. 50.

30. N.J.—Kastner v. Weinstein, 153 A. 538, 107 N.J.Law 254.

31. N.Y.—Unger v. Forty-Second Street & Grand Street Ferry Railroad Co., 51 N.Y. 497.

32. R.I.—Himes v. Cole Teaming Co., 98 A. 897, 39 R.I. 504.

44 C.J. p 1045 note 79 [a], p 1056 note 38.

Propensity to shy

Owners are not liable for injuries caused by horses having a propensity to shy, unless they are driven in a place where they have no right to be, or the injuries are caused by negligently handling them.—Staton v. Western Macaroni Mfg. Co., 174 P. 821, 52 Utah 426.

33. Cal.—Rowe v. Such, 66 P. 862, 67 P. 760, 134 Cal. 573.

N.Y.—Gottwald v. Bernheimer, 6 Daly 212.

Pa.—Jordan v. Eisele, 116 A. 675, 273 Pa. 95—Lukes v. American Ice Co., 109 A. 680, 267 Pa. 337—McLaughlin v. American Ice Co., 100 Pa.Super. 216.

34. Cal.—Rowe v. Such, 66 P. 862, 67 P. 760, 134 Cal. 573.

Ill.—Swafford v. Rosenbloom, 102 Ill. App. 578.

44 C.J. p 1056 note 45.

35. La.—Maus v. Broderick, 25 So. 977, 51 La.Ann. 1153.

Tenn.—Thane v. Douglass, 52 S.W. 155, 102 Tenn. 307.

44 C.J. p 1056 notes 43, 44.

In New York

(1) The rule of the text has been followed in a number of cases.—Unger v. Forty-Second Street & Grand Street Ferry Railroad Co., 51 N.Y. 497—Setzkorn v. City of Buffalo, 219 N.Y.S. 351, 219 App.Div. 416—Hackett v. Lenox Sand & Gravel Co., 175 N.Y.S. 361, 187 App.Div. 211—Hollaran v. New York, 153 N.Y.S. 447, 168 App.Div. 469—Kelly v. Adelman, 76 N.Y.S. 574, 72 App.Div. 590—Pearl v. Macauley, 39 N.Y.S. 472, 6 App.Div. 70—Rice v. Von Der Lieth, 181 N.Y.S. 767, 111 Misc. 418—Howley v. Kraemer, 73 N.Y.S. 142, 36 Misc. 190—Davis v. Kallfelz, 50 N.Y.S. 928, 22 Misc. 602—Doherty v. Sweetser, 81 N.Y.S. 649, 82 Hun 556.

(2) There is authority to the contrary, however, and the authority of Unger v. Forty-Second Street & Grand Street Ferry Railroad Co., 51 N.Y. 497, has been denied on the ground that the statement of the rule therein was obiter.—Gottwald v. Bernheimer, 6 Daly 215.

(3) However, in a subsequent case which followed the rule of the text it was stated that in the case of Gottwald v. Bernheimer, supra, defendant's explanation that he had securely tied the horse with a strap which it had thereafter broken was sufficient to show that he was not negligent.—Rice v. Von Der Lieth, supra.

36. N.Y.—Unger v. Forty-Second Street & Grand Street Ferry Railroad Co., 51 N.Y. 497.

44 C.J. p 1056 note 41.

37. N.Y.—Unger v. Forty-Second

fastened, took fright, broke his fastening, and ran away.³⁸

Mistake in emergency. Where a driver of runaway horses is confronted with a sudden emergency requiring instant selection of one of two courses of action, and through error of judgment selects the wrong course to the injury of another, he will be held guilty of negligence if the runaway was his fault,³⁹ but not if the runaway happened without his fault.⁴⁰

b. Leaving Animal Unhitched and Unattended

One who leaves a horse or team unhitched and unattended on municipal streets takes the risk of what it may do and will be liable for injuries resulting therefrom where the conditions are such as to make such conduct negligent.

One who leaves a horse unhitched and unattended on municipal streets takes the risk of what the horse may do.⁴¹ Although the mere fact that a horse that is unhitched and unattended runs away does not establish negligence,⁴² it may constitute such negligence as will make the owner or driver liable for injuries resulting from a runaway to leave a horse or other animal unhitched and unattended on municipal streets,⁴³ or to leave it improperly or insufficiently hitched,⁴⁴ or attended only by one in-

capable of controlling the animal,⁴⁵ and there is authority which holds that to leave a horse or team unhitched and unattended is undoubted negligence,⁴⁶ or negligence if not explained,⁴⁷ or at least *prima facie* negligence.⁴⁸ These rules are applicable without regard to viciousness or scienter,⁴⁹ even though the animal is gentle,⁵⁰ and the rules are particularly applicable where the animal is of a nervous or spirited character.⁵¹

It is not necessarily negligence to leave a horse or similar animal standing on municipal streets unhitched,⁵² or hitched or weighted but unattended,⁵³ and there is no absolute rule of law requiring one who has a horse in a street to tie it or to hold it by the reins, if there is a person immediately at hand to look after it.⁵⁴ It may be negligence to leave a horse unfastened which is restless and high-strung, although the owner is watching it from a short distance.⁵⁵ Compliance with city regulations respecting the period a horse may be left unattended does not exempt the driver from the duty of exercising ordinary diligence under existing circumstances.⁵⁶

Ordinances forbidding the running at large of animals on the streets are intended to prevent injury to persons.⁵⁷

Street & Grand Street Ferry Railroad Co., *supra*.

44 C.J. p 1047 note 88 [a]—17 C.J. p 396 note 25.

38. N.Y.—Gottwald v. Bernheimer, 6 Daly 215.

39. Pa.—Luks v. American Ice Co., 109 A. 680, 267 Pa. 337.

40. Pa.—Luks v. American Ice Co., *supra*.

41. Pa.—Stevenson v. United States Express Co., 70 A. 275, 221 Pa. 59, 128 Am.S.R. 725—Friel v. Supplee-Willis-Jones Milk Co., 10 A.2d 107, 138 Pa Super. 23.

42. Pa.—Jordan v. Elsele, 116 A. 675, 273 Pa. 95.

Violation of ordinance prohibiting leaving animals unhitched and unguarded as negligence see *infra* § 1786.

43. La.—Salvant v. Estate of Frank Newfield, Inc., 128 So. 320, 13 La. App. 410.

44 C.J. p 1056 note 49.

On highways see Highways § 244 c.

44. Mich.—Sinsabaugh v. Brown, 85 N.W. 1110, 126 Mich. 538.

44 C.J. p 1056 note 50.

45. Neb.—Miller v. Strivens, 67 N. W. 458, 48 Neb. 458.

N.Y.—Fraser v. Kimler, 2 Hun 514, 5 Thomps. & C. 16.

64 C.J.S.—16

46. N.Y.—Norris v. Kohler, 41 N.Y. 42.

47. N.Y.—Davis v. Kallfelz, 50 N.Y.S. 928, 22 Misc. 602—Doherty v. Sweetser, 31 N.Y.S. 649, 82 Hun 556.

48. N.Y.—Dooling v. New York, 132 N.Y.S. 1012, 148 App.Div. 713, motion denied 133 N.Y.S. 1119, 149 App.Div. 953.

Pa.—Jordan v. Elsele, 116 A. 675, 273 Pa. 95—Friel v. Supplee-Willis-Jones Milk Co., 10 A.2d 107, 135 Pa.Super. 23.

49. Ga.—Phillips v. Dewald, 7 S.E. 151, 79 Ga. 732, 11 Am.S.R. 458. 3 C.J. p 94 note 74.

Ability to foresee

It is not necessary to show that defendant should have been able to foresee that injury would result to plaintiff exactly as it did.—Lloyd v. Bowen, 86 S.E. 797, 170 N.C. 216.

Habit or propensity

It is not necessary to show that the animal had a habit or propensity of running away to the knowledge of defendant.

Conn.—Haywood v. Hamm, 58 A. 695, 77 Conn. 158.

Mass.—O'Connor v. Hickey, 156 N.E. 838, 260 Mass. 110.

50. La.—Karstendiek v. Jackson Brewing Co., 48 So. 958, 123 La. 346.

44 C.J. p 1057 note 55.

Violation of ordinance

Where the leaving of the horse unhitched and unattended was in violation of an ordinance, the fact that the animal was ordinarily gentle and reliable did not excuse the act or release defendant from liability.—Healy v. Johnson, 103 N.W. 92, 127 Iowa 221.

51. R.I.—Robinson v. Morris, 73 A. 611, 30 R.I. 132.

44 C.J. p 1057 note 54.

Young and skittish

Pa.—Jordan v. Elsele, 116 A. 675, 273 Pa. 95.

52. La.—Rouseo v. Gauche-Connor Co., 8 La.App., Orleans, 216.

44 C.J. p 1057 note 58.

53. Colo.—Caughlin v. Campbell-Sell Baking Co., 89 P. 53, 39 Colo. 148, 121 Am.S.R. 158, 8 L.R.A.N.S., 1001.

44 C.J. p 1057 note 59.

54. N.Y.—Wasmer v. Delaware, etc., R Co., 80 N.Y. 212, 36 Am.R. 608.

44 C.J. p 1057 note 60.

55. Ga.—Phillips v. Dewald, 7 S.E. 151, 79 Ga. 732, 11 Am.S.R. 458.

44 C.J. p 1057 note 61.

56. Mass.—O'Connor v. Hickey, 156 N.E. 838, 260 Mass. 110.

57. Miss.—Chamberlain v. Lindsey, 139 So. 812, 163 Miss. 183.

Proximate cause. Leaving a horse or team in the street unhitched or unattended imposes no liability for injuries not proximately due to such act.⁵⁸ However, defendant is not relieved from liability for injuries resulting from such an act by the fact that the actual occurrence must have seemed improbable,⁵⁹ or by what is a mere concurring, and not an independent and intervening, act of negligence,⁶⁰ as where horses left unhitched and unattended are caused to run away by a person or agency other than defendant, but no runaway or injury therefrom would have occurred had defendant properly hitched or attended the horses.⁶¹

c. Vicious or Dangerous Character of Animal

One who has the management and control of horses or other animals on municipal streets is liable for injuries primarily resulting from their vicious or dangerous character of which he had knowledge.

In general a person who puts a dangerous animal on the streets or public ways of a municipality does so at his peril.⁶² Hence, where damage results primarily from the vicious or unsafe character of the animal, defendant will ordinarily be held liable for permitting it on municipal streets when he knew of its dangerous character,⁶³ but not where he was excusably ignorant thereof.⁶⁴ The viciousness of the animal has been held of no consequence, however, in an action for injuries caused by an animal running at large on the city streets in violation of an ordinance.⁶⁵

Scienter. The knowledge of the owner or person in charge of a horse or other animal of his vicious or unruly habits is a circumstance to be considered

in determining whether or not due care was exercised in its management and control.⁶⁶ It has been held necessary to prove the scienter in order to render the owner of a domestic animal liable for its vicious acts committed in a city street while it is being driven or ridden,⁶⁷ or led,⁶⁸ or while it is standing in charge of an attendant,⁶⁹ or is temporarily left unattended.⁷⁰ The rule has been held to be uninfluenced by an ordinance making it a misdemeanor to leave a horse or other animal unfastened and unattended on the street;⁷¹ but other authority has held it unnecessary to prove scienter in an action for injury caused by being bitten by a dog where the action is based on defendant's violation of a municipal ordinance against allowing a dog to run unmuzzled on the city streets and not on the common-law action for negligence.⁷² Scienter need not be shown where the liability is based on the negligence of the driver or owner and not the vicious character of the animal.⁷³

§ 1784. — Care as to Particular Persons

- a. In general
- b. Children

a. In General

Operators of vehicles on municipal streets are required to exercise care commensurate with the known or apparent mental and physical capacity of the person encountered, and hence they must be especially cautious where blind, infirm, intoxicated, or otherwise incapacitated persons are concerned.

Under the rule that a driver must use ordinary care commensurate with the circumstances, consid-

58. Pa.—Chachkin v. Accommodation Ice & Coal Co., 92 Pa.Super. 416.

44 C.J. p 1046 note 82 [b], p 1057 note 65.

59. Pa.—Jordan v. Elsele, 116 A. 675, 273 Pa. 95.

44 C.J. p 1046 note 83 [a].

60. Cal.—Parkin v. Grayson-Owen Co., 143 P. 257, 25 Cal.App. 269.

43 C.J. p 1046 note 85 [c].

61. Ga.—Phillips v. Dewald, 7 S.E. 151, 79 Ga. 732, 11 Am.S.R. 458.

44 C.J. p 1047 note 87.

62. N.Y.—Gropp v. Great Atlantic & Pacific Tea Co., 126 N.Y.S. 211, 141 App.Div. 372, reversed on other grounds 98 N.E. 1103, 205 N.Y. 617 —Mahoney v. Dwyer, 32 N.Y.S. 346, 84 Hun 348.

63. Mass.—Corliss v. Keown, 93 N. E. 143, 207 Mass. 149.

44 C.J. p 1054 note 14 [b], p 1057 note 67.

Liability of owner for injuries

caused by vicious animal generally see Animals §§ 142-167.

On highways see Highways § 244 b.

Driving fractions animals

N.Y.—Conway v. Rheims, 95 N.Y.S. 119, 107 App.Div. 289.

44 C.J. p 1054 note 13.

Imputation of knowledge

A servant's knowledge of the vicious propensities of a horse when driven on the street is imputable to his employer, so as to make the latter liable for injuries resulting therefrom.—Gropp v. Great Atlantic & Pacific Tea Co., 126 N.Y.S. 211, 141 App.Div. 372, reversed on other grounds 98 N.E. 1103, 205 N.Y. 617.

Propensity to shy

Horses are not to be regarded as vicious or dangerous simply because they have a propensity to shy.—Staton v. Western Macaroni Mfg. Co., 174 P. 821, 52 Utah 426.

64. Wis.—Kocha v. Union Transfer Co., 205 N.W. 923, 188 Wis. 133.

44 C.J. p 1058 note 68.

65. Miss.—Chamberlain v. Lindsey, 139 So. 812, 163 Miss. 183.

66. N.C.—Lloyd v. Bowen, 86 S.E. 797, 170 N.C. 216.

67. Minn.—De Greif v. Northwestern Knitting Co., 118 N.W. 558, 119 N.W. 956, 106 Minn. 15.

3 C.J. p 93 note 65.

68. R.I.—Eddy v. Union R. Co., 56 A. 677, 25 R.I. 451, 105 Am.S.R. 897, 1 Ann.Cas. 204.

3 C.J. p 93 note 66.

69. Pa.—Miller v. Atlantic Refining Co., 60 A. 306, 210 Pa. 628.

3 C.J. p 93 note 67.

70. Ga.—Reed v. Southern Express Co., 22 S.E. 133, 95 Ga. 108, 51 Am. S.R. 62.

3 C.J. p 93 note 68.

71. Mo.—Putermann v. Simon, 105 S.W. 1098, 127 Mo.App. 511.

3 C.J. p 93 note 69.

72. Ill.—Wistafka v. Grotowski, 205 Ill.App. 529.

73. N.Y.—Koffier v. American Ry. Express, 214 N.Y.S. 787, 126 Misc. 838.

ered supra § 1780, one of the circumstances to be considered is the mental and physical capacity of the particular person encountered.⁷⁴ Thus the operators of vehicles on the public streets are required to be especially careful where blind or infirm persons are concerned.⁷⁵ This extraordinary duty is placed on such operators, however, only when such persons are seen, or where there is reason to anticipate their presence;⁷⁶ and, in the absence of knowledge or circumstances indicating otherwise, the operator of a vehicle has a right to presume that others in or near the streets are in the full possession of their faculties and will exercise their senses to avoid an accident.⁷⁷

Intoxicated persons. The driver of a vehicle must consider the incapacity of an intoxicated person when his intoxicated condition is or should be known to the driver,⁷⁸ and the law exacts a greater degree of caution with respect to such persons.⁷⁹

b. Children

Children on municipal streets are not trespassers, and drivers of vehicles are bound to anticipate their presence and, in view of their characteristic heedlessness and nonappreciation of danger, to exercise the degree of care required of a reasonably prudent man under the circumstances.

A child on a municipal street is not a trespasser,⁸⁰ even though he is merely playing thereon.⁸¹ With

respect to children on municipal streets a driver must exercise care commensurate with the exigencies of the situation,⁸² and the degree of care required is that of a reasonably prudent man under similar circumstances.⁸³ The driver is generally held to be bound to anticipate the presence of children in the streets and to exercise reasonable diligence to avoid injuring them.⁸⁴ He must bear in mind the characteristics of young children with respect to nonappreciation of danger,⁸⁵ and he must anticipate childish heedlessness on their part and has no right to assume that they will exercise the discretion needed to protect them from the dangers of traffic.⁸⁶ Where children are concerned he must be especially careful;⁸⁷ he must exercise extreme care,⁸⁸ or more than the ordinary caution⁸⁹ required in the case of adults.⁹⁰ What would be but ordinary negligence on the part of the driver of a vehicle with respect to a grown pedestrian may be gross negligence with respect to a child.⁹¹

On the other hand, drivers are not insurers against accidents to children.⁹² A driver will not be liable where the injury occurs without his fault,⁹³ as where he is reasonably ignorant of the dangerous proximity of children when starting the vehicle,⁹⁴ or when approaching a place where children are coasting,⁹⁵ or where he neither knew, nor should have known, of the child's presence or attempt to board his vehicle,⁹⁶ or attempt to reach

74. Del.—Brown v. Wilmington, 90 A. 44, 27 Del. 492.

44 C.J. p 1058 note 70.

Care required by operator of motor vehicle towards persons with physical disabilities see Motor Vehicles § 394.

75. La.—Smith v. New Orleans Public Service, App., 174 So. 158.

76. La.—Smith v. New Orleans Public Service, supra.

77. La.—Handy v. New Orleans Public Service, 120 So. 271, 10 La. App. 72.

78. Del.—Brown v. Wilmington, 90 A. 44, 27 Del. 492.

Care required by operator of motor vehicle toward intoxicated person see Motor Vehicles § 395.

79. N.J.—Cofone v. Gnassi, 136 A. 505.

44 C.J. p 1059 note 88.

80. Iowa.—Long v. Ottumwa R., etc., Co., 142 N.W. 1008, 162 Iowa 11.

44 C.J. p 1058 note 72.

81. Mass.—Boni v. Goldstein, 177 N. E. 581, 276 Mass. 372—O'Brien v. Hudner, 65 N.E. 788, 182 Mass. 381. 44 C.J. p 1058 note 73.

Child playing on street as traveler within rule requiring municipality

to keep streets in repair see supra § 846.

82. Pa.—Idell v. Day, 116 A. 506, 273 Pa. 34, 20 A.L.R. 1429.

44 C.J. p 1058 note 74.

Care required of operators of motor vehicles see Motor Vehicles § 396.

83. Iowa.—Faatz v. Sullivan, 200 N. W. 321, 199 Iowa 875.

44 C.J. p 1058 note 75.

84. Wash.—Lee v. Independent Dairy, 221 P. 309, 127 Wash. 622.

44 C.J. p 1059 note 80.

85. Conn.—Di Maio v. Yolen Bottling Works, 107 A. 497, 93 Conn. 597.

Ill.—Morrison v. Flowers, 139 N.E. 10, 308 Ill. 189.

86. La.—Kahn v. Shreveport Rys. Co., App., 161 So. 636.

87. La.—Shill v. New Orleans Public Service, App., 175 So. 113—Smith v. New Orleans Public Service, App., 174 So. 158.

88. La.—Kahn v. Shreveport Rys. Co., App., 161 So. 636.

N.Y.—Reiss v. City of New York, 246 N.Y.S. 302, 231 App.Div. 42.

89. La.—Shill v. New Orleans Public Service, App., 175 So. 113.

Wash.—Femling v. Star Pub. Co., 81 P.2d 293, 195 Wash. 395, set aside

on other grounds 84 P.2d 1008, 195 Wash. 395.

44 C.J. p 1058 note 77.

90. Wis.—Pisarek v. Singer Talking Mach. Co., 200 N.W. 675, 185 Wis. 92.

44 C.J. p 1058 note 78.

91. Cal.—Lampton v. Davis Standard Bread Co., 191 P. 710, 48 Cal. App. 116.

92. Utah.—Herald v. Smith, 190 P. 932, 56 Utah 304.

93. Ky.—Fultz' Adm'r v. Williams, 99 S.W.2d 803, 266 Ky. 651.

La.—Shill v. New Orleans Public Service, App., 175 So. 113.

Mich.—Eichkern v. Park Brewing Co., 147 N.W. 501, 181 Mich. 1.

Wash.—Femling v. Star Pub. Co., 84 P.2d 1008, 195 Wash. 395.

44 C.J. p 1059 note 82.

94. N.Y.—Herron v. High Ground Dairy Co., 138 N.Y.S. 3, 153 App. Div. 338.

44 C.J. p 1059 note 83.

95. Pa.—Idell v. Day, 116 A. 506, 273 Pa. 34, 20 A.L.R. 1429.

44 C.J. p 1059 note 84.

96. Mich.—Eichkern v. Park Brewing Co., 147 N.W. 501, 181 Mich. 1.

under it for a toy which had fallen under it,⁹⁷ or where a child darts out or runs into the street from a place of safety and he is not able by the use of prudence and skill, after being confronted with the peril, to evade the emergency created by the child.⁹⁸

The operator of a vehicle who has an infant signal traffic to enable him to back into a street owes a duty to the infant to see that he is not placed in a perilous position while performing such service,⁹⁹ and the driver of an approaching vehicle, while not bound to obey such signals, is in duty bound so to drive as not to place the infant in an apparent position of danger.¹

The fact that a street was closed to traffic may be considered on the issue of defendant's negligence in operating a steam roller injuring a child.²

The proximity of school grounds imposes on a driver a greater degree of caution than ordinary circumstances would require.³

§ 1785. — Frightening Animals

One who negligently frightens animals on a municipal street is liable for the resultant injury.

In accordance with the rules relating to highways generally, considered in Highways § 243, one who frightens horses is liable for resultant injury if he

acted negligently,⁴ as by making an unnecessary noise calculated to frighten near-by horses;⁵ and he is not relieved from liability by the act of another in also frightening the animal, where such other person's act is a mere concurring, and not an independent and intervening, act of negligence.⁶ He is not liable, however, if he inadvertently frightened the horses without negligence,⁷ or if his frightening of the animal was not the proximate cause of the injury.⁸

§ 1786. — Violation of Statute or Ordinance

A person is generally liable for injuries proximately caused by his violation of a statute or ordinance regulating the use of municipal streets or highways.

In conformity with the general rules, discussed in the C.J.S. title Negligence § 19, also 45 C.J. p 714 note 91—p 732 note 36, and subject to the limitations and qualifications thereon recognized in the particular jurisdiction, negligence of defendant may be predicated on, or evidenced by, his violation of a statute or ordinance.⁹ Although there is some authority to the contrary,¹⁰ violations of traffic regulations of municipal corporations have been held to constitute negligence per se.¹¹ Thus in various instances it has been held that actionable negligence

97. Mo.—Hight v. American Bakery Co., 151 S.W. 776, 168 Mo App. 431.

98. La.—Shill v. New Orleans Public Service, App., 175 So. 113.

99. Mich.—Sadlowski v. Meeron, 215 N.W. 422, 240 Mich. 306, reheard 220 N.W. 680, 243 Mich. 602.

1. Mich.—Sadlowski v. Meeron, supra.

2. Conn.—Chernov v. Blakeslee, 111 A. 908, 95 Conn. 617.

3. Pa.—Mulhern v. Philadelphia Homemade Bread Co., 101 A. 74, 257 Pa. 22.

44 C.J. p 1059 note 86.

4. Ga.—Bowen v. Smith-Hall Grocery Co., 82 S.E. 23, 141 Ga. 721, L.R.A.1915D 617.

44 C.J. p 1054 note 15, p 1059 note 91. By motor vehicles see Motor Vehicles §§ 411-421.

5. Mo.—Phelan v. Granite Bituminous Pav. Co., 167 S.W. 1059, 183 Mo.App. 531.

44 C.J. p 1060 note 92.

6. Md.—Pennsylvania Steel Co. v. Wilkinson, 69 A. 412, 107 Md. 574, 16 L.R.A., N.S., 200.

44 C.J. p 1046 note 85 [a], [b].

7. Iowa.—Carlisle v. Sells-Floto Shows Co., 163 N.W. 380, 180 Iowa 549.

44 C.J. p 1060 note 93.

8. Iowa.—Herdman v. Zwart, 149 N.W. 631, 167 Iowa 500.

44 C.J. p 1046 note 82 [a] (3).

9. Hawaii.—Young v. Honolulu Construction & Draying Co., 34 Hawaii 426.

Ky.—Foreman v. Western Union Telegraph Co., 14 S.W.2d 1079, 228 Ky. 300.

Mo.—Meyer v. Pevely Dairy Co., 64 S.W.2d 696, 333 Mo. 1109.

N.C.—Marsh v. Byrd, 200 S.E. 389, 214 N.C. 669—Brown v. Postal Telegraph-Cable Co., 153 S.E. 457, 198 N.C. 771.

Tenn.—Elmore v. Thompson, 14 Tenn.App. 78.

44 C.J. p 1060 note 95.

Violation of statute against leaving animal unfastened and unattended on city street see supra § 1783.

Cumulative effect

Ordinances and statutes imposing specific duties with respect to use of streets and highways are cumulative and do not destroy the common-law rules as to diligence and negligence.—Williams v. Grier, 26 S.E.2d 698, 198 Ga. 327, conformed to 27 S.E.2d 352, 70 Ga.App. 75.

Primary purpose of safety ordinance does not necessarily limit its scope on issue of negligence.—Callahan v. Terminal Cab Corporation, 181 N.E. 67, 259 N.Y. 112.

Strictness of compliance required

(1) Traffic regulations and ordinances designed to protect human life and property should be literally observed, but where an ordinance does not have such an end in view the same strictness of enforcement is not required.—McGehee v. Ashley, 137 So. 80, 18 La.App. 393.

(2) Courts must see that ordinances enacted for public safety are rigidly enforced.—Roberts v. Eason, 6 La.App. 703.

10. N.Y.—Roles v. John A. Schwarz, Inc., 278 N.Y.S. 307, 244 App.Div. 729.

Nonmandatory statute

Traffic ordinance relating to right of pedestrians and vehicles respectively was held not mandatory, but merely suggestive, and therefore violation was not negligence per se.—Crouch v. Cudd, 155 S.E. 136, 158 S.C. 1.

Traffic regulations of police department

N.Y.—Roles v. John A. Schwarz, Inc., 278 N.Y.S. 307, 244 App.Div. 729.

11. La.—Buckley v. Featherstone Garage, 128 So. 446, 11 La.App. 564.

Where regulations embody express commands

La.—Buckley v. Featherstone Garage, supra.

may be predicated on defendant's violation of ordinances or statutes with reference to the speed of travel,¹² the giving of signals,¹³ vehicles keeping as near the right-hand curb as possible,¹⁴ entering or crossing a designated street without stopping,¹⁵ the right of way at intersections,¹⁶ turning at intersections,¹⁷ turning or crossing between intersections,¹⁸ the failure to display a red flag at the rear end of a load projecting beyond the rear of the vehicle,¹⁹ the driving of a vehicle so loaded as to obstruct the driver's view,²⁰ parking,²¹ safety zone ordinances,²² the leading of animals on sidewalks,²³ riding a bicycle on a sidewalk,²⁴ the leaving of animals unhitched and unguarded,²⁵ or requiring particular equipment of bicycles.²⁶

In order to avail himself of a violation of an ordinance or statute, plaintiff must be within the protection of the ordinance.²⁷ The fact that, at the time of the accident, defendant was violating a statute or ordinance does not preclude a finding that plaintiff's own negligence was the proximate cause of the injury.²⁸ One who has participated in the illegal use of a street cannot recover as for an ille-

gal act, regardless of negligence and contributory negligence.²⁹

Proximate cause. The violation of a statute or ordinance regulating the use of streets is not in itself sufficient to make one using them in violation thereof liable, but it must appear that such violation was the proximate cause of the injury,³⁰ and this rule applies even where the violation of an ordinance constitutes negligence per se.³¹

§ 1787. Contributory Negligence

As a general rule, contributory negligence of the plaintiff will preclude his right to recover for injuries sustained while on a municipal street.

Except in jurisdictions where the doctrine of comparative negligence is in force, as discussed in the C.J.S. title Negligence §§ 169-173, also 45 C.J. p 1037 note 97-p 1043 note 62, the contributory negligence of plaintiff will preclude his right to recovery,³² unless defendant may be held liable under the doctrine of the last clear chance³³ which has been held applicable notwithstanding the continuing negligence of plaintiff.³⁴

12. Cal.—Opitz v. Schenck, 174 P. 40, 178 Cal 636.

44 C.J. p 1060 note 96.

13. Ind.—Doering v. Walters, 140 N. E. 74, 80 Ind App 194.

14. Tenn.—Elmore v. Thompson, 14 Tenn App. 78.

Negligence per se

Tenn.—Elmore v. Thompson, supra.

15. Mo.—Meyer v. Pevely Dairy Co., 64 S.W.2d 696, 333 Mo. 1109.

N.C.—Marsh v. Byrd, 200 S.E. 389, 214 N.C. 669.

Negligence per se

Mo.—Meyer v. Pevely Dairy Co., 64 S.W.2d 696, 333 Mo. 1109.

16. N.J.—Healey v. Braested, 120 A. 12, 98 N.J.Law 520.

17. Or.—Marshall v. Olson, 202 P. 736, 102 Or. 502.

44 C.J. p 1060 note 98.

18. Iowa.—Ford v. Des Moines Ice, etc., Co., 174 N.W. 486, 187 Iowa 729.

19. Hawaii.—Young v. Honolulu Construction & Draying Co., 34 Hawaii 426.

20. Wash.—Schwalen v. Fuller, 182 P. 592, 187 P. 367, 107 Wash. 476, 10 A.L.R. 296.

21. Ga.—Williams v. Grier, 26 S.E. 2d 698, 196 Ga. 327, conformed to 27 S.E.2d 352, 70 Ga.App. 75.

La.—Roberts v. Eason, 6 La.App. 703.

22. N.C.—Brown v. Postal Telegraph-Cable Co., 153 S.E. 457, 198 N.C. 771.

23. N.Y.—Grinnell v. Taylor, 32 N.

Y.S. 684, 85 Hun 85, affirmed 49 N. E. 1097, 155 N.Y. 653.

24. Ky.—Foreman v. Western Union Telegraph Co., 14 S.W.2d 1079, 228 Ky. 300.

44 C.J. p 1060 note 95 [b].

25. Ala.—City Ice Delivery Co. v. Lecari, 98 So. 901, 210 Ala. 629.

44 C.J. p 1060 note 4.

26. Cal.—Rabe v. Western Union Tel. Co., 244 P. 1077, 198 Cal. 290.

27. Ga.—Williams v. Grier, 26 S.E. 2d 698, 196 Ga. 327, conformed to 27 S.E.2d 352, 70 Ga.App. 75.

44 C.J. p 1061 notes 6, 7.

28. Cal.—Davis v. John Breuner Co., 140 P. 586, 167 Cal. 683.

44 C.J. p 1061 note 8.

29. Ind.—Frazure v. Ruckles, 113 N. E. 730, 63 Ind.App. 538.

44 C.J. p 1061 note 9.

30. Pa.—Johnson v. American Reduction Co., 158 A. 153, 305 Pa. 537.

44 C.J. p 1061 note 10.

31. Mo.—Borak v. Mosler Safe Co., 231 S.W. 623, 288 Mo. 83.

44 C.J. p 1061 note 11.

32. U.S.—New York Telephone Co. v. Beckers, C.C.A.N.Y., 30 F.2d 578. Cal.—Leek v. Western Union Telegraph Co., 66 P.2d 1232, 20 Cal App.2d 374—Flores v. Los Angeles Ry. Corporation, 59 P.2d 856, 15 Cal.App.2d 576—Bence v. Teddy's Taxi, 282 P. 392, 101 Cal.App. 748, rehearing denied 283 P. 86, 101 Cal.App. 748.

Hawaii.—Young v. Honolulu Construction & Draying Co., 34 Hawaii 426.

La.—Dean v. Burglass, 81 So. 330, 144 La. 824—Preaus v. Western

Union Telegraph Co., App., 151 So. 813—McGehee v. Ashley, 137 So. 80, 18 La.App. 393—Buckley v. Featherstone Garage, 123 So. 446, 11 La App 564—Handy v. New Orleans Public Service, 120 So. 271, 10 La App. 72—Roberts v. Eason, 6 La App 703.

N.C.—Brown v. Postal Telegraph-Cable Co., 153 S.E. 457, 198 N.C. 771.

Pa.—Frank v. Pleet, 87 Pa Super. 494.

Tenn.—Phillips-Buttorff Mfg. Co. v. McAlexander, 15 Tenn.App. 618—Ballow v. Postal Tel. Co., 12 Tenn. App. 348.

Wash.—Price v. Gabel, 298 P. 444, 162 Wash. 275.

Wis.—Rang v. Klawun, 223 N.W. 121, 198 Wis. 1.

44 C.J. p 1061 note 14.

Contributory negligence:

In general see the C.J.S. title Negligence §§ 116-173, also 45 C.J. p 941 note 27-p 1043 note 62.

In proceedings involving injuries by motor vehicles see Motor Vehicles §§ 456-493.

33. Cal.—Baldock v. Western Union Telegraph Co., 15 P.2d 199, 127 Cal.App. 141.

La.—Preaus v. Western Union Telegraph Co., App., 151 So. 813.

Last-clear-chance doctrine held not applicable

La.—Legendre v. Consumers' Seltzer, etc., Mfg. Co., 84 So. 517, 147 La. 120.

34. Cal.—Baldock v. Western Un-

§ 1788. — What Constitutes

- a. In general
- b. Duty to discover danger
- c. Reliance on care of person causing injury
- d. Acts in emergencies
- e. As affected by law of the road
- f. Violation of statute or ordinance

a. In General

The failure of a plaintiff injured while on a municipal street to use ordinary and reasonable care for his own safety constitutes contributory negligence.

Every person using the streets is required to use ordinary care for his own safety and failure to do so constitutes contributory negligence.³⁵ Where plaintiff's negligence constitutes the proximate cause of the injury, there can be no recovery;³⁶ but, in order for plaintiff's negligence to have this effect, it must have been a proximate cause of the injury,³⁷ and, if it was not a proximate cause of the injury, there is no contributory negligence barring recovery.³⁸

b. Duty to Discover Danger

The failure of a person in a municipal street to use his senses and intelligence to discover and avoid an obvious danger constitutes contributory negligence.

Ion Telegraph Co., 15 P.2d 199, 127 Cal.App. 141.

35. Cal.—Hoffman v. Maguire, 44 P.2d 444, 6 Cal.App.2d 398.

Hawaii.—Young v. Honolulu Construction & Draying Co., 34 Hawaii 426.

44 C.J. p 1062 note 15.

Average prudent person

The conduct of the average prudent person in similar circumstances is the guide by which to determine contributory negligence.—Brandes v. Freitas, 2 P.2d 830, 116 Cal.App. 459.

Maintenance of clock in street was held not contributory negligence precluding recovery of damages for its negligent destruction.—Pattison v. Lutz, 30 Ohio N.P., N.S., 371.

36. U.S.—New York Telephone Co. v. Beckers, C.C.A.N.Y., 30 F.2d 578. Cal.—Leek v. Western Union Telegraph Co., 66 P.2d 1232, 20 Cal. App.2d 374.

La.—Buckley v. Featherstone Garage, 123 So. 446, 11 La.App. 564.

Tenn.—Ballow v. Postal Tel. Co., 12 Tenn.App. 348.

Wash.—Price v. Gabel, 298 P. 444, 162 Wash. 275.

44 C.J. p 1063 note 16.

37. Cal.—Coffey v. Slingerland, 50 P.2d 836, 9 Cal.App.2d 731.

Hawaii.—Young v. Honolulu Construction & Draying Co., 34 Hawaii 426.

Tenn.—Phillips-Buttorff Mfg. Co. v. McAlexander, 15 Tenn.App. 618.

Tex.—Western Union Telegraph Co. v. Brown, Civ.App., 297 S.W. 267.

38. Cal.—Coffey v. Slingerland, 50 P.2d 830, 9 Cal.App.2d 731.

Tenn.—Western Union Tel. Co. v. Dickson, 173 S.W.2d 714, 27 Tenn. App. 752.

Tex.—Western Union Telegraph Co. v. Brown, Civ.App., 297 S.W. 267. 44 C.J. p 1063 note 17.

Proximate cause and contributory negligence generally see the C.J.S. title Negligence § 129, also 45 C.J. p 972 note 89—p 976 note 17.

Violation of statute or ordinance

This rule has been applied where the action was founded on defendant's violation of a statute or ordinance.—Young v. Honolulu Construction & Draying Co., 34 Hawaii 426—44 C.J. p 1063 note 18.

39. Conn.—Radwick v. Goldstein, 98 A. 583, 90 Conn. 701.

Duty to discover danger:

In general see the C.J.S. title Negligence §§ 120, 152, also 45 C.J. p 947 note 79—p 949 note 91, p 1017 notes 80—84.

Of persons encountering motor vehicles see Motor Vehicles § 458.

In the exercise of due care a person using municipal streets is required to use his senses and intelligence to observe and discover impending danger,³⁹ and his failure to discover and avoid an obvious danger constitutes contributory negligence,⁴⁰ as where he steps, without looking or listening, from behind one object in the street in front of another object, which injures him,⁴¹ or drives into an obstruction that might easily have been seen,⁴² or where he crosses an intersecting street without keeping a lookout for approaching vehicles.⁴³ The failure, however, to observe⁴⁴ or anticipate⁴⁵ impending danger is not necessarily negligence, as where the danger is sudden and not normally to be expected.⁴⁶

c. Reliance on Care of Person Causing Injury

Every person on a municipal street has the right to assume, in the absence of notice or knowledge to the contrary, that others will use due care to avoid injuring him, but such right will not excuse his failure to exercise ordinary care for his own safety.

Under the rule that the rights of all persons using municipal streets are reciprocal, as discussed supra § 1778, every person on the street has the right to assume, in the absence of notice or knowledge to the contrary, that others will use due care to avoid injuring him,⁴⁷ and that they will not expose him to

40. N.Y.—Wass v. Western Union Telegraph Co., 10 N.Y.S.2d 956. 44 C.J. p 1063 note 21.

41. Mass.—Jean v. Nester, 158 N.E. 893, 261 Mass. 442.

42. Tenn.—Ballow v. Postal Tel. Co., 12 Tenn.App. 348.

43. Cal.—Flores v. Los Angeles Ry. Corporation, 59 P.2d 856, 15 Cal. App.2d 576—Bence v. Teddy's Taxi, 282 P. 392, 101 Cal.App. 748, rehearing denied 283 P. 86, 101 Cal. App. 748.

La.—Preaux v. Western Union Telegraph Co. App., 151 So. 813. 44 C.J. p 1063 note 22.

Duty to look

Rule that traveler approaching crossing must look when it is possible to look effectively is applicable to street crossings.—New York Telephone Co. v. Beckers, C.C.A.N.Y., 30 F.2d 578.

44. Wis.—Turtenwald v. Wisconsin Lakes Ice, etc., Co., 98 N.W. 948, 121 Wis. 65.

44 C.J. p 1063 note 23.

45. Iowa.—Stokes v. Sac City, 144 N.W. 639, 162 Iowa 514.

44 C.J. p 1063 note 24.

46. Conn.—Hott v. New Haven, 101 A. 498, 92 Conn. 29.

44 C.J. p 1063 note 25.

47. Ky.—Foreman v. Western Union Telegraph Co., 14 S.W.2d 1079, 228 Ky. 300.

danger by breach of a statutory or common-law duty.⁴⁸ Likewise, a person is not bound to anticipate that others will violate a municipal ordinance or statute.⁴⁹ The right to rely on care by others, however, does not excuse plaintiff for failure to exercise the ordinary care for his own safety demanded by the circumstances,⁵⁰ and, even though a traveler on a municipal street has the right of way, he must exercise reasonable care for his own safety.⁵¹ Any right a traveler may have to indulge in a presumption that the streets of the municipality are safe has no application where the danger is known and obvious.⁵²

d. Acts in Emergencies

A person on a street who is confronted by an emergency requiring instant action is not necessarily negligent if he takes the wrong course.

One confronted by an emergency requiring instant action is not ordinarily held negligent for taking the wrong course in his effort to escape injury on the street.⁵³ One attempting to stop a runaway is not guilty of contributory negligence if he acted to save life⁵⁴ in imminent peril,⁵⁵ or if there were people about in the street who might be harmed by the runaway,⁵⁶ especially where he was under a duty to do so.⁵⁷ Moreover, the fact that plaintiff remained on the street at the time of a runaway in order to guard his own team and the occupants of his vehicle does not conclusively establish contributory negligence on his part.⁵⁸

e. As Affected by Law of the Road

A traveler on a street may properly assume that drivers of vehicles will obey the law of the road, but the mere fact that a plaintiff violated the law of the road does not of itself necessarily constitute contributory negligence.

A driver may properly assume that an approaching vehicle will obey the right-hand rule,⁵⁹ and one on a vehicle being overtaken may assume that the overtaking vehicle will pass to the left⁶⁰ sufficiently to clear it.⁶¹ Merely driving on the wrong side of the road is not necessarily contributory negligence,⁶² and violation of an ordinance relative to the right of way at intersections is not of itself contributory negligence,⁶³ although failure to give defendant his right of way at an intersection may under the circumstances constitute contributory negligence.⁶⁴

f. Violation of Statute or Ordinance

The violation of a statute or ordinance by a plaintiff injured while on a municipal street may constitute contributory negligence if it was a proximate cause of his injury.

The general rule that plaintiff's contributory negligence may be predicated on his violation of a statute or ordinance, as discussed in the C.J.S. title Negligence § 127, also 45 C.J. p 969 note 56—p 972 note 75, is applicable to persons injured on municipal streets while violating statutes or ordinances⁶⁵ relative to bicycling, as discussed *infra* § 1789 b, coast-

N.J.—Clarkson v. Ley, 148 A. 745, 106 N.J.Law 380.

Pa.—Robinson v. American Ice Co., 141 A. 244, 292 Pa. 366.

44 C.J. p 1063 note 28.

Right to rely on care of:

Motorist see Motor Vehicles § 459.

Other persons generally see the C.J.S. title Negligence § 118, also 45 C.J. p 954 note 39—p 956 note 51.

Right of way

Pedestrian with right of way is not obliged to anticipate that vehicles will not respect that right of way.—Caryl, to Use of Merchants Mut. Casualty Co. v. Baltimore Transit Co., Md., 58 A.2d 239.

48. Hawaii.—Young v. Honolulu Construction & Draying Co., 34 Hawaii 426.

Ky.—Foreman v. Western Union Telegraph Co., 14 S.W.2d 1079, 228 Ky. 300.

49. Mo.—Schiermeier v. Kroger Grocery & Baking Co., App., 167 S.W.2d 367.

50. Wis.—Ashton v. P. F. Coughlin Co., 191 N.W. 561, 179 Wis. 307. 44 C.J. p 1063 note 29.

51. U.S.—New York Telephone Co.

v. Beckers, C.C.A.N.Y., 30 F.2d 578.

52. N.Y.—Wright v. Western Union Tel. Co., 87 N.Y.S.2d 444.

53. Pa.—Kovacs v. Ajhar, 196 A. 876, 130 Pa.Super. 149.

44 C.J. p 1063 note 31.

Acts in emergencies:

Generally see the C.J.S. title Negligence § 123, also 45 C.J. p 962 note 95—p 966 note 21.

Involving motor vehicles see Motor Vehicles § 460.

54. N.Y.—Bernardine v. City of New York, 51 N.Y.S.2d 888, 268 App.Div. 444, affirmed 62 N.E.2d 604, 294 N.Y. 361, 161 A.L.R. 364. 44 C.J. p 1064 note 32.

Danger incurred to save life or property generally see the C.J.S. title Negligence §§ 124—125, also 45 C.J. p 966 note 22—p 969 note 51.

55. Kan.—Smith v. City Ice, etc., Co., 232 P. 603, 117 Kan. 485.

44 C.J. p 1064 note 33.

56. N.Y.—Bernardine v. City of N.Y., 51 N.Y.S.2d 888, 268 App.Div. 444, affirmed 62 N.E.2d 604, 294 N.Y. 361, 161 A.L.R. 364—Holleran v. City of New York, 153 N.Y.S. 447, 168 App.Div. 469.

57. N.Y.—Muhs v. Brooklyn Fire Ins. Salvage Corps, 85 N.Y.S. 911, 89 App.Div. 389.

44 C.J. p 1064 note 35.

58. Mo.—Hall v. Huber, 61 Mo.App. 384.

59. La.—Schick v. Jenevein, 82 So. 360, 145 La. 333.

44 C.J. p 1064 note 36.

Law of road generally see *supra* § 1779.

60. Cal.—Moreno v. Los Angeles Transfer Co., 186 P. 800, 44 Cal. App. 551.

61. Cal.—Moreno v. Los Angeles Transfer Co., *supra*. 44 C.J. p 1064 note 38.

62. La.—Karstendiek v. Jackson Brewing Co., 48 So. 958, 123 La. 346.

44 C.J. p 1064 note 39.

Failure to keep to right generally see *supra* § 1779 b.

63. N.Y.—McCarragher v. Proal, 100 N.Y.S. 208, 114 App.Div. 470.

64. Colo.—Rosenbaum v. Riggs, 225 P. 832, 75 Colo. 408.

65. Cal.—Leek v. Western Union Telegraph Co., 66 P.2d 1232, 20 Cal. App.2d 374—Coffey v. Slingerland, 50 P.2d 830, 9 Cal.App.2d 731.

ing, *infra* § 1789 c, engaging in an occupation in the street,⁶⁶ one-way streets,⁶⁷ traffic signals at intersections,⁶⁸ stop signs,⁶⁹ safety zones,⁷⁰ lighting⁷¹ and speed⁷² of vehicles, and the maintenance of obstructions;⁷³ but the general rule is inapplicable where no violation of the ordinance is shown.⁷⁴ Disregard of municipal traffic regulations is not contributory negligence where traffic is regulated by state statute.⁷⁵

Proximate cause. In accordance with the general rule, as discussed in the C.J.S. title Negligence § 127, also 45 C.J. p 970 note 68—p 971 note 69, the fact that one is injured while violating a statute or ordinance regulating the use of streets does not defeat his right to recovery unless his unlawful act was a contributing cause to the injury,⁷⁶ as in the case of acts not a contributing cause of injury but constituting a violation of ordinances relative to lighting construction work,⁷⁷ vehicles,⁷⁸ speed of

travel,⁷⁹ right of way,⁸⁰ one-way streets,⁸¹ parking,⁸² or maintaining obstructions on the sidewalk.⁸³

§ 1789. — Particular Persons

- a. In general
- b. Cyclists
- c. Coasters
- d. Pedestrians
- e. Persons working on or in street
- f. Persons boarding, alighting from, or on, streetcar
- g. Children

a. In General

Drivers of vehicles who are injured on streets cannot recover damages for injuries caused by their contributory negligence.

The general rule that one injured on municipal streets cannot recover if the injury was caused by his contributory negligence, discussed *supra* § 1787, applies to drivers of vehicles,⁸⁴ and later vigilance

La.—McGehee v. Ashley, 137 So. 80, 18 La App. 393—Buckley v. Featherstone Garage, 123 So. 446, 11 La App. 564.

N.C.—Brown v. Postal Telegraph-Cable Co., 153 S.E. 457, 198 N.C. 771.

Tenn.—Phillips-Buttorff Mfg. Co. v. McAlexander, 15 Tenn.App. 618.

Wash.—Knutson v. McMahan, 58 P. 2d 1033, 186 Wash. 518—Price v. Gabel, 298 P. 444, 162 Wash. 275.

44 C.J. p 1064 note 44.
By motorist see Motor Vehicles § 461.

Negligence per se

Ala.—Alabama Lumber & Building Material Ass'n v. Mason, 160 So. 232, 230 Ala. 168.

66. Wash.—Price v. Gabel, 298 P. 444, 162 Wash. 275.

As matter of law

Wash.—Price v. Gabel, *supra*.

67. Mass.—Scranton v. Crosby, 9 N. E.2d 391, 298 Mass. 15.

Effect of statute making operator not a trespasser

Statute providing that violation of one-way ordinance should not render operator of vehicle a trespasser does not require that violation be ignored for all purposes.—Scranton v. Crosby, *supra*.

68. Ala.—Alabama Lumber & Building Material Ass'n v. Mason, 160 So. 232, 230 Ala. 168.

Cal.—Leek v. Western Union Telegraph Co., 66 P.2d 1232, 20 Cal.App. 2d 374.

Wa.—Buckley v. Featherstone Garage, 123 So. 446, 11 La.App. 564.

69. N.Y.—Manard v. Sheppard, 276 N.Y.S. 494, 248 App.Div. 265.

Distinction between violation of statute and of ordinance

Violation of city ordinance requiring full stop before crossing certain street has been held only evidence of negligence, whereas violation of statutory regulation is negligence as a matter of law.—Manard v. Sheppard, *supra*.

70. N.C.—Brown v. Postal Telegraph-Cable Co., 153 S.E. 457, 198 N.C. 771.

71. Wis.—Yahnke v. Lange, 170 N. W. 722, 168 Wis. 512.
44 C.J. p 1064 note 47.

72. Cal.—Stein v. San Francisco United R. Cos., 113 P. 663, 159 Cal. 368.

44 C.J. p 1064 note 48.

73. N.Y.—Tolkon v. Otto E Reimer Co., 110 N.Y.S. 129, 125 App.Div. 695.

44 C.J. p 1064 note 49.

74. Tenn.—Western Union Tel. Co. v. Dickson, 178 S.W.2d 714, 27 Tenn.App. 752.

44 C.J. p 1064 note 50.

Jaywalking ordinance

Violation of jaywalking ordinance by pedestrian crossing street was held not shown, notwithstanding there was no designated crossing at the intersection.—Western Union Tel. Co. v. Dickson, *supra*.

75. Pa.—Kerbaugh v. U. S. Express Co., 58 Pa.Super. 550.

44 C.J. p 1065 note 61.

76. Cal.—Coffey v. Slingerland, 50 P.2d 880, 9 Cal.App.2d 731.

Mich.—Haszczyn v. Detroit Creamery Co., 275 N.W. 211, 281 Mich. 467.

Tenn.—Phillips-Buttorff Mfg. Co. v. McAlexander, 15 Tenn.App. 618—

Elmore v. Thompson, 14 Tenn.App. 78.

Wash.—Knutson v. McMahan, 58 P. 2d 1033, 186 Wash. 518.

44 C.J. p 1064 note 52.

77. Conn.—Case v. Clark, 76 A. 518, 83 Conn. 183.

44 C.J. p 1065 note 54.

78. Ill.—Graham v. Hagmann, 110 N.E. 337, 270 Ill. 252.

44 C.J. p 1065 note 55.

79. Ariz.—Marchese v. Metheny, 203 P. 567, 23 Ariz. 333.

44 C.J. p 1065 note 58.

80. Vt.—Lachance v. Myers, 129 A. 172, 98 Vt. 498.

44 C.J. p 1065 note 59.

Law of road generally see *supra* § 1779.

81. Mass.—Scranton v. Crosby, 9 N. E.2d 391, 298 Mass. 15.

Where operator not a trespasser

Under statute providing that violation of ordinance limiting traffic to one direction does not render operator of vehicle a trespasser, violation of one-way ordinance bars recovery if illegal element in forbidden act contributed to cause injury but not if such element was merely an attendant circumstance.—Scranton v. Crosby, *supra*.

82. Ill.—Marx v. Chicago Daily News Co., 194 Ill.App. 322.

44 C.J. p 1065 note 60.

83. Ind.—Schindler v. Kappler, 133 N.E. 519, 77 Ind.App. 385.

44 C.J. p 1065 note 56.

84. U.S.—New York Telephone Co. v. Beckers, C.C.A.N.Y., 30 F.2d 578.
Hawaii.—Young v. Honolulu Construction & Draying Co., 34 Hawaii 426.

will not excuse former negligence.⁸⁵ Recovery will not be denied, however, where the acts of plaintiff fell short of contributory negligence.⁸⁶

b. Cyclists

Cyclists injured while using the streets cannot recover if their contributory negligence was a proximate cause of the injury.

The rule that one guilty of contributory negligence cannot recover for injuries received while using the streets, discussed supra § 1787, applies to bicyclists⁸⁷ and motorcyclists, as discussed in Motor Vehicles § 463, and they must exercise ordinary care in order to avoid collision with other vehicles.⁸⁸ The violation of a statute or ordinance by a cyclist constitutes contributory negligence,⁸⁹ particularly where the ordinance or statute violated is a traffic regulation intended to conserve the safety of the traveling public,⁹⁰ unless such violation was not a contributory cause to the injury.⁹¹

c. Coasters

Whether or not a person who is injured while coasting on municipal streets is guilty of contributory negligence depends on the surrounding circumstances, and the mere fact of coasting on a street, unless forbidden by ordinance, does not constitute contributory negligence.

The mere fact that plaintiff was coasting on municipal streets does not show contributory negligence,⁹² but whether or not there was negligence will depend on the surrounding circumstances.⁹³

Where coasting is forbidden by ordinance it may constitute contributory negligence,⁹⁴ except where violation of the coasting ordinance was not a proximate cause of injury.⁹⁵

d. Pedestrians

- (1) In general
- (2) Crossing street

(1) In General

In the use of municipal streets pedestrians are required to exercise ordinary and reasonable care for their own safety. The preferential right of a pedestrian to the use of a sidewalk does not excuse him from the duty to exercise due care, although it does affect the precautions necessary to constitute due care.

In the use of municipal streets pedestrians are required to exercise ordinary or reasonable care under the circumstances.⁹⁶ The right of a pedestrian to use any part of a municipal street for the purpose of travel, as discussed supra § 1759, is subject to the exercise of due care, governed by the actual use of the highway.⁹⁷ He is not negligent, as a matter of law, in walking in the street instead of on the sidewalk,⁹⁸ nor is he negligent as a matter of law because he fails constantly to look behind to discover danger from approaching vehicles.⁹⁹

On sidewalk. A pedestrian using the sidewalk along a street has a right to assume that anyone using it who does not have an equal right to its use will exercise due care to protect him from injury.¹

La.—*Roberts v. Eason*, 6 La.App. 703 44 C.J. p 1065 note 64.

Contributory negligence with respect to motor vehicles see Motor Vehicles §§ 456-493.

85. N.Y.—*Altenkirch v. National Biscuit Co.*, 111 N.Y.S. 284, 127 App.Div. 307.

44 C.J. p 1065 note 65.

86. La.—*Schick v. Jenevein*, 82 So 360, 145 La. 333.

44 C.J. p 1065 note 66.

87. Ala.—*Alabama Lumber & Building Material Ass'n v. Mason*, 160 So. 232, 230 Ala. 168.

44 C.J. p 1066 note 69.

Contributory negligence of bicycle rider injured by motor vehicle as precluding recovery see Motor Vehicles § 464.

88. Mo.—*Beebe v. Kansas City*, 17 S.W.2d 608, 223 Mo.App. 642.

89. Ala.—*Alabama Lumber & Building Material Ass'n v. Mason*, 160 So. 232, 230 Ala. 168.

44 C.J. p 1066 note 71.

90. Ala.—*Alabama Lumber & Building Material Ass'n v. Mason*, supra.

91. Kan.—*Anderson v. Sterrit*, 148 P. 635, 95 Kan. 483.

44 C.J. p 1066 note 72.

Violation of statute or ordinance as contributory negligence generally see supra § 1788 f

92. Pa.—*Idell v. Day*, 116 A. 506, 273 Pa. 34, 20 A.L.R. 1429.

Contributory negligence of child injured by motor vehicle while coasting on street as precluding recovery see Motor Vehicles § 485 a (2).

Not necessarily wrongful

Coasting on a public street not extensively used by the public or expressly prohibited by ordinance is not necessarily a nuisance, an unlawful act, or negligence per se—*Kovacs v. Ajhar*, 196 A. 876, 130 Pa. Super. 149.

93. Pa.—*Idell v. Day*, 116 A. 506, 273 Pa. 34, 20 A.L.R. 1429.

Negligence of coaster held proximate cause of injury.—*Stoll v. Laubengayer*, 140 N.W. 532, 174 Mich. 701.

94. Mass.—*Boyd v. Ellison*, 143 N.E. 41, 248 Mass. 250.

44 C.J. p 1066 note 75.

95. Conn.—*Farrington v. Cheponis*, 78 A. 652, 84 Conn. 1.

44 C.J. p 1066 note 76.

96. Tenn.—*Western Union Tel. Co.*

v. Dickson, 173 S.W.2d 714, 27 Tenn. App. 752

Wis.—*Itang v. Klawun*, 223 N.W. 121, 198 Wis. 1.

Pedestrian injured by motor vehicle see Motor Vehicles §§ 468-474

Common-law principles control

Except as pedestrian's conduct is regulated by statute, question of contributory negligence is generally determinable by common-law principles.—*Long v. Barbieri*, 7 P.2d 1082, 120 Cal.App. 207.

Failure to look

It is not negligence per se for a person in a pedestrian zone in the street to fail to look for approaching vehicles for a period of thirty seconds.—*Hoffman v. Maguire*, 44 P. 2d 444, 6 Cal.App.2d 398.

97. La.—*Neyrey v. Maillet*, App., 21 So.2d 158.

14 C.J. p 1066 note 77.

98. La.—*Neyrey v. Maillet*, App., supra.

44 C.J. p 1066 note 78.

99. Mo.—*McKane v. Lynch*, 233 S.W. 175, 289 Mo. 16.

44 C.J. p 1066 note 79.

1. Cal.—*Brandes v. Freitas*, 2 P.2d 830, 116 Cal.App. 459.

Pedestrian on sidewalk injured by

He is not required to anticipate or maintain a lookout for vehicles on a sidewalk,² and in the absence of negligence on his part he may recover for injuries caused by his being struck by a vehicle thereon.³ However, he may not exercise his preferential right to the use of the sidewalk in an arbitrary or unreasonable manner, or without regard to the lesser right of other possible users.⁴ He is bound to take reasonable precautions to protect himself from injury;⁵ and in passing over a crossing on the sidewalk he is required to exercise care commensurate with the danger he is liable to encounter,⁶ although he is not governed by the same rules on approaching a private crossing over the sidewalk as on arriving at an intersection of two public highways.⁷

(2) Crossing Street

(a) In general

(b) Between intersections or not at regular crossings

(a) In General

A pedestrian, in crossing a street, is under the duty to exercise such care for his safety as the circumstances require.

In crossing a street a pedestrian must exercise his faculties to look for approaching vehicles and must

exercise such reasonable care as the surrounding circumstances require⁸ and any infirmity or physical weakness necessitates.⁹ The particular acts necessary to constitute a proper lookout in crossing a street are not prescribed by law,¹⁰ and what constitutes a proper lookout is to be determined from all the facts and circumstances existing at the time, and is such as would be kept under the circumstances by a person of ordinary care and prudence.¹¹

A pedestrian must use his judgment as to how and when to cross a street without a collision,¹² and must use his powers of observation to discover approaching vehicles,¹³ at a time when his observation is not temporarily obstructed.¹⁴ Although a pedestrian is not under a positive duty to stop, look, and listen for the approach of vehicles before attempting to cross a street,¹⁵ or imperatively required, as a matter of law, to look both ways when he starts to cross a street,¹⁶ except perhaps where there is heavy vehicular travel,¹⁷ it is his duty, immediately before placing himself in a position of danger, to look in the direction from which danger may be anticipated,¹⁸ and he is bound to see that which by a proper use of his senses he might have seen.¹⁹ He must continue to exercise reasonable care while crossing the entire roadway.²⁰ However, he is not, while crossing, obliged to be constantly

- motor vehicle see Motor Vehicles §§ 473-474.
- Preferential right of pedestrian to use of sidewalk see *supra* § 1778 b.
2. Ky.—Foreman v. Western Union Telegraph Co., 14 S.W.2d 1079, 228 Ky. 300.
- Bicycle**
- Ky.—Foreman v. Western Union Telegraph Co., *supra*.
- Mo.—Schliermeyer v. Kroger Grocery & Baking Co., App., 167 S.W.2d 967.
3. Ky.—Foreman v. Western Union Telegraph Co., 14 S.W.2d 1079, 228 Ky. 300.
4. Cal.—Brandes v. Freitas, 2 P.2d 830, 116 Cal.App. 459.
5. Cal.—Brandes v. Freitas, *supra*.
6. Wis.—Jones v. Nolan, 222 N.W. 229, 197 Wis. 311.
7. Wis.—Henderson v. O'Leary, 187 N.W. 994, 177 Wis. 130, 24 A.L.R. 942.
- 44 C.J. p 1066 note 80.
8. Cal.—Flores v. Los Angeles Ry. Corporation, 59 P.2d 856, 15 Cal. App.2d 576—Long v. Barbieri, 7 P.2d 1082, 120 Cal.App. 207.
- La.—Preaus v. Western Union Telegraph Co., App., 151 So. 813.
- N.J.—Purro v. Salerno, 162 A. 527, 109 N.J.Law 381—Rochford v. Stankewicz, 158 A. 386, 108 N.J.Law 265.
- Va.—Heindl v. Perritt, 163 S.E. 93, 158 Va. 104.
- Wis.—Rang v. Klawun, 223 N.W. 121, 198 Wis. 1.
- 44 C.J. p 1067 note 85.
- Only ordinary care is required.**
- Cal.—Kinnear v. Martinelli, 258 P. 686, 84 Cal.App. 721.
- Iowa.—Swan v. Dalley-Luce Auto Co., 277 N.W. 580, 225 Iowa 89, rehearing denied 281 N.W. 504, 225 Iowa 89.
- Tenn.—Western Union Tel. Co. v. Dickson, 173 S.W.2d 714, 27 Tenn. App. 752.
- Newsboy who is selling papers in the street must exercise the same degree of care as a pedestrian.**—Hoffman v. Maguire, 44 P.2d 444, 6 Cal.App.2d 398.
9. Mass.—O'Connor v. Hickey, 156 N.E. 838, 260 Mass. 110.
- Partially blind person**
- Person without use of one eye must exercise unusual precautions on street.—Handy v. New Orleans Public Service, 120 So. 271, 10 La.App. 72.
10. Tex.—Psimenos v. Huntley, Civ. App., 47 S.W.2d 622.
11. Tex.—Psimenos v. Huntley, *supra*.
- Va.—Heindl v. Perritt, 163 S.E. 93, 158 Va. 104.
12. N.J.—Purro v. Salerno, 162 A. 527, 109 N.J.Law 381—Rochford v. Stankewicz, 158 A. 386, 108 N.J.Law 265—Newark Passenger Ry. Co. v. Block, 27 A. 1067, 55 N.J.Law 605, 22 L.R.A. 374.
13. N.J.—Rochford v. Stankewicz, 158 A. 386, 108 N.J.Law 265—Newark Passenger Ry. Co. v. Block, 27 A. 1067, 55 N.J.Law 605, 22 L.R.A. 374.
14. N.J.—Purro v. Salerno, 162 A. 527, 109 N.J.Law 381.
15. Cal.—Brandes v. Freitas, 2 P.2d 830, 116 Cal.App. 459.
- 44 C.J. p 1067 note 82.
16. Tex.—Psimenos v. Huntley, Civ. App., 47 S.W.2d 622.
- 44 C.J. p 1067 note 84.
17. Cal.—Davis v. John Breuner Co., 140 P. 586, 167 Cal. 683—Thompson v. White, 204 P. 561, 56 Cal.App. 173.
18. Cal.—Flores v. Los Angeles Ry. Corporation, 59 P.2d 856, 15 Cal. App.2d 576.
- Look in direction from which vehicles may approach**
- Cal.—Bence v. Teddy's Taxi, 282 P. 392, 101 Cal.App. 748, rehearing denied 283 P. 86, 101 Cal.App. 748.
19. N.Y.—Wass v. Western Union Telegraph Co., 10 N.Y.S.2d 956.
20. Cal.—Flores v. Los Angeles Ry.

on the lookout for approaching vehicles,²¹ and his observation need not extend beyond the distance within which vehicles moving at a lawful speed would endanger him.²²

In crossing a street a pedestrian is not required to anticipate negligence on the part of another.²³ He may assume that others using the highway will exercise ordinary care to avoid injuring him,²⁴ that the driver of a vehicle will exercise proper caution in approaching a street crossing,²⁵ and that persons driving on the street will not violate any ordinance or law²⁶ and that they will observe traffic regulations.²⁷ He may reasonably expect that danger from vehicles will arise only from persons driving in conformity with rules of the road,²⁸ and not at an unlawful rate of speed.²⁹

Pedestrian with right of way. Although a statute enacting vehicular traffic rules gives pedestrians the right of way at crossings in town and cities, pedestrians are not thereby absolved from duty to use reasonable care;³⁰ but the fact that a pedestrian has the right of way is a factor in the determination of what constitutes the exercise of ordi-

nary care with respect to the use of the senses and otherwise.³¹

Traffic signals. A pedestrian's duty to exercise ordinary care and caution for his own safety exists, notwithstanding he is crossing an intersection on the "go" or green light of a traffic signal.³² He is chargeable with negligence if he starts against the signal,³³ particularly where a statute or ordinance expressly prohibits pedestrians from crossing against such signals;³⁴ but it is not negligence for a pedestrian to start across a street when the signal is against vehicular traffic thereon, although the signal may be changed before he reaches the other side, and he has the right of way against a vehicle thereafter approaching.³⁵ Where a pedestrian enters a street intersection with a "go" traffic signal, he may assume that all persons on a cross street will observe the traffic signal.³⁶

Proximate cause. Where one is negligent by failing to look before crossing a street, in order to escape the consequences of his negligence he must prove that, even if he had looked, the accident would still have happened.³⁷ A pedestrian's right to recover for injuries sustained in crossing a street

Corporation, 59 P.2d 856, 15 Cal. App.2d 576.

44 C.J. p 1067 note 86.

21. Cal.—Baldock v. Western Union Telegraph Co., 15 P.2d 199, 127 Cal. App. 141.

Iowa.—Gearhart v. Des Moines R. Co., 21 N.W.2d 569, 237 Iowa 213—Swan v. Dailey-Luce Auto Co., 277 N.W. 580, 225 Iowa 89, rehearing denied 281 N.W. 504, 225 Iowa 89.

La.—Whittington v. Western Union Telegraph Co., App., 193 So. 498.

N.Y.—Nelson v. Ogilvie, 220 N.Y.S. 466, 219 App. Div. 832.

Tenn.—Western Union Tel. Co. v. Dickson, 173 S.W.2d 714, 27 Tenn. App. 752.

Va.—Heindl v. Perritt, 163 S.E. 93, 158 Va. 104.

44 C.J. p 1068 note 88.

22. N.J.—Puorro v. Salerno, 162 A. 527, 109 N.J.Law 381—Rochford v. Stankewicz, 158 A. 386, 108 N.J. Law 265—Newark Passenger Ry. Co. v. Block, 27 A. 1067, 55 N.J. Law 605, 22 L.R.A. 374.

23. Iowa.—Gearhart v. Des Moines R. Co., 21 N.W.2d 569, 237 Iowa 213—Swan v. Dailey-Luce Auto Co., 277 N.W. 580, 225 Iowa 89, rehearing denied 281 N.W. 504, 225 Iowa 89.

24. Md.—Deford v. Lohmeyer, 128 A. 454, 147 Md. 472.

44 C.J. p 1067 note 87.

25. N.J.—Clarkson v. Ley, 148 A. 745, 106 N.J.Law 380.

Tenn.—Western Union Tel. Co. v.

Dickson, 173 S.W.2d 714, 27 Tenn. App. 752.

26. Iowa.—Gearhart v. Des Moines R. Co., 21 N.W.2d 569, 237 Iowa 213—Swan v. Dailey-Luce Auto Co., 277 N.W. 580, 225 Iowa 89, rehearing denied 281 N.W. 504, 225 Iowa 89.

La.—Creedy v. D. H. Holmes Co., 134 So. 413, 16 La.App. 562.

44 C.J. p 1068 note 89.

27. La.—Smith v. City of Alexandria, App., 178 So. 737—Creedy v. D. H. Holmes Co., 134 So. 413, 16 La.App. 562.

Va.—Virginia Electric & Power Co., 18 S.E.2d 301, 179 Va. 54.

28. U.S.—Western Union Telegraph Co. v. Morrissey, C.C.A.Mass., 92 F. 2d 414.

Iowa.—Gearhart v. Des Moines R. Co., 21 N.W.2d 569, 237 Iowa 213. Md.—Caryl, to Use of Merchants Mut. Cas. Co. v. Baltimore Transit Co., 58 A.2d 239.

44 C.J. p 1068 note 90.

29. La.—Smith v. City of Alexandria, App., 178 So. 737.

44 C.J. p 1068 note 91.

30. Iowa.—Rofls v. Mullins, 162 N. W. 783, 179 Iowa 1223.

44 C.J. p 1068 note 92.

31. Tenn.—Western Union Tel. Co. v. Dickson, 173 S.W.2d 714, 27 Tenn.App. 752.

Pedestrian may assume that approaching vehicles will be under control so as to enable the operators to yield the right of way.—

Western Union Tel. Co. v. Dickson, supra.

32. Va.—Cheatwood v. Virginia Electric & Power Co., 18 S.E.2d 301, 179 Va. 54.

33. Cal.—Leek v. Western Union Telegraph Co., 66 P.2d 1232, 20 Cal App 2d 374.

La.—Preaus v. Western Union Telegraph Co., App., 151 So. 813—Buckley v. Featherstone Garage, 123 So. 446, 11 La.App. 564.

44 C.J. p 1069 note 94.

Traffic being directed by policeman Pedestrian who steps from sidewalk in front of moving traffic being directed by police officer is guilty of contributory negligence.—Wright v. Western Union Tel. Co., 87 N.Y.S.2d 444.

34. Cal.—Leek v. Western Union Telegraph Co., 66 P.2d 1232, 20 Cal.App.2d 374.

35. Md.—Caryl, to Use of Merchants Mut. Cas. Co. v. Baltimore Transit Co., 58 A.2d 239.

Ohio.—Cleveland Ry. Co. v. Goldman, 170 N.E. 641, 122 Ohio St. 73.

44 C.J. p 1069 note 93.

36. Ohio.—Cleveland Ry. Co. v. Goldman, 170 N.E. 641, 122 Ohio St. 73.

Va.—Virginia Electric & Power Co., 18 S.E.2d 301, 179 Va. 54.

37. N.Y.—Knapp v. Barrett, 110 N. E. 428, 216 N.Y. 226.

is not defeated by his violation of an ordinance governing the conduct of pedestrians crossing a street where such violation was not the cause of the injury.³⁸

(b) Between Intersections or Not at Regular Crossings

In the absence of ordinance prohibiting such action, it is not negligence as a matter of law for a pedestrian to cross a public street at a point where there is no crosswalk, or at a place other than a regular intersection; but in crossing at such a place he must exercise due care, and this requires greater caution than if he were at an established crossing.

The right of a pedestrian to cross the street at any place, discussed supra § 1759, is subject to the requirement that in so doing he must use ordinary care under the conditions as they exist.³⁹ In the absence of an ordinance prohibiting such action, it is not negligence as a matter of law for a pedestrian to cross a public street at a point where there is no crosswalk, or at a place other than a regular intersection;⁴⁰ and, assuming that a pedestrian's violation of an ordinance giving vehicles the right of way between street intersections and crossings makes a prima facie showing of negligence, it does not constitute contributory negligence as a matter of law.⁴¹ In crossing at such a place, however, he must exercise greater caution than if he were at an established crossing,⁴² particularly where an ordinance makes the right of pedestrians between intersections inferior to that of vehicles or gives pedestrians the right of way at street crossings and vehicles the right of way at other points in the street.⁴³

unless he is in a locality where no street intersections or crossings exist.⁴⁴ Under a provision which not only gives the right of way to vehicles between intersections or places designated as crosswalks, but also provides that pedestrians shall cross a street only at cross street intersections and places designated as crosswalks, a pedestrian who crosses the street between intersections is guilty of negligence as a matter of law.⁴⁵ The violation of an ordinance relative to crossing streets between intersections or at places other than a crosswalk, however, will not preclude any right to recover for injuries sustained in making such a crossing where such violation was not a proximate cause of the injury.⁴⁶ An ordinance providing that pedestrians must cross at right angles, in crossing the street at intersections, has no application where the accident did not occur at an intersection, but near one.⁴⁷

Under the last clear chance doctrine, defendant may be held liable for injuring a pedestrian, even though the latter was negligent in consequence of crossing a street at a place other than a crosswalk in violation of an ordinance.⁴⁸

e. Persons Working on or in Street

Persons working on or in the streets, although required to exercise reasonable care for their own safety, have been held not to be required to exercise the same quantum of care as pedestrians who are merely crossing the street.

One whose duties require him to work on or in the streets in the public service, while required to exercise reasonable care for his own safety,⁴⁹ has

38. La.—Creedy v. D. H. Holmes Co., 134 So. 413, 16 La.App. 562.

Signal of intention to cross

Pedestrian's failure to hold up hand before entering street as warning of intention to cross as set forth in ordinance did not deprive him of right to continue after almost across street.—Creedy v. D. H. Holmes Co., supra.

39. Ind.—Craft v. Stone, 124 N.E. 473, 74 Ind.App. 71.

Mont.—Carey v. Guest, 258 P. 236, 78 Mont. 415.

Care commensurate with the danger the pedestrian is likely to encounter is required.—Rang v. Klawun, 223 N.W. 121, 198 Wis. 1.

40. Cal.—Broedlow v. Le Gros, 263 P. 1027, 88 Cal.App. 671.

Ind.—Craft v. Stone, 124 N.E. 473, 74 Ind.App. 71.

Mass.—Bonl v. Goldstein, 177 N.E. 581, 276 Mass. 372.

Minn.—LeVasseur v. Minneapolis St. Ry. Co., 21 N.W.2d 522, 221 Minn. 205.

Mont.—Carey v. Guest, 258 P. 236, 78 Mont. 415.

Pa.—Lowers v. Zuker, 157 A. 339, 102 Pa.Super. 581.

44 C.J. p 1069 note 96.

41. Wash.—Rhimer v. Davis, 218 P. 193, 126 Wash. 470.

42. Mont.—Carey v. Guest, 258 P. 236, 78 Mont. 415.

Pa.—Schulte v. Yellow Cab Co of Philadelphia, 158 A. 184, 104 Pa. Super. 130—Lowers v. Zuker, 157 A. 339, 102 Pa.Super. 581.

44 C.J. p 1069 note 97.

43. Wash.—Hoffman v. Hansen, 203 P. 53, 118 Wash. 73.

44 C.J. p 1069 note 1.

44. Pa.—Lowers v. Zuker, 157 A. 339, 102 Pa.Super. 581.

45. Tenn.—Phillips-Buttorff Mfg. Co. v. McAlexander, 15 Tenn.App. 618.

Wash.—Knutson v. McMahan, 58 P. 2d 1033, 186 Wash. 518.

44 C.J. p 1070 note 8.

Care required

Pedestrian attempting to cross street between intersections in violation of ordinance had duty to exercise care commensurate with situ-

ation and keep lookout to avoid injury.—Knutson v. McMahan, supra. Violation held not shown

Where streetcar ran across crossing marked for pedestrians before stopping and plaintiff, alighting from the streetcar, passed around in front of car and thence to sidewalk, plaintiff was not guilty of violating jay walking ordinance.—National Funeral Home v. Dalehite, 15 Tenn.App. 482.

46. Tenn.—Phillips-Buttorff Mfg. Co. v. McAlexander, 15 Tenn.App. 618—Elmore v. Thompson, 14 Tenn.App. 78.

Wash.—Knutson v. McMahan, 58 P. 2d 1033, 186 Wash. 518.

47. Ill.—Stansfield v. Wood, 231 Ill. App. 586.

48. Cal.—Baldock v. Western Union Telegraph Co., 15 P.2d 199, 127 Cal.App. 141.

49. Mich.—Haszcyn v. Detroit Creamery Co., 275 N.W. 211, 281 Mich. 467.

44 C.J. p 1070 note 7.

Injuries by motor vehicles see Motor Vehicles § 476.

been held not to be required to exercise the same diligence or quantum of care as pedestrians who are merely crossing the street,⁵⁰ whether or not his work has a direct relation to the streets.⁵¹

f. Persons Boarding, Alighting from, or on, Streetcar

Persons boarding, or alighting from, and the occupants and operators of, streetcars must exercise due care to avoid injury.

One standing in the street waiting to board a streetcar, who observes an approaching team, is not guilty of contributory negligence in failing to keep constant watch on it to avoid being struck.⁵² There is no absolute rule of law requiring one about to alight from a streetcar to look up and down the street before alighting in order to prevent injury from passing vehicles.⁵³ One alighting from a streetcar may assume that a vehicle will not be driven in a manner dangerous to alighting passengers.⁵⁴

It is not negligence per se for a passenger to stand on the running board of an open streetcar,⁵⁵ and one standing momentarily on the running board of a streetcar while looking for a seat is not negligent in failing to pay heed to a team passing the car.⁵⁶ The motorman of a streetcar is negligent per se,

precluding a recovery for injuries sustained by him in a collision, when he operates his car at such a speed that he cannot stop it within the distance at which he can see an obstruction.⁵⁷ A motorman, however, is not negligent in failing to anticipate a runaway horse coming down the track at night.⁵⁸

g. Children

The contributory negligence of a child will preclude its recovery for injuries received on a municipal street, but its physical and mental capacity is considered in the determination of whether or not its conduct constituted contributory negligence and a child is not held to the same standard of conduct required of an adult.

A child is bound to use such care as its physical and mental capacity permits;⁵⁹ and recovery for injuries received on the street will be denied where they proximately resulted from the negligence of the child,⁶⁰ but not where there was no negligence.⁶¹ In determining whether a child's conduct constituted negligence, it cannot be judged by what an adult should have done,⁶² for what might constitute negligence in an adult is not necessarily negligence in a child.⁶³

Playing in the street, in violation of an ordinance, is not contributory negligence where such act did not proximately cause the injury of the child.⁶⁴

Violation of ordinance by engaging in occupation in street as constituting negligence see *supra* § 1788 f.

Work necessitating obstruction of street

Employees whose work required them to be in or on public streets and also requires obstructions in or about such streets which otherwise would be in violation of law are not thereby necessarily guilty of negligence in performance of their work, but must take reasonable precaution and use reasonable means to guard against possible injury resulting from such unusual conditions—*Haszczyzn v. Detroit Creamery Co.*, *supra*.

50. Cal.—*Scott v. City and County of San Francisco*, App., 206 P.2d 45—*Zumwalt v. E. H. Tryon, Inc.*, 14 P.2d 912, 126 Cal.App. 588—*State Compensation Ins. Fund v. Scamell*, 238 P. 780, 73 Cal.App. 285.

44 C.J. p 1070 note 8.

51. Cal.—*Scott v. City and County of San Francisco*, App., 206 P.2d 45—*Zumwalt v. E. H. Tryon, Inc.*, 14 P.2d 912, 126 Cal.App. 583.

52. Mo.—*Thompson v. Keyes-Marshall Bros. Livery Co.*, 113 S.W. 1128, 214 Mo. 487.

Contributory negligence of person injured by motor vehicle while boarding or alighting from street car see *Motor Vehicles* §§ 477-482

53. Mass.—*McGourty v. De Marco*, 85 N.E. 891, 200 Mass. 57. 44 C.J. p 1070 note 11.

54. N.H.—*Chatel v. Schonland*, 78 A. 128, 75 N.H. 543, 139 Am.S.R. 739.

55. U.S.—*U S. Express Co v. Kraft*, Pa., 161 F. 300, 88 C.C.A. 346, 19 L.R.A., N.S., 296

Ind.—*Frank Bird Transfer Co. v. Morrow*, 72 N.E. 189, 36 Ind.App. 305.

Contributory negligence of occupant or operator of street car injured by motor vehicle see *Motor Vehicles* § 483.

56. Mass.—*Sibley v. Nason*, 81 N.E. 887, 196 Mass. 125, 124 Am.S.R. 520, 12 L.R.A., N.S., 1173, 12 Ann. Cas. 938.

44 C.J. p 1070 note 15.

57. Ill.—*Regan v. McCarthy*, 119 Ill. App. 578.

Within range of lights

La.—*Dean v. Burglass*, 81 So. 330, 144 La. 824.

58. La.—*Damonte v. Patton*, 43 So. 153, 118 La. 530, 118 Am.S.R. 384. 8 L.R.A., N.S., 209, 10 Ann.Cas. 862.

59. Mass.—*Jean v. Nester*, 158 N.E. 893, 261 Mass. 442.

Tenn.—*Ballow v. Postal Tel. Co.*, 12 Tenn.App. 348.

44 C.J. p 1070 note 18.

Contributory negligence of persons under disability injured by motor vehicles see *Motor Vehicles* §§ 484-485.

60. Tenn.—*Ballow v. Postal Tel. Co.*, 12 Tenn.App. 348.

44 C.J. p 1063 note 16 [a], p 1070 note 19.

61. Mass.—*Jean v. Nester*, 158 N.E. 893, 261 Mass. 442.

44 C.J. p 1070 note 20.

62. Mich.—*Sadlowski v. Meeron*, 215 N.W. 422, 240 Mich. 306, reheard 220 N.W. 680, 243 Mich. 602.

63. Wash.—*Wickman v. Lundy*, 206 P. 842, 120 Wash. 69

Negligence of child was not in issue where child was not quite four years old.—*Femling v. Star Pub Co.*, 81 P.2d 293, 195 Wash. 395, set aside on other grounds 84 P.2d 1008, 195 Wash. 395.

64. Ill.—*Star Brewery Co. v. Houck*, 78 N.E. 827, 222 Ill. 348, 113 Am.S.R. 420.

44 C.J. p 1071 note 22.

e. *Actions for Damages*

§ 1790. In General

General rules as to actions apply in the case of actions for injuries on the streets or other public ways of a municipal corporation.

The general rules applicable in the case of actions for injuries arising out of the use of highways generally, discussed in Highways § 246, are applicable in the case of actions for injuries on the streets or other public ways of a municipal corporation.⁶⁵ Actions for injuries resulting from the operation of motor vehicles are discussed in Motor Vehicles §§ 494-560.

§ 1791. Pleading

- a. In general
- b. Issues, proof, and variance

a. In General

In an action for damages arising out of the use of streets and sidewalks, the declaration, petition, or complaint must allege the facts essential to the plaintiff's cause of action.

In accordance with general rules of pleading, and more particularly pleading in actions based on negligence, the declaration, petition, or complaint in an action for damages arising out of the use of streets and sidewalks must allege the facts essential to plaintiff's cause of action.⁶⁶ It is not necessary to allege that at the time of the injury the street on which it is alleged the accident occurred was open to the public.⁶⁷ Also, a complaint in an action for

injuries to a pedestrian while walking on a sidewalk is not demurrable for not alleging that the sidewalk was for the exclusive use of pedestrians, that fact being implied.⁶⁸ Where, in a suit against the municipality, it appears from the complaint that the injury was caused by an ambulance which was being operated for a public hospital of a municipal corporation, the failure to allege that the hospital was operated for private gain and profit has been held to be fatal.⁶⁹ Traffic ordinances must be pleaded the same as any other fact.⁷⁰

b. Issues, Proof, and Variance

In an action for damages arising out of the use of streets and sidewalks, the plaintiff can recover only on proof of the specific negligence charged where he has alleged specific acts of negligence.

In an action for damages arising out of the use of streets and sidewalks, where plaintiff has alleged specific acts of negligence, he can recover only on proof of the specific negligence charged.⁷¹ A person leading a horse along a street has been held to be liable for the injury done by the horse through the person's negligence without the necessity of proving scienter.⁷² Under a general allegation of negligent and reckless driving, any evidence otherwise competent tending to show such driving is admissible.⁷³ Traffic ordinances, in order to be available, must be proved as any other fact.⁷⁴ Evidence is admissible under the general issue to excuse the presence of a vehicle on the wrong side of the

65. Cal.—Coffey v. Slingerland, 50 P.2d 830, 9 Cal.App.2d 731.

Mo.—Gordon v. Postal Telegraph-Cable Co., App., 24 S.W.2d 644.

66. Mo.—Wecker v. Grafeman-McIntosh Ice Cream Co., 31 S.W.2d 974, 326 Mo. 451.

44 C.J. p 1071 note 29.

Allegations held sufficient

(1) In general.

Ga.—Haygood v. Bell, 153 S.E. 432, 41 Ga.App. 535.

Mo.—Klusman v. Harper, 298 S.W. 121, 221 Mo.App. 1110.

44 C.J. p 1071 note 29 [a].

(2) Petition for injuries to traffic policeman alleging that steam roller struck him while near intersection of public streets was sufficient to charge steam roller operator with duty to look.—Haines v. Bridges Asphalt Paving Co., Mo., 55 S.W.2d 481.

(3) Petition alleging that, when bicycle striking plaintiff approached, plaintiff was in imminent peril, and that rider could have avoided accident, stated cause of action under humanitarian rule.—Gordon v. Post-

al Telegraph-Cable Co., Mo.App., 24 S.W.2d 644.

Allegations held insufficient

Mo.—Wecker v. Grafeman-McIntosh Ice Cream Co., 31 S.W.2d 974, 326 Mo. 451.

44 C.J. p 1071 note 29 [b].

General or specific negligence

Petition for injuries, alleging that rider negligently ran bicycle over plaintiff, alleged general primary negligence; but petition alleging that rider negligently ran bicycle over plaintiff, and failed to slacken speed, stop, or turn aside, after seeing plaintiff in imminent peril, in legal effect charged only specific negligence.—Gordon v. Postal Telegraph-Cable Co., Mo.App., 24 S.W.2d 644.

Prima facie negligence

Allegation of leaving horses hitched to wagon untied and unattended in street states prima facie case of negligence, not negligence as matter of law.—Valdez v. Azar Bros., 264 P. 962, 33 N.M. 230.

67. Cal.—Fallon v. United R. Cos., 151 P. 290, 28 Cal.App. 60, 64. 44 C.J. p 1071 note 30.

68. Ala.—American Bolt Co. v. Fennell, 48 So. 97, 158 Ala. 484.

69. Ga.—Watson v. Atlanta, 71 S.E. 664, 136 Ga. 370.

70. La.—Horn v. Draube, 132 So. 531, 16 La.App. 17.

71. Mo.—Crone v. St. Louis Oil Co., 158 S.W. 417, 176 Mo.App. 344. 44 C.J. p 1071 note 33.

Held no variance

Ind.—Danner v. Marquiss, 33 N.E.2d 511, 218 Ind. 441.

Mo.—Crawford v. Kansas City Stock Yards Co., 73 S.W.2d 308, 228 Mo. App. 673.

44 C.J. p 1071 note 33 [a].

72. N.J.—Kastner v. Weinstein, 153 A. 538, 107 N.J.Law 254.

73. N.Y.—Meyers v. Barrett, 152 N. Y.S. 921, 167 App.Div. 170.

44 C.J. p 1071 note 34.

74. La.—Horn v. Draube, 132 So. 531, 16 La.App. 17.

street.⁷⁵ A cause of action for injuries, based on the ground that the driver of a horse was negligent, is disassociated from any liability for the keeping of a vicious horse, and, in an action for the negligence of the driver, evidence of viciousness of the horse is inadmissible.⁷⁶

§ 1792. Evidence

- a. Presumptions and burden of proof
- b. Admissibility
- c. Weight and sufficiency

a. Presumptions and Burden of Proof

The burden is on the plaintiff in an action for damages arising out of the use of streets and sidewalks to establish the facts material to his cause of action.

Under general rules as to presumptions and the burden of proof in civil actions generally, the burden is on plaintiff in an action for damages arising out of the use of streets and sidewalks to establish the facts material to his cause of action,⁷⁷ as, for example, the negligence of defendant,⁷⁸ his responsibility for the act or instrumentality complained of,⁷⁹ and that the act complained of was the proximate cause of the injury.⁸⁰ In some jurisdictions plaintiff has the burden of proving the absence of his own contributory negligence,⁸¹ although, under the rules applicable in cases of negligence generally, in other jurisdictions the burden of establishing contributory negligence is on defendant.⁸²

Under the rules governing the application of the doctrine of *res ipsa loquitur* generally, the mere proof of the injury does not raise a presumption of defendant's negligence,⁸³ but when the thing causing the injury is shown to be under the control of defendant and the accident is such as does not happen if reasonable care is used, it does, in the absence of explanation by defendant, afford sufficient evidence that the accident arose from want of care on his part.⁸⁴

Violation of regulation or law of the road. In case of a collision between a vehicle on the wrong side of the road and one coming from the other direction, it is presumed that the collision was caused by the negligence of the driver of the vehicle on the wrong side of the road.⁸⁵ The burden is on him who violates the law of the road to show that his act was not the proximate cause of the injury or that there were justifiable circumstances which excuse his conduct.⁸⁶ A statute providing that the violation of a one-way ordinance should not render the operator of a vehicle a trespasser frees the operator from the burden consequent on being a "trespasser".⁸⁷

b. Admissibility

Any evidence which is otherwise competent and is relevant to the issues may be admitted in an action for an injury arising from a negligent or wrongful use of a street or other public way.

75. Utah.—*White v. Shipley*, 160 P. 441, 48 Utah 496.

76. N.Y.—*Gropp v. Great Atlantic, etc., Tea Co.*, 142 N.Y.S. 140, 157 App.Div. 346.

77. Del.—*Skonieczny v. Churchman*, 78 A. 634, 23 Del. 226.

78. N.J.—*Hagens v. West Englewood Lumber Co.*, 138 A. 519, 5 N.J.Misc. 825.

Pa.—*Quicksall v. Abbotts Alderney Dairies*, 89 Pa.Super. 420. 44 C.J. p 1072 note 41.

Effect of presumption

Defendant owning horses which crashed into show window was held not to have burden of proving lack of negligence, notwithstanding presumption of negligence.—*Hagens v. West Englewood Lumber Co.*, 138 A. 519, 5 N.J.Misc. 825.

79. N.Y.—*Gershel v. White's Express Co.*, 113 N.Y.S. 919. 44 C.J. p 1072 note 42.

80. Fla.—*Girtman v. Eaton*, 59 So. 397, 64 Fla. 69.

N.Y.—*Crum v. Wright*, 143 N.Y.S. 1080, 82 Misc. 419.

81. Mich.—*Beattie v. J. L. Hudson Co.*, 146 N.W. 660, 180 Mich. 111.

N.Y.—*Perez v. Sandrowitz*, 73 N.E. 228, 180 N.Y. 397.

82. U.S.—*Western Union Telegraph Co. v. Morrissey*, C.C.A.Mass., 92 F. 2d 414.

Mass.—*Nerbonne v. New England S. S. Co.*, 193 N.E. 72, 288 Mass. 508 —*O'Connor v. Hickey*, 167 N.E. 746, 268 Mass. 454.

44 C.J. p 1072 note 46.

83. Pa.—*Bowman v. Stouman*, 141 A. 41, 292 Pa. 293.

44 C.J. p 1072 note 48.

Runaway horse

(1) Mere fact of runaway does not prove negligence of driver of horse-drawn vehicle on streets—*McLaughlin v. American Ice Co.*, 100 Pa.Super. 216—*Quicksall v. Abbotts Alderney Dairies*, 89 Pa.Super. 420.

(2) However, leaving a horse unattended on a city street and not under the control of a driver raises a presumption of negligence placing on the person so doing the burden of justifying the act.—*Evans v. Scott Powell Dairies*, 26 A.2d 449, 344 Pa. 595—*Friel v. Supplee-Wills-Jones Milk Co.*, 10 A.2d 107, 138 Pa.Super. 23—*Ross v. Freihofer Baking Co.*, 163 A. 43, 107 Pa.Super. 151.

(3) So evidence of injury by runaway team left unattended was held to make prima facie case of negligence, which owner was bound to

explain.—*Setzkorn v. City of Buffalo*, 219 N.Y.S. 351, 219 App.Div. 416, affirmed 159 N.E. 670, 246 N.Y. 605.

Eye injury

Res ipsa loquitur was inapplicable to eye injury from particles of glass, where injury was sustained as pedestrian reached point about eight feet from end of a pane of glass being trimmed by employees—*Curby v. Bennett Glass & Paint Co.*, 103 P. 2d 657, 99 Utah 80.

84. N.Y.—*Wasserman v. Kaufman*, 162 N.Y.S. 752.

44 C.J. p 1072 note 49.

Horses on sidewalk

Proof of team of horses running on sidewalk and into show window raised presumption of owner's negligence.—*Hagens v. West Englewood Lumber Co.*, 138 A. 519, 5 N.J.Misc. 825.

85. Utah.—*Staton v. Western Macaroni Mfg. Co.*, 174 P. 821, 52 Utah 426.

44 C.J. p 1072 note 50.

86. Me.—*Bragdon v. Kellogg*, 105 A. 433, 118 Me. 42, 6 A.L.R. 669.

44 C.J. p 1072 note 51.

87. Mass.—*Scranton v. Crosby*, 9 N. E.2d 391, 298 Mass. 15.

Subject to the general rules of evidence in civil actions, any evidence, which is otherwise competent and is relevant to the issues, may be admitted in an action for an injury arising from a negligent or wrongful use of a street or other public way,⁸⁸ as, for example, evidence of regulatory ordinances or statutes,⁸⁹ and of their violation⁹⁰ or of a compliance therewith.⁹¹ Evidence as to a regulatory ordinance is inadmissible, however, where there is no evidence warranting its application.⁹² Evidence of the appearance of the street and a team after a collision is admissible on the question of the injury and its extent,⁹³ and testimony as to a particular part of a wagon injured in a collision is admissible to show the point of contact, although damages to the wagon are not claimed.⁹⁴ Although a team of defendant was rightfully traveling on the left side of a street to avoid a crowd, the fact is competent for the consideration of the jury in passing on the conduct of plaintiff.⁹⁵

The testimony of experts as to how near a team may drive with relation to another team in the exercise of care and skill in approaching and driving past without danger is inadmissible, at least where such question is a matter of common knowledge.⁹⁶

In an action for personal injury caused by plaintiff's horse taking fright at a wild animal exhibited on a street corner, evidence is admissible that other horses were frightened.⁹⁷ Evidence of the vicious disposition of a horse ridden by plaintiff and its tendency to bolt is admissible on the question of contributory negligence.⁹⁸

c. Weight and Sufficiency

General rules as to the weight and sufficiency of evidence are applicable in an action for damages arising from the negligent or wrongful use of streets and sidewalks.

The general rules determinative of the weight and sufficiency of evidence in civil actions generally apply in actions for injury arising from the use of streets or other public ways,⁹⁹ as, for example, with reference to the sufficiency of the evidence to support the verdict generally,¹ or to establish defendant's negligence in striking a pedestrian,² or in injuring a child on the streets,³ or a person approaching or leaving a street car,⁴ or a passenger or a person on a street car,⁵ or a person working in the street.⁶ Likewise, the sufficiency of evidence has been adjudicated with respect to establishing defendant's negligence in colliding with another vehi-

88. Mass.—Violondo v. Ginsberg, 170 N.E. 397, 270 Mass. 418.
44 C.J. p 1072 note 54.

89. Mass.—Violondo v. Ginsberg, supra.
N.J.—Kastner v. Weinstein, 153 A. 538, 107 N.J.Law 254.
44 C.J. p 1073 note 55.

90. Mass.—O'Connor v. Hickey, 156 N.E. 838, 260 Mass. 110.
44 C.J. p 1073 note 56.

91. Mass.—O'Connor v. Hickey, supra.
44 C.J. p 1073 note 57.

92. N.C.—Hayes v. Pine State Creamery, 141 S.E. 340, 195 N.C. 113.

93. N.Y.—John Simmons Co. v. Piercy, 109 N.Y.S. 730.

94. Mo.—Hill v. Meyer, App., 221 S.W. 171.

95. Mass.—Crimmins v. Armstrong Transfer Express Co., 104 N.E. 457, 217 Mass. 155.

96. Cal.—Sullivan v. Morton Draying, etc., Co., 108 P. 895, 13 Cal. App. 85.

97. Iowa.—Stokes v. Sac City, 144 N.W. 639, 162 Iowa 514.
44 C.J. p 1073 note 62.

98. Ill.—Wallin v. Mitchell, 200 Ill. App. 324.

99. Wash.—Femling v. Star Pub. Co., 84 P.2d 1008, 195 Wash. 395.

1. Evidence held sufficient

Cal.—Petro v. Martinez, 176 P.2d 933, 77 Cal App 2d 912.
Neb.—Harstick v. Beckenhauer, 8 N.W.2d 834, 143 Neb. 179.
Pa.—McLaughlin v. American Ice Co., 100 Pa.Super. 216.
44 C.J. p 1073 note 67 [a].

Evidence held insufficient

Wash.—Adams v. Anderson, etc., Lumber Co., 214 P. 835, 124 Wash. 356.

2. Evidence held sufficient

(1) In general.
Cal.—Brockway v. Western Union Telegraph Co., 84 P.2d 524, 29 Cal. App.2d 244.
Ill.—Livingston v. Blind, 138 Ill.App. 494.
44 C.J. p 1073 note 68 [a].

(2) In an action for personal injuries alleged to have been sustained by being run over by a vehicle of defendant, a prima facie case of negligence is established by showing the violation of an ordinance consisting in driving a team at a prohibited rate of speed.—Richard Guthmann Transfer Co. v. McGuire, 138 Ill.App. 162, affirmed McGuire v. Richard Guthmann Transfer Co., 84 N.E. 728, 234 Ill. 125.

Evidence held insufficient

La.—Preaus v. Western Union Telegraph Co., App., 151 So. 813.
Miss.—White v. McCoy, 7 So.2d 886.
Wash.—Femling v. Star Pub. Co., 84 P.2d 1008, 195 Wash. 395.
44 C.J. p 1073 note 68 [b].

3. Evidence held sufficient

Conn.—Chernov v. Blakeslee, 111 A. 908, 95 Conn. 617.
44 C.J. p 1073 note 69 [a].

Evidence held insufficient

Md.—Schier v. Wehner, 82 A. 976, 116 Md. 553, Ann Cas 1913C 1053.
44 C.J. p 1073 note 69 [b].

4. Evidence held sufficient

Ill.—Balsley v. Petzel, 182 Ill.App. 136.

Evidence held insufficient

Mass.—Botway v. Oslason, 106 N.E. 857, 219 Mass. 250.
Pa.—Shaffer v. Roesch, 64 A. 511, 215 Pa. 287.

5. Evidence held sufficient

Ind.—Ft. Wayne, etc., Tract. Co. v. Parish, 119 N.E. 488, 67 Ind.App. 597.

Pa.—Lynch v. Abbott's Alderney Dairies, 92 Pa.Super. 172.

Evidence held insufficient

Pa.—Walker v. Supplee-Wills-Jones Milk Co., 18 A.2d 446, 143 Pa.Super. 573.
44 C.J. p 1073 note 71 [b].

6. Evidence held sufficient

Conn.—Hayes v. Morris, 119 A. 901, 98 Conn. 603.

Evidence held insufficient

Iowa.—Ash v. Century Lumber Co., 133 N.W. 888, 153 Iowa 528, 38 L.R.A., N.S., 973.

cle,⁷ or animals,⁸ or a horseback rider,⁹ or in frightening horses;¹⁰ to show defendant's ownership or control of the vehicle alleged to have occasioned the injury;¹¹ or of the animal alleged to have occasioned the injury;¹² and to show the causal connection between defendant's act and the injury.¹³

General rules have also been applied in determining the sufficiency of evidence to show a violation of traffic regulations;¹⁴ to show negligence in leaving horses or other animals unattended or unsecured;¹⁵ to show negligence resulting in a runaway;¹⁶ to show negligence in leading animals;¹⁷ and to show the contributory negligence of plaintiff¹⁸ or the absence thereof.¹⁹ Evidence which may be said to establish negligence on the part of

defendant is insufficient to support a recovery where it equally tends to show negligence on the part of plaintiff.²⁰ A verdict for plaintiff cannot be set aside because the evidence leaves it uncertain which of two causes was responsible for the injury if defendant is liable for both causes.²¹ Proof of the violation of governmental regulations constitutes some evidence of negligence in connection with other facts,²² and a statute providing that the violation of a one-way ordinance should not render the operator of a vehicle a trespasser has been held not to change the rule that illegal conduct is evidence of negligence.²³ Driving on the wrong side of the road may be presumptive evidence of negligence,²⁴ which may be overcome by proof of circumstances showing the necessity of the action.²⁵

7. U.S.—Adams Express Co. v. Adams, Neb., 159 F. 62, 86 C.C.A. 252.

44 C.J. p 1073 note 73.

8. N.Y.—Blrns Express, Inc. v. Foster-Scott Ice Co., 144 N.Y.S. 683, 44 C.J. p 1073 note 74.

9. Evidence held insufficient
Tex.—Hiegler Ice Cream Co. v Thomas, Civ.App., 165 S.W. 3.

10. Evidence held sufficient
Tex.—Scott v. Shine, Civ.App., 194 S.W. 964.

11. Evidence held sufficient
Mass.—Eshenwald v. Suffolk Brewing Co., 134 N.E. 642, 241 Mass. 166.

44 C.J. p 1073 note 77.

12. Evidence held sufficient
N.Y.—Flieg v. Levy, 133 N.Y.S. 249, 148 App.Div. 781, affirmed 101 N.E. 1162, 208 N.Y. 564.

13. Evidence held sufficient

(1) In general.

Ill.—Livingston v. Blind, 138 Ill. App. 494.

Mass.—Nerbonne v. New England S. S. Co., 193 N.E. 72, 288 Mass. 508.
Tenn.—Western Union Tel. Co. v. Dickson, 173 S.W.2d 714, 27 Tenn. App. 752.

44 C.J. p 1074 note 79 [a].

(2) To show that plaintiff's negligence in not closely observing traffic conditions when she attempted to cross street was proximate cause of collision.—Preaus v. Western Union Telegraph Co., La.App., 151 So. 813.

Evidence held insufficient
Pa.—Buccilli v. Shanahan, 109 A. 634, 266 Pa. 342.

44 C.J. p 1074 note 79 [c].

14. Evidence held sufficient
D.C.—Standard Oil Co. v. Allen, 267 F. 645, 50 App.D.C. 87.

15. Evidence held sufficient

(1) In general.

Mass.—Violondo v. Ginsberg, 170 N. E. 397, 270 Mass. 418.

Pa.—Friel v. Supplee-Wills-Jones

Milk Co., 10 A.2d 107, 138 Pa.Super 23.

44 C.J. p 1074 note 81 [a].

(2) To establish prima facie case of negligence—Rice v. Von Der Lieth, 181 N.Y.S. 767, 111 Misc. 418.

Evidence held insufficient

Cal.—Parkin v. Grayson-Owen Co., 143 P. 257, 25 Cal.App. 269.
44 C.J. p 1074 note 81 [b].

Some evidence of negligence

Leaving horse unhitched and unattended on city streets is at least some evidence of negligence.—Courtner v. Secombe, 8 Minn. 299—44 C.J. p 1057 note 52.

16. N.Y.—Bernardine v. City of New York, 51 N.Y.S.2d 888, 268 App.Div. 444, affirmed 62 N.E.2d 604, 294 N.Y. 361, 161 A.L.R. 364.
44 C.J. p 1074 note 82.

Purported explanation

In action against city for personal injuries caused by runaway police horse stopped by plaintiff on a public highway wherein defendant's negligence was prima facie established by proof that horse was running away unattended, a purported explanation of how the horse came to be unattended by showing that when policeman was in act of mounting horse it threw the officer and ran away confirmed proof of defendant's negligence.—Bernardine v. City of New York, supra.

17. Evidence held insufficient

Mo.—Lyman v. Dale, 171 S.W. 352, 262 Mo. 353.

18. Evidence held sufficient

Cal.—McCormick v. Red Arrow Bonded Messenger Corporation, 117 P.2d 376, 47 Cal.App.2d 89.
44 C.J. p 1074 note 84 [a].

Evidence held insufficient

Tex.—Studebaker Bros. Mfg. Co. v. Carter, 111 S.W. 1086, 51 Tex.Civ. App. 331.

44 C.J. p 1074 note 84 [b].

19. Mass.—Violondo v. Ginsberg, 170 N.E. 397, 270 Mass. 418.

44 C.J. p 1074 note 85.

Evidence held sufficient

Mass.—Violondo v. Ginsberg, supra.
44 C.J. p 1074 note 85 [a].

"Some" evidence of care

Evidence that pedestrian looked twice before attempting to cross from safety zone to sidewalk and saw no vehicle approaching was "some" evidence of care—Baldock v. Western Union Telegraph Co., 15 P.2d 199, 127 Cal.App. 141.

20. Ind.—Winski v. Clegg, 142 N.E. 130, 81 Ind.App. 560.
44 C.J. p 1074 note 86.

21. Mo.—Gerken v. City Dairies Co., App., 249 S.W. 130.
44 C.J. p 1074 note 87.

22. N.Y.—Roles v. John A. Schwarz, Inc., 278 N.Y.S. 307, 244 App.Div. 729.

Protection and safety

Where a municipal ordinance prescribes a duty for the protection and safety of others and there is a reasonable and logical connection between the failure to observe the requirements of the ordinance and the omission claimed to have caused the injury, the neglect of duty imposed by the ordinance is evidence of negligence.—Young v. Honolulu Construction & Draying Co., 34 Hawaii 426.

23. Mass.—Scranton v. Crosby, 9 N. E.2d 391, 298 Mass. 15.

24. Fla.—Florida Motor Lines v. Ward, 137 So. 163, 102 Fla. 1105.
44 C.J. p 1049 note 20.

Strongest kind of presumption of negligence prevails

Utah.—Staton v. Western Macaroni Mfg. Co., 174 P. 821, 52 Utah 426.

25. Cal.—Anderson v. Dahl, 8 P.2d 883, 121 Cal.App. 198.
44 C.J. p 1049 note 21.

§ 1793. Trial

General rules of trial apply in actions for damages resulting from the negligent or wrongful use of streets or sidewalks.

The rules governing the course and conduct of trials in civil actions generally apply in actions for injuries resulting from the negligent or wrongful use of public streets or sidewalks.²⁶

§ 1794. — Questions of Law and Fact

- a. In general
- b. Contributory negligence

a. In General

In actions arising out of injuries from the use of streets, it is for the jury to determine controverted questions of fact if the evidence is conflicting or such that different inferences may fairly be drawn therefrom; but the evidence may be such as to require that the defendant's freedom from liability be determined by the court as a matter of law.

Under the general rules applicable to the trial of civil actions, in actions arising out of injuries from the use of streets, it is, where the trial is to a jury,

for the jury to determine controverted questions of fact if the evidence is conflicting or such that different inferences may fairly be drawn therefrom.²⁷ Hence, the question of defendant's negligence is one of fact for the jury,²⁸ as, for example, in case of injuries occasioned to pedestrians,²⁹ or children in the street,³⁰ or persons working in the street,³¹ or in the case of injuries arising from collisions between vehicles.³² The question of defendant's negligence should also be submitted to the jury, where the evidence is conflicting, in the case of injuries occurring because of horses not being under control,³³ or because of their running away,³⁴ or because of their having been insecurely fastened or unattended,³⁵ or because of the manner in which a vehicle is loaded.³⁶ It is also a question for the jury whether defendant's negligence was the proximate cause of the injuries received by plaintiff.³⁷

On the other hand, where the facts present no conflict and furnish the basis for but a single inference and that favorable to defendant, his freedom from liability is to be determined by the court as a matter of law.³⁸ Also, the reasonableness of an

26. Mass.—O'Connor v. Hickey, 156 N.E. 838, 260 Mass. 110.

27. Pa.—Eddy v. Reed, 86 Pa.Super. 578.

44 C.J. p 1074 note 90.

28. U.S.—Massey-Harris Co. v. Gill, C.C.A.Okl., 64 F.2d 392.

Hawaii—Young v. Honolulu Construction & Draying Co., 34 Hawaii 426.

Ill.—Alexander v. Brewerton Coal Co., 258 Ill.App. 281.

Mich.—Sadlowski v. Meeron, 215 N.W. 422, 240 Mich. 306, reheard 220 N.W. 680, 243 Mich. 602.

Mo.—Haines v. Bridges Asphalt Paving Co., 55 S.W.2d 431.

Neb.—Day v. Metropolitan Utilities Dist., 214 N.W. 647, 115 Neb. 711, rehearing denied 216 N.W. 556, 115 Neb. 711.

44 C.J. p 1074 note 91.

29. Cal.—Schediwy v. McDermott, 298 P. 107, 113 Cal.App. 218.

Ind.—Danner v. Marquiss, 33 N.E.2d 511, 218 Ind. 441.

N.H.—Mattosian v. American Circus Corporation, 139 A. 580, 83 N.H. 147.

44 C.J. p 1075 note 92.

Injury by bicycle

Cal.—Baldock v. Western Union Telegraph Co., 15 P.2d 199, 127 Cal. App. 141.

Kan.—Jent v. Postal Telegraph Cable Co., 275 P. 1096, 128 Kan. 46.

Ky.—Foreman v. Western Union Telegraph Co., 14 S.W.2d 1079, 228 Ky. 300.

N.C.—Strother v. Western Union Telegraph Co., 190 S.E. 899, 211 N.C. 738.

Injury by hand truck

N.Y.—Russell v. James Butler Grocery Co., 193 N.E. 281, 265 N.Y. 482.

30. Mass.—Slora v. Streeter & Sons Co., 163 N.E. 155, 264 Mass. 586.

N.Y.—Reiss v. City of New York, 246 N.Y.S. 302, 231 App Div. 42.

44 C.J. p 1075 note 93.

31. Mich.—O'Donnell v. Lange, 127 N.W. 691, 162 Mich. 654, Ann.Cas. 1912A 847.

Tex.—Sulzberger, etc., Co. v. Page, Civ.App., 195 S.W. 928.

32. R.I.—Rutkovich v. Cialella, 135 A. 401.

44 C.J. p 1076 note 95.

33. N.J.—Kastner v. Weinstein, 153 A. 538, 107 N.J.Law 254.

Pa.—Ross v. Freihofer Baking Co., 163 A. 43, 107 Pa.Super. 151.

44 C.J. p 1076 note 96.

34. Ky.—Gray-Von Allmen Sanitary Milk Co. v. McAfee, 17 S.W.2d 231, 229 Ky. 444.

N.Y.—Rice v. Von Der Lieth, 178 N.Y.S. 441, 108 Misc. 284, reversed on other grounds 181 N.Y.S. 767, 111 Misc. 418.

44 C.J. p 1076 note 97.

35. Ill.—Williams v. Bowman Dairy Co., 7 N.E.2d 503, 289 Ill.App. 620.

Mass.—Brown v. Hathaway Bakeries, 43 N.E.2d 328, 312 Mass. 110.

—O'Connor v. Hickey, 167 N.E. 746, 268 Mass. 454—O'Connor v. Hickey, 186 N.E. 828, 260 Mass. 110.

44 C.J. p 1057 note 62, p 1076 note 98.

Whether horse left unhitched

On conflicting evidence the ques-

tion whether defendant in fact left the horse unhitched and unattended is for the jury.—Hensley v. Davidson Bros. Co., Iowa, 103 N.W. 975—44 C.J. p 1057 note 63.

Justification

Whether owner or driver of horse justified his act in leaving it unhitched on public street is for jury, in action for injury occasioned thereby.—Ross v. Freihofer Baking Co., 163 A. 43, 107 Pa.Super. 151.

36. Ga.—Hardwick v. Figgers, 106 S.E. 738, 26 Ga.App. 494.

44 C.J. p 1076 note 99.

37. Mo.—Crawford v. Kansas City Stock Yards Co., 73 S.W.2d 308, 228 Mo.App. 673.

Intervening cause

Under evidence showing that farm manufacturer's agents were demonstrating and guarding tractor and that while their attention was diverted someone caused tractor to start and run into building, causing plaintiff's injury, question of proximate cause of accident was for jury.—Massey-Harris Co. v. Gill, C.C.A. Okl., 64 F.2d 392.

38. Mass.—Brown v. Hathaway Bakeries, 43 N.E.2d 328, 312 Mass. 110.

Pa.—Walker v. Supplee-Wills-Jones Milk Co., 18 A.2d 446, 143 Pa.Super. 573.

Utah.—Curby v. Bennett Glass & Paint Co., 103 P.2d 657, 99 Utah 80.

Wash.—Fleming v. Star Pub. Co., 84 P.2d 1008, 195 Wash. 395.

44 C.J. p 1076 note 1.

ordinance respecting the right of way, if drawn into question, is for the court.³⁹ The causal connection between the violation of a statute as to the use of highways and an accident may be so clear on undisputed facts as to be a question of law,⁴⁰ but in other situations it is a question of fact for the jury.⁴¹ So the violation of a statute or ordinance regulating the operation of vehicles on streets is not always negligence as a matter of law.⁴²

b. Contributory Negligence

A verdict should be directed for the defendant on the ground of contributory negligence, in an action for injuries received in a public street or way, only where reasonable minds would agree that the injury was caused by contributory negligence and there is no evidence on which the jury might reasonably find otherwise.

A verdict should be directed for defendant on

the ground of contributory negligence, in an action for injuries received in a public street or way, only where reasonable minds would agree that the injury was caused by contributory negligence and there is no evidence on which the jury might reasonably find otherwise.⁴³ So, where the evidence is conflicting and the inferences to be drawn from it are not clear, the question whether plaintiff has exercised such care and diligence to avoid injury as was to be expected of a reasonably careful and prudent person under the circumstances is for the jury.⁴⁴ For example, the contributory negligence of a pedestrian ordinarily is for the jury,⁴⁵ as is that of a child injured while in the street,⁴⁶ or a person working in the street,⁴⁷ or boarding or leaving a street car,⁴⁸ or riding thereon.⁴⁹ In like man-

Injury to pedestrian

In action for injuries to pedestrian, struck by bicycle while crossing street, evidence that plaintiff looked to left and right when six feet from curb and could see four blocks along street, but saw no moving vehicle before starting across street, was insufficient to make out prima facie case for jury, in absence of any evidence as to how bicycle was ridden, where it came from, or what rider did or failed to do.—*Wass v. Western Union Telegraph Co.*, 10 N.Y.S. 2d 956.

39. Ga.—*Schnore v. Joyner*, 157 S.E. 353, 42 Ga App 688.

40. Wis.—*Steinkrause v. Eckstein*, 175 N.W. 988, 170 Wis. 487.

Willful or negligent violation of a city ordinance, requiring vehicles to keep to the left in passing another vehicle, is negligence per se.—*Hamilton v. Larrimer*, 105 N.E. 43, 183 Ind. 429.

41. Me.—*Briggs v. Lake Auburn Crystal Ice Co.*, 92 A. 185, 112 Me. 344.

Wis.—*Steinkrause v. Eckstein*, 175 N.W. 988, 170 Wis. 487.

42. Hawaii.—*Char v. Honolulu Rapid Transit Co.*, 31 Hawaii 53.

43. Mass.—*Nerbonne v. New England S. S. Co.*, 193 N.E. 72, 288 Mass. 508.

Pa.—*Smith v. Pachter*, 19 A.2d 85, 342 Pa. 21.
44 C.J. p 1076 note 4.

Conduct held not contributory negligence as matter of law

(1) In general.—*O'Connor v. Hickey*, 156 N.E. 838, 260 Mass. 110—44 C.J. p 1076 note 4 [a]—[d].

(2) Contributory negligence as a matter of law is not to be determined by whether pedestrian looked more than once before crossing street or by the number of times he looked.—*Moeller v. St. Paul City Ry. Co.*, 16 N.W.2d 289, 218 Minn. 353,

156 A.L.R. 371—44 C.J. p 1076 note 4 [a] (4).

(3) Under ordinance pertaining to rights and duties of pedestrians in their use of city streets and prohibiting jaywalking, a pedestrian is not guilty of negligence as a matter of law in walking along the roadway of a city street.—*Neyrey v. Maillet*, La.App. 21 So.2d 158.

(4) Under statute requiring pedestrians crossing a roadway at any point other than within a marked crosswalk or within an unmarked crosswalk at an intersection to yield right of way to vehicles, pedestrian crossing from safety zone at street car tracks to nearest curb after alighting from street car was not guilty of contributory negligence as a matter of law, so as to preclude recovery for injury sustained when struck by bicyclist.—*Brockway v. Western Union Telegraph Co.*, 84 P. 2d 524, 29 Cal.App.2d 244.

44. Cal.—*Scott v. City and County of San Francisco*, App., 206 P.2d 45.

Ill.—*Alexander v. Brewerton Coal Co.*, 258 Ill.App. 281.

Mass.—*Brown v. Hathaway Bakeries*, 43 N.E.2d 328, 312 Mass. 110.
Mich.—*Sadlowski v. Meeron*, 215 N.W. 422, 240 Mich. 306, reheard 220 N.W. 680, 243 Mich. 602.

Neb.—*Day v. Metropolitan Utilities Dist.*, 214 N.W. 647, 115 Neb. 711, rehearing denied 216 N.W. 556, 115 Neb. 711.

N.J.—*Kastner v. Weinstein*, 153 A. 538, 107 N.J.Law 254.

Pa.—*Kovacs v. Ajhar*, 196 A. 876, 130 Pa Super. 149.
44 C.J. p 1066 note 67, p 1077 note 5.

45. U.S.—*Western Union Telegraph Co. v. Morrissey*, C.C.A.Mass., 92 F. 2d 414.

Cal.—*Brandes v. Freitas*, 2 P.2d 830, 116 Cal.App. 459—*Schediwy v. McDermott*, 298 P. 107, 113 Cal.App. 218.

Mo.—*Schiermeier v. Kroger Grocery & Baking Co.*, 167 S.W.2d 967.

N.C.—*Hayes v. Western Union Telegraph Co.*, 189 S.E. 499, 211 N.C. 192.

Pa.—*McLaughlin v. American Ice Co.*, 100 Pa.Super. 216.

Va.—*Heindl v. Perritt*, 163 S.E. 93, 158 Va. 104.

Wash.—*Ahrens v. Anderson*, 57 P. 2d 410, 186 Wash. 182.

44 C.J. p 1078 note 6.

Violation of statute or ordinance

In pedestrian's action for injuries received when struck by bicycle while crossing intersection, whether there was violation of traffic ordinance by plaintiff, whether such violation was excusable or justifiable, and whether it contributed proximately to injury, were questions for jury.—*Coffey v. Slingerland*, 50 P.2d 830, 9 Cal.App.2d 731.

Aged pedestrian

Jury, in determining what constitutes reasonable care on part of aged pedestrian, should consider his infirmities and conditions incident to age.—*O'Connor v. Hickey*, 156 N.E. 838, 260 Mass. 110.

46. Mass.—*Slora v. Streeter & Sons Co.*, 163 N.E. 155, 264 Mass. 586.

N.Y.—*Reiss v. City of New York*, 246 N.Y.S. 302, 231 App.Div. 42.

44 C.J. p 1078 note 7.

Coasting by children on a street not extensively used by public, if not expressly prohibited by ordinance, is not necessarily negligence per se.—*Smith v. Pachter*, 19 A.2d 85, 342 Pa. 21.

47. Mich.—*O'Donnell v. Lange*, 127 N.W. 691, 162 Mich. 654, Ann.Cas. 1912A 847.

44 C.J. p 1078 note 8.

48. Mass.—*McGourty v. De Marco*, 85 N.E. 891, 200 Mass. 57.

Mo.—*Wyer v. Ratican*, 131 S.W. 155, 150 Mo.App. 474.

49. U.S.—*U. S. Express Co. v.*

ner, plaintiff's contributory negligence in an action arising out of a collision between vehicles ordinarily is for the jury.⁵⁰ It is also a question for the jury whether plaintiff's negligence was the proximate cause of his injuries.⁵¹

The question of contributory negligence is one of law, on the other hand, where the facts are undisputed.⁵² So, where the only conclusion possible from the testimony is that plaintiff was guilty of contributory negligence, a dismissal of the action is warranted.⁵³ However, the evidence as to defendant's negligence on ascertaining plaintiff's position of peril may be sufficient to warrant submission of the case to the jury under the so-called "humanitarian" rule.⁵⁴

§ 1795. — Instructions

The parties in an action for damages arising out of the negligent or wrongful use of streets or sidewalks are entitled to instructions on any issue that the evidence tends to support, which is not sufficiently covered

by other instructions; but the instructions must conform to the issues as raised by the pleadings, must correctly state the law applicable to the issues, and must not be misleading.

In accordance with the rules applicable in civil cases generally, the parties in an action for damages arising out of the negligent or wrongful use of streets or sidewalks are entitled to instructions on any issue that the evidence tends to support,⁵⁵ which is not sufficiently covered by other instructions;⁵⁶ but a requested instruction is properly refused when so worded as to exclude consideration of relevant evidence⁵⁷ or principles of law,⁵⁸ or which states a principle inapplicable to the particular facts of the case,⁵⁹ or where the evidence fails to raise the issue on which the instruction is sought,⁶⁰ or where the requested instruction is in part correct and in part incorrect.⁶¹ If a requested instruction is correct as far as given, but is not sufficiently full, it is the duty of counsel to ask for a further explanatory charge.⁶²

Instructions must be predicated on the evidence and conform to the issues,⁶³ as raised by the pleadings,⁶⁴ and they should correctly state the law⁶⁵ applicable to all issues involved, such as the rights

Kraft, Pa., 161 F. 300, 88 C.C.A. 346, 19 L.R.A., N.S., 296.
44 C.J. p 1079 note 10.

50. Neb.—Hackett v. Alamito Sanitary Dairy Co., 133 N.W. 227, 90 Neb. 200, 41 L.R.A., N.S., 337, Ann. Cas. 1913A 829.
44 C.J. p 1079 note 11.

51. Tenn.—Western Union Tel. Co. v. Dickson, 173 S.W.2d 714, 27 Tenn.App. 752.

52. Ky.—Foreman v. Western Union Telegraph Co., 14 S.W.2d 1079, 228 Ky. 300.

53. Pa.—Henson v. Arthur, 66 A. 256, 217 Pa. 156.
44 C.J. p 1079 note 12.

54. Mo.—Gordon v. Postal Telegraph-Cable Co., App., 24 S.W.2d 644—Klusman v. Harper, 298 S.W. 121, 221 Mo.App. 1110.

55. Cal.—Coffey v. Slingerland, 50 P.2d 830, 9 Cal.App.2d 731.
Mass.—O'Connor v. Hickey, 167 N.E. 746, 268 Mass. 454.
44 C.J. p 1079 note 14.

Presumption of negligence

In pedestrian's action for injuries received when struck by bicycle while crossing intersection, where evidence was conflicting as to whether plaintiff crossed intersection in violation of ordinance, instructions relating to presumption of negligence arising from violation of ordinance, evidence necessary to overcome presumption, and proximate cause should be given.—Coffey v.

Slingerland, 50 P.2d 830, 9 Cal.App.2d 731.

56. Vt.—Fertel v. Peck, 67 A. 818, 80 Vt. 351.
44 C.J. p 1079 note 15.

57. Ala.—J. T. Camp Transfer Co. v. Davenport, 74 So. 156, 15 Ala.App. 507, certiorari denied 74 So. 1005, 199 Ala. 698.
44 C.J. p 1079 note 16.

58. Mo.—Crawford v. Kansas City Stock Yards Co., 73 S.W.2d 308, 228 Mo.App. 673—Gordon v. Postal Telegraph-Cable Co., App., 24 S.W.2d 644—Nordmann v. J. Hahn Bakery Co., App., 298 S.W. 1037.
Okl.—P. & S. Taxi & Baggage Co. v. Cameron, 80 P.2d 618, 183 Okl. 226.
44 C.J. p 1079 note 17.

Last clear chance

In pedestrian's action for injuries received when struck by bicycle while crossing intersection, refusal of instruction relating to last clear chance doctrine which omitted element that defendant by exercise of ordinary care had last clear chance to avoid accident, and that he failed to exercise such ordinary care, was not error.—Coffey v. Slingerland, 50 P.2d 830, 9 Cal.App.2d 731.

59. Ill.—Condon v. Chicago R. Co., 181 Ill.App. 830.
44 C.J. p 1080 note 18.

60. Mo.—Crawford v. Kansas City Stock Yards Co., 73 S.W.2d 308, 228 Mo.App. 673—Nordmann v. J. Hahn Bakery Co., App., 298 S.W. 1037.

44 C.J. p 1080 note 19.

61. N.Y.—Dooling v. New York, 132 N.Y.S. 1012, 148 App.Div. 713.
44 C.J. p 1080 note 20.

62. Tex.—Patton-Worsham Drug Co. v. Drennon, Civ App., 123 S.W. 705, reversed on other grounds 133 S.W. 871, 104 Tex. 62.

63. Ky.—Foreman v. Western Union Telegraph Co., 14 S.W.2d 1079, 228 Ky. 300.
44 C.J. p 1080 note 22.

Primary negligence

Instruction on driver's negligence as to child was held not erroneous, as submitting question of primary negligence as well as humanitarian doctrine.—Klusman v. Harper, 298 S.W. 121, 221 Mo.App. 1110.

Instruction held not objectionable

Ind.—Danner v. Marquiss, 33 N.E.2d 511, 218 Ind. 441.

64. Ky.—Foreman v. Western Union Telegraph Co., 14 S.W.2d 1079, 228 Ky. 300.
44 C.J. p 1080 note 23.

65. Mass.—O'Connor v. Hickey, 156 N.E. 838, 260 Mass. 110.
N.Y.—Manard v. Sheppard, 276 N.Y.S. 494, 243 App.Div. 265.
44 C.J. p 1080 note 24.

Instruction held not erroneous

Mo.—Gordon v. Postal Telegraph-Cable Co., App., 24 S.W.2d 644.

Proximate cause

Ill.—Metropolitan Trust Co. v. Bowman Dairy Co., 11 N.E.2d 847, 292 Ill.App. 492, affirmed 15 N.E.2d 838, 369 Ill. 222.

44 C.J. p 1080 note 24 [c].

and duties of pedestrians,⁶⁶ the law of the road,⁶⁷ burden of proof,⁶⁸ and contributory negligence.⁶⁹ Instructions must not be misleading,⁷⁰ or assume the existence of evidence not given,⁷¹ or invade the province of the jury,⁷² and should define technical terms used therein.⁷³ Instructions directing a verdict on the finding of certain facts must include every fact essential to recovery.⁷⁴ Instructions should be considered as a whole and if, taken together, they fairly and fully present the law, they are not objectionable.⁷⁵

§ 1796. — Verdict and Findings

In an action for damages arising out of the negligent or wrongful use of public streets or sidewalks, special findings of the jury must be consistent with the general verdict.

As in other civil actions, special findings of the jury in an action for damages arising out of the negligent or wrongful use of public streets or sidewalks must be consistent with the general verdict.⁷⁶ However, a finding that the evidence establishes no cause for the running away of a team will not defeat a finding of the negligence of defendant in failing to secure the team and of defendant's liability for its consequences.⁷⁷

§ 1797. Damages

General rules of damages apply in actions based on the negligent or wrongful use of streets or sidewalks.

The general rules of damages, except as modified by statute, apply to actions for injuries resulting from the negligent or wrongful use of public streets or sidewalks.⁷⁸

f. Offenses and Penalties

§ 1798. In General

A violation of regulations concerning the use of public streets and ways is frequently made a criminal or penal offense; but a prosecution for the violation is warranted when, and only when, the conduct complained of is within the terms of the statute or ordinance.

Within the limitations imposed by charter, constitutional, and statutory provisions, a municipality in the exercise of its police power may enforce its ordinances and regulations by the infliction of punishment for the violation thereof as discussed supra § 314; and, where such power exists, a violation of regulations concerning the use of public streets and ways is frequently made a criminal or penal offense.⁷⁹ So the violation of traffic regulations promulgated by a police commission may be

made punishable as an offense, and a civil action for the penalty is not the only remedy which is available.⁸⁰ However, an ordinance prohibiting a certain use of the street under a penalty of a fixed sum does not authorize the arrest and criminal prosecution of a person for violating the ordinance.⁸¹ Traffic regulations providing for fine or imprisonment for the violation thereof have been held to be penal in nature and hence subject to strict construction.⁸²

A prosecution for violation of such regulations is warranted when, and only when, the conduct complained of is within the terms of the statute or ordinance;⁸³ and the prosecution may not be maintained where the acts or omissions of accused do

66. Mass.—O'Connor v. Hickey, 156 N.E. 838, 260 Mass. 110.
44 C.J. p 1080 note 25.

67. Cal.—Slaughter v. Goldberg, 147 P. 90, 26 Cal.App. 318.
44 C.J. p 1081 note 28.

68. Tex.—Municipal Pav. Co. v. Donovan Co., Civ.App., 142 S.W. 644.
44 C.J. p 1081 note 27.

69. Minn.—Bolstad v. Armour, 144 N.W. 462, 124 Minn. 155.
44 C.J. p 1081 note 28.

Humanitarian theory
Instruction submitting case on humanitarian theory was not erroneous in stating that plaintiff's own negligence is no defense.—Gordon v. Postal Telegraph-Cable Co., Mo.App., 24 S.W.2d 644.

70. Mass.—O'Connor v. Hickey, 156 N.E. 838, 260 Mass. 110.
N.Y.—Dementes v. Yellow Taxi Cor-

poration, 228 N.Y.S. 450, 223 App. Div. 482.
44 C.J. p 1081 note 29.

Instructions held not misleading
Tenn.—Dennie v. Isler, 8 Tenn.App. 1.
44 C.J. p 1081 note 29 [b].

71. Colo.—Coors v. Brock, 96 P. 963, 44 Colo. 80.

72. Ala.—Southern Hardware, etc., Co. v. Standard Equipment Co., 48 So. 357, 158 Ala. 596.

73. Iowa.—Stokes v. Sac City, 130 N.W. 786, 151 Iowa 10.
44 C.J. p 1082 note 32.

74. Mo.—Crone v. St. Louis Oil Co., 158 S.W. 417, 176 Mo.App. 344.
44 C.J. p 1082 note 33.

75. Iowa.—Stokes v. Sac City, 144 N.W. 639, 162 Iowa 514.
44 C.J. p 1082 note 34.

76. Kan.—Dehner v. American R. Express Co., 311 P. 1115, 112 Kan. 618.

77. Kan.—Dehner v. American R. Express Co., supra.

78. Mo.—Nordmann v. J. Hahn Bakery Co., App., 298 S.W. 1037.

79. Md.—State v. Magaha, 32 A.2d 477, 182 Md. 122.
44 C.J. p 1023 note 87 [a].

Street obstructions and encroachments as:
Criminal offense see supra § 1756.
Penal offense see supra § 1755.

80. N.Y.—People v. Lewis, 3 N.Y.S. 2d 508, 167 Misc. 139.

81. N.Y.—Fuller v. Redding, 39 N.Y.S. 109, 16 Misc. 634, reversed on other grounds 43 N.Y.S. 96, 13 App. Div. 61.

82. N.Y.—People, on Complaint of McGuire, v. Perry, 23 N.Y.S.2d 769.

83. N.Y.—People v. Berkowitz, 39 N.Y.S.2d 236.

Matters considered
In determining whether causing a wagon drawn by team of burros to

not constitute a violation⁸⁴ or fall within an exception to the prohibition⁸⁵ of the regulation. Under an ordinance regulating or prohibiting the distribution of pamphlets, circulars, or other advertising matter, the mere act of distribution makes the offense complete,⁸⁶ but there must be a distribution on a public street or other public place denoted for the ordinance to be violated.⁸⁷ Under the terms of some ordinances, accused may not be charged with a violation in the case of distribution of a single pamphlet,⁸⁸ or distribution of political circulars⁸⁹ or pamphlets of historic and social interest,⁹⁰ or in the case of sale of newspapers or other printed matter.⁹¹ It has also been held that a member of a religious sect who sold religious pamphlets on a city sidewalk did not violate an ordinance prohibiting the sale of pamphlets between certain hours on designated sidewalks, where the sale of the religious pamphlets did not interfere with traffic or with the safety, comfort, or convenience of the public in the use of the streets.⁹²

Where a city ordinance forbids animals being driven through its streets to go on any sidewalk,

or otherwise to occupy, obstruct, injure, or encumber, such sidewalks so as to interfere with their use by passengers, one who voluntarily drives animals through the streets must prevent them at all hazards from doing the acts forbidden; and if he fails to do so he may be convicted of violating the ordinance.⁹³

§ 1799. Persons Liable

Persons who are responsible for an act or omission constituting a violation of a regulation concerning the use of public streets or ways, and who are expressly or impliedly within the terms of the regulation, may be prosecuted for its violation.

As a general rule, persons who are responsible for an act or omission constituting a violation of a regulation concerning the use of public streets or ways, and who are expressly or impliedly within the terms of the regulation, may be prosecuted for its violation.⁹⁴ It has been held, however, that an ordinance prohibiting the distribution of advertising matter on the streets does not impose a penalty on one who furnishes another circulars for distribution on the streets.⁹⁵ The owner of a vehicle is not lia-

be driven on busy thoroughfare for advertising purposes was violation of traffic regulations prohibiting advertising vehicles on streets, motive power of wagon and design and physical appearance of vehicle could be considered as showing that entire setup was an advertising scheme.—*People v. Berkowitz*, supra.

Regulations held violated

(1) In general.—*Buffalo v. Till*, 182 N.Y.S. 418, 192 App.Div. 99.

(2) Truck bearing placards stating that reward was offered by union for arrest and conviction of bomb throwers, and requesting withdrawal of patronage from specified theaters, was an advertising truck within prohibitory ordinance.—*People v. Hopkins*, 263 N.Y.S. 290, 147 Misc. 12.

84. N.Y.—*People on Complaint of Doyle v. Smith*, 180 N.E. 891, 259 N.Y. 48.

Violation held not shown

(1) In general.

Pa.—*Commonwealth v. Ash*, 31 Pa. Dist. & Co. 369, 54 Montg.Co. 46, 29 Mun.L.R. 142.

Puerto Rico.—*People v. Padilla*, 20 Puerto Rico 262.

(2) An ordinance prohibiting the entering of an intersection against an amber or red light is not violated by one who enters on green light and completes crossing on amber or red light.—*City of Cincinnati v. Peacock*, 51 N.E.2d 906, 72 Ohio App. 321.

85. N.Y.—*People v. Hopkins*, 263 N.Y.S. 290, 147 Misc. 12.

Exception held not applicable

(1) One transporting placards for trade union picketing, by means of truck carrying notices relative to labor controversy, was not carrying business notice on ordinary business wagon and not engaged in owner's usual business, within exception to ordinance prohibiting advertising trucks on streets.—*People v. Hopkins*, supra.

(2) Where accused was charged with distribution of handbills in a public street, which was prohibited by ordinance except where distribution was of notices of a meeting, and defendant had distributed sheets of paper entitled "Garment workers" and signed "International Ladies Garment Workers' Union," which announced a play which was to be given, acts of accused did not fall within exceptions to the prohibition.—*Commonwealth v. Kimball*, 13 N.E.2d 18, 299 Mass. 353, 114 A.L.R. 1440.

86. N.Y.—*People v. Horwitz*, 140 N.Y.S. 437, 27 N.Y.Cr. 237.

Wis.—*City of Milwaukee v. Snyder*, 283 N.W. 301, 230 Wis. 131, reversed on other grounds 60 S.Ct. 146, 308 U.S. 147, 84 L.Ed. 155.

"Distributing"

One who had in his possession over three hundred cards, some of which he had already given to pedestrians on city sidewalk, and according to stipulation was "proceeding to distribute" the rest to other persons, was distributing cards within prohibition of municipal ordi-

nance.—*People v. Young*, 85 P.2d 231, 33 Cal.App.2d Supp. 747, reversed on other grounds *Young v. People of State of California*, 60 S.Ct. 146, 308 U.S. 147, 84 L.Ed. 155.

87. N.Y.—*People v. Horwitz*, 140 N.Y.S. 437, 27 N.Y.Cr. 237.

88. N.J.—*Coughlin v. Sullivan*, 126 A. 177, 100 N.J.Law 42.

89. La.—*City of New Orleans v. Hood*, 32 So.2d 899, 212 La. 485.

90. N.J.—*Ex parte Cox*, 4 A.2d 526, 122 N.J.Law 150.

91. Mass.—*Commonwealth v. Nichols*, 18 N.E.2d 166, 183 Mass. 164.

92. Ga.—*Burns v. City of Carrollton*, 34 S.E.2d 621, 72 Ga.App. 628 —*Jones v. City of Moultrie*, 33 S.E.2d 561, 72 Ga.App. 282.

93. Mass.—*Commonwealth v. Curtis*, 9 Allen 266.

94. N.Y.—*People v. Berkowitz*, 39 N.Y.S.2d 236.

General manager of business concern could be held criminally liable for violation of traffic regulation by causing a wagon drawn by a team of burros to be driven on busy thoroughfare for advertising purposes, particularly where it was shown that general manager's name was inserted directly beneath corporate name on advertising sign.—*People v. Berkowitz*, supra.

95. N.Y.—*People v. Lookstein*, 139 N.Y.S. 680, 78 Misc. 306, 28 N.Y.Cr. 311.

ble under a penal statute for offenses committed by one driving it without his permission.⁹⁶

§ 1800. Defenses

A prosecution for a violation of a regulation concerning the use of public streets and walks is subject to any valid defense which may be available to the accused.

A prosecution for a violation of a regulation concerning the use of public streets and walks is subject to any valid defense which may be available to accused.⁹⁷ Accordingly, it may be a defense that the order of a policeman alleged to have been disobeyed was arbitrary and unreasonable;⁹⁸ and the urgency of the duty of a public official may be a defense to a prosecution for the violation of a traffic rule.⁹⁹ It is no defense, however, to a prosecution for playing a musical instrument on the streets without a license that there was no actual disturbance or breach of the peace on the particular occasion.¹ Also, it is generally no defense that the intention was good,² or that efforts were made by accused to prevent a breach of the ordinance,³ or that obedience to the ordinance would raise the price of necessities.⁴

Where an ordinance imposed a penalty on the owner of a vehicle kept for hire for neglect to light the lamps of his vehicle at night, it is no defense that such owner was not present and had no knowledge of such violation.⁵ Under a statute providing that, in cities or villages, or on streets usually congested with traffic, slow moving vehicles must keep near the right curb, it is no defense that a driver was not blocking any traffic and was driving on a prohibited part of the street to save his horses.⁶ A driver of a cab left standing on the street is to be

deemed personally with the cab, although actually out of sight in a railroad station soliciting passengers, so as to preclude him from denying that he was standing in a place different from that assigned him by the municipal officers.⁷

Fast driving. It is no defense to a complaint for fast driving that the mayor and city marshal had given oral permission,⁸ or that no person was endangered by such driving,⁹ or that accused had a reputation as a careful driver;¹⁰ but accused may prove his motive where a discretion is allowed to the jury in fixing the imprisonment.¹¹

Driving on sidewalk. It is no defense to a prosecution for unlawfully driving or riding on a sidewalk that others did likewise without complaint,¹² or that the informer contributed nothing to the original construction of the sidewalk or did not aid in keeping it in repair,¹³ or that the abutting owner consented to such use of the sidewalk,¹⁴ or that the vehicle portion of the street was too muddy where its condition was known to the driver before he started out.¹⁵

§ 1801. Prosecution and Punishment

The complaint or other pleading in a prosecution for violation of a regulation concerning the use of public streets or ways must sufficiently charge an offense. Questions relating to issues, proof, and variance, evidence, and questions of law and fact in such prosecutions are governed by general rules.

The complaint, information, indictment, or warrant in a prosecution for violation of a regulation concerning the use of public streets and ways must sufficiently charge an offense which it is within the power of the municipality to create.¹⁶ A complaint

96. R.I.—Campbell v. Providence, 9 R.I. 262.

44 C.J. p 1082 note 49.

97. N.Y.—People v. Mahoney, 121 N.Y.S. 898, 65 Misc. 449.

98. D.C.—Barnes v. District of Columbia, 24 App.D.C. 458.

43 C.J. p 449 note 84 [a]

99. N.Y.—People v. Mahoney, 121 N.Y.S. 898, 65 Misc. 449.

44 C.J. p 1082 note 50.

1. Mass.—Commonwealth v. Plaisted, 19 N.E. 224, 148 Mass. 375, 24 Am.S.R. 566, 2 L.R.A. 142.

2. Mass.—Commonwealth v. Plaisted, *supra*.

3. Mass.—Commonwealth v. Curtis, 9 Allen 266.

4. Mass.—Commonwealth v. Worcester, Thach.Cr.Cas. 100.

5. Ala.—Dane v. Mobile, 36 Ala. 304.

6. Minn.—State v. Bussian, 127 N.W. 495, 111 Minn. 488, 31 L.R.A., N.S., 682.

7. Mass.—Commonwealth v. Matthews, 122 Mass. 60.

8. Mass.—Commonwealth v. Worcester, 3 Pick. 462—Commonwealth v. Worcester, Thach.Cr.Cas. 100.

9. Mass.—Commonwealth v. Worcester, 3 Pick. 462.

10. Mass.—Commonwealth v. Worcester, 3 Pick. 462.

11. Ill.—Morton v. Princeton, 18 Ill. 383.

12. Pa.—Commonwealth v. Forrest, 32 A. 652, 170 Pa. 40, 29 L.R.A. 365.

13. Pa.—Commonwealth v. Forrest, *supra*.

14. Pa.—Commonwealth v. Forrest, *supra*.

15. N.C.—State v. Brown, 13 S.E. 940, 109 N.C. 802.

16. Fla.—Pittman v. Nix, 11 So 2d 791, 152 Fla 378, 144 A.L.R. 1341. 3 C.J. p 183 note 34.

Soliciting union membership

Charge of single act of soliciting a man on town street to join labor union and pay membership fee therein did not amount to charge of operating a business on such street within power of town to regulate conduct of private business on streets—Pittman v. Nix, *supra*.

Negating matters of defense

Fact that the pamphlets which defendant was selling, allegedly in violation of city ordinance prohibiting the sale of pamphlets between certain hours on designated sidewalks, were religious pamphlets which defendant had a right to sell and that his conduct did not interfere with the safety, comfort, or convenience of the public in the use of the streets, were matters of defense properly to be introduced by defendant and were not matters which

for violating an ordinance which uses substantially the words of the by-law or regulation ordinarily is sufficient.¹⁷ Where willfulness¹⁸ or unreasonableness¹⁹ is a necessary element to constitute the offense, such words must be used in the complaint. Where a given act is made by ordinance an offense in itself without reference to actual obstruction of public travel or expressed intent to obstruct, the complaint need not allege that the public travel was obstructed and that accused intended so to do.²⁰ The facts that an affidavit contained the name of a police officer at the beginning as the informant, but was sworn to by another as city marshal, have been held not to destroy the prosecution.²¹ Only allegations in the information itself will be considered by the court on a motion to dismiss the information.²²

Issues, proof, and variance. A conviction for a common-law nuisance cannot be had under a complaint for violating a by-law.²³ In an action or prosecution for fast driving, it is not necessary to prove that any person was endangered by such driving, where this is not required by the ordinance or

by-law.²⁴

Evidence. The usual rules relating to evidence in criminal prosecutions apply to prosecutions for unlawful use of the streets.²⁵ The operator of a vehicle charged with violation of a regulation requiring him to stop at a crosswalk line on the change of a traffic signal may show the circumstances under which he proceeded in order that it may be determined as a fact whether an emergency existed excusing a failure to stop under the terms of the regulation.²⁶

Questions of law and fact. Whether a nuisance at common law was committed by using a street as a stand for hourly coaches is a question of fact for the jury;²⁷ but whether an ordinance prohibiting driving on streets faster than a rapid walk is reasonable is a question of law.²⁸

Punishment. Where accused was found guilty and fined for each of three infractions of traffic regulations prohibiting advertising vehicles on streets, the sentence may be suspended in one case where two infractions occurred on one day.²⁹

B. SEWERS, DRAINS, AND WATERCOURSES

§ 1802. Public Sewers and Drains

A drainage or sewerage system constructed by a municipal corporation, is its property, and the general public of the state has no interest therein.

A drainage or sewerage system constructed by a

municipal corporation is its property,³⁰ and the general public of the state has no interest therein.³¹ Sometimes the sewer system of a municipality is divided into public and district sewers³² or trunk and local sewers.³³ Some statutes do not contemplate that connecting sewers, forming a continuous

the summons or accusation on the ordinance was required to negative. —Burns v. City of Carrollton, 34 S. E.2d 621, 72 Ga.App. 628.

17. Mass.—Commonwealth v. Lagorio, 6 N.E. 546, 141 Mass. 81—Commonwealth v. Rowe, 6 N.E. 545, 141 Mass. 79.
44 C.J. p 1083 note 66.

18. N.Y.—Fuller v. Redding, 39 N. Y.S. 109, 16 Misc. 634, reversed on other grounds 43 N.Y.S. 96, 13 App.Div. 61.
44 C.J. p 1083 note 67.

19. Vt.—State v. Bacon, 40 Vt. 456.

20. Mass.—Commonwealth v. Derby, 38 N.E. 440, 162 Mass. 183.

21. Mo.—City of Mexico v. Sharp, 300 S.W. 308, 221 Mo.App. 195.

22. N.Y.—City of Rochester v. Quine, 11 N.Y.S.2d 918, 171 Misc. 598.

23. Mass.—Commonwealth v. Harding, Thach.Cr.Cas. 270.

24. Mass.—Commonwealth v. Worcester, 3 Pick. 462.

25. Wash.—City of Tacoma v. Roe, 68 P.2d 1028, 190 Wash. 444.
44 C.J. p 1083 note 73—3 C.J. p 183 note 35 [a].

Evidence held to sustain conviction
Wash.—City of Tacoma v. Roe, supra.
44 C.J. p 1083 note 73 [b].

Evidence held insufficient
(1) In general.—Csiki v. City of Moultrie, 22 S.E.2d 178, 68 Ga.App. 130—44 C.J. p 1025 note 26 [a].

(2) Proof that accused appeared on street and distributed two magazines, as one of Jehovah's Witnesses, without having obtained a permit to do so, would not authorize conviction of violating city ordinance prohibiting handbills to be handed out to public and thrown on city's streets, without having first obtained a permit so to do, since magazines were not handbills within meaning of ordinance.—City of Jackson v. Berry, 11 So.2d 438, 193 Miss. 820.

26. Cal.—People v. Ausen, 105 P.2d 321, 40 Cal.App.2d Supp. 831.

27. Mass.—Commonwealth v. Harding, Thach.Cr.Cas. 270.

28. Mass.—Commonwealth v. Worcester, 3 Pick. 462.

29. N.Y.—People v. Berkowitz, 39 N.Y.S.2d 236.

30. Ala.—Corpus Juris cited in Benson v. City of Andalusia, 195 So. 443, 445, 240 Ala. 99.

Fla.—Corpus Juris quoted in State v. City of Tampa, 187 So. 604, 616, 137 Fla. 29.

44 C.J. p 1083 note 2.

Injuries from construction of sewer: Generally see supra § 1235.
Defective sewer see supra §§ 873–894.

Power to construct sewer see supra § 1049.

Sewer departments, boards, and officers see supra §§ 616–625.

31. Ala.—Corpus Juris cited in Benson v. City of Andalusia, 195 So. 443, 445, 240 Ala. 99.

44 C.J. p 1083 note 3.

32. Mo.—Schwabe v. Moore, 172 S. W. 1157, 187 Mo.App. 74.

44 C.J. p 1083 note 4.

33. Ohio.—Cincinnati v. Standard Wagon Co., 8 Ohio S. & C.P. 79, 1 Ohio N.P. 387.

44 C.J. p 1084 note 5.

line, shall always be deemed a single common sewer.³⁴

Under some statutes the action of a metropolitan sewer district in dealing with the property of incorporated towns must meet with their approval.³⁵

§ 1803. — Location

Municipal authority to locate sewers cannot be abdicated by contract. The location of sewage disposal works is within the discretion of the municipal authorities, with which the courts will not interfere in the absence of a showing of arbitrary or capricious action.

The authority of a municipal corporation to locate sewers is legislative³⁶ and cannot be abdicated by the municipality through a contract.³⁷ The location of a sewage disposal plant or works is committed to the discretion of the municipal authorities,³⁸ and the courts are not authorized to interfere with the exercise of such discretion in the absence of pleading and proof that the action of the official in selecting a particular location was not the exercise of a fair discretion but was the result of an arbitrary or capricious choice on their part.³⁹ The municipality may use the streets for the construction of a sewerage system.⁴⁰ A sewerage system need not extend to tidewater when not so required by statute,⁴¹ and, where it does not so extend, statutes relating only to sewers extending to tidewater are not applicable.⁴²

§ 1804. — Construction, Maintenance, and Repair

The construction, maintenance, and repair of public sewers and drains by municipal corporations are discussed supra § 1049.

Examine Pocket Parts for later cases.

§ 1805. — Regulation, Control, and Use

- a. In general
- b. Connection and use generally
- c. Operation and effect of connection or permit therefor
- d. Charges for use or connection

a. In General

The right of a municipal corporation to regulate and control the use of its drains and sewers is a necessary incident of its ownership. A municipal corporation, provided it retains control, may permit any appropriate use to be made of its sewers and drains and fix reasonable conditions for such use.

The right of a municipal corporation to regulate and control the use of its drains and sewers is an exercise of its police power,⁴³ and is a necessary incident of its ownership thereof;⁴⁴ and such right may be protected and enforced by injunction⁴⁵ or the imposition of proper penalties.⁴⁶ Where a statute confers on a municipality the power to regulate the use of sewers, and neither defines the limits of that power nor prescribes the manner of its exercise, the municipality is necessarily invested with power to exercise its discretion,⁴⁷ and the courts

34. Mass.—*Ayer v. Somerville*, 10 N.E. 457, 143 Mass. 585.

35. Ky.—*Louisville & Jefferson County Metropolitan Sewer Dist. v. Town of Strathmoor Village*, 211 S.W.2d 127, 307 Ky. 343.

36. Mo.—*Stewart v. City of Springfield*, 185 S.W.2d 626, 350 Mo. 234. Acquisition or use of land see supra § 1049.

Sewers beyond boundary of municipality see supra § 1059.

Use of natural watercourses for sewerage and drainage purposes see infra § 1807.

37. Mo.—*Stewart v. City of Springfield*, supra.

38. Tex.—*Stone v. City of Wylie*, Com.App., 34 S.W.2d 842. 44 C.J. p 1084 note 12.

39. Tex.—*Stone v. City of Wylie*, supra.

40. N.Y.—*In re Yonkers*, 23 N.E. 661, 117 N.Y. 564.

44 C.J. p 1084 note 18.

Use of streets for sewers as additional servitude requiring compensation see *Eminent Domain* § 133 e.

41. N.J.—*Philadelphia Trust, etc., Co. v. Merchantville*, 68 A. 170, 75 N.J.Law 451, affirmed 74 A. 1135, 76 N.J.Law 822.

42. N.J.—*Philadelphia Trust, etc., Co. v. Merchantville*, supra.

43. Ala.—*Benson v. City of Andalusia*, 195 So. 443, 240 Ala. 99—*MacMahon v. Baumhauer*, 175 So. 299, 234 Ala. 482.

Mich.—*Coldwater v. Tucker*, 36 Mich. 474, 24 Am R. 601.

Municipal regulation of toilets, water closets, privies, etc., see supra § 303.

Police powers of municipalities generally see supra §§ 126-137.

"By the statutes . . . the governing body of the city is vested with the police power to preserve the public health and welfare and the proper disposition of sewage is essential to this public health and welfare."—*Erickson v. City of Sioux Falls*, 14 N.W.2d 89, 95, 70 S.D. 40.

Notice of change of drainage, sewerage, or sewer connections

Pa.—*Commonwealth v. Minet*, 62 York Leg.Rec. 1.

44. Ala.—*Corpus Juris cited in Benson v. City of Andalusia*, 195 So. 443, 445, 240 Ala. 99.

Tex.—*Texas Milk Products Co. v. City of Mt. Pleasant*, Civ.App., 55 S.W.2d 1101.

44 C.J. p 1085 note 49.

45. Mass.—*Melrose v. Cutter*, 34 N. E. 695, 159 Mass. 461.

44 C.J. p 1086 note 50.

Evidence did not establish that use of drainage ditch by plant for drainage of its artificial waters stimulated growth of vegetation in ditch, stopping flow of water therein, so as to warrant grant of injunction to city restraining plant from using ditch on ground that such use constituted a nuisance.—*Town of Amite City v. Southern United Ice Co., La. App.*, 34 So.2d 60.

46. Pa.—*Fisher v. Harrisburg*, 2 Grant 291.

Tex.—*Wichita Falls v. Landers*, Civ. App., 291 S.W. 696.

47. S.D.—*Erickson v. City of Sioux Falls*, 14 N.W.2d 89, 70 S.D. 40.

will not interfere with such action unless it appears to be unreasonable or arbitrary.⁴⁸

Unless restrained by statute, a municipal corporation may permit any appropriate use to be made of its sewers,⁴⁹ drains,⁵⁰ and gutters,⁵¹ and it may fix reasonable conditions for the use thereof;⁵² but, in granting permission for the use of its sewers in the first instance, and for the continuing use thereof, the municipality must at all times retain control,⁵³ and any attempt by way of contract to deprive it of that control is void.⁵⁴ An open drain or gutter designed for carrying off surface waters must not be used by individuals or corporations for purposes which will create a nuisance.⁵⁵

Soil taken from one part of a sewerage system may be removed to another,⁵⁶ and the surface of lands acquired for sewerage purposes may also be used for school purposes.⁵⁷

While it is not ultra vires for a municipality to enter into an agreement with any person or municipal authority having property or public rights to protect, relating to the operation of a tidal cham-

ber at the outlet of a sewer,⁵⁸ when not authorized by the legislature to make such a contract, a township through which a municipal sewer passes cannot contract with the municipality, with respect to the use of the sewer in another municipality, so as to acquire a right to compel specific performance of the contract⁵⁹ or to enjoin a breach or violation thereof for the sole reason that the violation results in a public nuisance.⁶⁰

b. Connection and Use Generally

Property owners have no right to use or connect with a municipal sewer without the consent of the municipal corporation; it may permit such use or connection or, particularly under empowering statute, require connection; and reasonable conditions and regulations as to such use or connection may be imposed.

Some statutes confer control over sewer connections on municipal corporations.⁶¹ Since, as discussed supra § 1802, the ownership of public sewers is in the municipality, property owners have no right to make connections with, or use, a municipal sewer or sewer system without the consent of the municipality;⁶² but the municipality may permit them to make such connections or use,⁶³ and may

48. S.D.—*Ericksen v. City of Sioux Falls*, supra.

49. Ill.—*Springer v. Walters*, 37 Ill. App. 326, affirmed 28 N.E. 761, 139 Ill. 419.

50. La.—*Municipality No. 1 v. Gas-Light Co.*, 5 La. Ann. 439.

51. La.—*Municipality No. 1 v. Gas-Light Co.*, supra.

52. Ohio.—*State ex rel. F. B. Co. v. Village of Beachwood*, App., 46 N. E.2d 808.

53. S.D.—*Ericksen v. City of Sioux Falls*, 14 N.W.2d 89, 70 S.D. 40.

54. S.D.—*Ericksen v. City of Sioux Falls*, supra.

Reason for rule

The supervision and regulation of the sewers is a police function of the city; the police power of the city cannot be bargained away by contract, but must at all times be available for use to meet such public needs as may arise.—*Ericksen v. City of Sioux Falls*, supra.

55. La.—*Municipality No. 1 v. Gas-Light Co.*, 5 La. Ann. 439.

44 C.J. p 1086 note 55.

56. Mass.—*Titus v. Boston*, 21 N.E. 310, 149 Mass. 164.

57. N.Y.—*Winkler v. Summers*, 5 N.Y.S. 723, 22 Abb.N.Cas. 80.

58. N.J.—*Belleville Tp. v. Orange*, 62 A. 331, 70 N.J.Eq. 244, affirmed 65 A. 1117, 71 N.J.Eq. 775.

59. N.J.—*Belleville Tp. v. Orange*, supra.

60. N.J.—*Belleville Tp. v. Orange*, supra.

44 C.J. p 1086 note 60.

61. Ark.—*Branch v. Gerlach*, 127 S. W. 451, 94 Ark. 378.

44 C.J. p 1086 note 62.

Connection of private sewers and drains see infra § 1806.

Mandamus to compel granting of permit for connections see Mandamus § 180 f.

62. Fla.—*Corpus Juris* quoted in *State v. City of Tampa*, 187 So. 604, 616, 137 Fla. 29.

44 C.J. p 1086 note 64.

"No one has any vested rights in the use of the sewers."—*Ericksen v. City of Sioux Falls*, 14 N.W.2d 89, 95, 70 S.D. 40.

Connecting service and main sewers

Under statute, the privilege of connecting service sewers with main or trunk sewers is under the absolute control of the governing body of the city.—*Johnson v. Rapid City*, 231 N.W. 524, 57 S.D. 173.

Effect of assessment; annexation

(1) Where lands outside city were assessed to pay for sewer system, the owners acquired a right to use the system and a beneficial interest in the improvements which could not be taken from them by the annexation by the city of a part of the lands included in the improvement district, and city could not arbitrarily refuse the owners their right to use the system.—*City of El Cajon v. Heath*, 196 P.2d 81, 86 Cal.App.2d 530.

(2) Assessments for improvements generally see supra §§ 1290-1652.

Surface water

Except in so far as public interests give municipality control, lot owner has inherent right to have surface water pass into public street, and direct pipe from eaves of house to public storm-water sewer imposes no additional burden on sewer.—*Cheltenham & Abington Sewerage Co. v. Public Service Commission of Pennsylvania*, 162 A. 469, 107 Pa.Super. 225, affirmed 166 A. 649, 311 Pa. 175.

63. Fla.—*Corpus Juris* quoted in *State v. City of Tampa*, 187 So. 604, 616, 137 Fla. 29.

Pa.—*Borough of Conshohocken v. Tracy*, Com.Pl., 60 Montg.Co. 350, 36 Mun.L.R. 104.

S.C.—*Glenn v. Woodworth*, 14 S.E. 2d 555, 197 S.C. 56.

S.D.—*Ericksen v. City of Sioux Falls*, 14 N.W.2d 89, 70 S.D. 40.

44 C.J. p 1086 note 65.

Sole authority of city

Where city acquired title to sewer system in residential district developed by private corporation, corporation had no more authority concerning sewers, and city alone was authorized to determine whether or not system was adequate for use by apartment houses, regardless of the wishes of a majority of property owners in the district and of an expired restrictive covenant.—*Barr v. Algon Realty Corporation*, 2 N.Y.S. 2d 273, 166 Misc. 177, affirmed 8 N.

enter into binding contracts therefor.⁶⁴ In the exercise of its discretion,⁶⁵ the governing body of the municipality may grant such licenses or permits to make connections as may be warranted by the capacity and ability of the sewers and disposal plants to dispose of sewage, and as the public interests may require.⁶⁶

In the interest of the public health and welfare, a municipality may require property owners to connect with a sewer⁶⁷ at their own expense,⁶⁸ although the sewer runs through private property,⁶⁹ the legislature may properly and validly confer power on the municipality to impose such a requirement,⁷⁰ and, if the legislature does so, the municipality must comply with the requirements of the

Y.S.2d 119, 255 App.Div. 869, reargument denied 8 N.Y.S.2d 1005, 255 App.Div. 986—*Fisher v. Manhattan Beach*, 2 N.Y.S.2d 273, 166 Misc. 177, affirmed 8 N.Y.S.2d 120, 255 App.Div. 869, reargument denied 8 N.Y.S.2d 1005, 255 App.Div. 986.

Permission to nonresidents held optional with city

N.C.—*Atlantic Const. Co. v. City of Raleigh*, 53 S.E.2d 165, 230 N.C. 365.

64. Ky.—*Louisville & Jefferson County Metropolitan Sewer Dist. v. Town of Strathmoor Village*, 211 S.W.2d 127, 307 Ky. 343.

N.C.—*Atlantic Const. Co. v. City of Raleigh*, 53 S.E.2d 165, 230 N.C. 365.

Ohio—*City of Cleveland v. Village of Cuyahoga Heights*, 75 N.E.2d 99, 81 Ohio App. 191.

Contracts held valid

Colo.—*Town of Estes Park v. Mills*, 65 P.2d 1086, 100 Colo. 94.

Iowa.—*City of Des Moines v. City of West Des Moines*, 30 N.W.2d 500.

Kan.—*City of North Newton v. Regier*, 103 P.2d 873, 152 Kan. 434.

Ky.—*Louisville & Jefferson County Metropolitan Sewer Dist. v. Town of Strathmoor Village*, 211 S.W.2d 127, 307 Ky. 343.

Mich.—*Drain Com'r of Oakland County v. City of Royal Oak*, 10 N.W.2d 435, 306 Mich. 124.

N.J.—*City of New Brunswick v. Borough of Milltown*, 38 A.2d 288, 135 N.J.Eq. 310.

Ohio.—*State ex rel. Gordon v. Taylor*, 79 N.E.2d 127, 149 Ohio St. 427—*City of Cleveland v. Village of Cuyahoga Heights, Com.Pl.*, 79 N.E.2d 576, affirmed 75 N.E.2d 99, 81 Ohio App. 191.

Consideration

Monetary payment held sufficient consideration for option to connect sewer systems in contract between cities; and fact that city giving option was getting rid of the menace to the purity of its source of water supply was a valuable consideration for the giving of the option.—*City of Des Moines v. City of West Des Moines, Iowa*, 30 N.W.2d 500.

Petition and acceptance as contract

(1) A real estate company's petition to city council to connect certain lots with city sewer system and the city's formal resolution of acceptance of the proposal constituted

an enforceable contract, and the contract did not need an ordinance to evidence its adoption—*Gillfillan v. Haven*, 53 A.2d 901, 161 Pa.Super. 114.

(2) Petition signed by landowners with property abutting on avenue, addressed to city council, and having for its purpose the obtaining of city's co-operation in laying out private sewer along avenue to connect with city sewer system, was not a binding contract on landowners who signed so that they could not withdraw therefrom before construction of sewer.—*Harrell v. Sunylan Co.*, 97 S.W.2d 686, 128 Tex. 460.

Tax sale of some of lots served did not terminate contractual obligation of city—*Gillfillan v. Haven*, 53 A.2d 901, 161 Pa.Super. 114.

Rights of landowners to deposit

Tex.—*Harrell v. Sunylan Co.*, 97 S.W.2d 686, 128 Tex. 460.

65. S.D.—*Erickson v. City of Sioux Falls*, 14 N.W.2d 89, 70 S.D. 38.

66. S.D.—*Erickson v. City of Sioux Falls*, supra.

67. Ala.—*City of Leeds v. Avram*, 14 So.2d 728, 244 Ala. 427.

Fla.—**Corpus Juris** quoted in *State v. City of Tampa*, 187 So. 604, 616, 137 Fla. 29.

Md.—**Corpus Juris** cited in *Harlan v. Town of Bel Air*, 13 A.2d 370, 372, 178 Md. 260.
44 C.J. p 1086 note 66.

Abatement of nuisance

Ky.—*Francis v. City of Bowling Green*, 82 S.W.2d 804, 259 Ky. 525.

Requirement held applicable to house drains and house sewers

Ky.—*Stegner v. Coomer*, 176 S.W.2d 395, 296 Ky. 334.

City's failure to pay sewer service charge was no defense to suit to compel compliance with ordinance requiring property owners to make sewer connections with system, since owners had other adequate remedy against city to compel payment of charge.—*Francis v. City of Bowling Green*, 82 S.W.2d 804, 259 Ky. 525.

Confiscatory nature of charges

Defense that rental charges imposed by ordinance requiring property owners to make connections were confiscatory could not be asserted by parties to suit to compel compliance, in absence of showing that rental to be paid by them was

confiscatory.—*Francis v. City of Bowling Green*, supra.

Fact that other property was not served by the sewer system does not justify a property owner in refusing to make the connection as required by ordinance.—*Francis v. City of Bowling Green*, 82 S.W.2d 804, 259 Ky. 525.

Easement of owner; duty of city

Where city owns street in fee, abutting owner required to build and maintain sewer from his property to the main sewer in the street has only an easement in the street for his sewer connection, and the only duty the city owes him is not willfully to injure the sewer.—*Colombe v. City of Niagara Falls*, 295 N.Y.S. 84, 162 Misc. 594.

Damages from tree roots

Property owner putting in an improperly constructed sewer from his property to the main sewer cannot hold the city liable for damages to the sewer from roots of trees wholly on city property, where a properly constructed sewer would not be damaged by roots.—*Colombe v. City of Niagara Falls*, supra.

68. Md.—**Corpus Juris** cited in *Harlan v. Town of Bel Air*, 13 A.2d 370, 372, 178 Md. 260.

N.Y.—*Colombe v. City of Niagara Falls*, 295 N.Y.S. 84, 162 Misc. 594.
44 C.J. p 1086 note 67.

69. Mass.—*Commonwealth v. Abbott*, 35 N.E. 782, 160 Mass. 282.
44 C.J. p 1086 note 68.

70. Md.—**Corpus Juris** cited in *Harlan v. Town of Bel Air*, 13 A.2d 370, 372, 178 Md. 260.

44 C.J. p 171 notes 71-72, p 1086 note 69.

Owner of farm held not abutting owner, within statute requiring such owners to make connection, where farm did not abut on a street in which a sewer was constructed and dwelling was several hundred feet from road in which there was a sewer.—*Harlan v. Town of Bel Air*, 13 A.2d 370, 178 Md. 260.

Duty to fix rules by ordinance

By virtue of statute, it is duty of city council to fix by ordinance the rules by which it will enforce its right to compel property owners to make necessary sewer and water connections.—*Seymour v. City of Ames*, 255 N.W. 874, 218 Iowa 615.

statute.⁷¹ The reasonableness of such a requirement depends largely on the local terrain and the means deemed essential to protect the health and morals of the municipality.⁷² Some statutes, however, have been held not to confer power on a municipality to compel connection of outside vaults or privies with a sewer.⁷³

The state⁷⁴ or the municipality,⁷⁵ but no private person,⁷⁶ may impose conditions and regulations with respect to making connections, but such regulations and conditions must be reasonable.⁷⁷ The municipality may require, as conditions for permitting the connection, a written application with description of the property,⁷⁸ and the obtaining of a permit.⁷⁹ It may also require the connection to be made by a licensed tapper,⁸⁰ that the materials used shall be suitable for the purpose,⁸¹ and that the work shall be done under the supervision, or subject to the inspection and approval, of a municipal officer,⁸² or it may itself do the actual work of connection at the cost of the property owner;⁸³ but it

cannot require the property owner to purchase the necessary materials from it,⁸⁴ or compel him to permit it to do at his expense the work on his own premises incidental to the connection which he might do himself or procure others to do,⁸⁵ although it may properly provide for the doing of the work under contract with the municipality at the expense of the property owner after he has failed to avail himself of ample opportunity to select and purchase the material and have the work done.⁸⁶ Under statute, land not abutting on a sewer may be entitled to sewer service without dedication of a portion thereof if such a plan is feasible.⁸⁷

A failure to comply with particular requirements may not render the completed connection unlawful,⁸⁸ and a strict compliance with the prescribed conditions may be waived by the municipality,⁸⁹ or irregularities in the proceedings of the municipal authorities may be waived by a property owner.⁹⁰ A connection or use made without permit makes one liable for the prescribed fees and charges⁹¹ or for

No compulsive power against property outside city

N.C.—Atlantic Const. Co. v. City of Raleigh, 53 S.E.2d 165, 230 N.C. 365.

71. Iowa.—Seymour v. City of Ames, 255 N.W. 874, 218 Iowa 615.

72. Fla.—State v. City of Daytona Beach, 34 So.2d 309.

73. Colo.—Gault v. Ft. Collins, 142 P. 171, 57 Colo. 324, Ann.Cas.1916B 718.

44 C.J. p 1087 note 70.

74. Pa.—Commonwealth v. Dougherty, 40 A.2d 902, 156 Pa.Super. 520.

75. Cal.—Harter v. Barkley, 112 P. 556, 158 Cal. 742.

44 C.J. p 1087 note 71.

Direct connection not required

Pa.—McNemry v. Borough of Bellevue, 152 A. 563, 301 Pa. 568.

Engineers' passing on connections

Agreement between boroughs, providing that location and size of connections with sewer should be determined by city engineers, did not require that engineers pass on every connection with branch sewer.—McNemry v. Borough of Bellevue, *supra*.

Requirement imposed on land outside city

Cal.—City of El Cajon v. Heath, 196 P.2d 81, 86 Cal.App.2d 530.

Terms for service to nonresidents
N.C.—Atlantic Const. Co. v. City of Raleigh, 53 S.E.2d 165, 230 N.C. 365.

76. Okl.—Hale v. Warren, 50 P.2d 631, 174 Okl. 404.

Contribution to cost of construction of sewer extension which, under

agreement, became part of city sewer system, could not be recovered by landowner constructing extension from another user of line.—Hale v. Warren, *supra*.

77. Cal.—City of El Cajon v. Heath, 196 P.2d 81, 86 Cal.App.2d 530.

44 C.J. p 1087 notes 71, 74.

78. Me.—Evans v. Portland, 54 A. 1107, 97 Me. 509.

79. Ky.—City of Lexington v. Jones, 160 S.W.2d 19, 289 Ky. 719.

44 C.J. p 1087 note 80.

80. N.C.—Slaughter v. O'Berry, 35 S.E. 241, 126 N.C. 181, 48 L.R.A. 442.

44 C.J. p 1087 note 81.

81. Mass.—Ranlett v. Lowell, 126 Mass. 431.

N.C.—Slaughter v. O'Berry, 35 S.E. 241, 126 N.C. 181, 48 L.R.A. 442.

82. N.C.—Slaughter v. O'Berry, *supra*.

83. Cal.—Harter v. Barkley, 112 P. 556, 158 Cal. 742.

44 C.J. p 1087 note 84.

Constitutionality of statute

(1) A statute which permits a city, on constructing a sewer, to lay necessary pipes for house connections from the sewer to the curb line of the abutting lot, and authorizing the charge of the costs to the abutting premises, is not for such reason unconstitutional.—Van Wagener v. Paterson, 51 A. 922, 67 N.J. Law 455.

(2) A statute authorizing the disposal of the sewage of one municipality by another municipality and providing that owners shall connect with the system and that, on their failure, such latter municipality may

cause connections to be made at the owner's expense, is not unconstitutional because the officers who may carry out such later provision may be called on to perform functions in another municipality.—Mead v. Turner, 119 N.Y.S. 526, 134 App.Div. 691, 694—44 C.J. p 173 note 97.

84. N.C.—Slaughter v. O'Berry, 35 S.E. 241, 126 N.C. 181, 48 L.R.A. 442.

85. N.C.—Slaughter v. O'Berry, *supra*.

86. La.—Fristoe v. Crowley, 76 So. 812, 142 La. 393, L.R.A.1918C 254.
N.C.—Slaughter v. O'Berry, 35 S.E. 241, 126 N.C. 181, 48 L.R.A. 442.

87. D.C.—Miller v. Shwinn, Inc., 113 F.2d 748, 72 App.D.C. 282.

88. N.Y.—Barton v. Syracuse, 36 N. Y. 54, 1 Transc.A. 317.

44 C.J. p 1088 note 89.

Failure to comply with ordinance of adjoining borough in making connection with latter's sewer was immaterial, where contract permitting connection did not require such compliance—McNemry v. Borough of Bellevue, 152 A. 563, 301 Pa. 568.

89. Mich.—Hack v. City of Detroit, 34 N.W.2d 66, 322 Mich. 558.

44 C.J. p 1088 note 90.

90. Minn.—Fergus Falls v. Boen, 80 N.W. 961, 78 Minn. 186.

91. Minn.—Fergus Falls v. Edison, 102 N.W. 218, 94 Minn. 121, 70 L. R.A. 238—Fergus Falls v. Boen, 80 N.W. 961, 78 Minn. 186.

the prescribed penalty.⁹²

District sewers. Under a statute requiring that district sewers shall connect with public sewers or the natural course of drainage, the connection need not be direct,⁹³ but may be by means of another intermediate district sewer.⁹⁴ "The natural course of drainage," as the phrase is used in a statute, does not mean any natural course of drainage,⁹⁵ but the natural receptacle of the general sewerage system or some part thereof.⁹⁶

c. Operation and Effect of Connection or Permit Therefor

Permission granted by a municipal corporation to connect with its sewers is a license which may be revoked for sufficient cause at any time.

The grant by a municipal corporation of the privilege of connecting with its sewers is a license which may be revoked for sufficient cause at any time;⁹⁷ a municipality cannot grant a vested right in the use of its sewers.⁹⁸ A permit or license, granted by a municipality, to make a sewer connection means only that the licensee is permitted to empty his sewage into the system as long as the system will take care of it and the municipal authorities permit;⁹⁹ so, any license or permit to connect with a municipality's sewers must necessarily be contin-

gent on the ability of the sewage system and disposal plant to digest and dispose of the licensee's or permittee's sewage.¹ A municipality, in granting a license or permit to make a connection with, and empty sewage into, its sewer system has no power to guarantee that it will successfully operate a sewage disposal plant or an adequate sewerage system,² and cannot by contract assume any liability for damages to any person whose sewage is inadequately treated³ or bind itself to receive and dispose of all the sewage which patrons may attempt to empty into it.⁴

Under some statutes the effect of the connection of a private sewer, at each end thereof, with a public sewer of the municipality, under an agreement between the municipality and the property owner, is to establish a mutual drainage system⁵ and to confer on the municipality the right to use the private sewer in common with its own sewer.⁶ A permit for a sewer connection runs with the land if it is issued to the owner,⁷ but is good only for the sewer and premises described,⁸ and authorizes the use of the sewer only for such purposes as are legitimate and proper.⁹

The municipality may sever a connection where it was made illegally¹⁰ or where the property owner has failed to pay the stipulated charge,¹¹ and a pro-

92. Ky.—City of Lexington v. Jones, 160 S.W.2d 19, 289 Ky. 719.

Sewage from buildings outside city

A city was not without power, because of lack of extraterritorial jurisdiction, to impose penalty for discharging sewage from buildings outside city limits into city's sewer mains without having required permits—City of Lexington v. Jones, supra.

93. Mo.—Eyerman v. Blaksley, 78 Mo. 145—Heman v. Payne, 27 Mo. App. 481.

94. Mo.—Eyerman v. Blaksley, 78 Mo. 145—Heman v. Payne, 27 Mo. App. 481.

95. Mo.—Bayha v. Taylor, 36 Mo. App. 427.

96. Mo.—Bayha v. Taylor, supra. 44 C.J. p 1088 note 96.

97. S.D.—Erickson v. City of Sioux Falls, 14 N.W.2d 89, 70 S.D. 40.

Revocable permit to nonresident

Town may grant to nonresident at most a revocable permit to connect with town sewer system without charge, not a perpetual privilege.—Town of Estes Park v. Mills, 65 P.2d 1086, 100 Colo. 94.

98. S.D.—Erickson v. City of Sioux Falls, 14 N.W.2d 89, 70 S.D. 40.

Effect of expenditure or contributions

The mere fact that one has ex-

pended considerable money to make the connection gives him no vested right to retain the connection; a city may accept voluntary contributions from corporation for use of city sewage system and disposal plant in disposition of corporation's sewage, but such payments neither impose any liability on city nor confer vested rights or supervisory control on corporation.—Erickson v. City of Sioux Falls, supra.

Perpetual privilege

In absence of specific contract for future use of sewerage system between town and nonresident, latter may not take advantage of an ultra vires perpetual privilege for such use alleged to have been given by the town.—Town of Estes Park v. Mills, 65 P.2d 1086, 100 Colo. 94.

Contract held invalid

Contract granting private corporation right to empty all of its industrial sewage into city sewers, without limitation as to character or volume of such sewage, for fifteen years, was invalid as attempting to grant a vested right for the fifteen-year term, and the corporation acquired no rights thereunder.—Erickson v. City of Sioux Falls, 14 N.W.2d 89, 70 S.D. 40.

99. S.D.—Erickson v. City of Sioux Falls, supra.

1. S.D.—Erickson v. City of Sioux Falls, supra.

2. S.D.—Erickson v. City of Sioux Falls, supra.

3. S.D.—Erickson v. City of Sioux Falls, supra.

4. S.D.—Erickson v. City of Sioux Falls, supra.

5. Ill.—Knudson v. Neal, 150 NE 626, 320 Ill. 136.

44 C.J. p 1088 note 98.

Liability for injury arising from defective or unauthorized connection see supra § 878.

6. Ill.—Knudson v. Neal, supra.

7. Me.—Evans v. Portland, 64 A. 1107, 97 Me. 509.

8. Me.—Evans v. Portland, supra.

9. N.Y.—New York v. Baumberger, 30 N.Y. Super 219.

44 C.J. p 1088 note 3.

10. Ala.—Corpus Juris cited in Benson v. City of Andalusia, 195 So. 443, 445, 240 Ala. 99.

Pa.—Assay v. Baldwin, 7 Wkly.N.C. 160.

11. Ala.—Corpus Juris cited in Benson v. City of Andalusia, 195 So. 443, 445, 240 Ala. 99.

Ky.—Louisville & Jefferson County Metropolitan Sewer Dist. v. Barker, 212 S.W.2d 122, 307 Ky. 655.

44 C.J. p 1088 note 5.

vision for such severance is a reasonable regulation.¹² The connection of premises other than those for which a permit was granted may constitute a breach of the condition of a bond given by a person engaged in the work of making sewer connections.¹³ Likewise, if for any reason the sewerage system or plant will not handle sewage from a particular source, by reason of its nature or quantity,¹⁴ or if such sewage is of such a character that it prevents the disposal plant from functioning,¹⁵ it is within the power of the municipality to require such sewer connection to be discontinued, and it may be its duty to do so.¹⁶ In the exercise of its discretion, with which the courts will not interfere unless the action is clearly unreasonable and arbitrary,¹⁷ the governing board of the municipality may revoke such licenses or permits as may be warranted by the capacity and ability of the sewers and disposal plant to dispose of sewage, and as the public interests may require.¹⁸

On the other hand, a property owner who has paid for his permit and established his connection according to the requirements may sue to enjoin the municipality from cutting off the connection,¹⁹ and, where a municipality accepts the dedication to public use of a lateral sewer connected with its sewage disposal system, persons who built the lateral sewer and whose property benefits thereby may enjoin the municipality from disconnecting it from the main system;²⁰ but property owners of a particular sewer district who have been assessed for the construction of sewers have no vested property rights in them,²¹ and cannot sue to enjoin persons whose property is outside of the district from making connections under license from the municipality,²² unless they can show that their private property will be materially injured thereby;²³ nor can a property owner constructing a sewer line under a public street, with the municipality's permission and with-

out reservation or restriction in the grant with respect to the use of the sewer line, object to its use by other owners with the permission of the municipality, especially where the line has been almost wholly serviced by the municipality at its own cost.²⁴ Where a municipality has granted another a license to connect their sewer systems pending an agreement as to charges, and, on failure to reach an agreement, the first municipality, after notice, disconnects the systems, it has been held that a mandatory injunction to compel reconnection will not be granted.²⁵

A legal option contract between municipalities giving one the right to use the other's sewer system for an additional period or periods will not be declared void by equity;²⁶ nor will it be annulled on the ground that it may be impossible of performance in the future because of possible limitation on the latter's taxing power.²⁷ Likewise, an agreement of one municipality with another for connection with its sewer and disposal of the latter's sewage will not be canceled because it entails greater expense, and renders performance thereof more burdensome to the municipality, than was contemplated at the time the agreement was made.²⁸

An agreement exempting a user from charges for the construction or use of a sewer, or of connection therewith, does not exempt him from charges for the treatment and purification of the sewage emptied into the sewer by him.²⁹

Property owners in a sewer improvement district have been held, in particular circumstances, not estopped from maintaining an action against others to require the discontinuance of a connection with the sewers, on the ground that plaintiffs had induced the belief in such others that an outlet for sewage would be furnished;³⁰ and such property owners have the right to institute such suit after the com-

12. Ala.—Benson v. City of Andalusia, 195 So. 443, 240 Ala. 99.

13. Mo.—St. Louis v. Thierry, 13 S. W. 344, 100 Mo. 176.

14. S.D.—Erickson v. City of Sioux Falls, 14 N.W.2d 89, 70 S.D. 40.

15. S.D.—Erickson v. City of Sioux Falls, *supra*.

16. S.D.—Erickson v. City of Sioux Falls, *supra*.

Nuisance

It may be necessary for the municipality to discontinue sewerage service in order to protect itself against possible damage suits for the creation of a nuisance.—Erickson v. City of Sioux Falls, *supra*.

17. S.D.—Erickson v. City of Sioux Falls, *supra*.

18. S.D.—Erickson v. City of Sioux Falls, *supra*.

19. Pa.—Allen v. Swarthmore Borough, 25 Pa.Super. 410. 44 C.J. p 1088 note 7.

20. N.J.—Morse v. Borough of Essex Fells, 188 A. 484, 121 N.J.Eq. 202.

Reason for rule

Acceptance of dedication cannot be subsequently repudiated.—Morse v. Borough of Essex Fells, *supra*.

21. Ill.—Springer v. Walters, 28 N. E. 761, 139 Ill. 419.

22. Ill.—Springer v. Walters, *supra*.

23. Ill.—Springer v. Walters, *supra*.

24. S.C.—Glenn v. Woodworth, 14 S.E.2d 555, 197 S.C. 56.

Fact that the property is not within the city limits is not very material—Glenn v. Woodworth, *supra*.

25. Pa.—Rohrer v. City of Lancaster, 39 Pa.Dist. & Co. 109.

26. Iowa.—City of Des Moines v. City of West Des Moines, 30 N.W. 2d 500.

27. Iowa.—City of Des Moines v. City of West Des Moines, *supra*.

28. N.J.—City of New Brunswick v. Borough of Milltown, 38 A.2d 288, 135 N.J.Eq. 310.

29. Ohio.—State ex rel. Gordon v. Taylor, 79 N.E.2d 127, 149 Ohio St. 427.

30. Ark.—Sloss v. Turner, 1 S.W.2d 992, 175 Ark. 994.

missioners of the district and the municipality refuse to sue.³¹ A delay of eight months, after the making of the connection, in bringing such suit has been held not to support a plea of laches.³²

d. Charges for Use or Connection

- (1) In general
- (2) Mode of computation or measurement
- (3) Persons liable
- (4) Actions and remedies

(1) In General

A municipal corporation may fix the charges for using or connecting with its sewers, and the consumer impliedly agrees to pay them. The charges must be fair and reasonable, and not discriminatory; under most authorities they do not constitute a tax.

A municipal corporation is entitled to the same privilege of receiving payment for the service rendered in the ownership and operation of sewers as

a private corporation would be,³³ and an ordinance imposing a sewer rental is not invalid because the municipality does not collect from itself an annual charge for the use of its sewers.³⁴ So, a municipality may fix and determine the fees and charges for making connection with, or for the use of, its sewers,³⁵ and it is not prevented from so doing by the fact that it has for years permitted connections³⁶ or use³⁷ to be made without charge; the state, by permitting the establishment of sewer rents, of necessity authorizes the discontinuance of free service.³⁸ The charges may be fixed and enforced by the usual and appropriate procedure for the collection of such charges,³⁹ and the consumer, by accepting the service with knowledge of the rates,⁴⁰ impliedly agrees to pay the charges therefor.⁴¹ A statute empowering municipalities to impose such charges has been held to apply solely to charges based on actual use of the sewer system,⁴² and not to authorize the requirement of payment by all per-

31. Ark.—Sloss v. Turner, *supra*.

Reason for rule

It was the duty of the commissioners to protect the interests of the district before it was turned over to the city as a completed project, and it was the duty of the city thereafter to take such action as was necessary for that purpose.—Sloss v. Turner, *supra*—Peay v. Kinsworthy, 190 S.W. 565, 126 Ark. 323.

32. Ark.—Sloss v. Turner, 1 S.W.2d 993, 175 Ark. 994.

33. Pa.—In re Petition of City of Philadelphia, 16 A.2d 32, 340 Pa. 17.

Statutory right to collect rent

N.H.—Opinion of Justices, 39 A.2d 765, 93 N.H. 478.

Ohio.—Grim v. Village of Lewisville, 6 N.E.2d 998, 54 Ohio App. 270.

Agreement for free use held not shown

Conn.—Town of Manchester v. Rogers Paper Mfg. Co., 186 A. 623, 121 Conn. 617.

Charges for purification of sewage

Conn.—Town of Manchester v. Rogers Paper Mfg. Co., *supra*.

State as consumer

N.H.—Opinion of Justices, 39 A.2d 765, 93 N.H. 478.

County as consumer

Ky.—Louisville & Jefferson County Metropolitan Sewer Dist. v. Barker, 212 S.W.2d 122, 307 Ky. 655.

34. Pa.—Gericke v. City of Philadelphia, 44 A.2d 233, 353 Pa. 60.

35. Ala.—City of Leeds v. Avram, 14 So.2d 728, 244 Ala. 427.—*Corpus Juris* cited in Benson v. City of Andalusia, 195 So. 443, 445, 240 Ala. 99.—MacMahon v. Baumhauer, 175 So. 299, 234 Ala. 482.

Ark.—Freeman v. Jones, 75 S.W.2d 226, 189 Ark. 815.

Cal.—City of El Cajon v. Heath, 196 P.2d 81, 81 Cal.App.2d 530.

Ky.—Bond Bros. v. Louisville and Jefferson County Metropolitan Sewer Dist., 211 S.W.2d 867, 307 Ky. 689.

44 C.J. p 1087 note 72.

Statute construed

The act authorizing city authorities to fix sewer rates and provide funds necessary for servicing the bonded indebtedness is not a limitation on lawful rates, but looks to rendering the enterprises self-liquidating in so far as reasonable rates would provide funds and thus relieve taxpayers of the burden of such indebtedness.—Mitchell v. City of Mobile, 13 So.2d 664, 244 Ala. 442.

State utilities commission was held to have no jurisdiction to fix charges for connection with municipal sewers.—Atlantic Const. Co. v. City of Raleigh, 53 S.E.2d 165, 230 N.C. 365.

36. Pa.—Fisher v. Harrisburg, 2 Grant 291.

Maintenance through taxation

A city, by maintaining its sewers through taxation, did not impliedly bind itself never to establish compensatory rates.—Opinion of Justices, 39 A.2d 765, 93 N.H. 478.

37. Conn.—Town of Manchester v. Rogers Paper Mfg. Co., 186 A. 623, 121 Conn. 617.

Use of city sewers by county

Ky.—Louisville & Jefferson County Metropolitan Sewer Dist. v. Barker, 212 S.W.2d 122, 307 Ky. 655.

38. N.H.—Opinion of Justices, 39 A.2d 765, 93 N.H. 478.

39. Ala.—Benson v. City of Andalusia, 195 So. 443, 240 Ala. 99.—MacMahon v. Baumhauer, 175 So. 299, 234 Ala. 482.

40. Ky.—Louisville & Jefferson County Metropolitan Sewer Dist. v. Barker, 212 S.W.2d 122, 307 Ky. 655.

Notice as to rates to be discussed at council meeting held sufficient to satisfy requirements of statute.—Carpenter v. City of Paragould, 128 S.W.2d 980, 198 Ark. 454.

41. Ky.—Louisville & Jefferson County Metropolitan Sewer Dist. v. Barker, 212 S.W.2d 122, 307 Ky. 655.

42. Ky.—Louisville & Jefferson County Metropolitan Sewer Dist. v. St. Matthews Sanitary Ass'n, 208 S.W.2d 490, 307 Ky. 348.

N.H.—Opinion of Justices, 39 A.2d 765, 93 N.H. 478.

Pa.—In re Petition of City of Philadelphia, 16 A.2d 32, 340 Pa. 17.

Governing body of sanitary district, knowing of ordinances and charges by city for sewerage service, and not making express contract with city on some other basis, became bound by implied contract to pay for services at rate fixed by ordinance.—Board of Sup'rs of Henrico County v. City of Richmond, 173 S.E. 356, 162 Va. 14.

Payment held not under duress

Ohio—Union Properties v. City of Cleveland, 52 N.E.2d 335, 142 Ohio St. 358.

Payment held not under mistake in fact

Ohio—Union Properties v. City of Cleveland, 52 N.E.2d 335, 142 Ohio St. 358.

43. Pa.—In re Petition of City of Philadelphia, 16 A.2d 32, 340 Pa. 17.

sons to whom the sewer system is made available by its presence;⁴³ but an ordinance requiring the payment of sewer rental charges by the owners of all properties within the municipality and accessible to the sewer, whether or not they are users of the sewer system, has been held to be valid.⁴⁴

The charges must be reasonable,⁴⁵ fair and equitable,⁴⁶ must be fixed by ordinances which are not arbitrary,⁴⁷ and must be uniform and without discrimination against particular property owners;⁴⁸ but a higher rate for users outside the municipal limits than for those within may be proper.⁴⁹

Where the power to establish the rate is conferred by statute on the municipal authorities, the jurisdiction of the court in an action involving charges extends, at most, to considering whether or not the rate is unreasonable, arbitrary, and capricious,⁵⁰ and it has no power to establish a new rate;⁵¹ like-

wise, it has been held that it is the duty of the governing body of a municipality to decide on the rate,⁵² and that the court cannot set it aside unless it is clearly inequitable.⁵³

The municipality may require, as a condition for permitting the connection, the prepayment of a local assessment, if valid;⁵⁴ but an ordinance requiring owners of land formerly forfeited for delinquent taxes to pay, as a prerequisite to securing sewer service, that portion of a special assessment against the land, for such improvement, which was not realized from the proceeds of the sale of the land, has been held to be invalid.⁵⁵

A statute requiring the schedule of sewer rates by a sewer district applicable to property within a municipality to be approved by ordinance has been held not to require such formal action in the case of nonconcurrence by the municipality.⁵⁶

43. Pa.—In re Petition of City of Philadelphia, *supra*.

Ordinance judged by legal effect

An ordinance requiring payment to be made by all such persons must be judged by its legal effect and not by statements as to what is proposed to be done therein or otherwise.—In re Petition of City of Philadelphia, *supra*.

The theory of special benefits arising from the mere presence, or availability for use, of a sewer cannot sustain such a charge, since, while right to use a sewer may enhance value of abutting lot, such enhanced value accrues, if at all, immediately on construction of the sewer.—In re City of Philadelphia, 21 A.2d 876, 343 Pa. 47.—In re Petition of City of Philadelphia, 16 A.2d 32, 340 Pa. 17.

44. Ohio.—Colley v. Village of Englewood, 71 N.E.2d 524, 80 Ohio App. 540.

Statute not exclusive

The statute authorizing village to establish just and equitable rates or rent charges for use of sewage by persons whose premises are served by connection to village sewerage system is not exclusive.—Colley v. Village of Englewood, *supra*.

45. Ala.—Corpus Juris cited in Benson v. City of Andalusia, 195 So. 443, 445, 240 Ala. 99.—MacMahon v. Baumhauer, 175 So. 299, 234 Ala. 482.

Cal.—City of El Cajon v. Heath, 196 P.2d 81, 86 Cal App.2d 530.

Ohio.—Colley v. Village of Englewood, 71 N.E.2d 524, 80 Ohio App. 540.

44 C.J. p 1087 note 75.

Charge held not unreasonable

Ala.—Mitchell v. City of Mobile, 13 So.2d 664, 244 Ala. 442.

Ark.—Freeman v. Jones, 75 S.W.2d 226, 189 Ark. 815.

Tex.—City of Wichita Falls v. Landers, Civ.App., 291 S.W. 696.

Va.—Board of Sup'rs of Henrico County v. City of Richmond, 173 S.E. 356, 162 Va. 14.

Wash.—Town of Port Orchard v. Kitsap County, 141 P.2d 150, 19 Wash.2d 59.

44 C.J. p 1087 note 75 [b].

46. Ohio.—Colley v. Village of Englewood, 71 N.E.2d 524, 80 Ohio App. 540.

47. Ala.—MacMahon v. Baumhauer, 175 So. 299, 234 Ala. 482.

Rate held not arbitrary or capricious Wash.—Town of Port Orchard v. Kitsap County, 141 P.2d 150, 19 Wash.2d 59.

48. Ala.—MacMahon v. Baumhauer, 175 So. 299, 234 Ala. 482.

Ohio.—Colley v. Village of Englewood, 71 N.E.2d 524, 80 Ohio App. 540.

44 C.J. p 1087 note 76.

Charges held not discriminatory

Fla.—State v. City of Daytona Beach, 34 So.2d 309.

Pa.—Gericke v. City of Philadelphia, 44 A.2d 233, 353 Pa. 60.

Wash.—Town of Port Orchard v. Kitsap County, 141 P.2d 150, 19 Wash.2d 59.

W.Va.—Houchins v. City of Beckley, 32 S.E.2d 286, 127 W.Va. 306.

44 C.J. p 1087 note 76 [b].

49. Ky.—Bond Bros. v. Louisville and Jefferson County Metropolitan Sewer Dist., 211 S.W.2d 867, 307 Ky. 689.—Louisville & Jefferson County Metropolitan Sewer Dist. v. Joseph E. Seagram & Sons, 211 S.W.2d 122, 307 Ky. 413.

50. Wash.—Town of Port Orchard v. Kitsap County, 141 P.2d 150, 19 Wash.2d 59.

51. Wash.—Town of Port Orchard v. Kitsap County, *supra*.

52. Pa.—In re City of Philadelphia, 21 A.2d 876, 343 Pa. 47.

53. Pa.—In re City of Philadelphia, *supra*.

54. Mo.—Hill v. St. Louis, 60 S.W. 116, 159 Mo. 159.

44 C.J. p 1087 note 79.

Payment in installments

(1) Where ordinance required sewer assessment to be paid in installments and abutting owner had paid first installment and was not in default, owner was entitled to connect drain with sewer.—Blick & Co. v. George, 169 A. 224, 313 Pa. 77.

(2) Payment of assessments in installments generally see *supra* § 1573.

Subsequent maintenance assessment

Town, that, in consideration of nonresidents contributing money for its sewage disposal plant, permitted him to connect with sewerage system, was not entitled to collect subsequent maintenance assessment from his administratrix or, in the alternative, to disconnect the sewer, merely because operation of sewer had become more expensive, in absence of showing that town needed entire sewage capacity.—Town of Estes Park v. Mills, 65 P.2d 1086, 100 Colo. 94.

55. Minn.—Fortman v. City of Minneapolis, 4 N.W.2d 349, 212 Minn. 340.

56. Ky.—Louisville & Jefferson County Metropolitan Sewer Dist. v. Joseph E. Seagram & Sons, 211 S.W.2d 122, 307 Ky. 413.

Statements as notice of failure to approve

Representation by aldermen and positive assertions of president of board and other members that city would not approve rate schedules proposed by sewer district was suf-

Nature of charge; tax. A charge for the use of, or connection with, a sewer system has been held a charge for special benefits received,⁵⁷ or a method of paying for the construction.⁵⁸ Such a charge, or a charge for sewer services, or a rental charge, is, under most authorities, not a tax,⁵⁹ or an assessment.⁶⁰ However, the rental may partake of the nature of a tax or assessment,⁶¹ and a charge for the use of a sewer has been referred to as a tax.⁶² A distinction has been made between the actual use of the facilities with knowledge of the rates charged, in which case the charges are not taxes, or a substitute for taxes, and not an exercise of the taxing power, but an obligation resting on contract,⁶³ and the imposition of a charge with no regard to the extent or value of the use made of the sewer facilities or whether any use is made, in which case the charge is in legal effect a tax, the obligation to pay it being created only by the exercise of the taxing power.⁶⁴

A service charge and the cost of connection to the system have been distinguished,⁶⁵ in that the former is for the daily use of the system, payable by the person who uses it, unless the contrary is clearly expressed,⁶⁶ while the latter occurs only at the time of the connection,⁶⁷ and is a feature of the

premises⁶⁸ and in the nature of a permanent fixture.⁶⁹

The due certification and entry of a city sewerage service charge may create a valid lien against the premises for the amount of such charge.⁷⁰

Hearing. Where a statute provides for a public hearing, after notice, before the governing body of a municipal corporation prior to the establishment of rates to be charged for the use of a sewer, a person aggrieved by the rates must ordinarily avail himself of this remedy and cannot resort to the courts in the first instance.⁷¹

(2) Mode of Computation or Measurement

Charges by a municipal corporation for the use of its sewers must be in conformity with statute, and the volume of water delivered to the user has been held an acceptable basis for such charges.

A municipal corporation may fix, as the, or a, basis for computing the charge for the use of its sewers, the volume of water delivered to the user, as measured by the water meter,⁷² or the water rates, or rents.⁷³ A charge apportioned on the basis of the total cost of a whole outfall system and septic tank of a sewer improvement district has also been held equitable;⁷⁴ and, as between two cities, the basis used in determining the costs and charges

cient notice of failure to approve.
—Louisville & Jefferson County Metropolitan Sewer Dist. v. Joseph E. Seagram & Sons, *supra*.

57. Tex.—Wichita Falls v. Landers, Civ.App., 291 S.W. 696.

58. Ky.—Louisville & Jefferson County Metropolitan Sewer Dist. v. Joseph E. Seagram & Sons, 211 S.W.2d 122, 307 Ky. 413.

59. Ala.—Benson v. City of Andalusia, 195 So. 443, 240 Ala. 99.

Ky.—Louisville & Jefferson County Metropolitan Sewer Dist. v. Barker, 212 S.W.2d 122, 307 Ky. 655—Louisville & Jefferson County Metropolitan Sewer Dist. v. Joseph E. Seagram & Sons, 211 S.W.2d 122, 307 Ky. 413—Veail v. Louisville and Jefferson County Metropolitan Sewer Dist., 197 S.W.2d 413, 303 Ky. 248—City of Lexington v. Jones, 160 S.W.2d 19, 289 Ky. 719.

N.H.—Opinion of Justices, 39 A.2d 765, 93 N.H. 478.

N.Y.—Robertson v. Zimmerman, 196 N.E. 740, 268 N.Y. 52.

N.C.—Atlantic Const. Co. v. City of Raleigh, 53 S.E.2d 165, 230 N.C. 365.

Ohio.—State ex rel. Gordon v. Taylor, 79 N.E.2d 127, 149 Ohio St. 427—Grim v. Village of Lewisville, 6 N.E.2d 998, 54 Ohio App. 270.

Pa.—Borough of Albion v. Griffith, Com.Pl., 28 Erie Co. 145.

Taxes generally see *infra* §§ 1978–2121.

Charge held not general tax

Ala.—Benson v. City of Andalusia, 195 So. 443, 240 Ala. 99.

Tex.—City of Wichita Falls v. Landers, Civ.App., 291 S.W. 696.

60. Ky.—City of Lexington v. Jones, 160 S.W.2d 19, 289 Ky. 719.

Ohio.—State ex rel. Gordon v. Taylor, 79 N.E.2d 127, 149 Ohio St. 427—Grim v. Village of Lewisville, 6 N.E.2d 998, 54 Ohio App. 270.

Not assessments for local benefit

N.H.—Opinion of Justices, 39 A.2d 765, 93 N.H. 478.

Not a special assessment

Ohio.—Grim v. Village of Lewisville, 6 N.E.2d 998, 54 Ohio App. 270.

61. Ohio.—Grim v. Village of Lewisville, *supra*.

Lien in nature of tax

Charges held a valid lien in nature of a tax and superior to a prior mortgage lien.—Union Properties v. City of Cleveland, App., 49 N.E.2d 571, affirmed 52 N.E.2d 335, 142 Ohio St. 358.

62. Mass.—Thayer Foss Co. v. City of Woburn, 168 N.E. 734, 269 Mass. 186.

63. Pa.—In re Petition of City of Philadelphia, 16 A.2d 32, 340 Pa. 17.

64. Pa.—In re Petition of City of Philadelphia, *supra*.

65. Ala.—City of Leeds v. Avram, 14 So.2d 728, 244 Ala. 427.

66. Ala.—City of Leeds v. Avram, *supra*.

67. Ala.—City of Leeds v. Avram, *supra*.

68. Ala.—City of Leeds v. Avram, *supra*.

69. Ala.—City of Leeds v. Avram, *supra*.

70. Ohio.—Union Properties v. City of Cleveland, 52 N.E.2d 335, 142 Ohio St. 358.

Defective and invalid lien

Pa.—Fidelity-Philadelphia Trust Co. v. Woodbury, Com.Pl., 58 Montg. Co. 242.

71. W.Va.—Brewer v. City of Point Pleasant, 172 S.E. 717, 114 W.Va. 572.

72. Fla.—State v. City of Miami, 27 So.2d 118, 157 Fla. 726.

Okl.—Sharp v. Hall, 181 P.2d 972, 198 Okl. 678.

W.Va.—Houchins v. City of Beckley, 32 S.E.2d 286, 127 W.Va. 306.

73. Fla.—State v. City of Daytona Beach, 34 So.2d 309.

Pa.—Gerlicke v. City of Philadelphia, 44 A.2d 233, 353 Pa. 60—In re City of Philadelphia, 21 A.2d 876, 343 Pa. 47.

74. Ark.—Sloss v. Turner, 1 S.W.2d 993, 175 Ark. 994.

to be paid has been held not improper where, in fixing the minimum charge, consideration is given to the daily sewage flow, the population ratio between the two cities, and the cost of the disposal plant in the city whose sewer system is to be used, and the method and measure followed are similar to those prescribed by statute for cities of more than a certain population.⁷⁵

Where a contract setting forth the mode of computing the charges is unambiguous, it must be given effect as written,⁷⁶ and the practical construction thereof by the parties is not controlling.⁷⁷

Under a statute providing that sewer rentals shall be apportioned equitably among the properties served, "equitably" confers an element of discretion in defining classes of patrons and of service and the rates payable by any class,⁷⁸ and "apportioned" implies the consideration of two or more relationships, not only as between classes but also between members of the same class,⁷⁹ and both words must also be construed with respect to the provision in the statute enabling the municipality to establish and operate the sewer system as a self-liquidating unit of municipal activity.⁸⁰ Under such statute, the charge must be in proportion to the ex-

tent or value of the use of the sewers,⁸¹ and a continuation of a traditional method of paying for tax service out of the general tax rate cannot be sustained, since it is inequitable to light users of the sewers.⁸² A sewer charge based on the water consumption of the property served as measured by the charges for water supplied has been held to be valid under such a statutory requirement,⁸³ even though such a charge may bear particularly heavy on certain industries.⁸⁴ On the other hand, under such a statute, a rate, or rate factor, based on the assessed valuation of the properties actually using the sewer system is invalid as a tax measured by such value without relation to such use,⁸⁵ and cannot be justified on the theory that the value of the use is different from the extent of the use, in the absence of a showing of any relation either between the value of the use and the cost of installation or between the cost of installation and the assessed value of the property served.⁸⁶

(3) Persons Liable

Unless an ordinance provides otherwise, a sewer service charge falls on the tenant using the sewer, and the cost of connection on the owner of the premises making a permanent improvement thereto. In particular circumstances, a vendor, and not the purchasers, of lots has been held liable for the cost of connection.

75. Kan.—City of North Newton v. Regier, 103 P.2d 873, 152 Kan. 434.

76. Mo.—Ferguson Sewer Dist. v. Emerson Elec. Mfg. Co., App., 187 S.W.2d 774.

Charges varying with number of user's employees

Mo.—Ferguson Sewer Dist. v. Emerson Elec. Mfg. Co., supra.

77. Mo.—Ferguson Sewer Dist. v. Emerson Elec. Mfg. Co., supra.

78. Pa.—Gericke v. City of Philadelphia, 44 A.2d 233, 353 Pa. 60.

79. Pa.—Gericke v. City of Philadelphia, supra.

80. Pa.—Gericke v. City of Philadelphia, supra.

81. Pa.—In re City of Philadelphia, 21 A.2d 876, 343 Pa. 47.

82. Pa.—In re City of Philadelphia, supra.

83. Pa.—Gericke v. City of Philadelphia, 44 A.2d 233, 353 Pa. 60.

"The amount of water which flows into a building is roughly proportional to what flows out as sewage."—In re City of Philadelphia, 21 A.2d 876, 343 Pa. 47.

Metered and nonmetered properties

Ordinance imposing annual sewer rent apportioned between users paying water charges by meters as a class and nonmetered properties which pay appliance rates is not invalid as an unjust discrimination.—

Gericke v. City of Philadelphia, 44 A.2d 233, 353 Pa. 60.

Use of sewerage system by other townships

Objections to special contracts whereby townships outside city were permitted to use portions of city's sewerage system could not be relied on to invalidate ordinance not purporting to impose a charge for such service.—Gericke v. City of Philadelphia, supra.

84. Pa.—In re City of Philadelphia, 21 A.2d 876, 343 Pa. 47.

Special rates for certain institutions

The provision of special rates for charitable institutions, public and private schools, etc., based on their water charges under separate ordinances fixing such charges, whatever effect might be if separately challenged in proper proceeding, could not be made the basis of striking down the whole ordinance.—Gericke v. City of Philadelphia, 44 A.2d 233, 353 Pa. 60.

85. Pa.—In re City of Philadelphia, 21 A.2d 876, 343 Pa. 47.

Varying cost of furnishing and maintaining sewers

The fact that cost of furnishing and maintaining sewers is greater in sections of city wherein property values are higher than in other sections does not validate rental rate based on assessed valuation of prop-

erties served, particularly in absence of evidence as to conditions when existing sewers were installed and in view of resulting sewer rental charges of different multiples of water rent against different buildings in same sections of city.—In re City of Philadelphia, supra.

Higher assessment of corner dwellings does not justify imposition of higher sewer rental.—In re City of Philadelphia, supra.

Practical basis

A rate so based has been held not justified on the ground that there is no method of charging for sewer service which can be exactly equitable to every owner and that a practical basis must be used.—In re City of Philadelphia, supra.

Type of sewage

The fact that cost of sewage disposal for any property depends on type of sewage, as well as quantity thereof, does not authorize imposition of rental rate based on assessed valuation of property served, as such value has no relation to type of sewage.—In re City of Philadelphia, supra.

Urgency of city's sewage disposal problem does not justify such a charge.—In re City of Philadelphia, supra.

86. Pa.—In re City of Philadelphia, supra.

Unless an ordinance is clear to the contrary,⁸⁷ a sewer service charge falls on the tenant making use of the service,⁸⁸ while the cost of connection falls on the owner of the premises making a permanent improvement thereto.⁸⁹ A vendor, and not the purchasers, of lots sold on the mutual assumption of an existing sewer connection has been held properly charged with the cost of the connection.⁹⁰ A city acquiring land has been held bound by a provision in a prior deed that the grantors and their successors should not be obligated to pay for the use of a sewer.⁹¹

An agreement that the vendor of a sewer system to a town would pay the town a proportion of the cost of operating a purification plant based on the volume of sewage delivered by the vendor and another has been held not a guaranty by the vendor of payment by such other, but a direct promise by the vendor without the necessity that the town first seek payment from such other.⁹²

(4) Actions and Remedies

General rules governing civil actions and remedies apply to the recovery by a municipal corporation of charges for the use of its sewers, or to recover such charges which are alleged to have been illegally exacted.

Under an ordinance requiring property owners to make physical connection with a municipal sewer system, the municipal corporation may sue in assumpsit for the connection expense incurred on default of a property owner.⁹³ The usual rules as to parties⁹⁴ and evidence⁹⁵ apply in an action by a municipal corporation to recover sewer charges.

An action to recover from the municipality sewerage charges alleged to have been illegally exacted must be brought by a proper party⁹⁶ within the time limited by statute,⁹⁷ and in such an action the usual rules of evidence apply.⁹⁸

§ 1806. Private Sewers and Drains

- a. In general
- b. Acquisition by municipality
- c. Charges and compensation
- d. Actions

a. In General

As far as the public necessities require, a municipal corporation may reasonably regulate the use of private sewers and drains; and it may permit or prevent the use of the space below the surface of its streets for such purposes. An individual constructing a sewer or drain in a public street may or may not, according to circumstances, have the right to the exclusive use thereof.

In the exercise of its control of the space below the surface of the street, a municipal corporation may prevent its use for private drains or sewers,⁹⁹ or, in proper circumstances, may remove such a sewer,¹ as where it is so located as to interfere with the paving or macadamizing of the street or the erection of a curb.² On the other hand, a municipality may permit an individual or corporation to construct, under proper circumstances and restrictions, a private drain or sewer in its streets,³ without the consent of the abutting owner;⁴ and a license for this purpose is usually revocable,⁵ but the right to construct a private sewer may be so granted as to give the owner a vested right therein which the city cannot revoke.⁶ It is sometimes,⁷ although

87. Ala.—City of Leeds v. Avram, 14 So.2d 728, 244 Ala. 427.

88. Ala.—City of Leeds v. Avram, supra.

89. Ala.—City of Leeds v. Avram, supra.

Service charge and cost of connection distinguished see supra subdivision d (1) of this section.

90. Ark.—Sloss v. Turner, 1 S.W.2d 993, 175 Ark 994.

Reason for rule

The vendor should bear the cost of furnishing what he represented the lots already had.—Sloss v. Turner, supra.

91. Mass.—Thayer Foss Co. v. City of Woburn, 168 N.E. 734, 269 Mass. 186.

92. Conn.—Town of Manchester v. Rogers Paper Mfg. Co., 186 A. 623, 121 Conn. 617.

93. Ala.—City of Leeds v. Avram, 14 So.2d 728, 244 Ala. 427.

94. Conn.—Town of Manchester v.

Rogers Paper Mfg. Co., 186 A. 623, 121 Conn. 617

95. Va.—Board of Sup'rs of Henrico County v. City of Richmond, 173 S.E. 356, 162 Va. 14.

96. Successors of grantors in a deed exempting such grantors and their successors from the obligation to pay for the use of a sewer have been held entitled to maintain an action of contract to recover taxes paid under protest for such use.—Thayer Foss Co. v. City of Woburn, 168 N.E. 734, 269 Mass. 186.

97. Ohio.—Union Properties v. City of Cleveland, App., 49 N.E.2d 571, affirmed 52 N.E.2d 335, 142 Ohio St. 358.

98. Evidence held insufficient to show duress.—Union Properties v. City of Cleveland, supra.

99. Pa.—Miller v. Borough of New Oxford, 165 A. 766, 109 Pa.Super. 85.

44 C.J. p 1088 notes 11-12.

1. Pa.—Miller v. Borough of New Oxford, supra.

2. Pa.—Miller v. Borough of New Oxford, supra.

3. Idaho.—Cornwall v. Garrison, 81 P.2d 1094, 59 Idaho 287.

Pa.—Miller v. Borough of New Oxford, 165 A. 766, 109 Pa.Super. 85 —Frickville Sewerage Co. v. James, 26 Pa.Dist. & Co. 562.

44 C.J. p 1088 note 13.

4. Pa.—Wood v. McGrath, 24 A. 682, 150 Pa. 451, 16 L.R.A. 715.

5. N.J.—Ainley v. Hackensack Impr Comm., 45 A. 807, 64 N.J. Law 504.

Vt.—Camp v. Barre, 29 A. 1022, 66 Vt 563.

6. Mich.—Stevens v. Muskegon, 69 N.W. 227, 111 Mich. 72, 36 L.R.A. 77.

7. Ill.—Corpus Juris cited in Atkinson Trust & Sav. Bank v. De Roo, 75 N.E.2d 46, 49, 332 Ill.App. 251.

44 C.J. p 1088 note 17.

not always,⁸ held that a private drain or sewer constructed by an individual in a public street is his private property, and that he has a right to the exclusive use of it,⁹ unless the municipality has reserved a right to use it,¹⁰ or provision has been made by the municipality¹¹ or the person constructing the sewer¹² for the making of connections therewith by other persons, on the payment of a fee or charge,¹³ or unless the owner grants the municipality the privilege of connecting with the sewer.¹⁴ Where a drain or sewer has been constructed or maintained by an individual on his own initiative and it has never been accepted or taken over by the municipality, he alone is liable for the cost of its construction.¹⁵

While the owners of a ditch or sewer cannot compel the municipality to assume jurisdiction to control and regulate it,¹⁶ and a municipality has no duty to maintain a private drain¹⁷ or to keep it unobstructed,¹⁸ the municipality may, in so far as the public necessities require, regulate the use of private drains, ditches, and sewers;¹⁹ but the power of regulation should be reasonably exercised²⁰ and private rights should not be invaded or impaired un-

less the public welfare and safety demand it,²¹ and then no further than the circumstances require.²² Under the authority conferred by some statutes, a court may compel the operation of a plant for pumping sewage from a private system into the municipal system²³ until such time as municipal sewers are extended to the locality.²⁴

The operators of a sewer system, having assumed the duties and obligations of a public utility, have a right to discontinue operation,²⁵ but not without giving patrons a reasonable time, or a sufficient period, within which to provide themselves with such services or a substitute therefor.²⁶

In private dwellings or buildings. Regulations of methods and devices for the conveyance of sewage from private dwellings are recognized as an exercise of that branch of the police power which pertains to the public health.²⁷ A municipality may require that permits for the installation of sewerage systems in private dwellings be obtained²⁸ and may confer the power to grant such permits on designated boards,²⁹ since such delegation is not a grant of power to legislate.³⁰ Under some building codes,

8. N.Y.—A. & D. S. Realty Corp. v. Kass, 197 N.Y.S. 279, 119 Misc. 735.

Effect of grant of authority to school district

Fact that city may have granted school district authority to install a sewer in city street did not justify assumption that city thereby vacated that part of street for street purposes, or that there was an agreement between city and district that district should have right to maintain sewer for its own use to exclusion of public.—Cornwall v. Garrison, 81 P.2d 1094, 59 Idaho 287.

9. Ill.—Corpus Juris cited in Atkinson Trust & Savings Bank v. De Roo, 75 N.E.2d 46, 49, 332 Ill. App. 251.

44 C.J. p 1088 note 19.

10. Ill.—Corpus Juris cited in Atkinson Trust & Savings Bank v. De Roo, 75 N.E.2d 46, 49, 332 Ill. App. 251.

44 C.J. p 1088 note 20.

11. Minn.—Lee v. Scriber, 172 N.W. 802, 143 Minn. 17.

12. Ark.—Pulaski Heights Sewerage Co. v. Loughborough, 129 S.W. 536, 95 Ark. 264, 29 L.R.A., N.S., 319.

44 C.J. p 1089 note 22.

Easement to use sewer terminated on building of public sewer with requirement that abutting owners connect therewith.—Stegner v. Coomer, 176 S.W.2d 395, 296 Ky. 334.

13. Minn.—Lee v. Scriber, 172 N.W. 802, 143 Minn. 17.

44 C.J. p 1089 note 23.

14. Okl.—Dall v. Adams Bldg. Corp., 195 P.2d 755.

Grant held not violated by extension of use of city sewer, without owner's permission to property not located in area originally designated.—Dall v. Adams Bldg. Corp., supra.

15. Vt.—St. Albans v. Noble, 56 Vt. 525.

16. Pa.—Borough of Ashland v. Borough of Frackville, Com.Pl., 5 Sch.Reg. 81.

Utah.—Davis v. Midvale City, 189 P. 74, 56 Utah 1.

17. N.Y.—Kosmak v. Mayor, etc., of City of New York, 22 N.E. 945, 117 N.Y. 361—People, on Complaint of Green v. Willis, 17 N.Y.S.2d 784, 173 Misc. 442.

The provision of sanitary code making it duty of every owner of realty to maintain drainage thereof in such manner that it shall not be a nuisance or dangerous to life or health does not impose duty on municipal authorities to take charge of a private ditch.—People, on Complaint of Green v. Willis, supra.

18. N.Y.—People, on Complaint of Green v. Willis, supra.

19. Tex.—City of Beaumont v. Calder Place Corporation, 183 S.W.2d 713, 143 Tex. 244.

44 C.J. p 1089 note 28.

Municipal regulation of toilets, water closets, privies, etc., see supra § 303.

Filling in ditch

The sanitary code provision plac-

ing duty on owner of realty to keep drainage thereof in such condition that it shall not be dangerous to life or health did not prohibit owner from filling in ditch which was not a natural drain, in absence of evidence that filling in was dangerous to life or health.—People, on Complaint of Green v. Willis, 17 N.Y.S.2d 784, 173 Misc. 442.

Notice of change of drainage, sewerage, or sewer connections
Pa.—Commonwealth v. Minet, Quar. Sess., 62 York Leg.Rec. 1.

20. N.J.—Rodwell v. Newark, 34 N.J.Law 264.

21. Colo.—Platte, etc., Canal, etc., Co. v. Lee, 29 P. 1036, 2 Colo.App. 184.

22. N.J.—Rodwell v. Newark, 34 N.J.Law 264.

23. N.Y.—Larchmont v. Larchmont Park, 173 N.Y.S. 32, 185 App.Div. 330.

24. N.Y.—Larchmont v. Larchmont Park, supra.

25. Tex.—West v. Probst, Com. App., 6 S.W.2d 96.

26. Tex.—West v. Probst, supra.

27. Cal.—In re Nicholls, 241 P. 399, 74 Cal.App. 504.

28. Cal.—In re Nicholls, supra.

29. Cal.—In re Nicholls, supra.

30. Cal.—In re Nicholls, supra.

a building inspector may permit the construction of a drainage system for roof water, wholly separate from the sewerage system of the building.³¹

b. Acquisition by Municipality

A private sewer or drain may be acquired by a municipal corporation in the same manner as property generally.

A drain or sewer constructed by private persons may pass to the public by dedication and acceptance,³² or it may pass to the municipal corporation by deed;³³ but the administrative officers of a municipality have no authority to convert a private drain into a public one without acquiring the property on which the drain is located.³⁴

A city possessing power to construct a sewer has authority to purchase a sewer which has been previously constructed by an individual with its permission and which can be used for public purposes as a public sewer.³⁵ However, a municipality is not required to acquire or take over a drain or sewer unless it is so provided by statute;³⁶ where it does acquire or take over a private sewer³⁷ or the property of a sewer company,³⁸ it must, of course, compensate the owner for the value thereof.

c. Charges and Compensation

A municipal corporation may have a contract right to fix or regulate the rates to be charged by a sewerage company. General rules governing the determination of rates and charges for public utility services have been

applied to rates and charges for the use of private sewers, or for the services of sewerage companies, in municipalities.

A municipal corporation may have a contract right to fix or regulate the rates to be charged by a sewerage company,³⁹ even though it may not have charter power to do so;⁴⁰ but the fact that a municipality prescribes maximum rates as a condition of its consent to the exercise of rights granted directly by the legislature to a sewerage company does not prevent the legislature from subsequently conferring power on a public utility commission to regulate the rates to be charged by the company.⁴¹ A statute may prohibit sewerage corporations from granting free service to any patron,⁴² regardless of existing contracts to the contrary.⁴³

Compensation for storm sewer services rendered by a utility company to a community cannot be claimed on the basis of full and exclusive ownership of the storm sewer system when the circumstances show a partial ownership in the community;⁴⁴ nor can recovery be had against a municipality for such services on the basis of quasi contract or contract implied in fact, where the services were rendered in plaintiff's own interest and without expectation of reward.⁴⁵ Likewise, with respect to asserted ownership and the right to demand compensation, a conveyance of a "disposal plant and sewage system" has been held not to include a storm water system,⁴⁶ and a conveyance of a "sewerage

31. Minn.—State v. Nash, 158 N.W. 730, 134 Minn. 73.

32. Mo.—Kansas City v. Ratekin, 30 Mo.App. 416.

44 C.J. p 1090 note 49.

Dedication of street as carrying private sewer pipes see Dedication § 8.

Mode of acquisition of property by municipality generally see supra § 957.

33. Ohio.—Kinney v. Cincinnati, 6 Ohio N.P., N.S., 137.

34. N.Y.—Kosmak v. Mayor, etc., of City of New York, 22 N.E. 945, 117 N.Y. 361—People, on Complaint of Green, v. Willis, 17 N.Y.S.2d 784, 173 Misc. 442.

35. Mo.—Schwabe v. Moore, 172 S.W. 1157, 187 Mo.App. 74.

36. N.C.—Shute Sewerage Co. v. Monroe, 78 S.E. 151, 162 N.C. 275. 44 C.J. p 1090 note 53.

Sewer in annexed district

The right or duty of a city to purchase a privately owned sewer system in an annexed district is largely a matter within the discretion of the city authorities.—South Memphis Land Co. v. City of Memphis, 74 S.W.2d 209, 18 Tenn.App. 142.

37. N.Y.—Wright v. Mt. Vernon, 60 N.E. 1123, 167 N.Y. 541.

38. Pa.—Hanover Borough v. Hanover Sewer Co., 96 A. 132, 251 Pa. 95.

44 C.J. p 1090 note 55.

Price

Where town, in granting corporation a franchise to install a sewage system, reserved right to acquire the system at any time on payment of entire "cost," including any and all "cost" of repair or maintenance, together with interest thereon sufficient to make a total of six per cent on the "investment," deducting the "net earnings," the price required was the cost of the system, plus the cost of "maintenance," plus interest of six per cent on the investment, less the sum of "net earnings."—Town of Romney v. Romney Imp. Co., 11 S.E.2d 758, 122 W.Va. 608.

39. U.S.—Opelika v. Opelika Sewer Co., Ala., 44 S.Ct. 517, 265 U.S. 215, 68 L.Ed. 985.

44 C.J. p 1089 note 34.

Regulation of public utility rates by municipality generally see supra § 292.

40. U.S.—Opelika v. Opelika Sewer Co., supra.

44 C.J. p 1089 note 35.

41. N.J.—Collingswood Sewerage Co. v. Collingswood, 105 A. 209, 92 N.J.Law 509.

44 C.J. p 1089 note 36.

42. Pa.—Dickson v. Drexel, 132 A. 284, 285 Pa. 419.

43. Pa.—Dickson v. Drexel, supra.

44. Minn.—Country Club District Service Co. v. Village of Edina, St. Paul Fire & Marine Ins. Co., Intervener, 8 N.W.2d 321, 214 Minn. 26.

45. Minn.—Country Club District Service Co. v. Village of Edina, St. Paul Fire & Marine Ins. Co., Intervener, supra.

46. Pa.—Cheltenham & Abington Sewerage Co. v. Public Service Commission, 166 A. 649, 311 Pa. 175.

Process of development of subdivisions was held to negative idea that promoters intended to reserve property right in storm water sewers constructed on land so as to authorize collection of compensation for use of sewers.—Cheltenham & Abington Sewerage Co. v. Public Service Commission, supra.

plant and system" not to include a storm water drain system, but only the grantor's interest in the sanitary sewerage plant and system, where the sanitary sewer system and the storm water drain system were entirely disconnected;⁴⁷ and one who, of his own accord, and for his own purposes, substitutes an artificial channel for a natural channel cannot charge compensation for the use of the artificial channel.⁴⁸

In proceedings by a public utility commission inquiring into the fairness and reasonableness of rates charged by a sewerage company, the commission has been held to have statutory authority to compel the company to correct its patron ledger and to revise its system of notation therein so that it might in the future properly reflect the company's transactions.⁴⁹

Where no written notice to clean privy vaults is given a property owner by a city health department, as required by ordinance, a licensed scavenger is not entitled to recovery against the owner for cleaning the vaults, where the owner did not employ him or consent to his doing the work.⁵⁰

Determination of rates and charges. In the absence of legislation fixing maximum charges,⁵¹ a court has power to determine what is a reasonable charge for a connection with,⁵² or the use of,⁵³ a private sewer in a municipality, but it may not prescribe the rates to be charged in the future⁵⁴ or

in cases other than the one before it.⁵⁵

A sewer company providing service in a municipality is entitled to earn a sufficient sum annually to provide not only for current repairs, but for making good depreciation and replacing parts of the property when they come to the end of their life, and to pay a fair return on capital judiciously expended in the construction of the plant.⁵⁶ In determining the value of the plant or property, the reasonable value at the time it is being used for the public service is the basis for determining whether rates fixed are reasonable;⁵⁷ the investment on which the company is entitled to base its compensation, in determining the sufficiency of rates, cannot include property not at present actually employed,⁵⁸ and not reasonably proper and necessary for the service to be performed.⁵⁹ The value of personal property should be considered if it represents an investment reasonably necessary for the successful carrying on of the business.⁶⁰ So, as a general rule of law, a sewer company is entitled to charge and collect a rate that will pay the cost of operation and provide for upkeep, for depreciation and replacements, and for a reasonable return on the investment.⁶¹

Where a utility commission fixes a rate base and prescribes the gross annual revenue for a sewerage company, and approves a schedule prepared by the company, the rates prescribed are "commission

47. Pa.—Cheltenham & Abington Sewerage Co. v. Public Service Commission, *supra*.

48. Pa.—Cheltenham & Abington Sewerage Co. v. Public Service Commission, *supra*.
Natural watercourses generally see *infra* § 1807.

49. Pa.—Cheltenham & Abington Sewerage Co. v. Pennsylvania Public Utility Commission, 49 A.2d 707, 355 Pa. 377, appeal dismissed and certiorari denied 67 S.Ct. 1205, 331 U.S. 784, 91 L.Ed 1815.

50. Minn.—Meinke v. Jannette, 216 N.W. 534, 173 Minn. 612.

51. Ark.—Pulaski Heights Sewerage Co. v. Loughborough, 129 S.W. 536, 95 Ark. 264, 29 L.R.A., N.S., 319.

Rates and rate making as to public utilities generally see the C.J.S. title Public Utilities §§ 13-30, also 51 C.J. p 11 note 72-p 31 note 21.

52. Ark.—Pulaski Heights Sewerage Co. v. Loughborough, *supra*.
44 C.J. p 1089 note 40.

53. Ark.—Pulaski Heights Sewerage Co. v. Loughborough, *supra*.
Pa.—Quinn v. Brusa, 31 Pa.Co. 405.

54. Ark.—Pulaski Heights Sewerage Co. v. Loughborough, 129 S.

W. 536, 95 Ark 264, 29 L.R.A., N.S., 319.

55. Ark.—Pulaski Heights Sewerage Co. v. Loughborough, *supra*.
44 C.J. p 1090 note 43.

53. Tex.—West v. Probst, Com App. 6 S.W.2d 96.

Fixing depreciation; sinking fund method

Fixing of accrued depreciation of sewerage company property solely by sinking fund method held fundamental error; assumption, for purposes of computing annual depreciation, that sewerage plant would have total life of one hundred years was held unauthorized.—Cheltenham & Abington Sewerage Co. v. Public Service Commission, 186 A. 149, 122 Pa.Super. 252.

57. Tex.—West v. Probst, Com. App., 6 S.W.2d 96.

Cash working capital allowance

Pa.—Cheltenham & Abington Sewerage Co. v. Public Service Commission, 186 A. 149, 122 Pa.Super. 252.

Cost of financing; brokerage fee

Pa.—Cheltenham & Abington Sewerage Co. v. Public Service Commission, 186 A. 149, 122 Pa.Super. 252.

Going concern value

Pa.—Cheltenham & Abington Sewer-

age Co. v. Public Service Commission, 186 A. 149, 122 Pa.Super. 252.

58. Tex.—West v. Probst, Com.App., 6 S.W.2d 96.

59. Tex.—West v. Probst, *supra*.
Plants of needlessly large capacity
Tex.—West v. Probst, *supra*.

60. Tex.—West v. Probst, *supra*.

61. N.J.—Atlantic City Sewerage Co. v. Board of Public Utility Com'rs, 29 A.2d 850, 129 N.J.Law 401.

Pa.—Cheltenham & Abington Sewerage Co. v. Public Service Commission, 186 A. 149, 122 Pa.Super. 252.
Tex.—West v. Probst, Com.App., 6 S.W.2d 96.

Estimating income taxes; purchase of defective title

Commission, in estimating sewerage company's income taxes, properly deducted from gross revenue interest paid on company's entire bond issue, although part of bond proceeds was used to purchase defective title to storm sewer.—Cheltenham & Abington Sewerage Co. v. Public Service Commission, 186 A. 149, 122 Pa.Super. 252.

made rates," and may be relied on as such by the company until changed by the commission.⁶² An order of the commission sustaining a complaint alleging the unjustness and unreasonableness of rates and praying an award of reparations, and ordering a further hearing to determine the damage sustained by particular complainants is an "appealable order."⁶³ The determination by the commission of the propriety and amount of an award for reparations to be made for past excessive charges must be in accordance with the statutes in force at the time of the filing of the petition,⁶⁴ except as to procedural changes.⁶⁵

d. Actions

General rules governing actions in civil cases have been applied in actions involving private sewers in municipal corporations.

An action in assumpsit at common law does not lie to recover for the use of a private sewer where a statute provides for the determination by the municipal officers of the amount to be paid.⁶⁶

One who is not the owner of a sewer installed in a street cannot maintain an action to enjoin an abutting property owner from connecting therewith.⁶⁷ An action involving private sewers must be timely brought,⁶⁸ and in such an action the rights of persons not made parties may not be adjudicated,⁶⁹ and the usual rules as to the weight and sufficiency of evidence apply.⁷⁰ A court will not enjoin a con-

nection with a private sewer on the ground that the sewer will be overloaded thereby where the evidence is insufficient to show that such result will follow.⁷¹

A schedule prepared by accountants of a public service commission after examination of the books of a sewerage company, in proceedings inquiring into the fairness and reasonableness of its rates, has been held to afford sufficient evidence for the commission to find patrons entitled to, and the amount of, reparations sought.⁷²

§ 1807. Natural Watercourses

a. In general

b. Use for drainage or sewerage purposes

a. In General

Riparian owners may use a natural watercourse running through a municipal corporation, if not navigable water, for any legitimate purpose not affecting the rights of other such owners or creating a nuisance. Unless it has a statutory right of control, a municipal corporation cannot control a natural watercourse which is not a sewer, except as health measures or the protection of streets require; and it has no right to divert water from such a stream to the detriment of lower proprietors.

Natural watercourses running through a municipal corporation, if not navigable waters, belong to the riparian owners⁷³ who may use them for any legitimate purpose which will not affect the rights of other riparian owners⁷⁴ or create a nuisance,⁷⁵

62. Pa.—Cheltenham & Abington Sewerage Co. v. Pennsylvania Public Utility Commission, 25 A.2d 334, 344 Pa. 366, appeal dismissed 63 S.Ct. 38, 317 U.S. 588, 87 L.Ed. 482, rehearing denied 63 S.Ct. 153, 317 U.S. 707, 87 L.Ed. 564, certiorari denied Pennsylvania Public Utility Commission v. Cheltenham & Abington Sewerage Co., 63 S.Ct. 39, 317 U.S. 588, 87 L.Ed. 482.

63. Pa.—Cheltenham & Abington Sewerage Co. v. Pennsylvania Public Utility Commission, 22 A.2d 37, 146 Pa.Super. 274, modified on other grounds 25 A.2d 334, 344 Pa. 366, appeal dismissed 63 S.Ct. 38, 317 U.S. 588, 87 L.Ed. 482, rehearing denied 63 S.Ct. 153, 317 U.S. 707, 87 L.Ed. 564, certiorari denied Pennsylvania Public Utility Commission v. Cheltenham & Abington Sewerage Co., 63 S.Ct. 39, 317 U.S. 588, 87 L.Ed. 482.

64. Pa.—Cheltenham & Abington Sewerage Co. v. Pennsylvania Public Utility Commission, 22 A.2d 37, 146 Pa.Super. 274, modified on other grounds 25 A.2d 334, 344 Pa. 366, appeal dismissed 63 S.Ct. 38, 317 U.S. 588, 87 L.Ed. 482, rehearing denied 63 S.Ct. 153, 317 U.S.

707, 87 L.Ed. 564, certiorari denied Pennsylvania Public Utility Commission v. Cheltenham & Abington Sewerage Co., 63 S.Ct. 39, 317 U.S. 588, 87 L.Ed. 482.

65. Pa.—Cheltenham & Abington Sewerage Co. v. Pennsylvania Public Utility Commission, 22 A.2d 37, 146 Pa.Super. 274, modified on other grounds 25 A.2d 334, 344 Pa. 366, appeal dismissed 63 S.Ct. 38, 317 U.S. 588, 87 L.Ed. 482, rehearing denied 63 S.Ct. 153, 317 U.S. 707, 87 L.Ed. 564, certiorari denied Pennsylvania Public Utility Commission v. Cheltenham & Abington Sewerage Co., 63 S.Ct. 39, 317 U.S. 588, 87 L.Ed. 482.

66. Me.—Jameson v. Cunningham, 183 A. 131, 134 Me. 134.

67. Idaho.—Cornwall v. Garrison, 81 P.2d 1094, 59 Idaho 287.

68. Pa.—Miller v. Borough of New Oxford, 165 A. 766, 109 Pa.Super. 85.

69. Idaho.—Cornwall v. Garrison, 81 P.2d 1094, 59 Idaho 287.

70. Evidence held insufficient

Minn.—Country Club District Service Co. v. Village of Edina, St. Paul Fire & Marine Ins. Co., In-

tervenor, 8 N.W.2d 321, 214 Minn. 26.

Pa.—Cheltenham & Abington Sewerage Co. v. Public Service Commission, 166 A. 649, 311 Pa. 175—Miller v. Borough of New Oxford, 165 A. 766, 109 Pa.Super. 85.

71. Ohio.—Bradley v. Schwab, 3 Ohio App. 359, 20 Ohio Cir.Ct., N.S., 157, 29 Ohio Cir.Ct. 320.

72. Pa.—Cheltenham & Abington Sewerage Co. v. Pennsylvania Public Utility Commission, 49 A.2d 707, 355 Pa. 377, appeal dismissed and certiorari denied 67 S.Ct. 1205, 331 U.S. 784, 91 L.Ed. 1815.

73. N.Y.—Schenectady v. Furman, 15 N.Y.S. 724, 61 Hun 171, appeal dismissed 31 N.E. 626, 133 N.Y. 696.

74. Mich.—A. L. Lakey Co. v. Kalamazoo, 101 N.W. 841, 138 Mich. 644, 110 Am.S.R. 338, 67 L.R.A. 931.

N.Y.—Schenectady v. Furman, 15 N.Y.S. 724, 61 Hun 171, appeal dismissed 31 N.E. 626, 133 N.Y. 696.

75. N.Y.—Schenectady v. Furman, supra.

although they have no right to obstruct such streams so as to overflow or damage other property⁷⁶ or create a nuisance.⁷⁷ Where a natural watercourse is not a sewer, the municipality has no control over it except the power to keep it cleaned out as a health measure,⁷⁸ and prevent its being obstructed so as to overflow or injure the public streets,⁷⁹ unless the power of control is conferred by statute,⁸⁰ or the city has acquired, by condemnation proceedings, a right of way for a new channel of the stream.⁸¹ It has no right to divert water from such a stream to the detriment of lower proprietors,⁸² or so to exercise a power of control conferred by its charter as to deprive persons who have acquired a vested water right in the stream of their property without due process of law;⁸³ nor can it compel one landowner to remove an obstruction from the stream merely on the ground of protecting the property of another landowner.⁸⁴

A municipal corporation, having acquired land outside its boundaries and impounded thereon the waters of a nonnavigable stream to provide a water supply, has the same right as a private riparian owner to forbid any person to enter on such impounded waters without a permit,⁸⁵ and the public has no fishing rights in such waters.⁸⁶

b. Use for Drainage or Sewerage Purposes

While, in general, a municipal corporation has a right to use for sewerage and drainage any natural channel for the flow of water, the state may regulate or prohibit the discharge of municipal sewage into a stream which is a source of water supply. The validity of an ordinance

prohibiting the discharge of sewage into a river within the jurisdiction of a municipal corporation has been upheld as a health measure.

In general, a municipal corporation has a right to use for sewerage and drainage purposes any natural channel for the flow of water,⁸⁷ and it may exercise this right without incurring liability to keep the channel open to its mouth,⁸⁸ even though the state or the owners of the lots through which it passes have made an artificial and covered substitute in place of the natural channel.⁸⁹ So, a municipality may utilize for drainage a creek running through its borders,⁹⁰ and, under a power to drain and repair, may straighten it to conform to the direction of streets.⁹¹ A proviso that a statute relating to the construction of drains as an inlet or outlet into or out of the municipality shall be liberally construed justifies the diversion of a natural watercourse for such purposes.⁹²

In the interest of the public health and safety, the state may regulate⁹³ or, if necessary, prohibit⁹⁴ the discharge of municipal sewage into a river or stream which is a source of water supply; and, as against the state, a municipality can acquire no prescriptive right to discharge its sewage into a river.⁹⁵ On the other hand, the legislature may authorize a municipality to use tidal streams below high-water level as an outlet for sewers;⁹⁶ and a statute forbidding the discharge of sewage or refuse into, or the placing of sewage or refuse on the banks of, a river which furnishes the public water supply of any municipality may expressly exempt from the operation of its provisions such mu-

76. Pa.—Commonwealth v. Stevens, 36 A. 166, 178 Pa. 543—Flynn v. Shenandoah, 19 Pa.Co. 622.

77. Pa.—Commonwealth v. Stevens, 36 A. 166, 178 Pa. 543—Flynn v. Shenandoah, 19 Pa.Co. 622.

78. Mich.—A. L. Lakey Co. v. Kalamazoo, 101 N.W. 841, 138 Mich. 644, 110 Am.S.R. 338, 67 L.R.A. 931.

44 C.J. p 1090 note 62.

79. Pa.—Scranton v. Scranton Steel Co., 26 A. 1, 154 Pa. 171.

80. Iowa.—Erickson v. Cedar Rapids, 185 N.W. 46, 193 Iowa 109. 44 C.J. p 1090 note 64.

81. Kan.—Hutchinson v. White, 233 P. 508, 117 Kan. 622. 44 C.J. p 1090 note 65.

82. N.J.—Sparks Mfg. Co. v. Newton, 45 A. 596, 60 N.J.Eq. 399.

Use of water of nonnavigable stream for municipal water supply see the C.J.S. title Waters § 226, also 87 C.J. p 1118 note 31—p 1120 note 40.

83. Utah.—Fisher v. Bountiful City, 59 P. 520, 21 Utah 29.

84. Pa.—Scranton v. Scranton Steel Co., 26 A. 1, 154 Pa. 171. 44 C.J. p 1090 note 68.

85. Ala.—City of Birmingham v. Lake, 10 So.2d 24, 248 Ala. 367.

86. Ala.—City of Birmingham v. Lake, supra.

87. Iowa.—Sioux City v. Simmons Hardware Co., 129 N.W. 978, 131 N.W. 17, 151 Iowa 334. 44 C.J. p 1091 note 69.

Right to use substituted conduits
Commonwealth, townships, and property owners had same right to use artificial conduits following natural watercourses and substituted therefor as they had to pass surface drainage into natural courses.—Cheltenham & Abington Sewerage Co. v. Public Service Commission of Pennsylvania, 162 A. 469, 107 Pa. Super. 225, affirmed 166 A. 649, 311 Pa. 175.

Right to drain surface water held not shown

N.Y.—Town of Hamburg v. Gervasi, 55 N.Y.S.2d 876, 269 App.Div. 393.

88. Pa.—Dalton v. Towanda Borough, 64 A. 547, 215 Pa. 402—Munn v. Pittsburgh, 40 Pa. 364.

89. Pa.—Dalton v. Towanda Borough, 64 A. 547, 215 Pa. 402—Munn v. Pittsburgh, 40 Pa. 364.

90. Mass.—Bennett v. New Bedford, 110 Mass. 433.

44 C.J. p 173 note 86.

91. Dak.—McGuire v. Rapid City, 43 N.W. 706, 6 Dak. 346, 5 L.R.A. 752.

92. Ind.—Huntington v. Amiss, 79 N.E. 199, 167 Ind. 375.

93. Mont.—Miles City v. State Board of Health, 102 P. 696, 39 Mont. 405, 25 L.R.A., N.S., 589. 44 C.J. p 1091 note 72.

94. Mont.—Miles City v. State Board of Health, supra.

95. Mont.—Miles City v. State Board of Health, supra.

96. N.J.—Marcus Sayre Co. v. Newark, 45 A. 985, 60 N.J.Eq. 361, 83 Am.S.R. 629, 48 L.R.A. 722.

municipalities as, at the date of the passage of the act, have a public sewer or system of sewers, legally constructed under municipal authority, discharging its drainage or sewage into the river.⁹⁷ The right of a municipal corporation to empty its sewage into a stream or river has been held to be merely a legislative license,⁹⁸ revocable whenever the public health and safety require.⁹⁹

Where a municipality which has adopted a natural watercourse for drainage purposes changes its course and permits a landowner for a consideration to fill up the abandoned channel, it cannot subsequently reopen it without instituting proceedings de novo for the condemnation of the property.¹ The owner of a water privilege for manufacturing purposes on a stream in a city has been held to have no usufructuary right in the sewage of the city which has been discharged into a stream above his property,² and cannot prevent the city from diverting it elsewhere.³

After water which has been diverted from a stream for sewerage purposes has been returned thereto, it becomes a part of the water of the state,⁴ and a municipal contract purporting to grant the exclusive right to divert the sewage from the stream cannot be sustained.⁵ However, by reason of the

public necessity of disposing of city sewage,⁶ a municipal contract for the discharge of sewage on another's land, which grants the owner of the land the exclusive use of such sewage, will be upheld as against a claim that, as soon as the sewage became surplusage and waste water and started on its return to the stream from which it had previously been diverted, it became part of the public waters.⁷

A municipality has no right to authorize a person to construct a private sewer discharging into an open watercourse which is not a public sewer so as to create a nuisance.⁸ An ordinance prohibiting the discharge of sewage into a river within the jurisdiction of a municipality has been held a valid exercise of the statutory power of the municipality to enact ordinances for the promotion of the health of the community;⁹ as such, its enforcement will not be specialized by the compulsion of a court of equity.¹⁰

A statute providing that navigable waters within the state shall be common highways has been held not to give a municipality on a navigable stream the same rights in the expenditure of public funds for the improvement thereof as it would have in improving highways.¹¹

C. PUBLIC BUILDINGS

§ 1808. In General

Municipal corporations may ordinarily, under their charter provisions, regulate and control the use of their public buildings, but they may not appropriate public buildings to other than a public use without special legislative sanction.

Municipal corporations may ordinarily, under their charter provisions, regulate and control the use of their public buildings.¹² A municipal building may be used for any municipal purposes for which it is suited and for which the municipality

97. N.J.—State Board of Health v. Phillipsburg, 71 A. 750, 83 N.J.Eq. 422.

98. Mo.—Riggs v. City of Springfield, 126 S.W.2d 1144, 344 Mo. 420, 122 A.L.R. 1496.

99. Mo.—Riggs v. City of Springfield, supra.

1. Pa.—Strohl v. Ephrata, 35 A. 713, 178 Pa. 50.

2. Conn.—Flisk v. Hartford, 37 A. 933, 69 Conn. 375, 38 L.R.A. 474.

3. Conn.—Flisk v. Hartford, supra.

4. Wyo.—Wyoming Hereford Ranch v. Hammond Packing Co., 236 P. 764, 33 Wyo. 14.

5. Wyo.—Wyoming Hereford Ranch v. Hammond Packing Co., supra.

6. Wyo.—Wyoming Hereford Ranch v. Hammond Packing Co., supra.

7. Wyo.—Wyoming Hereford Ranch v. Hammond Packing Co., supra.

8. N.J.—Hutchinson v. Trenton Board of Health, 39 N.J.Eq. 569.

9. N.Y.—Parsons v. Town of Smithtown, 288 N.Y.S. 470, 160 Misc. 103.

10. N.Y.—Parsons v. Town of Smithtown, 288 N.Y.S. 470, 160 Misc. 103.

11. Minn.—Behrens v. City of Minneapolis, 271 N.W. 814, 199 Minn. 363.

Fact that the price of gas may be lowered to consumers as a result of such expenditure does not justify it. —Behrens v. City of Minneapolis, supra.

12. Wis.—Bell v. Platteville, 36 N. W. 831, 71 Wis. 139.

44 C.J. p 1091 note 88.

Establishment and regulation of markets see infra §§ 1824-1830.

Power to erect and maintain public buildings see supra § 1041.

Regulation and use of buildings for public housing see infra § 1831.

Heating plant

(1) Municipality is not compelled

to comply with provisions of act relating to construction of heating plants using out-of-state fuels where state does not provide means for administration of law by state department of business control as provided by statute—Ruffcorn v. City of Seattle, 63 P.2d 503, 189 Wash. 53.

(2) Municipal park board which installed burner using out-of-state oil in clubhouse after furnishing state department of business control with engineer's report showing that cost of heating clubhouse by state fuels would be more than five per cent greater than cost of heating by out-of-state oil, and after department's refusal to make finding on its own investigation with respect to cost of different kinds of fuel, held exempt from operation of statute requiring municipality to use state fuels in heating municipal buildings.—Ruffcorn v. City of Seattle, supra.

might provide buildings,¹³ at least until the property is permanently dedicated to a particular public use,¹⁴ and although a building was erected or acquired primarily for a special purpose it may be used incidentally for other municipal purposes not exclusive of the primary use.¹⁵ On the other hand, public buildings ordinarily are held for public use, and a municipal corporation has no proprietary rights in the buildings distinct from its trust for the public.¹⁶ So a municipality cannot appropriate public buildings to other than a public use without special legislative sanction,¹⁷ and it may be without power to use public buildings to carry on a private business for profit.¹⁸ A private citizen has the right to enter a public building for a lawful purpose and in a lawful manner.¹⁹

A municipality may lease a private building for public use,²⁰ but such a contract or lease must be made in compliance with statutory requirements,²¹ after proper authorization by municipal officers.²² Municipal corporations are in some cases authorized by statute to use certain county buildings, such as jails or courthouses,²³ or to execute to the state a penal bond conditioned to build and keep them

in repair.²⁴ Some statutes vest the care and management of a public building, which is both a city and county building, in a board of trustees;²⁵ but, in the absence of charter or statutory authority, a combined city and county government is without power to turn over the control and management of a public building to a board of trustees, a majority of whom it does not select.²⁶

Sale. A municipal corporation may sometimes have the power to sell a public building which is no longer needed for public use,²⁷ but the sale may be made only by an officer or body authorized to do so,²⁸ and a municipality has been held to have no power to sell its town hall in the absence of express legislative grant, where there was continued need for the hall and a new one was not to be established.²⁹ A court cannot interfere with the right of a purchaser of a public building sold pursuant to advertisement by the city council to handle and dispose of the property as it desires.³⁰

§ 1809. Use or Lease for Private Purposes

Generally a municipal corporation may either gratuitously or for compensation permit buildings erected for a municipal purpose to be used incidentally for law-

13. Tex.—City of Aransas Pass v. Minter, Civ.App., 34 S.W.2d 1113, error refused.

44 C.J. p 1092 note 89.

Public underground exhibition hall. constructed with public funds, could be used by municipality for all public purposes and all purposes incidental thereto, including right to afford to patrons of adjacent municipal stadium and public hall parking and storing privileges, and reasonable charge therefor could be made; municipality could permit its officers and employees to use hall for parking and storing their automobiles, while performing their duties, on reasonable terms; also, hall could be used for parking, storing, and servicing municipal automobiles, trucks, busses, and other vehicles, since such use was public in kind.—City of Cleveland v. Ruple, 200 N.E. 507, 130 Ohio St. 465, 103 A.L.R. 853.

14. Tex.—City of Aransas Pass v. Minter, Civ.App., 34 S.W.2d 1113, error refused.

15. Ohio.—City of Cleveland v. Ruple, 200 N.E. 507, 130 Ohio St. 465, 103 A.L.R. 853.

44 C.J. p 1092 note 90.

16. N.Y.—American Dock Co. v. City of New York, 21 N.Y.S.2d 943, 174 Misc. 813, affirmed 26 N.Y.S.2d 704, 261 App.Div. 1063, affirmed 36 N.E.2d 696, 286 N.Y. 658.

17. N.Y.—American Dock Co. v. City of New York, supra.

18. Kan.—State ex rel. Smith v.

City of Hiawatha, 272 P. 113, 127 Kan. 183.

Conducting shows

City was without authority to conduct shows for profit in memorial auditorium erected at public expense.—State ex rel. Smith v. City of Hiawatha, 272 P. 113, 127 Kan. 183.

Garage business

Public underground exhibition hall, constructed with public funds for holding public exhibitions or to provide space for storage, garage, or other public purposes, and for all uses incidental thereto, could not be used by municipality in carrying on purely private garage business in competition with other private garage businesses in vicinity.—City of Cleveland v. Ruple, 200 N.E. 507, 130 Ohio St. 465, 103 A.L.R. 853.

19. Idaho.—Cornell v. Harris, 88 P. 2d 498, 60 Idaho 87.

20. Mo.—Atwill v. City of Richmond, App., 132 S.W.2d 672.

Completed transaction

Informal lease of private library and building to village for year held valid as completed transaction, where rent had been paid and possession taken.—Koeester v. Village of Pardeeville, 225 N.W. 204, 199 Wis. 54.

21. Mo.—Atwill v. City of Richmond, App., 132 S.W.2d 672.

22. Mo.—Atwill v. City of Richmond, supra.

Ratification

Where lease executed by mayor of

city was void for lack of authorization, payment of monthly rental provided in lease as it purported to become due did not constitute such a formal act as was required for ratification of lease.—Atwill v. City of Richmond, supra.

23. Ind.—Tippecanoe County v. Lafayette, 7 Ind. 614.

24. Ind.—State v. Callehan, 1 Ind. 147.

25. N.Y.—Buffalo v. Zittel, 162 N.Y. S. 234.

26. Cal.—Egan v. San Francisco, 133 P. 294, 165 Cal. 576, Ann Cas. 1915A 754.

27. N.C.—Shaver v. Salisbury, 68 N. C. 291.

43 C.J. p 1343 note 71.

Appurtenances

Deed from city to county of courthouse and jail property with rights and appurtenances held not to include as one of appurtenances flowing water passing through pipes and mains into buildings.—City Council of Augusta v. Richmond County, 173 S.E. 140, 178 Ga. 400.

28. Mich.—Bostedor v. City of Eaton Rapids, 263 N.W. 416, 273 Mich. 426.

29. Del.—Drexler v. Commissioners of Town of Bethany Beach, 185 A. 484, 15 Del.Ch. 214.

30. S.C.—Watson v. Jennings, 144 S.E. 78, 146 S.C. 372.

ful private purposes, which will not interfere with public use, and such buildings may be leased for a limited period of time for private use where not presently needed for municipal purposes; but municipal authorities empowered to lease a public building are not charged with an absolute duty of letting to all applicants and they are vested with judgment and discretion in the matter.

As a general rule, a municipal corporation may either gratuitously or for compensation³¹ permit buildings erected for a municipal purpose to be used incidentally for lawful private purposes, which will not interfere with public use,³² such as the

use of a city hall or other municipal building for lectures, entertainments, or theatrical performances.³³ While a municipality ordinarily is without power to erect a building for the mere purpose of renting it out, as discussed supra § 959, after it has lawfully constructed or leased a building for municipal purposes, it may have the power to let, sublet, or rent for hire the building or a portion thereof,³⁴ for a limited period of time³⁵ and for a lawful use,³⁶ where the building or portion there-

31. Cal.—Corpus Juris quoted in Captain Charles V. Gridley Camp, No. 104, United Spanish War Veterans v. Board of Sup'rs of Butte County, 277 P. 500, 503, 98 Cal. App. 585.

Mass.—Worden v. New Bedford, 131 Mass. 23, 41 Am R. 185.

Mont.—Corpus Juris cited in Colwell v. City of Great Falls, 157 P.2d 1013, 1019, 117 Mont. 126.

Lease of premises erected or acquired for public housing see infra § 1831.

Hospital

(1) A city's lease of its hospital property and equipment to nonprofit hospital corporation, rendering hospital services in city's behalf without compensation or remuneration, except for necessary outlays in operation of hospital, was not unconstitutional as grant or loan of city's credit.—South Side Dist. Hospital v. Hartman, 153 P.2d 537, 62 Ariz. 67.

(2) Authorization by city voters of bond issue to provide funds for purchase and equipment of hospital did not warrant leasing of hospital even if voters were advised of contemplated leasing, when single question of bond issue was presented to them and the hospital could not be leased unless authorized by a majority of the qualified voters at an election called for that purpose.—Lewis v. City of Seminole, Okl., 195 P.2d 267.

32. Cal.—Corpus Juris quoted in Captain Charles V. Gridley Camp, No. 104, United Spanish War Veterans v. Board of Sup'rs of Butte County, 277 P. 500, 503, 98 Cal. App. 585.

Mont.—Corpus Juris cited in Colwell v. City of Great Falls, 157 P.2d 1013, 1019, 117 Mont. 126.

44 C.J. p 1092 note 98.

Assemblages

Governing body of municipality may, in its discretion, provide room in city hall for public assemblages.—Reid v. City of Muskogee, 278 P. 339, 137 Okl. 44.

Industrial museum

Park commissioners' agreement to allocate public building, restored with proceeds of bond issue, to nonprofit industrial museum corpora-

tion was held not ultra vires.—Furlong v. South Park Com'rs, 172 N.E. 757, 340 Ill. 363.

Manner of granting permit

The statute authorizing city to grant permit to use public places does not require that such permission be granted by ordinance, but warranted granting permission by contract authorized by resolution.—Femmer v. City of Juneau, C.C.A. Alaska, 97 P.2d 649.

33. Cal.—Corpus Juris quoted in Captain Charles V. Gridley Camp, No. 104, United Spanish War Veterans v. Board of Sup'rs of Butte County, 277 P. 500, 503, 98 Cal App 585.

44 C.J. p 1092 note 99.

Boxing and wrestling matches

Cal.—Lynch v. City and County of San Francisco, 43 P.2d 538, 3 Cal. 2d 141.

Public policy

The interim leasing of municipal auditorium by city to private individual for purpose of exhibiting moving pictures was not void as against public policy.—Colwell v. City of Great Falls, 157 P.2d 1013, 117 Mont. 126.

34. Cal.—Corpus Juris quoted in Captain Charles V. Gridley Camp, No. 104, United Spanish War Veterans v. Board of Sup'rs of Butte County, 277 P. 500, 503, 98 Cal. App. 585.

Ky.—Board of Councilmen of City of Frankfort v. Pattie, 12 S.W.2d 1108, 227 Ky. 343.

Mo.—Harris v. City of St. Louis, 111 S.W.2d 995, 233 Mo.App. 911.

44 C.J. p 1092 note 2.

Express power

(1) Power to lease is sometimes expressly conferred by charter or statute.—South Side Dist. Hospital v. Hartman, 153 P.2d 537, 62 Ariz. 67—44 C.J. p 1092 note 2 [a].

(2) Act giving cities power to own and operate hospitals and to lease them to domestic nonprofit associations or corporations, and validating cities' ownership, operation, and leasing of hospitals before act took effect, is valid.—South Side Dist. Hospital v. Hartman, supra.

Relationship of parties

The relationship existing between a city and an individual to whom, or organization to which, the city has leased its municipal auditorium or a part thereof during a time when the auditorium is not being used by the city for purely civic matters is that of landlord and tenant.—Harris v. City of St. Louis, 111 S.W.2d 995, 233 Mo.App. 911.

Increase of minimum rental

Annual sewer rental, imposed by city ordinance on city as owner of leased premises in trust, was within term "taxes or charges of like nature which may be imposed on premises," in provision of lease for increase or decrease of minimum rental as total sum of such taxes or charges increased or decreased, in view of tenant's payment of sewer rental charges in form of general taxes before passage of ordinance.—City of Philadelphia v. N. Snellenburg & Co., 63 A.2d 480, 163 Pa.Super. 507.

35. Cal.—Corpus Juris quoted in Captain Charles V. Gridley Camp, No. 104, United Spanish War Veterans v. Board of Sup'rs of Butte County, 277 P. 500, 503, 98 Cal App. 585.

44 C.J. p 1092 note 3.

Property owned in private capacity

City may sell or lease for any term property owned in its private proprietary capacity.—Board of Councilmen of City of Frankfort v. Pattie, 12 S.W.2d 1108, 227 Ky. 343.

Constitutional limitation

Lease of city's opera house is not granting of franchise or privilege or contract with reference thereto, within constitutional provision prohibiting such grants or contracts for more than a certain term of years.—Board of Councilmen of City of Frankfort v. Pattie, supra.

36. Cal.—Corpus Juris quoted in Captain Charles V. Gridley Camp, No. 104, United Spanish War Veterans v. Board of Sup'rs of Butte County, 277 P. 500, 503, 98 Cal. App. 585.

Ohio.—Heald v. Cleveland, 19 Ohio N.P.N.S., 305..

Profit-making events

City held authorized to rent its

of is not presently needed for municipal purposes,³⁷ and, in case of a lease or sublease of a portion of the building, its use by the lessee or sublessee will not interfere with the proper use of the remainder of the building by the municipality.³⁸ Under some statutes, however, a municipality may be denied the power to lease certain public buildings for private use,³⁹ and a statute authorizing the lease of certain buildings has been held not to authorize the leasing of premises for conducting a purely commercial enterprise.⁴⁰

Where a municipality has the power to lease its property to others, it has the incidental power to grant an option to lease⁴¹ or to provide in the lease that it will refund to the lessee on the termination of the lease the value of permanent improvements placed on the property by him.⁴² A city, like any other landlord, may agree to furnish electric power to tenants in connection with a lease of city-owned premises.⁴³ Statutory regulations as to the mode of exercising the power to lease must be observed;⁴⁴ and, where the lease was procured by fraud, it may be set aside by the courts.⁴⁵ A legislative prohibition of a lease of

property already under lease means that the city shall not execute two leases covering the same property for the same period of time;⁴⁶ it does not prevent the city from renewing a lease before its expiration.⁴⁷ The repeal of a statute granting to a board of trustees power to lease a particular building indicates an intention on the part of the legislature to deny to the board of trustees the power to lease the building or any part of it.⁴⁸

Refusal to lease. Municipal authorities empowered to lease a public building are not charged with an absolute duty of letting to all applicants;⁴⁹ they are vested with judgment and discretion in the matter,⁵⁰ and their exercise of this discretion will not be interfered with by the courts in the absence of a plain case of abuse of discretion.⁵¹

Tenancy at will. An agreement between a city and an individual that he shall act as watchman and caretaker of certain city property, move into the house thereon, and put and keep it and other improvements on the property in repair, creates the relationship of landlord and tenant, not of employer and employee;⁵² and, the tenancy being one at will, it may be terminated on demand by the city

convention hall for private profit-making events, including sporting exhibitions, where not interfering with public uses.—*Clarey v. City of Philadelphia*, 166 A. 237, 311 Pa. 11.

37. Cal.—*Corpus Juris* quoted in *Captain Charles V. Gridley Camp, No. 104, United Spanish War Veterans v. Board of Sup'rs of Butte County*, 277 P. 500, 503, 98 Cal. App. 585.

Mont.—*Corpus Juris* cited in *Colwell v. City of Great Falls*, 157 P.2d 1013, 1019, 117 Mont. 126.

N.H.—*Douglas v. Hollis*, 172 A. 433, 86 N.H. 578.

N.J.—*Cordingley v. Borough of Mendham*, 171 A. 158, 12 N.J.Misc. 331.

Pa.—*Corpus Juris* cited in *Clarey v. City of Philadelphia*, 166 A. 237, 238, 311 Pa. 11.

44 C.J. p 1092 note 5.

38. Mont.—*Colwell v. City of Great Falls*, 157 P.2d 1013, 117 Mont. 126. Tex.—*Mission v. Richards*, Civ.App., 274 S.W. 269.

Use of remainder

City held empowered to lease city auditorium even though city police court, city jail, and mayor's office are housed under same roof.—*Cline v. City of Hickory*, 176 S.E. 250, 207 N.C. 125.

39. Kan.—*State ex rel. Griffith v. City of Independence*, 256 P. 799, 123 Kan. 766—*Electric Theater Co. v. Darby*, 254 P. 1035, 123 Kan. 225.—*Darby v. Otterman*, 253 P. 803, 122 Kan. 603.

Existing use

A city, without specific statutory authority, could not lease city auditorium to an individual for a theater, where auditorium was built with public funds for public and municipal purposes and it was being devoted to such uses.—*City of Bessemer v. Huey*, 22 So.2d 325, 247 Ala. 12.

40. Kan.—*Glen W. Dickinson Theaters v. Lambert*, 16 P.2d 515, 138 Kan. 498.

41. N.J.—*Borough of East Rutherford v. Sterling Paper Converting Co.*, 32 A.2d 855, 21 N.J.Misc. 232.

Option to renew

N.J.—*Borough of East Rutherford v. Sterling Paper Converting Co.*, supra.

42. N.Y.—*Wilkins v. New York*, 30 N.Y.S. 424, 9 Misc. 610.

43. N.Y.—*New Colonia Ice Co. v. Woolley*, 41 N.Y.S.2d 662, 181 Misc. 473.

44. Utah.—*McDonald v. Price*, 146 P. 550, 45 Utah 464.

Requirements held complied with

Md.—*Gottlieb-Knabe Co. v. Macklin*, 71 A. 949, 109 Md. 429, 31 L.R.A., N.S., 580, 16 Ann.Cas. 1092.

N.J.—*Whirl-O-Ball v. City of Asbury Park*, 55 A.2d 463, 136 N.J. Law 316.

45. Ky.—*Capital Amusement Co. v. Frankfort*, 276 S.W. 528, 210 Ky. 622.

44 C.J. p 1092 note 9.

46. Me.—*Biddeford v. Yates*, 72 A. 335, 104 Me. 506, 15 Ann.Cas. 1091.

47. Me.—*Biddeford v. Yates*, supra.

48. Kan.—*Darby v. Otterman*, 252 P. 903, 122 Kan. 603, followed in *State v. Independence*, 256 P. 799, 123 Kan. 766, and *Electric Theater Co. v. Darby*, 254 P. 1035, 123 Kan. 225.

49. N.D.—*State v. Vesperman*, 204 N.W. 202, 52 N.D. 641.

Not a public utility

Public hall in municipal auditorium does not constitute public utility. N.D.—*State v. Vesperman*, supra.

Ohio—*State ex rel. White v. City of Cleveland*, 181 N.E. 24, 125 Ohio St. 230, 86 A.L.R. 1172.

50. Ohio—*State ex rel. White v. City of Cleveland*, supra.

44 C.J. p 1093 note 14.

51. N.D.—*State v. Vesperman*, 204 N.W. 202, 52 N.D. 641.

52. Wash.—*Najewitz v. City of Seattle*, 152 P.2d 722, 21 Wash.2d 556.

In suit to enjoin ejection of plaintiff from city property, amended complaint, alleging that city employed plaintiff as watchman and caretaker of property and particularly to move into house thereon and that it was agreed that plaintiff would put and keep house and other improvements on property in repair and useful condition, did not allege cause of action based on employment contract, but merely set up agreement for occupancy of real property, notwithstanding contrary conclu-

for possession of the land, without prior notice,⁵³ and no liability exists on the part of the city for the repairs or improvements made on the property by the lessee.⁵⁴

Collection of rent. The state tax collector may have authority to maintain suit to collect, on behalf of a municipal corporation, indebtedness due under a contract for rental of municipal warehouses.⁵⁵

D. MEANS OF PUBLIC TRANSPORTATION AND COMMUNICATION

§ 1810. Transportation

A municipal corporation may exercise all the ordinary rights of proprietorship in a line of railroad constructed by it under legislative authority, and it may sell such property as is not needed for transportation purposes.

Where a municipal corporation has by legislative authority constructed a line of railroad which is an independent road and its exclusive property, it may exercise all the ordinary rights of proprietorship therein.⁵⁶ A municipality may be authorized to convey land to a railroad for a freight depot,⁵⁷ but land deeded to a municipality for a special purpose may not be transferred by it to a railroad for other purposes.⁵⁸ A municipal corporation, after construction of transportation facilities, may sell such property as is not necessary for transportation purposes.⁵⁹ The legality of contractual provisions in connection with construction and operation of a railroad passenger terminal which made bonds issued by the city payable out of revenues from the terminal, which exempted the terminal from taxation, which postponed the obligation of the railroads to pay rent for the use of the terminal, and which fixed the final maturity of date for the bonds, could not be questioned where such

provisions were specifically authorized by a constitutional amendment permitting the city to construct and operate railroad passenger stations.⁶⁰ Matters of rapid transit affecting a certain city are not exclusively of city concern, but the state legislature is still empowered to act in such matters.⁶¹

§ 1811. Communication; Radio Broadcasting

The use of a municipally owned radio broadcasting station for other than strictly departmental business is not necessarily unlawful, and municipal authorities may exercise some discretion in deciding what shall be broadcast.

A municipal corporation has power to construct and maintain a radio broadcasting station for the use of the various departments of the city government in the conduct of the business of the municipality, as discussed supra § 1054, and the use of the station for other than strictly departmental business is not necessarily unlawful.⁶² As long as the use made of the station is within that authorized by the proper board, there can be no judicial interference with the exercise of the discretion of the municipal authorities in deciding what shall be broadcast.⁶³ However, there are limits to the proper use of the station;⁶⁴ the use actually made

sions and argumentative allegations.—*Najewitz v. City of Seattle*, supra.

53. Wash.—*Najewitz v. City of Seattle*, supra.

54. Wash.—*Najewitz v. City of Seattle*, supra.

55. Miss.—*Gully v. Williams Bros.*, 180 So. 400, 182 Miss. 119.

Capacity in which owned

The right of action to recover indebtedness due under contract for rental of warehouses erected by municipality for public purpose in promoting general welfare did not belong to the municipality in its proprietary capacity, and the warehouses were not owned by it in its purely proprietary capacity, with respect to authority of state tax collector to maintain suit to recover indebtedness due under the rental contract.—*Gully v. Williams Bros.*, supra.

56. Pa.—*Philadelphia v. Philadelphia*, etc., R. Co., 58 Pa. 253, 44 C.J. p 1093 note 20.

Power to build, provide, and maintain transportation facilities generally see supra § 1045.

57. Miss.—*City of Jackson v. Ala-*

bama & V. Ry. Co., 160 So. 602, 172 Miss. 528.

58. Wis.—*Matson v. Town of Caladonia*, 227 N.W. 298, 200 Wis. 43.

59. N.Y.—396 Flatbush Ave. Extension Realty Corporation v. City of New York, 190 N.E. 339, 264 N.Y. 180.

Conveyance of fee title

Deed whereby city, after construction of subway, granted certain property not required for rapid transit purposes, subject to permanent easement and right of way, held under evidence to convey fee title except as to portion actually used or which thereafter might become necessary for use for subway purposes, and grantee had right to possession and rents of property not presently used for subway—396 Flatbush Ave. Extension Realty Corporation v. City of New York, supra.

60. La.—*Hotard v. City of New Orleans*, 35 So.2d 752, 213 La. 843, appeal dismissed 69 S.Ct. 57, 335 U.S. 803, 93 L.Ed. —.

61. N.Y.—*Connolly v. Stand*, 83 N.Y.S.2d 445, 192 Misc. 872, affirmed

82 N.Y.S.2d 922, 274 App.Div. 877, affirmed 82 N.E.2d 399, 298 N.Y. 658.

62. N.Y.—*Lewis v. La Guardia*, 14 N.Y.S.2d 463, 172 Misc. 82, affirmed 14 N.Y.S.2d 991, 258 App.Div. 713, affirmed 27 N.E.2d 44, 282 N.Y. 757.—*Fletcher v. Hylan*, 211 N.Y.S. 397, 125 Misc. 489.

63. N.Y.—*Fletcher v. Hylan*, 211 N.Y.S. 727.

Communism breakfasts

Broadcasts over municipal radio station of speeches which were delivered by prominent speakers at communion breakfasts sponsored by organizations of Catholic municipal employees and were determined to be of public interest by administrative officer charged with operation of the radio station, in the sound exercise of his discretion, were authorized by law.—*Lewis v. La Guardia*, 14 N.Y.S.2d 463, 172 Misc. 82, affirmed 14 N.Y.S.2d 991, 258 App.Div. 713, affirmed 27 N.E.2d 44, 282 N.Y. 757.

64. N.Y.—*Fletcher v. Hylan*, 211 N.Y.S. 727.

must be within that authorized by the proper board,⁶⁵ and the station cannot be used for any private purpose of any person,⁶⁶ whether he is a public official or merely a private citizen.⁶⁷

E. WATER FRONTAGE, LANDINGS, DOCKS, AND WHARVES

§ 1812. In General

Although in the absence of a statutory grant of power a municipal corporation has no control over navigable waters, it may exercise power delegated to it by the state to control water frontage and submerged lands under navigable waters, within certain limitations, and to control and regulate the construction, maintenance, and use of landing places, wharves, docks, and piers within the corporate limits.

Although in the absence of a statutory grant of power a municipal corporation has no control over navigable waters,⁶⁸ the state may delegate its public trusts with respect to the control of water frontage and submerged lands under navigable waters to a municipal corporation, which may then exercise control over such waters,⁶⁹ subject to the paramount authority of the federal government over interstate and foreign commerce,⁷⁰ and subject to revocation by the state of any merely administrative powers delegated by it.⁷¹ So a municipality, in order to secure the orderly use of public waters, may ordain where, when, and how the several uses of which such waters are susceptible shall

be enjoyed,⁷² and the use of water of a lake as a source of water supply for the inhabitants of the city and for water storage as a part of the city waterworks system is a use for a public purpose which the city is authorized to make.⁷³ Also a city may have the power to establish a line of mean high water⁷⁴ or to establish divisional lines in waters between areas in which its riparian rights as owner of land fronting on such waters and those of owners of other such lands may be exercised;⁷⁵ and a municipal corporation which owns land fronting on a navigable river has power to make an agreement, binding on it and the owner of adjoining land, as to the division of riparian rights between them.⁷⁶

The state may delegate the supervision of public wharves to the city within whose limits they are located;⁷⁷ and when duly authorized by charter or statute a municipal corporation may control and regulate the construction, maintenance, and use of landing places, wharves, docks, and piers within the corporate limits,⁷⁸ and require all vessels to land

65. N.Y.—Fletcher v. Hylan, *supra*.

66. N.Y.—Fletcher v. Hylan, *supra* 44 C.J. p 1093 note 26.

67. N.Y.—Fletcher v. Hylan, *supra*.

68. N.Y.—Mayville v. Wilcox, 16 N.Y.S. 15, 61 Hun 223.
44 C.J. p 1093 note 32.

69. Cal.—City of Oakland v. Hogan, 106 P.2d 987, 41 Cal.App.2d 333.

Minn.—Nelson v. De Long, 7 N.W.2d 342, 213 Minn. 425.
44 C.J. p 1093 note 29.

Navigable waters generally see the C.J.S. title Navigable Waters § 1 et seq, also 45 C.J. p 404 note 1 et seq.

Park abutting on stream see *infra* § 1813.

Wharves, piers, and docks:

Generally see the C.J.S. title Wharves § 1 et seq, also 68 C.J. p 202 note 1 et seq.

Acquisition or use for park purposes see *infra* § 1820.

Power of municipality to acquire property for and to erect, see *supra* § 1055.

Paramount duty

It is city government's paramount duty zealously to guard public interest, unhampered by private contracts which may hinder its control of or impair full beneficial use of its harbor, ports, waterways, and tidelands held by it in trust for promotion and improvement of navigation and commerce.—Board of Port Com'rs of

City of Oakland v. Williams, 70 P.2d 918, 9 Cal.2d 381.

Access to harbor

City, holding title to tide and submerged lands for park and playground purposes and structures promoting commerce and navigation, may cut off portions from access to harbor in aid of fishing and navigation.—Los Angeles Athletic Club v. City of Long Beach, 17 P.2d 1061, 128 Cal.App. 427.

Definition of riparian rights

An exercise of regulatory power, conferred on city by its charter, to establish lines of improvements in waters of river, is essential to definition of riparian rights of owners of adjoining lands fronting on such river.—Mayor and City Council of Baltimore v. Crown Cork & Seal Co., C.C.A.Md., 122 F.2d 385.

Police jurisdiction

N.J.—Ross v. Mayor and Council of Borough of Edgewater, 180 A. 866, 115 N.J.Law 477, affirmed 184 A. 810, 116 N.J.Law 447, certiorari denied 57 S.Ct. 37, 299 U.S. 543, 81 L. Ed. 400.

70. U.S.—State of California v. U. S., Cal., 64 S.Ct. 352, 320 U.S. 577, 88 L.Ed. 322, rehearing denied 64 S.Ct. 516, 321 U.S. 802, 88 L.Ed. 1089, and City of Oakland v. U. S., 64 S.Ct. 516, 321 U.S. 802, 88 L.Ed. 1089—Illinois Cent. R. Co. v. Illi-

nois, Ill., 13 S.Ct. 110, 146 U.S. 387, 36 L.Ed. 1018

71. U.S.—New Orleans, etc., R. Co. v. Ellerman, La., 105 U.S. 166, 26 L.Ed 1015

72. Minn.—Nelson v. De Long, 7 N.W.2d 342, 213 Minn. 425.

73. U.S.—Mitchell v. City of St. Paul, 31 N.W.2d 46, 225 Minn. 390.

74. N.Y.—Del Balso Holding Corporation v. McKenzie, 5 N.Y.S.2d 790, 167 Misc. 498.

Matters considered

N.Y.—Del Balso Holding Corporation v. McKenzie, *supra*.

75. U.S.—Mayor and City Council of Baltimore v. Crown Cork & Seal Co., C.C.A.Md., 122 F.2d 385.

76. U.S.—Mayor and City Council of Baltimore v. Crown Cork & Seal Co., *supra*.

77. Cal.—City of Oakland v. El Dorado Terminal Co., 106 P.2d 1000, 41 Cal.App.2d 320.

44 C.J. p 1093 note 33.

"Public utility"

Cal.—City of Oakland v. El Dorado Terminal Co., *supra*.

78. Cal.—City of Oakland v. El Dorado Terminal Co., *supra*—City of Oakland v. Hogan, 106 P.2d 987, 41 Cal.App.2d 333.

Minn.—Nelson v. De Long, 7 N.W.2d 342, 213 Minn. 425.

at its wharves and landings⁷⁹ and pay reasonable wharfage, as discussed *infra* § 1814. However, the charter or statute is the measure of the municipality's authority,⁸⁰ and compliance must be had with any provisions as to how the rights conferred shall be exercised.⁸¹ The municipality must also exercise its powers with due regard to the private rights of littoral or riparian proprietors,⁸² and of the proprietors of private wharves⁸³ and ferries;⁸⁴ and power to establish dock and wharf lines and to restrain encroachments and prevent obstructions to navigation does not authorize a municipality to declare a structure a nuisance which in fact is not a nuisance⁸⁵ or to prohibit the erection of warehouses or other appropriate structures upon private wharves above high-water level.⁸⁶

Sometimes a duty to regulate is imposed by statute on a municipality.⁸⁷ However, the exercise of a legislative grant of power to a municipality to make improvements in its water fronts or harbor is not obligatory but optional,⁸⁸ and the probability that the municipality may at some future time condemn certain property for public purposes is no ground for enjoining the owner from constructing a permanent improvement thereon.⁸⁹ Where a municipality has built and maintained a public wharf or landing place, private citizens have the

right to use such wharf or landing place on compliance with appropriate regulations,⁹⁰ but, if a common or public landing has not been established in the manner required by statute, the acquisition of wharf property by a municipality does not give every individual a right to dock his vessel at the wharf.⁹¹

Discontinuance or abandonment of wharf or landing place. A public utility, such as a city-owned wharf, may in some circumstances be abandoned,⁹² but an abandonment which has the appearance of having been made to circumvent the statutes relating to sale or lease of utilities by municipal corporations has been held to be of doubtful legality.⁹³ A municipal corporation is not authorized to discontinue a public landing place under authority to discontinue a way.⁹⁴

Filling in submerged land. A municipality may have power to authorize or direct the filling in of land under water which has been granted to it by the state,⁹⁵ but in the absence of statutory authorization, the rule is otherwise as to land belonging to the state.⁹⁶

Relation to streets. A public street leading to navigable waters will keep even pace with the extension of the land,⁹⁷ whether the change in the

Pa.—City of Pittsburgh v. Archie Co., 89 Pittsb. Leg. J., 502.

44 C.J. p 1093 note 34.

Garbage scoops

N.Y.—Peterson v. City of New York, 256 N.Y.S. 139, 235 App. Div. 41, modified on other grounds 183 N.E. 280, 260 N.Y. 156.

Use for other purposes

City held authorized to use space between way and river, not needed as public landing or wharf, for storage or parking of automobiles, even though city charged daily storage fee, as long as such use did not interfere with use of such space for landing and wharf purposes.—James Rees & Sons Co. v. City of Pittsburgh, 175 A. 420, 316 Pa. 356.

79. Minn.—Nelson v. De Long, 7 N.W.2d 342, 213 Minn. 425.

44 C.J. p 1094 note 35.

Exclusion of shorelands

Minn.—Nelson v. De Long, *supra*.

80. Pa.—James Rees & Sons Co. v. City of Pittsburgh, 175 A. 420, 316 Pa. 356.

44 C.J. p 1094 note 37.

Conflict of provisions

Statute authorizing city or town council to regulate wharfage and dockage and anchorage of vessels within corporate limits was not intended to operate in conflict with the statutes relating to harbor matters for ports in general.—State ex

rel. Watson v. Friend, 11 So.2d 182, 152 Fla. 74.

81. U.S.—Chester v. Hagan, D.C. Pa., 116 F. 223, appeal dismissed 128 F. 1018, 62 C.C.A. 680.

82. N.Y.—City of New York v. Swift & Co., 294 N.Y.S. 209, 162 Misc. 581.

44 C.J. p 1094 note 39.

Apportionment

U.S.—Mutual Chemical Co. of America v. Mayor and City Council of Baltimore, D.C. Md., 33 F.Supp. 881.

Absence of injury

Fact that plaintiff's property abutted on street which lay between such property and wharf was held not to give plaintiff special right to enjoin city from allegedly illegally using wharf for parking automobiles, where plaintiff suffered no injury.—James Rees & Sons Co. v. City of Pittsburgh, 175 A. 420, 316 Pa. 356.

83. N.Y.—Brooklyn v. New York Ferry Co., 87 N.Y. 204.

44 C.J. p 1094 note 40.

84. Cal.—Vallejo Ferry Co. v. Vallejo, 80 P. 514, 146 Cal. 392.

85. U.S.—Yates v. Milwaukee, Wis., 10 Wall. 497, 505, 19 L. Ed. 984.

44 C.J. p 1094 note 42.

86. Ind.—Martin v. Evansville, 32 Ind. 85.

87. N.C.—Wool v. Edenton, 23 S.E. 40, 117 N.C. 1.

44 C.J. p 1094 note 44.

88. Ill.—Goodrich v. Chicago, 20 Ill. 445.

Mo.—Hafner Mfg. Co. v. St. Louis, 172 S.W. 28, 262 Mo. 621.

89. Ill.—Chicago v. Reed, 27 Ill. App. 482.

90. Alaska—Berger v. Ohlson, 9 Alaska 605.

Pa.—City of Philadelphia v. Pennsylvania Sugar Co., 36 A.2d 653, 348 Pa. 599.

91. Mass.—Wilson Line of Mass. v. Selectmen of Hull, 77 N.E.2d 222, 322 Mass. 296.

92. Wash.—Bremerton Municipal League v. Bremer, 130 P.2d 367, 15 Wash.2d 231.

93. Wash.—Bremerton Municipal League v. Bremer, *supra*.

94. Mass.—Commonwealth v. Tucker, 2 Pick. 44.

95. N.Y.—Langdon v. New York, 93 N.Y. 129.

44 C.J. p 1094 note 47.

96. N.Y.—In re New York, 111 N.E. 256, 217 N.Y. 1.

97. Fla.—Frater v. Baylen St. Wharf Co., 49 So. 188, 57 Fla. 63, 131 Am.S.R. 1084.

Municipality as riparian owner of waters and land thereunder within limits of street see *infra* § 1816.

land is due to natural causes⁹⁸ or to the voluntary act of the owner of the land.⁹⁹ However, the charter power of a municipality to lay out streets does not include power to lay out streets over navigable waters;¹ and a street terminating in a road which follows the line of the shore and comes in contact with the water at intervals does not constructively extend into the water.² A public landing, wharf, or pier may be a street³ or a part⁴ or extension⁵ thereof, and where it connects with a public street it may be a public highway;⁶ but it has been held that a county wharf is not a continuation of a street,⁷ and that the charter or statutory power of a municipality to abolish or vacate streets and highways does not include power to vacate a wharf or landing⁸ or to abolish the right of the public therein.⁹

Foreign trade zone. A municipal corporation may have authority to operate and maintain, under federal grant, a foreign trade zone adjacent to its water front.¹⁰

§ 1813. Powers of Particular Officers or Boards

Particular officers, boards, or commissioners invested with the regulation and control of the public water front, docks, wharves, and piers cannot exceed the powers which are conferred on them by statutory or charter provisions.

The powers of particular officers, boards, or commissioners invested with the regulation and control of the public water front, docks, wharves, and

piers ordinarily are regulated by statutory or charter provisions.¹¹ Such officers cannot exceed the powers which are conferred on them;¹² and, where the statute is not imperative but permissive, their discretion must be exercised with due regard to private rights.¹³ Any person seeking privileges from the municipality with respect to such property must see to it that he obtains them from the proper source.¹⁴

The annual appropriation and payment of money by a city to a port commission to finance a pier owned by the city and operated by the commission is a payment to a public body or agency for a public purpose and a contract providing therefor is neither ultra vires nor unconstitutional.¹⁵ Where a municipality contracts with an independent governmental agency for the latter's operation of a municipally owned pier, the agency's rights and duties with respect to the income from the pier are limited by the terms of the contract.¹⁶ The city may not complain of the commission's breach of duty in operating a competing pier owned by it, where the city previously knew of, and consented to, such operation,¹⁷ and the city may not complain of any commingling of funds by the commission in the absence of any loss and of the availability of funds held for the city's account.¹⁸ In an action by the city against the commission for rescission of the contract and for an accounting, the court may determine defendant's counterclaim in order to give complete relief and allow the

98. Fla.—Frater v. Baylen St. Wharf Co., *supra*.
Accretion to street as property of municipality see *infra* § 1817.

99. Fla.—Frater v. Baylen St. Wharf Co., *supra*.

1. Or.—Chapman v. Hood River, 196 P. 467, 100 Or. 43.

2. Wash.—Anderson Steamboat Co. v. King County, 146 P. 855, 84 Wash. 375.

3. Pa.—Pittsburgh v. Pittsburgh, etc., R. Co., 10 Pa. Dist. 541.

4. Ill.—Chicago, etc., R. Co. v. People, 78 N.E. 790, 222 Ill. 427.

5. Mo.—Hafner Mfg. Co. v. St. Louis, 172 S.W. 28, 262 Mo. 621.
N.Y.—In re New York Cent., etc., R. Co., 77 N.Y. 248.

6. Mo.—Hafner Mfg. Co. v. St. Louis, 172 S.W. 28, 262 Mo. 621.

7. Wash.—Anderson Steamboat Co. v. King County, 146 P. 855, 84 Wash. 375.

8. N.J.—Palen v. Ocean City, 62 A. 947, 72 N.J. Law 15.

9. Minn.—Betcher v. Chicago, etc., R. Co., 124 N.W. 1096, 110 Minn. 228.

10. N.Y.—American Dock Co. v. City of New York, 21 N.Y.S.2d 943, 174 Misc. 813.

Statutes held not to terminate authority

N.Y.—American Dock Co. v. City of New York, *supra*.

11. U.S.—Mutual Chemical Co. of America v. Mayor and City Council of Baltimore, D.C.Md., 33 F. Supp. 881, modified on other grounds, C.C.A., Mayor and City Council of Baltimore v. Crown Cork & Seal Co., 122 F.2d 385.

Cal.—Ravettino v. City of San Diego, 160 P.2d 52, 70 Cal.App.2d 37.

44 C.J. p 1095 note 63.

12. N.Y.—Villas v. Featherston, 87 N.Y.S. 1094, 91 App.Div. 259.

44 C.J. p 1095 note 64.

Conduct of business

City port district had authority to provide that its water-front facilities should not be used for the conduct of certain named businesses which would naturally compete with, and be detrimental to, like businesses conducted by individuals.—Trudnak v. Gustafson, 133 So. 494, 133 Fla. 834.

13. N.Y.—Cornell v. New York, 20 N.Y.S. 314.

14. N.Y.—Duryea v. New York, 2 Hun 293, reversed on other grounds 62 N.Y. 592.

15. N.J.—City of Camden v. South Jersey Port Commission, Super. Ch., 63 A.2d 552.

16. N.J.—City of Camden v. South Jersey Port Commission, *supra*.

Reserve funds

N.J.—City of Camden v. South Jersey Port Commission, *supra*.

17. N.J.—City of Camden v. South Jersey Port Commission, *supra*.

Sacrifice of business

Contention of city that port commission in operating pier for city sacrificed the business of such pier for benefit of competing pier owned and operated by the commission was not sustained by the evidence.—City of Camden v. South Jersey Port Commission, *supra*.

18. N.J.—City of Camden v. South Jersey Port Commission, *supra*.

retention of the amount in defendant's hands against the amount owed by plaintiff.¹⁹

§ 1814. Wharfage and Other Charges

Municipal corporations may under statutory or charter authority fix the rate of wharfage, dockage, and landing, or the charge to be imposed for the use of publicly operated terminals, but the rate or charge must be reasonable and the provisions of the statute as to the manner of exercising the power to fix the rate or charge must be followed.

Municipal corporations may under express statutory or charter authority fix the rate of wharfage, dockage, and landing,²⁰ or the charge to be imposed for the use of publicly operated terminals;²¹ but unless authorized by charter or statute²² a municipal corporation has no right to exact and collect wharfage for the use of a public wharf,²³ and, where such authority is granted and the manner of its exercise prescribed, the provisions of the statute must be followed.²⁴ Although a municipality is authorized to collect wharfage, it will be presumed that a public wharf is to be used free of charge in the absence of any ordinance to the contrary,²⁵ and ordinances regulating wharfage are to be strictly construed.²⁶

A municipality cannot, under the guise of its authority to collect wharfage, levy any tax or duty of tonnage,²⁷ or charge for entering or leaving the port or remaining therein without regard to the place of mooring or landing,²⁸ or collect wharfage where no wharfage facilities are in fact furnished or used.²⁹ The municipality may, however, where it owns and maintains the wharves, docks, and other water-front facilities, charge such reasonable fees as will fairly remunerate it for the use of its property;³⁰ and the determination of the amount of the charge to be imposed for the use of water-front facilities ordinarily is within the discretion of the municipality,³¹ subject to statutory provisions prohibiting discriminatory rates and requiring the establishment of reasonable rates and regulations.³² The fact that the charges for what are properly wharfage facilities actually furnished are fixed on a tonnage basis will not constitute them a tonnage tax within the prohibition of the federal Constitution.³³ The persons paying reasonable charges have no legal concern as to how they are expended by the municipality.³⁴ It has been held to be the better practice for the municipality to segregate the earnings of a public wharf and pay the costs of operation and mainte-

19. N.J.—City of Camden v. South Jersey Port Commission, *supra*.

20. U.S.—Femmer v. City of Juneau, C.C.A. Alaska, 97 F.2d 649—The George W. Elder, C.C.A.Or., 206 F. 268, 124 C.C.A. 332, certiorari denied 34 S.Ct. 330, 232 U.S. 722, 58 L.Ed. 815.

Minn.—Nelson v. De Long, 7 N.W.2d 342, 213 Minn. 425.

Pa.—City of Pittsburgh v. Archie Co., 89 Pittsb.Leg.J., 502.

44 C.J. p 1095 note 68.

Collection by lessee see *infra* § 1815.

Proprietary capacity

Although city may exact fee from vessels stopping at its wharves, charge may be imposed only in municipality's proprietary, as distinguished from sovereign, capacity.—City of Oakland v. E. K. Wood Lumber Co., 292 P. 1076, 211 Cal. 16, 80 A.L.R. 379.

Rate fixed by contract

Statutes prohibiting city from contracting away its power to fix rates charged by private organizations for public utilities do not affect city's power to fix by contract the rate to be charged user of municipally owned wharf.—Femmer v. City of Juneau, C.C.A.Alaska, 97 F. 2d 649.

21. U.S.—State of California v. U. S., D.C.Cal., 46 F.Supp. 474, affirmed 64 S.Ct. 352, 320 U.S. 577, 88 L.Ed. 322, rehearing denied 64 S.Ct. 516, 321 U.S. 802, 88 L.Ed.

1089, and City of Oakland v. U. S., 61 S.Ct. 516, 321 U.S. 802, 88 L.Ed. 1089.

Determination of cost basis

In determining the proper rates to be charged by cities operating terminals on water fronts, the determination of the proper cost basis should be left to the discretion of the maritime commission.—State of California v. U. S., *supra*.

22. Md.—McMurray v. Baltimore, 54 Md. 103.

Pa.—City of Philadelphia v. Pennsylvania Sugar Co., 36 A.2d 653, 348 Pa. 599.

44 C.J. p 1095 note 69.

23. U.S.—Chester v. Hagan, D.C. Pa., 116 F. 223, appeal dismissed 128 F. 1018, 62 C.C.A. 680.

44 C.J. p 1095 note 70.

24. U.S.—Chester v. Hagan, *supra*. 44 C.J. p 1096 note 71.

25. Iowa.—Muscatine v. Keokuk Northern Line Packet Co., 45 Iowa 185.

26. Ohio.—Cincinnati v. Walls, 1 Ohio St. 232.

44 C.J. p 1096 note 73.

27. U.S.—Cannon v. New Orleans, La., 20 Wall 577, 22 L.Ed. 417.

28. U.S.—Cannon v. New Orleans, *supra*—Northwest Union Packet Co. v. St. Louis, C.C.Mo., 18 F.Cas. No.10,345, 4 Dill. 10, affirmed 100 U.S. 423, 25 L.Ed. 688.

29. Cal.—City of Oakland v. E. K. Wood Lumber Co., 292 P. 1076, 211 Cal. 16, 80 A.L.R. 379.

44 C.J. p 1096 note 76.

30. Cal.—City of Oakland v. E. K. Wood Lumber Co., *supra*.

Ill.—MacNeil v. Chicago Park Dist., 82 N.E.2d 452, 401 Ill. 556

Minn.—Nelson v. De Long, 7 N.W. 2d 342, 213 Minn. 425.

44 C.J. p 1096 note 77.

31. Ill.—MacNeil v. Chicago Park Dist., 82 N.E.2d 452, 401 Ill. 556.

Fees held reasonable

Where harbor fees fixed by municipality for use by boats of harbor were based on length of boats and nature of facilities used, were graduated, and applied equally to all persons seeking the use of such facilities, the fees were reasonable.—MacNeil v. Chicago Park Dist., *supra*.

32. U.S.—State of California v. U. S., D.C.Cal., 46 F.Supp. 474, affirmed 64 S.Ct. 352, 320 U.S. 577, 88 L.Ed. 322, rehearing denied 64 S.Ct. 516, 321 U.S. 802, 88 L.Ed. 1089 and City of Oakland v. U. S., 64 S.Ct. 516, 321 U.S. 802, 88 L.Ed. 1089.

33. U.S.—Northwestern Union Packet Co. v. St. Louis, C.C.Mo., 100 U.S. 423, 25 L.Ed. 688.

44 C.J. p 1096 note 78.

34. U.S.—Leathers v. Aiken, C.C.La., 9 F. 679.

nance therefrom, rather than to deposit such earnings in the general fund.³⁵

Private wharves, piers, or docks. Wharf owners have the exclusive power to impose and collect wharfage at private wharves,³⁶ and they do not forfeit their right to wharfage by dedicating a part of the wharf space to street purposes.³⁷ A municipality has been held to have no power to exact minor privilege charges from a landowner for piers or docks built into navigable waters in front of the land owned by the landowner, where such power has not been granted to it by statute or charter,³⁸ and a city may not, under the guise of its regulatory authority, exact rent from the owner of land under water on which such owner intends to build a pier.³⁹

§ 1815. Sales, Leases, and Grants

- a. In general
- b. Mode of letting or confirming
- c. Termination and holding over
- d. Construction, operation, and effect

a. In General

The powers of a municipal corporation with respect to the making of leases or grants of franchises or privileges pertaining to the public water front, wharves, and piers depend on the authority conferred by statutory or charter provisions, and in exercising such powers the

municipality must conform to any limitations or restrictions imposed.

The powers of a municipal corporation with respect to the making of leases or grants of franchises and privileges depend on whether it is invested with the whole power of disposing of water fronts, docks, and wharves or merely a limited right respecting such property.⁴⁰ While it has been held that a municipal corporation holds its public water front or wharves as it does its streets, and that it has no power to sell or lease them to private persons in the absence of special statutory authority,⁴¹ municipalities may be⁴² and frequently are⁴³ authorized by charter or statutory provisions to make leases or grants of certain franchises or privileges pertaining to the public water front, wharves, and piers.

So a city may lease tidelands to an individual to erect a private wharf,⁴⁴ or refuse to lease its submerged lands for such a purpose⁴⁵ except under conditions, limitations, and restrictions deemed most beneficial to the navigation and use of the port of the city;⁴⁶ and the owner of property abutting on navigable water may not wharf out or build on submerged lands which are the property of the state, for which the city is the agent, without a license, grant, lease, franchise, or some form of governmental permission.⁴⁷ However, municipalities

35. Alaska.—Femmer v. City of Juneau, 9 Alaska 175.

36. Ala.—Demopolis v. Webb, 6 So. 408, 87 Ala. 659.

44 C.J. p 1096 note 80.

37. N.Y.—Verplanck v. New York, 2 Edw. 220.

38. Md.—Mayor and City Council of Baltimore v. Canton Co. of Baltimore, 47 A.2d 775, 186 Md. 618.

Platform

N.Y.—City of New York v. Swift & Co., 294 N.Y.S. 209, 162 Misc. 581.

Permit providing for charges

Md.—Mayor and City Council of Baltimore v. Canton Co. of Baltimore, 47 A.2d 775, 186 Md. 618.

39. N.Y.—Del Balso Holding Corporation v. McKenzie, 3 N.E.2d 438, 271 N.Y. 313.

40. Pa.—Reighard v. Flinn, 42 A. 23, 189 Pa. 355, 43 L.R.A. 502.

44 C.J. p 1096 note 83.

Limited authority

Where a city is authorized by its charter to erect, maintain, and regulate public wharves and to regulate wharfage, it cannot lease its wharves, or empower any one else to fix its rates of wharfage.—Matthews v. Alexandria, 68 Mo. 115, 30 Am.R. 776.

41. U.S.—Juneau Ferry, etc., Co. v.

Morgan, Alaska, 236 F. 204, 149 C. C.A. 394.

43 C.J. p 1344 note 87.

42. Ohio.—White v. Cleveland, 14 Ohio Cir.Ct.N.S., 369, 83 Ohio Cir. Ct. 317, affirmed 102 N.E. 1135, 87 Ohio St. 482.

43. U.S.—Femmer v. City of Juneau, C.C.A.Alaska, 97 F.2d 649—Nolte v. Hudson Nav. Co., C.C.A.N. Y., 16 F.2d 182.

Ala.—Lang v. City of Mobile, 195 So. 248, 239 Ala. 331.

Alaska.—Femmer v. City of Juneau, 9 Alaska 175.

Cal.—City of Oakland v. Williams, 274 P. 328, 206 Cal. 315—City of Oakland v. Hogan, 106 P.2d 987, 41 Cal.App.2d 333—Ocean Park Pier Amusement Corporation v. City of Santa Monica, 104 P.2d 668, 40 Cal.App.2d 76, rehearing denied 104 P.2d 879, 40 Cal.App.2d 76.

Kan.—State v. McCombs, 138 P.2d 134, 156 Kan. 391.

Ky.—Inland Waterways Co. v. City of Louisville, 13 S.W.2d 283, 227 Ky. 376.

Mass.—D. N. Kelley & Son v. Selectmen of Town of Fairhaven, 3 N. E.2d 241, 294 Mass. 570.

N.J.—Shea v. Ellenstein, 193 A. 551, 118 N.J.Law 438.

44 C.J. p 1096 note 85.

Intent

Charter authorizing city to lease public wharves indicates intention of legislature not to treat wharves as highways, but as private property of the municipality subject to private lease—Horn v. People, 26 Mich. 221.

"Proprietary capacity"

Court was not authorized to strike down city's lease of improved public levee because of any conceived lack of wisdom or good business in execution thereof, but was authorized only to act when illegality or invalidity appeared, since operation of levee was in city's "proprietary capacity."—State v. McCombs, 133 P. 2d 134, 156 Kan. 391.

Agreement held a "lease"

Kan.—State v. McCombs, *supra*.

Recovery of amount paid

U.S.—Gulf Refining Co. v. City of Philadelphia, D.C.Pa., 31 F.Supp. 587, affirmed, C.C.A., 110 F.2d 661.

44. Cal.—People v. Monstad, 289 P. 847, 209 Cal. 658.

44 C.J. p 1096 note 85 [a] (2).

45. Md.—Baltimore v. White, 2 Gill 444.

46. Md.—Baltimore v. White, *supra*.

47. Cal.—City of Oakland v. Hogan, 106 P.2d 987, 41 Cal.App.2d 333.

must conform to any limitations or restrictions in the statute from which their powers are derived,⁴⁸ as, for example, a requirement that the lease be secured by a bond;⁴⁹ and they cannot make any lease or grant⁵⁰ or authorize any use⁵¹ or erection,⁵² which is prohibited by charter or statute.

Ordinarily a lease or grant by a municipality of a franchise or privilege pertaining to the public water front, wharves, docks, or piers is valid when, and only when, it is temporary or for a limited period of time,⁵³ not exceeding the term permitted by statute,⁵⁴ and is supported by a valid and sufficient consideration.⁵⁵ It is also ordinarily a requi-

site of a valid grant or lease of publicly owned water front rights or facilities that the municipality reserve the right to resume possession,⁵⁶ but it has been held that port property held in a proprietary capacity and not dedicated to a public use may be sold absolutely where it is no longer adapted to the purpose for which it was originally intended.⁵⁷ Generally, a lease or grant is valid only when exclusive rights are not granted to individuals,⁵⁸ and the municipality reserves or does not abandon or delegate to individuals its right of regulation and control.⁵⁹ It has been held, however, that a lease may grant a preferential right to the use of a public wharf or dock,⁶⁰ that statutes pertaining to

48. Cal.—Larue Wharf & Warehouse Co. v. Board of Port Com'rs of City of Oakland, 70 P.2d 926, 9 Cal.2d 397—Board of Port Com'rs of City of Oakland v. Williams, 70 P.2d 918, 9 Cal.2d 381—Ocean Park Pier Amusement Corporation v. City of Santa Monica, 104 P.2d 668, 40 Cal.App.2d 76, rehearing denied 104 P.2d 879, 40 Cal.App.2d 76—Stone v. City of Los Angeles, 299 P. 838, 114 Cal.App. 192.

Md.—Mayor and City Council of Baltimore v. Canton Co. of Baltimore, 47 A.2d 775, 186 Md. 618.

N.Y.—Warehousemen's Ass'n of Port of New York v. Cosgrove, 238 N.Y. S. 424, 227 App.Div. 560.

Wash.—Bremerton Municipal League v. Bremer, 130 P.2d 367, 15 Wash. 2d 231.

44 C.J. p 1097 note 86.

Contract held unauthorized

Kan.—State ex rel. Boynton v. Kansas City, 37 P.2d 18, 140 Kan. 471.

Improvements

Statute authorizing cities to lease land abutting on a navigable stream contemplated that improvements on the land should be made by the lessee.—State v. McCombs, 133 P.2d 134, 156 Kan. 391.

Which statutes applicable

Where various statutes affecting leases of public levees were not in pari materia, lease by city was not required to meet the requirements of all the statutes; if there were inconsistencies among acts pertaining to improvement and leasing of cities' public levees, the latter acts controlled lease.—State v. McCombs, supra.

Manner of fixing rates

U.S.—Femmer v. City of Juneau, C. C.A.Alaska, 97 F.2d 649.

Kan.—State v. McCombs, 133 P.2d 134, 156 Kan. 391.

49. Wash.—Barnett v. Lincoln, 299 P. 392, 162 Wash. 613.

"Lease"

Contract, whereby port gave a private corporation exclusive right to

use and possession of warehouse space on pier and other rights, held "lease," not "license" or mere "privilege," with respect to bond requirement.—Barnett v. Lincoln, supra.

50. Cal.—Board of Port Com'rs of City of Oakland v. Williams, 70 P.2d 918, 9 Cal.2d 381—City of Oakland v. Key System, 149 P.2d 195, 64 Cal.App.2d 427—Ocean Park Pier Amusement Corporation v. City of Santa Monica, 104 P.2d 668, 40 Cal.App.2d 76, rehearing denied 104 P.2d 879, 40 Cal.App.2d 76—Stone v. City of Los Angeles, 299 P. 838, 114 Cal.App. 192.

44 C.J. p 1097 note 87.

51. N.Y.—Brown v. New York, 79 N.Y.S. 943, 78 App.Div. 361, affirmed 68 N.E. 1115, 176 N.Y. 571—People v. Mallory, 2 Thomps. & C. 76, 46 How.Pr. 281.

Production of oil

Act granting tidelands and submerged lands to city to use for establishment of harbor and authorizing city to lease such land does not authorize city to lease land for production of oil.—Stone v. City of Los Angeles, 299 P. 838, 114 Cal.App. 192.

52. N.Y.—New York v. Cunard Steamship Co., 15 N.Y.S. 904, 61 Hun 346.

44 C.J. p 1097 note 89.

53. Alaska.—Conradt v. Miller, 2 Alaska 433.

44 C.J. p 1097 note 90.

54. Cal.—Larue Wharf & Warehouse Co. v. Board of Port Com'rs of City of Oakland, 70 P.2d 926, 9 Cal.2d 397—Board of Port Com'rs of City of Oakland v. Williams, 70 P.2d 918, 9 Cal.2d 381.

Ky.—Ricketts v. Hiawatha Oil & Gas Co., 189 S.W.2d 858, 300 Ky. 548.

Shorter term than authorized

The statutes pertaining to improvement and leasing of cities' public levees do not require that the lease be for the full term authorized by the statutes.—State v. McCombs, 133 P.2d 134, 156 Kan. 391.

55. Kan.—State v. McCombs, supra.

Mutual promises of contract, under which city delivered possession of improved public levee to lessee and assigned leases on other facilities to lessee, authorized lessee to make leases at lawful rentals, and under which lessee had duties to perform not unlike those found in commercial leases and was given exclusive control of the levee constituted sufficient consideration for the contract.—State v. McCombs, supra.

56. U.S.—Illinois, etc., R., etc., Co. v. St. Louis, C.C.Mo., 12 F.Cas.No. 7,007, 2 Dill. 70.

44 C.J. p 1097 note 91.

57. Or.—Dix v. Port of Port Orford, 282 P. 109, 131 Or. 157.

58. U.S.—Femmer v. City of Juneau, C.C.A.Alaska, 97 F.2d 649.

Mass.—Cape Cod S. S. Co. v. Selectmen of Provincetown, 3 N.E.2d 244, 295 Mass. 65.

44 C.J. p 1097 note 92.

59. U.S.—Femmer v. City of Juneau, C.C.A.Alaska, 97 F.2d 649.

44 C.J. p 1097 note 93.

Lease held not invalid

Lease by city of improved public levee, wherein lessee agreed to conform with state laws with respect to the leased premises and agreed that, in use of the premises, lessee should conform to the laws, was not invalid as failing to reserve to city the right to establish harbor lines.—State v. McCombs, 133 P.2d 134, 156 Kan. 391.

Ky.—Inland Waterways Co. v. City of Louisville, 13 S.W.2d 283, 227 Ky. 376.

60. U.S.—Femmer v. City of Juneau, C.C.A.Alaska, 97 F.2d 649.

No discrimination shown

Contract whereby city gave to transportation company priority in right to land its vessels at city dock but reserved to city right to serve other vessels also, under which contract rules and regulations for operation of the dock were promulgated and established by city, which oper-

the leasing of public levees may authorize the lease of all of an improved public levee to one tenant or the lease of different parts to different tenants,⁶¹ and that the lease of a water-front warehouse for the exclusive use of a single individual is not objectionable where such warehouse is but a unit of a comprehensive plan of harbor improvement available generally for public use.⁶²

It has further been held that a lease or grant of water front rights or facilities is valid when, and only when, the use or improvement permitted is of a public character,⁶³ consistent with the nature and purposes of the property and the objects for which it was acquired or dedicated,⁶⁴ and will not constitute a purpresture or public nuisance,⁶⁵ or obstruct or interfere with navigation or commerce⁶⁶ or the rights of the public.⁶⁷ A contract granting the right to use a public wharf may provide for the arbitration of disputes arising thereunder,⁶⁸ and for defense by the city at its own expense of any suit attacking the validity of the contract.⁶⁹

Wharfage. Unless so empowered by charter or statute,⁷⁰ a municipality cannot delegate to a lessee or other individual or private corporation its power to collect wharfage or other charges,⁷¹ and fix the rates therefor;⁷² on making a lease or grant of a portion of a wharf to private persons

it must reserve the right to regulate the charges.⁷³

Sublease. Where, in order to obtain a lease of a wharf, it is necessary for the municipal corporation to take a lease of other property also, but it has no use for the latter property, it may sublease it.⁷⁴

Operation of foreign trade zone. The power of a municipality to operate and maintain a foreign trade zone under a federal grant obtained from a federal agency does not carry with it as incidental a concomitant right to operate the zone through the medium of a contract with a private corporation, resulting in a lease of public property held by the city for public use, and its diversion to a possession or use exclusively private, for private business purposes,⁷⁵ and such a lease is invalid in the absence of special statutory authorization therefor.⁷⁶ Under statutes relating to the use of terminal facilities, however, private operation of such a zone under contract with the city is permissible under express conditions,⁷⁷ and such a contract does not constitute a transfer of the federal grant to operate the zone prohibited by federal law;⁷⁸ but even under these statutes the operating contract will be considered invalid if it imposes no obligation on the private organization of providing equipment, but obligates the city to furnish all equipment.⁷⁹ An invalid contract may be attacked by action in a state court.⁸⁰

ated dock for benefit of all desiring to use it, subject to the preference, was not invalid as being monopolistic or as unlawfully discriminating against others who might desire to use the dock.—*Femmer v. City of Juneau*, 9 Alaska 175.

61. Kan.—*State v. McCombs*, 133 P. 2d 134, 156 Kan. 391.

62. Cal.—*City of Oakland v. Williams*, 274 P. 328, 206 Cal. 315.

63. Cal.—*Ocean Park Pier Amusement Corporation v. City of Santa Monica*, 104 P.2d 668, 40 Cal.App. 2d 76, rehearing denied 104 P.2d 879, 40 Cal.App.2d 76.

N.Y.—*American Dock Co. v. City of New York*, 21 N.Y.S.2d 943, 174 Misc. 813, affirmed 26 N.Y.S.2d 704, 261 App.Div. 1063, affirmed 36 N.E.2d 696, 286 N.Y. 658.

44 C.J. p 1097 note 94.

64. Minn.—*Penn-O-Tex Oil Co. v. City of Minneapolis*, 291 N.W. 131, 207 Minn. 307.

44 C.J. p 1097 note 95.

65. N.Y.—*People v. Vanderbilt*, 26 N.Y. 287, 28 N.Y. 396, 84 Am.D. 351.

44 C.J. p 1097 note 96.

66. Cal.—*Oakland v. Larue Wharf, etc.*, Co., 176 P. 361, 179 Cal. 207.

44 C.J. p 1097 note 97.

67. Mass.—*Cape Cod S. S. Co. v. Selectmen of Provincetown*, 3 N.E. 2d 244, 295 Mass. 65.

44 C.J. p 1097 note 98.

68. U.S.—*Femmer v. City of Juneau*, C.C.A.Alaska, 97 F.2d 649.

69. U.S.—*Femmer v. City of Juneau*, *supra*.

70. N.Y.—*American Ice Co. v. New York*, 112 N.E. 170, 217 N.Y. 402.

44 C.J. p 1097 note 1.

"Public money"

Where lease by city of improved public levee required lessee to pay as rental specified maximums of amounts collected from its tenants less expenses allowed by committee to be appointed by the city, lessee, and levee bondholders, of the total rents collected by the lessee, only the portion due to the city was "public money" and accountable as such.—*State v. McCombs*, 133 P.2d 134, 156 Kan. 391.

71. Alaska.—*Conrad v. Miller*, 2 Alaska 433.

Mo.—*Matthews v. Alexandria*, 68 Mo. 115, 30 Am.R. 776.

72. Cal.—*Oakland v. Carpentier*, 18 Cal. 540.

Mo.—*Matthews v. Alexandria*, 68 Mo. 115, 30 Am.R. 776.

73. U.S.—*Illinois, etc., R., etc., Co. v. St. Louis*, C.C.Mo., 12 F.Cas.No. 7,007, 2 Dill. 70.

44 C.J. p 1098 note 4.

74. La.—*State v. New Orleans*, 96 So. 510, 153 La. 664.

44 C.J. p 1098 note 5.

75. N.Y.—*American Dock Co. v. City of New York*, 21 N.Y.S.2d 943, 174 Misc. 813, affirmed 26 N.Y.S.2d 704, 261 App.Div. 1063, affirmed 36 N.E.2d 696, 286 N.Y. 658.

76. N.Y.—*American Dock Co. v. City of New York*, *supra*.

77. N.Y.—*American Dock Co. v. City of New York*, *supra*.

78. N.Y.—*American Dock Co. v. City of New York*, *supra*.

Purpose of prohibition
N.Y.—*American Dock Co. v. City of New York*, *supra*.

79. N.Y.—*American Dock Co. v. City of New York*, *supra*.

80. N.Y.—*American Dock Co. v. City of New York*, *supra*.

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N.Y.—*American Dock Co. v. City of New York*, *supra*.

b. Mode of Letting or Confirming

A municipal corporation must comply with all statutory requirements with respect to the mode of leasing or granting water-front rights or facilities.

A municipal corporation must comply with all statutory requirements with respect to the mode of leasing or granting water-front rights or facilities.⁸¹ Under some,⁸² but not other,⁸³ charter or statutory provisions, a lease of a public water front, dock, or wharf, or the sale of a right or privilege to occupy a portion thereof, by a municipality must be made publicly to the highest responsible bidder. Also under some statutes confirmation by the city is essential to the validity of a wharf franchise granted by a state board;⁸⁴ but the city can only confirm or reject;⁸⁵ it cannot ratify on conditions,⁸⁶ and where it attempts to do so the confirmation will be deemed absolute and unconditioned.⁸⁷ Since a municipality, when its charter permits, may contract by ordinance, an ordinance granting wharf rights for a term of years may, if the parties so intend, constitute a lease, notwithstanding a statute requires the acknowledgment and recording of leases.⁸⁸ A lease of water-front rights has been sustained as against objections that the execution of the lease by city officials was fraudulent or an abuse of discretion,⁸⁹ or that there was a variation between the lease and the proposal submitted on behalf of the lessee.⁹⁰

c. Termination and Holding Over

A mere license to use a dock or wharf or to occupy part of the water front of a municipal corporation is revocable at the pleasure of the municipality provided the revocation is made in the manner prescribed by charter or statute; but rights under a valid lease terminate only at the expiration of the term or happening or performance of a condition specified in the lease as effecting a termination.

A mere license to use a dock or wharf,⁹¹ or to erect a shed or structure thereon not authorized by law,⁹² or to erect and maintain a shed during the pleasure of a named board,⁹³ or to occupy part of the water front of a municipal corporation,⁹⁴ or to control land under a river bank⁹⁵ is revocable at the pleasure of the municipal corporation. Where, however, the manner of revoking a license or permit is prescribed by charter or statute, a revocation, in order to be valid and effectual, must be made in the manner prescribed,⁹⁶ and the licensee is entitled to reasonable notice to vacate the premises on revocation of the permit.⁹⁷ It has also been held that, where a permit is revocable at the will of the municipality before its expiration date, municipal officers may not use the power of revocation in bad faith, arbitrarily, or capriciously;⁹⁸ and such a permit may not be canceled without notice or just cause.⁹⁹

A municipality may not terminate at will a valid lease,¹ or right to construct a shed or structure

81. N.J.—*Anshelewitz v. Borough of Belmar*, 65 A.2d 825, 2 N.J. 178.

Absence of charter provision

Where the charter of the city does not specifically set up procedural provisions for the granting of wharfing out privileges, the city may rely on the provisions of state law not inconsistent with other provisions of the charter.—*City of Oakland v. Hogan*, 106 P.2d 987, 41 Cal. App.2d 338

Statute held inapplicable

Cal.—*People v. Monstad*, 289 P. 847, 209 Cal. 658.

82. N.Y.—*New York v. Union News Co.*, 118 N.E. 635, 222 N.Y. 263. 44 C.J. p 1098 note 6.

83. N.J.—*Reade v. Asbury Park*, 128 A. 391, 101 N.J. Law 319.

Optional terms and conditions

Statute authorizing city to lease a tidewater terminal on such terms and conditions as might be determined by the governing body obviated necessity for bidding in negotiating lease.—*Shea v. Ellenstein*, 193 A. 551, 118 N.J. Law 438.

"Franchise" or "privilege"

City's lease of river front property to private corporation for development as river terminals, subject to city's recapture for municipal wharf, held not grant of "franchise"

or "privilege" requiring preliminary advertisement and public sale.—*Inland Waterways Co. v. City of Louisville*, 13 S.W.2d 283, 227 Ky. 376.

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93. N.Y.—*In re New York*, 124 N.E. 148, 227 N.Y. 119.

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Violations of temporary permits

Permittee's violations of temporary permits under which it operated stands in municipal ferry terminal, occurring before contract period, and before issuance of permits, and of which violations commissioner of marine and aviation had knowledge, furnished no basis for revocation of such permits.—*A. E. F.'s Inc., v. McKenzie*, 55 N.Y.S.2d 448, 269 App. Div. 316.

1. N.Y.—*New York Contracting*,

the leasing of public levees may authorize the lease of all of an improved public levee to one tenant or the lease of different parts to different tenants,⁶¹ and that the lease of a water-front warehouse for the exclusive use of a single individual is not objectionable where such warehouse is but a unit of a comprehensive plan of harbor improvement available generally for public use.⁶²

It has further been held that a lease or grant of water front rights or facilities is valid when, and only when, the use or improvement permitted is of a public character,⁶³ consistent with the nature and purposes of the property and the objects for which it was acquired or dedicated,⁶⁴ and will not constitute a purpresture or public nuisance,⁶⁵ or obstruct or interfere with navigation or commerce⁶⁶ or the rights of the public.⁶⁷ A contract granting the right to use a public wharf may provide for the arbitration of disputes arising thereunder,⁶⁸ and for defense by the city at its own expense of any suit attacking the validity of the contract.⁶⁹

Wharfage. Unless so empowered by charter or statute,⁷⁰ a municipality cannot delegate to a lessee or other individual or private corporation its power to collect wharfage or other charges,⁷¹ and fix the rates therefor,⁷² on making a lease or grant of a portion of a wharf to private persons

it must reserve the right to regulate the charges.⁷³

Sublease. Where, in order to obtain a lease of a wharf, it is necessary for the municipal corporation to take a lease of other property also, but it has no use for the latter property, it may sublease it.⁷⁴

Operation of foreign trade zone. The power of a municipality to operate and maintain a foreign trade zone under a federal grant obtained from a federal agency does not carry with it as incidental a concomitant right to operate the zone through the medium of a contract with a private corporation, resulting in a lease of public property held by the city for public use, and its diversion to a possession or use exclusively private, for private business purposes,⁷⁵ and such a lease is invalid in the absence of special statutory authorization therefor.⁷⁶ Under statutes relating to the use of terminal facilities, however, private operation of such a zone under contract with the city is permissible under express conditions,⁷⁷ and such a contract does not constitute a transfer of the federal grant to operate the zone prohibited by federal law;⁷⁸ but even under these statutes the operating contract will be considered invalid if it imposes no obligation on the private organization of providing equipment, but obligates the city to furnish all equipment.⁷⁹ An invalid contract may be attacked by action in a state court.⁸⁰

ated dock for benefit of all desiring to use it, subject to the preference, was not invalid as being monopolistic or as unlawfully discriminating against others who might desire to use the dock.—*Femmer v. City of Juneau*, 9 Alaska 175.

61. Kan.—*State v. McCombs*, 133 P. 2d 134, 156 Kan. 391.

62. Cal.—*City of Oakland v. Williams*, 274 P. 328, 206 Cal. 315.

63. Cal.—*Ocean Park Pier Amusement Corporation v. City of Santa Monica*, 104 P.2d 668, 40 Cal.App. 2d 76, rehearing denied 104 P.2d 879, 40 Cal.App.2d 76.

N.Y.—*American Dock Co. v. City of New York*, 21 N.Y.S.2d 943, 174 Misc. 813, affirmed 26 N.Y.S.2d 704, 261 App.Div. 1063, affirmed 36 N.E.2d 696, 286 N.Y. 658.

44 C.J. p 1097 note 94.

64. Minn.—*Penn-O-Tex Oil Co. v. City of Minneapolis*, 291 N.W. 131, 207 Minn. 307.

44 C.J. p 1097 note 95.

65. N.Y.—*People v. Vanderbilt*, 26 N.Y. 287, 28 N.Y. 396, 84 Am.D. 351.

44 C.J. p 1097 note 96.

66. Cal.—*Oakland v. Larue Wharf, etc.*, Co. 176 P. 361, 179 Cal. 207.

44 C.J. p 1097 note 97.

67. Mass.—*Cape Cod S. S. Co. v. Selectmen of Provincetown*, 3 N.E. 2d 244, 295 Mass. 65.

44 C.J. p 1097 note 98.

68. U.S.—*Femmer v. City of Juneau*, C.C.A.Alaska, 97 F.2d 649.

69. U.S.—*Femmer v. City of Juneau*, supra.

70. N.Y.—*American Ice Co. v. New York*, 112 N.E. 170, 217 N.Y. 402.

44 C.J. p 1097 note 1.

"Public money"

Where lease by city of improved public levee required lessee to pay as rental specified maximums of amounts collected from its tenants less expenses allowed by committee to be appointed by the city, lessee, and levee bondholders, of the total rents collected by the lessee, only the portion due to the city was "public money" and accountable as such.—*State v. McCombs*, 133 P.2d 134, 156 Kan. 391.

71. Alaska.—*Conrad v. Miller*, 2 Alaska 433.

Mo.—*Matthews v. Alexandria*, 68 Mo. 115, 30 Am.R. 776.

72. Cal.—*Oakland v. Carpentier*, 18 Cal. 540.

Mo.—*Matthews v. Alexandria*, 68 Mo. 115, 30 Am.R. 776.

73. U.S.—*Illinois, etc., R., etc., Co. v. St. Louis*, C.C.Mo., 12 F.Cas.No. 7,007, 2 Dill. 70.

44 C.J. p 1098 note 4.

74. La.—*State v. New Orleans*, 96 So. 510, 153 La. 664.

44 C.J. p 1098 note 5.

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Statute authorizing city to lease a tidewater terminal on such terms and conditions as might be determined by the governing body obviated necessity for bidding in negotiating lease.—*Shea v. Ellenstein*, 193 A. 551, 118 N.J. Law 438.

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84. Cal.—*Santa Fé Land Impr. Co. v. San Diego*, 176 P. 377, 38 Cal. App. 380.

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1. N.Y.—*New York Contracting,*

on a pier granted pursuant to legislative authority.³ In such case the rights of the lessee or grantee ordinarily terminate at the expiration of the term of the lease or grant;³ and he may be evicted unless he establishes his right to retain possession under the terms of statutes generally protecting the rights of tenants of business space.⁴ The municipality may refuse to renew the lease at the expiration of the stated term where there is no contractual obligation for renewal, and a statute authorizes the termination of the lease at such time,⁵ and on such refusal to renew the lease the city may be under no obligation to compensate the lessee for improvements made by him.⁶

Sometimes provision is made in a lease of dock, wharf, or water front property for its termination on the happening or performance of a specified condition,⁷ but a provision for forfeiture on the grantee's noncompliance with the terms of a grant for a specific number of years has been held merely to give the city an option to terminate, and not to entitle the grantee to abandon possession at will.⁸ A right of termination reserved in a wharf

franchise granted by a state board is available to a city on the transfer to it, by the state, of the authority of the state board.⁹ Where, on the termination of a lease of dock space, the commissioner of docks grants permission to remain over at his pleasure and the lessee gives notice that he will not pay the amount of rent he has been paying, there is merely a holding at will.¹⁰

d. Construction, Operation, and Effect

Each party to a sale, lease, or grant of franchises or privileges pertaining to the public water front, docks, piers, or wharfage is bound by his covenants made therein and is liable in damages for a breach or violation thereof; and the lessee or grantee is bound to pay rent or other compensation in accordance with the terms of the lease or grant.

General rules apply with respect to the construction and operation of a sale, lease, or grant of franchises or privileges pertaining to the public water front docks, piers, or wharfage.¹¹ Each party to the grant or lease is bound by his covenants made therein¹² and is liable in damages for a breach or violation thereof;¹³ and the lessee or grantee is bound to pay rent or other compensation in ac-

etc., *Co. v. New York*, 87 N.Y.S. 100, 42 Misc. 425.

2. N.Y.—*Matter of Pier 15 East River*, 88 N.Y.S. 906, 95 App.Div. 501.

3. Cal.—*City of Oakland v. Hogan*, 106 P.2d 987, 41 Cal.App.2d 333.

4. N.Y.—*A. E. F.'s Inc., v. City of New York*, 68 N.E.2d 177, 295 N.Y. 381.

Exception of wharf properties

Occupancy of refreshment, fruit, and flower stands in city ferry terminal building by holders of permits issued by city marine commissioner is not subject to protection under emergency rent control statute against eviction from business space as long as occupant pays rent prescribed thereby, if such stands were within concourse of ferry terminal and were wharf properties within exception of rent control statute.—*A. E. F.'s Inc., v. City of New York*, 68 N.E.2d 177, 295 N.Y. 381.

5. Cal.—*Board of Port Com'rs of City of Oakland v. Williams*, 70 P.2d 918, 9 Cal.2d 381.

6. Cal.—*Board of Port Com'rs of City of Oakland v. Williams*, supra.

Resolution of doubt

Any doubt as to whether language of statute, purporting to give lessee of tidelands from city right to renewal of lease on expiration of prescribed term, requires city to compensate lessee for improvements on refusing to renew lease, must be resolved in city's favor and against

private grantee.—*Board of Port Com'rs of City of Oakland v. Williams*, supra.

7. U.S.—*Pennsylvania Cement Co. v. Bradley Contracting Co.*, C.C.A.N.Y., 11 F.2d 687.

44 C.J. p 1098 note 18.

8. Md.—*Mayor and City Council of Baltimore v. Baltimore Steam Packet Co.*, 164 A. 878, 164 Md. 284.

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11. N.Y.—*City of New York v. Cokenes*, 242 N.Y.S. 374, 229 App. Div. 695, motion granted 188 N.E. 101, 262 N.Y. 640.—*Columbia Yacht Club v. Moses*, 272 N.Y.S. 563, 151 Misc. 830.

Statute as part of lease

Provisions of statute circumscribing city's authority in leasing tidelands therein are deemed part of lease, whether or not expressly incorporated therein.—*Board of Port Com'rs of City of Oakland v. Williams*, 70 P.2d 918, 9 Cal.2d 381.

Construction and operation of particular provisions

(1) Provision reserving right to construct belt line railroad.—*City of Oakland v. American Dredging Co. of California*, 44 P.2d 309, 3 Cal.2d 220.

(2) Provision as to making of repairs by lessee.—*New York Cent. R. Co. v. City of New York*, 228 N.Y.

S. 631, 131 Misc. 796, affirmed 249 N.Y.S. 912, 233 App.Div. 668.

(3) Provision prohibiting discrimination in rates, charges, or facilities.—*City of Oakland v. E. K. Wood Lumber Co.*, 292 P. 1076, 211 Cal. 16, 80 A.L.R. 379.

(4) Other provisions.—*City of Oakland v. American Dredging Co. of California*, supra.

Presumption

In city's agreement for rental of space in ferry terminal, it will not be presumed that city intended to give exclusive privilege.—*City of New York v. Cokenes*, 242 N.Y.S. 374, 229 App. Div. 695, motion granted 188 N.E. 101, 262 N.Y. 640.

12. U.S.—*Nolte v. Hudson Nav. Co.*, C.C.A.N.Y., 16 F.2d 182.

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44 C.J. p 1098 note 21.

13. N.Y.—*New York Cent. R. Co. v. City of New York*, supra.

44 C.J. p 1098 note 22.

Raising vessel

Owner of vessels burning and sinking at pier rented from city held not liable as tenant for cost of raising them since there was no express or implied agreement to raise vessels.—*Petition of Highlands Nav. Corporation*, C.C.A.N.Y., 29 F.2d 37.

cordance with the terms of the lease or grant.¹⁴ A grant by a city of a pier has been held to convey to the grantee a right to maintain a pier¹⁵ and to collect wharfage revenues arising therefrom,¹⁶ including a lawful extension of the pier,¹⁷ but not to convey an absolute fee.¹⁸ Under a lease of piers providing that the lessee during the term shall establish or erect on the piers certain improvements which are to become the property of the lessor on the expiration of the lease, improvements erected in conformity therewith are the property of the city during the term¹⁹ and at the expiration of the lease.²⁰

The grant of the right to use a wharf or dock ordinarily is mere bilateral dealing and not the grant of a privilege of exercising a calling by the grantee on property maintained for general public use, usually termed a license or franchise.²¹ So an instrument whereby a city leased for a period of years a public wharf owned by the city, and required the lessee to maintain and operate the prem-

ises as a public wharf in accordance with the conditions and requirements imposed by the instrument is a lease which creates a leasehold estate and not a franchise.²² However, a lease by a city of the wharfage which may arise, accrue, or become due, for the use and occupation of public wharf property together with the right to enter upon such wharf property for the purposes of the lease and to collect such wharfage, is not a lease of the wharf,²³ and does not convey to the lessee any exclusive right to the wharf²⁴ or to the soil.²⁵ An ordinance giving owners of property adjoining a river the privilege of controlling land under the river bank has been held to confer a mere revocable license,²⁶ but, where the city as proprietary owner of former submerged land received rent for such land from the adjoining upland owner, the relationship between the city and the upland owner was that of landlord and tenant, so that, in the absence of agreement to the contrary, the tax burden did not fall on the upland owner.²⁷

14. N.Y.—City of New York v Interboro Fuel Corp., 56 N.Y.S.2d 808, 185 Misc. 299.

Intention of parties

(1) Whether city's grantee of wharf for certain number of years was obligated for stipulated compensation for entire term depended on intention of parties.—Mayor and City Council of Baltimore v. Baltimore Steam Packet Co., 164 A. 878, 164 Md. 284.

(2) An ordinance granting the exclusive use of a wharf for a term of years has been held to indicate an intention to obligate the grantee for compensation for the entire term.—Mayor and City Council of Baltimore v. Baltimore Steam Packet Co., supra.

Public moneys

Where city was to receive a stipulated part of rent collected by lessee under lease of improved public levee, the total rent received by the lessee was not required to be paid into the public treasury and disbursed according to statute as public moneys.—State v. McCombs, 133 P.2d 184, 156 Kan. 391.

Application of emergency rent control statute

(1) In general.—City of New York v. Interboro Fuel Corp., 56 N.Y.S.2d 808, 185 Misc. 299.

(2) City ferry terminal building, located on margin of navigable water and used for discharge and receipt of passengers from and by vessels brought alongside it, is wharf property within provision of emergency rent control statute, excepting piers, docks, and wharf properties from definition of "business space"

covered thereby, even though such building contains refreshment stands and other customary appurtenances for passengers' comfort and convenience.—A. E. F.'s Inc., v. City of New York, 58 N.Y.S.2d 90, 185 Misc. 812, affirmed 59 N.Y.S.2d 397, 269 App Div. 1020, appeal granted 59 N.Y.S.2d 913, 270 App Div. 754.

15. N.Y.—Knickerbocker Ice Co. v. Forty-Second St., etc., Ferry R. Co., 68 N.E. 864, 176 N.Y. 408.

Distinction between pier and franchise for pier

"The plaintiff has a franchise to construct and maintain this pier and take wharfage for its use. The pier itself is a structure built under his franchise. It is tangible, bulky property, and in no sense incorporeal. It is not like a mere right or privilege which has no physical existence."—Smith v. New York, 68 N.Y. 552, 555.

16. N.Y.—Knickerbocker Ice Co. v. Forty-Second St., etc., Ferry R. Co., 68 N.E. 864, 176 N.Y. 408.

Public service utility

A company granted a franchise by municipality for maintenance and operation of wharf for purposes of commerce and navigation as far as might be necessary and portions thereof not so used to be employed for amusement and recreation purposes, was not a public service utility, where company did not agree to submit to any governmental body the right to fix prices and there was no agreement that all members of the public should be served.—Ocean Park Pier Amusement Corporation v. City of Santa Monica, 104 P.2d

668, 40 Cal.App.2d 76, rehearing denied 104 P.2d 879, 40 Cal.App.2d 76.

17. N.Y.—American Ice Co. v. New York, 112 N.E. 170, 217 N.Y. 402. 44 C.J. p 1099 note 25.

18. N.Y.—Knickerbocker Ice Co. v. Forty-Second St., etc., Ferry R. Co., 68 N.E. 864, 176 N.Y. 408.

Privilege or license

U.S.—Femmer v. City of Juneau, C. C.A.Alaska, 97 F.2d 649.

Use of bulkheads

A city's sale to riparian owner of the use of bulkheads built by city, together with control thereof, was valid irrespective of whether city could pass absolute title, as against contention that there was failure of consideration.—Gulf Refining Co. v. City of Philadelphia, D.C.Pa., 31 F. Supp. 587, affirmed 110 F.2d 661.

19. N.Y.—People v. Barker, 47 N.E. 46, 153 N.Y. 98.

44 C.J. p 1099 note 27.

20. Mass.—City of Salem v. Batchelder, 166 N.E. 628, 267 Mass. 381.

21. Md.—Mayor and City Council of Baltimore v. Baltimore Steam Packet Co., 164 A. 878, 164 Md. 284.

22. W.Va.—Greene Line Terminal Co. v. Martin, 10 S.E.2d 901, 122 W.Va. 483.

23. N.Y.—Eastman v. New York, 46 N.E. 841, 152 N.Y. 468.

24. N.Y.—Eastman v. New York, supra.

25. N.Y.—Eastman v. New York, supra.

44 C.J. p 1099 note 30.

26. Ky.—Wood v. Town of Lewisport, 299 S.W. 197, 221 Ky. 566

27. N.Y.—Wilson & Co. v. City of

A provision in a lease limiting the charges which the lessee may exact from others does not obligate him to permit others to use the wharf on tendering the amount specified.²⁸ Also some charters provide that, where a pier is leased to a transportation company, no vessel can use the pier without the consent of the lessee.²⁹ A temporary lease of land dedicated for navigation purposes to be used for a different purpose will not work a forfeiture of the interest of the municipality.³⁰ A person leasing waterfront rights from a municipality may not question the lessor's title to the leased premises.³¹

§ 1816. Ownership of Submerged Lands

Submerged lands within the corporate limits of a municipal corporation belong to it only where title is vested in it by statute.

The rule obtaining in some jurisdictions that lands under navigable waters are the property of the state is applicable to submerged lands within the corporate limits of a municipal corporation,³² where the state has not,³³ or to the extent that it has not,³⁴ ceded or granted such lands to the municipality. An act extending the boundary of a municipal corporation over adjacent navigable waters does not grant the land covered by the waters to the municipality, but is merely for purposes of civil and criminal jurisdiction;³⁵ nor does a statute authorizing the municipality to construct piers and collect wharfage vest in it any title to the land under water between the piers.³⁶ In some cases,

however, the title to adjacent submerged lands within certain limits is vested by statute in the municipality,³⁷ subject to the rights of the public for purposes of navigable.³⁸ A municipal corporation is also a riparian owner of waters and land thereunder within the limits of an abutting street, where it owns the fee in the street, and may use it in its discretion as long as it does not obstruct navigation or injure the rights of others.³⁹ On the other hand, where the fee to the street is not in the city but in the abutting property owners, the city is not a riparian owner.⁴⁰ Where a city is the owner of land under water, no one has a right to enter thereon and build a pier unless he owns the adjacent upland.⁴¹

§ 1817. Accretion and Batture

Alluvion or land formed by accretion, although within municipal limits, belongs to the riparian proprietors; but municipal corporations have control over the batture within their limits, subject to the servitude for public use.

Alluvion or land formed by accretion, although within municipal limits, belongs to the riparian proprietors.⁴² The municipal corporation itself may be a riparian proprietor within the meaning of the rule,⁴³ as where it owns the fee in a street bounded by a stream.⁴⁴

In at least one jurisdiction, municipal corporations have control over the batture within their limits, subject to the servitude for public use.⁴⁵ Under a statute which permits riparian owners to recover as much of the batture as is not necessary

New York, 73 N.Y.S.2d 206, 278 N.Y. 86.

28. Cal.—Pacific Coast S. S. Co. v. Kimball, 46 P. 275, 114 Cal. 414.

29. N.Y.—Hudson Nav. Co. v. Olcott, 142 N.Y.S. 613, 81 Misc. 464, affirmed 143 N.Y.S. 1123, 159 App. Div. 902.

30. Tenn.—Hardy v. Memphis, 10 Heisk. 127.

31. Fla.—Amphitrite Corporation v. City of Fort Lauderdale, 3 So.2d 150, 147 Fla. 497.

32. Or.—Chapman v. Hood River, 196 P. 467, 100 Or. 43.

Grants to or by municipality of land under water see the C.J.S. title Navigable Waters § 107, also 45 C. J. p 555 note 70-p 557 note 18.

Extent of title

City's title to land under water does not include the state's title or the title of riparian owners other than the city.—Mayor and City Council of Baltimore v. Canton Co. of Baltimore, 47 A.2d 775, 186 Md. 618.

33. Cal.—People v. Banning Co., 138

P. 100, 166 Cal. 630, affirmed 36 S. Ct. 338, 240 U.S. 142, 60 L.Ed. 569.

Provision of charter that title of mayor and city council in and to water front, wharf property, land under water, etc., is declared to be inalienable, does not mean that state's title to its land under water is granted to city.—Mayor and City Council of Baltimore v. Canton Co. of Baltimore, 47 A.2d 775, 186 Md. 618.

34. Cal.—Santa Cruz v. Southern Pac. R. Co., 126 P. 362, 163 Cal. 538.

35. Fla.—Ruge v. Apalachicola Oyster Canning, etc., Co., 6 So. 489, 25 Fla. 556.

N.Y.—Palmer v. Hicks, 6 Johns. 133.

36. N.Y.—Walsh v. New York Floating Dry Dock Co., 77 N.Y. 448.

37. Tex.—Anderson v. Polk, Civ. App., 291 S.W. 1112, affirmed 297 S.W. 219, 117 Tex. 73.

44 C.J. p 1100 note 41.

38. Cal.—Long Beach v. Lisenby, 166 P. 333, 175 Cal. 575.

44 C.J. p 1100 note 42.

39. Ill.—Chicago v. McGinn, 51 Ill. 266, 2 Am.R. 295.

Va.—Norfolk City v. Cooke, 27 Gratt. 430, 68 Va. 430.

40. Pa.—In re Cramp, 13 Phila. 16.

41. N.Y.—Del Balso Holding Corporation v. McKenzie, 3 N.E.2d 438, 271 N.Y. 313.

42. R.I.—Prior v. Comstock, 19 A. 1079, 17 R.I. 1.

44 C.J. p 1100 note 48.

43. U.S.—New Orleans v. U. S., La., 10 Pet. 662, 9 L.Ed. 573.

44 C.J. p 1100 note 50.

44. Mo.—St. Louis v. Missouri Pac. R. Co., 21 S.W. 202, 114 Mo. 13—St. Louis v. Lemn, 6 S.W. 244, 93 Mo. 477.

45. La.—Town of Napoleonville v. Boudreaux, App., 142 So. 874.

44 C.J. p 1100 note 52.

"Batture" defined see 10 C.J.S. p 213.

Rights of adjacent owner

Adjacent owner of soil could not use bank of navigable stream within town as private property for erection of building.—Town of Napoleonville v. Boudreaux, supra.

for public use,⁴⁶ such owners must leave open without charge whatever is necessary for navigation and public uses, such as streets and highways,⁴⁷ and cannot recover from the city revenues received by it for privileges of occupation for a use of a public character.⁴⁸ Prior to such a statute, municipalities had the exclusive right to determine

when and to what extent batture might be occupied by the riparian owners.⁴⁹ Where the municipality is itself the riparian proprietor, it may withdraw from public use such of the batture as is not needed for such use⁵⁰ and lease it for private purposes.⁵¹

F. PUBLIC PARKS, SQUARES, COMMONS, AND PLACES

§ 1818. In General

- a. Definitions
- b. General principles
- c. Control and management

a. Definitions

A public park is a piece of ground set apart for purposes of pleasure, exercise, amusement or ornament; and a public square is a plat of ground devoted to public purposes.

Under the rules as to the use and regulation of parks and public squares and places, a public park is a piece of ground set apart for purposes of pleasure, exercise, amusement or ornament,⁵² and is usually laid out in walks, drives, and recreation grounds.⁵³ The term "square" is said to indicate a public use,⁵⁴ either for purpose of a free passage or to be ornamented for pleasure, amusement, recreation, or health;⁵⁵ and it is sometimes used as meaning a park.⁵⁶

The term "public square" has acquired a legal meaning, indicating that certain property has been dedicated to the public use.⁵⁷ In ordinary acceptance, it means a plat of ground devoted to public purposes, and not the territory of the streets adjoining the sides of the public square;⁵⁸ property of a public nature held for governmental or public purposes.⁵⁹ Unlike a common, a public square is not intended for the exclusive use of the citizens of the city or borough where it is situated, but is also designed, it has been held, for the comfort and convenience of strangers in the pursuit of either business or pleasure.⁶⁰

b. General Principles

The legislature may and usually does delegate to municipal corporations the regulation and control of property held for public uses within their limits, such as parks, public squares, and commons; but such property is held in trust for the use of the public, and ordinarily

46. La.—Donovan v. New Orleans, 35 La. Ann. 461.

47. La.—Louisiana Ice Mfg. Co. v. New Orleans, 9 So. 21, 43 La. Ann. 217—Sarpy v. New Orleans, 13 La. Ann. 349.

48. La.—Leonard v. Baton Rouge, 4 So. 241, 39 La. Ann. 275.

49. U.S.—New Orleans v. Morris, C. Cl. La., 18 F. Cas. No. 10,183, 3 Woods 115.

La.—Remy v. Municipality No. 2, 12 La. Ann. 500.

50. U.S.—New Orleans v. Morris, C. Cl. La., 18 F. Cas. No. 10,183, 3 Woods 115.

51. U.S.—New Orleans v. Morris, supra.

52. U.S.—Chrestensen v. Valentine, D.C.N.Y., 34 F. Supp. 596.

Conn.—Borough of Fenwick v. Town of Old Saybrook, 47 A.2d 849, 133 Conn. 22.

"Parkway" defined and distinguished from "park" see *infra* § 1821.

Other definitions

(1) A "park" is a pleasure ground set apart for recreation of the public to promote its health and enjoyment.

N.Y.—People v. Nahman, 70 N.Y.S. 2d 29, 188 Misc. 1019, affirmed 81

N.E.2d 36, 298 N.Y. 95—People v. Ribinovich, 13 N.Y.S.2d 135, 171 Misc. 569.

S.D.—LeFevre v. Board of Com'rs of City of Brookings, 272 N.W. 795, 65 S.D. 190.

Wash.—Batchelor v. Madison Park Corp., 172 P.2d 268, 25 Wash.2d 907.

(2) A "park" is piece of ground set apart for ornament or to afford benefit of air, exercise, or amusement.—Robbins v. Commissioners of Lincoln Park, 164 N.E. 10, 332 Ill. 571.

Boardwalk at beach held included

N.Y.—People v. Caponigri, 6 N.Y.S. 2d 577, 169 Misc. 9.

Area held not public park

(1) In general.—Hall v. City and County of Denver, 190 P.2d 122, 117 Colo. 508—44 C.J. p 1100 note 65 [c].

(2) A block from which old court house building was removed, and which was thereafter beautified and cared for as a park, was not a park within provision of city charter that no park shall be sold or leased at any time where there was no charter dedication of land as a park, no user by public for statutory period, and no common-law acceptance of an offer to dedicate.—Hall v. City and

County of Denver, 177 P.2d 234, 115 Colo. 538.

53. Conn.—Borough of Fenwick v. Town of Old Saybrook, 47 A.2d 849, 133 Conn. 22.

54. Ark.—Frauenthal v. Slaten, 121 S.W. 395, 91 Ark. 350.

Pa.—Rush v. Commonwealth, 14 Pa. 186.

58 C.J. p 1310 note 45.

55. N.J.—Hoboken M. E. Church v. Hoboken, 33 N.J. Law 13, 97 Am.D. 696.

58 C.J. p 1310 note 45.

56. Ark.—Frauenthal v. Slaten, 121 S.W. 395, 91 Ark. 350.

58 C.J. p 1310 notes 46–48.

57. Ill.—People v. Willison, 86 N.E. 1094, 237 Ill. 584.

50 C.J. p 863 note 43.

58. Ill.—People v. Willison, supra—De Witt County v. Clinton, 62 N.E. 780, 194 Ill. 521.

59. Pa.—Rung v. Shoneberger, 2 Watts 23, 26 Am.D. 95.

44 C.J. p 863 note 45.

60. Pa.—Rung v. Shoneberger, supra.

"Common" defined see Common Lands § 1.

Right of municipality to prohibit business use of square see *infra* subdivision c of this section.

cannot be used for purposes other than that for which it was dedicated or acquired and appropriated.

Land acquired by a city or town by purchase or condemnation, held strictly for public use as a park, and not subject to the terms of any gift, devise, grant, bequest, or other trust or condition, is under the control of the legislature;⁶¹ but the legislature may,⁶² and usually does,⁶³ delegate to municipal corporations the regulation and control of property held for public uses within their limits, such as

parks, public squares, and commons. In providing for the use and control of its public parks, a city, by its proper officers performs a governmental function,⁶⁴ and is not acting in its proprietary or business capacity.⁶⁵ The municipality holds the property in trust for the use of the public,⁶⁶ and as a general rule it cannot use or permit the use of such property for purposes other than that for which it was dedicated or acquired and appropriated.⁶⁷

61. Mass.—*Lowell v. City of Boston*, 79 N.E.2d 713, 322 Mass. 709, appeal dismissed *Pierce v. City of Boston*, 69 S.Ct. 84, 335 U.S. 849, 93 L.Ed. — — *Wright v. Walcott*, 131 N.E. 291, 238 Mass. 432.

N.Y.—*Corpus Juris* cited in *In re Central Parkway*, City of Schenectady, 251 N.Y.S. 577, 579, 140 Misc. 727.

Wyo.—*Corpus Juris* cited in *Rayor v. City of Cheyenne*, 178 P.2d 115, 116, 63 Wyo. 72.

62. N.J.—*Thomas v. Casey*, 1 A.2d 866, 121 N.J.Law 185, affirmed 9 A.2d 294, 123 N.J.Law 497.

N.Y.—*Corpus Juris* cited in *In re Central Parkway*, City of Schenectady, 251 N.Y.S. 577, 579, 140 Misc. 727.

44 C.J. p 1100 note 62.

63. Conn.—*Borough of Fenwick v. Town of Old Saybrook*, 47 A.2d 849, 133 Conn. 22.

Minn.—*Alexander Co. v. City of Owatonna*, 24 N.W.2d 244, 222 Minn. 312.

Mont.—*Lloyd v. City of Great Falls*, 86 P.2d 395, 107 Mont. 442.

N.J.—*Fraser v. Teaneck Tp.*, 58 A.2d 610, 137 N.J.Law 119, affirmed 64 A.2d 345, 1 N.J. 503.

44 C.J. p 1100 note 63.

Duty imposed on board

Where statute imposed duty on board of park commissioners to operate municipal swimming pool in manner most conducive to well being of general public but board was not established, it was incumbent on city itself to operate or cause the pool to be operated in same manner in which legislature intended park commissioners to operate it.—*Lawrence v. Hancock*, D.C.W.Va., 76 F. Supp. 1004.

64. Fla.—*City of Lakeland v. State* ex rel. Harris, 197 So. 470, 148 Fla. 761.

Ill.—*Le Pitre v. Chicago Park Dist.*, 29 N.E.2d 81, 374 Ill. 184.

Iowa.—*State v. Darling*, 248 N.W. 390, 216 Iowa 553, 88 A.L.R. 218.

Mass.—*Lowell v. City of Boston*, 79 N.E.2d 713, 322 Mass. 709, appeal dismissed *Pierce v. City of Boston*, 69 S.Ct. 84, 335 U.S. 849, 93 L.Ed. — —

Neb.—*Leidigh v. Nebraska City*, 292 N.W. 115, 138 Neb. 136—*Nebraska*

City v. Nebraska City Speed, etc., Ass'n, 186 N.W. 374, 107 Neb. 576.

65. U.S.—*Hague v. Committee for Industrial Organization*, C.C.A.N. J., 101 F.2d 774, modified on other grounds 59 S.Ct. 954, 307 U.S. 496, 83 L.Ed. 1423.

Mass.—*Lowell v. City of Boston*, 79 N.E.2d 713, 322 Mass. 709, appeal dismissed *Pierce v. City of Boston*, 69 S.Ct. 84, 335 U.S. 849, 93 L.Ed. — —

Neb.—*Leidigh v. Nebraska City*, 292 N.W. 115, 138 Neb. 136—*Nebraska City v. Nebraska City Speed, etc.*, Ass'n, 186 N.W. 374, 107 Neb. 576.

66. U.S.—*Hague v. Committee for Industrial Organization*, N.J., 59 S.Ct. 954, 307 U.S. 496, 83 L.Ed. 1423.

D.C.—*Quinn v. Dougherty*, 30 F.2d 749, 58 App.D.C. 339, followed in *Reichelderfer v. Quinn*, 53 F.2d 1079, 60 App.D.C. 325, reversed on other grounds 53 S.Ct. 177, 287 U.S. 315, 77 L.Ed. 331, 83 A.L.R. 1429.

Fla.—*State ex rel. Bigler v. City of Miami*, 40 So.2d 207.

Ky.—*Bedford-Nugent Co. v. Argue*, 137 S.W.2d 392, 281 Ky. 827.

Mass.—*Lowell v. City of Boston*, 79 N.E.2d 713, 322 Mass. 709, appeal dismissed *Pierce v. City of Boston*, 69 S.Ct. 84, 335 U.S. 849, 93 L.Ed. — —

Mont.—*Lloyd v. City of Great Falls*, 86 P.2d 395, 107 Mont. 442.

N.Y.—*Corpus Juris* cited in *In re Central Parkway*, City of Schenectady, 251 N.Y.S. 577, 579, 140 Misc. 727.

Ohio.—*City of Cleveland v. Tussey*, 13 Ohio Supp. 11.

Tex.—*Corpus Juris* quoted in *City of Waco v. O'Neal*, Civ.App., 33 S.W.2d 205, 206.

Wash.—*Batchelor v. Madison Park Corp.*, 172 P.2d 268, 25 Wash.2d 907.

Wyo.—*Corpus Juris* cited in *Rayor v. City of Cheyenne*, 178 P.2d 115, 116, 63 Wyo. 72.

44 C.J. p 1100 note 64.

Status public grounds of municipality was fixed at time of its incorporation.—*Harbor Land Co. v. Village of Fairport*, Ohio App., 49 N.E.2d 194.

Abandonment of trust

Where city held golf course as statutory public trustee, trusteeship could not be defeated by city's express or implied abandonment of trust.—*City of Coral Gables v. Hepkins*, 144 So. 385, 107 Fla. 778.

Private rights in favor of purchasers of lots by reference to map, in areas mapped and designated as public parks, terminate when such areas become public parks, and do not revive on subsequent vacation of public right.—*Schweitzer v. Adami*, 159 A. 529, 110 N.J.Eq. 193, affirmed 166 A. 124, 113 N.J.Eq. 46.

67. Cal.—*Vale v. City of San Bernardino*, 292 P. 689, 109 Cal.App. 102.

Conn.—*Town of Winchester v. Cox*, 26 A.2d 592, 129 Conn. 106.

Ill.—*Robbins v. Commissioners of Lincoln Park*, 164 N.E. 10, 332 Ill. 571.

Ky.—*Bedford-Nugent Co. v. Argue*, 137 S.W.2d 392, 281 Ky. 827.

La.—*Anderson v. Thomas*, 117 So. 573, 166 La. 512.

Mont.—*Lloyd v. City of Great Falls*, 86 P.2d 395, 107 Mont. 412.

N.Y.—*Beth Israel Hospital Ass'n v. Moses*, 294 N.Y.S. 1018, 250 App. Div. 591, affirmed 9 N.E.2d 838, 275 N.Y. 209—*Williams v. Hyman*, 227 N.Y.S. 392, 223 App.Div. 48, affirmed *Williams v. City of New York*, 162 N.E. 547, 248 N.Y. 616—*Kesbec, Inc. v. City of New York*, 67 N.Y.S.2d 900, 189 Misc. 719—*Campbell v. Town of Hamburg*, 281 N.Y. S. 753, 156 Misc. 134—*Corpus Juris* cited in *In re Central Parkway*, City of Schenectady, 251 N.Y. S. 577, 579, 140 Misc. 727.

S.D.—*LeFevre v. Board of Com'rs of City of Brookings*, 272 N.W. 795, reversing 270 N.W. 654, 65 S.D. 64.

Tex.—*Corpus Juris* quoted in *City of Waco v. O'Neal*, Civ.App., 33 S.W.2d 205, 206.

Wyo.—*Corpus Juris* cited in *Rayor v. City of Cheyenne*, 178 P.2d 115, 116, 63 Wyo. 72.

44 C.J. p 1100 note 65.

Rights and liabilities as to dedicated property generally see *Dedication* § 55.

Abandonment of use

City's abandonment of use of

The use to which park property may be devoted by a municipal corporation depends to some extent, however, on whether it was dedicated to the city by a donor or purchased or condemned by the municipality, as dedications by individuals are construed strictly according to the terms of the grant, while a less strict construction of those made by the public is adopted.⁶⁸ While the legislature cannot authorize a municipality to permit property dedicated for a particular public purpose to be used for other purposes,⁶⁹ the legislature may grant authority to devote park property to other than strictly park purposes,⁷⁰ or relieve the municipality from a trust,⁷¹ with respect to lands owned by the municipality in fee.

So, in the absence of restrictions imposed by statute or by dedication of land solely for a park, a city may have the power to vacate a public park for the purpose of erecting public improvements thereon,⁷² and a park in the middle of a street may be abolished by the city under its police power to regulate traffic on the streets.⁷³ Also, where land was conveyed to the city for park purposes, under a deed providing for reverter in case the city should cease

to use the property for such purposes, at a time when the city had statutory authority to vacate as well as to establish parks, the city was authorized to abandon the property for park purposes and to devote it to other purposes on obtaining a waiver of the rights of the reversioners.⁷⁴ Where property is dedicated or set apart without restriction merely for public uses, the municipal authorities may determine for what use it is appropriate and shall be used,⁷⁵ and, if not irrevocably dedicated or appropriated by them to any particular public use,⁷⁶ its use may be changed as the public convenience and necessities require.⁷⁷ Ordinarily land held for park purposes is held for the benefit of the people of the state at large and not only for the benefit of the local inhabitants,⁷⁸ but a municipality accepting a deed of land for a park for the use and benefit of its citizens and residents may be obligated to hold such property only for their benefit and reasonably to exclude the nonresident public.⁷⁹

Property constituting parks, public squares, and commons may, in the absence of express restriction, be used in such manner as will promote the

property for park is not established by temporary use for purpose not inconsistent with intended public use.—*Heger v. City of St. Louis*, 20 S.W.2d 665, 323 Mo. 1031.

Easement for park held shown

Tex.—*Reynolds v. City of Alice*, Civ. App., 150 S.W.2d 455.

68. Cal.—*Slavich v. Hamilton*, 257 P. 60, 201 Cal. 299.

Ky.—*Board of Park Com'rs of Ashland v. Shanklin*, 199 S.W.2d 721, 304 Ky. 43.

La.—*City of Shreveport v. Kahn*, 193 So. 461, 194 La. 55.

N.Y.—*Beth Israel Hospital Ass'n v. Moses*, 294 N.Y.S. 1018, 250 App. Div. 591, affirmed 9 N.E.2d 838, 275 N.Y. 209.—*Campbell v. Town of Hamburg*, 281 N.Y.S. 753, 156 Misc. 134.

S.D.—*LeFevre v. Board of Com'rs of City of Brookings*, 272 N.W. 795, 65 S.D. 190.

Second deed from original grantors authorizing swimming pool on property originally deeded city for park purposes held immaterial in determining city's authority to divert property.—*Carstens v. City of Wood River*, 163 N.E. 816, 332 Ill. 400, 63 A.L.R. 471.

69. Wyo.—*Corpus Juris cited in Rayor v. City of Cheyenne*, 178 P. 2d 115, 117, 63 Wyo. 72.
44 C.J. p 1101 note 66.

Obligation of state

Municipality in accepting land for use as park did so as representative of state in exercise of one of its

functions, and obligation assumed by municipality became obligation of state.—*Town of Winchester v. Cox*, 26 A.2d 592, 129 Conn. 106.

70. N.M.—*McCarter v. City of Raton*, 115 P.2d 90, 45 N.M. 351.
Wyo.—*Corpus Juris cited in Rayor v. City of Cheyenne*, 178 P.2d 115, 117, 63 Wyo. 72.

43 C.J. p 1344 note 84—44 C.J. p 1101 note 67.

Authority to vacate park

N.M.—*McCarter v. City of Raton*, 115 P.2d 90, 45 N.M. 351.

71. Wyo.—*Corpus Juris cited in Rayor v. City of Cheyenne*, 178 P. 2d 115, 117, 63 Wyo. 72.

44 C.J. p 1101 note 68.

72. Mich.—*Riggs v. Detroit Bd. of Education*, 27 Mich. 262.

44 C.J. p 184 note 20.

73. Mich.—*City of Detroit v. Judge of Recorder's Court of City of Detroit*, 234 N.W. 445, 253 Mich. 6.

74. Mont.—*Lloyd v. City of Great Falls*, 86 P.2d 395, 107 Mont. 442.

Acquiescence

Where property was conveyed by railroad company to city for use as a public park and as site for a public library, subsequent quitclaim deed by company to city covering portion of property which city and state highway commission proposed to utilize as link in state highway constituted an acquiescence in change of use contemplated by the city.—*McCarter v. City of Raton*, 115 P.2d 90, 45 N.M. 351.

Gifts prior to statute

Statutes which allegedly contemplated that lands acquired by city by gift or donation must be used by city for the particular purpose for which they were given or donated were not applicable to gifts of land for park purposes, which were made prior to the existence of the statutes.—*Lloyd v. City of Great Falls*, 86 P.2d 395, 107 Mont. 442.

75. Ohio.—*Sargent v. Cleveland*, 4 Ohio Dec., Reprint, 213, 1 Clev.L. Rep. 122.

Right of user not acquired

Where millowners used property for mill purposes during daytime, and at night public used property for parking, village had not acquired right by prescription to use land for purpose of parking vehicles, there being no adverse or continuous and uninterrupted use.—*Village of Manchester v. Blaess*, 242 N.W. 798, 253 Mich. 652.

76. Ky.—*Massey v. Bowling Green*, 268 S.W. 348, 206 Ky. 692.
44 C.J. p 1101 note 70.

77. Ga.—*Pettitt v. Macon*, 23 S.E. 198, 95 Ga. 645.

78. Conn.—*Borough of Fenwick v. Town of Old Saybrook*, 47 A.2d 849, 133 Conn. 22.—*Town of Winchester v. Cox*, 26 A.2d 592, 129 Conn. 106.

79. N.Y.—*Campbell v. Town of Hamburg*, 281 N.Y.S. 753, 156 Misc. 134.

public interest⁸⁰ and is not inconsistent with the purpose for which it was intended.⁸¹ A public square intended for ornamentation, recreation, and pleasure may be improved and beautified,⁸² but where it has been dedicated to the city primarily for the purpose of ornamentation it may be improper to install playgrounds therein.⁸³ As a general rule, parks may be devoted to any use which tends to promote popular enjoyment and recreation⁸⁴ and which is incidental to their use as parks.⁸⁵ So a bathing beach may be maintained in a park,⁸⁶ and it has been held that a swimming pool may be constructed on property which was acquired for a park but which has been undeveloped;⁸⁷ but it has also been held that the use of a park for a recreational center with a swimming pool closed in by a wire fence constituted an unauthorized diversion of property from park purposes.⁸⁸

The municipal authorities may provide for the pleasure, amusement, comfort, and refreshment of persons frequenting parks;⁸⁹ and the city may ei-

ther provide the means itself⁹⁰ or grant privileges to private persons to do so, as discussed *infra* § 1822. The express power given a city to create and regulate parks impliedly grants the power to operate a nursery to supply park needs;⁹¹ and whether the city shall maintain such a nursery or buy trees and shrubs on the open market is an administrative function, and the courts will not interfere with its exercise in the absence of arbitrary action.⁹² The owner of property abutting a city park along a lake is not possessed of easements of passage and view.⁹³

c. Control and Management

Municipal authorities may make all necessary and proper regulations with respect to the government and management of public parks, squares, commons, and places, and how they shall be used by the public; but, in order to be valid, the regulations adopted must be reasonable and nondiscriminatory.

The municipal authorities may make all necessary and proper regulations with regard to the government and management of the public parks, squares, commons, and places,⁹⁴ and how they shall be used

80. Cal.—Griffith v. City of Los Angeles, 178 P.2d 793, 78 Cal.App.2d 796.

44 C.J. p 1101 notes 73, 74.

Temporary housing purposes

(1) Use by city of park property for temporary housing purposes to help meet the housing shortage caused by necessities of war having retarded construction of sufficient houses was a use for park purposes, and was not violative of city charter.—Griffith v. City of Los Angeles, *supra*.

(2) Such use did not constitute an abandonment of use of the lands for park and playground purposes.—City of Columbus ex rel. Falter v. Columbus Metropolitan Housing Authority, Ohio Com Pl., 67 N.E.2d 338, affirmed 68 N.E.2d 108.

Tunnel opening

Public use of small area of park for tunnel opening held not an unlawful use.—Humphreys v. City and County of San Francisco, 268 P. 388, 92 Cal.App. 69.

81. Cal.—Humphreys v. City and County of San Francisco, *supra*.

La.—Anderson v. Thomas, 117 So. 573, 166 La. 512.

44 C.J. p 1101 note 74.

82. Pa.—Commonwealth v. Beaver Borough, 33 A. 112, 171 Pa. 642.

44 C.J. p 1101 note 72.

83. N.Y.—Beth Israel Hospital Ass'n v. Moses, 9 N.E.2d 338, 275 N.Y. 309.

84. N.Y.—Rivet v. Burdick, 6 N.Y.S. 2d 79, 255 App.Div. 131.—In re Central Parkway, City of Schenectady, 251 N.Y.S. 577, 140 Misc. 727.

85. Cal.—Vale v. City of San Bernardino, 292 P. 689, 109 Cal.App. 102.

Particular incidents

Maintaining restaurant, conducting dances, and renting lockers at town park were common incidents of pleasure ground and contributed to use and enjoyment of park and would not be restrained where there was no discrimination among local citizens who had right to use and benefit of park.—Campbell v. Town of Hamburg, 281 N.Y.S. 753, 156 Misc. 134.

86. Fla.—Ide v. City of St. Cloud, 8 So.2d 924, 150 Fla. 806.

The roping off of bathing beach by village on its park property adjacent to and under waters of navigable lake for exclusive use of bathers after making ample provision for boating, which was only other public use of such waters, was reasonable regulation.—Nelson v. De Long, 7 N.W.2d 342, 213 Minn. 425.

87. S.D.—LeFevre v. Board of Com'rs of City of Brookings, 272 N.W. 795, 65 S.D. 190.

88. Ill.—Carstens v. City of Wood River, 163 N.E. 816, 332 Ill. 400, 63 A.L.R. 471.

89. Kan.—Bailey v. Topeka, 154 P. 1014, 97 Kan. 327, 830, L.R.A.1916D 491.

44 C.J. p 1101 note 75.

90. Mo.—Longwell v. Kansas City, 203 S.W. 657, 199 Mo.App. 480.

44 C.J. p 1101 note 76.

91. Ill.—People ex rel. Sweitzer v. City of Chicago, 3 N.E.2d 330, 363 Ill. 409, 104 A.L.R. 1335.

Resolution sufficient

Ill.—People ex rel. Sweitzer v. City of Chicago, *supra*.

92. Ill.—People ex rel. Sweitzer v. City of Chicago, *supra*.

93. Ill.—McCormick v. Chicago Yacht Club, 163 N.E. 418, 331 Ill. 514, 60 A.L.R. 763.

94. N.Y.—People v. Hass, 86 N.E.2d 169, 299 N.Y. 190.—People v. Ribinovich, 13 N.Y.S.2d 135, 171 Misc. 569.

Tex.—Ex parte Largent, 162 S.W.2d 419, 144 Tex.Cr. 592, certiorari denied Largent v. Reeves, 63 S.Ct. 72, 317 U.S. 668, 87 L.Ed. 536, rehearing denied 63 S.Ct. 443, 317 U.S. 713, 87 L.Ed. 568.—Corpus Juris quoted in City of Waco v. O'Neal, Civ.App., 33 S.W.2d 205, 206, error refused.

44 C.J. p 1101 note 80.

Zoological garden

The manner of operating a zoological garden comes within the sound discretion of the city legislative branch.—City of Cleveland v. Lausche, 49 N.E.2d 207, 70 Ohio App. 273.

Labor disputes

A regulation of department of parks of city which in substance prohibited the exhibition of any sign, placard, notice, declaration, or appeal of any kind or description in any park or on any park street except by permit was not intended to grant to private businesses operating on city property an immunity from consequences of labor disputes which other private businesses did not possess.—People v. Ribinovich, 13 N.Y.S.2d 135, 171 Misc. 569.

by the public,⁹⁵ such as are necessary to preserve the public peace and safety,⁹⁶ the protection of the property from injury,⁹⁷ and to secure to the public its common enjoyment;⁹⁸ and municipal regulations made under a grant of police power, if reasonably necessary for the health of patrons of privately owned places of recreation, operated for profit, are equally applicable to the same kind of enterprise operated by the municipality in a proprietary capacity.⁹⁹ As long as they act within the legitimate scope of their authority their discretion is not subject to outside interference¹ or judicial revision or reversal;² but, in order to be valid, the regulations adopted must be reasonable³ and nondiscriminatory,⁴ and they must tend to promote the public health, safety, morals, or general welfare.⁵ The privilege of a citizen to use the public parks is not absolute but relative and must be exercised in subordination to the general comfort and convenience

and be consonant with peace and good order, but the right cannot be abridged or denied in the guise of regulation.⁶

The power to regulate, control, and protect the use of parks, parkways, and public places ordinarily does not extend to private property adjacent to, but outside, the limits of such parks and the streets and highways surrounding them,⁷ but a municipality has been held to have ample police power to prohibit owners of property adjoining public parks from projecting voices from their private property on the parks describing their wares, to the irritation, annoyance, and inconvenience of people using the parks.⁸ A municipality may not, in the absence of special authority, exercise police power over a public park located beyond its territorial limits.⁹ While the cutting of ice from a stream within a public park may be prohibited,¹⁰ the fact that a park abuts on a stream gives the municipality only such rights in

Violation of regulations not shown
N.Y.—People v. Reilly, 14 N.Y.S.2d 589.

95. N.Y.—Bullock v. Wooding, 8 A.2d 273, 123 N.J.Law 176.

Tex.—**Corpus Juris** quoted in City of Waco v. O'Neal, Civ.App., 33 S.W.2d 205, 206, error refused.
44 C.J. p 1101 note 81.

Swimming pool

A wide discretion is vested in operator of municipal swimming pool regarding time when pool should be open to the public.—Kern v. City Com'rs of City of Newton, 122 P.2d 728, 155 Kan. 8.

96. Ill.—Chicago Park Dist. v. Canfield, 47 N.E.2d 61, 382 Ill. 218.
N.J.—Bullock v. Wooding, 8 A.2d 273, 123 N.J.Law 176.
Tex.—City of Tyler v. Ingram, Civ. App., 157 S.W.2d 184, reversed on other grounds 164 S.W.2d 616, 139 Tex. 600.

44 C.J. p 1101 note 82.

Registration

Ordinances for the control of public beaches and providing for registration of persons desiring to use the bathing facilities and punishment for violation are valid where their purpose is public safety and general welfare, and fact that ordinances were not legally administered would not render them void in toto.—Bullock v. Wooding, 8 A.2d 273, 123 N.J.Law 176.

Swimming and bathing

Where superintendent of parks of city had right, under ordinance, to designate lake as place for swimming and bathing, his failure to stop such practice, with knowledge thereof, was held not tantamount to setting aside lake for swimming and bathing or to erection of signs per-

mitting such use—Cunningham v. City of Niagara Falls, 272 N.Y.S. 720, 242 App.Div. 39.

97. La.—Municipality No. 1 v. Municipality No. 2, 12 La. 49.
Mass.—Commonwealth v. Davis, 4 N.E. 577, 140 Mass. 485.

98. N.Y.—People v. Ribinovich, 13 N.Y.S.2d 135, 171 Misc. 569.
Tex.—**Corpus Juris** quoted in City of Waco v. O'Neal, Civ.App., 33 S.W.2d 205, 206.
44 C.J. p 1101 note 84.

99. Utah.—Griffin v. Salt Lake City, 176 P.2d 156.

Swimming pools and bath houses

Utah.—Griffin v. Salt Lake City, supra.

1. Tex.—**Corpus Juris** quoted in City of Waco v. O'Neal, Civ.App., 33 S.W.2d 205, 206, error refused.
44 C.J. p 1101 note 85.

2. Ill.—Smutny v. Irving Park Dist., 269 Ill.App. 544.
Ohio.—McGuire v. City of Cincinnati, App., 40 N.E.2d 435, appeal dismissed 38 N.E.2d 1023, 139 Ohio St. 218.

Tex.—**Corpus Juris** quoted in City of Waco v. O'Neal, Civ.App., 33 S.W.2d 205, 206, error refused.
44 C.J. p 1101 note 86.

3. Mass.—Whitney v. Commonwealth, 77 N.E. 516, 190 Mass. 531.
Puerto Rico.—Diaz v. People, 28 Puerto Rico 408.

Regulations held not unreasonable

Rules, issued by city park commissioner pursuant to authority given by city charter, prohibiting use of public address systems, loud speakers, advertising, committing nuisances, and navigation of boats and vessels within park and beach areas

were not unreasonable.—People v. Reilly, 14 N.Y.S.2d 589.

4. Ill.—Chicago Park Dist. v. Canfield, 47 N.E.2d 61, 382 Ill. 218.

5. Ill.—Chicago Park Dist. v. Canfield, supra.

Aesthetic purposes

If regulation of park district is for promotion of public health, safety, morals, or general welfare, it is no objection to its validity that it may also promote aesthetic purposes, if its reasonableness may be sustained on other grounds.—Chicago Park Dist. v. Canfield, supra.

6. Pa.—Commonwealth v. Hessler, 15 A.2d 486, 141 Pa.Super. 421.

7. N.Y.—People v. Green, 83 N.Y.S. 460, 85 App.Div. 400.

Surface constructions

The power of the department of public parks to control surface constructions on streets within a specified distance of a public park does not apply to a street within that distance of a tract of land the taking of which for a park has been authorized by statute, but the area and boundaries of which have not been settled by the commissioners appointed for that purpose by the statute.—Broadbelt v. Loew, 44 N.Y.S. 159, 15 App.Div. 343, affirmed 57 N.E. 1105, 162 N.Y. 642.

8. N.Y.—People v. Caponigri, 6 N.Y.S.2d 577, 169 Misc. 9.

9. Miss.—Lester v. Jackson, 11 So. 114, 69 Miss. 837.
43 C.J. p 1328 note 83.

10. Iowa.—Des Moines Park Comrs. v. Diamond Ice Co., 105 N.W. 203, 130 Iowa 603, 8 L.R.A., N.S., 1103.

the stream as any other riparian owner would have.¹¹

Business activities. A municipal corporation may prevent its parks and common places from being used by any citizen or class of citizens for the conduct of any kind of private business.¹² So the city may prohibit the use of a public square as a place of business for commercial vehicles,¹³ or for the barter and sale of merchandise or property,¹⁴ and it may ban the distribution in public parks of handbills containing advertising matter.¹⁵ Where, however, a village was organized on territory partly occupied by a township park, the jurisdiction of the village over the park was limited to matters specified in a statute, and an ordinance prohibiting the sale of merchandise by one to whom the township park commissioners had granted a concession was held invalid.¹⁶

Speeches, assemblies, and parades. As a general rule, a city has the power to regulate the use of its public parks for public addresses, assemblies, and parades,¹⁷ and municipal authorities may require that a permit be obtained before the parks or other public places may be so used.¹⁸ Also, no citizen has any constitutional or primary inalienable right to use a park facility, designed primarily as an ath-

letic stadium, for public addresses on social, political, or economic subjects, irrespective of the right of the municipality to regulate such facility for the best interests of the public.¹⁹ It has been held, however, that, consistent with the primary uses of parks and other public places for the use of the people for travel and recreation, such places must be open for the use of the people in order that they may exercise their rights of free speech and assembly²⁰ and to picket a private business located on park property;²¹ and an ordinance requiring a permit for the use of parks for public assembly and enabling a city officer to refuse a permit on his mere opinion that such refusal will prevent riots, disturbances, or disorderly assemblage has been held invalid.²²

Exclusion of portion of public; segregation of races. As a general rule, whether a portion of a park may be set aside temporarily for the use of a particular portion of the public rests in the discretion of the authorities;²³ but the general public cannot be excluded for an unreasonable length of time,²⁴ nor can a particular class of persons be arbitrarily excluded.²⁵ It has been held under some statutes that municipal authorities have discretionary power to adopt such rules and regulations as will provide for the separation of the white and

11. N.J.—*Paterson v. Jersey City*, 93 A. 592, 87 N.J. Law 163, followed in *Paterson v. East Newark*, 93 A. 1085, 87 N.J. Law 324.

44 C.J. p 1101 note 90.

12. Tex.—*City of Dallas v. Harris*, Civ.App., 157 S.W.2d 710, error refused.

13. Tex.—*West v. City of Waco*, 294 S.W. 832, 116 Tex. 472.

14. Tex.—*Ex parte Largent*, 162 S.W.2d 419, 144 Tex.Cr. 592, certiorari denied *Largent v. Reeves*, 63 S.Ct. 72, 317 U.S. 668, 87 L.Ed. 536, rehearing denied 63 S.Ct. 443, 317 U.S. 713, 87 L.Ed. 568—*Corpus Juris* quoted in *City of Waco v. O'Neal*, Civ.App., 33 S.W.2d 206, 206, error refused—*West v. Waco*, Civ.App., 275 S.W. 282.

Wis.—*City of Stevens Point v. Bocksenbaum*, 274 N.W. 505, 325 Wis. 373.

15. U.S.—*Christensen v. Valentine*, D.C.N.Y., 34 F.Supp. 596.

16. Ill.—*People ex rel. Carroll v. Village of Lakewood*, 13 N.E.2d 275, 468 Ill. 209.

17. N.J.—*Thomas v. Casey*, 1 A.2d 866, 121 N.J. Law 185, affirmed 9 A.2d 294, 123 N.J. Law 447.

Prohibition

The proper authorities may prohibit public speaking or preaching in the parks.—*Commonwealth v. Da-*

vis, 39 N.E. 113, 162 Mass. 510, 44 Am S.R. 389, 26 L.R.A. 712—44 C.J. p 1101 note 91.

18. N.J.—*Thomas v. Casey*, 1 A.2d 866, 121 N.J. Law 185, affirmed 9 A.2d 294, 123 N.J. Law 447.

N.Y.—*People v. Hass*, 86 N.E.2d 169, 299 N.Y. 190.

Public nuisance

N.J.—*Thomas v. Casey*, 1 A.2d 866, 121 N.J. Law 185, affirmed 9 A.2d 294, 123 N.J. Law 447.

19. Ill.—*Coughlin v. Chicago Park Dist.*, 4 N.E.2d 1, 364 Ill. 90.

20. U.S.—*Hague v. Committee for Industrial Organization*, C.C.A.N.J., 101 F.2d 774, modified on other grounds 59 S.Ct. 954, 307 U.S. 496, 83 L.Ed. 1423.

Easement of assemblage

The purpose of most parks is the recreation of the public, including not only physical recreation, but mental recreation and the opportunity to impart and receive instructions, and hence the municipality's proprietary right in parks is subject to an easement of assemblage for the benefit of the public.—*Committee for Industrial Organization v. Hague*, D.C.N.J., 25 F.Supp. 127. Modified on other grounds, C.C.A., *Hague v. Committee for Industrial Organization*, 101 F.2d 774, modified on other grounds 59 S.Ct. 954, 307 U.S. 496, 83 L.Ed. 1423.

21. N.Y.—*People v. Ribimovich*, 13 N.Y.S.2d 135, 171 Misc. 569.

22. U.S.—*Hague v. Committee for Industrial Organization*, N.J., 59 S.Ct. 954, 307 U.S. 496, 83 L.Ed. 1423.

23. N.J.—*Strock v. East Orange*, 77 A. 1051, 80 N.J. Law 619, 623, affirmed 81 A. 826, 82 N.J. Law 543. 44 C.J. p 1101 note 93.

24. Neb.—*Nebraska City v. Nebraska City Speed, etc., Ass'n*, 186 N.W. 374, 107 Neb. 576.

N.H.—*Sherburne v. Portsmouth*, 58 A. 38, 72 N.H. 539.

25. Ga.—*Blackman Health Resort v. Atlanta*, 107 S.E. 525, 151 Ga. 507, 17 A.L.R. 516.

44 C.J. p 1102 note 95.

Exclusion held proper

In action to compel city officials and lessee of municipal swimming pool to admit plaintiff, a citizen of African descent, to pool, where commissioner, appointed by supreme court to hear evidence, found that plaintiff was generally known by the people of the city to be a man of immoral character, it was the right and duty of city and lessee to bar plaintiff from the pool.—*Kern v. City Com'rs of City of Newton*, 122 P.2d 728, 155 Kan. 8.

colored races in the enjoyment of the public parks,²⁶ and that they may assign portions of parks for the exclusive use in part of negroes, and do likewise as to white people.²⁷ It has also been held, however, that a municipality may not exclude colored people from the use of a park facility in violation of their constitutional rights.²⁸

Operation by nonprofit corporation. The city may contract for the operation of a zoological garden, museum, or aquarium, by a private nonprofit corporation organized to promote the sciences of natural history.²⁹

Fees. As a general rule, municipal authorities may, in case of expense in maintaining service in a public park, demand a reasonable fee for individual use.³⁰ So a reasonable fee may be charged for the use of a bathhouse, swimming pool,³¹ or pavilion.³² Under the terms of a contract by the city with a private nonprofit corporation, organized to promote the sciences of natural history, providing for the operation of the city's zoological garden by the corporation, fees may be charged for admission to the garden,³³ for use of a parking lot therein,³⁴

and for animal rides at the garden.³⁵

§ 1819. Powers of Particular Boards, Bodies, or Officers

Under some charters or statutes, and the action taken by a municipal corporation thereunder, the control and management of parks are vested in a park commission, commissioner, board, or department.

Under some charters or statutes,³⁶ and the action taken by a municipal corporation thereunder,³⁷ the control and management of parks are vested in a park commission, commissioner, board, or department. Such an officer or body may have discretionary power to promulgate rules and regulations, having the force and effect of law, governing the use of parks and their facilities,³⁸ and such regulations will be held valid where they are reasonable and within the scope of authority conferred on the official body by statute,³⁹ even though they are embodied in a resolution rather than in an ordinance;⁴⁰ but such an officer or agency may not promulgate regulations which affect private property where the power to do so has not been conferred by charter or statute,⁴¹ and they may not conduct a

26. Ky.—Sweeney v. City of Louisville, 218 S.W.2d 30, 309 Ky. 465.

27. Ky.—Warley v. Board of Park Com'rs, 26 S.W.2d 554, 233 Ky. 688.

Golf courses

Md.—Durkee v. Murphy, 29 A.2d 253, 181 Md. 259.

28. Ohio.—Culver v. City of Warren, App., 83 N.E.2d 82.

29. Ohio.—City of Cleveland v. Lausche, 49 N.E.2d 207, 70 Ohio App. 273.

Contract not abrogated

N.Y.—Wetter v. Moses, 86 N.Y.S.2d 110, affirmed 39 N.Y.S.2d 992, 265 App.Div. 993, reargument and appeal denied 42 N.Y.S.2d 919, 266 App.Div. 776, appeal dismissed 50 N.E.2d 100, 290 N.Y. 761.

30. Ill.—Carstens v. City of Wood River, 176 N.E. 266, 344 Ill. 319—Love v. Glencoe Park Dist., 370 Ill.App. 117.

31. Ill.—Carstens v. City of Wood River, supra.

32. Ill.—Carstens v. City of Wood River, supra.

Amount of fee

City was entitled to charge for use of pavilion in park a fee sufficient only to cover lights and janitor's service.—Carstens v. City of Wood River, supra.

33. Ohio.—McGuire v. City of Cincinnati, App., 40 N.E.2d 435, appeal dismissed 38 N.E.2d 1023, 139 Ohio St. 218.

Discrimination

The imposition of nondiscriminatory fee is not invalid as amounting to discriminatory rule of exclusion from gardens.—McGuire v. City of Cincinnati, supra.

34. Ohio.—City of Cleveland v. Lausche, 49 N.E.2d 207, 70 Ohio App. 273.

35. Ohio.—City of Cleveland v. Lausche, supra.

36. Ill.—Le Pitre v. Chicago Park Dist., 29 N.E.2d 81, 374 Ill. 184. Md.—Durkee v. Murphy, 29 A.2d 253, 181 Md. 259.

N.Y.—People v. Nahman, 70 N.Y.S.2d 29, 188 Misc. 1019, affirmed 81 N.E.2d 36, 298 N.Y. 95—People v. Caponigri, 6 N.Y.S.2d 577, 169 Misc. 9.

Wash.—State ex rel. Thompson v. City of Seattle, 63 P.2d 320, 185 Wash. 105.

44 C.J. p 1102 note 96.

Powers of park officers and departments generally see supra §§ 645-650.

Validity of statute

Act providing for establishment of permanent park board, as applied to city, held not invalid as interfering with management and control of property owned and managed in proprietary capacity, notwithstanding revenues received from golf courses and swimming pool.—State v. Darling, 246 N.W. 390, 218 Iowa 553, 88 A.L.R. 218.

Exclusive control

The statutes governing city board

of park commissioners was intended to lodge in board as trustee for the people the exclusive control of park properties, and the board cannot surrender or delegate its official dominion, discretion, powers and duties to persons not answerable to the people.—Board of Park Com'rs of Ashland v. Shanklin, 199 S.W.2d 721, 304 Ky. 43.

37. N.J.—Astley v. Newark, 119 A. 187, 98 N.J.Law 251. 44 C.J. p 1102 note 97.

38. Ill.—Coughlin v. Chicago Park Dist., 4 N.E.2d 1, 364 Ill. 90. N.Y.—People v. Ribnovich, 13 N.Y.S.2d 135, 171 Misc. 569.

39. Del.—Kelley v. City of Wilmington, 156 A. 867, 5 W.W.Harr. 9.

40. Ill.—Coughlin v. Chicago Park Dist., 4 N.E.2d 1, 364 Ill. 90.

41. N.Y.—People v. Caponigri, 6 N.Y.S.2d 577, 169 Misc. 9.

Lack of comprehensive guide

The rule of the park commissioner prohibiting any person from acting as crier, or advertiser through the media of voice, public address system, or other mechanical device, on beaches or boardwalks or "in the vicinity" of them, was invalid for failing to state some comprehensible guide as to how the defendant might use his voice or loud-speaker on his private premises in the vicinity of the park to avoid a penalty.—People v. Caponigri, supra.

business for private gain in the city parks.⁴³ The jurisdiction of such board or department is exclusive of that of other boards;⁴³ but, where the board or department has not adopted certain regulations within its authority to make, a city council may do so by ordinance,⁴⁴ and under some statutes the area covered by the intersection of a street and a boulevard is subject to the control and jurisdiction of the city, exercisable by the council, in respect of its use as a public street,⁴⁵ although the same area is also subject to the jurisdiction of park commissioners in respect of its use as a boulevard and pleasure drive-way.⁴⁶

§ 1820. Use for Public Buildings, Structures, or Statues

In the absence of statutory authority it is improper to use a portion of a public park, square, or pleasure ground for the erection and maintenance of a public building to be used for other than park purposes; but it is lawful to erect in a park a building or structure which contributes to the use and enjoyment of the park by the public.

In the absence of statutory authority it is improper to use a portion of a public park, square, or pleasure ground for the erection and maintenance of a public building⁴⁷ to be used for administrative⁴⁸ or military⁴⁹ purposes having no connection with park purposes.⁵⁰ On the other hand, it is lawful to erect in a park a building or structure which contributes to the use and enjoyment of the park by the public,⁵¹ and it has been held proper to erect in a park

a building designed to serve the purpose both of an office and a residence for the superintendent of the park.⁵² It has been held both proper⁵³ and improper⁵⁴ to construct a municipal auditorium on park property. The legislature may authorize the construction of an underground garage in the city common for the purpose of abating a public nuisance arising from serious traffic congestion,⁵⁵ even though it would result in withdrawing from the use of the public a small part of the surface of the common;⁵⁶ but it has also been held unlawful, without statutory authorization, to erect in a park a garage for the keeping of automobiles and motor trucks used by park officers and employees.⁵⁷ The property may be inclosed by a fence or railing,⁵⁸ provided there are openings therein at suitable intervals so that the public is not wholly excluded.⁵⁹

Statues, monuments, and memorials. The municipal authorities may permit the erection of statues and monuments in public parks,⁶⁰ whether they are purely ornamental⁶¹ or include the idea of a memorial;⁶² but, where a right to locate in park territory a boulder of a particular size is reserved, a boulder of any other size cannot be erected over objection raised by the proper authorities.⁶³ Municipal authorities may change the location of a memorial erected on land belonging to the municipality.⁶⁴

Docks and piers. A public boat dock may be

43. La.—*Rome v. London & Lancashire Indemnity Co. of America*, App., 157 So. 175, reversed on other grounds 160 So. 121, 181 La. 630.

43. Md.—*Williams v. Baltimore*, 97 A. 140, 128 Md. 140.

44 C.J. p 1102 note 98.

44. Colo.—*Hedges v. Mitchell*, 194 P. 620, 69 Colo. 285.

45. Ill.—*South Park Comrs. v. Chicago City R. Co.*, 122 N.E. 89, 286 Ill. 504.

44 C.J. p 1102 note 1.

46. Ill.—*South Park Comrs. v. Chicago City R. Co.*, supra.

44 C.J. p 1102 note 2.

47. Ill.—*Princeville v. Auten*, 77 Ill. 325.

N.J.—*Fessler v. Union*, 56 A. 272, 67 N.J.Eq. 14.

Building erected by or leased to private person see infra § 1822.

Erection of buildings on property dedicated for park generally see Dedication § 66.

48. Ill.—*Melin v. Community Cons. School Dist. No. 76*, 144 N.E. 13, 312 Ill. 376.

44 C.J. p 1102 note 5.

49. Pa.—*Meigs' Appeal*, 62 Pa. 28, 1 Am.R. 372.

50. N.Y.—*Williams v. Gallatin*, 128 N.E. 121, 229 N.Y. 248.

51. N.Y.—*In re Central Parkway, City of Schenectady*, 251 N.Y.S. 577, 140 Misc. 727.

44 C.J. p 1102 note 8.

Pioneer's cabin

Fact that log cabin in park, representing pioneer home, was open to public, did not show diversion from park purposes or interference with free public use; use of land for park purposes was not affected merely because pioneers' societies managed their meetings in log cabin in park; fact that pioneers' societies, permitted to use log cabin in public park, denied similar permission to rival society, did not alone show unlawful use of park.—*Vale v. City of San Bernardino*, 292 P. 689, 109 Cal.App. 102.

52. Minn.—*State v. Brown*, 126 N.W. 408, 111 Minn. 80.

53. Cal.—*Los Angeles Athletic Club v. City of Long Beach*, 17 P.2d 1061, 128 Cal.App. 427.

54. La.—*Anderson v. Thomas*, 117 So. 573, 166 La. 512.

55. Mass.—*Lowell v. City of Boston*, 79 N.E.2d 713, 322 Mass. 709, appeal dismissed *Pierce v. City of Boston*, 69 S.Ct. 84, 335 U.S. 849, 93 L.Ed. —.

56. Mass.—*Lowell v. City of Boston*, 79 N.E.2d 713, 322 Mass. 709, appeal dismissed *Pierce v. City of Boston*, 69 S.Ct. 84, 335 U.S. 849, 93 L.Ed. —.

57. Or.—*Wessinger v. Mische*, 142 P. 612, 71 Or. 239.

58. Ill.—*Guttery v. Glenn*, 66 N.E. 305, 201 Ill. 275.

44 C.J. p 1103 note 15.

59. Minn.—*Scranton v. Minneapolis*, 60 N.W. 26, 58 Minn. 437.

60. N.Y.—*In re Central Parkway, City of Schenectady*, 251 N.Y.S. 577, 140 Misc. 727.

44 C.J. p 1102 note 11.

61. N.Y.—*Parsons v. Van Wyck*, 67 N.Y.S. 1054, 56 App.Div. 329.

62. Miss.—*Brahan v. Meridian*, 71 So. 170, 111 Miss. 30.

44 C.J. p 1103 note 13.

63. Ill.—*Chicago Medical Soc. v. South Park Comrs.*, 150 Ill.App. 564.

64. Wis.—*Matson v. Town of Caladonia*, 227 N.W. 298, 200 Wis. 43.

erected and maintained on park property,⁶⁵ but a private pier acquired by a municipal corporation for park purposes is private property, although owned by the municipality and held for a public purpose, until it is actually devoted to the public use for which it was acquired, where the municipality has neither invited nor permitted a use of it that is public in its nature.⁶⁶

§ 1821. Use for Purpose of Passage or Travel

Ordinarily a park is not a place for passage or travel and it is improper, in the absence of express legislative authority, to devote a portion of a park, square, or common to use for general street and highway purposes; but a charter or statutory provision may authorize the building of a street or highway through a park or on a portion of park property vacated for such use.

Under some charter provisions, a street may be laid across a park approach with the consent of the park commissioners⁶⁷ and thereby becomes a public highway at the intersection;⁶⁸ and where the commissioners have given an absolute and unconditional consent they cannot withdraw it at will⁶⁹ and thereby discontinue and terminate the existence of the street as a public thoroughfare across the parkway.⁷⁰ Ordinarily, however, a distinction is drawn between a street and a park,⁷¹ one being a place for passage and the other being a place for rest and

recreation.⁷² A street is not a park⁷³ and a public park or square is not a street or highway or portion thereof,⁷⁴ even though roadways have been constructed through it.⁷⁵

Sometimes the term "park" is used to designate a small inclosed and ornamented strip or plot of land in the center of a street,⁷⁶ and such a park is a portion of the highway.⁷⁷ A "parkway" is not a "park," but it is a street or highway of a certain kind;⁷⁸ a street of special width, which is given a parklike appearance by planting its sides or center, or both, with grass, shade trees, and flowers, and intended for recreation and for street purposes.⁷⁹ In other words, it is merely an ornamental part of a street which may be used for recreational purposes.⁸⁰

It is improper, in the absence of express legislative authority, to devote a portion of a public park, square, or common to the use of the public for general street and highway purposes unconnected with the enjoyment of the property for park purposes.⁸¹ Also it is improper to use a portion of park property for the construction of a sidewalk for the benefit of an individual.⁸² The legislature may, however, authorize the construction of a highway in a park,⁸³ and, where a charter or statutory provision so authorizes, a street or highway may be built

65. Minn.—Nelson v. De Long, 7 N. W.2d 342, 213 Minn. 425.

66. N.Y.—Birch v. New York, 83 N. E. 51, 190 N.Y. 397, 18 L.R.A., N.S., 595.

67. N.Y.—People v. Mosier, 118 N. Y.S. 95, 134 App.Div. 4.
44 C.J. p 1103 note 21.

68. N.Y.—People v. Mosier, supra.

69. N.Y.—People v. Mosier, supra.

70. N.Y.—People v. Mosier, supra.

71. Ind.—Bennett v. Seibert, 35 N. E. 35, 37 N.E. 1071, 10 Ind.App. 369.

72. Ind.—Bennett v. Seibert, supra.
"Park" defined see supra § 1808 a.

73. N.Y.—Matter of United Tract. Co., 104 N.Y.S. 377, 119 App.Div. 806.
44 C.J. p 1103 note 28.

74. Ill.—Guttery v. Glenn, 66 N.E. 305, 201 Ill. 275.

N.Y.—Sebring v. Quackenbush, 199 N.Y.S. 245, 120 Misc. 609, affirmed 209 N.Y.S. 918, 214 App.Div. 758.
44 C.J. p 1103 note 29.

75. N.Y.—Sebring v. Quackenbush, supra.

Public ways

Roadways, constructed as part of public parks by park commissioners, are not public ways.—Burke v. Met-

ropolitan Dist. Commission, 159 N.E. 739, 262 Mass. 70.

76. N.Y.—Sebring v. Quackenbush, 199 N.Y.S. 245, 120 Misc. 609, affirmed 209 N.Y.S. 918, 214 App.Div. 758.

N.C.—Corpus Juris cited in Spicer v. City of Goldsboro, 39 S.E.2d 526, 528, 226 N.C. 557.

77. N.Y.—Sebring v. Quackenbush, 199 N.Y.S. 245, 120 Misc. 609, affirmed 209 N.Y.S. 918, 214 App.Div. 758.

78. Mich.—Village of Grosse Pointe Shores v. Ayres, 235 N.W. 829, 254 Mich. 58.

Mo.—Municipal Securities Corp. v. Kansas City, 177 S.W. 856, 860, 265 Mo. 252.

"Boulevard" compared

(1) Under some circumstances, "boulevard" has been said to be the equivalent of "parkway."
Md.—Bouis v. City of Baltimore, 113 A. 852, 138 Md. 284.

Mo.—Chaplin v. Kansas City, 168 S. W. 763, 259 Mo. 479.

(2) The term "boulevard" has been distinguished from "parkway."
Ky.—Newbold v. Brotzge, 272 S.W. 755, 209 Ky. 218.
Mich.—In re Detroit Park Site, 198 N.W. 839, 227 Mich. 132, 136.

"Avenue" compared

(1) The term "avenue" has been

held to be equivalent to, or synonymous with, "parkway"—Newbold v. Brotzge, 272 S.W. 755, 209 Ky. 218.

(2) The term "avenue" has been distinguished from "park" or "parkway."—In re Westchester County, 158 N.E. 881, 246 N.Y. 314.

79. Mich.—Village of Grosse Pointe Shores v. Ayres, 235 N.W. 829, 254 Mich. 58.

N.C.—Spicer v. City of Goldsboro, 39 S.E.2d 526, 226 N.C. 557.
46 C.J. p 1375 note 29.

80. N.C.—Spicer v. City of Goldsboro, supra.

81. Ill.—Robbins v. Commissioners of Lincoln Park, 164 N.E. 10, 332 Ill. 571.

Mass.—Town of Needham v. Norfolk County Com'rs, 86 N.E.2d 63, 324 Mass. 293.

N.Y.—In re Central Parkway, City of Schenectady, 251 N.Y.S. 577, 140 Misc. 727.
44 C.J. p 1103 note 31.

Use of park by railroads, street railroads, or motor busses see infra § 1822.

82. Tex.—Look v. El Paso Union Pass. Depot Co., Com.App., 228 S. W. 917.

83. N.Y.—In re Central Parkway, City of Schenectady, 251 N.Y.S. 577, 140 Misc. 727.

through a park⁸⁴ or on a portion of park property vacated for such use.⁸⁵ Also, the laying of sidewalks or streets through or around a public park is not necessarily a diversion of the property to other than park purposes;⁸⁶ it may be proper where the streets or sidewalks are necessary or contribute to the full enjoyment of the property for park purposes.⁸⁷ A speedway may be constructed in a park,⁸⁸ and the making of a pleasure driveway around and on the borders of a large public square is not improper;⁸⁹ but an owner of private property adjoining a public square cannot require the municipal authorities, on inclosing the square, to leave a space for a public way between the inclosure and the line of his property.⁹⁰

Municipal authorities may exclude such use of boulevards within the confines of a park as mitigates against full realization of the purposes of the park for public use,⁹¹ and they may exercise the power to enact traffic regulations for parks and boulevards provided such regulations promote the public health, safety, morals, or general welfare.⁹² The proper authorities may regulate the speed at which persons may ride or drive in parks or parkways;⁹³ require vehicles to keep to the right in certain cases;⁹⁴ prohibit the taking of additional passengers on a public passenger vehicle except at the direction of the person first hiring the vehi-

cle;⁹⁵ prohibit the solicitation of passengers for hire;⁹⁶ or even exclude certain classes of vehicles from the parks or parkways or a portion thereof,⁹⁷ if such regulation promotes and protects the public welfare⁹⁸ and is not discriminatory.⁹⁹

§ 1822. Conveyances, Leases, and Grants of Privileges

- a. In general
- b. Construction and operation

a. In General

A municipal corporation may have the power to grant certain privileges with respect to the private use of park property, squares, or public places, but unless authority has been conferred on it by statute it cannot sell, lease, or permit the use of such public property for purposes, or on terms and conditions, which are inconsistent with the purpose for which the property was intended or which will unreasonably impair or interfere with the right of the public to use the premises.

As a general rule, no citizen has the right to use at his pleasure or on his own terms public property belonging to, and under the control of, a municipal corporation without a permit from the designated officer of the municipality or its executive officers.¹ A municipality may, on the other hand, have the power to grant certain privileges with respect to the private use of park property, squares, or public places.² So the proper municipal authorities may

84. Cal.—Ritzman v. City of Los Angeles, 101 P.2d 541, 38 Cal.App. 2d 470.

85. Cal.—Spinks v. City of Los Angeles, 31 P.2d 193, 220 Cal. 366.

Effect of statute

Statute authorizing city to sell or lease municipal property which is not being used strictly to carry out an essential governmental function, but requiring that approval of electorate be obtained, would not preclude city from vacating portion of park and permitting its use as a link in a state highway.—McCarter v. City of Raton, 115 P.2d 90, 45 N.M. 851.

86. Tex.—Look v. El Paso Union Pass. Depot Co., Com.App., 228 S. W. 917.

87. Tex.—El Paso Union Pass. Depot Co. v. Look, Civ.App., 201 S. W. 714, affirmed, Com.App., 228 S. W. 917.

88. N.Y.—Holtz v. Diehl, 56 N.Y.S. 841, 26 Misc. 224.

89. Pa.—Commonwealth v. Beaver Borough, 33 A. 112, 171 Pa. 542.

90. La.—Leftwich v. Plaquemine, 14 La. Ann. 152.

91. Ill.—Chicago Park Dist. v. Canfield, 47 N.E.2d 61, 382 Ill. 218—Chicago Park Dist. v. Canfield, 19

N.E.2d 376, 370 Ill. 447, 121 A.L.R. 557.

92. Ill.—Chicago Park Dist. v. Canfield, 47 N.E.2d 61, 382 Ill. 218.

93. Mass.—Commonwealth v. Tyler, 85 N.E. 569, 199 Mass. 490—Commonwealth v. Crowninshield, 72 N. E. 963, 187 Mass. 221, 68 L.R.A. 245.

94. Colo.—Hedges v. Mitchell, 194 P. 620, 69 Colo. 285. 44 C.J. p 1103 note 40.

95. Ill.—Jackie Cab Co. v. Chicago Park Dist., 9 N.E.2d 213, 366 Ill. 474, 112 A.L.R. 1410.

96. Ill.—Chicago Park Dist. v. Lattipée, 4 N.E.2d 86, 364 Ill. 182.

"Solicit"

Failure of ordinance of city park district prohibiting solicitation of passengers for hire in park system to define "solicit" held not to invalidate ordinance, since word "solicit" was so commonly understood that definition was unnecessary.—Chicago Park Dist. v. Lattipée, supra.

97. Ill.—Chicago Park Dist. v. Canfield, 47 N.E.2d 61, 382 Ill. 218. 44 C.J. p 1103 note 41.

Vehicle advertising

Ill.—Chicago Park Dist. v. Canfield, supra—Chicago Park Dist. v. Can-

field, 19 N.E.2d 376, 370 Ill. 447, 121 A.L.R. 557.

98. Ill.—Chicago Park Dist. v. Canfield, 47 N.E.2d 61, 382 Ill. 218.

99. Ill.—Chicago Park Dist. v. Canfield, 47 N.E.2d 61, 382 Ill. 218.

Exceptions

Ordinance of park district providing that no person shall operate vehicle displaying any placard, notice, or advertisement in any park or on any public way within park district, but excepting common carriers and taxicabs from operation of the ordinance, was invalid since it created an unlawful classification.—Chicago Park Dist. v. Canfield, 47 N.E.2d 61, 382 Ill. 218.

1. Ill.—Coughlin v. Chicago Park Dist., 4 N.E.2d 1, 364 Ill. 90.

2. Ill.—Stevens Hotel Co. v. Art Institute of Chicago, 260 Ill.App. 555, transferred, see 173 N.E. 761, 342 Ill. 180.

N.Y.—Curran v. City of New York, 77 N.Y.S.2d 206, 191 Misc. 229, affirmed 88 N.Y.S.2d 924, 275 App. Div. 784.

Power to:

Grant franchise or privilege generally see supra §§ 258, 1082 and § 2379 et seq.

Sell or lease generally see supra §§ 961-970.

grant privileges to private persons to furnish food or refreshments,³ or means of innocent entertainment, amusement, or recreation,⁴ in public parks, with the right to erect necessary structures incident thereto;⁵ and it has been held that these rights and privileges may be made exclusive,⁶ provided the municipality retains the right of supervision, regulation, and control.⁷

Ordinarily, however, in the absence of authority

conferred by statute, property dedicated to the municipality for public parks and squares is not subject to sale or conveyance by it;⁸ and ordinarily it cannot sell, lease, or permit the use of, a public park, square, or common for purposes, or on terms and conditions, which are inconsistent with the purpose for which the property was intended⁹ or which will unreasonably impair or interfere with the right of the public to use the premises.¹⁰

Parade or public assembly

The issuance of a permit by a public officer or body for a parade or public assembly in the city's parks in accordance with a city ordinance rests in the sound discretion of the public officer or body.—*Thomas v. Casey*, 1 A.2d 866, 121 N.J.Law 185, affirmed 9 A.2d 294, 123 N.J.Law 447.

Use of building

Municipal officers may license the temporary use of a city building in a public park for a public purpose.—*Curran v. City of New York*, 77 N.Y. S.2d 206, 191 Misc. 229, affirmed 88 N.Y.S.2d 924, 275 App.Div. 784.

3. Ill.—*Hagerman v. South Park Com'rs*, 278 Ill.App. 33.
N.Y.—*People v. Ribinovich*, 13 N.Y. S.2d 135, 171 Misc. 569.
44 C.J. p 1104 note 43.

Revocable permit

Park commissioner's power to grant refreshment stand concessions in park is limited to granting revocable permit.—*Williams v. Hylan*, 227 N.Y.S. 392, 223 App.Div. 48, affirmed *Williams v. City of New York*, 162 N.E. 547, 248 N.Y. 616.

Recital in lease of park space for refreshment stands that it is for public comfort and convenience is not conclusive, but question is for court.—*Williams v. Hylan*, supra.

4. N.Y.—*People v. Ribinovich*, 13 N.Y.S.2d 135, 171 Misc. 569.
Tex.—*City of Port Arthur v. Young*, Civ.App., 37 S.W.2d 385, error refused.
44 C.J. p 1104 note 44.

5. N.H.—*Sherburne v. Portsmouth*, 58 A. 38, 72 N.H. 539.

Determination as to location of refreshment stands in park, made in good faith by park commissioner, is not reviewable by courts.—*Williams v. City of New York*, 222 N.Y.S. 163, 129 Misc. 654, affirmed *Williams v. Hylan*, 227 N.Y.S. 392, 223 App.Div. 48, affirmed *Williams v. City of New York*, 162 N.E. 547, 248 N.Y. 616.

6. Kan.—*Bailey v. Topeka*, 154 P. 1014, 1015, 97 Kan. 327, 829, L.R.A.1916D 491.
44 C.J. p 1104 note 46.

7. Kan.—*Bailey v. Topeka*, supra.
44 C.J. p 1104 note 47.

8. U.S.—*U. S. v. Certain Land Situ-*

ate in City of Cape Girardeau, Mo., D.C.Mo., 55 F.Supp. 555, affirmed, C.C.A., U. S. v. Carmack, 151 F.2d 881, reversed on other grounds 67 S.Ct. 252, 329 U.S. 230, 91 L.Ed. 209, rehearing denied 67 S.Ct. 627, 329 U.S. 834, 91 L.Ed. 706.

Mo.—*State ex rel. City of Excelsior Springs v. Smith*, 82 S.W.2d 37, 336 Mo. 1104.

Mont.—*Lloyd v. City of Great Falls*, 86 P.2d 395, 107 Mont. 412.

N.Y.—*In re Central Parkway, City of Schenectady*, 251 N.Y.S. 577, 140 Misc. 727.

43 C.J. p 1344 note 83.

9. Ill.—*Lincoln Park Traps v. Chicago Park Dist.*, 55 N.E.2d 173, 323 Ill.App. 107.

Ky.—*Bedford-Nugent Co. v. Argue*, 137 S.W.2d 392, 281 Ky. 827.

La.—*Keefe v. City of Monroe*, 120 So. 102, 9 La.App. 545.

N.J.—*West v. Borough of Monmouth Beach*, 153 A. 495, 107 N.J.Law 445.

N.Y.—*Williams v. Hylan*, 227 N.Y.S. 392, 223 App.Div. 48, affirmed *Williams v. City of New York*, 162 N.E. 547, 248 N.Y. 616.

Ohio.—*Thrasher v. City of Cincinnati*, 13 Ohio Supp. 143.

44 C.J. p 1104 note 48.

Radio broadcasting station

Under city charter section authorizing board of park commissioners to lease property which it may acquire on behalf of city, board was held without authority to lease for radio broadcasting station park property which had been acquired by city and dedicated to public use, since power of board was limited to such time, as property had not become part of public parks of city and remained undedicated to public use.—*Hanlon v. Levin*, 179 A. 286, 168 Md. 674.

Sand and gravel business

Ky.—*Bedford-Nugent Co. v. Argue*, 137 S.W.2d 392, 281 Ky. 827.

"Erection and encumbrances"

The term as used in charter providing that the board of park commissioners may enact ordinances for the government and protection of all parks, and that the parks shall at all times be subject to all ordinances with respect to any erection or encumbrance thereon, does not include a portion of a house erected by the

owner of contiguous property, a part of which encroaches on the park.—*Ackerman v. True*, 66 N.Y.S. 140, 31 Misc. 597, 600.

Term of lease

(1) Permitting individuals to secure continuous tenure of park lands and to erect permanent structures will be enjoined as diversion of lands; plan permitting camping on park lands should provide for temporary tenure, impartial method of issuing permits, and compliance with health regulations.—*Tobin v. Hennessy*, 222 N.Y.S. 484, 220 App. Div. 695.

(2) City's leasing of pleasure property for twenty years held not void as for unreasonable time.—*City of Port Arthur v. Young*, Tex.Civ. App., 37 S.W.2d 385, error refused.

Damages to lessee

Ill.—*Lincoln Park Traps v. Chicago Park Dist.*, 55 N.E.2d 173, 323 Ill. App. 107.

Public way

A charter provision authorizing the granting of concessions and privileges in all of the public squares and parks of the city, and in all park drives, parkways, boulevards, play or recreation grounds, does not authorize the leasing of a portion of a public highway which is in no way connected with public parks or public recreation grounds, but is for the general use of the public and differs in no respect from the other public highways and streets of the city.—*Reed v. Seattle*, 213 P. 923, 124 Wash. 185, 29 A.L.R. 446.

10. Ill.—*Lincoln Park Traps v. Chicago Park Dist.*, 55 N.E.2d 173, 323 Ill.App. 107.

Ky.—*Board of Park Com'rs of Ashland v. Shanklin*, 199 S.W.2d 721, 304 Ky. 43.

44 C.J. p 1104 note 49.

Exclusive right of possession

City officers held unauthorized to vest in plaintiff by private contract exclusive right to possess public property in park.—*Keefe v. City of Monroe*, 120 So. 102, 9 La.App. 545.

Rights of abutting owners

Park commissioners and art institute cannot make contract as to building on park property which is destructive of abutting owner's

A charter or statutory provision may, however, authorize a municipality to convey¹¹ or lease¹² lands where it holds the absolute title thereto in fee, even though such lands have been previously acquired for, or used as, a park;¹³ and a deed of gift of property to the city, for recreational purposes, may authorize it to operate the property through a lessee.¹⁴ So the city may be authorized to lease land and dwellings acquired by it for a park until plans shall be formulated and necessary funds procured,¹⁵ and it may lease park property to a nonprofit corporation for the purpose of maintaining a horticultural garden and other recreational facilities for public use.¹⁶ The power of a municipality to lease a municipal swimming pool does not, however, include the power thereby to discriminate against the members of a minority race in the exercise of their constitutional rights.¹⁷ Due formalities must be observed in the making of a conveyance or lease of park property, and compliance must be had with all

statutory requirements.¹⁸ A lease made or concession granted by a municipality for a grossly inadequate consideration will not be upheld.¹⁹ The making and withdrawal of an offer to sell property do not alter its status as a public place.²⁰

For horse racing. It seems that a municipality may grant a concession to hold in a public park race meets for short periods of time for the entertainment of the public,²¹ and it has been held that the municipality may lease the portion of a park on which a race track and grand stand are located to a driving club for the purpose of racing horses where the public is excluded therefrom only on certain days;²² but it cannot so grant the use and control of a part of the park for a race track as practically to deprive the public of its enjoyment.²³

For transportation purposes. Unless authorized by a valid statute,²⁴ the municipal authorities are

rights under existing easement in park.—*Stevens Hotel Co. v. Art Institute of Chicago*, 260 Ill.App. 555, transferred, see 173 N.E. 761, 342 Ill. 180.

11. Mo.—*State ex rel. City of Excelsior Springs v. Smith*, 82 S.W. 2d 37, 336 Mo. 1104.
43 C.J. p 1344 notes 85, 86—44 C.J. p 1104 note 51.

Motive

Where a city has power to sell park property, its motive in doing so may not be questioned in the absence of fraud.—*State ex rel. City of Excelsior Springs v. Smith*, 82 S.W. 2d 37, 336 Mo. 1104.

12. Fla.—*Schmeller v. City of Fort Lauderdale*, 38 So.2d 36.
44 C.J. p 1104 note 52.

Athletic stadium

Md.—*Green v. Garrett*, 63 A.2d 326.

Capacity in which held

City holding property intended for recreational purposes in capacity as municipal corporation could lease property.—*City of Port Arthur v. Young*, Tex.Civ.App., 37 S.W.2d 385, error refused.

Subsurface space

Cal.—*City and County of San Francisco v. Linares*, 106 P.2d 369, 16 Cal.2d 441.

Mass.—*Lowell v. City of Boston*, 79 N.E.2d 713, 322 Mass. 709, appeal dismissed *Pierce v. City of Boston*, 69 S.Ct. 84, 335 U.S. 849, 93 L.Ed. —.

Authority of commission

Leases executed by commission were valid and binding on city council which succeeded to its authority, notwithstanding terms of the leases began at date after commission

ceased to exist.—*Kleinfus v. Sirgany*, 6 A.2d 724, 17 N.J.Misc. 175.

13. Mich.—*Briggs v. City of Grand Rapids*, 245 N.W. 555, 261 Mich. 11.

44 C.J. p 1104 note 53.

14. Tex.—*City of Port Arthur v. Young*, Civ.App., 37 S.W.2d 385, error refused.

15. Mo.—*Heger v. City of St. Louis*, 20 S.W.2d 665, 323 Mo. 1031.
N.Y.—*Tobin v. Hennessy*, 223 N.Y.S. 676, 130 Misc. 226, affirmed 227 N.Y.S. 363, 223 App.Div. 10.

16. Ariz.—*Moore v. Valley Garden Center*, 185 P.2d 998, 66 Ariz. 209.

17. Ohio.—*Culver v. City of Warren*, App., 83 N.E.2d 82.

Implied provision

Lease of municipal swimming pool was subordinate to obligation of municipality to see that constitutional right of all citizens to equal protection of law in use of public pool was preserved, and lease contained an implied provision protecting such constitutional right.—*Lawrence v. Hancock*, D.C.W.Va., 76 F.Supp. 1004.

18. N.J.—*West v. Borough of Monmouth Beach*, 153 A. 495, 107 N.J. Law 445.

Public bidding on notice

Ariz.—*Moore v. Valley Garden Center*, 185 P.2d 998, 66 Ariz. 209.

N.J.—*West v. Borough of Monmouth Beach*, 153 A. 495, 107 N.J. Law 445.

Necessity of election

City's leasing of pleasure property to carry out purpose of deed of gift held not void because not authorized by election, there being no alienation of such property.—*City of Port Arthur v. Young*, Tex.Civ.App., 37 S.W.2d 385, error refused.

Effect of irregularity

City's leasing of pleasure property by resolution and not by ordinance, if leasing by ordinance was required by charter, at most only rendered lease voidable and not void.—*City of Port Arthur v. Young*, supra.

Lease not validated

City's attempted lease of park property, invalid because needed by city and leased without advertisement, was not validated by municipality's acceptance of money paid by lessee as consideration, or for rent.—*West v. Borough of Monmouth Beach*, 153 A. 495, 107 N.J. Law 445.

Resolution granting franchise held not final

Del.—*Lewes Sand Co. v. Commissioners of Lewes*, 191 A. 821, 22 Del.Ch. 21.

19. N.Y.—*Williams v. Hyman*, 215 N.Y.S. 101, 126 Misc. 807, affirmed 216 N.Y.S. 936, 217 App.Div. 727.
44 C.J. p 1105 note 63.

20. La.—*Board of Liquidation v. New Orleans*, 48 So. 307, 118 La. 712.

21. Neb.—*Nebraska City v. Nebraska City Speed, etc., Assoc.*, 186 N.W. 374, 107 Neb. 576.

44 C.J. p 1104 note 55.

22. W.Va.—*Bryant v. Logan*, 49 S.E. 21, 56 W.Va. 141, 3 Ann.Cas. 1011.

23. Neb.—*Nebraska City v. Nebraska City Speed, etc., Assoc.*, 186 N.W. 374, 107 Neb. 576.

44 C.J. p 1105 note 57.

24. Pa.—*Philadelphia v. McManes*, 34 A. 331, 175 Pa. 28.

44 C.J. p 1105 note 58.

without right to permit the occupation and use of a public park, square, or common, or part thereof, for railroad or street railroad purposes,²⁵ but they may permit such occupation and use of public lands belonging to the city and not appropriated to any particular use;²⁶ park commissioners may grant to a public service company the right to operate motor busses on the boulevards, parkways, and streets under their control;²⁷ and a statute prohibiting the construction of a street railroad in any park does not apply to a park which is laid out, after the granting of a franchise to a street railroad company, so as to include the route of the railroad.²⁸ A statute authorizing the construction of a railway tunnel or subway under part of a city common is a sufficient authority for such construction, without a vote of the city government or of the citizens of the city.²⁹

b. Construction and Operation

Valid provisions of a conveyance, lease, or grant of privileges with respect to public parks, squares, or places will be construed in accordance with the intent of the parties and the meaning of the language used in the instrument, and will be given effect.

Valid provisions of a conveyance, lease, grant of privileges,³⁰ or contract to lease³¹ with respect to public parks, squares, or places will be construed in accordance with the intent of the parties and the meaning of the language used in the instrument, and will be given effect. This rule applies with respect to the construction and operation of provisions relating to the property covered,³² the obligations assumed by the municipality,³³ the rights reserved to it,³⁴ and the rent or other compensation to be paid;³⁵ and a violation of covenants in the lease may render the city liable for damages.³⁶

On the other hand, no obligation on the part of the city arises from an agreement made by minor officials, not authorized to bind the city or the park board and not incorporated in the lease, grant, or concession.³⁷ Provisions for forfeiture or annulment contained in the lease or other instrument may be enforced,³⁸ provided the forfeiture has been properly declared³⁹ and has not been waived;⁴⁰ but the lease or grant of privileges may not be revoked without justifiable cause,⁴¹ and, even though the in-

25. Ala.—*Douglass v. Montgomery*, 24 So. 745, 118 Ala. 599, 43 L.R.A. 376.

44 C.J. p 1105 note 59.

Dedicated property see Dedication § 66.

26. Ga.—*Pettitt v. Macon*, 23 S.E. 198, 95 Ga. 645.

Va.—*Norfolk v. Southern R. Co.*, 83 S.E. 1085, 117 Va. 101.

27. Ill.—*People v. Chicago Motor Bus Co.*, 129 N.E. 114, 295 Ill. 486. 44 C.J. p 1105 note 61.

28. N.Y.—*Coney Island, etc., R. Co. v. Kennedy*, 44 N.Y.S. 825, 15 App. Div. 588.

29. Mass.—*Codman v. Crocker*, 89 N.E. 177, 203 Mass. 146, 25 L.R.A., N.S., 980.

43 C.J. p 291 note 75.

30. N.Y.—*American Concessionaires v. City of Long Beach*, 8 N.Y.S.2d 281, 255 App.Div. 981.

44 C.J. p 1105 note 64.

Status of purchaser, lessee, or licensee

(1) Individual purchasing concessions of park, of which city reserves supervision and control, was more nearly employee than lessee.—*Warren v. City of Topeka*, 265 P. 78, 125 Kan. 524, 57 A.L.R. 555.

(2) Where the city's seasonal lease of municipal swimming pool to association provided for no consideration to city, did not permit lessee to make profits from operation of pool but required use of all net revenue to improve and develop pool and to provide additional recreation-

al facilities, lessee was a mere agent or instrumentality through which city operated the pool, at least to extent that rights of its citizens to use pool were affected.—*Lawrence v. Hancock*, D C W Va., 76 F.Supp. 1004.

(3) Persons occupying city property intended to be utilized for park purposes, under permit issued pursuant to local law providing for rental, and under agreement to vacate earlier than rental period on receipt of notice to do so, were licensees, not tenants, but were entitled to fair opportunity to remove their belongings before eviction.—*Magee v. Moses*, 272 N.Y.S. 426, 151 Misc. 816.

Right of contractor to repayment of advances for improvements

Tex.—*City of Dallas v. George*, 169 S.W.2d 473, 141 Tex. 9.

Franchise to remove and sell sand and gravel

Del.—*Lewes Sand Co. v. Commissioners of Lewes*, 191 A. 821, 22 Del.Ch. 21.

31. N.Y.—*Brown v. New York*, 108 N.Y.S. 555, 57 Misc. 433.

44 C.J. p 1105 note 65.

32. N.Y.—*Nichols v. Eustis*, 131 N.Y.S. 265, 146 App.Div. 475.

44 C.J. p 1105 note 64 [a].

33. N.Y.—*American Concessionaires v. City of Long Beach*, 8 N.Y.S.2d 281, 255 App.Div. 981.

Articles sold

Contract, which was prepared by city and which was acted on by a corporation, giving corporation ex-

clusive rights of selling in city's stadium such articles as were listed in schedules attached to the contract, merely permitted sale by corporation of articles enumerated, and did not require that corporation sell all articles enumerated.—*Cleveland Concession Co. v. City of Cleveland*, Ohio App., 83 N.E.2d 818, second case.

34. Tex.—*City of Port Arthur v. Young*, Civ.App., 37 S.W.2d 385, error refused.

44 C.J. p 1105 note 64 [b].

35. Ohio.—*Cleveland Concession Co. v. City of Cleveland*, App., 83 N.E.2d 818, second case.

44 C.J. p 1105 note 64 [c].

36. N.Y.—*American Concessionaires v. City of Long Beach*, 8 N.Y.S.2d 281, 255 App.Div. 981.

Exclusive rights

N.Y.—*American Concessionaires v. City of Long Beach*, supra.

37. Mass.—*Myers v. Boston*, 141 N.E. 589, 247 Mass. 36.

38. N.Y.—*Dieppe Corporation v. City of New York*, 285 N.Y.S. 468, 246 App.Div. 279.

44 C.J. p 1105 note 66.

39. Mo.—*Lewis v. St. Louis*, 69 Mo. 595.

44 C.J. p 1105 note 67.

40. Md.—*McDonald v. Baltimore City*, 105 A. 266, 133 Md. 301.

44 C.J. p 1105 note 68.

41. Ohio.—*Cleveland Concession Co. v. City of Cleveland*, App., 83 N.E.2d 818, second case.

strument is no more than a revocable license, its revocation contrary to its terms will render the city liable in damages.⁴² Where the use of space in a city park exists by virtue of a license rather than a lease, the licensee has no right to continue occupation of such space on expiration of the period of the license under a statute protecting the rights of tenants against eviction.⁴³

Reasonable regulations of traffic within a park are binding on a company operating stages within the park under a franchise granted by the state,⁴⁴ and a person operating a restaurant in a city park under contract with a municipality is subject to reasonable regulations as to the manner of conducting the business.⁴⁵ Also, where a city leases premises with a provision that a portion thereof may be sublet for saloon purposes, the fact that subsequently, pursuant to statute, the city by ordinance prohibits saloon business on such premises does not constitute an eviction,⁴⁶ or release the lessee from paying rent,⁴⁷ or entitle him to any abatement thereof.⁴⁸ However, it has been held that an ordinance regulating Sunday amusements does not become a part of a lease, executed by the city, covering an amusement park, in the absence of any reference thereto in the lease.⁴⁹

§ 1823. Prevention or Abatement of Improper Use

A municipal corporation within the limits of which a public park or common is located may bring an action to prevent or abate an obstruction to, or interference with, the proper use of the property; and a private citizen or resident of the municipality has a right of action where he has sustained or is threatened with a special injury.

A municipal corporation within the limits of which a public park or common is located may bring an action to prevent or abate an obstruction to, or interference with, the proper use of the property;⁵⁰ but it has no right to distrain and hold an automobile which has run into and injured a light standard in the park, until the owner shall make satisfaction for the damage done,⁵¹ its remedy being an action at law to recover for the damage.⁵² Except in some jurisdictions,⁵³ a private citizen or resident of a municipality has no right of action by reason of the diversion or appropriation of public property, such as parks and squares, to other uses, where he has not sustained or is not threatened with any special injury peculiar to himself as distinguished from the rest of the public,⁵⁴ but he has such right of action where he does sustain a special injury;⁵⁵ and ordinarily the owners of property abutting on a park or square have such a special right to insist that it shall not be appropriated to other uses.⁵⁶

42. N.Y.—*Williams v. City of New York*, 222 N.Y.S. 163, 129 Misc. 654, affirmed *Williams v. Hylan*, 227 N.Y.S. 392, 223 App.Div. 48, affirmed *Williams v. City of New York*, 162 N.E. 547, 248 N.Y. 616.

Value of improvements

Lessees recovering profits for entire life of lease breached by city could not recover value of permanent improvements which were to revert to city.—*City of Port Arthur v. Young*, Tex.Civ.App., 37 S.W.2d 885, error refused.

43. N.Y.—*Kesbec, Inc. v. City of New York*, 67 N.Y.S.2d 900.

44. N.Y.—*People v. Shellenberg*, 117 N.Y.S. 820, 133 App.Div. 79.

45. N.Y.—*Dieppe Corporation v. City of New York*, 285 N.Y.S. 468, 246 App.Div. 279.

46. Utah.—*Warm Springs Co. v. Salt Lake City*, 165 P. 788, 50 Utah 58, L.R.A.1917F 713.

47. Utah.—*Warm Springs Co. v. Salt Lake City*, supra.

48. Utah.—*Warm Springs Co. v. Salt Lake City*, supra.

49. N.J.—*Green v. Piper*, 84 A. 194, 80 N.J.Eq. 288.

50. Ala.—*Town of Leeds v. Sharp*, 118 So. 572, 218 Ala. 403.

44 C.J. p 1106 note 78.

What constitutes improper use see supra §§ 1818, 1820, 1821.

51. Ill.—*Yellow Cab Co. v. Thomas T. Hoskin Co.*, 215 Ill.App. 11.

52. Ill.—*Yellow Cab Co. v. Thomas T. Hoskin Co.*, supra.

53. Colo.—*McIntyre v. El Paso County*, 61 P. 237, 15 Colo.App. 78.

44 C.J. p 1106 note 81.

54. Ill.—*Carstens v. City of Wood River*, 176 N.E. 266, 344 Ill. 319.

44 C.J. p 1106 note 82.

55. Ill.—*Carstens v. City of Wood River*, 163 N.E. 816, 332 Ill. 400, 63 A.L.R. 471.

44 C.J. p 1106 note 83.

Bill held sufficient

Ill.—*Robbins v. Commissioners of Lincoln Park*, 164 N.E. 10, 332 Ill. 571.

Motives of plaintiffs suing to protect public rights in park and streets dedicated to public held immaterial.—*Griffith v. Allison*, Civ.App., 60 S.W.2d 899, reversed on other grounds 96 S.W.2d 74, 128 Tex. 86.

56. Ill.—*Robbins v. Commissioners*

of Lincoln Park, 164 N.E. 10, 332 Ill. 571.

44 C.J. p 1106 note 84.

Compensation to abutting owners on discontinuance of park see Eminent Domain § 104.

Proceedings to enforce and preserve proper use of dedicated property see Dedication §§ 68-73.

Bill held sufficient

(1) In general.

Ala.—*Florence Land Co. v. Florence*, 75 So. 19, 199 Ala. 580.

Ill.—*Robbins v. Commissioners of Lincoln Park*, 164 N.E. 10, 332 Ill. 571.

(2) In suit to restrain unlawful seizure of public park and drives, allegation in what way such seizure damaged adjacent property was unnecessary because obvious.—*Griffith v. Allison*, Civ.App., 60 S.W.2d 899, reversed on other grounds 96 S.W.2d 74, 128 Tex. 86.

Application to city council

Charter provision requiring application to city council for redress, satisfaction, compensation, or relief before filing original petition against city did not apply to a suit to enjoin city from diverting park property to sidewalk uses for the benefit of a private person.—*Look v. El Paso Union Pass. Depot Co.*, Tex. Com.App., 228 S.W.2d 917.

The owner of a lot in the immediate vicinity of a park, although not abutting thereon, but who is an adjacent proprietor in that he has an unobstructed view from his property, may sustain such an injury by reason of its diversion to other uses as to give him a right of action to enjoin the diversion and abandonment by the city of the grounds as a public park.⁵⁷ However, abutting property owners may waive their right to have a park kept free of buildings as to a structure erected by a particular person and in a particular portion of the park,⁵⁸ and, while such waiver may extend to a reasonably necessary enlargement of such structure,⁵⁹ it does not preclude objection to the erection of further buildings.⁶⁰ It has been held that the owner of property abutting

on a city park along a lake is not entitled to an injunction against the construction of a clubhouse outside the park limits but obstructing the view of, and access to, the lake.⁶¹

In the case of the dedication of a square to the public use, it has been said that the legislature has no power to alter or extend such dedication as against one who owns lots bordering thereon and purchased by him with reference thereto;⁶² but not even an abutting owner can object to a sale or appropriation to other uses of property to which the municipality has an absolute title in fee and which is made pursuant to legislative authority.⁶³ A person owning property abutting on a park may be restrained from making an improper use of the park.⁶⁴

G. MARKETS AND MARKET PLACES, STANDS, AND STALLS

§ 1824. In General

The right to control and regulate public markets and market places is an exercise of the police power of the states which may be delegated to municipal corporations, but the municipality must exercise the power in the manner prescribed by statute and its regulations must be reasonable, and not arbitrary or discriminatory.

The right to control and regulate public markets and market places is an exercise of the police power of the states.⁶⁵ Such power may be delegated to municipal corporations⁶⁶ and is a particularly ap-

propriate subject for municipal regulation.⁶⁷ This power may be exercised either under statutory or charter provisions relating expressly to the regulation of markets⁶⁸ or the vending of meat and other commodities usually sold at such places,⁶⁹ or under the general police powers ordinarily possessed by municipal corporations.⁷⁰ The power may be exercised whether the market is carried on by a corporation,⁷¹ an unincorporated association,⁷² or even a private individual.⁷³ The municipal police power

57. Ala.—*Douglass v. Montgomery*, 24 So. 745, 118 Ala. 599, 43 L.R.A. 376.

44 C.J. p 1106 note 85.

58. Ill.—*Stevens Hotel Co. v. Art Institute of Chicago*, 260 Ill.App. 555, transferred, see 173 N.E. 761, 342 Ill. 180.

59. Ill.—*Stevens Hotel Co. v. Art Institute of Chicago*, supra.

Failure of evidence

Where abutting owner suing to enjoin additions to art institute in park failed to state that such additions were unnecessary, failure of evidence to show reasonable necessity for additions did not entitle complainant to relief—*Stevens Hotel Co. v. Art Institute of Chicago*, supra.

60. Ill.—*Stevens Hotel Co. v. Art Institute of Chicago*, supra.

61. Ill.—*McCormick v. Chicago Yacht Club*, 163 N.E. 418, 331 Ill. 514, 60 A.L.R. 763.

62. N.J.—*Fessler v. Union*, 56 A. 273, 87 N.J.Eq. 14, affirmed 60 A. 1134, 68 N.J.Eq. 657.

63. Wash.—*Seattle Land, etc., Co. v. Seattle*, 79 P. 780, 87 Wash. 274, 44 C.J. p 1106 note 87.

64. Mich.—*Siegel Land Corp. v.*

Highland Park, 209 N.W. 51, 235 Mich. 133.

44 C.J. p 1107 note 88.

65. Fla.—*Jacksonville v. Ledwith*, 7 So. 885, 26 Fla. 163, 23 Am.S.R. 558, 9 L.R.A. 69.

43 C.J. p 391 note 52.

Municipal regulation of sale of food and drinks generally see Food § 9.

The public sale of articles of food has been the subject of police regulation and control from the early days of the common law.—*Strickland v. Pennsylvania R. Co.*, 26 A. 431, 154 Pa. 348, 21 L.R.A. 224.

66. Fla.—*Jacksonville v. Ledwith*, 7 So. 885, 26 Fla. 163, 23 Am.S.R. 558, 9 L.R.A. 69.

43 C.J. p 391 note 54.

67. Tenn.—*Staub v. City of Knoxville*, 33 S.W.2d 415, 161 Tenn. 663, 43 C.J. p 391 note 55.

Repeal or amendment

(1) An initiated ordinance adopted by the people of the city regulating a market place, under statute providing for initiation of an ordinance by electors of a city and for its becoming effective on a favorable vote, could not be repealed or amended except by the provision for the amendment or repeal being submitted to the electors.—*State ex rel. Harley v. City of Wichita*, 99 P.2d 812, 151 Kan. 390.

(2) An ordinance passed by the city commission and not adopted by a vote of the people, providing for additional burdens and regulations for the wholesaling of berries, vegetables, fruits, and other produce beyond that contemplated by the people when the initiated ordinance was adopted, had the effect of amending the initiated ordinance, and was therefore void.—*State ex rel. Harley v. City of Wichita*, supra.

68. Ky.—*Potter v. Bell*, 101 S.W. 297, 125 Ky. 288, 30 Ky.L. 1314, 43 C.J. p 392 note 56.

69. Fla.—*Jacksonville v. Ledwith*, 7 So. 885, 26 Fla. 163, 23 Am.S.R. 558, 9 L.R.A. 69.

43 C.J. p 392 note 57.

70. Conn.—*State v. Cullum*, 147 A. 804, 110 Conn. 291, 43 C.J. p 392 note 58.

71. Pa.—*Central Market Co. v. Erie*, 44 Pa.Super. 191.

72. La.—*New Prytanis Market Ass'n v. Beoubay*, App., 185 So. 531.

Pa.—*Central Market Co. v. Erie*, 44 Pa.Super. 191.

73. La.—*New Prytanis Market Ass'n v. Beoubay*, App., 185 So. 531.

43 C.J. p 392 note 61.

over markets cannot be surrendered.⁷⁴

The power conferred on a municipal corporation to control markets is, as a rule, not to be strictly construed except where the regulation will tend to produce a monopoly in favor of private individuals.⁷⁵ The right to regulate public markets cannot be used to create a monopoly of the right to sell⁷⁶ or so as to deny the right of consumers and producers of market supplies to deal with each other directly.⁷⁷ While in judging the reasonableness of such regulations the court will not look closely into mere matters of judgment where there may be a reasonable difference of opinion, and will not interfere with the exercise of the discretion granted to the municipal corporation on the ground of unreasonableness except in a clear case,⁷⁸ regulations relating to markets must be reasonable,⁷⁹ and not arbitrary⁸⁰ or discriminatory.⁸¹ The regulation must have its foundation on public necessity;⁸² it must have some rational tendency to promote the public health, safety, and welfare of the municipality.⁸³ Any ordinance relating to the regulation of markets is invalid if in conflict with a valid statutory provision,⁸⁴ and a statute expressly limiting the powers of municipal authorities with respect to markets is not repealed by a general statute authorizing them to enact all ordinances necessary for the general

welfare of the municipality.⁸⁵ The power granted by statute must be exercised in the manner prescribed therein.⁸⁶

§ 1825. Delegation of Power

In the absence of express or implied authorization from the state, the discretionary power to control and regulate markets must be exercised by the municipal governing body and cannot be delegated to any board or official; but, where the power is conferred by statute on a certain board or official, it may and should be exercised by such person or agency.

In the absence of express authorization from the state or power necessarily implied from that granted, the discretionary power to control and regulate markets must be exercised by the municipal governing body and cannot be delegated to any board or official;⁸⁷ but, where the power is conferred by statute on a certain board or official, it may and should be exercised by such board or official.⁸⁸ Under delegated authority municipal corporations may provide that certain markets and like facilities shall be established and operated subject to the regulations adopted by designated boards or officials,⁸⁹ but such boards or officials are limited to the powers conferred on them,⁹⁰ and an officer vested only with regulatory powers may be without power to establish or abolish market areas.⁹¹ The fixing of rent of market stores has been held to be an administra-

74. Fla.—*Jacksonville v. Ledwith*, 7 So. 885, 26 Fla. 163, 23 Am.S.R. 558, 9 L.R.A. 69.

Tex.—*Newson v. Galveston*, 13 S.W. 368, 76 Tex. 559, 7 L.R.A. 797.

75. La.—*State v. Gisch*, 31 La.Ann. 544.

Tex.—*Ex parte Canto*, 17 S.W. 155, 21 Tex.App. 61, 57 Am.R. 609.

76. Fla.—*Jacksonville v. Ledwith*, 7 So. 885, 26 Fla. 163, 23 Am.S.R. 558, 9 L.R.A. 69.

77. Mich.—*Hughes v. Detroit*, 42 N.W. 984, 75 Mich. 574, 13 Am.S.R. 475, 4 L.R.A. 863.

78. N.Y.—*Buffalo v. Hill*, 79 N.Y.S. 449, 79 App.Div. 402.
43 C.J. p 392 note 63.

79. Tenn.—*Staub v. City of Knoxville*, 33 S.W.2d 415, 161 Tenn. 663.
43 C.J. p 392 note 64.

80. N.Y.—*Cowan v. City of Buffalo*, 288 N.Y.S. 239, 247 App.Div. 591.
Tenn.—*Nashville v. Hager*, 5 Tenn. Civ.App. 192.

81. Ohio.—*Kraft v. Cincinnati*, 6 Ohio S. & C.P. 8, 3 Ohio N.P. 195.
Tenn.—*Nashville v. Hager*, 5 Tenn. Civ.App. 192.

Ordinance held not invalid

Okl.—*Hover v. Oklahoma City*, 271 P. 162, 133 Okl. 71.

82. Pa.—*Central Market Co. v. Erie*, 44 Pa.Super. 191.

83. Pa.—*Central Market Co. v. Erie*, supra.

84. Ga.—*Haywood v. Savannah*, 12 Ga. 104.

Ohio.—*Mays v. Cincinnati*, 1 Ohio St. 268.

85. Ga.—*Haywood v. Savannah*, 12 Ga. 404.

86. Fla.—*Jacksonville v. Ledwith*, 7 So. 885, 26 Fla. 163, 23 Am.S.R. 558, 9 L.R.A. 69.

87. N.J.—*State v. Paterson*, 34 N.J. Law 163.
43 C.J. p 393 note 79.

88. N.Y.—*New Colonia Ice Co. v. Woolley*, 41 N.Y.S.2d 662, 181 Misc. 473—*Sorgen v. Prendergast*, 123 N.Y.S. 765, 68 Misc. 189, affirmed 124 N.Y.S. 1130, 139 App.Div. 929.

89. La.—*Baton Rouge v. Sanchez*, 108 So. 552, 161 La. 320.

City manager

Under initiated ordinance of city providing that city manager should have authority to make supplemental rules and regulations for the conduct and administration of market, and control and management of the business thereof, not inconsistent with the ordinance, city manager had no authority to submit question of what supplementary rules should be made to city commission.

—*State ex rel. Harley v. City of Wichita*, 99 P.2d 812, 151 Kan. 390.

90. N.Y.—*Smith v. Morgan*, 1 N.Y. S.2d 958, 253 App.Div. 239.

Revocation of licenses

Order of commissioner of markets purporting to revoke licenses of public pushcart market licensees which was void because of lack of authority of commissioner to make such order could not be upheld on ground that licenses expired soon after order was to become effective, since commissioner who had no power to revoke license on ground that he abolished the market was equally without power to refuse to renew license on that ground alone.—*Smith v. Morgan*, supra.

Alienation of land

Agriculture and markets law, in transferring the functions of management and control of public markets to the commissioner of public markets, merely gives him authority of business management, without transferring to him the residual powers of the commissioners of the sinking fund as the ultimate trustees of the city property, to alienate land no longer needed for market purposes.—*Elth v. City of New York*, 300 N.Y.S. 558, 165 Misc. 18.

91. N.Y.—*Smith v. Morgan*, 1 N.Y. S.2d 958, 253 App.Div. 239.

tive function⁹² which may be delegated to designated officials or boards.⁹³

§ 1826. Location; Abandonment and Removal

In the absence of any statutory restriction as to place, the right to establish a market includes the right to fix its location, to shift that location from place to place when the convenience or the necessity of the people requires it, and to abolish a previously existing market and establish another in a different locality within the municipal boundaries.

In the absence of any statutory restriction as to place, the right to establish a market includes the right to fix its location,⁹⁴ to shift that location from place to place when the convenience or the necessity of the people requires it,⁹⁵ and to abolish a previously existing market and establish another in a different locality within the municipal boundaries.⁹⁶ The fact that the site was acquired for market purposes is immaterial.⁹⁷ It has been held, however, that a municipal corporation should not abolish a duly authorized and existing public market which is the only one within the municipal boundaries;⁹⁸ and an order abolishing a public pushcart market because of alleged traffic difficulties has been held discriminatory and unreasonable where the conclusion that traffic difficulties would result from continuance of the market was based on mere conjecture.⁹⁹

The power to establish markets will not authorize a municipal corporation to erect permanent market buildings on a public street so as to create a nuisance by obstructing traffic or injuring abutting owners;¹ and it is immaterial in such case that the proposed site is already used as a market.² The right to build a market house in a street may be acquired as against a property owner by express grant from him³ or by adverse possession.⁴

On the question whether municipal corporations may or may not authorize the use of public streets for the purpose of holding markets there seems to be a conflict of opinion; some cases have sustained the power of the corporation to do so,⁵ while other cases have denied the existence of the power.⁶ The conflict has been explained by distinguishing cases where the abutting owner owned the fee to the street and where he did not.⁷ If the abutting owner owns the fee, it has been held that a municipal corporation cannot authorize the use of the street for market purposes without compensation.⁸ On the other hand, if the owner of the abutting property does not own the fee, it has been held that the authorization by a municipal corporation to use the streets for market purposes is not a taking of property without just compensation.⁹ Although a city may prohibit the use of a public street as a market,¹⁰ as long as it elects to permit a street to be so

92. Md.—Baltimore v. Wollman, 91 A 339, 123 Md. 310.

93. N.Y.—Baltimore v. Wollman, supra—Hinrichs, Inc. v. New York, 201 N.Y.S. 377, 121 Misc. 592, affirmed 209 N.Y.S. 836, 212 App.Div. 816, affirmed 152 N.E. 413, 242 N.Y. 527.

94. Pa.—Strickland v. Pennsylvania R. Co., 26 A. 431, 154 Pa. 348, 21 L.R.A. 224.

Territories for markets

City ordinance relating to establishment of public markets is construable as designating certain territories as market locations and permitting commissioner of markets to designate products that might be sold in the territories, and not construable as permitting commissioner to determine territories in which markets should be located.—Smith v. Morgan, 1 N.Y.S.2d 958, 253 App.Div. 239.

95. N.Y.—Smith v. Morgan, 4 N.Y.S. 2d 837, 167 Misc. 815, affirmed 4 N.Y.S.2d 844, 254 App.Div. 672, affirmed 16 N.E.2d 394, 278 N.Y. 667, 43 C.J. p 393 note 86.

Omission

Where resolution of board of estimate, setting aside for public market purposes portions of a number of designated streets without including

an area formerly comprising a particular market, was valid, the commissioner of markets had no power to issue permits to pushcart peddlers for area which had formerly been the particular market.—Smith v. Morgan, 4 N.Y.S.2d 837, 167 Misc. 815, affirmed 4 N.Y.S.2d 844, 254 App.Div. 672, affirmed 16 N.E.2d 394, 278 N.Y. 667.

96. N.Y.—Smith v. Morgan, 4 N.Y.S.2d 837, 167 Misc. 815, affirmed 4 N.Y.S.2d 844, 254 App.Div. 672, affirmed 16 N.E.2d 394, 278 N.Y. 667.

43 C.J. p 393 note 87.

97. Ohio.—Gall v. Cincinnati, 18 Ohio St. 563.

98. Mich.—Taggart v. Detroit, 38 N.W. 714, 71 Mich. 92.

99. N.Y.—Smith v. Morgan, 1 N.Y.S.2d 958, 253 App.Div. 239.

1. Ind.—Richmond v. Smith, 47 N.E. 630, 148 Ind. 294.

43 C.J. p 393 note 90.

2. Pa.—Harrisburg's Appeal, 10 A. 787, 7 Pa.Cas. 322.

3. Ohio.—Fenton v. Cheseldine, 11 Ohio Dec. (Reprint) 649, 28 Cinc.L. Bul. 223—Wilder v. Cincinnati, 4 Ohio S. & C.P. 104, 1 Ohio N.P. 347.

4. Mich.—Cooper v. Detroit, 4 N.W. 362, 42 Mich. 584.

5. Cal.—Ex parte Anderson, 19 P. 2d 1027, 130 Cal.App. 395.

N.Y.—Smith v. Morgan, 4 N.Y.S.2d 837, 167 Misc. 815, affirmed 4 N.Y.S.2d 844, 254 App.Div. 672, affirmed 16 N.E.2d 394, 278 N.Y. 667, 43 C.J. p 393 note 94.

6. Wash.—Anderson v. Nichols, 278 P. 161, 152 Wash. 315.

43 C.J. p 393 note 95.

No right to use sidewalks for market purposes was or could be acquired by municipality's permitting their use for market purposes.—House-Wives League v. City of Indianapolis, 185 N.E. 511, 204 Ind. 685.

7. Md.—State v. Burkett, 87 A. 514, 119 Md. 609, 622, Ann.Cas.1914D 345.

43 C.J. p 393 note 96.

8. Ind.—Richmond v. Smith, 47 N.E. 630, 148 Ind. 294.

43 C.J. p 394 note 97.

9. Md.—State v. Burkett, 87 A. 514, 119 Md. 609, Ann.Cas.1914D 345.

10. N.Y.—Russo v. Morgan, 21 N.Y.S.2d 637, 174 Misc. 1013.

Display of furniture

A store owner's display of articles of furniture in front of store was not a stand, prohibited by city code, as "stand" is a framework on which something is supported or displayed,

used, it cannot exclude from the use of the market an abutting property owner or an owner who holds part of the abutting premises by leasehold,¹¹ and it cannot discriminate against some abutting owners in favor of others with respect to the use of the market.¹²

§ 1827. Acquisition of Property; Rights Therein and Use Thereof

A municipal corporation, under its power to establish and regulate markets, may purchase a suitable market site and erect the buildings required. The use of property for a market may be discontinued and the property devoted to other purposes or sold where it is not exclusively dedicated for market purposes.

A municipal corporation, under its power to establish and regulate markets, may purchase a suitable market site and erect the buildings required,¹³ or it may set aside certain public lands in the city for market purposes.¹⁴ The use of land by municipal corporations for a municipal market is for a proprietary purpose,¹⁵ and not for a governmental purpose.¹⁶ An ordinance designating certain property for a public market and authorizing the purchase thereof does not relate to a franchise¹⁷ and does not constitute municipal legislation¹⁸ within constitutional and charter provisions requiring a referendum. Since municipal corporations are not duty bound to maintain markets, as discussed supra § 1056, they may discontinue the use of prop-

erty as such;¹⁹ and, when so authorized by statute, they may dispose of unneeded market lands, whether by sale or lease, and for private purposes if they so decide,²⁰ where the property is not exclusively dedicated for market purposes.²¹

Where land is purchased under a statute authorizing its acquisition for the purpose of a public market, the municipality, although acquiring the fee to such land, cannot permit its use for other than market purposes;²² but where a statute authorizes the construction of a market house and grants to the municipality in fee certain lands on which it is constructed but which are more than are necessary for such purpose, the remainder may, in the absence of any restriction in the grant, be used for other purposes;²³ and, where a city purchases land in fee, the fact that it was intended and subsequently used for market purposes will not constitute a dedication of the property for market purposes so as to prevent the municipality from removing the market to another locality and appropriating the old location to a different municipal use.²⁴ A municipality which voluntarily accepts a partnership with an individual in the profits to be derived from a market house must accord to him the ordinary rights of a partner with respect to financial administration of property.²⁵

Lease of market building. Power to build a mar-

as articles in museum or goods in store—*People v. Gerand*, 21 N.Y.S. 2d 428.

11. N.Y.—*Russo v. Morgan*, 21 N.Y.S.2d 637, 174 Misc. 1013.

Lessee of upper floor

Fact that plaintiffs who sold fish from stands in roadway of street rented offices on upper floors of buildings abutting on street in order to qualify for permits for stands from city department of markets did not preclude plaintiffs from being entitled to permits, especially where operators of stores on street level had either bought or leased their premises for purposes of getting advantages of stands in street.—*Russo v. Morgan*, supra.

12. N.Y.—*Russo v. Morgan*, supra.

13. Or.—*Public Market Co. of Portland v. City of Portland*, 83 P.2d 440, 160 Or. 155.

43 C.J. p 394 note 99.

Authorization by ordinance

In enacting ordinance authorizing making of a contract for purchase of public market, city council could, subject only to charter limitation on incurrence of indebtedness, adopt, modify, or repeal any provisions of former ordinance declaring intention to obligate city to establish a

public market.—*Public Market Co. of Portland v. City of Portland*, 83 P.2d 440, 160 Or. 155.

14. N.Y.—*Smith v. Morgan*, 4 N.Y.S.2d 837, 167 Misc. 815, affirmed 4 N.Y.S.2d 844, 254 App Div. 672, affirmed 16 N.E.2d 394, 278 N.Y. 667.

Nature of function

Whether the setting aside of streets and other public property in city for market purposes is an administrative or legislative function was not required to be determined in view of the fact that the power to exercise that function is expressly conferred on that branch of the city government which possesses the power to assign lands of city for public use.—*Smith v. Morgan*, supra.

15. N.Y.—*Matter of Harlem River*, 217 N.Y.S. 644, 127 Misc. 710.

16. N.Y.—*Matter of Harlem River*, supra.

17. Or.—*Whitbeck v. Funk*, 12 P.2d 1019, 140 Or. 70.

18. Or.—*Whitbeck v. Funk*, supra.

19. Miss.—*Marshall v. Meridian*, 60 So. 135, 103 Miss. 206.

20. N.Y.—*Elth v. City of New York*, 300 N.Y.S. 558, 165 Misc. 18.

21. N.Y.—*Elth v. City of New York*, supra.

Dedicatory statute held repealed

N.Y.—*Elth v. City of New York*, supra.

Effect of repeal

Repeal of exclusive dedication of square for farmers and market gardeners was not equivalent to declaration that it was to be transformed into property for private uses, but as long as department of public markets controlled square it was required to be used for public market purposes, not necessarily for farmers and market gardeners, but for purposes belonging to usual jurisdiction of department of public markets.—*Elth v. City of New York*, supra.

22. N.Y.—*Bird v. Grout*, 94 N.Y.S. 127, 106 App Div. 159.

43 C.J. p 394 note 7.

23. Md.—*Dugan v. Baltimore*, 5 Gill & J. 357.

24. Ohio.—*Gall v. Cincinnati*, 18 Ohio St. 563.

25. La.—*New Orleans v. Guillotte*, 12 La. Ann. 818.

43 C.J. p 394 note 10.

ket house includes power to lease a building for market purposes.²⁶

§ 1828. Leases and Sales; Stalls and Privileges

Municipal corporations have power to lease or sell stalls or other space or facilities in public markets; the precise rights of the occupant of the stall or other space will depend, as a general rule, on the terms of the contract under which the space is held, but the purchase of a stall does not confer on the purchaser an absolute property, but a qualified right only.

The right to sell in public market stands or stalls is acquired by contract with the municipal or other authorities controlling the market.²⁷ Municipal corporations have power to lease²⁸ or sell²⁹ stalls in public markets, or other space or facilities therein, or to prohibit the occupancy of a stall without procuring a lease;³⁰ and such leases or sales may be made by a board on which, or officer on whom, authority has been conferred.³¹ The power to lease or sell market space or rights may and should be exercised in the manner prescribed by statute.³²

General rules apply with respect to the construction and operation of such a lease or contract to lease,³³ and the precise rights of the occupant of a stall or other space in the market will depend on the terms of the contract under which the space is held.³⁴

In general, the purchase of a stall in a public market, like the purchase of a pew in a church, does not confer on the purchaser an absolute property, but a qualified right only.³⁵ The right to sell at a stall or stand in a public market is to be exercised by the lessee thereof subject to all qualifications and restrictions that the municipal corporation may impose;³⁶ and this is so whether or not they are made part of the lease or contract.³⁷ Such requirements or restrictions must be reasonable.³⁸ The right of an occupant of a stall in a public market is such a right of property as may be transferred,³⁹ and is limited in duration to the existence of the market.⁴⁰ The lease of a market stall does not imply a contract on the part of the municipality to protect the lessee against competition by unlicensed vendors.⁴¹

26. N.C.—Wade v. Newbern, 77 N. C. 460.

27. Md.—Hatch v. Pendergast, 15 Md. 251.
43 C.J. p 394 note 13.

28. Ga.—Corpus Juris cited in Newton v. City of Atlanta, 6 S.E. 2d 61, 64, 189 Ga. 441.

Kan.—State ex rel Parker v Kansas City, 98 P.2d 101, 151 Kan. 2.
N.Y.—New Colonia Ice Co. v Woolley, 41 N.Y.S.2d 662, 181 Misc. 473.
43 C.J. p 394 note 14.

Lease of ice plant

N.Y.—New Colonia Ice Co. v. Woolley, supra.

Mutuality

A contract for lease of public market, providing that lessee was to commence immediately to sublease spaces in market and that lessee's interest in lease would be forfeited unless lessee procured subleases calling for payment of specified amount in bonuses by certain date, was not void for want of mutuality even if contract was unilateral in its inception, where contract became mutual and binding on partial performance by lessee, and on execution for a valuable consideration by lessor of a waiver of certain obligations under contract.—Lyon v. Goss, 123 P.2d 11, 19 Cal.2d 659.

Provisions held valid

N.J.—Yedid v. Atlantic City, 182 A. 817, 14 N.J.Misc. 124.

N.Y.—Grill v. City of New York, 27 N.E.2d 14, 282 N.Y. 471—New Colonia Ice Co. v. Woolley, 41 N.Y.S. 2d 662, 181 Misc. 473.

Tex.—Mayer v. Kostos, Civ.App., 71 S.W.2d 398, error refused.

29. Md.—Rose v. Baltimore, 51 Md. 256, 34 Am.R. 307.
43 C.J. p 394 note 15.

30. Iowa.—State v. Leiber, 11 Iowa 407.

31. N.Y.—New Colonia Ice Co. v. Woolley, 41 N.Y.S.2d 662, 181 Misc. 473—Eith v. City of New York, 300 N.Y.S. 558, 165 Misc. 18.

Ministerial act

N.J.—Peejay Corp. v. City of Newark, 39 A.2d 873, 136 N.J.Eq. 31.

32. N.Y.—New Colonia Ice Co. v. Woolley, 41 N.Y.S.2d 662, 181 Misc. 473.

Approval of board of estimate

N.Y.—New Colonia Ice Co. v. Woolley, supra.

Competitive bidding held not required

N.Y.—New Colonia Ice Co. v. Woolley, supra.

Necessity of ordinance

City may have power to lease stall in city market without ordinance therefor.—Lorino v. Holcombe, Civ. App., 71 S.W.2d 402, reversed on other grounds Holcombe v. Lorino, 79 S.W.2d 307, 124 Tex. 446.

33. Cal.—Lyon v. Goss, 123 P.2d 11, 19 Cal.2d 659.

34. U.S.—Brooklyn Eastern Dist. Terminal v. City of New York, C. C.A.N.Y., 139 F.2d 1007, 152 A.L.R. 296, certiorari denied 64 S.Ct. 1158, 322 U.S. 747, 88 L.Ed. 1579.

Mass.—Collins v. Isaac Locke Co., 152 N.E. 331, 256 Mass. 242.

N.Y.—Grill v. City of New York, 27 N.E.2d 14, 282 N.Y. 471.

43 C.J. p 395 note 17.

Tenant at will

(1) Lease of stall in city market which allegedly was to run as long as lessee paid rent and complied with reasonable rules and regulations of city governing operation of market held to create tenancy at will, terminable at will of either city or lessee.—Holcombe v. Lorino, 79 S.W.2d 307, 124 Tex. 446.

(2) The lessee of a market stall for one year, who held over but failed to comply with the provisions of a city ordinance as to the payment of rent, was a mere tenant at will, and could be evicted after the proper notice had been given.—Dubuque v. Miller, 11 Iowa 583.

35. Md.—Mayor and Council of City of Baltimore v. Ercolano, 184 A. 164, 170 Md. 341—Goldberg v. Novickow, 77 A. 261, 113 Md. 29.
43 C.J. p 395 note 19.

36. Md.—Mayor and Council of City of Baltimore v. Ercolano, 184 A. 164, 170 Md. 341.
43 C.J. p 395 note 20.

37. Pa.—Strickland v. Pennsylvania R. Co., 26 A. 431, 154 Pa. 348, 21 L.R.A. 224.

38. La.—Swayze v. Monroe, 40 So. 926, 116 La. 643.

39. Md.—Border State Sav. Inst. v. Wilcox, 63 Md. 525.

40. Md.—Rose v. Baltimore, 51 Md. 270, 34 Am.R. 307.
43 C.J. p 395 note 24.

41. Tex.—Peck v. Austin, 22 Tex. 261, 73 Am.D. 261.

43 C.J. p 395 note 27.

A person in possession of the stall under a verbal lease from the market master, although the latter had no authority to make it, is not a trespasser so as to authorize a forcible seizure and removal of his property,⁴² and the lessee and collector of market revenues may not summarily eject the occupant of a stall who has tendered the required dues and conformed to the market regulations.⁴³ The occupant of a market stall who sells his rights to another is not bound in warranty to his vendee in case of an eviction or disturbance of the latter by the municipality itself,⁴⁴ but will be liable only for his own acts which interfere with the enjoyment of what he sells.⁴⁵

The lessee of a market takes subject to the provisions of existing ordinances⁴⁶ and the right of the municipality to make necessary public improvements.⁴⁷ A lease of an established market does not prevent the municipality from establishing another market and leasing it to a different person,⁴⁸ or require it to protect the lessee against competition by unauthorized private markets, unless the contract so provides,⁴⁹ or give such lessee any right of action against a person maintaining a competing and unauthorized private market.⁵⁰

The operator of a quasi-public market established by contract with a city may contract with tenants for the use of market stalls,⁵¹ and it may proceed to eject such tenants for cause without joining the city as a party plaintiff to the action;⁵² but the operator may not without cause eject a tenant who has complied with all the rules and regulations and has regularly paid the stipulated rent, where the city itself, if the market were a public market, could not do so.⁵³

§ 1829. Permits and Licenses

Municipal corporations may require that permits or licenses be obtained for the privilege of occupying stands or stalls in a public market, and they may require the payment of a reasonable amount as a license fee. The licensed occupant of a stall or stand in a market has no such interest in the stall as the lessee of a store or building, and the municipality may provide for the revocation of the permit or license.

Municipal corporations may require that permits or licenses be obtained for the privilege of occupying stands or stalls in a public market.⁵⁴ Ordinarily the number of persons to whom permits may be issued and the space to be used by any licensee are matters within the discretion of the board in which, or the officer in whom, authority has been vested;⁵⁵ but the grant or refusal of a permit cannot be left to unlimited or arbitrary discretion.⁵⁶ Municipalities may require the payment of a reasonable amount as a license fee from those occupying stands or stalls in a public market,⁵⁷ even under the general power of regulation and control,⁵⁸ unless restricted by statute.⁵⁹ Charges for licenses or market privileges must, however, be reasonable⁶⁰ and without discrimination,⁶¹ and cannot be imposed as a means of raising revenue;⁶² but the requirement of a reasonable license fee is not objectionable as a tax for revenue⁶³ or as tending to create a monopoly.⁶⁴ The right to a stand in the market without payment of a license fee cannot be acquired by prescription.⁶⁵ Payment of the required license fee gives the payee a right of occupancy, although his license has not been issued.⁶⁶

The licensed occupant of a stall or stand in a market has no such interest in the stall as the lessee of a store or dwelling,⁶⁷ and he has no legal right

42. Tex.—San Antonio v. Royal, 16 S.W. 1101.

43. La.—Douat v. Beombay, 15 La. Ann. 377.

44. La.—Barrere v. Bartet, 23 La. Ann. 722.

45. La.—Barrere v. Bartet, supra.

46. La.—Vidalat v. New Orleans, 10 So. 175, 43 La. Ann. 1121.

47. La.—Vidalat v. New Orleans, supra.

48. La.—Cougot v. New Orleans, 15 La. Ann. 21.

43 C.J. p 395 note 28.

49. La.—Vidalat v. New Orleans, 10 So. 175, 43 La. Ann. 1121.

50. La.—Jacobs v. Levy, 27 La. Ann. 619.

51. La.—New Prytania Market Ass'n v. Beoubay, App., 185 So. 531.

52. La.—New Prytania Market Ass'n v. Beoubay, supra.

53. La.—New Prytania Market Ass'n v. Beoubay, supra.

54. Ohio.—Cincinnati v. Buckingham, 10 Ohio 257.

Tex.—Ex parte Canto, 17 S.W. 155, 21 Tex. App. 61, 57 Am. R. 609.

55. N.Y.—Ortiz v. Morgan, 292 N.Y. S. 341, 161 Misc. 471.

56. N.Y.—Russo v. Morgan, 21 N.Y. S. 2d 637, 174 Misc. 1013.

43 C.J. p 396 note 45.

Rules held invalid

N.Y.—Russo v. Morgan, supra.

57. Fla.—Jacksonville v. Ledwith, 7 So. 885, 26 Fla. 163, 23 Am. S. R. 553, 9 L. R. A. 69.

43 C.J. p 395 note 37.

58. Tex.—Ex parte Canto, 17 S.W. 155, 21 Tex. App. 61, 57 Am. R. 609.

59. Ohio.—Mayo v. Cincinnati, 1 Ohio St. 268.

43 C.J. p 395 note 39.

60. Md.—State v. Rowe, 20 A. 179, 72 Md. 548.

43 C.J. p 395 note 40.

61. U.S.—Georgia Packing Co. v. Macon, C. C. Ga., 60 F. 774, 22 L. R. A. 775, appeal dismissed 60 F. 781, 9 C. C. A. 262.

Tenn.—Vosse v. Memphis, 9 Lea 294.

62. Md.—State v. Rowe, 20 A. 179, 72 Md. 548.

43 C.J. p 395 note 42.

63. Fla.—Blanchard v. Ivers, 24 So. 66, 40 Fla. 117—Jacksonville v. Ledwith, 7 So. 885, 26 Fla. 163, 23 Am. S. R. 553, 9 L. R. A. 69.

64. Tex.—Ex parte Canto, 17 S.W. 155, 21 Tex. App. 61, 57 Am. R. 609.

65. Mass.—Commonwealth v. Clay, 112 N. E. 867, 224 Mass. 271.

66. Md.—Hatch v. Pendergast, 15 Md. 251.

67. N.C.—Hutchins v. Durham, 24 S. E. 723, 118 N. C. 457, 32 L. R. A. 706.

to the renewal of the license or to the occupation of the premises during an indefinite number of years at his option.⁶⁸ The municipal corporation may provide for the revocation of the permit or license, or termination of the occupancy thereunder,⁶⁹ in which case a licensee who refuses to vacate after the expiration or revocation of his license is a trespasser⁷⁰ and may be ejected, no greater force than necessary being used,⁷¹ or he may be restrained, in an action in equity, from remaining in possession.⁷² The holder of a permit in an old market house, when the market is removed to another locality, is not entitled as a matter of right to a permit for maintaining a stall in the new market house.⁷³ The relationship between the city and a permittee who occupies a stall in an inclosed market which is in the exclusive possession and control of the city during the hours the market is closed is that of bailor and bailee;⁷⁴ the city is obliged to account and to exercise reasonable care to provide for the safety of the merchandise and chattels left under its control,⁷⁵ but it is not an insurer of the safety of such goods and chattels,⁷⁶ and it is not liable for any loss where it has exercised reasonable care.⁷⁷

Assignability. Permits for the conduct of market stalls are assignable if the consent or approval of designated public officials or boards is obtained,⁷⁸ in which case the assignee is entitled to the same

rights and privileges as originally possessed by the assignor.⁷⁹

Penalty for sale without license. A municipal corporation may provide that persons occupying stalls in a market without authority, for the purpose of selling therefrom, shall be liable to a fine.⁸⁰

§ 1830. Particular Regulations

- a. In general
- b. Sales outside markets
- c. Farm products
- d. Inspection

a. In General

Under the power to regulate and control markets, municipal corporations may enact and enforce all regulations which are desirable for the protection of public health, and they may adopt and enforce any reasonable and proper rules and regulations with respect to the market and the business transacted there.

While there is some conflict as to what grant of authority will justify particular regulations,⁸¹ under the power to regulate and control markets, municipal corporations may enact and enforce all regulations which are desirable for the protection of public health,⁸² and they may adopt and enforce any reasonable and proper rules and regulations with respect to the market and the business transacted there.⁸³ The municipality may enact any reasonable regulation necessary to preserve the clean-

Pa.—McTighe v. Schwartz, 72 A 630, 223 Pa. 277—Semple v. City of Pittsburgh, 8 Pa.Dist. & Co 314, 74 Pittsb.Leg.J. 321.

68. Md.—Mayor and Council of City of Baltimore v. Ercolano, 184 A. 164, 170 Md. 341.

Pa.—McTighe v. Schwartz, 72 A 630, 223 Pa. 277—Semple v. City of Pittsburgh, 8 Pa.Dist. & Co. 314, 74 Pittsb.Leg.J. 321.

69. La.—Economides v. Hinrichs, 19 So. 124, 48 La.Ann. 370, 43 C.J. p 396 note 49.

70. N.C.—Hutchins v. Durham, 24 S.E. 723, 118 N.C. 457, 32 L.R.A. 706.

Pa.—Semple v. City of Pittsburgh, 8 Pa.Dist. & Co. 314, 74 Pittsb.Leg.J. 321.

71. N.C.—Hutchins v. Durham, 24 S. E. 723, 118 N.C. 457, 32 L.R.A. 706.

72. Pa.—McTighe v. Schwartz, 72 A. 630, 223 Pa. 277—Semple v. City of Pittsburgh, 8 Pa.Dist. & Co. 314, 74 Pittsb.Leg.J. 321.

73. N.Y.—People v. Meyer, 5 N.Y.S. 69.

74. N.Y.—Charnov v. City of New York, 77 N.Y.S.2d 770, 191 Misc. 486.

75. N.Y.—Charnov v. City of New York, supra.

76. N.Y.—Charnov v. City of New York, supra.

Burden of proof

In action against city by occupant of stalls in public market owned and operated by city for loss by theft during night while market was under exclusive possession and control of city, occupant had burden of showing failure by city to exercise reasonable care.—Charnov v. City of New York, supra.

77. N.Y.—Charnov v. City of New York, supra.

78. N.Y.—People v. Metz, 107 N.Y.S. 970, 123 App.Div. 269.

79. N.Y.—People v. Metz, supra.

80. Iowa.—State v. Leiber, 11 Iowa 407.

S.C.—Charleston v. Goldsmith, 29 S. C.L. 428.

81. Fla.—Jacksonville v. Ledwith, 7 So. 885, 26 Fla. 163, 23 Am.S.R. 558, 9 L.R.A. 69.

Mo.—St. Louis v. Weber, 44 Mo. 547.

82. Pa.—Strickland v. Pennsylvania R. Co., 26 A. 431, 154 Pa. 348, 21 L.R.A. 224.

43 C.J. p 396 note 56.

83. Conn.—State v. Cullum, 147 A. 804, 110 Conn. 291.

Tenn.—Staub v. City of Knoxville, 33 SW 2d 415, 161 Tenn. 663, 43 C.J. p 396 note 57.

Particular regulations held valid

(1) Provision requiring marking off of space at angles over entire length of market on two sides.—Staub v. City of Knoxville, supra.

(2) Provision prohibiting parking against market house except by certain vehicles for described purposes for limited time.—Staub v. City of Knoxville, supra.

Disposal of one load

Under ordinance of city regulating a market, and providing that each stall or place must be vacated as soon as the load is disposed of, and that the city reserves the right to re-rent the stall when vacated for the remaining market period, the payment of the fee provided for a market period gave the lessee the right to dispose of one load of produce therein during that market period and no more; the market was not intended as a place where jobbers in produce could come and conduct a business by paying the fee of two dollars a day for two stalls.—State ex rel. Harley v. City of Wichita, 99 P.2d 812, 151 Kan. 390.

liness of market places,⁸⁴ may confine the sale of particular articles to certain designated stands or portions of the market and prevent their sale elsewhere,⁸⁵ may prohibit the transfer of goods from one vehicle to another for sale,⁸⁶ may prohibit parking near the curb in a market area except for sale purposes,⁸⁷ may limit a marketer to one vehicle on the market place at any one time,⁸⁸ and may require the immediate removal from the market of any vehicle when it becomes empty or substantially empty.⁸⁹

Municipal regulations may also limit the sales in a market to specific articles,⁹⁰ may forbid delivering within the municipal limits meat that has not been exposed for sale in the public market,⁹¹ may prohibit the sale of less than a specified quantity of meat outside market stalls,⁹² and may prohibit the standing of wagons containing perishable produce within the market limits for over a specified period of time between specified hours unless permitted by a designated market official.⁹³ Regulations have also been sustained which prohibit the selling of provisions at the public market which have been previously purchased within the municipal boundaries outside the market,⁹⁴ which prohibit the slaughter of poultry in public markets,⁹⁵ which regulate market hours,⁹⁶ or which require diseased or unwholesome articles to be removed.⁹⁷ On the other hand, the corporation cannot prohibit the sale of perish-

able articles entirely within the municipal limits,⁹⁸ and a provision prohibiting salesmen from selling from more than one vehicle has been held unreasonable and invalid.⁹⁹

Forestalling and regrating. Municipal corporations may enact ordinances or regulations to prevent forestalling and regrating,¹ and are in some cases expressly authorized to do so.²

The ordinary rules of construction apply to the construction of statutes³ and ordinances or regulations⁴ relating to the regulation of markets.

b. Sales outside Markets

As a general rule a municipal corporation may prohibit the sale of marketable articles within certain limits or during certain hours except at the established market; but such restrictive regulations must be reasonable and must fall within the scope of the power granted to the municipality by the state.

As a general rule a municipal corporation may prohibit by ordinance or by-law the sale of marketable articles within certain limits or during certain hours except at the established market,⁵ and it is within the power of the legislature to authorize municipal corporations to do so.⁶ While there are decisions which deny the right of a municipal corporation to prohibit selling outside the public markets, under a general power to regulate and control markets,⁷ ordinarily it is held that such restrictive regulations as to selling outside market limits may

84. Pa.—Strickland v. Pennsylvania R. Co., 26 A. 431, 154 Pa. 348, 21 L.R.A. 224.

43 C.J. p 396 note 58.

85. Pa.—Philadelphia v. Davis, 6 Watts & S. 269.

43 C.J. p 396 note 59.

86. Tenn.—Staub v. City of Knoxville, 33 S.W.2d 415, 161 Tenn. 663.

87. Tenn.—Staub v. City of Knoxville, supra.

88. Tenn.—Staub v. City of Knoxville, supra.

89. Tenn.—Staub v. City of Knoxville, supra.

Word "substantially," used in provision of ordinance requiring removal of "empty or substantially empty" vehicles from market, means "really" or "actually."—Staub v. City of Knoxville, supra.

90. La.—First Municipality v. Cutting, 4 La. Ann. 335—First Municipality v. Devron, 4 La. Ann. 278.

City may prohibit the sale of groceries in meat and vegetable markets.—First Municipality v. Cutting, 4 La. Ann. 335.

91. La.—St. Martinville v. Dugas, 103 So. 761, 158 La. 262.

92. Mo.—St. Louis v. Jackson, 25 Mo. 37.

93. Mass.—Commonwealth v. Brooks, 109 Mass. 355.

94. Pa.—Easton City v. Messinger, 42 Pa. Co. 658.

43 C.J. p 397 note 65.

95. N.Y.—Loewenstein v. Myers, 20 N.Y.S. 761.

96. Cal.—Ex parte Anderson, 19 P. 2d 1027, 130 Cal. App. 395.

43 C.J. p 397 note 67.

97. Pa.—Strickland v. Pennsylvania R. Co., 26 A. 431, 154 Pa. 348, 21 L.R.A. 224—Central Market Co. v. Erie, 44 Pa. Super. 191.

98. N.C.—State v. Perry, 65 S.E. 915, 151 N.C. 661, 134 Am. S.R. 1002.

During certain hours

An act empowering a city to pass an ordinance to establish markets, etc., and to restrain and prohibit "during market hours" the sale at any other place, of meats, vegetables, etc., except by regular licensed dealers, etc., does not authorize a general prohibition by ordinance of vegetables and farm products, except by licensed vendors, but authorizes such prohibition during market hours only.—State v. St. Paul Mu-

nicipal Ct., 20 N.W. 243, 32 Minn. 329.

99. Tenn.—Staub v. City of Knoxville, 33 S.W.2d 415, 161 Tenn. 663.

1. Tenn.—Dutton v. Knoxville, 113 S.W. 381, 121 Tenn. 25, 130 Am. S.R. 748, 16 Ann. Cas. 1028.

43 C.J. p 234 note 88 [b], p 399 note 98.

Forestalling, engrossing, and regrating as monopoly see Monopolies § 3.

2. Ky.—Louisville v. Roupe, 6 B. Mon. 591.

3. Pa.—Philadelphia v. Davis, 6 Watts & S. 269.

4. Md.—Baltimore v. Wollman, 91 A. 339, 123 Md. 310.

43 C.J. p 397 note 72.

5. N.C.—Angelo v. City of Winston-Salem, 136 S.E. 489, 193 N.C. 207, 52 A.L.R. 663, affirmed 47 S.Ct. 763, 274 U.S. 725, 71 L.Ed. 1329.

43 C.J. p 397 note 73.

6. Ga.—Henry v. Macon, 18 S.E. 143, 91 Ga. 268.

43 C.J. p 397 note 74.

7. Ill.—Bloomington v. Wahl, 46 Ill. 489.

43 C.J. p 397 note 75.

be made under a general power to establish and regulate markets,⁸ and that, where adequate market facilities are furnished, such regulations are not unreasonable or in restraint of trade but a proper regulation of it,⁹ although the rule is otherwise where market facilities are not furnished.¹⁰ In some cases such ordinances or by-laws have been held void on the ground that they were unreasonable and in restraint of trade.¹¹ The validity of such ordinances and by-laws as being in restraint of trade obviously depends very largely on the extent of the prohibition or regulation contained in the particular ordinance or by-law, it being well settled that such ordinances or by-laws must be reasonable.¹² The ordinance or by-law must fall within the scope of the power granted.¹³

In accordance with the foregoing rules, it has been held that municipal corporations may, when duly authorized, prohibit the maintenance of private markets within a certain distance of a public market,¹⁴ prohibit the sale of perishable food outside public markets¹⁵ or within certain limits about them¹⁶ or outside markets during market hours,¹⁷ prohibit the sale of anything but fruit by keepers of fruit stands within a certain distance of the market,¹⁸ or prescribe such regulations as to the time and place of selling outside the market limits as the general welfare of the municipality may demand.¹⁹ It seems to be uniformly held that under a power to regulate the vending of meats, etc., a municipality may prevent their being retailed outside the public

markets.²⁰ A municipality may also, under a power to prevent the obstruction of streets, prohibit the standing of wagons for the sale of market produce within certain limits,²¹ or prevent any street vending without a permit.²² It may prescribe that huckster wagons shall not stand in the market place longer than a prescribed time.²³

Effect of contract. The power of a municipal corporation under its police power to prohibit the sale of marketable articles elsewhere than in the established markets cannot be fettered or surrendered by private contracts.²⁴

License. A license may be required for the sale of salt meat and fish outside the market.²⁵

Penalty. A municipal corporation may enact ordinances prescribing reasonable penalties for selling marketable articles outside the established market.²⁶

c. Farm Products

A municipal corporation may enact regulations to insure the freshness of farm products sold in the market; and for that purpose it may restrict the use of the market and streets and alleys adjacent thereto to producers.

In the exercise of the power to regulate public markets, a municipal corporation may enact regulations to insure the freshness of farm products sold in the market;²⁷ and for that purpose it may restrict the use of the market and streets and alleys adjacent thereto to producers.²⁸ The latter enact-

8. N.C.—Angelo v. City of Winston-Salem, 136 S.E. 489, 193 N.C. 207. 52 A.L.R. 663, affirmed 47 S.Ct. 763, 274 U.S. 725, 71 L.Ed. 1329. 43 C.J. p 397 note 76.

9. N.C.—State v. Pendergrass, 10 S.E. 1002, 106 N.C. 664. 43 C.J. p 398 note 77.

10. Iowa.—Burlington v. Dankwardt, 34 N.W. 801, 78 Iowa 170. Pa.—Sunbury Borough v. Rockefeller, 19 Pa.Dist. 914.

11. Ga.—Bethune v. Hughes, 28 Ga. 560, 73 Am.D. 789. 43 C.J. p 398 note 79.

12. Pa.—Sunbury Borough v. Rockefeller, 19 Pa.Dist. 914.

13. Minn.—State v. Municipal Court, 20 N.W. 243, 32 Minn. 329. 43 C.J. p 398 note 79 [a].

14. La.—Gossigi v. New Orleans, 6 So. 534, 41 La. Ann. 522. 43 C.J. p 398 note 84.

Ordinance held not violated
La.—Cendon v. H. G. Hill Stores, 131 So. 41, 171 La. 241.

Ordinance held not repealed
Tex.—Tomassi v. San Antonio, Civ. App., 268 S.W. 273. 43 C.J. p 566 note 40.

15. La.—St. Martinville v. Dugas, 103 So. 761, 158 La. 262.

43 C.J. p 398 note 85.

16. La.—State v. Namias, 21 So. 852, 49 La. Ann. 618, 62 Am.S.R. 657. N.C.—State v. Perry, 65 S.E. 915, 151 N.C. 661, 134 Am.S.R. 1002.

17. Ga.—Henry v. Macon, 18 S.E. 143, 91 Ga. 268—Badkins v. Robinson, 53 Ga. 613.

18. La.—New Orleans v. Grafma, 27 So. 590, 52 La. Ann. 1082, 78 Am.S.R. 387.

19. N.C.—State v. Perry, 65 S.E. 915, 151 N.C. 661, 134 Am.S.R. 1002. Pa.—Mt. Carmel Borough v. Fisher, 21 Pa.Super. 643.

20. Fla.—Blanchard v. Ivers, 24 So. 66, 40 Fla. 117. 43 C.J. p 398 note 90.

21. Mich.—People v. Keir, 43 N.W. 1039, 78 Mich. 98.

22. Mass.—Commonwealth v. Ellis, 33 N.E. 651, 158 Mass. 555.

23. Mass.—Commonwealth v. Brooks, 109 Mass. 355.

24. Fla.—Jacksonville v. Ledwith, 7 So. 885, 26 Fla. 163, 23 Am.S.R. 558, 9 L.R.A. 69.

Tex.—Newson v. Galveston, 13 S.W. 368, 76 Tex. 559, 7 L.R.A. 797.

25. N.Y.—Buffalo v. Hill, 79 N.Y.S. 449, 79 App.Div. 402.

26. La.—Crowley v. Rucker, 31 So. 629, 107 La. 213.

Ordinance held not to provide penalty
Colo.—Cornelius v. People, 3 P.2d 1072, 89 Colo. 451.

27. Tex.—Bruce v. Gainesville, Civ. App., 183 S.W. 41. 43 C.J. p 399 note 2.

28. Conn.—State v. Cullum, 147 A. 804, 110 Conn. 291.

N.Y.—Rowehl v. City of New York, 260 N.Y.S. 467, 236 App.Div. 852. 43 C.J. p 399 note 3.

Words "goods" and "producer," used in ordinance relating to public markets, held to refer respectively to agricultural products and person who grows such products.—State v. Cullum, 147 A. 804, 110 Conn. 291.

Filing of certificate
Provision in ordinance regulating public market requiring seller from outside state to file certificate showing himself bona fide producer held not invalid as unreasonable.—Staub

ment has been held valid, and not discriminatory.²⁹ The corporation may designate a portion of a market which shall be free to citizens coming to vend the produce of their own farms,³⁰ and exclude from such portion persons not answering this description.³¹

d. Inspection

A municipal corporation may provide for the inspection of the quality of articles sold within the public markets and the weights and measures employed in making sales.

A municipal corporation, in the exercise of its

power to regulate public markets, may provide for the inspection of the quality of articles sold within the market³² and the weights and measures employed in making sales.³³ It also may provide that the market itself shall be regularly inspected by designated public officials,³⁴ and impose the cost of inspection on the owner or operator of such markets.³⁵ The governing body of the corporation exercises a wide discretion in determining the amount of the fee for inspection,³⁶ but such fee must not be unreasonable or arbitrary;³⁷ the fee must be in proportion to the amount necessary to meet the expense and cost of the service.³⁸

H. OTHER PROPERTY AND PLACES

§ 1831. In General

- a. General rules
- b. Public housing
- c. Public utilities

a. General Rules

A municipal corporation may have the power to lease public lands to another for a sufficient consideration and to recover rent under such a lease; and, in the absence of a statute providing otherwise, such a lease need not be submitted to the electorate for its approval.

In accordance with the general rules as to the right of a municipal corporation to dispose of its property, discussed supra §§ 961-970, a municipality may have the power to lease public land or property to others³⁹ for a sufficient consideration,⁴⁰ and to recover rent under such lease,⁴¹ and, in the absence

of a statute providing otherwise, such a lease need not be submitted to the electorate for its approval.⁴² Such a lease may be invalid, however, if it operates to prevent free legislation in a matter of municipal government,⁴³ and, where a city has an easement only in lots conveyed to it to be used for levee purposes, its lease of the lots for building purposes is void and confers no right of possession as against the grantor of the easement.⁴⁴ Under a statute authorizing municipalities to own manufacturing plants and to lease them for operation by individuals or private corporations, the lease must be of such character as will insure the continued operation of the proposed industry, with power in the municipality to enforce the continued operation, best to promote and protect the public interest.⁴⁵

v. City of Knoxville, 33 S.W.2d 415, 161 Tenn. 663.

29. Conn.—State v. Cullum, 147 A. 804, 110 Conn. 291.

Tenn.—Staub v. City of Knoxville, 33 S.W.2d 415, 161 Tenn. 663. 43 C.J. p 399 note 4.

30. Mass.—Commonwealth v. Nightingale, Thach.Cr. p 251.

31. Mass.—Commonwealth v. Nightingale, supra.

32. Pa.—Strickland v. Pennsylvania R. Co., 26 A. 431, 154 Pa. 348, 21 L.R.A. 224—Central Market Co. v. Erie, 44 Pa.Super. 191.

33. Pa.—Strickland v. Pennsylvania R. Co., 26 A. 431, 154 Pa. 348, 21 L.R.A. 224—Central Market Co. v. Erie, 44 Pa.Super. 191.

34. La.—Baton Rouge v. Sanchez, 108 So. 552, 161 La. 320.

35. La.—Baton Rouge v. Sanchez, supra.

36. La.—Baton Rouge v. Sanchez, supra.

37. La.—Baton Rouge v. Sanchez, supra.

38. La.—Baton Rouge v. Sanchez, supra.

39. Ga.—Aven v. Steiner Cancer Hospital, 5 S.E.2d 356, 189 Ga. 126. Lease of public buildings see supra § 1809.

Right not exclusive

A lease by city of a small tract of land with right of way to a sand hill and with right to lessee to use, sell, ship, or deliver sand from the sand hill, was not an exclusive right. —Lewes Sand Co. v. Graves, 8 A.2d 21, 1 Terry, Del., 189.

Surrender of lease; damages

N.Y.—City of New York v. Pike Realty Corporation, 160 N.E. 359, 247 N.Y. 245, followed in 238 N.Y. S. 808, 227 App.Div. 577.

40. Ohio.—Gilbert v. City of Dayton, App. 59 N.E.2d 954.

Valuable consideration

Ohio.—Gilbert v. City of Dayton, supra.

41. N.Y.—City of New York v. Pike Realty Corporation, 160 N.E. 359, 247 N.Y. 245, followed in 238 N.Y.S. 808, 227 App.Div. 577.

Abandonment

City leasing premises cannot constructively evict lessee through one department and recover rent through another, if lessee abandons premises; but city's refusal to approve plans of one leasing vacant property from city for public garage held not to relieve lessee retaining possession from liability for rent.—City of New York v. Pike Realty Corporation, supra.

42. Cal.—City of Santa Barbara v. Maher, 77 P.2d 306, 25 Cal.App.2d 325.

43. Ga.—Aven v. Steiner Cancer Hospital, 5 S.E.2d 356, 189 Ga. 126.

44. Minn.—Sanborn v. Van Duyn, 96 N.W. 41, 90 Minn. 215.

45. Miss.—Albritton v. City of Winona, 178 So. 799, 181 Miss. 75, 115 A.L.R. 1436, appeal dismissed Albritton v. City of Winona, Mississippi, 58 S.Ct. 766, 303 U.S. 627, 82 L.Ed. 1088.

Power of court

Miss.—Albritton v. City of Winona, 178 So. 799, 181 Miss. 75, 115 A.L.R. 1436, appeal dismissed Albritton

The rights and liabilities of the parties under a lease of city-owned property depend on the terms of the contract.⁴⁶ A conveyance by the city subsequent to the leasing of property does not relieve the city from its obligations to the lessees under the lease.⁴⁷ Where there is a lease of lands, the reversion being exempt from taxation, the tax on the usufructuary interest, in the absence of agreement to the contrary, necessarily falls on the lessee;⁴⁸ but, where subleases of public-owned lands are silent as to who shall pay realty taxes thereon, the obligation rests on the lessor.⁴⁹ Where a person has received a permit to construct improvements on city-owned land, he is entitled to a reasonable time within which to remove the improvements on revocation of the permit.⁵⁰

An action to enjoin a municipality from improperly using certain premises and from erecting and maintaining a fence thereon has been held maintainable without proof that plaintiff had filed a written notice of claim against the municipality pursuant to law.⁵¹ An ordinance providing that a mineral water system should be managed by a committee selected by the council, defining their duties and powers and providing that the members might be removed by the council, has been held not invalid as placing the system beyond the control of the mayor and the city council, or as a delegation of legislative powers.⁵² A municipal corporation may exercise police power in the protection of the territory outside its limits acquired by it for water supply to insure cleanliness and prevent any business and conduct likely to corrupt the fountain of water supply for the city.⁵³

b. Public Housing

The governing body of a municipal corporation or subordinate agency, such as a housing authority or commis-

sion, must act within the limits imposed by constitutional and statutory provisions in managing or controlling public housing projects erected with public funds.

The governing body of a municipal corporation or subordinate agency, such as a housing authority or commission, must act within the limits imposed by constitutional and statutory provisions in managing or controlling public housing projects erected with public funds.⁵⁴ So it has been held that the municipality in exercising its right of management may not exclude persons of the colored race from certain projects and segregate them in another, notwithstanding the project made available to colored applicants is of like character and equal quality as the other projects.⁵⁵ Any breach of contract by a housing authority receiving federal aid may be complained of only by the federal agency with whom the contract was made, and not by tenants of the housing authority;⁵⁶ but the fact that the buildings of a housing unit were constructed by a federal agency does not excuse a city's housing authority to which the buildings were leased from attempting to remedy a dangerous condition in the buildings after the authority was operating them.⁵⁷ A housing authority organized under state statute and receiving federal assistance has the power and duty of establishing rentals,⁵⁸ and the burden of establishing that the rentals are unauthorized is on the tenants who challenge them.⁵⁹ In order to authorize a housing authority to terminate a lease for false statements in the application, the statement must be material,⁶⁰ and in this respect a statement will be regarded as material if it is of such a nature as substantially to thwart the purpose for which information was sought and induce action by the authority that it would not otherwise have taken;⁶¹ but if the departure from an accurate statement of truth is so slight that the difference would not affect the decision of any reasonable person the false statement is

v. City of Winona, Mississippi, 58 S.Ct. 766, 303 U.S. 627, 82 L.Ed. 1088.

46. Mass.—R. H. Macy & Co. v. City of Fall River, 83 N.E.2d 880, 323 Mass. 624.

47. Mass.—R. H. Macy & Co. v. City of Fall River, *supra*.

48. Cal.—Tilden v. Orange County, App., 201 P.2d 86.

49. Cal.—Tilden v. Orange County, *supra*.

50. Ala.—Messer v. City of Birmingham, 10 So.2d 760, 243 Ala. 520.

51. N.Y.—Pansmith v. Incorporated Village of Island Park, 68 N.Y.S.2d 694, 188 Misc. 1052.

52. Mo.—State ex rel. City of Ex-
64 C.J.S.—21

celsior Springs v. Smith, 82 S.W.2d 37, 336 Mo. 1104.

53. Conn.—Dunham v. New Britain, 11 A. 354, 55 Conn. 378.
43 C.J. p 236 note 17.

54. N.J.—Seawell v. MacWithey, 63 A.2d 542, 2 N.J.Super. 255, affirmed in part, reversed in part on other grounds 67 A.2d 309, 2 N.J. 563. Power to construct public housing projects see *supra* § 1061.

55. N.J.—Seawell v. MacWithey, *supra*.

56. U.S.—Jarrett v. Norfolk Redevelopment and Housing Authority, D.C.Va., 74 F.Supp. 585, affirmed, C.A., 169 F.2d 409, certiorari denied 69 S.Ct. 238, 335 U.S. 886, 93 L.Ed. —.

57. Cal.—Manney v. Housing Au-

thority of City of Richmond, 180 P.2d 69, 79 Cal.App.2d 453.

58. U.S.—Jarrett v. Norfolk Redevelopment and Housing Authority, C.A.Va., 169 F.2d 409, certiorari denied 69 S.Ct. 238, 335 U.S. 886, 93 L.Ed. —.

59. U.S.—Jarrett v. Norfolk Redevelopment and Housing Authority, D.C.Va., 74 F.Supp. 585, affirmed, C.A., 169 F.2d 409.

60. N.Y.—Syracuse Housing Authority v. Colagiovanni, 77 N.Y.S.2d 213, 191 Misc. 728, affirmed 77 N.Y.S.2d 263, 273 App.Div. 801, appeal denied 81 N.Y.S.2d 680, 274 App. Div. 851.

61. N.Y.—Syracuse Housing Authority v. Colagiovanni, *supra*.

not material.⁶² A covenant in a lease from a city housing authority by which the tenant released the landlord from liability for any injury resulting from any cause except willful acts, although it operated as a present release in discharge of all liability for negligence, has been held not void as in contravention of public policy.⁶³

Sale or lease of excess property. A municipal housing authority may have the right to dispose by sale or lease of any property in excess of the building and recreational needs of the housing project, subject to such restrictions as will preserve and protect the improvement.⁶⁴

c. Public Utilities

The state may delegate to municipal corporations the power to regulate and control municipally-owned utility plants, and, where statutory authority exists therefor, a municipality may have the power to sell or lease a

utility plant or system owned by it, or to encumber such a plant or system; but, in order to effect such a sale or lease, compliance must be had with all statutory regulations.

The state may delegate to municipal corporations the power to regulate and control municipally-owned utility plants.⁶⁵ Where statutory authority exists therefor, a municipality may have the power to sell or lease a utility plant or system owned by it⁶⁶ or to encumber such a plant or system;⁶⁷ but property of a utility may not be alienated by the municipality without authority from the legislature,⁶⁸ even though its own contract of purchase has not been fully performed.⁶⁹ In order to effect such a sale or lease, the municipality must comply with all statutory regulations,⁷⁰ as, for example, a requirement that the proposed sale be approved by a state commission,⁷¹ or by a vote of the electorate,⁷² after proper notice of election.⁷³

62. N.Y.—Syracuse Housing Authority v. Colagiovanni, *supra*.

63. Pa.—Manius v. Housing Authority of City of Pittsburgh, 39 A.2d 614, 350 Pa. 512.

64. N.Y.—Borek v. Golder, 74 N.Y. S.2d 675, 190 Misc. 366.

65. Ill.—Springfield Gas, etc., Co. v. Springfield, 126 N.E. 739, 292 Ill. 236.

66. U.S.—Kentucky-Tennessee Light & Power Co. v. City of Paris, Tenn., C.C.A.Tenn., 48 F.2d 795, certiorari denied City of Paris, Tenn., v. Kentucky-Tennessee Light & Power Co., 52 S.Ct. 20, 284 U.S. 638, 76 L.Ed. 543.

Ga.—Brown v. Mayor, etc., of Fort Valley, 33 S.E.2d 705, 199 Ga. 234—Byrd v. City of Alma, 143 S.E. 767, 166 Ga. 510.

Okl.—Thomas v. Reid, 285 P. 92, 142 Okl. 38.

Pa.—Philadelphia Gas Works Co. v. City of Philadelphia, 1 A.2d 156, 331 Pa. 321.

Tex.—Guadalupe-Blanco River Authority v. City of San Antonio, 200 S.W.2d 989, 145 Tex. 611—Guadalupe-Blanco River Authority v. Tuttle, Civ.App., 171 S.W.2d 520, error refused 174 S.W.2d 589, 141 Tex. 523.

43 C.J. p 1342 note 65.

Sale or disposal of property generally see *supra* §§ 961-970.

Sale and lease of municipal water works see the C.J.S. title Waters § 240, also 67 C.J. p 1157 notes 11-16.

Discretion

Tex.—Guadalupe-Blanco River Authority v. Tuttle, Civ.App., 171 S.W.2d 520, error refused 174 S.W.2d 589, 141 Tex. 523.

Purchase and lease

The acquisition by a municipality of a utility system and the lease of

a portion thereof to another governmental agency may be considered together as one contract where the conveyance and lease were executed at the same time as the result of a common understanding to consummate one over-all transaction.—Guadalupe-Blanco River Authority v. City of San Antonio, 200 S.W.2d 989, 145 Tex. 611.

67. Tex.—South Texas Public Service Co. v. Jahn, Civ.App., 7 S.W.2d 942, error refused.

68. Md.—Worcester Electric Co. v. Hancock, 135 A. 832, 151 Md. 670.

Public service commission's approval of city's sale of light properties held not equivalent to necessary legislative authority.—Worcester Electric Co. v. Hancock, *supra*.

69. Md.—Worcester Electric Co. v. Hancock, *supra*.

70. Cal.—Hughes v. City of Torrance, 175 P.2d 290, 77 Cal.App.2d 272.

Okl.—Thomas v. Reid, 285 P. 92, 142 Okl. 38.

Tex.—City of San Antonio v. Guadalupe-Blanco River Authority, Civ. App., 191 S.W.2d 118, reversed on other grounds Guadalupe-Blanco River Authority, 200 S.W.2d 989, 145 Tex. 611—South Texas Public Service Co. v. Jahn, Civ.App., 7 S.W.2d 942, error refused.

Wis.—Wisconsin Gas & Electric Co. v. City of Ft. Atkinson, 213 N.W. 873, 193 Wis. 232, 52 A.L.R. 1033.

T. V. A. Act was intended to prevent disposition of electric plants acquired under the act without consent of the populace.—Cawood v. Coleman, 172 S.W.2d 548, 294 Ky. 858.

Contract held not sale or lease

Ga.—Brown v. Mayor, etc., of Fort Valley, 33 S.E.2d 705, 199 Ga. 234.

71. Wis.—Wisconsin Gas & Electric

Co. v. City of Ft. Atkinson, 213 N.W. 873, 193 Wis. 232, 52 A.L.R. 1033.

72. Ala.—Brown v. Tuskegee Light & Power Co., 168 So. 159, 232 Ala. 361.

N.M.—City of Clovis v. Southwestern Public Service Co., 161 P.2d 878, 49 N.M. 270, 161 A.L.R. 504.

Tex.—South Texas Public Service Co. v. Jahn, Civ.App., 7 S.W.2d 942, error refused.

Vote required

Statute, as far as it requires more than majority vote to authorize sale of municipal electric plant, held violative of spirit of constitution and inoperative.—Thomas v. Reid, 285 P. 92, 142 Okl. 38.

Content of election

Ga.—Byrd v. City of Alma, 143 S.E. 767, 166 Ga. 510.

Tex.—Hayter v. Baker, Civ.App., 293 S.W. 331.

Extent of authority

Where the voters of a municipality are asked to give their assent to the conveyance of a municipally-owned water and light plant, and to grant a franchise to the purchaser, under the referendum provisions of the constitution, the extent of the authority thus granted to the municipal officers is limited by the terms of the proposal and of the franchise ordinance so submitted at the election held for that purpose.—City Nat. Bank v. Kiowa, 230 P. 894, 104 Okl. 161—43 C.J. p 1348 note 41.

73. N.M.—City of Clovis v. Southwestern Public Service Co., 161 P.2d 878, 49 N.M. 270, 161 A.L.R. 504.

Wis.—Wisconsin Gas & Electric Co. v. City of Ft. Atkinson, 213 N.W. 873, 193 Wis. 232, 52 A.L.R. 1033.

Notice as to disposition of proceeds not required.—Wisconsin Gas

Under some statutes, however, a sale⁷⁴ or lease⁷⁵ of utility property need not be submitted to the voters; and particular provisions requiring approval of the electors have been held to apply only to sales of the entire utility plant or system and not to sales of a small fractional part thereof,⁷⁶ or of certain machinery previously used to generate electricity,⁷⁷ or of surplus utility-owned property,⁷⁸ especially where it was not authorized to acquire such property.⁷⁹ An ordinance which orders the sale of an electric light plant purchased under statutory authority has been held not of a legislative character within the rule limiting the right of initiative and referendum to acts of such a character.⁸⁰ A proceeding to sell a utility plant ordinarily is properly initiated by resolution of the city council,⁸¹ but under some statutes enactment of an ordinance is required in order to effect a sale.⁸²

The validity of a sale by a municipality of its utility plant has been held unaffected by the fact that the sale combined both gas and electric utilities,⁸³ or that the sale of the utility plant was accompanied by a lease of realty and grant of a franchise,⁸⁴ or that additional property was included by mistake in the preliminary agreement for sale;⁸⁵ and a lease contract has been sustained as against the objection that the transaction was unconscionable⁸⁶ or was induced by alleged misrepresentations.⁸⁷ An ordinance authorizing the sale and lease of a municipal

utility plant, failing to require security, has been held cured by a contract giving the municipality security.⁸⁸

Where the municipality desires to repudiate a lease of its utility system which it regards as disadvantageous, it must surrender the entire consideration received and restore the status quo,⁸⁹ and, if it unduly delays rescission and accepts benefits after discovering an alleged fraud, a bill for cancellation will be dismissed.⁹⁰ Recovery of the plant on the ground of irregularity in the disposition thereof may be precluded where the original transfer had been beneficial to the municipal corporation, the property of the company at the time of suit had been enlarged and improved at great expense, and ownership of the corporation had been sold prior to institution of the suit.⁹¹ A board of trustees appointed by municipal ordinance to control and operate a utility system purchased by the municipality may not maintain suit challenging the validity of a contract by which the municipality leased part of the utility property to another with option to purchase.⁹² Where the remedy at law is adequate, the municipality may not enforce the contract of sale by a bill in equity.⁹³

Where a municipal corporation has leased its utility plant to another, the right to manage the leased property ordinarily is vested in the lessee.⁹⁴ The municipality is entitled under the lease only to the

& Electric Co. v. City of Ft. Atkinson, *supra*.

Notice held insufficient

Colo.—Missemer v. Town of Hugo, 1 P.2d 94, 89 Colo. 222.

74. Ga.—Byrd v. City of Alma, 143 S.E. 767, 166 Ga. 510.

Subsequent amendment

Where council of city of third class enacted ordinance effecting sale of municipal light plant and received part of purchase price, fact that before sale was entirely consummated and possession delivered statute authorizing sale was repealed and amended by requiring matter to be submitted to voters was held not to affect sale.—Bluff City v. Western Light & Power Corporation, 19 P.2d 478, 137 Kan. 169.

75. Mich.—White v. City of Grand Rapids, 244 N.W. 469, 260 Mich. 267.

Tex.—Guadalupe-Blanco River Authority v. City of San Antonio, 200 S.W.2d 989, 145 Tex. 611.

76. Ky.—Fleming - Mason Rural Electric Co-Op. Corporation v. City of Vanceburg, 166 S.W.2d 269, 292 Ky. 130.

Rural electric line

Ky.—Fleming-Mason Rural Electric

Co-Op. Corporation v. City of Vanceburg, *supra*.

77. N.C.—Mullen v. Town of Louisville, 33 S.E.2d 484, 225 N.C. 53.

78. Ky.—Fleming - Mason Rural Electric Co-Op. Corporation v. City of Vanceburg, 166 S.W.2d 269, 292 Ky. 130.

79. Ky.—Fleming - Mason Rural Electric Co-Op. Corporation v. City of Vanceburg, *supra*.

80. Okl.—Yarbrough v. Donaldson, 170 P. 1165, 67 Okl. 318.

81. Wis.—Wisconsin Gas & Electric Co. v. City of Ft. Atkinson, 213 N.W. 873, 193 Wis. 232, 52 A.L.R. 1033.

82. Ky.—Russell v. Bell, 6 S.W.2d 236, 224 Ky. 298.

83. Wis.—Wisconsin Gas & Electric Co. v. City of Ft. Atkinson, 213 N.W. 873, 193 Wis. 232, 52 A.L.R. 1033.

84. Ohio.—Stone v. Osborn, 157 N.E. 410, 24 Ohio App. 251.

85. Wis.—Wisconsin Gas & Electric Co. v. City of Ft. Atkinson, 213 N.W. 873, 193 Wis. 232, 52 A.L.R. 1033.

86. Tex.—Guadalupe-Blanco River

Authority v. City of San Antonio, 200 S.W.2d 989, 145 Tex. 611

87. Tex.—Guadalupe-Blanco River Authority v. City of San Antonio, *supra*.

88. Ohio.—Stone v. Osborn, 157 N.E. 410, 24 Ohio App. 251.

89. Tex.—Guadalupe-Blanco River Authority v. City of San Antonio, 200 S.W.2d 989, 145 Tex. 611.

90. U.S.—Kentucky - Tennessee Light & Power Co. v. City of Paris, Tenn., CCA Tenn. 48 F.2d 795, certiorari denied City of Paris, Tenn., v. Kentucky-Tennessee Light & Power Co., 52 S.Ct. 20, 284 U.S. 638, 76 L.Ed 543.

91. Ala.—Brown v. Tuskegee Light & Power Co., 168 So. 159, 232 Ala. 361.

92. Tex.—Tuttle v. Guadalupe-Blanco River Authority, 174 S.W.2d 589, 141 Tex. 523.

93. Ala.—Alabama Power Co. v. City of Eufaula, 168 So. 661, 232 Ala. 473.

94. Tex.—Guadalupe-Blanco River Authority v. City of San Antonio, 200 S.W.2d 989, 145 Tex. 611.

amount of the rental provided for, and it may not claim the profits made by the lessee in the operation of the system in addition to the rental.⁹⁵ The lessee's failure to disclose the amount received by it for an assignment of the lease does not constitute a fraud on the city where the latter has consented to the assignment and has no further interest therein.⁹⁶ A municipality leasing a transmission line to a lessee agreeing to "maintain" it has been held liable for the expense of removing and rebuilding the line on the widening of a highway.⁹⁷

§ 1832. Personal Property

A municipal corporation may have the power to lease personal property from others, and personal property owned absolutely by it may be used by the municipal authorities in their discretion in any manner which is not fraudulent or unlawful.

A statute giving a municipal corporation broad power to purchase and hold property empowers the city to lease personal property from others unless there is in the very nature of the use and control of the property an implied inhibition against a lease.⁹⁸ Personal property owned absolutely by a municipality may be used by the municipal authorities in their discretion in any manner which is not fraudulent or unlawful.⁹⁹ Authority given by an initiative and referendum amendment to refer ordinances and resolutions relating to the sale of municipal property includes personalty as well as realty.¹ A contractor granted the privilege of removing and selling or disposing of certain waste material from a plant of a city is a purchaser for value, where the agreement was entered into by the city to save the expense of removal, and the contractor made improvements and invested capital in order to enjoy the license granted;² and, where certain material removed from the plant has been deposited upon the property of the city with its consent, the

contractor does not lose title thereto by his failure to remove it from the property of the city during the life of the contract,³ but after the termination of the contract by the city he is obliged to remove the material within a reasonable time.⁴ The lessee of a city dump cannot recover damages allegedly caused by another depositing waste material on the dump where it is not shown that expense was necessarily incurred by plaintiff in the handling of such waste material, and defendant was within his rights in depositing such material without financial obligation.⁵

License to use fire alarm system. The owner and operator of an electric contrivance designed to furnish private patrons with a means of giving alarms of fire as an adjunct to the general alarm system of the city has, even though possessing the right of any citizen to send in alarms of fire, no vested right to use the appliances of the city for that purpose,⁶ and the mere fact that the city authorities have acquiesced in his act in securing the connection of his system with the city's system does not create a license in his favor.⁷

Gas leases. A contract whereby a city assigned to a private company a half interest in gas leases held by it and in conjunction with the company drilled producing gas wells thereon has been held ultra vires,⁸ and such assignments may be canceled where the municipality has offered to do all that which, in equity and good conscience, was required to be done as a condition precedent to cancellation.⁹

Sale of cause of action. Under a charter empowering the common council to manage and control the finances of the city and all city property, it is within the power of the council to sell a cause of action acquired by compensation of an injured workman.¹⁰

95. Tex.—Guadalupe-Blanco River Authority v. City of San Antonio, *supra*.

96. Tex.—Guadalupe-Blanco River Authority v. City of San Antonio, *supra*.

97. Kan.—Electric Service Co. v. City of Mullinville, 262 P. 536, 125 Kan. 70.

98. Miss.—American - LaFrance v. City of Philadelphia, 184 So. 620, 183 Miss. 207.

Lease of property to municipality generally see *supra* § 954.

99. Pa.—Morton v. Philadelphia, 4 Pa. Dist. 523.

44 C.J. p 1107 note 91.

1. Ark.—Smith v. Lawson, 43 S.W. 2d 544, 184 Ark. 825.

2. Ga.—Lederle v. Atlanta, 138 S.E. 910, 164 Ga. 440.

44 C.J. p 1107 note 92.

3. Ga.—Lederle v. Atlanta, *supra*.

4. Ga.—Lederle v. Atlanta, *supra*.

5. Utah.—Associated Scavengers v. Illingsworth, 74 P.2d 655, 93 Utah 504.

6. Or.—National Fire Alarm Co. v. Portland, 117 P. 285, 59 Or. 409.

7. Or.—National Fire Alarm Co. v. Portland, *supra*.

8. Miss.—Bishopric v. City of Jackson, 18 So.2d 776, 198 Miss. 720, certiorari denied 65 S.Ct. 57, 323 U.S. 725, 89 L.Ed. 582.

9. Miss.—Bishopric v. City of Jackson, *supra*.

10. Wis.—Saudek v. Milwaukee Electric R., etc., Co., 157 N.W. 579, 163 Wis. 109.

XIX. FISCAL MANAGEMENT, PUBLIC DEBT, SECURITIES, AND TAXATION

A. POWER TO INCUR INDEBTEDNESS AND EXPENDITURE

1. IN GENERAL

§ 1833. In General

A municipal corporation may incur indebtedness or obligations when and only when the power to do so is expressly conferred by constitution, statute, or charter, or is necessarily implied from the powers expressly granted, or is essential to the objects for which the corporation was created. Subject to constitutional restrictions, the legislature may confer on, or withhold from, municipal corporations any fiscal power or prescribe the manner of its exercise.

A municipal corporation may incur indebtedness or create obligations binding on it when and only when the power to do so is expressly conferred on it by constitution, statute, or charter,¹¹ or is necessarily or reasonably implied from the powers

expressly granted,¹² or is essential to the objects for which the corporation was created.¹³ Some authorities state that the power to incur debts is not an incident of local municipal government¹⁴ and is not recognized as a right derived from the common law,¹⁵ but is one that can be exercised by a municipality only when conferred on it by charter or legislative act.¹⁶

Subject to constitutional provisions and limitations,¹⁷ the legislature may by charter or general law confer on or withhold from municipal corporations any fiscal power,¹⁸ and may prescribe the manner and conditions of its exercise;¹⁹ but it

11. U.S.—North Miami, Fla., v. Meredith, C.C.A.Fla., 121 F.2d 279, certiorari denied 62 S.Ct. 138, 314 U.S. 674, 86 L.Ed 539.

Ala.—Alabama College v. Harman, 175 So. 394, 234 Ala. 446.

Ga.—Miller v. City of Cornelia, 4 S.E.2d 568, 188 Ga. 674—City of Eastman v. Georgia Power Co., 25 S.E.2d 47, 69 Ga App. 182.

Ill.—People ex rel. Lipaky v. City of Chicago, 85 N.E.2d 667, 403 Ill. 134.

Iowa.—Brodkey v. Sioux City, 296 N.W. 352, 229 Iowa 1291.

Mass.—Whiting v. Mayor of Holyoke, 172 N.E. 338, 272 Mass. 116. 44 C.J. p 1107 note 98.

"Indebtedness" defined.

(1) As applied to municipal corporations, the term "indebtedness" means what the corporation owes, irrespective of the demands it may hold against others.—Jordan v. Andrus, 69 P. 118, 27 Mont. 22, 26.

(2) "Indebtedness" has also been defined as "a liability voluntarily incurred by the city by express contract, and which it is bound to pay in money"—Overall v. Madisonville, 102 S.W. 278, 282, 125 Ky. 684, 12 L.R.A.,N.S., 433.

(3) Other definitions.

W.Va.—Spilman v. Parkersburg, 14 S.E. 279, 35 W.Va. 605.

31 C.J. p 413 notes 29, 30.

General-welfare provision of charter does not confer on municipality power to incur debts.—Miller v. City of Cornelia, 4 S.E.2d 568, 188 Ga. 674.

12. Ariz.—City of Phoenix v. Michael, 148 P.2d 353, 61 Ariz. 238.

Kan.—State ex rel. v. City of Pratt, 85 P.2d 10, 148 Kan. 885.

Mass.—Whiting v. Mayor of Holyoke, 172 N.E. 338, 272 Mass. 116.

Ohio—City of Cleveland v. Artl, 23 N.E.2d 525, 62 Ohio App. 210.

44 C.J. p 1107 note 99.

13. Cal.—Frisbee v. O'Connor, 7 P. 2d 316, 119 Cal.App. 601.

44 C.J. p 1107 note 1.

14. Ill.—Ziebell v. Town of Bremen, 39 N.E.2d 725, 313 Ill.App. 266.

Mass.—Whiting v. Mayor of Holyoke, 172 N.E. 338, 272 Mass. 116.

44 C.J. p 1107 note 2.

15. Conn.—State v. Williams, 35 A. 24, 421, 68 Conn. 131, 48 L.R.A. 465.

16. Ill.—Merchants' Loan & Trust Co. v. Chicago, 105 N.E. 726, 264 Ill. 76.

44 C.J. p 1107 note 3.

17. Pa.—Atkins v. City of Philadelphia, 14 A.2d 423, 339 Pa. 345.

44 C.J. p 1107 note 4.

Scope of restrictions

It is competent for the people of a state, in their constitution, to place what emphasis they please on restrictions in the creation of debt and in doing so to distinguish between debts differing in kind and necessity.—Twining v. City of Wilmington, 200 S.E. 416, 214 N.C. 655.

Statute held invalid

Statute authorizing court to appoint administrator for insolvent municipal corporation with authority, subject to direction of court making appointment, to control fiscal affairs of municipal corporation was invalid since it imposed legislative and executive functions on judiciary.—City of Enterprise v. State, 69 P. 2d 953, 156 Or. 623.

Constitutional provision operating as limitation

Constitution authorizing municipality to incur indebtedness equaling a designated per cent of valuation

does not, without statute, empower municipality to incur such indebtedness, such authorization operating merely as a limitation.—Oconto Co. v. Town of Townsend, 246 N.W. 410, 210 Wis. 85.

Constitutional provision held not to operate as limitation

Utah—Wadsworth v. Santaquin City, 28 P.2d 161, 83 Utah 321.

18. Ala.—Bankhead v. Town of Suligent, 155 So. 869, 229 Ala. 45, 96 A.L.R. 1381.

Pa.—Cummings v. City of Scranton, 36 A.2d 473, 348 Pa. 538—Atkins v. City of Philadelphia, 14 A.2d 423, 339 Pa. 345.

S.C.—Kalber v. Stokes, 9 S.E.2d 785, 194 S.C. 339.

Wis.—Oconto Co. v. Town of Townsend, 246 N.W. 410, 210 Wis. 85.

44 C.J. p 1107 note 5.

Legislature as source of power

Power to incur indebtedness comes from legislature, not constitution, and constitutional mandate to levy sufficient tax when incurring indebtedness is merely regulatory.—Ohlinger v. Maiden Creek Tp., Berks County, 167 A. 882, 312 Pa. 289, 90 A.L.R. 1227.

Coordination and standardization of laws

The purpose of the local finance law was to coordinate and standardize all the laws relating to or governing the financial affairs and management of all municipal corporations of the state.—Glesen v. Town Board of Richford, 81 N.Y.S. 2d 236, 192 Misc. 427.

19. Me.—Kelley v. Brunswick School Dist., 187 A. 703, 134 Me. 414.

N.Y.—Scarborough Properties Corporation v. Village of Briarcliff

cannot, on the one hand, force a municipality to repudiate existing obligations lawfully incurred²⁰ or diminish its power to meet such obligations;²¹ nor can it, on the other hand, authorize or compel a municipality to incur debts or make expenditures in violation of constitutional restrictions.²² Also, the legislature may limit the power of municipalities to incur debts,²³ some constitutional provisions expressly authorizing²⁴ or requiring²⁵ it to do so. A constitutional limitation on the powers of municipal corporations to contract debts does not preclude the legislature from prescribing other limitations,²⁶ unless the limitations prescribed by the legislature conflict with those prescribed by the constitution;²⁷ but the legislature cannot place limitations on a power conferred on municipalities by

the constitution,²⁸ except to the extent authorized by other provisions of the constitution.²⁹

In some states the policy of the law, as manifested by constitutional or statutory provisions, or both, is to restrict the contracting of debts by municipal corporations;³⁰ and, generally speaking, a municipality is without power to create, incur, or contract an indebtedness in excess or contravention of limitations prescribed by constitution, statute, or charter.³¹ On the other hand, where particular expenditures are within the powers of a municipality, the court will not, in the absence of fraud, inquire into the motives which actuated the city authorities,³² or substitute its judgment for that of the city authorities as to the wisdom of the expenditure.³³ It has been both affirmed³⁴ and de-

Manor, 16 N.E.2d 369, 278 N.Y. 370.

N.C.—Valleytown Tp. Highway Commn. v. Webb, 68 S.E. 211, 152 N.C. 710.

44 C.J. p 1107 note 6.

Statutes held valid

Ill.—People v. Kelly, 192 N.E. 372, 357 Ill. 408.

Iowa.—Pennington v. Town of Sumner, 270 N.W. 629, 222 Iowa 1005, 109 A.L.R. 355.

La.—National Bank of Commerce in New Orleans v. Board of Supervisors of La. State University and Agricultural and Mechanical College, 20 So.2d 264, 206 La. 913.

Mass.—Allydonn Realty Corporation v. Holyoke Housing Authority, 23 N.E.2d 665, 304 Mass. 288.

Minn.—Tetzlaff v. Village of Chisholm, 227 N.W. 202, 178 Minn. 342.

N.Y.—McKinnon v. Delaney, 27 N.Y.S.2d 713, affirmed 34 N.Y.S.2d 399, 263 App.Div. 986, affirmed 45 N.E.2d 166, 289 N.Y. 656, motion granted 49 N.E.2d 625, 290 N.Y. 669.

Pa.—Williams v. Samuel, 2 A.2d 834, 332 Pa. 265.

R.I.—Opinion to the Governor, 63 A.2d 724.

20. Kan.—Kansas City v. Wyandotte Gas Co., 61 P. 317, 9 Kan. App. 325.

44 C.J. p 1107 note 7.

21. Ill.—Geweke v. Village of Niles, 14 N.E.2d 482, 368 Ill. 463, 117 A.L.R. 262.

22. N.C.—Brown v. Board of Com'rs of Richmond County, 28 S.E.2d 104, 223 N.C. 744.

Okl.—Burch v. City of Pauls Valley, 201 P.2d 247.

23. N.Y.—Scarborough Properties Corporation v. Village of Briarcliff Manor, 16 N.E.2d 369, 278 N.Y. 370.

N.C.—Wharton v. Greensboro, 59 S.E. 1043, 146 N.C. 356.

Statute held not to limit power

Ill.—Euziere v. Highway Com'r of Town of Rockville, 178 N.E. 397, 346 Ill. 131.

24. Ohio.—State v. Weller, 128 N.E. 88, 101 Ohio St. 123.

44 C.J. p 1107 note 9.

25. Or.—Murphy v. Salem, 87 P. 532, 49 Or. 54.

44 C.J. p 1107 note 10.

26. Wyo.—Whipps v. Town of Greybull, 109 P.2d 805, 56 Wyo. 355, 146 A.L.R. 596.

44 C.J. p 1108 note 11.

27. Ky.—Harris v. Morganfield, 257 S.W. 1032, 201 Ky. 588—Winchester v. Nelson, 193 S.W. 1040, 175 Ky. 63.

28. Mich.—Michigan United Light, etc., Co. v. Hart, 209 N.W. 937, 235 Mich. 682.

44 C.J. p 1108 note 13.

29. Ohio.—State v. Weller, 128 N.E. 88, 101 Ohio St. 123.

30. Pa.—Kratz v. City of Allentown, 155 A. 116, 304 Pa. 51.

Tex.—T. & N. O. R. R. Co. v. Galveston County, 169 S.W.2d 713, 141 Tex. 34.

44 C.J. p 1108 note 15.

Purposes of restrictions

(1) Constitutional and statutory restraints on the power of municipal corporations to incur indebtedness and issue bonds are intended for the protection of minorities, for the protection of posterity, and for the protection of majorities against their own improvidence, and it is the court's duty to enforce them.—Raynor v. King County, 97 P.2d 696, 2 Wash.2d 199.

(2) The purpose of constitutional provision prohibiting a city from borrowing money, except by act of legislature, save in cases of emergency, is to enable the people themselves to maintain a check on the financial policies of the public officials, and thus protect themselves

and their descendants against what they consider an unwarranted and unnecessary increase of the public debt.—Mayor and City Council of Baltimore v. Hofrichter, 11 A.2d 375, 178 Md. 91.

Requirement of legislative authorization

Md.—Mayor and City Council of Baltimore v. Hofrichter, supra.

31. U.S.—Schofield Engineering Co. v. City of Danville, D.C.Va., 35 F. Supp. 668, affirmed, C.C.A., 126 F.2d 942.

Iowa.—Brodkey v. Sioux City, 296 N.W. 352, 229 Iowa 1291.

N.M.—Henning v. Town of Hot Springs, 102 P.2d 25, 44 N.M. 321.

N.Y.—Albany Port District Commission v. National Commercial Bank & Trust Co. of Albany, 21 N.Y.S.2d 267, 259 App.Div. 1115, affirmed 28 N.E.2d 977, 283 N.Y. 768—People v. City of Schenectady, 60 N.Y.S.2d 911, 186 Misc 385.

Pa.—Zimmerman v. Susquehanna Tp. Com.Pl., 59 Dauph Co. 359—Community Welfare Chest v. City of Easton, Com.Pl., 87 Pittsb Leg. J. 372, 31 Mun.L.R. 20, 27 North. Co. 26.

44 C.J. p 1108 note 16.

Transactions held not to create debt or involve expenditure

Ohio.—City of Youngstown v. Park and Recreation Commission, 39 N.E.2d 214, 68 Ohio App. 104.

W.Va.—Chapman v. Huntington, W.Va. Housing Authority, 3 S.E.2d 502, 121 W.Va. 319.

32. Wash.—Clise v. City of Seattle, 280 P. 80, 153 Wash. 666.

33. U.S.—J. B. McCrary Co. v. Town of Winnfield, D.C.La., 40 F. Supp. 427.

Kan.—State ex rel. v. City of Pratt, 85 P.2d 10, 148 Kan. 885.

Wash.—Clise v. City of Seattle, 280 P. 80, 153 Wash. 666.

34. Ky.—Barrow v. Bradley, 227 S.W. 1016, 190 Ky. 480.

nied³⁵ that a limitation on a municipal power of taxation operates as a limitation on the power of a municipality to contract indebtedness. At any rate, municipal powers to incur a debt and to levy taxes for its payment are closely interwoven;³⁶ indeed, it has been held that the power to create a debt to be paid by taxation is the same as the power to tax,³⁷ and the creation of such a debt, the same in effect as the imposition of the tax itself.³⁸ The rules governing the construction of statutes generally are applicable in construing statutes and charter provisions dealing with municipal indebtedness.³⁹ It has been held that a statute prohibiting and penalizing public officials and others for reckless disregard of statutes enacted to safeguard public money should be rigidly enforced.⁴⁰

Limitation as to time for which indebtedness may be created. A constitutional provision, authorizing municipalities to contract indebtedness only for the period of probable usefulness of the object or purpose for which such indebtedness is contracted, includes debts contracted for relief and

other proper purposes, which do not involve the construction or acquisition of a physical structure.⁴¹ In order to determine the validity of an indebtedness under such a provision, there must be some basis for a determination that the object or purpose for which the indebtedness is incurred will probably be useful in the future as well as in the immediate present.⁴² The legislature has power to determine the period of probable usefulness of the purpose for which an indebtedness is to be contracted;⁴³ and a transaction whereby the municipality contracts an indebtedness for a longer period than that declared by the legislature to be the period of probable usefulness of the particular purpose involved is invalid.⁴⁴ Such a provision applies only to an indebtedness "contracted for," that is to say, an indebtedness voluntarily assumed and payable at a stipulated time in the future in accordance with stipulated terms.⁴⁵ However, while a judgment for a sum of money does not constitute an indebtedness "contracted,"⁴⁶ such a provision has been held not to prohibit a proposed bond

35. U.S.—*Slocum v. North Platte*, Neb., 192 F. 252, 112 C.C.A. 510. 44 C.J. p 1108 note 18.

36. Ohio—*State v. Bish*, 135 N.E. 816, 104 Ohio St. 206.

Political subdivisions covering same territory

There is no inherent unwisdom in statute limiting indebtedness of political divisions covering same territory, each possessing power to tax same property.—*City of Stamford v. Town of Stamford*, 141 A. 891, 107 Conn. 596.

37. Same test as to validity of power

The power to create a debt to be discharged by taxation is the same as the power to impose a tax and the validity of such power must be judged by the same constitutional limitations as are applicable in determining validity of power to impose a tax.

Ill.—*People ex rel. Gallenbach v. Franklin*, 58 N.E.2d 555, 388 Ill. 560.

N.C.—*Green v. Kitchin*, 50 S.E.2d 545, 229 N.C. 450.

38. Ill.—*People ex rel. Sanitary Dist. of Chicago v. Schlaeger*, 63 N.E.2d 382, 391 Ill. 314.

Iowa.—*Corpus Juris cited in Trepp v. Independent School Dist. of Pocahontas*, 240 N.W. 247, 251, 213 Iowa 944.

39. U.S.—*Brownell v. City of St. Petersburg*, D.C.Fla., 38 F.Supp. 1003, reversed on other grounds, C.C.A., *Brownell v. City of St. Petersburg*, Fla., 128 F.2d 721.

Ariz.—*City of Tucson v. Tucson*

Sunshine Climate Club, 164 P.2d 598, 64 Ariz. 1.

Minn.—*Phelps v. City of Minneapolis*, 219 N.W. 872, 174 Minn. 509.

Mo.—*State ex rel. City of Chillicothe v. Wilder*, 98 S.W. 465, 200 Mo. 97.

N.Y.—*People ex rel. Schieffelin v. Walker*, 160 N.E. 384, 247 N.Y. 320, reargument denied 161 N.E. 191, 247 N.Y. 584—*Balducci v. Strough*, 239 N.Y.S. 611, 135 Misc. 346.

Pa.—*Smiley v. Roberts*, 48 Pa. Dist. & Co. 238, 36 Mun.L.R. 48.

S.C.—*Brailsford v. Walker*, 31 S.E. 2d 385, 205 S.C. 228.

Vt.—*E. B. & A. C. Whiting Co. v. City of Burlington*, 175 A. 35, 106 Vt. 446.

44 C.J. p 1108 note 21.

Powers held subject to strict construction

Cal.—*Alameda County v. Ross*, 89 P. 2d 460, 32 Cal.App.2d 135.

Ky.—*Jefferson County Fiscal Court v. Jefferson County ex rel. Grauman*, 128 S.W.2d 230, 278 Ky. 68.

Liberal construction

Constitutional provision relating to debts of city should be interpreted to give municipal authorities widest consistent measure of freedom.—*Thom v. City of Baltimore*, 141 A. 125, 154 Md. 273.

Construction with respect to other statutes

Cal.—*Holman v. Santa Cruz County*, App., 205 P.2d 767.

Del.—*Town of Seaford v. Eastern Shore Public Service Co.*, 24 A.2d 436, 2 Terry 438.

Ind.—*City of Gary v. Cosgrove*, 6 N.E.2d 940, 211 Ind. 294.

Kan.—*City of Council Grove v. Schmidt*, 127 P.2d 250, 155 Kan. 515.

Mass.—*Mayor of Haverhill v. Water Com'rs of Haverhill*, 48 N.E.2d 188, 320 Mass. 63.

Mont.—*Hendrickson v. Powell County*, 112 P.2d 199, 112 Mont. 1.

Statute excepting rights expressly granted

Statute relating to municipal indebtedness excepted from its operation only such rights as were expressly granted to municipal corporation by its charter, or by special act of legislature, and not implied rights.—*E. B. & A. C. Whiting Co. v. City of Burlington*, 175 A. 35, 106 Vt. 446.

40. Okl.—*State v. Kimbrell*, 5 P.2d 366, 152 Okl. 239.

41. N.Y.—*Cherey v. City of Long Beach*, 26 N.E.2d 945, 282 N.Y. 382, 127 A.L.R. 1210.

Purpose of indebtedness or expenditure generally see *infra* §§ 1835–1845.

42. N.Y.—*Cherey v. City of Long Beach*, *supra*.

43. N.Y.—*Cherey v. City of Long Beach*, 17 N.Y.S.2d 541, 258 App. Div. 986, affirmed 26 N.E.2d 945, 282 N.Y. 382, 127 A.L.R. 1210.

44. N.Y.—*Smull v. Delaney*, 25 N.Y.S.2d 387, 175 Misc. 795.

45. N.Y.—*Cherey v. City of Long Beach*, 26 N.E.2d 945, 282 N.Y. 382, 127 A.L.R. 1210.

46. N.Y.—*Cherey v. City of Long Beach*, *supra*.

issue for the purpose of paying judgments recovered against the municipality, where the bonds are payable within the period in which the object for which they are issued continues to serve a useful purpose.⁴⁷

§ 1834. Effect of Invalidity of Debt or Expenditure

Unauthorized debts and expenditures do not ordinarily create any municipal liability, although, in the case of an unauthorized loan, the proceeds of which are applied to a proper purpose, recovery may be had on principles of equity for money had and received. Invalid debts or expenditures may in a proper case be validated by ratification or curative legislation.

Unauthorized debts and expenditures do not as a general rule create municipal liability.⁴⁸ A contract creating an unauthorized or prohibited indebtedness is void or at least unenforceable,⁴⁹ and a municipal corporation is ordinarily not liable on an implied contract involving an expenditure exceeding statutory limitations;⁵⁰ it is sometimes,⁵¹ although not always,⁵² held that the municipality is not liable on a quantum meruit. Unless authorized by valid charter or statutory provision to pay debts which constitute moral obligations on its part, as discussed *infra* § 1835, a municipal corporation is without power to pay claims or debts which are not its legal obligations;⁵³ and, when the money of a municipality is paid out on a contract or

for an indebtedness which the municipality had no authority to make or incur, it may be recovered back.⁵⁴ A judgment against a municipality on a contract illegal and void for lack of any appropriation therefor is void;⁵⁵ and parties who connive with municipal officials to procure such a fraudulent judgment are liable to innocent persons injured thereby or to the municipality.⁵⁶ Warrants issued in payment of an indebtedness incurred in excess of the statutory or constitutional limitation on indebtedness are unenforceable;⁵⁷ but, where the limitation was not exceeded at the time an indebtedness was incurred, the issuance of a warrant in payment of the indebtedness is authorized, even though between the time of the incurring of the indebtedness and the issuance of the warrant other indebtedness exceeding the limit had been incurred.⁵⁸ Notwithstanding a municipal purchase of property subject to a mortgage is invalid as increasing the indebtedness of the municipality beyond the constitutional limit, as discussed *infra* § 1852, the equities of the municipality in the property will be protected on a foreclosure of the mortgage.⁵⁹

Unauthorized loan. When money is borrowed by a municipal corporation without authority of law, but is used and applied for a legitimate purpose, the corporation is liable on principles of equity and justice, as on an implied assumpsit, for money had and received.⁶⁰ However, this principle does

47. N.Y.—*Cherey v. City of Long Beach*, *supra*.

Statutory declaration of period of usefulness

The statute, enacted in compliance with the constitutional provision, determining that period of probable usefulness of an indebtedness for payment of judgments against municipality not related to capital account is five years, constitutes a legislative construction that the constitution authorizes a municipality to contract an indebtedness payable at later date for purpose of funding judgments, where such funding would serve a continuing useful purpose.—*Cherey v. City of Long Beach*, *supra*.

BASIS of determining period of usefulness

When applied to payment of indebtedness represented by judgments against a municipal corporation, the "probable period of usefulness" is to be construed as the period over which payment of the judgments in annual installments can be spread without inflicting undue hardship on the taxpayers.—*Cherey v. City of Long Beach*, 17 N.Y.S.2d 541, 258 App.Div. 986, affirmed 28 N.E.2d 945, 282 N.Y. 382, 127 A.L.R. 1210.

48. Ga.—*City of Eastman v. Georgia Power Co.*, 25 S.E.2d 47, 69 Ga. App. 182.

44 C.J. p 1146 note 43.

Waiver

Substantive legal rights of municipalities cannot be waived so as to create unauthorized and illegal indebtedness against taxpayers.—*State v. Kimbrell*, 5 P.2d 366, 152 Okl. 239.

49. Ga.—*Marletta Lights, etc., Board v. Niller*, 116 S.E. 335, 115 Ga. 296.

44 C.J. p 1146 note 45.

50. Pa.—*Willis Bancroft, Inc., v. Millcreek Tp.*, 6 A.2d 916, 335 Pa. 529.

51. U.S.—*A. L. Greenburg Iron Co. v. Abbeville, C.C.A.Ga.*, 2 F.2d 559. 44 C.J. p 1146 note 46.

52. Ga.—*City of Eastman v. Georgia Power Co.*, 25 S.E.2d 47, 69 Ga. App. 182.

Pa.—*Willis Bancroft, Inc., v. Millcreek Tp.*, 6 A.2d 916, 335 Pa. 529. 44 C.J. p 1146 note 47.

53. Conn.—*Lambert v. City of New Haven*, 30 A.2d 923, 129 Conn. 647. 44 C.J. p 1146 note 49.

54. Kan.—*Corpus Juris cited in J. D. Adams Co. v. Dor Tp., Smith*

County, 113 P.2d 138, 141, 153 Kan. 623.

N.Y.—*Broschart v. City of New York*, 3 N.Y.S.2d 18, 166 Misc. 515, affirmed 7 N.Y.S.2d 646, 255 App. Div. 776.

44 C.J. p 1146 note 50.

55. Okl.—*In re Protest of Chicago, R. I. & P. Ry. Co.*, 289 P. 258, 143 Okl. 287.

56. Okl.—*State v. Kimbrell*, 5 P.2d 366, 152 Okl. 239.

57. Iowa.—*Corpus Juris cited in Trepp v. Independent School Dist. of Pocahontas*, 240 N.W. 247, 252, 213 Iowa 944.

44 C.J. p 1146 note 51.

Warrants generally see *infra* §§ 1892-1901.

58. Iowa.—*Phillips v. Reed*, 80 N.W. 347, 109 Iowa 188.

44 C.J. p 1146 note 52.

59. Ill.—*Lewis v. Clay City Electric Light, etc., Co.*, 184 Ill.App. 208.

60. Ariz.—*Corpus Juris quoted in Palmcroft Development Co. v. City of Phoenix*, 49 P.2d 626, 631, 46 Ariz. 200, 103 A.L.R. 802, modified on other grounds 51 P.2d 921, 46 Ariz. 400, 103 A.L.R. 811.

Fla.—*Corpus Juris quoted in Board of Public Instruction for Wash-*

not apply where there is an express prohibition of the power to borrow money,⁶¹ or where the borrowed money is not used for a public purpose or is used for a prohibited purpose.⁶²

Ratification. Municipal indebtedness in excess of a constitutional limitation cannot be made good by ratification,⁶³ unless, at the time of ratification, the indebtedness does not exceed the limit;⁶⁴ nor can a special indebtedness for street improvements incurred by a municipality, whose incorporation was void and which could not in any event have been a liability against the general taxpayers, be so ratified by the corporation, after it has been legally created, as to convert the liability to a general one enforceable against all the taxpayers;⁶⁵ but an expenditure made in excess of a limitation imposed by a municipal ordinance may be ratified by the municipal council.⁶⁶ Where it is provided by statute that no contract shall be made or expense in-

curred by a municipality, unless an appropriation therefor shall have been previously made, a contract or expenditure in violation of this provision can be ratified only by making an appropriation expressly for its performance.⁶⁷ Ratification of a payment which is not illegal in the sense of being ultra vires precludes the municipality from recovering back the money paid.⁶⁸

Curative legislation. A municipal contract, expenditure, or appropriation invalid when made may be cured by subsequent legislation,⁶⁹ and payment thereof authorized⁷⁰ by subsequent legislation, or by subsequent legislation coupled with ratification of the indebtedness by the electors,⁷¹ unless the invalidity results from a violation of a constitutional inhibition,⁷² and even in that case it may be validated by a constitutional amendment⁷³ and enabling act.⁷⁴

ington County v. Cooley, 175 So. 219, 221, 128 Fla. 591—**Corpus Juris cited in** Logan v. Board of Public Instruction for Polk County, 158 So. 720, 725, 118 Fla. 184—**Corpus Juris quoted in** Johnson v. Town of Anthony, 156 So. 732, 734, 116 Fla. 302.

Pa.—Union Nat. Bank v. Manchester Borough, 13 Pa. Dist. & Co. 117, 43 York Leg. Rec. 62.

44 C.J. p 1146 note 56.

Borrowing generally see *infra* § 1869.

Profit and value to city

Question whether money advanced to city for public improvement can be recovered as for money had and received is not to be determined by whether the expenditure was profitable to the city, and it is not to be measured by the money or use value to the city of the improvement but by its cost, provided only the cost is reasonable.—Brownell v. City of St. Petersburg, C.C.A.Fla., 128 F.2d 721.

61. U.S.—Town of Belleair v. Olds, C.C.A.Fla., 127 F.2d 838, certiorari denied 63 S.Ct. 36, 317 U.S. 644, 87 L.Ed. 519.

Ala.—Allen v. La Fayette, 8 So. 30, 89 Ala. 641, 9 L.R.A. 497.

Ariz.—**Corpus Juris quoted in** Palmcroft Development Co. v. City of Phoenix, 49 P.2d 626, 631, 46 Ariz. 200, 103 A.L.R. 802, modified on other grounds 51 P.2d 921, 46 Ariz. 400, 103 A.L.R. 811.

Fla.—**Corpus Juris quoted in** Board of Public Instruction for Washington County v. Cooley, 175 So. 219, 221, 128 Fla. 591—**Corpus Juris cited in** Logan v. Board of Public Instruction for Polk County, 158 So. 720, 725, 118 Fla. 184—**Johnson v. Town of Anthony**, 156 So. 732, 116 Fla. 302.

62. U.S.—Brownell v. City of St. Petersburg, C.C.A.Fla., 128 F.2d 721.

63. Mont.—State v. Helena, 63 P. 99, 24 Mont. 521, 81 Am.S.R. 453, 55 L.R.A. 336.

44 C.J. p 1146 note 59.

64. Wash.—Pilling v. Everett, 120 P. 873, 67 Wash. 109.

65. Wash.—State v. Moss, 86 P. 1129, 44 Wash. 91, followed in State v. Blaine, 87 P. 124, 44 Wash. 218.

66. Pa.—Sillsby Mfg. Co. v. Allentown, 26 A. 646, 153 Pa. 319.

67. Neb.—Gutta-Percha, etc., Mfg. Co. v. Ogalalla, 59 N.W. 513, 40 Neb. 775, 42 Am.S.R. 996.

N.J.—**Corpus Juris cited in** City Affairs Committee of Jersey City v. Board of Comrs of Jersey City, 46 A.2d 425, 428, 134 N.J.Law 180.

Expenditure held not ratified

Majority vote of taxpaying voters of city authorizing expenditure of public funds in improving realty obtained by city did not constitute ratification of expenditure of public funds for purchase of such realty for park or airport where expenditure was illegal because of lack of appropriation therefor.—Dowler v. State ex rel. Prunty, 66 P.2d 1081, 179 Okl. 532.

68. Wash.—Tacoma v. Leighton, 153 P. 362, 88 Wash. 606.

44 C.J. p 1146 note 65.

69. Mont.—Weber v. City of Helena, 297 P. 455, 89 Mont. 109.

44 C.J. p 1146 note 66.

70. U.S.—City of New Orleans v. Clark, La., 95 U.S. 644, 24 L.Ed. 521.

43 C.J. p 280 note 55.

Statute construed

(1) Statute "authorizing and empowering" payment of municipal indebtedness incurred in good faith and for value prior to a certain date in violation of state budget law is mandatory and not directory.—Palmcroft Development Co. v. City of Phoenix, 49 P.2d 626, 46 Ariz. 200, 103 A.L.R. 802, modified on other grounds 51 P.2d 921, 46 Ariz. 400, 103 A.L.R. 802.

(2) It was the legislative intent to validate all claims incurred before the statutory date, whether or not indebtedness was also incurred in violation of other provisions of law.—Palmcroft Development Co. v. City of Phoenix, *supra*.

71. U.S.—Santa Cruz v. Wykes, Cal., 202 F. 357, 120 C.C.A. 485.

72. Okl.—Dowler v. State ex rel. Prunty, 66 P.2d 1081, 179 Okl. 532, 44 C.J. p 1147 note 68.

Jurisdictional "defects" and "requirements" distinguished

Jurisdictional "defects" with respect to incurring of municipal expenses refers to the failure on the part of officers to perform acts which are jurisdictional as to them but not as to the legislature, and such defects may be cured by a curative or validating act; but jurisdictional "requirements" refers to acts which are jurisdictional to the legislature itself because they are prescribed by the constitution, and failure to comply with such requirements cannot be cured by legislative acts.—Weber v. City of Helena, 297 P. 455, 89 Mont. 109.

73. S.C.—Lucas v. Florence, 87 S.E. 996, 103 S.C. 169.

74. S.C.—Lucas v. Florence, *supra*.

2. PURPOSE OF INDEBTEDNESS OR EXPENDITURE

§ 1835. In General

- a. General rules
- b. Public or private purposes
- c. Moral obligations

a. General Rules

Municipal corporations may expend money or incur indebtedness only for purposes authorized by law, but within constitutional and statutory limitations each municipality may determine for itself the portion of its debt incurring power to be used for any authorized purpose.

A municipal council cannot expend public funds for any purpose it may desire;⁷⁵ in expending money municipal corporations are rigidly restricted to the purposes authorized by law⁷⁶ expressly or

by implication,⁷⁷ and, where authority is expressly delegated to a municipality to raise and apply money for a special purpose, such authority must be strictly construed,⁷⁸ and the purpose strictly followed;⁷⁹ but within constitutional and statutory limitations each municipality is permitted⁸⁰ and required⁸¹ to determine for itself the portion of its debt incurring power which shall be used for any authorized municipal purpose, and, in the absence of any reason therefor, there is no presumption that funds will be used for an illegal purpose.⁸² Under a statute to such effect, a municipality is permitted and required to incur liabilities to meet mandatory expenditures required by law;⁸³

75. Ohio.—State v. Semple, 148 N.E. 342, 112 Ohio St. 559.

76. U.S.—Hoskins v. City of Orlando, C.C.A.Fla., 51 F.2d 901.

Ariz.—City of Phoenix v. Michael, 148 P.2d 353, 61 Ariz. 238.

Ga.—Miller v. City of Cornelia, 4 S.E.2d 568, 188 Ga. 674.

Idaho.—City of Nampa v. Kibler, 113 P.2d 411, 62 Idaho 511.

Ill.—People ex rel. Schlaeger v. Bunge Bros. Coal Co., 64 N.E.2d 365, 392 Ill. 153—Illinois Anti-Vivisection Soc. v. City of Chicago, 7 N.E.2d 379, 289 Ill.App. 391.

Ky.—Caudill v. Pansion, 24 S.W.2d 938, 233 Ky. 12.

Mass.—Burnham v. Mayor and Aldermen of Beverly, 35 N.E.2d 242, 309 Mass. 388, 135 A.L.R. 750.

N.Y.—Union Free School Dist. No. 3 of Town of Rye, Westchester County, v. Town of Rye, 21 N.E.2d 681, 280 N.Y. 469.

N.C.—Brown v. Board of Com'rs of Richmond County, 28 S.E.2d 104, 223 N.C. 744.

Pa.—Georges Tp. v. Union Trust Co. of Uniontown, 143 A. 10, 293 Pa. 364—Community Welfare Chest v. City of Easton, Com.Pl., 87 Pittsb. Leg.J. 372, 31 Mun.L.R. 20, 27 North.Co. 26.

Tex.—Anderson v. City of San Antonio, 67 S.W.2d 1036, 123 Tex. 163—Moreland v. City of San Antonio, Civ.App., 116 S.W.2d 823, error refused.

Utah.—American Petroleum Co. v. Ogden City, 62 P.2d 557, 90 Utah 465.

44 C.J. p 1108 note 28.

77. U.S.—Hoskins v. City of Orlando, C.C.A.Fla., 51 F.2d 901.

Ariz.—City of Glendale v. White, 194 P.2d 435, 67 Ariz. 231.

N.C.—Green v. Kitchin, 50 S.E.2d 545, 229 N.C. 450.

Ascertainment of authorized purpose

Purpose for which money borrowed by municipality is to be used or debt created may be ascertained

from authorizing acts or duty enjoined or necessarily implied therefrom.—Georges Tp. v. Union Trust Co. of Uniontown, 143 A. 10, 293 Pa. 364.

78. Ariz.—City of Tucson v. Tucson Sunshine Climate Club, 164 P.2d 598, 64 Ariz. 1.

Ohio.—City of Cleveland v. Artl, 23 N.E.2d 525, 62 Ohio App. 210.

44 C.J. p 1108 note 24.

79. Ala.—Hamilton v. City of Aniston, 27 So.2d 857, 248 Ala. 396.

Ill.—People ex rel. Schlaeger v. Bunge Bros. Coal Co., 64 N.E.2d 365, 392 Ill. 153.

Neb.—Tukey v. Omaha, 74 N.W. 613, 54 Neb. 370, 69 Am.S.R. 711.

N.Y.—Ford v. Walker, 237 N.Y.S. 545, 227 App.Div. 416.

Okl.—Gulf, C. & S. F. Ry. Co. v. Exercise Board of Love County, 283 P. 1003, 141 Okl. 34.

Tex.—American Nat. Ins. Co. v. Donald, 83 S.W.2d 947, 125 Tex. 597.

Utah.—Bohn v. Salt Lake City, 8 P.2d 591, 79 Utah 121, 81 A.L.R. 215.

Emergency

The word "emergency," as used in constitutional provision prohibiting city from borrowing money, except by an act of legislature, save in cases of "emergency," means a sudden, unexpected, and unforeseen condition, or occurrence in municipal affairs of such public gravity and exigency as to require forthwith municipal action for which the requisite public money is not presently procurable by usual and regular methods of acquiring funds for municipal use.—Mayor and City Council of Baltimore v. Hofrichter, 11 A.2d 375, 178 Md. 91.

80. Cal.—Mullins v. Henderson, 170 P.2d 118, 75 Cal.App.2d 117—Powell v. City and County of San Francisco, 144 P.2d 617, 62 Cal. App.2d 291.

Fla.—State ex rel. Davis v. Ryan, 158 So. 62, 118 Fla. 42—State ex rel. Ake v. Broward County Port

Authority, 158 So. 62, 118 Fla. 42.

Ill.—City of Evanston v. Wazau, 4 N.E.2d 78, 364 Ill. 198, 106 A.L.R. 789, certiorari denied Wazau v. City of Evanston, 57 S.Ct. 492, 300 U.S. 662, 81 L.Ed. 870.

Ky.—Waddle v. City of Somerset, 134 S.W.2d 956, 281 Ky. 30.

N.Y.—Union Free School Dist. No. 3 of Town of Rye, Westchester County, v. Town of Rye, 21 N.E.2d 681, 280 N.Y. 469.

44 C.J. p 1108 note 26.

Contracts or expenditures held proper

Ark.—Adamson v. City of Little Rock, 134 S.W.2d 558, 199 Ark. 435.

Fla.—Higbee v. Housing Authority of Jacksonville, 197 So. 479, 143 Fla. 560.

Kan.—State ex rel. Parker v. Kansas City, 98 P.2d 101, 151 Kan. 2.

Ky.—Swinburne v. City of Newport, 181 S.W.2d 421, 297 Ky. 820.

La.—Hotard v. City of New Orleans, 35 So.2d 752, 213 La. 843, appeal dismissed 69 S.Ct. 57, 335 U.S. 803, 93 L.Ed. — —Chandler & Chandler v. City of Shreveport, App., 162 So. 437.

Mo.—State ex rel. Fire Dist. of Lemay v. Smith, 184 S.W.2d 593, 353 Mo. 807—Dysart v. City of St. Louis, 11 S.W.2d 1045, 321 Mo. 514, 62 A.L.R. 762.

N.C.—Green v. Kitchin, 50 S.E.2d 545, 229 N.C. 450.

Ohio.—Burt v. City of Cleveland, 62 N.E.2d 274, 76 Ohio App. 451.

81. Ohio.—State v. Weller, 128 N.E. 88, 101 Ohio St. 123.

82. La.—Hotard v. City of New Orleans, 35 So.2d 752, 213 La. 843, appeal dismissed 69 S.Ct. 57, 335 U.S. 803, 93 L.Ed. —.

83. Mont.—State ex rel. Helena Housing Authority v. City Council of City of Helena, 90 P.2d 514, 108 Mont. 347.

Extent of discretion

The discretion which city council has under statute relating to the

and, in general, a municipal corporation has authority to appropriate money for the payment of its debts.⁸⁴

b. Public or Private Purposes

Public funds of a municipal corporation may not be expended for a private purpose, and in many states constitutional provisions expressly prohibit municipal corporations from giving or loaning money or credit to, or in aid of, private individuals or associations.

It is generally held, in some cases under express constitutional or statutory provisions, that public

funds can be appropriated and expended by a municipal corporation only for public purposes,⁸⁵ and, when so provided by constitution, statute, or charter, no indebtedness can be incurred or appropriation made except for municipal or corporate purposes;⁸⁶ but, in the absence of constitutional restriction, the legislature may authorize a municipal corporation to incur indebtedness or make expenditures for purposes which are public, although not strictly municipal.⁸⁷ A municipal corporation cannot expend⁸⁸ or be authorized by the legislature to expend⁸⁹ its public funds for private purposes

making of expenditures to meet an emergency is in the matter of declaring an emergency and statute does not give council discretion in meeting "mandatory expenditures required by law."—State ex rel. Helena Housing Authority v. City Council of City of Helena, *supra*.

84. Ill.—Neidhardt v. City of Wood River, 69 N.E.2d 345, 329 Ill.App. 485.

85. Ariz.—City of Phoenix v. Michael, 148 P.2d 353, 61 Ariz. 238.

Iowa.—Love v. City of Des Moines, 230 N.W. 373, 210 Iowa 90.

Mass.—Burnham v. Mayor and Aldermen of Beverly, 35 N.E.2d 242, 309 Mass. 388, 135 A.L.R. 750.—In re Opinion of the Justices, 8 N.E.2d 753, 297 Mass. 567.

Miss.—Davenport v. Blackmur, 186 So. 321, 184 Miss. 836.

S.C.—Marshall v. Rose, 49 S.E.2d 720, 213 S.C. 428.

44 C.J. p 1108 note 28.

"Public purpose" defined

(1) "Public purpose," as regards expenditure of municipal funds, means a purpose within the frame of governmental and proprietary power given to the particular municipality to be exercised for the welfare of its inhabitants and others coming within the municipal care, and involves reasonable connection with the convenience and necessity of the particular municipality whose aid is extended in its promotion.—Greensboro-High Point Airport Authority v. Johnson, 36 S.E.2d 803, 809, 226 N.C. 1.

(2) A "public purpose," for which municipal funds may be appropriated, generally has for its objective the promotion of the general welfare, security, prosperity, and contentment of all the inhabitants of the municipality.—City Affairs Committee of Jersey City v. Board of Com'rs of Jersey City, 46 A.2d 425, 427, 134 N.J.Law 180.

"Public funds" means funds belonging to any political subdivision of the state, more especially taxes, customs, moneys, etc., raised by operation of some general law and appropriated by the government to the

discharge of its obligations or for some public or governmental purpose.—State ex rel. St. Louis Police Relief Ass'n v. Igoo, 107 S.W.2d 929, 340 Mo. 1166.

Donation for public purposes

(1) A city may aid a public municipal purpose by donation.—Briggs v. City of Raleigh, 141 S.E. 597, 195 N.C. 223.

(2) A city has constitutional power to donate money for public purposes in instances where legislature has designated activities to be benefited.

Ark.—Kerr v. East Central Ark. Regional Housing Authority, 187 S.W.2d 189, 208 Ark. 625.

N.Y.—Nuefeld v. O'Dwyer, 79 N.Y.S. 2d 53, 192 Misc. 538.

S.C.—McNulty v. Owens, 199 S.E. 425, 188 S.C. 377.

Direct or indirect accomplishment of purpose

In exercise of proper local function of providing work for relief of unemployed, it is immaterial whether such employment is secured by paying out municipal funds directly in wages or indirectly by purchasing land to make possible federal project, completion of which, as necessary incident, entails expenditure of equal or greater amount of federal funds for wages to those in need of such relief.—McNichols v. City and County of Denver, 74 P.2d 99, 101 Colo. 316.

86. Ill.—Baltzer v. City of Chicago, 260 Ill.App. 384.

N.Y.—Union Free School Dist No. 3 of Town of Rye, Westchester County, v. Town of Rye, 21 N.E. 2d 681, 280 N.Y. 469—Evans v. Berry, 186 N.E. 203, 262 N.Y. 61, 89 A.L.R. 387—Bauer v. City of Niagara Falls, 29 N.Y.S.2d 448, 262 App.Div. 938.

S.C.—Marshall v. Rose, 49 S.E.2d 720, 213 S.C. 420.

44 C.J. p 1109 note 29—43 C.J. p 288 note 40.

Definitions

(1) "Corporate purpose," within statute relative to city finances, is a purpose having a legitimate connection with the objects for which the

corporation was created.—Elsenau v. City of Chicago, 165 N.E. 129, 130, 334 Ill. 78.

(2) The "purpose" contemplated by the constitutional provision prohibiting a city from contracting any indebtedness except for city purposes is something for the common good and general welfare of the municipality, sanctioned by its citizens, public in character and authorized by the legislature.—Hoyt v. Broome County, 25 N.Y.S.2d 527, 531, 175 Misc. 896, reversed on other grounds 34 N.E.2d 481, 285 N.Y. 402, 134 A.L.R. 916.

(3) Other definitions.—People ex rel. Moshier v. City of Springfield, 19 N.E.2d 598, 370 Ill. 541.

87. Cal.—Sacramento v. Adams, 153 P. 908, 171 Cal. 458.

Wis.—State v. Tappan, 29 Wis. 664, 9 Am.R. 622.

88. Fla.—City of Daytona Beach v. King, 181 So. 1, 132 Fla. 273, 116 A.L.R. 880—State ex rel. Davis v. Ryan, 158 So. 62, 118 Fla. 42—State ex rel. Ake v. Broward County Port Authority, 158 So. 62, 118 Fla. 42—Brumby v. City of Clearwater, 149 So. 203, 108 Fla. 633.

Iowa.—Love v. City of Des Moines, 230 N.W. 373, 210 Iowa 90.

La.—Hardin v. City of Shreveport, 150 So. 665, 178 La. 46.

Mass.—Quinlan v. City of Cambridge, 68 N.E.2d 11, 320 Mass. 124—Opinions of the Justices, 67 N.E.2d 588, 320 Mass. 773, 165 A.L.R. 807—Allydonn Realty Corporation v. Holyoke Housing Authority, 23 N.E.2d 665, 304 Mass. 288—Whiting v. Mayor of Holyoke, 172 N.E. 338, 272 Mass. 116.

Mich.—Skutt v. City of Grand Rapids, 266 N.W. 344, 275 Mich. 258.

Mo.—State ex rel. Kansas City Ins. Agents' Ass'n v. Kansas City, 4 S.W.2d 427, 319 Mo. 386.

Ohio.—Ferrie v. Sweeney, Com.Pl., 72 N.E.2d 128.

44 C.J. p 1109 note 31.

89. Iowa.—Love v. City of Des Moines, 230 N.W. 373, 210 Iowa 90.

Mass.—Quinlan v. City of Cam-

or pledge its credit to pay a private indebtedness⁹⁰ or make appropriations for donations or gratuities.⁹¹ Some constitutional provisions expressly forbid any municipality to give any money or property,⁹² or loan its credit⁹³ to, or in aid of, any individual, association, or corporation; and the leg-

bridge, 68 N.E.2d 11, 320 Mass. 124.

Statute held valid

N.Y.—Von Seebeck v. City of New York, 281 N.Y.S. 307, 156 Misc. 181.

90. Or.—Barde v. Funk, 24 P.2d 334, 144 Or. 233.

91. Ga.—Miller v. City of Cornelia, 4 S.E.2d 568, 188 Ga. 674.

Idaho.—City of Nampa v. Kibler, 113 P.2d 411, 62 Idaho 511.

Ill.—Illinois Anti-Vivisection Soc. v. City of Chicago, 7 N.E.2d 379, 289 Ill.App. 391.

Iowa.—Love v. City of Des Moines, 230 N.W. 373, 210 Iowa 90.

Ky.—Caudill v. Pansion, 24 S.W.2d 938, 233 Ky. 12.

N.J.—New Jersey Bell Tel. Co. v. City of Newark, 42 A.2d 629, 136 N.J.Eq. 479.

N.Y.—Oswego Falls Corporation v. City of Fulton, 265 N.Y.S. 436, 148 Misc. 170, affirmed 268 N.Y.S. 978, 241 App.Div. 560.

N.C.—Brown v. Board of Com'rs of Richmond County, 28 S.E.2d 104, 223 N.C. 744.

44 C.J. p 1109 note 32.

Statute held ineffective to authorize municipal corporation to donate money to community chest.

Ark.—Neel v. City of Little Rock, 163 S.W.2d 525, 204 Ark. 568, 142 A.L.R. 1071.—City of Little Rock v. Community Chest of Greater Little Rock, 163 S.W.2d 522, 204 Ark. 562, 142 A.L.R. 1072.

Failure to assess

Constitutional order that money shall not be granted by state or subdivisions for private purposes is not disregarded if no assessment for special benefits from local improvements is made, since negative failure to assess is not equivalent of positive grant.—Manchester v. Straw, 169 A. 592, 86 N.H. 390.

92. Cal.—American Co. v. City of Lakeport, 32 P.2d 622, 220 Cal. 548. Ga.—West v. Trotzler, 196 S.E. 902, 185 Ga. 794.

Iowa.—Love v. City of Des Moines, 230 N.W. 373, 210 Iowa 90.

N.J.—Carr v. Borough of Merchantville, 142 A. 1, 102 N.J.Law 553.

N.Y.—Union Free School Dist. No. 3 of Town of Rye, Westchester County, v. Town of Rye, 21 N.E.2d 681, 280 N.Y. 469.—Lewis v. La Guardia, 14 N.Y.S.2d 463, 172 Misc. 82, 258 App.Div. 713, affirmed 27 N.E.2d 44, 282 N.Y. 757.

N.D.—Marks v. City of Mandan, 296 N.W. 39, 70 N.D. 474.

Tex.—Bland v. City of Taylor, Civ. App., 37 S.W.2d 291, affirmed Da-

vis v. City of Taylor, 67 S.W.2d 1033, 123 Tex. 39.

44 C.J. p 1109 note 33.

Assistance in defense

The constitutional provision, prohibiting state from contracting debt by loan to assist in defending United States, except in time of war, is inapplicable to controversy concerning right of city to issue bonds to buy land for donation to United States as site for air corps technical school, purpose thereof being strictly local and municipal.—McNichols v. City and County of Denver, 74 P.2d 99, 101 Colo. 316.

City operating under freeholders' charter

The constitutional prohibition against gift of public funds is not applicable to municipality operating under a freeholders' charter.—Mullins v. Henderson, 170 P.2d 118, 75 Cal App.2d 117.

Provision held prospective in operation

N.Y.—Hebrew Orphan Asylum of City of New York v. City of New York, 270 N.Y.S. 310, 150 Misc. 299.

Transactions or expenditures held proper

(1) Generally.

Ark.—Hogue v. Housing Authority of North Little Rock, 144 S.W.2d 49, 201 Ark. 263.

Cal.—City of Pasadena v. Chamberlain, 36 P.2d 387, 1 Cal.App.2d 125, hearing denied, Sup., 36 P.2d 392, 1 Cal App 2d 125.

Ga.—City of Atlanta v. Pickens, 169 S.E. 99, 176 Ga. 833.—City of Macon v. Benson, 166 S.E. 26, 175 Ga. 502.

La.—Jouett v. Keeney, 136 So. 175, 17 La.App. 323.

Mo.—Dysart v. City of St. Louis, 11 S.W.2d 1045, 321 Mo. 514, 62 A.L.R. 762.

N.Y.—Lewis v. La Guardia, 14 N.Y.S.2d 463, 172 Misc. 82, affirmed 14 N.Y.S.2d 991, 258 App.Div. 713, affirmed 27 N.E.2d 44, 282 N.Y. 757.

Ohio.—Hines v. City of Bellefontaine, 57 N.E.2d 164, 74 Ohio App. 393.

Pa.—Williams v. Samuel, 2 A.2d 834, 332 Pa. 265.

Tex.—Wheeler v. City of Brownsville, 220 S.W.2d 457.

(2) Expenditures or advancements under refunding plan in aid of street improvement districts.

Ariz.—Wise v. First Nat. Bank, 65 P.2d 1154, 49 Ariz. 146.

Cal.—San Bernardino County v. Way, 117 P.2d 354, 18 Cal.2d 647.—Culver City v. Reese, 80 P.2d 992, 11 Cal.2d 441.—City of Dunsmuir v. Porter, 60 P.2d 836, 7 Cal.2d 269.

Colo.—Montgomery v. City and County of Denver, 80 P.2d 434, 102 Colo. 427.

(3) Expenditure in pursuance of public purpose, such as poor relief.—City and County of San Francisco v. Collins, 13 P.2d 912, 216 Cal. 187.

(4) Purchase of right of way guaranteed state highway department for construction of state highway through city.—Jackson v. City of Rome, 187 S.E. 386, 182 Ga. 848.

(5) Award of damages to person injured by police officer while engaged in making arrest.—Evans v. Berry, 186 N.E. 203, 262 N.Y. 61, 89 A.L.R. 387.

The organic acts of some territories provide that a municipal corporation cannot create or assume indebtedness except for the actual running expenses thereof.—Dickinson v. Petersburg, 6 Alaska 488.

93. Ariz.—City of Phoenix v. Michael, 148 P.2d 353, 61 Ariz. 238.

Ark.—Jernigan v. Harris, 62 S.W.2d 5, 187 Ark. 705.

N.J.—Carr v. Borough of Merchantville, 142 A. 1, 102 N.J.Law 553.

N.Y.—Union Free School Dist. No. 3 of Town of Rye, Westchester County, v. Town of Rye, 21 N.E.2d 681, 280 N.Y. 469.

N.D.—Marks v. City of Mandan, 296 N.W. 39, 70 N.D. 474.

Ohio.—Village of Brewster v. Hill, 190 N.E. 766, 128 Ohio St. 343, motion denied 191 N.E. 366, 128 Ohio St. 354.

Tex.—Bland v. City of Taylor, Civ. App., 37 S.W.2d 291, affirmed Davis v. City of Taylor, 67 S.W.2d 1033, 123 Tex. 39.

44 C.J. p 1109 note 34.

Statutes held valid

Ark.—Hogue v. Housing Authority of North Little Rock, 144 S.W.2d 49, 201 Ark. 263.

Cal.—Culver City v. Reese, 80 P.2d 992, 11 Cal.2d 441.

Colo.—City of Aurora v. Krauss, 59 P.2d 79, 99 Colo. 12.

Ga.—City of Atlanta v. Pickens, 169 S.E. 99, 176 Ga. 833.—City of Macon v. Benson, 166 S.E. 26, 175 Ga. 502.

N.J.—City of Newark v. Public Service Co-ordinated Transport, 155 A. 469, 9 N.J.Misc. 722, affirmed 160 A. 654, 109 N.J.Law 270.

N.Y.—McKinnon v. Delaney, 27 N.Y.S.2d 713, affirmed 34 N.Y.S.2d 399, 263 App.Div. 986, affirmed 45 N.E.2d 166, 289 N.Y. 656, motion granted 49 N.E.2d 625, 290 N.Y. 669.

Ohio.—Greene County Law Library Ass'n v. Curlett, 63 N.E.2d 455, 76 Ohio App. 537.

islature may be prohibited by constitutional provision from authorizing any municipal corporation to appropriate money for,⁹⁴ or make a gift⁹⁵ or loan its credit to,⁹⁶ any individual or association. Such provisions are mandatory;⁹⁷ and are generally construed as directed against benefits at public expense attempted in behalf of individuals, corporations, or associations, acting independently and conducting some enterprise of their own such as is usually conducted for profit and is commercial in nature.⁹⁸

A municipality may not authorize the payment of claims against the corporation arising under contracts ultra vires,⁹⁹ or any payment that may tend to defraud the municipal treasury.¹ Since the power of taxation is limited to taxation for public purposes, as discussed infra § 1987, the legislature has no power to authorize a municipal corporation to lend its aid to private, as distinguished from public, enterprises, and thereby incur an indebtedness which may necessitate the exercise of the power of taxation to liquidate.² However,

Pa.—Williams v. Samuel, 2 A.2d 834, 332 Pa. 265.

Tex.—Wheeler v. City of Brownsville, 220 S.W.2d 457.

Contracts and transactions held valid

U.S.—Federal Reserve Bank of Philadelphia v. Ocean City, C.C.A.N.J., 84 F.2d 657, certiorari denied Ocean City, N. J. v. Federal Reserve Bank of Philadelphia, 57 S. Ct. 109, 299 U.S. 584, 81 L.Ed. 431.

Ark.—Hogue v. Housing Authority of North Little Rock, 144 S.W.2d 49, 201 Ark. 263.

Ga.—Jackson v. City of Rome, 187 S.E. 386, 182 Ga. 848.

Mont.—Blackford v. City of Libby, 62 P.2d 216, 108 Mont. 272, 107 A.L.R. 1348.

N.Y.—Evans v. Berry, 186 N.E. 203, 262 N.Y. 61, 89 A.L.R. 387.

N.D.—Marks v. City of Mandan, 296 N.W. 39, 70 N.D. 474.

Ohio.—Miller v. Village of Orrville, 192 N.E. 474, 48 Ohio App. 87.

Pa.—City Club of Philadelphia v. Public Service Commission, 92 Pa. Super. 219.

⁹⁴ Fla.—State ex rel. Davis v. Ryan, 158 So. 62, 118 Fla. 42—State ex rel. Ake v. Broward County Port Authority, 158 So. 62, 118 Fla. 42.

Ga.—City of Macon v. Benson, 166 S.E. 26, 175 Ga. 502.

Ohio.—New York Cent. R. Co. v. City of Bucyrus, 186 N.E. 450, 126 Ohio St. 558, followed in Bush v. Hague, 191 N.E. 5, 128 Ohio St. 342.

Pa.—Harbold v. City of Reading, 49 A.2d 817, 355 Pa. 253.

Tex.—Seydler v. Border, Civ.App., 115 S.W.2d 702, error refused.

44 C.J. p 1109 note 37.

Statutes held valid

U.S.—Bessemer Inv. Co. v. City of Chester, D.C.Pa., 22 F.Supp. 311, modified on other grounds, C.C.A., 113 F.2d 571.

Ga.—Morris v. Tatum, 178 S.E. 167, 50 Ga.App. 315.

Tex.—Wheeler v. City of Brownsville, 220 S.W.2d 457—Bland v. City of Taylor, Civ.App., 37 S.W.2d 291, affirmed Davis v. City of Taylor, 67 S.W.2d 1033, 123 Tex. 39.

⁹⁵ Cal.—Pacific Indemnity Co. v. Myers, 296 P. 1084, 211 Cal. 635—

Taylor v. Mott, 56 P. 256, 123 Cal. 497.

What constitutes gift

In determining whether an appropriation of public funds is a gift within constitutional provision denying legislature power to authorize any political corporation to make a gift of public money or thing of value, the primary and fundamental subject of inquiry is as to whether the money is to be used for a public or private purpose, and, if it is for a public purpose, it is not, generally speaking, a gift.—San Bernardino County v. Way, 117 P.2d 354, 18 Cal. 2d 647—City of Oakland v. Garrison, 228 P. 433, 194 Cal. 298—Sacramento-Yolo Port Dist v. Rodda, Cal.App., 204 P.2d 372—City of Ojai v. Chaffee, 140 P.2d 116, 119, 60 Cal.App.2d 54.

Collected or uncollected taxes

As far as constitutional prohibition against empowering political corporations to make a gift of public money or thing of value is concerned, no effective distinction can be made between the contribution of tax moneys after collection and the contribution of the taxes themselves.—San Bernardino County v. Way, 117 P.2d 354, 18 Cal.2d 647.

Release of liability

Act giving public service commission exclusive jurisdiction to regulate rates and service of enumerated utilities was not violative of constitutional provision prohibiting legislature from releasing or extinguishing indebtedness or "liability" of any corporation or individual to any municipality, since provision referred to fixed money liability and not to a contractual right to fix such rates.—Southern Bell Telephone & Telegraph Co. v. City of Louisville, 96 S.W.2d 695, 265 Ky. 286.

⁹⁶ Ala.—Griffin v. Jeffers, 130 So. 190, 221 Ala. 649.

Fla.—State ex rel. Davis v. Ryan, 158 So. 62, 118 Fla. 42—State ex rel. Ake v. Broward County Port Authority, 158 So. 62, 118 Fla. 42.

Ohio.—New York Cent. R. Co. v. City of Bucyrus, 186 N.E. 450, 126 Ohio St. 558, followed in Bush v. Hague, 191 N.E. 5, 128 Ohio St. 342.

Pa.—Harbold v. City of Reading, 49 A.2d 817, 355 Pa. 253.

Tex.—Seydler v. Border, Civ.App., 115 S.W.2d 702, error refused—Bland v. City of Taylor, Civ.App., 37 S.W.2d 291, affirmed Davis v. City of Taylor, 67 S.W.2d 1033, 123 Tex. 39.

44 C.J. p 1109 note 39.

Purpose

Constitutional provision prohibiting general assembly from authorizing any political division to appropriate money for any individual is intended to prevent extravagant outlays making resort to taxing power necessary.—Morris v. Tatum, 178 S.E. 167, 50 Ga.App. 315.

Statutes held valid

U.S.—Bessemer Inv. Co. v. City of Chester, D.C.Pa., 22 F.Supp. 311, modified on other grounds, C.C.A., 113 F.2d 571.

Fla.—Bailey v. City of Tampa, 111 So. 119, 92 Fla. 1030.

Ga.—City of Macon v. Benson, 166 S.E. 26, 175 Ga. 502—Bower v. City of Bainbridge, 148 S.E. 517, 168 Ga. 616.

Mont.—Hansen v. City of Havre, 114 P.2d 1053, 112 Mont. 207, 135 A.L.R. 1278—State ex rel. City of Missoula v. Holmes, 47 P.2d 624, 100 Mont. 256, 100 A.L.R. 581—Stanley v. Jeffries, 284 P. 134, 86 Mont. 114, 70 A.L.R. 166.

⁹⁷ Tex.—Texas & N. O. R. Co. v. Galveston County, Civ.App., 161 S.W.2d 530, affirmed 169 S.W.2d 713, 141 Tex. 34.

⁹⁸ Ariz.—City of Phoenix v. Michael, 148 P.2d 353, 61 Ariz. 238.

Tex.—Bland v. City of Taylor, Civ., 37 S.W.2d 291, affirmed Davis v. City of Taylor, 67 S.W.2d 1033, 123 Tex. 39.

⁹⁹ Pa.—Community Welfare Chest v. City of Easton, Com.Pl., 87 Pittsb.Leg.J. 372, 31 Mun.L.R. 20, 27 North Co. 26.

44 C.J. p 1109 note 40.

1. Mont.—Detroit Citizens' St. R. Co. v. Detroit, 58 N.W. 304, 110 Mich. 384, 64 Am.S.R. 350, 35 L.R.A. 859.

44 C.J. p 1109 note 41.

2. U.S.—Cole v. La Grange, C.C.

where municipal corporations have a fund out of which they can pay the debts which they contract, it may be within the power of the legislature to authorize them to use such fund in aid of projects strictly private or personal but which would in a secondary manner contribute to the public good.³

There is no universal test for distinguishing between a purpose which is public or municipal and, therefore, a proper object of municipal expenditure and one which is private and, therefore, an improper object to which to devote public money.⁴ Each case must be decided in the light of the existing conditions,⁵ with respect to the objects sought

to be accomplished,⁶ the degree and manner in which that object affects the public welfare,⁷ and the nature and character of the thing to be done;⁸ but the court will give weight to a legislative determination of what is a municipal purpose,⁹ as well as widespread opinion and general practice which regard as city purposes some things which may not be such by absolute necessity,¹⁰ or on a narrow interpretation of constitutional provisions.¹¹ Where an appropriation of public funds is primarily for public purposes, it is not necessarily rendered violative of constitutional provisions against gifts and loans of public credit by an incidental result which may be of private benefit.¹² On the other

Mo., 19 F. 871, affirmed 5 S.Ct. 416, 113 U.S. 1, 28 L.Ed. 896.

44 C.J. p 1110 note 43.

3. US—Citizens Sav., etc., Ass'n v. Topeka, Kan., 20 Wall. 655, 22 L.Ed. 455.

4. Ariz.—City of Glendale v. White, 194 P.2d 435, 67 Ariz. 231. Colo.—McNichols v. City and County of Denver, 74 P.2d 99, 101 Colo. 316.

Mass.—Opinions of the Justices, 67 N.E.2d 588, 320 Mass. 773, 165 A.L.R. 807—Allydonn Realty Corporation v. Holyoke Housing Authority, 23 N.E.2d 665, 304 Mass. 288. "What constitutes 'a city purpose' within the meaning of the constitutional provision cannot be stated with exactness. Something that 50 years ago could not have been held to be 'a city purpose' may today be clearly authorized by the constitution. 'The question of what is a public purpose is a changing question, changing to suit industrial inventions and developments and to meet new social conditions.'"—Hesse v. Rath, 230 N.Y.S. 676, 678, 224 App.Div. 344.

"No formula has yet been devised by which to determine what is or is not a public use or purpose within the meaning of the constitutional prohibition; but it is clear that the ultimate advantage of the public, as contradistinguished from that of the individual, is its characteristic feature."—Briggs v. City of Raleigh, 141 S.E. 597, 600, 195 N.C. 223.

5. Ariz.—City of Glendale v. White, 194 P.2d 435, 67 Ariz. 231.

Cal.—Sacramento-Yolo Port Dist. v. Rodda, App., 204 P.2d 372—City of Roseville v. Tulley, 131 P.2d 395, 55 Cal.App.2d 601.

Mass.—Opinions of the Justices, 67 N.E.2d 588, 320 Mass. 773, 165 A.L.R. 807—Allydonn Realty Corporation v. Holyoke Housing Authority, 23 N.E.2d 665, 304 Mass. 288.

N.Y.—Hesse v. Rath, 230 N.Y.S. 676, 224 App.Div. 344, affirmed 164 N.E. 342, 249 N.Y. 436.

Factors to be considered

The factors determining whether a proposed expenditure of public money is for a "public use" are whether benefit is available at equal terms to entire public in locality effected, whether service supplied is one needed by all or by a large number of public, whether need to be met requires united efforts under unified control, whether private enterprise has in past failed in supplying want or in eradicating evil, whether in so far as benefits accrue to individuals, whole of society has an interest in having those individuals benefited, whether proposed extension of governmental activity is in line with historical development of commonwealth, whether it will be necessary to use public ways or to invoke power of eminent domain, and whether a special emergency exists—Allydonn Realty Corporation v. Holyoke Housing Authority, 23 N.E.2d 665, 304 Mass. 288.

6. Ariz.—City of Glendale v. White, 194 P.2d 435, 67 Ariz. 231.

Mass.—Opinions of the Justices, 67 N.E.2d 588, 320 Mass. 773, 165 A.L.R. 807—Allydonn Realty Corporation v. Holyoke Housing Authority, 23 N.E.2d 665, 304 Mass. 288.

7. Ariz.—City of Glendale v. White, 194 P.2d 435, 67 Ariz. 231.

Mass.—Opinions of the Justices, 67 N.E.2d 588, 320 Mass. 773, 165 A.L.R. 807—Allydonn Realty Corporation v. Holyoke Housing Authority, 23 N.E.2d 665, 304 Mass. 288.

Reasonable connection with object

Municipal expenditures made for purpose of improving administration of municipal affairs must have a reasonable connection with object sought to be obtained.—City of Roseville v. Tulley, 131 P.2d 395, 55 Cal.App.2d 601.

8. Del.—Wilmington v. Wolcott, 112 A. 703, 12 Del.Ch. 379.

N.Y.—Schieffelin v. Hylan, 140 N.E. 689, 236 N.Y. 254.

9. Fla.—Zinnen v. City of Fort

Lauderdale, 32 So 2d 162, 159 Fla. 498.

44 C.J. p 1110 note 47.

The legislature has power to define a municipal or county purpose, such as would authorize expenditure of municipal funds, as contemplated by the constitution.—State v. City of Tallahassee, 195 So. 402, 142 Fla. 476.

10. N.Y.—Schieffelin v. Hylan, 140 N.E. 689, 236 N.Y. 354.

44 C.J. p 1110 note 48.

11. N.Y.—Schieffelin v. Hylan, supra.

12. Cal.—San Bernardino County v. Way, 117 P.2d 354, 18 Cal.2d 647—American Co. v. City of Lakeport, 32 P.2d 622, 220 Cal. 548—City of Pasadena v. Chamberlain, 36 P.2d 387, 1 Cal.App.2d 125, hearing denied, Sup., 36 P.2d 392, 1 Cal.App. 2d 125.

Mass.—Opinions of the Justices, 67 N.E.2d 588, 320 Mass. 773, 165 A.L.R. 807—Allydonn Realty Corporation v. Holyoke Housing Authority, 23 N.E.2d 665, 304 Mass. 288.

Mo.—State ex rel. Kansas City Ins. Agents' Ass'n v. Kansas City, 4 S.W.2d 427, 319 Mo. 386.

N.D.—Stutsman v. Arthur, 16 N.W. 2d 449, 73 N.D. 504, 158 A.L.R. 924.

Building bridge on private property

Objection that purchase of a park by park and recreation commission entailed expenditures by commission for construction of a bridge on another's property was untenable, where such construction was part of consideration for conveyance and cost involved was comparatively small.—Dudley v. City of Charlotte, 27 S.E.2d 732, 223 N.C. 638.

Slum clearance

Ariz.—City of Phoenix v. Superior Court of Maricopa County, 175 P. 2d 811, 65 Ariz. 139—Humphrey v. City of Phoenix, 102 P.2d 82, 55 Ariz. 374.

Snow removal from private ways in public use

Mass.—Opinion of the Justices, 47 N.E.2d 260, 313 Mass. 779.

hand, if the result is chiefly that of private benefit, an incidental or even ostensible public purpose will not save its constitutionality.¹³ A purpose may be a public one so as to be within a municipal power to appropriate funds therefor, even though it is not a necessary purpose.¹⁴ It has been laid down as a general rule that the question whether the performance of an act or the accomplishment of a specific purpose constitutes a "public purpose" for which municipal funds may be lawfully disbursed rests in the judgment of the municipal authorities, and the courts will not assume to substitute their judgment for that of the authorities unless the latter's exercise of judgment or discretion is shown to have been unquestionably abused.¹⁵

c. Moral Obligations

A municipal corporation is ordinarily without power to appropriate money for the payment of an unenforceable debt or claim, even if it constitutes a moral or equitable obligation; but the legislature may in a proper case authorize payment of such an obligation.

A municipal corporation has been held to be without power to appropriate money for the payment of a debt barred by the statute of limitations,¹⁶ or for payment of an unenforceable claim, even though it constitutes a moral or equitable obligation.¹⁷ However, the payment by municipal corporations of claims which, although invalid or ille-

gal, are just and equitable and constitute moral obligations is sometimes authorized by charter or statute,¹⁸ and such provisions are not unconstitutional;¹⁹ and, although it has been stated broadly that gifts supported by moral considerations are not within constitutional prohibitions against gifts,²⁰ it has also been held that the legislature may not, under the guise of fulfilling a moral obligation, authorize or require the grant of public funds to an individual in the absence of any legal, equitable, or moral right thereto,²¹ or authorize the payment of sums which, although they might be considered morally due, actually constitute no more than gifts or gratuities because the municipality has received no equivalent therefor.²²

§ 1836. Buildings, Improvements, and Utilities

A municipal corporation may appropriate money or incur indebtedness for the acquisition and maintenance of public buildings, improvements, and utilities, provided rules and provisions restricting expenditures and indebtedness to public and municipal purposes are not thereby violated.

A public improvement which may be regarded as for the common benefit and enjoyment of all the citizens of a municipality is a public and municipal purpose within the meaning of constitutional provisions;²³ and, in order to make such improvements,

Recognition of military service

The expenditure of public money in recognition of military services, even long after such services have been rendered, although such expenditure is directly for private benefit of persons rendering such services, is a "public purpose."—*Opinions of the Justices*, 67 N.E.2d 588, 320 Mass. 773, 165 A.L.R. 807.

13. Mass.—*Opinions of the Justices*, supra—*Allydorn Realty Corporation v. Holyoke Housing Authority*, 23 N.E.2d 665, 304 Mass. 288. N.D.—*Stutsman v. Arthur*, 16 N.W.2d 449, 73 N.D. 504, 158 A.L.R. 924.

14. N.C.—*Brumley v. Baxter*, 36 S.E.2d 281, 225 N.C. 691, 162 A.L.R. 930.

15. Ariz.—*City of Glendale v. White*, 194 P.2d 435, 67 Ariz. 231. Cal.—*City of Roseville v. Tulley*, 131 P.2d 395, 55 Cal.App.2d 601.

Fla.—*Saunders v. City of Jacksonville*, 25 So.2d 648, 157 Fla. 240—*State ex rel. Harper v. McDavid*, 200 So. 100, 145 Fla. 605, 133 A.L.R. 360—*City of Ferdinand v. State*, 197 So. 454, 143 Fla. 802.

N.J.—*City Affairs Committee of Jersey City v. Board of Com'rs of Jersey City*, 46 A.2d 425, 134 N.J. Law 180.

Tex.—*Davis v. City of Taylor*, 67 S.W.2d 1033, 123 Tex. 39.

16. Miss.—*Trowbridge v. Schmidt*, 34 So. 84, 82 Miss. 475.

17. N.C.—*Brown v. Board of Com'rs of Richmond County*, 28 S.E.2d 104, 223 N.C. 744.

Award to person injured by police

Commissioners' order for payment of claim against city for personal injuries resulting from being struck by motorcycle driven by traffic policeman attempting to catch speeder was void, since payment would be unconstitutional as constituting gift, in view of lack of legal liability of municipality.—*Tompkins v. Williams*, Tex.Com.App., 62 S.W.2d 70.

18. Hawaii.—*In re Saludes*, 34 Hawaii 79.

N.Y.—*Evans v. Berry*, 186 N.E. 203, 262 N.Y. 61, 89 A.L.R. 387—*Shaddock v. Schwartz*, 158 N.E. 872, 246 N.Y. 288.

44 C.J. p 1110 note 52.

"Moral obligation" defined

A "moral obligation" which can be recognized by legislature and made collectable from the state or its political divisions is one which cannot be enforced by action but which is binding on the party who incurs it in conscience and according to natural justice, or is a duty which would be enforceable by law were it not for some positive rule, which, with a view to general benefit, exempts the party in that particular instance

from legal liability.—*Harbold v. City of Reading*, 49 A.2d 817, 820, 355 Pa. 253.

Petition to council for allowance of moral obligation need not be phrased with nicety of pleadings—*Shaddock v. Schwartz*, 158 N.E. 872, 246 N.Y. 288.

19. N.Y.—*Tobin v. La Guardia*, 48 N.E.2d 287, 290 N.Y. 119.

N.C.—*Brown v. Board of Com'rs of Richmond County*, 28 S.E.2d 104, 223 N.C. 744.

Pa.—*Harbold v. City of Reading*, 49 A.2d 817, 355 Pa. 253.

44 C.J. p 1110 note 53.

Award to persons injured by police

Local law authorizing award to persons injured by officers performing police duty was not violative of constitutional provision that no city shall give money to aid individual.—*Evans v. Berry*, 186 N.E. 203, 262 N.Y. 61, 89 A.L.R. 387.

20. N.Y.—*Timmerman v. City of New York*, 69 N.Y.S.2d 102, affirmed 70 N.Y.S.2d 140, 272 App. Div. 758.

21. Pa.—*Harbold v. City of Reading*, 49 A.2d 817, 355 Pa. 253.

22. N.C.—*Brown v. Board of Com'rs of Richmond County*, 28 S.E.2d 104, 223 N.C. 744.

23. N.J.—*Simon v. O'Toole*, 155 A.449, 108 N.J.Law 32, affirmed 158 A. 543, 108 N.J.Law 548.

a municipal corporation may exercise its ordinary power to incur indebtedness,²⁴ although, when following the special assessment method, it cannot pledge its general credit,²⁵ unless expressly authorized.²⁶ A municipality may incur indebtedness for building a bridge²⁷ or tunnel,²⁸ and the legislature may properly authorize it to pay damages resulting to property from the construction.²⁹ Also, provision may be made for drainage;³⁰ for the construction of a sewerage system;³¹ for acquisition, development, and maintenance of an airport;³² for development of a bay³³ or improvement of a waterfront;³⁴ for flood control;³⁵ and for surveys for a ship canal.³⁶ Since the elimination of a grade crossing³⁷ and the relocation of streets in connection therewith³⁸ are municipal or corporate purposes, a municipal corporation may contribute to the expense thereof without violating constitutional provisions. The acquisition and maintenance

of public parks and recreational centers thereby securing pure air and healthful rest and recreation to the people of a city are public or city purposes.³⁹ Also, a municipality may, without violating constitutional provisions, issue warrants for the completion of a public improvement which has been constructed in part by the commissioners of an improvement district embracing the same area as the municipality.⁴⁰ Provision for the creation of a revolving fund for the purpose of securing prompt payment of special improvement district obligations has been held not to be violative of a constitutional prohibition against donation of its funds or loans of its credit by a municipality.⁴¹ However, it has also been held that a statute authorizing a municipality to issue bonds to refund special improvement warrants to the extent of special assessment deficiencies for which it was not otherwise generally liable violates a constitutional prohibition against

N.Y.—*People v. Kelly*, 76 N.Y. 475, 5 Abb.N.Cas. 383.

S.C.—*Marshall v. Rose*, 49 S.E.2d 720, 213 S.C. 428.

Benefit to individuals

The fact that particular individuals or corporations derive a benefit from making of public improvements does not make the improvements any less public or the city any less liable for money borrowed to make them.—*Brownell v. City of St. Petersburg*, C.C.A.Fla., 128 F.2d 721.

24. Cal.—*Department of Water and Power of City of Los Angeles v. Vroman*, 22 P.2d 698, 218 Cal. 206.

Okl.—*State ex rel. City of Shawnee v. Williamson*, 97 P.2d 74, 186 Okl. 278, 125 A.L.R. 1389.

44 C.J. p 225 note 98.

25. Kan.—*Atchison v. Price*, 25 P. 605, 45 Kan. 296.

44 C.J. p 226 note 99.

26. Mo.—*Perkinson v. Schnaake*, 83 S.W. 301, 108 Mo.App. 255.

44 C.J. p 226 note 1.

27. N.Y.—*People v. Kelly*, 76 N.Y. 475, 5 Abb.N.Cas. 383.—*Robia Holding Corporation v. Walker*, 239 N.Y.S. 659, 136 Misc. 358, affirmed 246 N.Y.S. 210, 230 App.Div. 666, affirmed 178 N.E. 747, 257 N.Y. 431.

28. N.Y.—*Robia Holding Corporation v. Walker*, *supra*.

29. N.Y.—*People v. Hennessy*, 98 N.E. 516, 205 N.Y. 301.

44 C.J. p 1110 note 57.

30. Md.—*Dinneen v. Rider*, 136 A. 754, 152 Md. 343.

44 C.J. p 1110 note 58.

31. Ark.—*Jernigan v. Harris*, 62 S.W.2d 5, 187 Ark. 705.

La.—*Cooley v. Sewerage Dist. No. 1 of Town of Slidell*, 136 So. 37, 172 La. 1019.

Md.—*Dinneen v. Rider*, 136 A. 754, 152 Md. 343.

A judgment against a city for void assessments for main and submain sewers did not violate the section of the constitution prohibiting a city to appropriate money for the benefit of individuals.—*Boswell v. Chambliss*, 113 P.2d 832, 189 Okl. 112.

32. Kan.—*Concordia-Arrow Flying Service Corporation v. City of Concordia*, 289 P. 955, 131 Kan. 247.

Mo.—*Ennis v. Kansas City*, 11 S.W.2d 1054, 321 Mo. 536.—*Dysart v. City of St. Louis*, 11 S.W.2d 1045, 321 Mo. 514, 62 A.L.R. 762.

N.Y.—*Hesse v. Rath*, 164 N.E. 342, 249 N.Y. 436.

Okl.—*City of Ardmore v. Excise Board of Carter County*, 8 P.2d 2, 155 Okl. 126.

Pa.—*Wentz v. City of Philadelphia*, 151 A. 883, 301 Pa. 261.

Wash.—*State v. Clausen*, 289 P. 61, 157 Wash. 457.

Engineering work

Statute authorizing municipalities to acquire, own, and operate airports and "to do all things and perform all acts necessary, proper or desirable to effectuate the full intent and purpose of this act" includes power and authority to contract and pay for proper or necessary engineering work in connection with airports.—*Town of Magee v. Mallett*, 174 So. 246, 178 Miss. 629.

33. N.Y.—*Bergen Beach Land Corp. v. New York*, 185 N.Y.S. 177, 113 Misc. 491.

34. U.S.—*City of St. Petersburg v. Meyers*, C.C.A.Fla., 55 F.2d 810.

Ownership of docks

In view of broad powers of city to expand and develop its seaport facilities and to construct wharves

and docks, the city could make expenditures out of current funds to state department of docks and terminals to aid in department's expansion of state docks in the city, notwithstanding title to docks would not be in city.—*State ex rel. Austin v. City of Mobile*, 28 So.2d 177, 248 Ala. 467.

35. Ky.—*Herd v. City of Middleboro*, 99 S.W.2d 458, 266 Ky. 488.

36. Pa.—*Commonwealth v. Pittsburgh*, 38 A. 628, 183 Pa. 202, 63 Am. S.R. 752.

37. Tenn.—*Darwin v. Town of Cookeville*, 97 S.W.2d 838, 170 Tenn. 508.

44 C.J. p 1110 note 61.

38. N.Y.—*McCutcheon v. Buffalo Terminal Station Commn.*, 111 N.E. 661, 217 N.Y. 127.—*People v. Brady*, 101 N.E. 766, 207 N.Y. 592.

39. Fla.—*Zinnen v. City of Fort Lauderdale*, 32 So.2d 162, 159 Fla. 498.

Mass.—*In re Opinion of the Justices*, 8 N.E.2d 753, 297 Mass. 567.

N.Y.—*Schieffelin v. Hylan*, 140 N.E. 689, 236 N.Y. 254.—*In re New York*, 2 N.E. 642, 99 N.Y. 569.

Okl.—*Excise Board of Oklahoma County v. Cooper*, 82 P.2d 824, 183 Okl. 387.

S.C.—*Marshall v. Rose*, 49 S.E.2d 720, 213 S.C. 428.

40. Ark.—*Bank of Commerce v. Huddleston*, 291 S.W. 422, 172 Ark. 999, 50 A.L.R. 1202.

41. Cal.—*American Co. v. City of Lakeport*, 32 P.2d 622, 220 Cal. 548.

Mont.—*Stanley v. Jeffries*, 284 P. 134, 86 Mont. 114, 70 A.L.R. 166.

N.D.—*Marks v. City of Mandan*, 296 N.W. 39, 70 N.D. 474.

public credits or donations.⁴² Under a statute authorizing payment of equitable claims not constituting obligations legally binding, a municipal corporation is not limited, in paying a claim by one who has made public improvements for its benefit, to claimant's outlay, but may pay him his customary profit as well;⁴³ the payment, however, must not exceed the value of the work.⁴⁴

Buildings and sites therefor. A municipal corporation may legally expend funds for the erection of a building which is intended primarily for a strictly public use,⁴⁵ even though it may incidentally and occasionally be devoted to uses which are not public⁴⁶ or there is a secret intent on the part of certain individuals to use the proposed structure for purposes not strictly public;⁴⁷ but it has been held that the power to incur indebtedness for municipal buildings is not to be implied from the duty to erect them.⁴⁸ A statute authorizing a municipality to issue certificates to pay for the construction of a particular building and designating the funds out of which such certificates may be paid has been held to constitute a legislative declaration that the construction of such a building is a municipal purpose.⁴⁹ Buildings for the erection of which it has been held that a municipality may make appropriations or incur indebtedness include a city

hall,⁵⁰ a market house,⁵¹ an armory,⁵² and a public hall or auditorium,⁵³ but not a grand army hall⁵⁴ or an opera house.⁵⁵ The legislature may authorize a municipal corporation to incur indebtedness or expend funds for the purpose of purchasing real property in the municipality to be donated to the state as a site for a state building.⁵⁶ Under some constitutional provisions, the council cannot appropriate money to aid in the building of a courthouse;⁵⁷ but under other constitutions the legislature may authorize a municipality to pay or become indebted for the cost of erecting a courthouse or other public buildings necessary to a county seat,⁵⁸ although such power has been held not granted by a statute authorizing a municipality to donate money or bonds in aid of public improvements.⁵⁹

Improvement and maintenance of highways, streets and sidewalks. Expenditures for the improvement of the highways and streets of a municipality are for a corporate⁶⁰ and public⁶¹ purpose, and a municipality may, without violation of constitutional or statutory provisions, appropriate or expend funds for payment of at least part of the cost of their construction, maintenance or repair,⁶² including expenses of opening, widening, extending,⁶³ or paving⁶⁴ them; but in resurfacing or repairing a street a municipal corporation is not

42. N.D.—Stutsman v. Arthur, 16 N. W.2d 449, 73 N.D. 504, 158 A.L.R. 924.

43. N.Y.—Shaddock v. Schwartz, 158 N.E. 872, 246 N.Y. 288.

44. N.Y.—Shaddock v. Schwartz, supra.

Burden on assaiant

One assailing award by city on equitable claim has burden to show that award was made without reference to value of work.—Shaddock v. Schwartz, supra.

45. Mass.—Wheelock v. Lowell, 81 N.E. 977, 196 Mass. 220, 124 Am.S. R. 543, 12 Ann.Cas. 1109.

Hospital buildings see infra § 1841.

Lease of building

Appropriation by village board of sum for rent of building for civic center was valid.—Koester v. Village of Pardeeville, 225 N.W. 204, 199 Wis. 54.

46. Mass.—Wheelock v. Lowell, 81 N.E. 977, 196 Mass. 220, 124 Am.S. R. 543, 12 Ann.Cas. 1109.

Dominating motive

If the dominating motive for the erection of a building by a municipality is a strictly public use, the expenditure for it is legal under the constitution, although incidentally it may be devoted occasionally to uses that are not public, but, if the project of the municipality is merely

colorable, masking under the pretext of a public purpose, a general design to enter into the private business of maintaining a building for gain, or devoting it mainly to any other than its public use as a gathering place for citizens generally, such an attempt would be a perversion of power and a nullity, and no public funds could be appropriated for it.—State ex rel. City of Jefferson v. Smith, 154 S.W.2d 101, 348 Mo. 554.

47. Mo.—Halbruegger v. St. Louis, 262 S.W. 379, 302 Mo. 573.

48. Kan.—Leavenworth v. Norton, 1 Kan. 432.

49. Fla.—State v. City of Tallahassee, 195 So. 402, 142 Fla. 476.

50. Okl.—Reid v. City of Muskogee, 278 P. 339, 137 Okl. 44.

51. Mass.—Spaulding v. Lowell, 23 Pick. 71.

52. N.Y.—Tobin v. La Guardia, 48 N.E.2d 287, 290 N.Y. 119.

53. Mass.—Wheelock v. Lowell, 81 N.E. 977, 196 Mass. 220, 124 Am.S. R. 543, 12 Ann.Cas. 1109.

44 C.J. p 1111 note 72.

54. Mass.—Kingman v. Brockton, 26 N.E. 998, 153 Mass. 255, 11 L.R.A. 123.

55. Iowa.—Brooks v. Brooklyn, 124 N.W. 868, 146 Iowa 136, 26 L.R.A., N.S., 425.

56. Wash.—State v. Burch, 204 P. 785, 119 Wash. 1.

44 C.J. p 1111 note 75.

57. Ark.—Russell v. Tate, 13 S.W. 130, 52 Ark. 541, 20 Am.S.R. 193, 7 L.R.A. 180.

58. Mich.—Callam v. Saginaw, 14 N.W. 677, 50 Mich. 7.

59. Ind.—Schneck v. Jeffersonville, 52 N.E. 212, 152 Ind. 204.

60. N.Y.—Robla Holding Corporation v. Walker, 239 N.Y.S. 659, 136 Misc. 358, affirmed 246 N.Y.S. 210, 230 App.Div. 666, affirmed 178 N.E. 747, 257 N.Y. 431.

Tenn.—Imboden v. Bristol, 179 S.W. 147, 132 Tenn. 562.

61. Fla.—City of Venice v. State, 118 So. 308, 96 Fla. 527.

62. U.S.—Boomer v. Glenn, D.C.Ky., 21 F.Supp. 766, appeal dismissed Glenn v. Boomer, C.C.A., 107 F.2d 1013.

63. Ark.—City of Fordyce v. Dallas County, 113 S.W.2d 500, 195 Ark. 552.

Fla.—City of Venice v. State, 118 So. 308, 96 Fla. 527.

Kan.—Taneyhill v. Kansas City, 3 P.2d 645, 133 Kan. 725.

Tex.—City of Corpus Christi v. Johnson, Civ.App., 54 S.W.2d 865.

44 C.J. p 1111 note 79.

64. Fla.—City of Venice v. State, 118 So. 308, 96 Fla. 527.

authorized to loan its credit for the purchase of materials to be used in renewing or reconstructing the roadbed and tracks of a street railroad.⁶⁵ A statute, authorizing the application of village funds to the care and maintenance of streets which the trustees are unable to accept by dedication and which are, therefore, mere private rights of way, has been held unconstitutional;⁶⁶ but it has also been held that the legislature may constitutionally authorize municipal expenditure of money for removal of ice and snow from ways in private ownership but open to public use as expenditures for a "public purpose," since such expenditures are temporary and concurrent with public use.⁶⁷ The moral obligation to pay damages resulting to real property from the change of grade of a street may be recognized,⁶⁸ but not in favor of a landowner who did not acquire title until after the grade was changed.⁶⁹ Except in some jurisdictions,⁷⁰ it is not improper for a municipality making street or sidewalk improvements payable out of special assessments to raise the funds in advance of the collection of the assessments, collect and enforce the assessments, and reimburse itself therefrom.⁷¹ Purchase and installation of parking meters do not violate a constitutional prohibition against use of

public funds in private enterprises;⁷² and a municipality may procure such meters⁷³ and pay therefor out of revenue to be derived from their use.⁷⁴

Public utilities. Indebtedness may be incurred or expenditures may be made by a municipality for the lighting of streets and public places,⁷⁵ for the furnishing or supplying of water⁷⁶ for the purchase⁷⁷ and operation⁷⁸ of a waterworks system, for the construction of electric transmission systems and lines,⁷⁹ and for the construction of a subway.⁸⁰ A constitutional provision granting to any incorporated city or town the power to become indebted for public utilities is not intended as a limitation on the powers of the legislature and does not prevent the latter from conferring such powers on other municipal corporations, such as water improvement districts.⁸¹ It has been held that a constitutional provision authorizing a city to incur additional indebtedness for an electric light plant must not be given a technical or strict construction so as to defeat the purpose of its adoption.⁸² A constitutional provision allowing cities to incur indebtedness beyond that ordinarily allowed for the purchase or construction of public utilities is part of the public policy of the state.⁸³

Tex.—City of Corpus Christi v. Johnson, Civ.App., 54 S.W.2d 865.

65. N.Y.—Syracuse, etc., R. Co. v. Syracuse, 183 N.Y.S. 757, 113 Misc. 28.

66. N.Y.—Smith v. Smythe, 90 N.E. 1121, 197 N.Y. 457, 35 L.R.A., N.S., 524.

67. Mass.—Opinion of the Justices, 47 N.E.2d 260, 313 Mass. 779.

The words "open to public use," as used in bill to authorize certain municipalities to appropriate money for removal of snow and ice from private ways open to public use, include open to public use by license or permission terminable at will of owner of way as well as open to public use as of right or permanently, and means that way is actually susceptible of and open to use by public other than for purposes merely incidental to use by owner and in manner similar to ordinary use for purposes of travel of a public way of same general nature.—Opinion of the Justices, *supra*.

68. N.Y.—People v. Prendergast, 95 N.E. 715, 202 N.Y. 188, 44 C.J. p 1111 note 82.

69. N.Y.—People v. Stillings, 119 N.Y.S. 298, 134 App.Div. 480, affirmed 93 N.E. 1128, 200 N.Y. 525—People v. Phillips, 85 N.Y.S. 200, 88 App. Div. 560.

70. Ill.—Midland Lumber Co. v.

Dallas City, 114 N.E. 580, 276 Ill. 172.

71. N.Y.—Kronsbein v. Rochester, 78 N.Y.S. 813, 76 App.Div. 494, 44 C.J. p 1111 note 85.

72. Or.—Morris v. City of Salem, 174 P.2d 192, 179 Or. 666.

73. Iowa.—Brodkey v. Sioux City, 296 N.W. 352, 229 Iowa 1291.

74. Or.—Morris v. City of Salem, 174 P.2d 192, 179 Or. 666.

75. Ind.—Cooper v. Middletown, 105 N.E. 393, 56 Ind.App. 374, 44 C.J. p 1111 note 86.

76. Ark.—Jernigan v. Harris, 62 S.W.2d 5, 187 Ark. 705.

Md.—Dinneen v. Rider, 136 A. 754, 152 Md. 343.

Mass.—White v. Treasurer of Wayland, 173 N.E. 701, 273 Mass. 468, 44 C.J. p 175 note 24, p 1111 note 87.

77. N.J.—Carr v. Borough of Merchantville, 142 A. 1, 102 N.J.Law 553.

Tex.—Sowell v. Griffith, Com.App., 294 S.W. 521, rehearing denied 296 S.W. xxi.

Payment out of general revenue

(1) Statute providing that a city owning a system for distribution, but having inadequate supply, may contract for purchase of water as deemed appropriate by its governing body or bind itself at any agreed price for all water taken by the city and not resold is direct authority to pay for a part of the water from the

general revenue of the city; and, under a provision of such a statute that city shall be obligated to pay for water solely out of net revenues if contract so provides, when no provision is made in contract that water be paid for solely out of water revenues, city may make any or all payments for water a general obligation and may provide both that payments be a general obligation and made out of water revenue funds.—Harding v. City of Dickinson, N.D., 38 N.W.2d 626.

(2) Payment out of general or special funds generally see *infra* § 1884.

78. Ala.—Bankhead v. Town of Suligent, 155 So. 869, 229 Ala. 45, 96 A.L.R. 1381.

79. Iowa.—Carroll v. City of Cedar Falls, 261 N.W. 652, 221 Iowa 277.

80. N.Y.—Litchfield Const. Co. v. City of New York, 155 N.E. 116, 244 N.Y. 251, motion denied 155 N.E. 898, 244 N.Y. 563.

81. Okl.—Lowery v. Tulsa County Water Impr. Dist. 5, 251 P. 748, 122 Okl. 116.

82. Mo.—Palmer v. City of Liberal, 64 S.W.2d 265, 334 Mo. 266.

83. Okl.—Protest of Reid, 15 P.2d 995, 160 Okl. 3.

The power of a municipality to incur indebtedness or make expenditures in respect of public utilities may be exercised by a contract with an individual or corporation supplying the product or services in question;⁸⁴ or, when so authorized by constitution, statute, or charter, the municipality itself may acquire⁸⁵ or construct⁸⁶ a public utility, and operate it⁸⁷ or provide for its operation by some one else under a lease not in perpetuity;⁸⁸ but it may not incur expense for supervisors and starters of a bus line under an agreement giving the owner of the line the entire revenue therefrom;⁸⁹ and, even though a municipality may have a right to levy a special assessment for the purpose of maintaining and operating an electric light plant, it does not follow that it can anticipate its future general revenues for the purpose of erecting such a plant.⁹⁰ A municipal corporation owning and

operating a public utility system may make expenditures or incur indebtedness for an extension thereof.⁹¹ An improvement district for the construction of waterworks and a lighting system is not a private enterprise within a constitutional provision against the pledging of public money.⁹²

Housing. The expenditure of public money by a municipal corporation for the clearance of slum areas and the construction of low-rent housing is a valid expenditure of public money for a public purpose.⁹³ It has also been held that the making of expenditures and incurring indebtedness for the housing of inhabitants of the municipality generally,⁹⁴ or more particularly, of veterans and their families,⁹⁵ is, in the light of an existing acute housing shortage, a proper exercise of power to expend money for a public purpose. A statute authorizing municipal low-cost housing in connec-

84. Ky.—Louisville Home Tel. Co. v. Louisville, 113 S.W. 855, 130 Ky. 611.

44 C.J. p 1111 note 88.

85. Cal.—Platt v. San Francisco, 110 P. 304, 158 Cal. 74.

44 C.J. p 1111 note 89.

86. N.Y.—Sun Printing, etc., Ass'n v. New York, 46 N.E. 499, 152 N.Y. 257, 37 L.R.A. 788.

44 C.J. p 1111 note 90.

87. N.Y.—New York v. Brooklyn City R. Co., 134 N.E. 533, 232 N.Y. 463.

44 C.J. p 1112 note 91.

88. N.Y.—Admiral Realty Co. v. New York, 99 N.E. 241, 206 N.Y. 110, Ann.Cas. 1914A 1054.

89. N.Y.—Belt Line R. Corp. v. New York, 195 N.Y.S. 203, 118 Misc. 665.

90. Iowa.—Windsor v. Des Moines, 81 N.W. 476, 110 Iowa 175, 80 Am S.R. 280.

91. Mont.—Milligan v. Miles City, 153 P. 276, 51 Mont. 374, L.R.A. 1916C 395.

Pa.—Wheeler v. Philadelphia, 77 Pa. 338.

Extent of statutory authority

Under statute providing that any city or village shall have the power by its governing body to provide for or to secure payment of cost or expenses of purchasing or constructing or otherwise acquiring "extending and improving" any real or personal property, etc., necessary in operation of electric light and power plant, etc., and to pledge earnings for "maintenance, extension or enlargement" of any electric light and power plant, legislature intended that officials of a city or village having an established electric light and power plant, distribution, or transmission lines should have authority

to keep them modern, efficient, and of sufficient size to meet public needs—Slepicka v. City of Wilber, 34 N.W.2d 646, 150 Neb. 376.

92. Ark.—Bank of Commerce v. Huddleston, 291 S.W. 422, 172 Ark. 999, 50 A.L.R. 1202.

93. Ariz.—Humphrey v. City of Phoenix, 103 P.2d 82, 55 Ariz. 374. Ark.—Hogue v. Housing Authority of North Little Rock, 144 S.W.2d 49, 201 Ark. 263.

Cal.—Housing Authority of Los Angeles County v. Dockweiler, 94 P.2d 794, 14 Cal.2d 437—Housing Authority of City of Oakland v. Forbes, 124 P.2d 194, 51 Cal.App.2d 1.

Fla.—Lott v. City of Orlando, 196 So. 313, 142 Fla. 338—Marvin v. Housing Authority of Jacksonville, 183 So. 145, 133 Fla. 590.

Ill.—Krause v. Peoria Housing Authority, 19 N.E.2d 193, 370 Ill. 356.

La.—State ex rel. Porter v. Housing Authority of New Orleans, 182 So. 725, 190 La. 710.

Mass.—Stockus v. Boston Housing Authority, 24 N.E.2d 333, 304 Mass. 507.

Mont.—Rutherford v. City of Great Falls, 86 P.2d 656, 107 Mont. 512.

N.J.—Redfern v. Board of Com'rs of Jersey City, 59 A.2d 641, 137 N.J. Law 356.

N.C.—Mallard v. Eastern Carolina Regional Housing Authority, 20 S.E.2d 281, 221 N.C. 334—Cox v. City of Kinston, 8 S.E.2d 252, 217 N.C. 391—Wells v. Housing Authority of City of Wilmington, 197 S.E. 693, 213 N.C. 744.

S.C.—Woodworth v. Gallman, 10 S.E.2d 316, 195 S.C. 157—McNulty v. Owens, 199 S.E. 425, 188 S.C. 377.

Reasons for rule

(1) The purpose of housing au-

thority law is to eliminate slums and unsafe and unsanitary buildings and the providing of low-rent housing with public funds is only a means by which main object can be accomplished—Allydorn Realty Corporation v. Holyoke Housing Authority, 23 N.E.2d 665, 304 Mass. 288.

(2) In eradicating the slum menace under housing authority acts, the housing authority lightens the burden of the city in protecting against disease, crime, and immorality, and hence public funds of the city may be used to aid in establishment of the housing authority.—Lennox v. Housing Authority of City of Omaha, 290 N.W. 451, 137 Neb. 582, supplemented 291 N.W. 100, 137 Neb. 582.

94. R.I.—Opinion to the Governor, 63 A.2d 724.

Extent of authority

Statute authorizing city to provide needed housing accommodations limits city's authority to engage in any housing project to an expenditure not to exceed specified amount, and city can proceed in such an enterprise only in the manner and to the extent prescribed by the statute to relieve a public emergency which legislature declared to be existing at time statute was adopted.—Opinion to the Governor, supra.

95. Ariz.—City of Phoenix v. Superior Court of Maricopa County, 175 P.2d 811, 65 Ariz. 139.

Mass.—Opinions of the Justices, 67 N.E.2d 588, 320 Mass. 773, 165 A.L.R. 807.

Ohio.—Curtis v. Toledo Metropolitan Housing Authority, Com.Pl., 78 N.E.2d 676—City of Columbus ex rel. Falter v. Columbus Metropolitan Housing Authority, Com.Pl., 67 N.E.2d 338, affirmed, App., 68 N.E.2d 108.

tion with slum clearance grants a limited authority and does not invade the whole field of housing so as to limit powers already possessed by municipalities in that field.⁹⁶

§ 1837. Payments to Officers, Employees, or Persons Rendering Services

A municipal corporation may pay or be authorized to pay for services rendered by an officer, employee, or other person; in a proper case a municipal corporation may appropriate money for the payment of the salary of an absent or illegally dismissed officer or employee, for pay for services rendered by an officer or employee, or for insurance or pensions for the benefit of its employees.

While, as a general rule, a municipal corporation cannot legally bestow a gratuity on an officer or employee⁹⁷ or, in the absence of proper authorization, expend public funds to pay a person rendering service in furtherance of a private purpose,⁹⁸ a municipality may pay,⁹⁹ or the legislature may authorize or direct it to pay,¹ for services rendered by an officer, employee, or other person, without violating constitutional prohibitions of gifts donations, or gratuities.² A moral or equitable obligation to pay for valuable services rendered is

sufficient to justify the action of the municipality in paying,³ or the action of the legislature in authorizing or requiring the municipality to make payment.⁴

A municipality may appropriate or expend money for the employment of counsel for the benefit of the municipality,⁵ but not for the services of attorneys employed in suits in which it had no interest⁶ or attorneys not employed by direction of the council.⁷ Where the finances and records of a village are in a chaotic condition, the employment of an expert accountant to examine the books, report the taxes due and payable, and install a proper system of accounting, is for a village purpose.⁸ Making of an assessment for a municipality, when properly and lawfully authorized, is of a public and not a private nature,⁹ and an appropriation to pay for the necessary work done in connection with the assessment is for a public purpose.¹⁰ However, a municipal council is without power to appropriate funds for the making of a new assessment which, when made, will not have any validity.¹¹ In the absence of legislative authority,

96. Ariz.—City of Phoenix v. Superior Court of Maricopa County, 175 P.2d 811, 65 Ariz. 139.

97. Mass.—Matthews v. Westborough, 134 Mass. 555.
44 C.J. p 1112 note 97.

Retroactive pay raise
Mass.—James v. Mayor of New Bedford, 64 N.E.2d 638, 319 Mass. 74.

98. La.—Hardin v. City of Shreveport, 150 So. 665, 178 La. 46.

Veterans' aid

Appropriation by city council of funds to pay "service officer" for advising and assisting all ex-service men and their families and dependents within city, in securing veterans' benefits, was unwarranted under charter, in absence of legislative delegation of authority to aid ex-service men.—Hardin v. City of Shreveport, *supra*.

99. Mo.—Corpus Juris cited in Kirby v. Nolte, 164 S.W.2d 1, 4, 349 Mo. 1015.

W.Va.—State v. Amos, 140 S.E. 544, 104 W.Va. 538.
44 C.J. p 1112 note 98.

Retroactive pay raise

(1) Transportation board's grant of retroactive pay increases to its employees, pursuant to agreement to make any such increases retroactive to specified date, if employees continued working after such date, was not gift prohibited by constitution, but was supported by valid and legal consideration.—Timmerman v. City of New York, 69 N.Y.S.2d 102, affirmed 70 N.Y.S.2d 140, 272 App.Div. 758.

(2) Payments of retroactive additional compensation by municipal port commission to longshoremen pursuant to port manager's agreement that, if members of local union would continue to work for port, the port would conform to conditions of contract being negotiated by international union with association of private employers of longshoremen, would not be an unconstitutional gift of public moneys.—Christie v. Port of Olympia, 179 P.2d 294, 27 Wash.2d 534.

Joint employment of policeman

An arrangement between city and merchants and citizens protective association for joint employment of a police patrolman was not beyond corporate power of city as involving payment of public money for private purpose, where evidence showed that patrolman protected not only the premises of the association's members but all business premises of city, and that patrolman was authorized to perform the duties of a regular patrolman.—Krawiec v. Industrial Commission, 25 N.E.2d 27, 372 Ill. 560.

Heroic act

Council of city was authorized to pass ordinance providing for payment of money to person performing heroic act in saving lives at request of city authorities.—State v. Rusk, 174 N.E. 142, 37 Ohio App. 109.

1. Ga.—Savannah v. Guerard, 122 S. E. 691, 158 Ga. 205.
44 C.J. p 1112 note 99.

2. N.Y.—People v. Crane, 108 N.E. 427, 214 N.Y. 154, L.R.A. 1916D 550, Ann.Cas.1915B 1254, affirmed 36 S. Ct. 85, 239 U.S. 195, 60 L.Ed. 218.
44 C.J. p 1112 note 1.

3. Pa.—McNulty v. Blanter, 9 Pa. Dist. & Co. 183, 18 Mun.L.R. 73, 27 Lack.Jur. 209.

44 C.J. p 1112 note 2.

Moral obligations generally see *supra* § 1835 c.

4. N.J.—Morris, etc., R. Co. v. Newark, 70 A. 194, 76 N.J.Law 555.

N.Y.—Gaynor v. Port Chester, 129 N.E. 657, 230 N.Y. 210.

5. Ala.—Carter v. Town of Muscle Shoals, 7 So.2d 74, 242 Ala. 519.

Ill.—Baltzer v. City of Chicago, 260 Ill.App. 384.

44 C.J. p 1112 note 5.

Aid in acquisition of utility

Ind.—Southern Indiana Gas & Electric Co. v. City of Boonville, 12 N. E.2d 122, 213 Ind. 307, rehearing denied 12 N.E.2d 503, 213 Ind. 307.

6. N.J.—Stell v. Jersey City, 111 A. 274, 95 N.J.Law 38.

44 C.J. p 1112 note 6.

7. N.Y.—Roberts v. New York, 5 Abb.Pr. 41.

8. N.Y.—Gaynor v. Port Chester, 129 N.E. 657, 230 N.Y. 210.

9. Del.—Wilmington v. Wolcott, 113 A. 703, 12 Del.Ch. 379.

10. Del.—Wilmington v. Wolcott, *supra*.

11. Pa.—Selig v. Philadelphia, 19 Pa.Dist. 907.

the board of trustees of a village has no power to pay the premiums on the official bonds of its officers.¹² A charter provision making the treasurer custodian of municipal funds and requiring him to keep accounts and report the state of the treasury implies the power to contract for the compensation of an auditor of his books;¹³ and, as an incident to a power to sell municipal realty at public auction, a municipality may contract to pay compensation for a broker's services.¹⁴

Absent or illegally dismissed officers or employees. A municipal council may lawfully appropriate money for the payment of the salary of an officer or employee during the period of his illegal dismissal,¹⁵ and it is held that constitutional prohibitions of gifts of municipal funds are not violated by statutes requiring a municipality to pay such a claim,¹⁶ or, in the case of officers and employees engaged in military service, the difference between their salary and their military pay;¹⁷ but it has also been held that a statute, which requires a municipality to pay salary to a duly elected officer for the period of time that the duties of the office were actually performed by another person claiming to have been elected to the office, is unconstitutional.¹⁸ A statute providing that an employee of a municipal corporation shall be paid

his salary as such during absence on military or naval duty is not violative of the constitutional prohibition against gifts of public money.¹⁹

Reimbursement for losses or expenses. Except in some jurisdictions,²⁰ an appropriation made by a municipality to a municipal officer to reimburse or indemnify him for expenses or losses incurred while in the performance of his duties is valid.²¹ A municipality may not pay,²² nor can the legislature authorize it to pay,²³ the expenses incurred by a public officer in defending himself against a criminal prosecution; but it has been held that a municipal corporation may appropriate funds,²⁴ or the legislature may authorize it to appropriate funds,²⁵ for the necessary expenses incurred by him in defending against charges arising out of acts done by him while in the bona fide discharge of his official duties.

Pensions and insurance. A municipal corporation may, without violating constitutional provisions, take out or pay for group²⁶ or workmen's compensation²⁷ insurance for the benefit of its employees. Also, in most jurisdictions constitutional prohibitions against gifts to individuals or expenditure of public funds for private purposes are not violated by provisions for pensions to firemen, policemen, or other municipal employees,²⁸ or their

12. N.Y.—Matter of Kenmore, 110 N.Y.S. 1008, 59 Misc. 388, 399. 44 C.J. p 1113 note 12.

13. Neb.—O. M. Campbell Co. v. City of Harvard, 243 N.W. 653, 123 Neb. 539.

14. N.C.—Realty & Mortgage Co. v. City of Winston-Salem, 6 S.E.2d 501, 303 Ill.App. 726.

15. Pa.—Doverspike v. Magee, 51 Pa. Super. 525.

16. N.J.—Jardot v. Rahway, 127 A. 799, 3 N.J.Misc. 201.

Statute held valid

A provision requiring replacement of any civil service employee whose position has been filled by one not appointed in accordance with the civil service laws, and, by implication, requiring the payment of a salary to such employee, is not retroactive and hence not unconstitutional.—Liebowitz v. Goldwater, 291 N.Y.S. 222, 161 Misc. 115.

17. N.Y.—Henn v. Mt. Vernon, 189 N.Y.S. 851, 198 App.Div. 152. 44 C.J. p 1113 note 15.

18. N.Y.—Stemmler v. New York, 72 N.E. 581, 179 N.Y. 473. 44 C.J. p 1113 note 16.

19. N.Y.—Hoyt v. Broome County, 34 N.E.2d 481, 285 N.Y. 402, 134 A. L.R. 916.

20. Cal.—Heslep v. Sacramento, 2 Cal 580.

21. Ill.—Barber v. City of Evanston, 17 N.E.2d 722, 297 Ill.App. 396. Mass.—Quinlan v. City of Cambridge, 68 N.E.2d 11, 320 Mass. 124. Tex.—City of Corsicana v. Babb, Com App., 290 S.W. 736. 44 C.J. p 1113 note 18.

Reimbursement of agents and employees generally see supra § 720. Reimbursement of officers for expenditures generally see supra § 535.

Training expenses

Payment by a municipal corporation of a sum of money to cover expenses and salary of policeman while attending the police academy for training was for a public purpose because the object of the expenditure was the maintenance of law and order which is an essential function of government, and such expenditure does not grant an exclusive "emolument or privilege" to the policeman contrary to the constitutional provision that no man or set of men is entitled to exclusive or separate emoluments or privileges from the community, but in consideration of public services.—Green v. Kitchen, 50 S.E.2d 545, 229 N.C. 450.

22. Tex.—City of Del Rio v. Lowe, Civ.App., 111 S.W.2d 1208, reversed on other grounds Lowe v. City of

Del Rio, 122 S.W.2d 191, 132 Tex. 111.

43 C.J. p 1113 note 26.

23. N.Y.—Schieffelin v. Henry, 206 N.Y.S. 172, 123 Misc. 792, affirmed 212 N.Y.S. 914, 215 App.Div. 706. affirmed 152 N.E. 436, 242 N.Y. 581.—In re Jensen, 59 N.Y.S. 653, 28 Misc. 378, affirmed 60 N.Y.S. 933, 44 App.Div. 509.

24. Minn.—Moorhead v. Murphy, 102 N.W. 219, 94 Minn. 123, 110 Am.S.R. 345, 68 L.R.A. 400. 43 C.J. p 695 note 70.

25. Wis.—Curry v. City of Portage, 217 N.W. 705, 195 Wis. 35.

26. Ala.—Opinion by the Justices, 30 So.2d 14, 249 Ala. 88. Tenn.—State v. Memphis, 251 S.W. 46, 147 Tenn. 658, 27 A.L.R. 1257.

27. Ga.—City of Atlanta v. Pickens, 169 S.E. 99, 176 Ga. 833.—City of Macon v. Benson, 166 S.E. 26, 175 Ga. 502.

Minn.—Red Wing v. Elchinger, 203 N.W. 622, 163 Minn. 54.

28. Ark.—Adamson v. City of Little Rock, 134 S.W.2d 558, 199 Ark. 435.

Cal.—Fessier v. Campbell, 42 P.2d 1020, 2 Cal.2d 638.—Richards v. Wheeler, 51 P.2d 436, 10 Cal.App.2d 108.

Iowa.—Talbot v. Independent

widows and children;²⁹ but in these jurisdictions a statute authorizing the granting of pensions to persons who have retired,³⁰ or to the widows of persons who have died,³¹ prior to the passage of the statute is unconstitutional; and it is likewise unconstitutional to pay a pensioner more than that to which he is entitled under the statutes.³² In other jurisdictions the policy of the state as manifested by constitutional provisions has been held to be opposed to the granting of pensions³³ except to firemen.³⁴

§ 1838. Investigations, Campaigns, and Lobbying

There is conflict among the authorities as to the power of municipal corporations to expend money in lobbying, campaigning, or otherwise promoting or opposing particular legislative action or action of an administrative body.

There is some conflict among the authorities as to the right of municipal corporations to appropriate funds or incur indebtedness for the purpose

of influencing legislation affecting its interests. Thus, some authorities hold that a municipality may expend its public funds for the protection and promotion of its well-being before the legislature;³⁵ that it may appropriate or expend money to compensate or reimburse a person for his services and expenses in endeavoring to obtain the passage of state or federal legislation affecting the municipality;³⁶ and that it is justified, if acting bona fide, in applying its funds in opposing proposed legislation or referendum to the people which would affect its existence, or materially injure its powers as a corporation, although no such power is expressly given to it by its incorporating act;³⁷ and it has further been held that in order to accomplish these purposes it may incur expenditures by the publication of pamphlets, circulars, advertisements, or radio addresses.³⁸ On the other hand, it has frequently been held that a municipal corporation has no right to appropriate its funds to promote³⁹ or oppose⁴⁰ the passage of legislation

School Dist. of Des Moines, 299 N. W. 556, 230 Iowa 949, 137 A.L.R. 234.

Ky.—Board of Trustees of Police-men's Pension Fund v. Schupp, 3 S.W.2d 606, 223 Ky. 269.

Miss.—Mayor and Aldermen of City of Vicksburg v. Crichtlow, 16 So.2d 749, 196 Miss. 259.

N.J.—Emanuel v. Sproat, 54 A.2d 765, 136 N.J.Law 154, affirmed 61 A.2d 236, 137 N.J.Law 610.

Ohio—Thompson v. City of Marion, 16 N.E.2d 208, 134 Ohio St. 122.

Tex.—Byrd v. City of Dallas, 6 S. W.2d 738, 118 Tex. 28

44 C.J. p 1114 note 34.

Pensions and benefits for agents and employees generally see *supra* § 727.

Viewed as withheld pay

Pensions are upheld as being in the nature of compensation for services previously rendered for which pay was withheld, rather than as constituting extra compensation or donations or gratuities.

Fla.—Voorhees v. City of Miami, 199 So. 313, 145 Fla. 402.

Tex.—City of Dallas v. Trammell, Civ.App. 90 S.W.2d 110, reversed on other grounds 101 S.W.2d 1009, 129 Tex. 150, 112 A.L.R. 997.

Wash.—Ayers v. City of Tacoma, 108 P.2d 348, 6 Wash.2d 545.

44 C.J. p 1114 note 34 [a] (2).

Insufficiency of funds

The provision of firemen's pension statute that, in case of insufficiency of funds, such additional funds as might be necessary should be paid out of city treasury did not violate constitutional provision prohibiting municipal corporations from appropriating money to any in-

dividual except for purely charitable purposes—West v. Trotzier, 196 S. E. 902, 185 Ga. 794.

29. Ga.—West v. Trotzier, 196 S.E. 902, 185 Ga. 794.

30. N.Y.—Mahon v. New York Board of Education, 74 N.Y.S. 172, 68 App.Div. 154, affirmed 63 N.E. 1107, 171 N.Y. 263, 89 Am.S.R. 810.

31. N.Y.—Glasser v. Buffalo, 187 N. Y.S. 337, 115 Misc. 88.

32. Pensioner gainfully employed

Right of city under charter providing for reduction in retirement allowance payable to pensioner engaged in gainful occupation prior to attaining a designated age became fixed when retired fireman started to work and attempt, retroactively, to pay to retired fireman difference between the smaller amount payable under such provision and the maximum retirement allowance would constitute gift of public funds in violation of constitution.—Brophy v. Employees Retirement System, 162 P.2d 939, 71 Cal.App.2d 455.

33. Mo.—State v. Kimmel, 165 S.W. 1067, 256 Mo. 611—State v. Ziegenhein, 45 S.W. 1099, 144 Mo. 283, 66 Am.S.R. 420.

34. Mo.—State v. Kimmel, 165 S.W. 1067, 256 Mo. 611.

35. Ala.—Fitts v. Commission of City of Birmingham, 141 So. 354, 224 Ala. 600.

Cal.—Powell v. City and County of San Francisco, 144 P.2d 617, 62 Cal.App.2d 291.

N.J.—City Affairs Committee of Jersey City v. Board of Com'rs of Jersey City, 46 A.2d 425, 134 N.J. Law 180.

36. Cal.—Powell v. City and County

of San Francisco, 144 P.2d 617, 62 Cal App 2d 291.

N.J.—City Affairs Committee of Jersey City v. Board of Com'rs of Jersey City, 41 A.2d 798, 132 N.J. Law 552, followed in Application of City Affairs Committee of Jersey City, 41 A.2d 806, 132 N.J. Law 567, affirmed 46 A.2d 425, 134 N. J. Law 180.

44 C.J. p 1114 note 42.

37. N.J.—City Affairs Committee of Jersey City v. Board of Com'rs of Jersey City, 46 A.2d 425, 134 N.J. Law 180

44 C.J. p 75 note 38.

38. N.J.—City Affairs Committee of Jersey City v. Board of Com'rs of Jersey City, 46 A.2d 425, 134 N.J. Law 180—In re Carrick, 22 A.2d 561, 127 N.J. Law 316.

Content and tone of advertisements

The validity of a resolution adopted by the city commissioners providing for advertisements urging defeat of a proposed revised constitution did not depend on the content or tone of advertisements or on conformance with judicial concepts of sound policy or fair and temperate advocacy, as long as the action taken by the commissioners was not clearly capricious.—City Affairs Committee of Jersey City v. Board of Com'rs of Jersey City, 46 A.2d 425, 134 N. J. Law 180.

39. Ariz.—City of Phoenix v. Michael, 148 P.2d 353, 61 Ariz. 238.

Ohio.—City of Cleveland v. Artl, 23 N.E.2d 525, 62 Ohio App. 210,

44 C.J. p 1114 note 41.

40. Ariz.—City of Phoenix v. Michael, 148 P.2d 353, 61 Ariz. 238.

44 C.J. p 75 note 37. p 1114 note 41.

affecting its interests or the taking of particular action by an administrative body.⁴¹ So, it is held that a municipal corporation is without authority to incur indebtedness or appropriate funds for the conduct of a campaign to secure the election of the city as the state capital,⁴² or to secure a favorable vote on a proposed bond issue,⁴³ even though conducting such a campaign is deemed necessary to correct misinformation disseminated by opponents of the proposal.⁴⁴

A municipality may not expend public money for investigation of a municipal department, where there is no just reason for such an investigation so as to constitute it a public purpose.⁴⁵ Also, a municipality has been held to be without authority, under its charter, to incur indebtedness or appropriate funds for the expense of extensive investigation by the mayor.⁴⁶

§ 1839. Celebrations, Entertainments, and Sports

Some authorities hold that a municipal corporation has no power to expend municipal funds for celebrations, but others hold that a municipal corporation may, at least when authorized by charter or statute, appropriate money for celebration of public events; a municipality may not ordinarily expend money for entertainment.

According to some authorities a municipal corporation has no power to incur indebtedness or appropriate municipal funds for celebrations, even

of patriotic holidays or anniversaries of historical events;⁴⁷ but other authorities have held that the celebration or commemoration of public events is a proper purpose for municipal appropriations,⁴⁸ at least where an appropriation for such a purpose is authorized by charter or statute.⁴⁹ Also, unless expressly authorized,⁵⁰ a municipal corporation is without power to incur indebtedness or appropriate public funds for the purpose of providing entertainment of any character⁵¹ for either its citizens⁵² or its guests;⁵³ and, regardless of its power to incur liability in the first instance, where the entertainment is provided and funds are raised under private auspices without official authorization, it is without power to devote public funds for the purpose of supplying a deficit in the funds raised.⁵⁴ While the legislature may expressly authorize a municipal corporation to incur indebtedness for the acquisition of a golf course, to be impartially conducted in the interest of the local public,⁵⁵ authority on the part of the municipality to incur indebtedness for this purpose will not be implied from general powers conferred on it.⁵⁶ Constitutional prohibitions against gifts of municipal money or property must be observed by the legislature in providing for the use of a municipal playground for an outdoor exhibition, game, or contest at which an admission is charged.⁵⁷

§ 1840. Schools, Colleges, and Libraries

Subject to constitutional, statutory, and charter re-

41. Ga.—*Stuart v. City of Atlanta*, 163 S.E. 493, 174 Ga. 587.

42. S.D.—*Shannon v. Huron*, 69 N. W. 598, 9 S.D. 356.

44 C.J. p 1114 note 39.

43. Cal.—*Mines v. Del Valle*, 257 P. 530, 201 Cal. 273.

Reason for rule

To use public funds to obtain a favorable vote on a proposed bond issue where public opinion is divided would be manifestly unfair and unjust to electors opposing the bond issue.—*Mines v. Del Valle*, *supra*.

Distinguished from proper appearances before public body

The courts have recognised that there is a difference between the expenditure of funds for election purposes and the use of money to pay expenses in proper appearances before a judicial or legislative body to urge particular action.—*Powell v. City and County of San Francisco*, 144 P.2d 617, 92 Cal.App.2d 391.

Advertising campaign

Appropriation for advertising in support of proposed bond issues to be submitted to voters was unauthorized.—*Eisenau v. City of Chicago*, 165 N.E. 122, 83 Ill. 78.

44. Cal.—*Mines v. Del Valle*, 257 P. 530, 201 Cal. 273.

45. Mass.—*Whiting v. Mayor of Holyoke*, 172 N.E. 338, 272 Mass. 116.

46. Mich.—*Attorney General v. Wayne Cir. Judge*, 122 N.W. 260, 157 Mich. 615.

47. N.C.—*Love v. Raleigh*, 21 S.E. 503, 116 N.C. 296, 28 L.R.A. 192.

44 C.J. p 1114 note 45.

48. Pa.—*Sambo v. Hadley*, 140 A. 347, 291 Pa. 395, followed in *Turner Const. Co. v. Mackey*, 140 A. 353, 291 Pa. 412, and *Plumly v. Hadley*, 140 A. 353, 291 Pa. 411—*Stegmaier v. Goeringer*, 67 A. 782, 218 Pa. 499, 11 Ann.Cas. 973.

49. Pa.—*Sambo v. Hadley*, 140 A. 347, 291 Pa. 395, followed in *Turner Const. Co. v. Mackey*, 140 A. 353, 291 Pa. 412, and *Plumly v. Hadley*, 140 A. 353, 291 Pa. 411. 44 C.J. p 1114 note 44.

50. Cal.—*Sacramento Chamber of Commerce v. Stephens*, 299 P. 728, 212 Cal. 607.

Charter provision authorizing the city council to appropriate money to

entertain public guests was held permissive and not mandatory—*Sacramento Chamber of Commerce v. Stephens*, *supra*.

51. N.Y.—*Matter of Kenmore*, 110 N.Y.S. 1008, 59 Misc. 388.

Private opera company

City council was not authorized to make appropriation to aid a private opera company in putting on performances—*Kulp v. City of Philadelphia*, 140 A. 129, 291 Pa. 413.

52. Mo.—*Kennedy v. Nevada*, 281 S. W. 56, 222 Mo. App. 459.

44 C.J. p 1114 note 49.

53. Mo.—*Kennedy v. Nevada*, *supra*. 44 C.J. p 1114 note 50.

54. Pa.—*Historical Pageant Ass'n v. Philadelphia*, 103 A. 824, 260 Pa. 447—*Blakenburg v. Philadelphia*, 20 Pa. Dist. 531.

55. Fla.—*West v. Town of Lake Placid*, 120 So. 361, 97 Fla. 127—*Bradentown v. State*, 102 So. 556, 88 Fla. 381, 36 A.L.R. 1297.

56. Fla.—*Bradentown v. State*, *supra*.

57. N.J.—*Strock v. East Orange*, 72 A. 34, 77 N.J. Law 382.

44 C.J. p 1115 note 56.

strictions, a municipal corporation may appropriate funds for the establishment and maintenance of schools and libraries.

Since the establishment and maintenance of schools are a municipal purpose,⁵⁸ an appropriation of funds for the support of schools is for a municipal purpose.⁵⁹ When authorized by statute municipal funds may be appropriated to a textile school,⁶⁰ a manual training school,⁶¹ a reform school,⁶² or a free library.⁶³ However, in pledging its revenues for school purposes, a municipality must keep within the authority conferred by charter or statute.⁶⁴ Also, a municipal corporation cannot, in violation of constitutional provisions, make a gift to a school district which is a separate and distinct political subdivision;⁶⁵ nor can the legislature authorize it to do so;⁶⁶ but, where the right of a municipality to contribute to an educational institution is questionable, a presumption arises that its disposition of public funds is a payment or exchange for value rather than a gift.⁶⁷ Donations by a municipality to a state normal college are upheld when authorized by a valid statute;⁶⁸ but not otherwise.⁶⁹

A contract binding a lessee of a municipally owned waterworks to furnish water free of cost to school-houses, including parochial schoolhouses, is not violative of a constitutional prohibition against the use of municipal property or credit in aid of any school under the control of any religious denomination, where under the lease the water is owned by the lessee.⁷⁰

§ 1841. Aid of Welfare, Charitable, or Religious Associations or Institutions

Provided it does not violate constitutional provisions relating to municipal expenditures, a municipal corporation may, when authorized to do so by statute or charter, appropriate money in aid of welfare or charitable associations or institutions.

An appropriation or expenditure of money by a municipal corporation in aid of a welfare or charitable association or institution is valid when authorized by charter or statutory provision⁷¹ and not prohibited by constitutional provision,⁷² but of course not when it falls within a constitutional prohibition and the construction placed thereon.⁷³

58. Miss.—Turner v. Hattiesburg, 53 So. 681, 98 Miss. 337.

59. Pa.—Cushman v. Pennsylvania Museum and School of Industrial Art, 10 Pa. Dist. & Co. 316.

44 C.J. p 1115 note 59.

School building

A municipal corporation may appropriate its corporate funds for the purchase of an interest in a building for public school purposes, notwithstanding the superintendence of the school is in the hands of trustees not elected by the municipality, and they have contracted to keep a school in the building.—Danielly v. Cabaniss, 52 Ga. 211.

60. Mass.—Hanscom v. Lowell, 43 N.E. 196, 165 Mass. 419.

61. Wis.—Maxcy v. Oshkosh, 128 N. W. 899, 1136, 144 Wis. 238, 81 L.R. A., N.S., 787.

62. U.S.—Livingston County v. Darlington, Ill., 101 U.S. 407, 25 L. Ed. 1015.

63. Appropriation for rent of private library to be under control of village and open to all members of the public was valid.—Koester v. Village of Pardeeville, 225 N.W. 204, 199 Wis. 54.

Authority held lacking

Town authorities cannot pledge town's faith and credit to procure grant by federal Public Works Administration for erection of public library, which is not necessary town expense, without majority vote of town electors, or expend public money for equipment and maintenance of such institution.—Westbrook v.

Town of Southern Pines, 1 S.E.2d 95, 215 N.C. 20.

64. Ala.—Cleveland School Furniture Co. v. Greenville, 41 So. 862, 146 Ala. 559.

65. Ohio.—Cleveland v. Cleveland City School Dist. Public Library Board, 114 N.E. 247, 94 Ohio St. 311.

School transferred to county

Where a municipality has transferred a school to the county board of education pursuant to election to determine whether the school should become part of the county school system, the municipality has no legal power to donate other funds for the support of the school.—Miller v. City of Cornelia, 4 S.E.2d 568, 188 Ga. 674.

66. Ohio.—Cleveland v. Cleveland City School Dist. Public Library Board, 114 N.E. 247, 94 Ohio St. 311.

67. Tenn.—Southwestern Presb. Univ. v. Clarksville, 259 S.W. 550, 149 Tenn. 256.

68. Miss.—Turner v. Hattiesburg, 53 So. 681, 98 Miss. 337.

69. Ill.—Eastern Illinois State Normal School v. Charleston, 193 Ill. App. 600, affirmed 111 N.E. 573, 271 Ill. 602, L.R.A.1916D 991, 44 C.J. p 1115 note 69.

70. N.Y.—St. Patrick's Church Society of Corning v. Heermans, 124 N.Y.S. 705, 68 Misc. 487.

71. Ind.—Indianapolis v. Indianapolis Home for Friendless Women, 50 Ind. 215.

44 C.J. p 1115 note 70.

Poor relief agencies

Appropriation to agencies aiding in carrying out poor relief is not violative of constitutional prohibitions against giving money or lending credit to private individuals, corporations, or associations, since poor relief is a proper governmental function.—Kotch v. Middle Coal Field Poor Dist., 197 A. 334, 329 Pa. 390.

Necessity of statutory authority

Poor relief and care and welfare of children are matters of state-wide concern, and, hence, authority for expending public funds by local authorities for such purposes must be found in general laws enacted by the general assembly.—Ferrie v. Sweeney, Ohio Com.Pl., 72 N.E.2d 128.

72. Ark.—Bourland v. Pollock, 249 S.W. 360, 157 Ark. 538.

44 C.J. p 1115 note 71.

73. La.—State v. New Orleans, 24 So. 666, 50 La. Ann. 880.

Pa.—Wilkesbarre City Hospital v. Luzerne County, 84 Pa. 55.

Expenditure for private purpose

The bestowal of care at public expense on children of those whose financial condition does not require it is an improper expenditure of public funds for a private purpose; hence, adoption of city ordinance appropriating public funds for temporary operation of day care centers for children of working mothers is irrespective of the ability of children's parents to pay the cost thereof was not in the exercise of municipality's powers of local self-government, and ordinance is invalid as constituting an expenditure of public funds for a

Some constitutional provisions prohibit the use of municipal funds in aid of any church, sect, denomination, or sectarian institution.⁷⁴ Except in some jurisdictions,⁷⁵ a municipal appropriation or concession to a firemen's relief association,⁷⁶ as well as a statute authorizing or requiring it,⁷⁷ is valid, unless the statute is so worded as to allow participation in the relief fund by firemen who are residents of the municipality, even though they may never have rendered service to that particular municipality.⁷⁸ Municipal corporations have been held empowered to erect or maintain hospitals,⁷⁹ or to enter into arrangements or contracts to furnish financial aid to others in the erection or maintenance of hospitals.⁸⁰ A provision for establishment of veterans' recreational centers is not violative of a constitutional prohibition against conferring special privileges on individuals not in consideration of public service, since military service constitutes public service.⁸¹

§ 1842. Aid of Private Manufacturing Establishment

A municipal corporation may not appropriate money or incur indebtedness in aid of a private manufacturing establishment.

As a general rule, a municipal corporation cannot incur indebtedness or grant money for the purpose of encouraging the establishment of a private manufacturing enterprise;⁸² nor can the legislature authorize it to do so;⁸³ but a statute au-

thorizing the use of municipal funds for a project which will incidentally benefit private manufacturing establishments is not invalid where the expenditure is for a public purpose and does not constitute an appropriation to private individuals or corporations.⁸⁴

§ 1843. Indebtedness Incurred before Incorporation, Change of Charter, or Dissolution

The legislature may impose on a municipal corporation liability for debts contracted by it before its incorporation; where a municipal corporation obtains a new or amended charter, the liabilities of the corporation in its prior form survive, and the legislature may expressly provide for their payment; debts and obligations of a municipal corporation, as well as the remedies for their enforcement, generally survive dissolution of the corporation.

Unless expressly authorized by legislation, a municipal corporation has no authority to appropriate money for the payment of expenses incurred by individuals, prior to its corporate existence, in procuring the passage of its charter.⁸⁵ The legislature, however, may impose on a municipal corporation debts contracted by it before it was lawfully incorporated.⁸⁶

On obtaining new or amended charter. Regardless of whether, on reincorporation or reorganization of a municipality, the corporation in its new form is technically regarded as a new corporation or as a continuation of the former body, as discussed supra § 96, and even though there may

private purpose and as contravening the provisions of the Child Welfare Act.—*Ferrie v. Sweeney*, Ohio Com. Pl., 72 N.E.2d 128.

As current operating expense

Claim by nonprofit corporation for money expended for poor relief under contract with city promising reimbursement therefor was a "current operating expense" and fell within category of indebtedness which could not be incurred by municipality under statutory provisions.—*Industrial Rescue Mission v. City of Columbus*, 81 N.E.2d 254, 83 Ohio App. 188.

74. Ga.—*Bennett v. La Grange*, 112 S.E. 482, 153 Ga. 428, 22 A.L.R. 1312.

44 C.J. p 1115 note 73.

75. Del.—*State v. Wilmington*, 134 A. 694, 3 W.W.Harr. 238.

44 C.J. p 1115 note 74.

76. Pa.—*Commonwealth v. Barker*, 61 A. 253, 211 Pa. 610.

77. N.Y.—*People v. Metz*, 104 N.Y. S. 1115, 120 App.Div. 565.

78. Cal.—*Taylor v. Mott*, 56 P. 256, 123 Cal. 497.

79. Ala.—*Hamilton v. City of An-*

niston, 27 So.2d 857, 248 Ala. 396. Md.—*Finan v. City of Cumberland*, 141 A. 269, 154 Md. 563.

Use in part for private practice

A municipality is not authorized without specific statutory authority to construct with municipal funds a building for use in part by physicians for office space in their private practice; and a statute authorizing it to own and maintain public hospital and to purchase and provide for things deemed advisable or necessary thereto does not carry with it such authority.—*Hamilton v. City of Anniston*, 27 So.2d 857, 248 Ala. 396.

80. Md.—*Finan v. City of Cumberland*, 141 A. 269, 154 Md. 563. 44 C.J. p 1116 note 78.

81. N.C.—*Brumley v. Baxter*, 36 S. E.2d 281, 225 N.C. 691, 162 A.L.R. 930.

82. U.S.—*Sutherland-Innes Co. v. Elvart*, Mich., 86 F. 597, 30 C.C.A. 305.

44 C.J. p 1116 note 80.

Aid to corporations and stock subscriptions see infra §§ 1870-1877.

83. U.S.—*Cole v. La Grange*, Mo., 5 S.Ct. 416, 113 U.S. 1, 28 L.Ed. 896. 44 C.J. p 1116 note 81—14 C.J. p 106 note 33.

84. Pa.—*Taylor v. Philadelphia*, 26 Pa. Dist. 979.

Relief of unemployment

The statute authorizing municipalities to acquire land and construct buildings thereon to be leased to individuals or private corporations for purpose of operating manufacturing establishments in order to relieve unemployment and promote agricultural and industrial welfare of state does not violate constitution prohibiting appropriation of property to private individuals or corporations where lease must contain provisions giving municipality power to enforce use of property for such purposes.—*Albritton v. City of Winona*, 178 So. 799, 181 Miss. 75, 115 A.L.R. 1436, appeal dismissed *Albritton v. City of Winona*, Mississippi, 58 S.Ct. 768, 303 U.S. 627, 82 L.Ed. 1088.

85. Mass.—*Frost v. Belmont*, 6 Allen 152.

86. N.J.—*Cooper v. Springer*, 48 A. 605, 65 N.J.Law 594.

be some changes in name, boundaries, powers, or officers;⁸⁷ it is a general rule that, in the absence of express provision to the contrary, where the territory and inhabitants are substantially the same, the corporation in its new form retains or succeeds to the liabilities of the corporation in its prior form;⁸⁸ and even where, after dissolution, only a portion of the territory of the dissolved corporation became reincorporated, a pro rata liability has been adjudged and enforced against the new municipality as a pro tanto successor to the old.⁸⁹ When granting a new charter to, and changing the name of, a municipality, the legislature may expressly provide for the payment of liabilities previously incurred,⁹⁰ and such provision is not unconstitutional,⁹¹ although there may be cases in which it is inapplicable,⁹² or where the performance of specified conditions is necessary in order to render it operative.⁹³ An issuance of bonds prior to the taking effect of a charter amend-

ment authorizing it cannot be upheld.⁹⁴ However; bonds previously authorized may be issued notwithstanding a change in the form of government of the municipality.⁹⁵ Some statutes relating to cities which have adopted the commission form of government do not purport to increase or extend the powers of such cities, in dealing with the revenues thereof, beyond the limitations prescribed by other statutes.⁹⁶

On forfeiture of charter or dissolution of corporation. The debts and contracts of a municipality,⁹⁷ as well as liens and encumbrances on its property⁹⁸ and all existing legal remedies for their enforcement,⁹⁹ remain after its dissolution, and sometimes statutory provision is made for their enforcement,¹ the legislature being expressly required by some constitutional provisions to make provision for the protection of the creditors of an abolished municipal corporation.² While at law the creditor of a dissolved municipal corporation

87. U.S.—*Mobile v. Watson*, Ala., 6 S.Ct. 398, 116 U.S. 289, 29 L.Ed. 620.

43 C.J. p 168 note 53.

88. Philippine—*Orden de Predicadores v. Metropolitan Water Dist.*, 44 Philippine 292.

43 C.J. p 168 note 55.

89. U.S.—*Brewis v. Duluth*, C.C. Minn., 13 F. 334, 3 McCrary 223—*Brewis v. Duluth*, C.C. Minn., 9 F. 747, 8 McCrary 219.

43 C.J. p 169 note 56.

90. Cal.—*People v. San Francisco*, 21 Cal. 668.

43 C.J. p 169 note 57.

91. Tex.—*White v. Quanah*, Civ. App., 27 S.W. 839.

92. Minn.—*Carey v. St. Louis County*, 36 N.W. 459, 38 Minn. 218.

43 C.J. p 169 note 59.

93. Tex.—*Quanah v. White*, 28 S. W. 1065, 88 Tex. 14.

43 C.J. p 169 note 60.

94. Miss.—*McClure v. Natchez*, 103 So. 813, 139 Miss. 187.

95. Ala.—*Stokes v. Montgomery*, 82 So. 663, 203 Ala. 307.

96. Iowa—*Peairs v. Des Moines*, 191 N.W. 136, 196 Iowa 1222.

43 C.J. p 169 note 63.

97. Ky.—*Corpus Juris* cited in *Owsley County Board of Education v. Owsley County Fiscal Court*, 64 S.W.2d 179, 182, 251 Ky. 165.

Mo.—*Diekroeger v. Jones*, 151 S.W.2d 691, 235 Mo.App. 1117.

N.C.—*Green v. City of Asheville*, 154 S.E. 852, 199 N.C. 516, followed in *Pressley v. City of Asheville*, 154 S.E. 855, 199 N.C. 520 and *Jarrett v. City of Asheville*, 154 S.E. 855, 199 N.C. 521.

43 C.J. p 175 note 70.

De facto corporation

(1) As respects payment of its debts and liabilities, contracts of a de facto municipal corporation remain valid after the corporation's dissolution.—*Payne v. First Nat. Bank*, Tex Com App., 291 S.W. 209.

(2) All powers, including that of taxation, assumed and held by a de facto corporation, survive dissolution thereof as far as necessary to protect the corporation's contracts, unless adequate protection thereof be otherwise secured by law.

Fla.—*State ex rel. Fidelity Life Ass'n v. City of Cedar Key*, 165 So. 672, 122 Fla. 454.

Tex.—*Payne v. First Nat. Bank*, supra.

(3) The officers of a dissolved municipal corporation are required to exercise their powers to protect the creditors.—*Payne v. First Nat. Bank*, supra.

(4) An assignee of nonnegotiable warrants executed by such a corporation can recover thereon against city after dissolution.—*Payne v. First Nat. Bank*, supra.

98. U.S.—*Mt. Pleasant v. Beckwith*, Wis., 100 U.S. 514, 25 L.Ed. 699.

43 C.J. p 175 note 71.

99. Fla.—*State ex rel. Fidelity Life Ass'n v. City of Cedar Key*, 165 So. 672, 122 Fla. 454.

Tex.—*Payne v. First Nat. Bank*, Com.App., 291 S.W. 209.

1. Tex.—*Young v. Colorado*, Civ. App., 174 S.W. 986.

43 C.J. p 175 note 72.

Trustee

(1) Under statute authorizing trustee of disincorporated town to wind up affairs of the town and to pay its debts, trustee was given no

authority to pay debts contracted by town through its mayor and council after order of disincorporation; the town's assets are a trust fund to be devoted to a specific purpose and trustee cannot use fund for any other purpose; the trustee is the only person who may encumber the assets in his hands, and his authority must be obtained from, or approved by, the court and neither parties favoring disincorporation nor parties opposing disincorporation may encumber such assets.—*Darrow v. Van Buskirk*, 110 P.2d 216, 51 Ariz. 1.

(2) A trustee appointed by county authorities pursuant to statute to wind up the affairs of a dissolved municipality is not in a position analogous to a receiver appointed by a court of equity.—*Town of South Tucson v. Board of Sup'rs of Pima County*, 84 P.2d 581, 52 Ariz. 575.

Limited applicability

Statutory provision governing payment of debts existing at time of dissolution of city or town was applicable only to municipalities which, by local election, surrender charters.—*State ex rel. Landis v. Peacock*, 151 So. 4, 112 Fla. 671.

2. Fla.—*State ex rel. Harrington v. City of Pompano*, 188 So. 610, 136 Fla. 730—*State v. City of Fort Pierce*, 182 So. 799, 133 Fla. 424—*State ex rel. Landis v. Peacock*, 151 So. 4, 112 Fla. 671—*Humphreys v. State*, 145 So. 858, 108 Fla. 92—*State v. Goodgame*, 108 So. 836, 91 Fla. 871.

Debts affected

The constitutional provision prohibiting the legislature from abolishing a municipality without making provision for payment of its

is without remedy,³ except as specially provided by statute,⁴ a court of equity will afford relief⁵ by taking possession of the property of the dissolved corporation for the benefit of its creditors⁶ and enforcing against it liens and encumbrances which survive the corporation.⁷

§ 1844. Expenditures beyond Corporate Limits

A municipal corporation may in a proper case make expenditures for purposes beyond its corporate limits; but it may not do so where it is under no obligation to make and derives no benefit from the expenditure involved.

The power of a municipal corporation to make expenditures for corporate purposes is ordinarily not limited to expenditures within its corporate limits.⁸ However, expenditure of municipal funds for purposes beyond the corporate limits is unlawful where the municipality is under no obligation to make, and derives no benefit from, the expenditure.⁹ A municipal corporation has no authority to expend corporate funds to operate a ferry outside of its corporate limits for the purpose of promoting and stimulating trade and business;¹⁰ it cannot lawfully agree to compensate a sexton of a cemetery situated beyond the corporate limits and not owned by it;¹¹ and a statute providing that the

board of trustees of a village may provide for the public inspection and parade of the fire department at an annual expense does not authorize the board of trustees to appropriate money for the purpose of enabling the fire department to participate in a parade held outside the village limits.¹²

§ 1845. Other Matters

Various expenditures have been held to come within or go beyond the powers of municipal corporations with respect to making expenditures or incurring indebtedness.

In addition to the purposes mentioned supra §§ 1835-1844, and in accordance with the rules therein discussed, it has been variously held that a municipal corporation may appropriate money or incur indebtedness for the development of natural municipal resources for manufacturing purposes;¹³ enforcement of a liquor law;¹⁴ the establishing and conducting of liquor dispensaries;¹⁵ collection and disposal of garbage;¹⁶ making a survey of a sewage problem;¹⁷ the necessary purchase of real property;¹⁸ the erection or construction of a memorial to soldiers and sailors;¹⁹ the purchase of a portrait as part of furnishing of council room;²⁰ advertising the city;²¹ abatement of a public nuisance;²² conducting radio broadcasts for the interest of the listening public;²³ maintenance and

debts could not be construed as authorizing a tax levy to service bonds and coupons issued by a city on properties improperly sought to be included within municipal limits by statutes declared unconstitutional after issuance of bonds.—*Richmond v. Town of Largo*, 19 So.2d 791, 155 Fla. 226.

3. U.S.—*Beckwith v. Racine*, C.C. Wis., 3 F.Cas No.1,213, 7 Biss 142, affirmed *Mt. Pleasant v. Beckwith*, 100 U.S. 514, 25 L.Ed. 699, 43 C.J. p 175 note 74.

4. N.M.—*San Miguel County Comrs v. Pierce*, 28 P. 512, 6 N.M. 324.

5. U.S.—*Mt. Pleasant v. Beckwith*, Wis., 100 U.S. 514, 25 L.Ed. 699, 43 C.J. p 175 note 76.

6. Ill.—*Chalstran v. Township High School Dist. No. 13 Board of Education*, 91 N.E. 712, 244 Ill. 470.

7. U.S.—*Mt. Pleasant v. Beckwith*, Wis., 100 U.S. 514, 25 L.Ed. 699, 43 C.J. p 175 note 78.

8. Ky.—*Smith v. City of Kuttawa*, 1 S.W.2d 979, 222 Ky. 569. Wis.—*Bloomer v. Bloomer*, 107 N.W. 974, 128 Wis. 297, 44 C.J. p 1116 note 88.

Rights in lake

A municipal corporation had capacity to acquire and own easements and rights in lake located beyond the

municipal limits.—*Smith v. City of Kuttawa*, 1 S.W.2d 979, 222 Ky. 569

Project partly outside of city

The statute providing for special improvement district revolving fund and for loans to such fund from general fund of city is not violative of constitutional prohibition against loaning of city's credit to an individual, association, or corporation, although part of project to carry out improvement within the city is located outside the city.—*Hansen v. City of Havre*, 114 P.2d 1053, 112 Mont. 207, 135 A.L.R. 1278.

9. Cal.—*Chapman v. City of Fullerton*, 265 P. 1035, 90 Cal.App. 463.

10. Ark.—*Jacksonport v. Watson*, 33 Ark. 704. Wash.—*In re Wooley*, 134 P. 825, 75 Wash. 206.

11. N.Y.—*Holley v. Mt. Vernon*, 126 N.Y.S. 460, 141 App.Div. 823, 44 C.J. p 1116 note 90.

12. N.Y.—*Matter of Kenmore*, 110 N.Y.S. 1008, 59 Misc. 388, 44 C.J. p 1116 note 91.

13. U.S.—*Hackett v. Ottawa*, Ill., 99 U.S. 86, 25 L.Ed. 363.

14. Mass.—*Dunn v. Framingham*, 132 Mass. 436.

15. Ala.—*Equitable Loan, etc., Co.*

v. Edwardsville, 38 So. 1016, 143 Ala. 182, 11 Am.S.R. 34.

16. Ill.—*People ex rel Toman v. New York Central Lines*, 44 N.E.2d 549, 380 Ill. 581—*People ex rel Chicago Title & Trust Co v Village of Glencoe*, 23 N.E.2d 697, 372 Ill. 280—*Consumers' Co v. City of Chicago*, 145 N.E. 114, 313 Ill. 408. W.Va.—*State ex rel. Klostermeyer v. City of Charleston*, 45 S.E.2d 7.

17. Cal.—*City of Oakland v Williams*, 103 P.2d 168, 15 Cal.2d 542

18. Ala.—*Allen v. La Fayette*, 8 So. 30, 89 Ala. 641, 9 L.R.A. 497, 44 C.J. p 1116 note 97.

19. N.Y.—*Parsons v. Van Wyck*, 67 N.Y.S. 1054, 56 App.Div. 329. Tenn.—*Hill v Roberts*, 217 S.W. 826, 142 Tenn. 215.

20. N.Y.—*Reynolds v. Albany*, 8 Barb. 597.

21. Cal.—*Sacramento Chamber of Commerce v. Stephens*, 299 P. 728, 212 Cal. 607.

22. Mass.—*Allydonna Realty Corporation v. Holyoke Housing Authority*, 23 N.E.2d 665, 304 Mass. 288.

23. N.Y.—*Lewis v. La Guardia*, 14 N.Y.S.2d 463, 172 Misc. 82, affirmed 14 N.Y.S.2d 991, 258 App.Div. 713, affirmed 27 N.E.2d 44, 282 N.Y. 757.

operation of a zoölogical garden;²⁴ the conduct of a primary election;²⁵ and the payment of the expense of a bond issue and sale,²⁶ or such minor expenses as are necessary to make common lands rentable.²⁷ Also, a statute providing that, on the creation by popular vote of antisaloon territory, unearned license fees shall be returned is not invalid as compelling a municipality to incur a debt;²⁸ and a statute making the municipality holding a local option election defendant in a contest thereof is not void as requiring it to expend public money for a private purpose,²⁹ since the only expenditure, if any, devolved on it is payment of costs.³⁰

On the other hand, it has been held that it is beyond the power of a municipality to appropriate funds or incur indebtedness for the purpose of having scrip engraved;³¹ paying for advertisements published in newspapers not designated as official;³² advertising the city;³³ purchasing works of art created by local talent;³⁴ defraying the expense of imprisoning persons charged with felonies;³⁵ aiding in national, state, and local defense;³⁶ assisting in the maintenance of the National Guard of the state;³⁷ or aiding individuals who have sustained property losses from fire.³⁸ It has been held that, as against a judgment creditor of the municipality, the council is without au-

thority to appropriate money to pay interest on municipal bonds and accounts as an item of expenditure for the administration of governmental purposes.³⁹

Membership in municipal association or league.

Although it has been held that it is beyond the power of a municipality to appropriate funds or incur indebtedness for the purpose of paying dues to, or contributing to the maintenance of, an organization of the municipalities of the state,⁴⁰ it has been stated that the trend of modern judicial opinion is to the contrary,⁴¹ and the expenditure of municipal funds for the payment of its dues as a member of a municipal league has been held to be permissible as expenditure for a public purpose,⁴² and not to be prohibited by constitutional prohibitions against giving or loaning credit or making donations to any private individual or association.⁴³ Of course, if a municipal league fails to adhere to the purposes for which it purportedly exists and which justify the expenditure of municipal funds for membership therein, continued membership therein would no longer be for a public purpose and the expenditure would be unlawful.⁴⁴

It has been held that a municipality may lawfully provide for payment of the necessary expenses of

24. Ohio.—City of Cleveland v. Lausche, 49 N.E.2d 207, 70 Ohio App. 273.

25. Fla.—State ex rel. Landis v. Dyer, 148 So. 201, 109 Fla. 33.

26. Tenn.—Miller v. Park City, 150 S.W. 90, 126 Tenn. 427, Ann.Cas. 1913E 83.

27. Mass.—Davis v. Rockport, 100 N.E. 612, 213 Mass. 279, 43 L.R.A., N.S., 1139.

28. Ill.—People v. McBride, 84 N.E. 865, 234 Ill. 146, 128 Am.S.R. 82, 14 Ann.Cas. 994.

29. Mo.—State v. Thurman, 187 S.W. 1190, 268 Mo. 537.

30. Mo.—State v. Thurman, supra.

31. Mo.—Cheeney v. Brookfield, 60 Mo. 53.

32. N.J.—Fagen v. Hoboken, 88 A. 1027, 85 N.J.Law 297.

33. Tex.—Anderson v. City of San Antonio, 67 S.W.2d 1036, 123 Tex. 163—Moreland v. City of San Antonio, Civ.App., 116 S.W.2d 823, error refused.

34. Ill.—People ex rel. Schlaeger v. Bunge Bros. Coal Co., 64 N.E.2d 365, 392 Ill. 153.

35. Ky.—Corbin v. Davis, 236 S.W. 564, 193 Ky. 391.

36. Ill.—People ex rel. Nelson v. Bey, 85 N.E.2d 829, 403 Ill. 232.

Reason for rule

The state cannot declare or wage war and cannot empower one of its municipal corporations to do so and has never bestowed on municipal corporations express power to give either direct or indirect financial aid to federal, state, or local governments in prosecution of a war.—People ex rel. Nelson v. Bey, supra.

37. Mo.—Knapp v. Kansas City, 48 Mo.App. 485.

38. Mass.—Lowell v. Boston, 111 Mass. 454, 15 Am.R. 39, 44 C.J. p 1117 note 11.

39. Ala.—Anniston v. Hurt, 37 So. 220, 140 Ala. 394, 103 Am.S.R. 45.

40. Ohio.—State v. Semple, 148 N.E. 342, 112 Ohio St. 559, 44 C.J. p 1117 note 6.

41. Ariz.—City of Glendale v. White, 194 P.2d 435, 67 Ariz. 231.

42. Ariz.—City of Glendale v. White, supra.

Ill.—People ex rel. Schlaeger v. Bunge Bros. Coal Co., 64 N.E.2d 365, 392 Ill. 153.

Mich.—Hays v. City of Kalamazoo, 25 N.W.2d 787, 316 Mich. 443.

Reason for rule

Expenditure of municipal funds for

a membership in a municipal league in a reasonable effort by municipal authorities to learn the manner in which complex municipal problems, arising from operations involving both governmental and proprietary capacities of municipality, are being solved in sister cities, thereby improving quality of service it renders its own taxpayers, is for a "public purpose".—City of Glendale v. White, 194 P.2d 435, 67 Ariz. 231.

Public policy

A contribution of public funds in payment of dues to municipal league for services thereof in presenting to members and committees of legislature statistics, information and arguments respecting merits of legislation affecting municipal problems, such as operation of public utilities, is not against public policy, although league officers and agents may take position at variance with that of city in particular instance.—Hays v. City of Kalamazoo, 25 N.W.2d 787, 316 Mich. 443.

43. Ariz.—City of Glendale v. White, 194 P.2d 435, 67 Ariz. 231—City of Phoenix v. Michael, 148 P.2d 353, 61 Ariz. 238.

44. Ariz.—City of Glendale v. White, 194 P.2d 435, 67 Ariz. 231.

delegates to a conference of a municipal league or association, since such disbursement is for a public purpose;⁴⁵ but it has also been held that payment of expenses for such a purpose is too remote to be regarded as disbursement for a public purpose.⁴⁶

Fire-fighting equipment. A municipality, under its general charter powers or under express authorization, generally has authority to make expenditures to provide and maintain the means necessary for the extinguishment of fires,⁴⁷ and pledge the

municipal credit therefor,⁴⁸ unless the creation of municipal indebtedness is forbidden.⁴⁹

Rewards for apprehending criminals. It is generally,⁵⁰ but not always,⁵¹ held that a municipality has no authority to appropriate money to the payment of rewards for the apprehension of criminals. Authority of a municipal corporation to offer rewards for the apprehension of criminals is discussed in the C.J.S. title Rewards § 11, also 54 C.J. p 780 note 94—p 781 note 5.

3. LIMITATION OF AMOUNT

§ 1846. Constitutional and Statutory Provisions Generally

- a. In general
- b. Application
- c. Construction
- d. Operation and effect

a. In General

Limitations on the amount of municipal indebtedness or expenditures may be imposed by provisions in constitutions, statutes, or charters.

Limitations on the amount of municipal indebtedness or expenditures may be imposed by the provisions of state constitutions,⁵² and such limitations may also be imposed by statutes⁵³ and, likewise,

45. Cal.—City of Roseville v. Tuley, 131 P.2d 395, 55 Cal App 2d 601.

Minn.—Tousley v. Leach, 230 N.W. 788, 180 Minn. 293.

46. Mass.—Waters v. Bonvouloir, 52 N.E. 500, 172 Mass. 286.

47. Ky.—Ward v. Lester, 31 S.W.2d 924, 235 Ky. 595.

Okl.—Chicago, R. I. & P. Ry. Co. v. Excise Board of Stephens County, 25 P.2d 630, 165 Okl. 188.

Authority to acquire fire-fighting equipment see supra § 959.

Fire-patrol service

City's contract for fire-patrol service was not invalid as requiring expenditure of public money for private purpose on ground that service was solely for benefit of insurance companies, where purpose of service was more than merely minimizing fire insurance losses.—State ex rel. Kansas City Ins. Agents' Ass'n v. Kansas City, 4 S.W.2d 427, 319 Mo. 386.

Overcoats

The city council of city of the first class had implied power to purchase overcoats for firemen, and what constituted proper equipment for paid fire department was within discretion of council.—Calmenson Clothing Co. v. Kruger, 281 N.W. 203, 66 S.D. 224.

48. U.S.—Desmond v. Jefferson, C.C. Tex., 19 F. 483.

44 C.J. p 1117 note 14.

49. Ga.—Hudson v. Marietta, 54 Ga. 286.

50. Conn.—Crofut v. Danbury, 32 A. 365, 65 Conn. 294.

44 C.J. p 1117 note 16.

51. Pa.—York v. Forscht, 23 Pa. 391.

52. Purpose of such provisions

(1) To limit public indebtedness.

U.S.—Fairbanks, Morse & Co. v. City of Wagoner, Okl., C.C.A. Okl., 81 F. 2d 209, reheard 86 F.2d 288—Banks-Miller Supply Co. v. Carter County, Ky., D.C.Ky., 45 F.Supp. 521.

Ind.—Edwards v. Housing Authority of City of Muncie, 19 N.E.2d 741, 216 Ind. 330.

Iowa.—Banta v. Clarke County, 260 N.W. 329, 219 Iowa 1195.

Ky.—Payne v. City of Covington, 123 S.W.2d 1045, 276 Ky. 380, 122 A.L.R. 321.

Mo.—Speas v. Kansas City, 44 S.W. 2d 108, 329 Mo. 184.

N.Y.—McCabe v. Gross, 8 N.E.2d 269, 274 N.Y. 39, 111 A.L.R. 538, reargument denied 10 N.E.2d 576, 274 N.Y. 611.

N.D.—Schieber v. City of Mohall, 268 N.W. 445, 66 N.D. 593.

Okl.—Faught v. City of Sapulpa, 292 P. 15, 145 Okl. 164.

44 C.J. p 1117 note 19 [a].

(2) To place limitation on city borrowing.—People ex rel. Guaranty Trust Co. of New York v. Cook, 18 N.Y.S.2d 965, affirmed People ex rel. Longken, Inc. v. Dooley, 27 N.Y.S. 2d 999, 261 App.Div. 993.

(3) To prevent abuse of municipal credit.—Wakem v. Inhabitants of Town of Van Buren, 15 A.2d 873, 137 Me. 127.

(4) To protect property of citizens.

Ill.—People ex rel. Lindheimer v. Hamilton, 25 N.E.2d 517, 373 Ill.

124—Kocsis v. Chicago Park Dist., 198 N.E. 847, 362 Ill. 24.

Me.—Wakem v. Inhabitants of Town of Van Buren, supra.

Okl.—School Dist. No. 2, Consolidated, Pushmataha County v. Gossett, 283 P. 249, 140 Okl. 243.

S.D.—Farrar v. Britton Independent School Dist. of Marshall County, 32 N.W.2d 627.

53. Ga.—DeJarnette v. Hospital Authority of Albany, 23 S.E.2d 716, 195 Ga. 189.

Ohio.—City of Middletown v. City Commission of Middletown, 37 N.E.2d 609, 138 Ohio St. 596—Phillips v. Hume, 170 N.E. 438, 122 Ohio St. 11—City of Cincinnati v. Gamble, 28 N.E.2d 676, 64 Ohio App. 313, reversed on other grounds 34 N.E.2d 226, 138 Ohio St. 220.

Or.—City of Portland v. Welch, 69 P.2d 228, 154 Or. 286, 106 A.L.R. 1188.

Enacted in interests of taxpayers

Statutory limitation of indebtedness was enacted in the interests of taxpayers residing within the boundaries of the various municipalities.—Ohio Nat. Life Ins. Co. v. Board of Education of Grant Community High School Dist. No. 124, 55 N.E.2d 163, 387 Ill. 159, certiorari denied 65 S.Ct. 439, 323 U.S. 796, 89 L.Ed. 635.

Purpose of statute

(1) To avoid waste and extravagance and yet permit municipalities and other taxing subdivisions of the state to function so as to supply the governmental wants and needs of the people.—State ex rel. Ward v.

such limitations may be imposed by charters.⁵⁴ The adoption of a constitutional provision limiting the indebtedness of municipal corporations will operate to repeal any inconsistent provisions contained in existing charters.⁵⁵ Although a constitutional limitation may be further limited by statute,⁵⁶ a limitation which the constitution has imposed may not be changed except as provided by the constitution,⁵⁷ and may not be changed by the legislature⁵⁸ or by the courts,⁵⁹ nor may it be disregarded or ignored by public officials, the legislature, the courts, or the people;⁶⁰ but it is the duty of the courts and municipal officers to see that it is strictly enforced.⁶¹ A statutory restriction may be removed by subsequent legislation.⁶² The rules governing the repeal by implication of statutes generally are applicable to statutes of this character.⁶³

b. Application

Statutes and constitutional provisions limiting the amount of indebtedness which a municipal corporation may incur have been applied to various kinds of municipal corporations and to the incurring of indebtedness for various purposes, and, according to some authority, have been held to constitute a limitation on the taxing power.

A limitation on the indebtedness of a class of municipal corporations is not applicable to municipal-

ities not within the class.⁶⁴ General statutes limiting the amount of indebtedness which a municipality may incur bind all municipalities not having special authority from the same source,⁶⁵ but according to one view they do not apply to cities operating under special charters⁶⁶ or home-rule charters,⁶⁷ although there is some authority holding such statutes applicable to home-rule cities.⁶⁸ Furthermore, there is authority holding that a limitation imposed by general law pursuant to a constitutional provision that the power of municipalities to incur debts may be limited by state law applies to all municipalities whether operating under charter or otherwise.⁶⁹ Sometimes a constitution makes special provision with respect to municipalities which, at the time of its adoption, have an aggregate indebtedness exceeding the general limitation prescribed.⁷⁰ Charter limitations on municipal indebtedness are applicable only to ordinary operations, and not to additional undertakings inaugurated pursuant to additional legislative action.⁷¹ The mere showing that a municipal corporation has reached its constitutional limit of indebtedness does not, in all instances, prevent the appropriation and expenditure of money.⁷²

Board of Com'rs of Republic County, 82 P.2d 84, 148 Kan 376

(2) To place a limitation on expenditure—International Harvester Co. v. State, 274 N.W. 217, 200 Minn. 242.

54. Minn.—Sommers v. City of St. Paul, 237 N.W. 427, 183 Minn 545.

55. Iowa.—Scott v. Davenport, 34 Iowa 208.

W.Va.—List v. Wheeling, 7 W.Va. 501.

Express limitations of bonded indebtedness see *infra* § 1911.

56. N.C.—Wharton v. Greensboro, 59 S.E. 1043, 146 N.C. 356.

Wis.—Oconto Co. v. Town of Townsend, 246 N.W. 410, 210 Wis. 85.

57. Ohio.—Kurtz v. City of Columbus, 22 N.E.2d 747, 61 Ohio App 423, affirmed 28 N.E.2d 587, 137 Ohio St. 184.

58. Ohio.—Kurtz v. City of Columbus, *supra*.

59. Iowa.—Brunk v. City of Des Moines, 291 N.W. 395, 228 Iowa 287, 134 A.L.R. 1391.

60. Okl.—Faught v. City of Sapulpa, 292 P. 15, 145 Okl. 164.

61. Okl.—School Dist. No. 2, Consolidated, Pushmataha County, v. Gossett, 283 P. 249, 140 Okl. 243.

62. Mich.—Corpus Juris cited in Harsha v. City of Detroit, 246 N.W. 849, 850, 261 Mich. 586, 90 A.L.R. 853.

Ohio.—Kurtz v. City of Columbus,

22 N.E.2d 747, 61 Ohio App. 423, affirmed 28 N.E.2d 587, 137 Ohio St. 184.

44 C.J. p 1117 note 25.

Curative statutes see *supra* § 1834

63. Wash.—Walla Walla v. Walla Walla Water Co., 19 S.Ct. 77, 172 U.S. 1, 43 L.Ed. 341.

44 C.J. p 1117 note 27.

Implied repeal of statutes generally see the C.J.S. title Statutes §§ 286-303, also 59 C.J. p 904 note 4-p 939 note 58.

64. Ala.—Taxpayers and Citizens of City of Fort Payne v. City of Fort Payne, 40 So.2d 439.

44 C.J. p 1117 note 31.

Housing authority created under slum clearance or housing authority act is not such agency of city as to make city liable for its debts, and hence constitutional limitations as to amount of indebtedness which may be contracted by political corporations are not involved.—State ex rel. Porterie v. Housing Authority of New Orleans, 182 So. 725, 190 La. 710.

Redevelopment authority created under the urban redevelopment law for purpose of eliminating and rehabilitating blighted sections of the municipality is not a municipal commission within constitutional provision relating to debt limits for a municipal commission.—Belovsky v. Redevelopment Authority of City of Philadelphia, 54 A.2d 277, 357 Pa. 329, 172 A.L.R. 953.

Sewer improvement district is not a political corporation or subdivision of the state within meaning of constitutional provision limiting the amount of indebtedness which may be incurred by such corporations or subdivisions.—Armstrong v. Sewer Imp. Dist. No. 1, Tulsa County, Okl., 199 P.2d 1012, reversed on other grounds 207 P.2d 917.

65. U.S.—Moore v. Walla Walla, C. C.Wash., 60 F. 961.

66. Iowa.—Miller v. Glenwood, 176 N.W. 373, 188 Iowa 514—Reed v. Cedar Rapids, 113 N.W. 773, 136 Iowa 191.

67. Minn.—American Electric Co. v. Waseca, 113 N.W. 899, 102 Minn. 329.

68. Ariz.—American-La France & Foamite Corporation v. City of Phoenix, 54 P.2d 258, 47 Ariz. 133

69. Ohio.—Phillips v. Hume, 170 N.E. 438, 122 Ohio St. 11.

70. Ky.—Bosworth v. Middlesboro, 227 S.W. 170, 190 Ky. 246.

Pa.—Pepper v. Philadelphia, 6 Pa. Dist. 317.

44 C.J. p 1118 note 38.

71. Or.—State ex rel. First Nat. Bank v. Melville, 41 P.2d 1071, 149 Or. 532.

72. Ill.—People ex rel. Toman v. B. Mercl & Sons Plating Co., 37 N.E. 2d 839, 378 Ill. 142.

Appropriations and payments generally see *infra* §§ 1885-1891.

Restrictions as to indebtedness for general purposes are sometimes held not to apply to indebtedness incurred for special objects.⁷³ At any rate, a special provision, constitutional or statutory, may authorize a transgression of a general limitation,⁷⁴ as for certain special purposes⁷⁵ or where, in case of emergency, the public health or safety shall so require;⁷⁶ but an exception allowing a municipality to exceed a general limit for a particular purpose does not apply to indebtedness for any other purpose,⁷⁷ and, as discussed *infra* § 1848, any limitation of the amount of indebtedness for a special purpose must be observed. A constitutional provision authorizing the enactment of laws to limit the power of municipalities to incur debts for local purposes has no application to liability arising by virtue of proceedings under another constitutional provision dealing with mortgage bonds for public utilities.⁷⁸

A constitutional limitation on the indebtedness of the state is inapplicable to the indebtedness of a city or other political subdivision of the state.⁷⁹

Where the territory of a municipal corporation proper and that of another political body are coincident in whole or in part, constitutional or statutory debt limitations are applicable to each separately,⁸⁰ and each may contract indebtedness up to the constitutional or statutory limit without reference to the indebtedness contracted by the other.⁸¹ Where, however, some independent board or commission, which although technically a separate corporation is only an agency of the town or city, incurs or seeks to incur a debt, the courts ought to look behind fiction to see what the real fact is.⁸² Bonds for school purposes, which are issued by a municipality, have been held to be the debts of the municipality and not of the board of education within the meaning of constitutional debt limitations.⁸³ The constitutional provision limiting municipal indebtedness does not prevent the annexation or the consolidation of two or more municipal corporations, even if one or more of them has reached the constitutional limit, as there is no resultant increase of corporate debt.⁸⁴

73. Mich.—Attorney General v. Thompson, 134 N.W. 722, 168 Mich. 511, followed in *Detroit v. Engel*, 173 N.W. 547, 207 Mich. 106. 44 C.J. p 1117 note 32.

74. Fla.—Williams v. Town of Dunnellon, 169 So. 631, 125 Fla. 114—Charles v. City of Miami, 169 So. 589, 125 Fla. 110. 44 C.J. p 1118 note 33.

Procedure

(1) Legislature has sole jurisdiction to set up procedure whereby body, seeking approval under constitutional amendment providing that limitations on expenditures can be exceeded if state board of equalization sanction it, can present its application for permission to exceed the allowable.—Skelly Estate Co. v. City and County of San Francisco, 69 P.2d 171, 9 Cal.2d 28.

(2) Since no maximum or minimum time for notice, filing, or hearing is provided for in constitutional amendment providing that limitation on expenditures of municipality may be exceeded by approval of state board of equalization, legislature in its discretion could make any provision it desired consistent with orderly course of business in board of equalization.—Skelly Estate Co. v. City and County of San Francisco, *supra*.

(3) A statute establishing certain procedure for such an application, being enacted for sole benefit of municipality, requires no notice to taxpayers, who are not necessary parties to proceeding.—Skelly Estate Co. v. City and County of San Francisco, *supra*.

75. N.C.—Lamb v. City of Randleman, 175 S.E. 293, 206 N.C. 837. 44 C.J. p 1118 note 34. Public utilities, works, or improvements see *infra* § 1852.

76. Ky.—Harris v. Morganfield, 257 S.W. 1032, 201 Ky. 588. 44 C.J. p 1118 note 35.

77. Ala.—Austin v. Snodgrass, 96 So. 139, 209 Ala. 353. N.Y.—Adams v. East River Sav. Inst., 20 N.Y.S. 12, 65 Hun 145, affirmed 32 N.E. 622, 136 N.Y. 52. 44 C.J. p 1118 note 36.

78. Ohio—Vollmer v. Village of Amherst, 29 N.E.2d 379, 65 Ohio App. 26, appeal dismissed 38 N.E. 2d 409, 139 Ohio St. 139, affirmed 43 N.E.2d 235, 140 Ohio St. 257.

79. Okl.—City of Madill v. Dabney, 285 P. 832, 142 Okl. 92. Limitations on amount of indebtedness which may be incurred by state generally see the C.J.S. title States § 144, also 59 C.J. p 217 note 48 et seq.

80. Ind.—Cerajewski v. McVey, 72 N.E.2d 650, 225 Ind. 67. N.D.—Baldwin v. Board of Ed. of City of Fargo, 33 N.W.2d 473. 44 C.J. p 1118 note 39.

Exclusion of indebtedness of separate taxing unit in computing existing debt of municipality see *infra* § 1849 a.

Limitations applicable distributively
Constitutional and statutory limitations on indebtedness of distinct political subdivisions apply distributively and not collectively.—Sanders v. Raleigh County Court, 174 S.E. 878, 115 W.Va. 187.

81. Ill.—Board of Education of City

of Chicago v. Upham, 191 N.E. 876, 357 Ill. 263, 94 A.L.R. 813. Ind.—Cerajewski v. McVey, 72 N.E. 2d 650, 225 Ind. 67. 44 C.J. p 1118 note 40.

City and school corporation

Ky.—City of Jackson v. First Nat. Bank of Jackson, 157 S.W.2d 321, 289 Ky. 1.

N.D.—Baldwin v. Board of Ed. of City of Fargo, 33 N.W.2d 473. 44 C.J. p 1118 note 40 [b].

82. Me.—Kelley v. Brunswick School Dist., 187 A. 703, 134 Me. 414—Reynolds v. City of Waterville, 42 A. 553, 92 Me. 292

83. Ky.—Hager v. Board of Education of City of Ashland, 72 S.W.2d 475, 254 Ky. 791.

44 C.J. p 1118 notes 41, 42.

Limitation applicable to debts of city school district

(1) Constitutional provision that no county or city shall be allowed to become indebted for any purpose to an amount which, including existing indebtedness, shall exceed specified per cent of assessed valuation of realty of county or city was held intended to include school debts of city school districts.—McCabe v. Gross, 8 N.E.2d 269, 274 N.Y. 39, 111 A.L.R. 538, reargument denied 10 N.E.2d 576, 274 N.Y. 611.

(2) Section of constitution providing that legislature shall provide for maintenance of free common schools was held not to exclude debts arising on account of city school districts from constitutional debt restriction.—McCabe v. Gross, *supra*.

84. Ill.—Kocsis v. Chicago Park Dist., 198 N.E. 847, 362 Ill. 24.

While a limitation on the tax rate that may be levied and a limitation on the amount of indebtedness permissible necessarily bear a relation to each other,⁸⁵ nevertheless they are separate and distinct limitations;⁸⁶ and each is confined to the subject matter covered thereby.⁸⁷ It has been held, however, that a constitutional provision imposing a tax limit by implication imposes a debt limit,⁸⁸ and, although there is some authority to the contrary,⁸⁹ that a limitation on the amount of indebtedness is a limitation on the taxing power.⁹⁰ A limitation on the amount of an additional tax which may or must be raised for a special purpose is not a limitation on the amount that may be appropriated for that purpose where funds from other sources are available.⁹¹

c. Construction

A constitutional limitation on the amount of municipal indebtedness is to be read in the broadest sense which will give effect to it, giving nontechnical words their usual

and customary meaning; statutory limitations are construed in accordance with the general rules of statutory interpretation.

A constitutional limitation on the amount of municipal indebtedness is to be read in the broadest sense which will give effect to it;⁹² it is to be construed to advance the benefit sought⁹³ and to suppress the evil intended to be suppressed;⁹⁴ and, where it does not contain any technical terms, its words should be given a meaning in accordance with their usual and customary signification⁹⁵ and their fair intendment.⁹⁶ Where it is impossible to apply a literal meaning to the provision, the court is at liberty to take the most feasible view; one which is in harmony with the rules of construction applicable under the conditions presented, and one which works the least harm.⁹⁷ Different provisions affecting such limitations should be read together.⁹⁸

The general rules of statutory interpretation fix the scope and meaning of statutes limiting the

85. Ky.—Winchester v. Nelson, 193 S.W. 1040, 175 Ky. 63.
Limitation on tax rate generally see *infra* § 1889.

86. Ohio.—State ex rel. City of Portsmouth v. Kountz, 194 N.E. 869, 129 Ohio St. 272, 97 A.L.R. 1099.

44 C.J. p 1119 note 45.

87. Ky.—Winchester v. Nelson, 193 S.W. 1040, 175 Ky. 63.

88. Ohio.—State ex rel. Markel v. City of Columbus, 40 N.E.2d 144, 139 Ohio St. 351—State ex rel. Board of Education of Cleveland City School District v. Morris, 18 N.E.2d 980, 135 Ohio St. 23—State ex rel. City of Portsmouth v. Kountz, 194 N.E. 869, 129 Ohio St. 272, 97 A.L.R. 1099—Kurtz v. City of Columbus, 22 N.E.2d 747, 61 Ohio App. 423, affirmed 28 N.E.2d 587, 137 Ohio St. 184.

Reason for rule

The greater includes the lesser, and the power to spend is circumscribed by the power to collect.—State ex rel. City of Portsmouth v. Kountz, 194 N.E. 869, 129 Ohio St. 272, 97 A.L.R. 1099.

89. Ohio.—State ex rel. City of Portsmouth v. Kountz, *supra*.

44 C.J. p 1119 note 45 [a], p 1269 note 41.

90. Mo.—State ex rel. School Dist. of Kansas City v. Thompson, 36 S.W.2d 109, 327 Mo. 144.

N.D.—Schieber v. City of Mohall, 268 N.W. 445, 66 N.D. 593.

Pa.—In re City of Philadelphia, 21 A.2d 876, 343 Pa. 47.

44 C.J. p 1269 note 40.

Levy of tax for payment of cur-

rent expenses as not constituting indebtedness see *infra* § 1851.

Purpose to limit taxation

(1) Purpose of constitutional provision limiting municipal indebtedness was to place restrictions on taxing power.

US—Fairbanks, Morse & Co. v. City of Wagoner, Okl., C.C.A.Okl., 81 F. 2d 209, reheard 86 F.2d 288.

Utah—Barnes v. Lehi City, 279 P. 878, 74 Utah 321.

(2) It is also to protect taxpayers.—Barnes v. Lehi City, *supra*.

(3) Thus, while constitutional provision provides merely a limit on power of city to contract indebtedness and not on power of taxation, underlying purpose of provision is to serve as a limit to taxation as a protection to taxpayers.—In re Petition of City of Philadelphia, 16 A.2d 32, 340 Pa. 17.

Invalidity of tax levied to pay for hidden debt

Although the constitutional provision limiting the amount of municipal indebtedness is not against the rate of a tax, and does not limit the rate of taxation by which the obligations of a municipality may be met, a tax levied to pay an indebtedness in excess of the constitutional limitation is invalid.—People v. Chicago, etc., R. Co., 97 N.E. 310, 253 Ill. 191.

91. Cal.—City of Glendale v. Haak, 144 P.2d 866, 62 Cal.App.2d 426.

92. N.Y.—Levy v. McClellan, 89 N. E. 569, 196 N.Y. 178.

Construction:

As directory or mandatory see *infra* subdivision d (1) of this section.

Of particular provisions see *infra* § 1847.

Time of taking effect see *infra* subdivision d (3) of this section.

Liberal construction

Constitutional limitations on indebtedness should be liberally construed in order to accomplish their wholesome purpose.—Payne v. City of Covington, 123 S.W.2d 1045, 276 Ky 380, 122 A.L.R. 321.

Loose construction should not be allowed to weaken force or broaden extent of constitutional provision confining debt limits of cities and towns.—Kelley v. Brunswick School Dist., 187 A. 703, 134 Me. 414.

93. W.Va.—Spilman v. Parkersburg, 14 S.E. 279, 35 W.Va. 605.

94. W.Va.—Spilman v. Parkersburg, *supra*.

95. Ky.—Samuels v. Clinton, 211 S. W. 567, 184 Ky. 97.

Okl.—School Dist. No. 2, Consolidated, Pushmataha County v. Gossett, 283 P. 249, 140 Okl. 243.

Particular words and phrases construed

(1) "Already incurred."—Brailsford v. Walker, 31 S.E.2d 385, 205 S. C. 228.

(2) "Facilities incidental or appurtenant to a project."—Diehl v. O'Dwyer, 84 N.Y.S.2d 109, 193 Misc. 1032.

96. Ky.—Samuels v. Clinton, 211 S. W. 567, 184 Ky. 97.

97. Pa.—Duane v. City of Philadelphia, 185 A. 401, 322 Pa. 33.

98. Ky.—Payne v. City of Covington, 123 S.W.2d 1045, 276 Ky. 380, 122 A.L.R. 321.

Utah.—State v. Salt Lake City, 81 P. 273, 29 Utah 361.

amount of municipal indebtedness⁹⁹ unless the case comes within a statutory rule of interpretation,¹ but it has been said that a statutory debt limitation should receive the same interpretation as one existing in a constitution.² A limitation in a home-rule charter should be given a fair construction so as to accomplish the purpose for which it was enacted.³

d. Operation and Effect

- (1) In general
- (2) Validity of statutes and ordinances
- (3) Time of taking effect

(1) In General

Constitutional and statutory limitations on the amount of municipal indebtedness are generally held mandatory, so that no debt can be created in excess thereof; and ordinarily necessity is no excuse for exceeding the limit prescribed. Every one dealing with a municipal corporation

is charged with notice of a limitation on the amount of its indebtedness; a constitutional or statutory limitation is not a grant of power or authority to contract indebtedness.

A few statutory limitations on the amount of municipal indebtedness have been regarded as directory only,⁴ acting as inhibitions on officers, but not as absolute restrictions on the municipal corporation.⁵ Generally speaking, however, a limitation on the amount of municipal indebtedness is mandatory,⁶ regardless of whether such limitation is imposed by the constitution⁷ or by statute,⁸ so that it is a general rule that, when the amount of the indebtedness of a municipal corporation is limited by law, no debt can be created in excess thereof,⁹ even though none of the citizens of the municipality objects thereto.¹⁰ A debt exceeding the limitation is void,¹¹ and so is the contract creating the indebtedness.¹² The fact that the debt limitation is exceed-

99. N.M.—Raton Waterworks Co. v. Raton, 49 P. 898, 9 N.M. 70.

44 C.J. p 1119 note 54.

Rules of statutory interpretation generally see the C.J.S. title Statutes §§ 311-411, also 59 C.J. p 943 note 29 et seq.

1. Ohio—State v. Weller, 149 N.E. 326, 113 Ohio St. 443.

2. Conn.—Russell v. Middletown City School Dist., 125 A. 641, 101 Conn. 249.

3. Minn.—Sommers v. City of St. Paul, 237 N.W. 427, 183 Minn. 545.

Words "not exceeding," as used in city charter provision for debt limit, are words not of grant or apportionment, but of limitation only, and standing alone are ordinarily construed as such—City of Kingsville v. Meredith, C.C.A. Tex., 103 F. 2d 279.

"Total cost of government" for fiscal year, within charter provision limiting such cost, includes entire cost of operating public schools, including cost paid from state and federal school aid.—Sommers v. City of St. Paul, 237 N.W. 427, 183 Minn. 545.

4. Cal.—McCracken v. San Francisco, 16 Cal. 591—Argenti v. San Francisco, 16 Cal. 255.

5. Cal.—Argenti v. San Francisco, supra.

Conn.—Whitney v. New Haven, 20 A. 666, 58 Conn. 450.

6. Okl.—School Dist. No. 2, Consolidated, Pushmataha County, v. Gossett, 283 P. 249, 140 Okl. 243.

44 C.J. p 1119 notes 60, 61.

7. U.S.—Banks-Miller Supply Co. v. Carter County, Ky., D.C.Ky., 45 F. Supp. 521.

Ala.—Taxpayers and Citizens of Shelby County v. Shelby County, 20 So.2d 36, 246 Ala. 192.

64 C.J.S.—23

Ky.—Payne v. City of Covington, 123 S.W.2d 1045, 276 Ky. 380, 122 A.L.R. 321.

Okl.—School Dist. No. 2, Consolidated, Pushmataha County, v. Gossett, 283 P. 249, 140 Okl. 243.

44 C.J. p 1119 note 60.

8. Okl.—School Dist. No. 2, Consolidated, Pushmataha County, v. Gossett, supra.

44 C.J. p 1119 note 61.

9. Ill.—People ex rel. Lindheimer v. Hamilton, 25 N.E.2d 517, 373 Ill. 124.

Mont.—Commonwealth Public Service Co. of Montana v. City of Deer Lodge, 28 P.2d 472, 96 Mont. 15.

N.D.—Schleber v. City of Mohall, 268 N.W. 445, 66 N.D. 593.

Okl.—School Dist. No. 2, Consolidated, Pushmataha County, v. Gossett, 283 P. 249, 140 Okl. 243.

Pa.—Georges Tp. v. Union Trust Co. of Uniontown, 143 A. 10, 293 Pa. 364.

44 C.J. p 1119 note 62.

Quasi-contractual claim

The rule that in common honesty a municipality is under an implied obligation to pay for benefits which it has received under agreements entered into by the municipal authorities has no application where the effect of permitting recovery on such a quasi-contractual claim would be to violate the constitutional limitation on municipal indebtedness.—Pittsburgh Paving Co., for Use of Iron & Glass Dollar Sav. Bank of Birmingham, v. City of Pittsburgh, 3 A.2d 905, 332 Pa. 563.

10. Pa.—In re City of Philadelphia, 21 A.2d 876, 343 Pa. 47.

11. Ala.—State ex rel. Hyland v. Baumhauer, 12 So.2d 326, 244 Ala. 1, answer to certified question conformed to 12 So.2d 340, 31 Ala. App. 35, certiorari denied 12 So.2d

342, 244 Ala. 71—State ex rel. Mantell v. Baumhauer, 12 So.2d 326, 244 Ala. 1, answer to certified question conformed to 12 So.2d 332, 31 Ala. App. 27, certiorari denied 12 So.2d 340, 244 Ala. 77.

Mont.—Commonwealth Public Service Co. of Montana v. City of Deer Lodge, 28 P.2d 472, 96 Mont. 15.

N.D.—Schleber v. City of Mohall, 268 N.W. 445, 66 N.D. 593.

Okl.—Faught v. City of Sapulpa, 292 P. 15, 145 Okl. 164.

44 C.J. p 1119 note 63.

Personal advance of money made by district fire commissioner to fire district for purpose of constructing a dam which exceeded power of fire district board to borrow in anticipation of revenue was ultra vires and could not be recovered—Holman v. Santa Cruz County, Cal.App., 205 P. 2d 767.

12. Ind.—Underwood v. Fairbanks, Morse & Co., 185 N.E. 118, 205 Ind. 316.

Okl.—Flood v. Town of Shidler, 260 P. 52, 127 Okl. 148.

Pa.—Pittsburgh Paving Co., for Use of Iron & Glass Dollar Sav. Bank of Birmingham, v. City of Pittsburgh, 3 A.2d 905, 332 Pa. 563—Ward v. City of Pittsburgh, 184 A. 240, 321 Pa. 414, 105 A.L.R. 682.

44 C.J. p 1119 note 64.

Contract in violation of budget law

(1) Contract under which city incurred binding obligation in excess of amount provided in city budget for such purpose was held void ab initio and unenforceable, since it was in violation of budget law prohibiting creation of obligation in any one year in excess of amount specified in budget for that year, in absence of showing that there were funds not covered by budget law available for such purpose at time

ed, however, does not render invalid debts contracted before the limitation was reached;¹³ and a contract for indebtedness partly within and partly beyond the limitation is void only as to the excess.¹⁴ A contract requiring no expenditure of money is not void.¹⁵ Warrants are invalid where they have the effect of increasing the indebtedness of the municipality beyond the prescribed limit.¹⁶

In determining whether existing indebtedness is valid, each item thereof must be analyzed and must stand or fall by itself.¹⁷ The last indebtedness incurred may be valid, and other and prior indebtedness may be invalid.¹⁸ The fact that the total existing indebtedness is excessive is not the determining factor as to the validity of any particular indebtedness.¹⁹ The constitutional limitations have been held to prohibit a municipality from filing in a court a pleading that admits an indebtedness in violation of the prohibition.²⁰

Necessity is no excuse for exceeding the limit prescribed²¹ unless the limitation is construed not to be applicable to indebtedness for expenditures necessary to maintain the corporate existence of the municipality²² or unless, as discussed *supra* subdivision b of this section, the constitution or statute imposing the limitation makes special provision for an

emergency. Likewise, it is not an excuse that the municipality has accumulated property greater in value than the amount of its outstanding indebtedness.²³

Everyone dealing with a municipality is charged with notice of a limitation on the amount of its indebtedness,²⁴ and, while a person need not anticipate that illegal claims will be incurred by officers willing to violate the constitution,²⁵ he must take notice of an error in an ordinance overestimating the municipal receipts or appropriating sums materially less than required to meet charges fixed by law or contract;²⁶ but a municipal corporation which has authorized a proper expenditure cannot by a subsequent resolution, of which persons advancing money for the expenditure have no notice, limit the amount of its liability.²⁷ A constitutional or statutory limitation of the amount of municipal indebtedness is not a grant of power or authority to contract indebtedness.²⁸ Also, a constitutional limitation of the amount of municipal indebtedness is restrictive only of the amount of municipal indebtedness²⁹ and not of the form or evidence thereof;³⁰ indebtedness may be incurred in any mode within the amount limited without violating the limitation.³¹ A statute authorizing municipalities to in-

budget was made.—*American-La France & Foamite Corporation v. City of Phoenix*, 54 P.2d 258, 47 Ariz. 133.

(2) Fact that at time of entry into contract of purchase and at time apparatus was delivered cash balance of city funds was in excess of cost of apparatus was insufficient to show existence of funds not subject to budget law or to validate contract in violation of budget act in creating obligation in excess of amount specified in budget.—*American-La France & Foamite Corporation v. City of Phoenix*, *supra*.

13. Alaska.—*Dickinson v. Petersburg*, 6 Alaska 488.

Ill.—*People ex rel. Toman v. B. Merell & Sons Plating Co.*, 37 N.E.2d 839, 378 Ill. 142.

Ky.—*Penrod v. City of Sturgis*, 107 S.W.2d 277, 269 Ky. 315.

Okl.—*Town of Covington v. Antrim Lumber Co.*, 252 P. 50, 123 Okl. 129.

14. Iowa.—*Corpus Juris* cited in *Trepp v. Independent School Dist. of Pocahontas*, 240 N.W. 247, 251, 213 Iowa 944.

Mich.—*Callahan v. City of Berkley*, 12 N.W.2d 431, 307 Mich. 701, rehearing denied 14 N.W.2d 87, 307 Mich. 701.

44 C.J. p 1119 note 67.

Municipal bonds issued in excess of constitutional and statutory lim-

itations of indebtedness are void as to such excess, and where only part of the issue is excessive, each bond is to be treated as only partly valid and its due proportion to the whole debt attempted to be incurred may be recovered.—*Pulaski County v. Ben Hur Life Ass'n of Crawfordsville, Ind.*, 149 S.W.2d 738, 286 Ky. 119.

15. W.Va.—*Chapman v. Huntington, W. Va., Housing Authority*, 3 S.E.2d 502, 121 W.Va. 319.

16. Ill.—*Holmgren v. Moline*, 109 N.E. 1031, 269 Ill. 248.

Iowa.—*Rankin v. Chariton*, 139 N.W. 560, 141 N.W. 424, 160 Iowa 265. Enforceability of warrants issued in payment of indebtedness incurred in excess of limitation on indebtedness see *supra* § 1834.

17. Okl.—*Faught v. City of Sapulpa*, 292 P. 15, 145 Okl. 164.

18. Okl.—*Faught v. City of Sapulpa*, *supra*.

19. Okl.—*Faught v. City of Sapulpa*, *supra*.

20. Okl.—*Faught v. City of Sapulpa*, *supra*.

21. Cal.—*Bradford v. San Francisco*, 44 P. 912, 112 Cal. 537.

44 C.J. p 1120 note 72.

22. Wash.—*Patterson v. Edmonds*, 129 P. 895, 72 Wash. 88—*Pilling*

v. Everett, 120 P. 873, 67 Wash. 109.

44 C.J. p 1120 note 71.

23. Iowa.—*Rankin v. Chariton*, 139 N.W. 560, 141 N.W. 424, 160 Iowa 265.

24. Ky.—*Payne v. City of Covington*, 123 S.W.2d 1045, 276 Ky. 380, 122 A.L.R. 321—*City of Covington v. O. F. Moore Co.*, 290 S.W. 1066, 218 Ky. 102.

Me.—*Moores v. Inhabitants of Town of Springfield*, 64 A.2d 569.

N.D.—*Schieber v. City of Mohall*, 268 N.W. 445, 66 N.D. 593.

Pa.—*Innes v. School Dist. of City of Nanticoke*, 20 A.2d 225, 342 Pa. 433.

44 C.J. p 1120 note 74.

25. Ky.—*City of Covington v. O. F. Moore Co.*, 290 S.W. 1066, 218 Ky. 102.

26. Ky.—*City of Covington v. O. F. Moore Co.*, *supra*.

27. Iowa.—*Duncombe v. Ft. Dodge*, 38 Iowa 281.

28. Va.—*Robertson v. City of Staunton*, 51 S.E. 178, 104 Va. 73. 44 C.J. p 1120 note 76.

29. Ill.—*Holmgren v. Moline*, 109 N.E. 1031, 269 Ill. 248.

30. Ill.—*Holmgren v. Moline*, *supra*.

31. Ill.—*Holmgren v. Moline*, *supra*.

crease the amount of their indebtedness, but setting no maximum, is limited by a constitutional provision setting a maximum.³²

(2) Validity of Statutes and Ordinances

Statutes and ordinances which conflict with a constitutional limitation on municipal indebtedness are void, and an ordinance providing for indebtedness in excess of a statutory limitation is void; but a statute or ordinance which authorizes the expenditure of money, but does not purport to authorize the incurring of a debt beyond the prescribed limit, is not void.

Statutes³³ and ordinances³⁴ which conflict with a constitutional limitation on municipal indebtedness are void, as the limitation is a curb on all legislative power,³⁵ and not only prohibits a municipal corporation from incurring indebtedness in excess of the limit, as discussed *supra* subdivision d (1) of this section, but also prohibits the legislature from authorizing it to do so.³⁶ An ordinance providing for an indebtedness in excess of a statutory limitation is also void,³⁷ and, in the case of a territory, a limitation imposed by act of congress is a limitation, as to the creation of municipal indebtedness not only on the municipal authorities,³⁸ but also on the legislature of the territory.³⁹ On the other hand, a constitutional provision limiting the amount of municipal indebtedness is not violated by a statute which authorizes a municipality to incur indebt-

edness, but does not purport to authorize it to incur indebtedness beyond the prescribed limit,⁴⁰ or which creates a school district in an area identical with that of a town and empowers the district to borrow money.⁴¹ An ordinance which provides for a contract when financial conditions will permit is not void.⁴² In determining whether a given proposition violates the constitutional debt limitation, the result attempted to be brought about by the proposal is the prime consideration,⁴³ and the controlling test is to be found by regarding substance rather than form⁴⁴ and in looking at its practical operation and effect when considered in the light of the constitutional restrictions.⁴⁵ An ordinance fixing salaries of councilmen has been held not unconstitutional as contravening the power of the legislature to control municipal indebtedness.⁴⁶

(3) Time of Taking Effect

Provisions limiting the amount of municipal indebtedness are not retroactive, but a constitutional provision limiting such indebtedness operates immediately on promulgation.

Provisions limiting the amount of municipal indebtedness are never retroactive,⁴⁷ and hence do not affect the validity of preëxisting indebtedness;⁴⁸ but a constitutional provision operates immediately on promulgation,⁴⁹ and before the enactment of a

32. Ariz.—Armer v. Wade, 58 P.2d 525, 48 Ariz. 1.

33. Ill.—East Moline v. Pope, 79 N. E. 587, 224 Ill. 386.

44 C.J. p 1120 note 80.

34. Ill.—East Moline v. Pope, *supra*.

44 C.J. p 1120 note 81.

35. Okl.—State v. Short, 240 P. 700, 113 Okl. 187.

36. Ky.—Booth v. Board of Education of City of Owensboro, 17 S. W.2d 1013, 229 Ky. 719.

Mont.—Commonwealth Public Service Co. of Montana v. City of Deer Lodge, 28 P.2d 472, 96 Mont. 15.

N.Y.—McCabe v. Gross, 8 N.E.2d 269, 274 N.Y. 39, 111 A.L.R. 538, reargument denied 10 N.E.2d 576, 274 N.Y. 611.

N.D.—Schleber v. City of Mohall, 268 N.W. 445, 66 N.D. 593.

Wis.—Roberts v. City of Madison, 27 N.W.2d 233, 250 Wis. 317.

44 C.J. p 1120 note 84—43 C.J. p 288 note 47 [d].

37. N.C.—Allen v. Raleigh, 107 S. E. 463, 181 N.C. 453.

38. Okl.—Martin v. Territory, 48 P. 106, 5 Okl. 188.

39. Okl.—Martin v. Territory, *supra*—City of Guthrie v. New Vienna Bank, 38 P. 4, 4 Okl. 194, overruling Guthrie v. Territory, 31 P. 190, 1 Okl. 188, 21 L.R.A. 841.

40. Ill.—Indiana Harbor Belt R. Co. v. Calumet City, 63 N.E.2d 369, 391 Ill. 280—People v. Bergin, 172 N. E. 60, 340 Ill. 20.

Tex.—San Antonio & A. P. Ry. Co. v. State, 95 S.W.2d 680, 128 Tex. 33.

44 C.J. p 1120 note 88.

Particular statutes held not unconstitutional

U.S.—Bessemer Inv. Co. v. City of Chester, D.C.Pa., 22 F.Supp. 311, modified on other grounds, C.C.A., 113 F.2d 571.

Ala.—Smith v. Town of Guin, 155 So. 865, 229 Ala. 61.

Ariz.—Crandall v. Town of Safford, 56 P.2d 660, 47 Ariz. 402.

Ga.—Lawson v. City of Moultrie, 22 S.E.2d 592, 194 Ga. 699—Town of McIntyre v. Scott, 12 S.E.2d 883, 191 Ga. 473—Miller v. Head, 198 S. E. 680, 186 Ga. 694—West v. Trotzler, 196 S.E. 902, 185 Ga. 794.

Ind.—Johnson v. Board of Park Com'rs of Ft. Wayne, 174 N.E. 91, 202 Ind. 282.

Mo.—Vrooman v. City of St. Louis, 88 S.W.2d 189, 337 Mo. 933—Speas v. Kansas City, 44 S.W.2d 108, 329 Mo. 184.

Pa.—Williams v. Samuel, 2 A.2d 834, 332 Pa. 265—Clark v. Beamish, 169 A. 130, 313 Pa. 56—Zimmerman v. Susquehanna Tp., Com.Pl., 59 Dauph.Co. 359.

41. Me.—Kelley v. Brunswick

School Dist., 187 A. 703, 134 Me 414.

42. Iowa.—Burlington Water Co. v. Woodward, 49 Iowa 58.

43. Ala.—Fuller v. City of Cullman, 199 So. 2, 240 Ala. 309.

44. Ala.—Fuller v. City of Cullman, *supra*.

45. Ala.—Fuller v. City of Cullman, *supra*.

46. Ohio.—City of Mansfield v. Endly, 176 N.E. 462, 38 Ohio App. 528, affirmed 181 N.E. 886, 124 Ohio St. 652.

Salary as not debt

Salary of municipal official is not debt within constitutional powers of legislature to limit power of municipalities to incur debts.—City of Mansfield v. Endly, *supra*.

47. Ind.—Powell v. Madison, 8 N.E. 31, 107 Ind. 106.

Mich.—Ludington Water-Supply Co. v. Ludington, 78 N.W. 558, 119 Mich. 480.

48. Ill.—James Anderson Co. v. City of Highland Park, 276 Ill.App. 327.

44 C.J. p 1120 note 91.

49. Ky.—Beard v. Hopkinsville, 24 S.W. 872, 95 Ky. 239, 15 Ky.L. 756, 44 Am.S.R. 222, 23 L.R.A. 402, explaining Holzhauer v. Newport, 22 S.W. 752, 94 Ky. 396, 15 Ky.L. 188.

statute in conformity therewith,⁵⁰ subject to such exceptions, if any, as are provided by the constitution itself.⁵¹

§ 1847. Particular Limitations

- a. Per cent of value of taxable property
- b. Yearly revenue
- c. Expenditure for previous year

a. Per Cent of Value of Taxable Property

Provisions that a municipal corporation shall not become indebted to an amount exceeding a specified per cent of the value of the taxable property therein, or to an amount exceeding the assessed value, have been construed and applied according to their terms in determining the valuation and the taxable property to be considered on the question whether the prescribed limit has been exceeded.

Under some constitutional provisions municipal indebtedness is limited to an amount, including existing indebtedness, in the aggregate not exceeding a specified per cent of the value of the taxable property in the municipality;⁵² and a constitutional restriction merely on the power of the legislature to permit the indebtedness of a municipal corporation to exceed a stated per cent of the value of its taxable property will not operate to repeal a clause in a preëxisting charter limiting the amount of the indebtedness to a smaller per cent.⁵³

Under the construction placed on some provisions,

the value of the taxable property is its actual value,⁵⁴ rather than its assessed value,⁵⁵ at least where, by statute, the assessment of property for taxation is limited to a certain per cent of its true or actual value.⁵⁶

Under the express provisions of some constitutional limitations, however, the value of the taxable property is ascertained by a specified assessment made prior to the incurring of the indebtedness, generally according to a prior assessment made for state and county purposes,⁵⁷ and such provisions are construed to contemplate a completed assessment,⁵⁸ including equalization or other action by a state board or agency charged with duties in connection therewith;⁵⁹ but in the absence of such a provision it has been held that, while a completed assessment is contemplated,⁶⁰ nevertheless the valuation to be considered is one made by municipal authorities⁶¹ as a basis for taxation for city purposes,⁶² rather than one made for state or county tax purposes.⁶³ In determining whether a particular tax is for municipal or state purposes within the meaning of the foregoing rules, the statute which authorizes its imposition is controlling,⁶⁴ rather than the use made of the revenue derived thereby.⁶⁵ In determining the debt limit, it has been held that the court may not revise or add to the tax list by which the value of

50. Ky.—Beard v. Hopkinsville, 24 S.W. 872, 95 Ky. 239, 15 Ky.L. 756, 44 Am.S.R. 222, 23 L.R.A. 402. Provision as self-executing see Constitutional Law § 52.

51. U.S.—Ashland Waterworks Co. v. Ashland, Ky., 251 F. 492, 163 C.C.A. 486.

Ky.—Holzhauer v. Newport, 22 S.W. 752, 94 Ky. 396, 15 Ky.L. 188. Provision for municipalities already indebted beyond limit see supra subdivision b of this section.

52. Fla.—State v. City of Miami, 26 So.2d 903.

Ill.—Kocsis v. Chicago Park Dist., 198 N.E. 847, 362 Ill. 24.

N.Y.—New York State Electric & Gas Corporation v. City of Plattsburg, 6 N.Y.S.2d 419, 168 Misc. 597, modified on other grounds 12 N.Y.S.2d 318, 256 App.Div. 732, 257 App.Div. 1022, modified on other grounds 24 N.E.2d 122, 281 N.Y. 450, reargument denied 26 N.E.2d 812, 282 N.Y. 682.

44 C.J. p 1121 note 95.

"All property . . . as listed and assessed for taxation," within statute limiting municipal indebtedness, includes only property subject to taxation.—State v. Brown, 180 N.E. 707, 125 Ohio St. 171.

Bond issue held within limitation Ky.—Rowland v. City of Winchester,

209 S.W.2d 305, 306 Ky. 772—City of Jackson v. First Nat. Bank of Jackson, 157 S.W.2d 321, 289 Ky. 1 —Daughaday v. City of Paducah, 118 S.W.2d 699, 274 Ky. 337—Franklin v. City of Dayton, 107 S.W.2d 338, 269 Ky. 484—City of Frankfort v. Fuss, 29 S.W.2d 603, 235 Ky. 143.

Mo.—State ex rel. Kellett v. Johnson, 50 S.W.2d 121, 330 Mo. 452.

53. Ill.—East St. Louis v. People, 17 N.E. 447, 124 Ill. 655.

54. Wash.—Hansen v. Hoquiam, 163 P. 391, 95 Wash. 132. 44 C.J. p 1121 note 96.

55. Wash.—Hansen v. Hoquiam, supra. 44 C.J. p 1121 note 97.

56. Wash.—Hansen v. Hoquiam, supra. 44 C.J. p 1121 note 98.

57. Ill.—Kocsis v. Chicago Park Dist., 198 N.E. 847, 362 Ill. 24. 44 C.J. p 1121 note 1.

Quasi-judicial act

An assessment, within constitution under which the assessed value of property in town as evidenced by last preceding assessment for state purposes must be taken as basis for determining limit of debt contracting power, is a quasi-judicial act consisting in making out a list of

the taxpayer's taxable property and fixing its valuation or appraisal.—First Nat. Bank v. Town of Luverne, 180 So. 283, 235 Ala. 606.

Validity of indebtedness evidenced by municipal funding bonds is determinable from last assessment for state and county purposes previous to incurring of indebtedness.—Alexander v. Board of Education of Town of Carmen, 18 P.2d 863, 161 Okl. 287.

58. Ill.—Kocsis v. Chicago Park Dist., 198 N.E. 847, 362 Ill. 24.

44 C.J. p 1121 note 2.

59. Ill.—Culbertson v. Fulton, 18 N.E. 781, 127 Ill. 30.

44 C.J. p 1121 note 3.

60. Pa.—Elliot v. Philadelphia, 78 A. 107, 229 Pa. 215.

44 C.J. p 1121 note 4.

61. Pa.—Bruce v. Pittsburg, 30 A. 831, 166 Pa. 152.

44 C.J. p 1121 note 5.

62. Pa.—Elliot v. Philadelphia, 78 A. 107, 229 Pa. 215.

44 C.J. p 1121 note 6.

63. Pa.—Elliot v. Philadelphia, supra. 44 C.J. p 1121 note 7.

64. Pa.—Elliot v. Philadelphia, supra.

65. Pa.—Elliot v. Philadelphia, supra.

the taxable property is required to be ascertained.⁶⁶

Under most limitations of municipal indebtedness, the value of the taxable property is ascertained according to the last tax assessment made prior to the incurring of the indebtedness,⁶⁷ but under a few provisions resort is had to the assessment next preceding the last.⁶⁸ The limit of indebtedness which may be incurred is to be estimated by assessments made as provided by law and cannot be estimated by the opinion of witnesses as to what a future assessment may be.⁶⁹

The validity of a debt is to be determined by the ratio of indebtedness to the assessed valuation in effect when the debt was created.⁷⁰ If a debt is valid when created it will not become invalid thereafter even if it should exceed the stated per cent of some future assessment;⁷¹ and, conversely, if the debt is invalid when incurred because of the constitutional inhibition, a subsequent increase in the assessed valuation of taxable property will not render it legal.⁷² Overassessment, even though the overassessing is imposed with uniformity, is invalid, since it opens the door to contracting an excessive debt.⁷³

A new municipality not organized long enough to have made the tax assessment on which a constitutional or statutory debt limitation is based is

nevertheless subject to the limitation;⁷⁴ it may incur indebtedness prior to the making of a tax assessment,⁷⁵ and such indebtedness is valid when within the limit as determined by the assessment subsequently made,⁷⁶ but not otherwise.⁷⁷

Particular kinds of taxable property. Taxable property, within the meaning of limitations of municipal indebtedness to a specified per cent of the value of the taxable property in the municipality, includes personal property,⁷⁸ unless such property is not subject to taxation⁷⁹ or unless the limitation is by its terms restricted to real estate,⁸⁰ and even in that case all property which the statutes make taxable as real estate is included.⁸¹ The assessed value of railroads, bridges, and telegraph and telephone companies within the city is properly included in the aggregate valuation,⁸² and so, it has been held, are franchise assessments,⁸³ and also the assessed value of properties which had been bid in by the city treasurer at a tax sale⁸⁴ and of properties against which the city holds tax liens,⁸⁵ even though the annual city taxes are not extended to them.⁸⁶

b. Yearly Revenue

Under some provisions a municipal corporation is prohibited from incurring an expense or creating an indebtedness in any one year in excess of the revenue provided for that year, or from incurring debts payable out

66. Iowa.—Trepp v. Independent School Dist. of Pocahontas, 240 N. W. 247, 213 Iowa 944.

67. Ala.—First Nat. Bank v. Town of Luverne, 180 So. 283, 235 Ala. 606.

Ill.—Kocsis v. Chicago Park Dist., 198 N.E. 847, 362 Ill. 24.

Okl.—St. Louis-San Francisco Ry. Co v Hendrickson, 263 P. 148, 128 Okl. 266.

44 C.J. p 1122 note 10.

68. Mo.—State v. Gordon, 158 S.W. 683, 251 Mo. 303.

44 C.J. p 1122 note 11.

69. Ky.—Nelson v. Williamsburg Independent Graded School Dist., 97 S.W.2d 814, 265 Ky. 792.

70. Ill.—Kocsis v. Chicago Park Dist., 198 N.E. 847, 362 Ill. 24. Time when debt comes into existence as controlling in determining whether debt in excess of limitation is created generally see *infra* § 1850.

71. Ill.—Kocsis v. Chicago Park Dist., *supra*.

72. Ill.—Kocsis v. Chicago Park Dist., *supra*.

73. N.Y.—People ex rel. Guaranty Trust Co. of New York v. Cook, 18 N.Y.S.2d 945, affirmed People ex rel. Longken, Inc., v. Dooley, 27 N.Y.S.2d 999, 261 App.Div. 993.

Conclusiveness of assessment

On question whether maximum total assessment as returned by assessors on all property of town was sufficient to support bond issue, showing of county tax receiver's assessment for year in question was not conclusive, and the matter was one for the trial judge to determine under the evidence.—Scott v. Town of McIntyre, 19 S.E.2d 49, 66 Ga. App. 640.

74. U.S.—Sidey v. City of Marceline, Mo., 237 F. 168, 150 C.C.A. 314, certiorari denied 37 S.Ct. 478, 243 U.S. 651, 61 L.Ed. 947.

Okl.—Ray v. Caddo County School Dist. No. 9, 95 P. 480, 21 Okl. 88.

75. Wash.—Childs v. Anacortes, 32 P. 217, 5 Wash. 452.

76. Okl.—Ray v. Caddo County School Dist. No. 9, 95 P. 480, 21 Okl. 88.

Wash.—In re Wooley, 134 P. 825, 75 Wash. 206.

77. Okl.—Ray v. Caddo County School Dist. No. 9, 95 P. 480, 21 Okl. 88.

44 C.J. p 1122 note 15.

78. Ky.—City of Jackson v. First Nat. Bank of Jackson, 157 S.W.2d 321, 289 Ky. 1.

44 C.J. p 1122 note 16.

Bank shares

The value of bank shares was taxable property in city and could be considered in determining maximum limit of municipal indebtedness, notwithstanding such property was not subject to maximum tax which city could levy on other property for sinking fund purposes.—City of Jackson v. First Nat. Bank of Jackson, *supra*.

79. Ohio.—State v. Brown, 180 N.E. 707, 125 Ohio St. 171.

80. N.Y.—Levy v. McClellan, 89 N. E. 569, 196 N.Y. 178.

81. N.Y.—Levy v. McClellan, *supra*.

82. Mo.—Southworth v. Glasgow, 132 S.W. 1168, 232 Mo. 108, Ann. Cas.1912B 1267.

83. Ky.—Winchester v. Nelson, 193 S.W. 1040, 175 Ky. 63.

N.Y.—Levy v. McClellan, 89 N.E. 569, 196 N.Y. 178.

44 C.J. p 1122 note 20.

84. N.Y.—L. L. F. Realty Co. v. Fuchs, 75 N.Y.S.2d 356, 273 App. Div. 111.

85. N.Y.—L. L. F. Realty Co. v. Fuchs, *supra*.

86. N.Y.—L. L. F. Realty Co. v. Fuchs, *supra*.

of the revenues of future years, or is limited as to the amount of deficit payable from the revenues of the next succeeding year which it may incur.

Under the provisions of some statutes or charters a municipal corporation is prohibited from incurring an expense or creating an indebtedness in any one year in excess of the revenue provided for that year,⁸⁷ and under such provisions it has been held that the right of a municipality to contract and incur obligations is limited by the amount which it did collect, and not what might have been collected.⁸⁸ Under such provisions a municipal corporation may continue to function although it does not have cash on hand each year to pay obligations contracted in such year if its expenditures do not exceed its revenues, but it may not increase its indebtedness.⁸⁹ Debts contracted during a fiscal year are not invalid unless in excess of the revenues for that year, and may be paid out of revenue of succeeding years.⁹⁰ Under some statutes or charters a municipality is prohibited from incurring debts payable out of the revenues of future years,⁹¹ and under some charters, when the revenues in any one year are insufficient to meet legitimate expenditures, the municipality may incur a deficit in a limited amount payable from the revenues of the next succeeding year.⁹² Under some provisions, which are discussed *infra* § 1859, a municipal corporation is prohibited from incurring any indebtedness or liability in any year in excess of its income and revenue for such year unless authorized to do so by a specified proportion of the electors voting at an election held for the purpose of passing on the question.

c. Expenditure for Previous Year

Under some statutes the total of amounts in the budget proposed for expenditures may not exceed by a certain per cent the aggregate of actual expenditures for the previous year, exclusive of certain expenditures.

Under some statutes the total of amounts in the

budget proposed for expenditure may not exceed by a certain per cent the aggregate of actual expenditures for the previous year, exclusive of certain expenditures,⁹³ and under such statutes it has been held that a sum expended from surplus revenues received from sources other than direct taxation constitutes an actual expenditure, and is properly included in the limitation base.⁹⁴ A provision that the amount of tax levies for emergency liabilities should be excluded from the base on which the limitation for the succeeding year should be determined has been construed to exclude the amount of emergency expenditures authorized by the state tax commission only where a tax levy was necessary to meet the emergency liabilities.⁹⁵

§ 1848. Limitations for Particular Purposes

A limitation of the amount of indebtedness which a municipal corporation may incur for a special purpose will be given effect according to, but not beyond, its terms.

The legislature may,⁹⁶ and sometimes does,⁹⁷ limit the amount of expenditure which a municipal corporation may make or the amount of indebtedness it may incur for a special purpose. Such a limitation will be given effect according to,⁹⁸ but not beyond,⁹⁹ its terms.

§ 1849. Computation of Existing Indebtedness

- a. In general
- b. Debts or liabilities arising from improvements, utilities, or taking of property
- c. Debts permitted to exceed general limitation
- d. Deduction of assets

a. In General

The existing indebtedness of a municipal corporation comprehends its valid outstanding obligations which it can

87. Ark.—Manhattan Rubber Mfg. Division of Raybestos Manhattan v. Bird, 185 S.W.2d 268, 208 Ark. 167, 159 A.L.R. 1257.

Ky.—Herd v. City of Middlesboro, 99 S.W.2d 458, 266 Ky. 488.

N.Y.—Rondout Sav. Bank v. City of Kingston, 259 N.Y.S. 30, 144 Misc. 880.

Okl.—Sinclair-Prairie Pipe Line Co. v. Excise Board of Seminole County, 42 P.2d 501, 171 Okl. 382.

44 C.J. p 1122 note 21.

88. Ark.—Manhattan Rubber Mfg. Division of Raybestos Manhattan v. Bird, 185 S.W.2d 268, 208 Ark. 167, 159 A.L.R. 1257.

89. Ark.—Manhattan Rubber Mfg.

Division of Raybestos Manhattan v. Bird, *supra*.

90. Ark.—Incorporated Town of Ozark v. Ozark Water Co., 81 S.W.2d 920, 190 Ark. 872—City of Ft. Smith v. U. S. Rubber Co., 42 S.W.2d 1004, 184 Ark. 588.

91. La.—Bowman v. New Orleans Fire Dept., 83 So. 14, 145 La. 793. 44 C.J. p 1122 note 22.

92. Tex.—Foster v. Waco, 255 S.W. 1104, 113 Tex. 352.

44 C.J. p 1122 note 24.

93. Ariz.—Brown v. City of Phoenix, 200 P.2d 720.

94. Ariz.—Brown v. City of Phoenix, *supra*.

95. Ariz.—Brown v. City of Phoenix, *supra*.

96. N.C.—Wharton v. Greensboro, 59 S.E. 1043, 146 N.C. 356.

Application of general limitations to particular purposes see *supra* § 1846 b.

97. N.C.—Wharton v. Greensboro, *supra*.

44 C.J. p 1122 note 27.

98. N.Y.—Kingsley v. Brooklyn, 78 N.Y. 200, 7 Abb.N.Cas. 28.

44 C.J. p 1122 note 28.

99. Mass.—McHenry v. City of Lawrence, 3 N.E.2d 262, 295 Mass. 119.

44 C.J. p 1122 note 29.

be called on to pay, and includes both bonded and floating indebtedness; but any debt expressly excepted by law is not to be included. Moreover, a limitation on municipal indebtedness is aimed at an actual, rather than a theoretical, indebtedness.

Generally speaking, the existing indebtedness of a municipal corporation comprehends its valid outstanding obligations which it can be called on to pay,¹ and includes all classes of indebtedness,² whether bonded³ or floating.⁴

In computing the amount of existing municipal indebtedness with reference to constitutional and statutory limitations, however, the language of express provisions on the subject is controlling,⁵ and any debt expressly excepted by law is not to be included.⁶ Where the limitation in express terms is

applicable in cases requiring the assent of the voters, indebtedness not requiring such assent is not to be computed as a part of the existing indebtedness.⁷ A limitation of indebtedness, moreover, is aimed at an actual, rather than a theoretical, indebtedness.⁸

Accordingly, the existing indebtedness of a municipal corporation, within the meaning of a limitation, does not include indebtedness, the money to pay which is in the municipal treasury⁹ or which is payable from a special fund,¹⁰ municipal stocks or bonds in the hands of the sinking fund commission,¹¹ illegal or void obligations,¹² unliquidated and disputed claims,¹³ a contract under which a debt may arise,¹⁴ indebtedness proposed to be incurred thereafter,¹⁵ merely optional obligations,¹⁶ or in-

1. Fla.—State v. City of Miami, 26 So.2d 903.

Okl.—Corpus Juris quoted in School Dist. No. 2, Consolidated, Pushmataha County v. Gossett, 283 P. 249, 252, 140 Okl. 243.

Pa.—Pennsylvania Power & Light Co. v. City of Bethlehem, 185 A. 710, 323 Pa. 313—McGuire v. Philadelphia, 91 A. 622, 245 Pa. 287—Shamokin Banking & Trust Co. v. Coal Tp. Poor Dist., 13 Pa. Dist. & Co. 57.

44 C.J. p 1123 note 31.

Indebtedness requiring assent of voters

Existing indebtedness, in constitutional provision limiting indebtedness of political subdivision, includes all indebtedness requiring assent of voters except that incurred under another constitutional provision authorizing indebtedness for public utilities.—Faught v. City of Sapulpa, 292 P. 15, 145 Okl. 164.

Legal obligations

The existing indebtedness includes the legal, but not the moral, obligations of the municipality.—City of Hudson v. Board of Education of City of Hudson, 287 N.Y.S. 620, 158 Misc. 583.

2. Okl.—Corpus Juris quoted in School Dist. No. 2, Consolidated, Pushmataha County, v. Gossett, 283 P. 249, 252, 140 Okl. 243.

44 C.J. p 1123 note 32.

3. Okl.—Corpus Juris quoted in School Dist. No. 2, Consolidated, Pushmataha County, v. Gossett, 283 P. 249, 252, 140 Okl. 243.

44 C.J. p 1123 note 33.

4. Ky.—Winchester v. Nelson, 193 S.W. 1040, 175 Ky. 63.

Okl.—Corpus Juris quoted in School Dist. No. 2, Consolidated, Pushmataha County, v. Gossett, 283 P. 249, 252, 140 Okl. 243.

5. U.S.—City of Kingsville v. Meredith, C.C.A.Tex., 103 F.2d 279.

44 C.J. p 1123 note 35.

6. N.C.—McNeill v. Whiteville, 119 S.E. 6, 186 N.C. 163.

44 C.J. p 1123 note 36.

Particular bonds are not to be included in the computation where it is expressly provided that they shall not be.

Mich.—Callahan v. City of Berkley, 12 N.W.2d 431, 307 Mich. 701, rehearing denied 14 N.W.2d 87, 307 Mich. 701.

N.Y.—Levy v. McClellan, 89 N.E. 569, 196 N.Y. 178.

N.C.—Lamb v. City of Randleman, 175 S.E. 293, 206 N.C. 837.

44 C.J. p 1124 note 51.

7. Okl.—Faught v. City of Sapulpa, 292 P. 15, 145 Okl. 164.

Indebtedness not exceeding income and revenue for fiscal year is not to be included where such indebtedness does not require the assent of the voters.

U.S.—Board of Education of Town of Carmen, Okl., v. James, C.C.A. Okl., 49 F.2d 91.

Okl.—Faught v. City of Sapulpa, 292 P. 15, 145 Okl. 164.

Indebtedness incurred during prior fiscal year

Existing indebtedness, in constitutional provision limiting indebtedness, does not include indebtedness incurred during prior fiscal year not exceeding income and evidenced only by contract or warrant.—Kansas City Southern Ry. Co. v. City of Heavener, 54 P.2d 165, 175 Okl. 517.—Faught v. City of Sapulpa, 292 P. 15, 145 Okl. 164.

8. Ala.—Corpus Juris cited in Taxpayers and Citizens of Shelby County v. Shelby County, 20 So. 2d 36, 39, 246 Ala. 192.

44 C.J. p 1123 note 37.

9. Ala.—Corpus Juris cited in Taxpayers and Citizens of Shelby County v. Shelby County, 20 So.2d 36, 40, 246 Ala. 192.

Ohio.—State ex rel. City of Ports-

mouth v. Kountz, 194 N.E. 869, 129 Ohio St. 272, 97 A.L.R. 1099.

44 C.J. p 1123 note 38.

Presumption of sufficiency of current revenues

In determining whether maximum permissible limit of indebtedness had been exceeded by city when bonds were issued, interest accruing on bonds and overdrafts in general fund and police fund could not be included in indebtedness since in absence of proof to the contrary it was to be assumed that the current revenues of the city were sufficient to discharge interest due and take care of the overdrafts.—City of Jackson v. First Nat. Bank of Jackson, 157 S.W.2d 321, 289 Ky. 1.

10. N.D.—State ex rel. Syvertson v. Jones, 23 N.W.2d 54, 74 N.D. 465. Indebtedness payable from special fund or assessment as debt subject to limitation generally see infra § 1853.

11. Ariz.—Corpus Juris quoted in Morgan v. Board of Sup'rs, 192 P. 2d 236, 238, 67 Ariz. 133.

44 C.J. p 1123 note 39.

12. Wash.—Seymour v. Ellensburg, 142 P. 875, 81 Wash. 365

44 C.J. p 1123 note 41.

13. Ill.—Simpson v. City of Highwood, 23 N.E.2d 62, 372 Ill. 212, 124 A.L.R. 1459.

44 C.J. p 1123 note 42.

14. Mont.—Farmers State Bank of Conrad v. City of Conrad, 47 P.2d 853, 100 Mont. 415.

44 C.J. p 1123 note 43.

15. Okl.—Peck-Williamson Heating, etc., Co. v. Oklahoma City Bd. of Education, 50 P. 286, 6 Okl. 279.

16. Iowa.—Windsor v. Des Moines, 81 N.W. 476, 110 Iowa 175, 89 Am. S.R. 280.

Wis.—Stedman v. Berlin, 78 N.W. 57, 97 Wis. 505.

debtedness of a separate taxing unit whose boundaries are coincidental with that of the city.¹⁷ The amount of money in the city treasurer's hands which can be properly applied for sinking fund purposes does not represent a debt from the city to the sinking fund.¹⁸ A sum temporarily transferred from one fund to another, for the repayment of which a tax has been levied, is not a debt of the municipality, since the obvious purpose of such temporary transfers is to avoid borrowing of money and thus creating a debt.¹⁹ Anticipated or uncollected income from special assessments or publicly owned utilities may not be considered as reducing the required millage to service special assessment and waterworks bonds for the purpose of determining whether general obligation bonds which have not been approved by the voters would come within the constitutional limitation.²⁰

Obligations to be computed as part of the municipal indebtedness include judgments rendered against the municipality,²¹ its liability to reimburse a special fund for money which it has unlawfully diverted therefrom,²² outstanding unpaid warrants against appropriations for prior years,²³ and, under the con-

struction placed on some constitutional provisions, loans to the municipality which have been authorized but not actually consummated.²⁴ In determining whether a proposed bond issue is within the constitutional limitation, it has been held that the outstanding unvoted bond indebtedness of all overlapping political subdivisions must be included.²⁵

Current expenses. Current expenses covered by current revenues are not considered as debts of the municipality in computing existing indebtedness,²⁶ and neither are liabilities for proper current expenses for the payment of which funds could lawfully be raised during the year in which the liabilities were incurred.²⁷ So, where a municipality contracts for annual services for a series of years to be paid for by annual payments, only the amount which may become due within a certain year or other period need be considered in determining whether the debt limit has been exceeded.²⁸ If loans made by a municipality to meet current expenses do not overreach current revenues and do not extend beyond the present means of payment possessed by the municipality, no debt is created in the constitutional sense,²⁹ but the rule is otherwise where the

17. Ky.—City of Jackson v. First Nat. Bank of Jackson, 157 S.W.2d 321, 289 Ky. 1.

44 C.J. p 1118 note 40 [a]. [b]. Indebtedness of other political bodies see supra § 1846 b.

Indebtedness of school district is to be disregarded in computing indebtedness of city or town.

Ky.—City of Jackson v. First Nat. Bank of Jackson, 157 S.W.2d 321, 289 Ky. 1.

N.D.—Baldwin v. Board of Education of City of Fargo, 33 N.W.2d 473.

44 C.J. p 1118 note 40 [b].

18. Ill.—Stone v. Chicago, 69 N.E. 970, 207 Ill. 492.

19. Ill.—Simpson v. City of Highwood, 23 N.E.2d 62, 372 Ill. 212, 124 A.L.R. 1459.

20. Ohio.—State ex rel. City of Portsmouth v. Kountz, 194 N.E. 869, 129 Ohio St. 272, 97 A.L.R. 1099.

21. Mo.—Corpus Juris cited in State v. City of Mound City, 73 S.W.2d 1017, 1021, 335 Mo. 702. 44 C.J. p 1124 note 47.

Judgments in tort

While, as discussed infra § 1850, a municipal tort liability is not affected by the fact that a city is already indebted up to its constitutional limit, judgments in tort against the city should be included in computing the amount of the city's indebtedness.—Corpus Juris cited in State v. City of Mound City, 73 S.W.

2d 1017, 1021, 335 Mo. 702—44 C.J. p 1124 note 47 [a].

Indebtedness merged into judgment
Existing indebtedness, in constitutional provision limiting indebtedness, includes indebtedness incurred during prior fiscal year to an amount not exceeding the income and revenue provided for that fiscal year when that indebtedness is merged into judgment.—Faught v. City of Sapulpa, 292 P. 15, 145 Okl. 164.

22. Pa.—Pennsylvania Power & Light Co. v. City of Bethlehem, 185 A. 710, 323 Pa. 313.

44 C.J. p 1124 note 48.

Diverted proceeds of excluded bonds
Where special assessment bonds were issued by village after statute was amended to exclude special assessment bonds from inclusion in debt limitation, if moneys received from sale of bonds had been diverted to general village expenses, then diverted amount should be included in computing debt limitation, but such diversion might not be employed to defeat right of holders of bonds regularly issued.—Callahan v. City of Berkley, 12 N.W.2d 431, 307 Mich. 701, rehearing denied 14 N.W.2d 87, 307 Mich. 701.

23. Okl.—School Dist. No. 2, Consolidated, Pushmataha County, v. Gossett, 283 P. 249, 140 Okl. 243.

24. Pa.—Duane v. City of Philadelphia, 185 A. 401, 322 Pa. 33. 44 C.J. p 1123 note 46.

25. Ohio.—State ex rel. Board of

Education of Cleveland City School District v. Morris, 18 N.E. 2d 980, 135 Ohio St. 23—State ex rel. City of Portsmouth v. Kountz, 194 N.E. 869, 129 Ohio St. 272, 97 A.L.R. 1099.

26. Pa.—Ward v. City of Pittsburgh, 184 A. 240, 321 Pa. 414, 105 A.L.R. 682.

Current expenses as constituting new debts, expenditures or transactions subject to limitation see infra § 1851.

27. Ga.—Edwards v. Clarksville, 133 S.E. 45, 35 Ga.App. 306.

44 C.J. p 1123 note 40.

Future operating expenses

In determining whether city's indebtedness exceeded constitutional limit when notes were originally mailed in September, future operating expenses of city through December, including salaries of policemen, firemen, street department employees, and teachers were not required to be considered existing indebtedness in September.—Frueher v. City of Bloomer, 4 N.W.2d 186, 241 Wis. 17.

28. Wis.—Frueher v. City of Bloomer, supra.

29. U.S.—American La France Fire Engine Co., to Use of American La France & Foamite Industries, v. Borough of Shenandoah, D.C.Pa., 30 F.Supp. 251, affirmed, C.C.A., 115 F.2d 866.

Pa.—Walters v. Tamaqua Borough,

transaction is a mere subterfuge to evade the constitutional prohibition.³⁰

Indebtedness incurred before adoption of constitution or charter. According to some authorities, indebtedness incurred before the adoption of the present constitution is not to be considered in determining the amount of municipal indebtedness³¹ unless the total indebtedness has, since the adoption of the constitution, been reduced below the prescribed limit.³² Likewise it has been held that indebtedness incurred prior to the passage of a charter imposing a limitation is not to be computed as a part of the indebtedness of the municipality.³³

Interest. Accrued,³⁴ but not unaccrued,³⁵ interest on the obligations of a municipality is to be included in computing its indebtedness at a particular time.

b. Debts or Liabilities Arising from Improvements, Utilities, or Taking of Property

The existing indebtedness of a municipal corporation includes its liability under contracts for public improvements to be met by an issue of bonds to be paid for by future taxation, but not where the debt is payable from special assessments; and under some constitutional provisions debts incurred for municipally owned public utilities may be excluded from the gross total in determining whether the debt limit has been reached.

The existing indebtedness of a municipal corpora-

tion includes its liability under contracts for public improvements where such liability is to be met by an issue of bonds and the bonds are to be paid for by future taxation,³⁶ but the rule is otherwise as to debts for local improvements payable from special assessments.³⁷ Prior to the extension of credit to a municipality for the amount of public benefits, and in the absence of a showing that the municipality is not ready to raise the amount by taxation, public benefits are not to be counted as debts;³⁸ but after there has been an extension of credit for the purpose of the improvement it has been held that they are considered to be debts.³⁹ Assessments against municipal property for improvements made payable by general tax levy have been held to constitute municipal obligations or debts.⁴⁰ Betterments may be considered against portions of lots divided by improvement district boundaries to determine whether the cost of an improvement exceeds the legal limitation.⁴¹

Some,⁴² but not other,⁴³ courts have held that the amount owing by a city to the owners of property taken for a public use is to be included in computing the existing indebtedness of the city. An estimate, made by a municipal officer charged with the duty of making it, of the damages caused by a street improvement⁴⁴ and of the cost of doing the work⁴⁵ has

10 Pa.Dist. & Co. 366, 23 Schuyl Leg.Reg. 147, 19 Mun.L.R. 47.

Tax anticipation certificates issued by borough in 1928 for current expenses, which remained unpaid in 1929, would not be included in determining whether councilmanic borrowing power of borough was exceeded in 1929, where loans were made with bona fide intention of making repayment out of 1928 current revenues.—Pittsburgh Paving Co., for Use of Iron & Glass Dollar Sav. Bank of Birmingham, v. City of Pittsburgh, 3 A.2d 905, 332 Pa. 563.

Bonds issued for payment of outstanding current expense loans do not constitute indebtedness in the constitutional sense.—Pittsburgh Paving Co., for Use of Iron & Glass Dollar Sav. Bank of Birmingham, v. City of Pittsburgh, supra.

30. Pa.—Pennsylvania Power & Light Co. v. City of Bethlehem, 185 A. 710, 323 Pa. 313.

31. Pa.—Foering v. City of Bethlehem, 20 Pa.Dist. & Co. 331, 24 North.Co. 144.

44 C.J. p 1124 note 53.

Special provision for municipalities excessively indebted at adoption of constitution see supra § 1846 b.

32. Ky.—Jones v. Bowling Green Bd. of Education, 239 S.W. 1032,

191 Ky. 198—Walsh v. Pineville, 153 S.W. 1002, 152 Ky. 556

33. Cal.—Soule v. McKibben, 6 Cal. 142.

34. Ill.—People ex rel. Lindheimer v. Hamilton, 25 N.E.2d 517, 373 Ill. 124.

Pa.—Pennsylvania Power & Light Co. v. City of Bethlehem, 185 A. 710, 323 Pa. 313.

44 C.J. p 1124 note 57.

35. Ark.—Street Improvement Dist. No. 113 of City of Hot Springs v. Mooney, 158 S.W.2d 661, 203 Ark. 745.

Ill.—People ex rel. Lindheimer v. Hamilton, 25 N.E.2d 517, 373 Ill. 124.

Iowa.—Corpus Juris cited in Pennington v. Town of Sumner, 270 N.W. 629, 637, 222 Iowa 1005, 109 A.L.R. 355.

N.D.—Schleber v. City of Mohall, 268 N.W. 445, 66 N.D. 593.

Pa.—Pennsylvania Power & Light Co. v. City of Bethlehem, 185 A. 710, 323 Pa. 313.

44 C.J. p 1124 note 58.

36. N.Y.—New York State Electric & Gas Corporation v. City of Plattsburgh, 24 N.E.2d 122, 281 N.Y. 450, reargument denied 26 N.E.2d 812, 282 N.Y. 682—Levy v. McClellan, 89 N.E. 569, 196 N.Y. 178.

37. N.D.—Grand Forks Park Dist. Comrs., 111 N.W. 615, 16 N.D. 25, 15 L.R.A.N.S., 61.

44 C.J. p 1124 note 60.

Deduction of assessments from gross debt see infra subdivision d of this section.

38. Ill.—People ex rel. Toman v. Crane, 23 N.E.2d 337, 372 Ill. 228.

39. Ill.—People ex rel. Toman v. Crane, supra.

40. Okl.—City of Lawton v. Morford, 293 P. 1068, 146 Okl. 222.

Assessment against city as debt subject to limitation generally see infra § 1853 a.

41. Ark.—Davidson v. Sewer Improvement Dist., 32 S.W.2d 1062, 182 Ark 741.

42. N.Y.—Levy v. McClellan, 89 N.E. 569, 196 N.Y. 178.

Tex.—Ft. Worth v. Reynolds, Civ. App., 190 S.W. 501.

44 C.J. p 1124 note 61.

43. Wash.—Baker v. Seattle, 27 P. 462, 2 Wash. 576.

44. Pa.—Pittsburgh Paving Co., for Use of Iron & Glass Dollar Sav. Bank of Birmingham v. City of Pittsburgh, 3 A.2d 905, 332 Pa. 563 —Schuldice v. Pittsburgh, 95 A. 938, 251 Pa. 28.

45. Pa.—Pittsburgh Paving Co., for Use of Iron & Glass Dollar Sav.

been held a sufficient basis for including the amount thereof in a computation of the indebtedness of the city.

Under some constitutional provisions and the construction placed thereon, debts incurred for public utilities owned by the municipality may be excluded or deducted from the gross total in determining whether the debt limit has been reached,⁴⁶ and this rule has been applied where the obligation is payable out of the revenues of public utilities or improvements,⁴⁷ or where provision is made for the exclusion of an indebtedness created for the purpose of purchasing, extending, adding to, improving, operating, or managing a public utility, secured solely by the property or income of such public utility.⁴⁸ Under a constitutional provision that no obligations to provide for the construction or acquisition of specified public utilities shall be considered a debt of the municipality if the net revenues therefrom are sufficient to pay interest and sinking-fund charges, bonds issued to provide funds for the operation, enlargement, and repairs of an existing plant must be included in a computation of the existing indebtedness of the municipality;⁴⁹ and under a constitutional provision of this character the court has no power to declare that the amount of an improvement loan exceeding the debt limit should be excluded from calculation of the amount of debt

in determining municipal borrowing capacity where the revenue therefrom, exclusive of revenues derived from taxation, is insufficient to make the loan self-liquidating,⁵⁰ even though a special fund would be created.⁵¹

c. Debts Permitted to Exceed General Limitation

Although there is authority to the contrary, it has been held that, where a municipal corporation is authorized to exceed the general limitation for specified, exceptional purposes, debts incurred for such exceptional purposes before the limitation has been reached are not to be included in computing existing indebtedness to determine whether a further indebtedness not for an exceptional purpose may be incurred.

Some authorities take the view that, even though a municipal corporation is authorized to exceed the general limitation for specified exceptional purposes, nevertheless debts incurred for such exceptional purposes before the limitation has been reached are to be included in computing its existing indebtedness for the purpose of determining whether it may incur a further indebtedness not for an exceptional purpose;⁵² but other authorities take a contrary view,⁵³ and hold that the two classes of indebtedness are entirely separate and distinct,⁵⁴ so that the indebtedness incurred under one class is not to be considered in determining whether the constitutional limitation on the other class has been exceeded.⁵⁵

Bank of Birmingham v. City of Pittsburgh, 3 A.2d 905, 332 Pa. 563—Schuldice v. Pittsburgh, 95 A. 938, 251 Pa. 28.

46. N.C.—Lamb v. City of Randleman, 175 S.E. 293, 206 N.C. 837. 44 C.J. p 1123 note 36 [a], [b].

47. Ala.—First Nat. Bank v. Town of Luverne, 180 So. 283, 235 Ala. 606.

N.D.—State ex rel. Syvertson v. Jones, 23 N.W.2d 54, 74 N.D. 465.

Bonds

In computing existing indebtedness, not to be included as an existing debt are bonds payable out of revenues of:

(1) Sewer system.—New York State Electric & Gas Corporation v. City of Plattsburgh, 24 N.E.2d 122, 281 N.Y. 450, reargument denied 26 N.E.2d 812, 282 N.Y. 682.

(2) Water system. Ky.—Kentucky Utilities Co. v. City of Paris, 58 S.W.2d 361, 248 Ky. 252.

Wash.—Dean v. Walla Walla, 92 P. 895, 48 Wash. 75.

48. Wis.—Payne v. City of Racine, 259 N.W. 437, 217 Wis. 550.

Sewage disposal system was a public utility, and the constitutional

provision was applicable to an extension of an existing municipal sewage system.—Payne v. City of Racine, supra.

49. Pa.—Hoffman v. Kline, 150 A. 889, 300 Pa. 485.

50. Pa.—In re City of Philadelphia, 21 A.2d 876, 343 Pa. 47—In re Petition of City of Philadelphia, 16 A.2d 32, 340 Pa. 17.

51. Pa.—In re Petition of City of Philadelphia, supra.

52. Ohio—State ex rel. City of Portsmouth v. Kountz, 194 N.E. 869, 129 Ohio St. 272, 97 A.L.R. 1099.

44 C.J. p 1124 note 66.

Restrictions as to indebtedness for general purposes as inapplicable to indebtedness incurred for special object see supra § 1846 b.

53. U.S.—Iron Products Inv. Co. v. City of Picher, C.C.A.Okl., 83 F.2d 443.

Ariz.—Crawford v. City of Prescott, 83 P.2d 789, 52 Ariz. 471.

Okl.—State ex rel. City of Shawnee v. Williamson, 97 P.2d 74, 186 Okl. 278, 125 A.L.R. 1389—Faight v. City of Sapulpa, 292 P. 15, 145 Okl. 164.

Pa.—Atkins v. City of Philadelphia, 14 A.2d 428, 339 Pa. 345.

S.D.—Rice v. City of Watertown, 281 N.W. 116, 66 S.D. 221. 44 C.J. p 1124 note 67.

54. Ariz.—Allison v. City of Phoenix, 33 P.2d 927, 44 Ariz. 66, 93 A.L.R. 354, followed in 33 P.2d 932, 44 Ariz. 81 and 33 P.2d 933, first case, 33 P.2d 933, 44 Ariz. 82; second case, 44 Ariz. 83—Walmsley v. Laird, 273 P. 536, 34 Ariz. 544.

55. Ariz.—Buntman v. City of Phoenix, 255 P. 490, 32 Ariz. 18—Walmsley v. Laird, 273 P. 536, 34 Ariz. 544.

Refunding bonds issued by city covering principal on waterworks bonds in default was held indebtedness in lieu of, and same as, original bonds and chargeable against limitation on indebtedness for water, light, and sewer purposes, and not against limitation on indebtedness for general purposes, as basis for determining whether proposed bond issue for parks and playgrounds would increase indebtedness for general purposes beyond limitation.—Allison v. City of Phoenix, 33 P.2d 927, 44 Ariz. 66, 93 A.L.R. 354, followed in 33 P.2d 932, 44 Ariz. 81, and 33 P.2d 933, first case, 33 P.2d 933, 44 Ariz. 82, second case, 44 Ariz. 83.

At any rate a debt which, at the time it was incurred, exceeded the limitation, and was contracted by popular vote in pursuance of constitutional authority to exceed the limit with the assent of the electors, is not subsequently to be computed as part of the indebtedness subject to the limitation.⁵⁶

d. Deduction of Assets

While a few decisions hold that a limitation of municipal indebtedness refers to outstanding debts and not net indebtedness, it has generally been held that in computing the existing indebtedness of a municipal corporation a deduction may be made from gross indebtedness of municipal assets applicable to the payment of such indebtedness.

The method of determining whether a new indebtedness will exceed a debt limit is a subject of more or less conflict.⁵⁷ According to a few decisions, a limitation of municipal indebtedness refers to outstanding debts and not to net indebtedness,⁵⁸ and accordingly it has been held that the amount of such indebtedness is not reduced by the amount of cash such municipal corporation may have on hand in the treasury subject to general disbursement;⁵⁹

but this principle does not apply to cash or bonds in a sinking fund created by law, which may be applied solely to the discharge of certain indebtedness,⁶⁰ the rule being that, in order that cash in the hands of a municipality may be deducted to ascertain whether the constitutional debt limitation has been exceeded, it is necessary that such fund be clearly designated as being usable solely for the purpose of discharging some outstanding indebtedness in such a manner that its application to such purpose can be enforced by law.⁶¹

On the other hand, it has generally been held that in computing the existing indebtedness of a municipality a deduction may be made from gross indebtedness of municipal assets applicable to the payment of such indebtedness;⁶² and in some jurisdictions it is so provided by statutes⁶³ which are held to be constitutional.⁶⁴

Where deduction is authorized in accordance with the general rule, particular assets which may be deducted include cash on hand⁶⁵ and solvent debts due

56. Mont.—*Arnold v. Miles City*, 128 P. 915, 46 Mont. 478.

44 C.J. p 1124 note 68.

57. S.D.—*Corpus Juris* cited in *Farrar v. Britton Independent School Dist.*, 32 N.W.2d 627, 631.

44 C.J. p 1124 note 69, p 1125 notes 70–85.

58. Ill.—*People ex rel. Lindheimer v. Hamilton*, 25 N.E.2d 517, 373 Ill. 124.

44 C.J. p 1124 note 69.

59. Ill.—*People ex rel. Lindheimer v. Hamilton*, *supra*.

Reason for rule

An obligation is no less a debt merely because of the fact that the debtor has on hand cash with which to pay it.—*People ex rel. Lindheimer v. Hamilton*, *supra*.

60. Ill.—*People ex rel. Lindheimer v. Hamilton*, *supra*.

44 C.J. p 1125 note 74 [c].

Reason for rule

The money being on hand and usable solely for the purpose of discharging a debt, the debt is regarded as apparent and not real.—*People ex rel. Lindheimer v. Hamilton*, *supra*.

61. Ill.—*People ex rel. Lindheimer v. Hamilton*, *supra*.

62. Fla.—*State v. City of Miami*, 26 So.2d 903, 157 Fla. 747.

Okl.—*State ex rel. City of Shawnee v. Williamson*, 97 P.2d 74, 186 Okl. 278, 125 A.L.R. 1389.

Wash.—*Raynor v. King County*, 97 P.2d 696, 2 Wash.2d 199.

44 C.J. p 1125 notes 74–76, 81–83.

63. Pa.—*Pittsburgh Paving Co., for*

Use of Iron & Glass Dollar Sav. Bank of Birmingham v. City of Pittsburgh, 3 A.2d 905, 332 Pa. 563

Assessable benefits

(1) Under statute providing that municipal officers could have prepared preliminary estimates of amount of benefits which might be assessed against owners of property benefited from municipal improvement and that such estimates should be considered as deductible assets in computing municipal indebtedness, the estimates of an engineer of assessable benefits to result from proposed street improvements which contained only the engineer's calculations of the net expense to the borough of the improvements, without disclosing the engineer's estimates of the amount of the assessable benefits, could not be used to determine deductible assets.—*Pittsburgh Paving Co., for Use of Iron & Glass Dollar Sav. Bank of Birmingham v. City of Pittsburgh*, *supra*.

(2) In determining whether councilmanic indebtedness of city exceeded constitutional limitation, the amount of indebtedness created by street improvement contracts was determinable only after viewers' proceedings were held after the street improvements were completed, and on court's confirmation of viewers' report, the benefits assessed became available assets deductible for purpose of computing the councilmanic indebtedness.—*Pittsburgh Paving Co., for Use of Iron & Glass Dollar Sav. Bank of Birmingham v. City of Pittsburgh*, *supra*.

64. Pa.—*Halpin v. Rochester*, 126 A

241, 281 Pa. 109—*Elliot v. Philadelphia*, 78 A. 107, 229 Pa. 215.

14 C.J. p 1125 note 73.

65. Pa.—*Ward v. City of Pittsburgh*, 184 A. 240, 321 Pa. 414, 105 A.L.R. 682

44 C.J. p 1125 note 74.

Money in sinking fund

Fla.—*State v. City of Miami*, 26 So. 2d 903.

Ky.—*City of Jackson v. First Nat. Bank of Jackson*, 157 S.W.2d 321, 289 Ky. 1—*City of Frankfort v. Harrod*, 143 S.W.2d 292, 283 Ky. 755.

Mo.—*Kansas City v. Reed*, 216 S.W. 2d 514.

Okl.—*State ex rel. City of Shawnee v. Williamson*, 97 P.2d 74, 186 Okl. 278, 125 A.L.R. 1389.

44 C.J. p 1125 note 74 [c].

Assets exclusive of assets to be used during current year

(1) Under statute providing that whenever it shall be necessary to compute the indebtedness of a taxing district, taxes levied for the current year and cash on hand received for the purpose of carrying on the business of such taxing district for the current year shall be considered as assets only as against indebtedness incurred during such current year which is payable from such taxes or cash on hand, in determining whether indebtedness of city incurred by action of city council exceeded constitutional limit, cash assets exclusive of assets to be used during current year for carrying on municipal business could be deducted from total indebtedness of

the municipality.⁶⁶ Bonds or other securities in a sinking fund are to be deducted from the indebtedness of the municipality⁶⁷ unless the sinking fund is one especially pledged for the retirement of obligations which are not computed as part of the indebtedness of the municipality within the meaning of constitutional limitations, in which case such bonds or securities cannot be allowed as a deduction or offset against the general debt of the municipality.⁶⁸ It has been held that unexpended money borrowed for a specific purpose should not be deducted,⁶⁹ but it has also been held proper to deduct cash in the treasury consisting of the unallotted proceeds of bonds issued to pay debts which were previously incurred and which are included in computing the indebtedness of the municipal corporation.⁷⁰ Damages for a contractor's failure to complete work within the time specified are not to be subtracted from the amount due on the contract, in determining whether the indebtedness has exceeded the legal limit.⁷¹

Taxes, special assessments, and income from licenses. It has been held that it is proper to deduct due and unpaid taxes,⁷² including unpaid taxes of

prior years⁷³ and, except as otherwise provided by statute,⁷⁴ taxes assessed for municipal purposes during the year in which the indebtedness is contracted;⁷⁵ but according to other authority neither uncollected taxes⁷⁶ nor the levy for the current year⁷⁷ can be deducted. At any rate, it is improper to deduct taxes which have been delinquent for such a period of time as to give rise to a presumption of payment,⁷⁸ or revenue anticipated from license fees or taxes⁷⁹ or from a tax roll not yet in the hands of the collector.⁸⁰ Uncollected special assessments may be deducted after they have become liens for fixed amounts,⁸¹ but not prior to that time.⁸² Where it is apparent that the full amount of unpaid taxes and assessments cannot be collected, this item of credit on the gross indebtedness may be reduced accordingly.⁸³ If delinquent taxes which the municipality expects to collect within the year are treated as current revenues, for the payment of current expenses, they cannot properly also be deducted from the indebtedness of the municipality;⁸⁴ and it follows that taxes pledged for the payment of loans made to a municipality to enable it to pay current expenses cannot be used as an asset in computing the municipal debt.⁸⁵

city incurred by council.—*Dearling v. Funk*, 32 P.2d 548, 177 Wash. 349.

(2) But cash on hand for the purpose of carrying on the business of the current year, may not, under the statute, be deducted.—*Tabb v. Funk*, 17 P.2d 18, 170 Wash. 545.

Ascertainment of balance in treasury

Balance in city treasury at end of fiscal year should be ascertained by adding to balance at beginning of year taxes falling due during year and amounts illegally paid out in determining whether indebtedness, on which city is sued, exceeds its revenue for such year.—*Brooks v. City of Gilroy*, 29 P.2d 212, 219 Cal. 766.

66. Pa.—*McGuire v. City of Philadelphia*, 91 A. 622, 245 Pa. 287. 44 C.J. p 1125 note 75.

What constitutes solvent debts

(1) Outstanding solvent debts, due a municipality, within the meaning of a statute authorizing it to deduct such debts from its gross indebtedness, are debts due it directly, payment of which it can enforce as quick assets for liquidation of any of its obligations.—*Ward v. City of Pittsburgh*, 184 A. 240, 321 Pa. 414, 105 A.L.R. 682—44 C.J. p 1125 note 75 [a].

(2) Solvent debts are those obligations due and owing to city which can promptly be realized and enforced.—*Ward v. City of Pittsburgh*, supra.

67. Ariz.—*Morgan v. Board of Sup'rs*, 192 P.2d 236, 67 Ariz. 183.

Pa.—*Ward v. City of Pittsburgh*, 184 A. 240, 321 Pa. 414, 105 A.L.R. 682. 44 C.J. p 1125 note 76.

68. N.Y.—*Levy v. McClellan*, 89 N. E. 569, 196 N.Y. 172.

69. Wis.—*Herman v. Oconto*, 86 N. W. 681, 110 Wis. 660.

44 C.J. p 1125 note 78.

70. N.Y.—*Levy v. McClellan*, 89 N. E. 596, 196 N.Y. 178.

71. Wis.—*Herman v. Oconto*, 86 N. W. 681, 110 Wis. 660.

72. Pa.—*Pennsylvania Power & Light Co. v. City of Bethlehem*, 185 A. 710, 323 Pa. 313—*Ward v. City of Pittsburgh*, 184 A. 240, 321 Pa. 414, 105 A.L.R. 682.

Wash.—*Dearling v. Funk*, 32 P.2d 548, 177 Wash. 349—*Tabb v. Funk*, 17 P.2d 18, 170 Wash. 545—*Forsyth v. Seattle*, 132 P. 224, 78 Wash. 515.

Taxes levied for sinking fund account

Ky.—*City of Jackson v. First Nat. Bank of Jackson*, 157 S.W.2d 321, 289 Ky. 1.

73. Wash.—*Seymour v. Ellensburg*, 142 P. 875, 81 Wash. 365—*Graham v. Spokane*, 53 P. 714, 19 Wash. 447.

44 C.J. p 1125 note 83.

74. Wash.—*Dearling v. Funk*, 32 P. 2d 548, 177 Wash. 349—*Tabb v. Funk*, 17 P.2d 18, 170 Wash. 545.

75. Wash.—*Graham v. Spokane*, 53 P. 714, 19 Wash. 447.

76. Iowa.—*Council Bluffs v. Stew-*

art, 1 N.W. 628, 51 Iowa 385, limiting *French v. Burlington*, 42 Iowa 614.

77. Iowa.—*Council Bluffs v. Stewart*, 1 N.W. 628, 51 Iowa 385.

78. Wash.—*Seymour v. Ellensburg*, 142 P. 875, 81 Wash. 365.

79. Ky.—*Winchester v. Nelson*, 193 S.W. 1040, 175 Ky. 62.

Wis.—*Rice v. Milwaukee*, 76 N.W. 341, 100 Wis. 516.

44 C.J. p 1126 note 87.

80. Wis.—*Balch v. Beach*, 95 N.W. 132, 119 Wis. 77—*Herman v. Oconto*, 86 N.W. 681, 110 Wis. 660.

81. Pa.—*Pennsylvania Power & Light Co. v. City of Bethlehem*, 185 A. 710, 323 Pa. 313.

44 C.J. p 1126 note 89.

82. Pa.—*Ward v. City of Pittsburgh*, 184 A. 240, 321 Pa. 414, 105 A.L.R. 682.

44 C.J. p 1126 note 90.

83. Pa.—*Pennsylvania Power & Light Co. v. City of Bethlehem*, 185 A. 710, 323 Pa. 313—*Ward v. City of Pittsburgh*, 184 A. 240, 321 Pa. 414, 105 A.L.R. 682.

84. Pa.—*Ward v. City of Pittsburgh*, supra.

Reason for rule

Such a practice would be using the delinquent taxes as an asset twice.—*Ward v. City of Pittsburgh*, supra.

85. Pa.—*Pittsburgh Paving Co., for Use of Iron & Glass Dollar Sav. Bank of Birmingham, v. City of*

Misapplied revenue. Revenue of the current year, which has been wrongfully applied by the municipality to obligations of a preceding year while there were outstanding legal claims for the current year, will be considered as still in the treasury in determining whether a constitutional or statutory limitation of indebtedness has been exceeded.⁸⁶

§ 1850. New Debts, Expenditures, or Transactions Subject to Limitation

A debt within the constitutional debt limitation is a pecuniary liability of a municipal corporation or a charge against its general credit, and, generally, subject to some qualifications and exceptions, the limitation applies, as of the time when the debt comes into existence, to all municipal indebtedness voluntarily created, regardless of its nature, form, or purpose, but not to contingent liabilities or to involuntary obligations or liabilities.

Where the amount involved in a municipal transaction, together with the previous debts and liabilities of the municipal corporation, does not in the aggregate exceed the amount of indebtedness limited by constitutional or statutory provision, it is immaterial, as far as the particular transaction is concerned, whether or not it constitutes a liability or indebtedness within the limitation.⁸⁷ On the other hand, where, on a proper computation thereof, it appears that the existing indebtedness of a municipality equals or exceeds the constitutional or statu-

tory limit, and it purposes to incur an additional financial obligation, it becomes necessary to consider whether such obligation constitutes a "debt" or "indebtedness" within the meaning of the constitutional or statutory limitation. In determining this question many and varied controversies arise,⁸⁸ and some judicial statements of what constitute "debt" or "indebtedness" are so formulated in the light of the peculiar language of the context in which they appear as to be of little service in prescribing rules of universal application.⁸⁹

Some authorities hold that the words "debt" and "indebtedness," as used in constitutional and statutory limitations, are to be taken in their ordinary and popular meaning,⁹⁰ but others take the view that these words are to be given a meaning less broad and comprehensive than they bear in general usage.⁹¹ According to some holdings, the debt limit has reference to an actual indebtedness for the payment of which a tax must be levied,⁹² and so it is held by some authorities, as discussed *infra* § 1853 a, that any obligation paid or contracted to be paid out of a fund that is the product of a tax levy is a debt within the purpose of the constitutional limitation. At any rate it is not disputed that no municipal indebtedness arises unless an obligation of some kind on the part of the municipality to pay money is created;⁹³ a debt within the constitutional

Pittsburgh, 3 A.2d 905, 332 Pa. 563.

86. Okl.—Fairbanks Co. v. Sulphur, 161 P. 811, 62 Okl. 10—Miami State Bank v. Miami, 144 P. 597, 43 Okl. 809.

87. Me.—Adams v. Waterville, 49 A. 1042, 95 Me. 242.

88. Del.—Cochran v. Middletown, 125 A. 459, 14 Del.Ch. 295. 44 C.J. p 1126 note 95.

Computation of existing indebtedness see *supra* § 1849.

Indebtedness payable from special fund or assessment see *infra* § 1853.

89. Del.—Cochran v. Middletown, *supra*.

90. Ill.—Austin v. Healy, 35 N.E.2d 78, 376 Ill. 633.

N.D.—Schieber v. City of Mohall, 268 N.W. 445, 66 N.D. 593.

Pa.—Frackville Sewerage Co. v. Jones, Quar.Sess., 31 Mun.L.R. 75, 6 Sch.Reg. 368.

44 C.J. p 1126 note 97.

Limitation on power of water improvement district compared

The constitutional provision limiting power of water improvement district to incur indebtedness is similar to constitutional limitations imposed on cities, and judicial interpretation of what constitutes an "in-

debtedness" will be same under both provisions.—Cameron County Water Improvement Dist. No. 8 v. Western Metal Mfg. Co. of Texas, Tex.Civ App., 125 S.W.2d 650, error dismissed, judgment correct.

91. Iowa.—Wyatt v. Town of Manning, 250 N.W. 141, 217 Iowa 929—Jewell v. Nuhn, 155 N.W. 174, 173 Iowa 112, Ann.Cas.1918D 356

Utah.—Barnes v. Lehi City, 279 P. 878, 74 Utah 321.

44 C.J. p 1126 note 98—31 C.J. p 413 note 28.

92. Fla.—Dickey v. City of Fort Lauderdale, 186 So. 427, 136 Fla. 241.

Mo.—Hight v. City of Harrisonville, 41 S.W.2d 155, 328 Mo. 549—Bell v. City of Fayette, 28 S.W.2d 356, 325 Mo. 75.

S.D.—Farrar v. Britton Independent School Dist. of Marshall County, 32 N.W.2d 627.

93. Del.—Cochran v. Middletown, 125 A. 459, 14 Del.Ch. 295.

Mich.—Young v. City of Ann Arbor, 255 N.W. 579, 267 Mich. 241.

Mont.—Farmers State Bank of Conrad v. City of Conrad, 47 P.2d 853, 100 Mont. 415.

N.Y.—Davidson v. City of Elmira, 44 N.Y.S.2d 302, 180 Misc. 1052, affirmed 46 N.Y.S.2d 655, 267 App.

Div. 797, appeal denied 47 N.Y.S. 2d 604, 267 App Div. 926.

N.C.—Williamson v. City of High Point, 195 S.E. 90, 213 N.C. 96.

44 C.J. p 1126 note 99.

Existing obligation

(1) A debt, within the meaning of constitutional provisions limiting the debt of a municipal corporation, is created when an obligation is undertaken to pay in the future for consideration in the present and imports a present and actual creditor as an incident to the transaction.—Graham v. City of Philadelphia, 6 A. 2d 78, 334 Pa. 513.

(2) A debt within the constitutional prohibition does not contemplate possible obligations accruing by act of God or by possible laws to be passed in the future, but merely contemplates an existing obligation presently enforceable against the property or funds of a municipality generally, or an obligation presently existing, enforceable in the future.—Graham v. City of Philadelphia, *supra*.

Unconditional obligation

A debt in the constitutional sense implies that an obligation has arisen out of contract express or implied which entitles the creditor unconditionally to receive from the debtor

limitation is a pecuniary liability of a municipality or a charge against its general credit.⁹⁴ The words "debt" or "liability" should not be so interpreted as to paralyze the legal functioning of such municipal corporations as might have reached or exceeded their existing debt limits.⁹⁵

The question whether a particular indebtedness is within the limitation does not depend on whether there is a right of action against the municipality,⁹⁶

and a debt may be created against a municipal corporation in violation of the constitutional provision, even though no liability is placed on the municipality which may be enforced in the future by the compulsory levy of taxes.⁹⁷

Generally speaking, the time which is controlling in determining whether a debt in excess of the constitutional limitation is created is the time when a municipal debt comes into existence,⁹⁸ rather than

a sum of money which the debtor is under a legal, equitable or moral duty to pay without regard to any future contingency.

Colo.—*Montgomery v. City and County of Denver*, 80 P.2d 434, 102 Colo. 427.

N.M.—*State ex rel. Capitol Addition Bldg. Commission v. Connelly*, 46 P.2d 1097, 39 N.M. 312, 100 A.L.R. 878—*Seward v. Bowers*, 24 P.2d 253, 37 N.M. 385.

Obligation to be met with funds or property

In order to constitute a debt against a municipality within constitutional debt limitation, there must be an obligation which municipality must, if need be, meet with its funds or property.

Ill.—*People v. Chicago Transit Authority*, 64 N.E.2d 4, 392 Ill. 77—*Hairgrove v. City of Jacksonville*, 8 N.E.2d 187, 366 Ill. 163.

Iowa.—*Interstate Power Co. v. Incorporated Town of McGregor*, 296 N.W. 770, 230 Iowa 42, 146 A.L.R. 315.

Obligation to render service

(1) Debt contemplated by constitutional provision limiting indebtedness means obligation to pay money, not to render service when its breach imposes no duty to pay money—*Oppenheim v. City of Florence*, 155 So. 859, 229 Ala. 50.

(2) When promise by city to render a service is made, and as part of it there is expressed an agreement that city shall not be pecuniarily liable if it is broken, there is conclusive agreement that debt as contemplated by constitutional provision limiting indebtedness will never thereby accrue, and, if city breaks its contract not to convert funds or divert them, such breach is not debt when covenant is made.—*Oppenheim v. City of Florence*, supra.

(3) A contract to furnish water does not constitute a debt within meaning of statutes pertaining to municipal fiscal affairs.—*City of McAlester v. State ex rel. Board of Public Affairs*, 154 P.2d 579, 195 Okl. 1.

Amount of claim not determinative

Amount for which court found city indebted for engineer's services, not amount of his claim presented to

council, is proper basis for determining whether indebtedness exceeds city's revenue for fiscal year in which incurred.—*Brooks v. City of Gilroy*, 29 P.2d 212, 219 Cal. 766.

Held indebtedness within constitutional limitation

(1) Account or demand allowed against city.—*Commonwealth Public Service Co. of Montana v. City of Deer Lodge*, 28 P.2d 472, 96 Mont. 15.

(2) Claim under contract for auditing services.—*First Nat. Bank v. City of Norman*, 75 P.2d 1109, 182 Okl. 7.

Held not to create indebtedness within constitutional limitation

(1) A contract of the city with the United States government, for a slum clearance project, authorized under the federal and state housing laws—*Williamson v. Housing Authority, etc., of Augusta*, 199 S.E. 43, 186 Ga. 673.

(2) Ordinance merely expressing city's agreement to build or acquire subways to extent that it has lawful authority to raise necessary funds.—*People v. City of Chicago*, 182 N.E. 419, 349 Ill. 304.

(3) Ordinance agreeing to contract with municipal housing commission.—*Jones v. City of Paducah*, 142 S.W.2d 365, 283 Ky. 628.

(4) Appropriation by municipal corporation, levy of taxes, or issuance of a warrant to meet the operating expenses of the city.—*John Wittbold & Co. v. City of Chicago Heights*, 19 N.E.2d 1019, 371 Ill. 94.

(5) Housing authority bonds.—*Bader Realty & Inv. Co. v. St. Louis Housing Authority, Mo.*, 217 S.W.2d 489.

(6) Assignment by the city of the rentals to be received from a lease of its gas works in return for payment to city.—*Graham v. City of Philadelphia*, 6 A.2d 78, 334 Pa. 513.

(7) Promise to perform statutory duty in conducting a proprietary business.—*Illinois Power & Light Corporation v. City of Centralia, D.C.*, 11 F.Supp. 874, vacated and cause remanded on other grounds, C.C.A., *City of Centralia v. Illinois Power & Light Corporation*, 89 F.2d 985.

94. Ala.—*Oppenheim v. City of Florence*, 155 So. 859, 229 Ala. 50. Iowa.—*Interstate Power Co. v. Incorporated Town of McGregor*, 296 N.W. 770, 230 Iowa 42, 146 A.L.R. 315.

95. Me.—*Moore v. Inhabitants of Town of Springfield*, 64 A.2d 569.

96. Ill.—*People v. Chicago, etc., R. Co.*, 97 N.E. 310, 253 Ill. 191.

97. Ga.—*Cartledge v. City Council of Augusta*, 188 S.E. 675, 183 Ga. 414—*Byars v. City of Griffin*, 147 S.E. 66, 168 Ga. 41—*Renfro v. Atlanta*, 78 S.E. 449, 140 Ga. 81, 45 L.R.A.N.S., 1173.

98. Ala.—*Smith v. Town of Guin*, 155 So. 865, 229 Ala. 61.

Ark.—*Manhattan Rubber Mfg. Division of Raybestos Manhattan v. Bird*, 185 S.W.2d 268, 208 Ark. 167, 159 A.L.R. 1257.

Me.—*Wakem v. Inhabitants of Town of Van Buren*, 15 A.2d 873, 137 Me. 127.

Okl.—*Faught v. City of Sapulpa*, 292 P. 15, 145 Okl. 164—*Town of Covington v. Antrim Lumber Co.*, 252 P. 50, 123 Okl. 129.

44 C.J. p 1127 note 7.
Validity of debt as determined by ratio of indebtedness to assessed valuation in effect when debt is created generally see supra § 1847 a.

Limit dependent on population

(1) Under constitutional provision limiting indebtedness of cities, city may incur debt permitted to cities having population of six thousand or more if city has population of six thousand when indebtedness is created, regardless of whether preceding decennial federal census shows city to have population of six thousand.—*Taxpayers and Citizens of City of Fort Payne v. City of Fort Payne, Ala.*, 40 So.2d 439—*Town of Camden v. Fairbanks, Morse & Co.*, 86 So. 8, 204 Ala. 112—*Ryan v. Mayor, etc., of City of Tuscaloosa*, 46 So. 638, 155 Ala. 479.

(2) Purpose of statutes relating to taking of municipal census is to provide procedure for obtaining official census, with all the advantage of an official census, and legislature did not intend to alter rights of municipalities to incur indebtedness under constitution.—*Taxpayers and Citi-*

the time when it matures,⁹⁹ a claim is presented for payment,¹ a warrant is issued,² or the debt is funded,³ since a debt payable in the future is, obviously, no less a debt than one payable presently,⁴ at least where the obligation is one to pay in the future for a consideration received in the present.⁵ A contract by a municipal corporation which, when properly construed, does not fix the amount of the liability from its date, however, does not create a present indebtedness, within the meaning of a constitutional restriction on municipal indebtedness.⁶

Where a municipality contracts for annual services for a period of years to be paid for by annual payments, the whole amount which may ultimately become due does not constitute a debt within the constitutional limitation,⁷ but regard is to be had

only to the amount that may become due within a certain year or other period;⁸ and, except in some jurisdictions,⁹ an obligation to pay for work to be performed in the future and paid for when performed does not become an indebtedness until the performance of the work.¹⁰ The effect of the constitutional provision cannot be avoided, however, by providing for installment payments on a present indebtedness running through a series of years.¹¹

Nature, form, and purpose of indebtedness. It has been said that the constitutional limitation is directed solely against the incurring of new debt,¹² and includes all indebtedness¹³ without regard to its nature¹⁴ or the manner in which it may be incurred,¹⁵ and regardless of whether it is expressly

zens of City of Fort Payne v. City of Fort Payne, *supra*.

(3) Where last municipal census taken under statute showed population of city to be under six thousand, but population allegedly exceeded six thousand when city instituted proceeding to validate general obligation street improvement warrants, the amount of which if validated would cause city to exceed constitutional debt limitation imposed on cities having population of less than six thousand but would not cause city to exceed debt limitation imposed on cities having population of six thousand or more, population when proceeding was instituted, rather than as shown by municipal census would control as to which debt limitation was applicable.—Taxpayers and Citizens of City of Fort Payne v. City of Fort Payne, *supra*.

(4) Under charter provision limiting cost of government to stated amount per person, city in fixing budget in August and September, 1930, under charter provision for 1931, was governed by 1930 federal census announced in July, without any addition.—Sommers v. City of St. Paul, 237 N.W. 427, 183 Minn. 545.

Time of incurring liability governs in determining whether at a particular time municipality has exceeded debt limitation.

Ill.—East St. Louis & Interurban Water Co. v. City of Belleville, 196 N.E. 442, 360 Ill. 490.

N.Y.—Davidson v. City of Elmira, 44 N.Y.S.2d 302, 180 Misc. 1052, affirmed 46 N.Y.S.2d 655, 267 App. Div. 797, appeal denied 47 N.Y.S.2d 604, 267 App. Div. 928.

Bonded indebtedness

(1) A bonded indebtedness is created within the meaning of a charter or constitutional limitation, at the time when the bonds are issued and sold, rather than at the time

when the election authorizing the bond issue is held.

Ky.—Howard v. Town of Loyall, 144 S.W.2d 502, 284 Ky. 233—Boll v. City of Ludlow, 29 S.W.2d 547, 234 Ky. 812.

Ohio—State v. Brown, 180 N.E. 707, 125 Ohio St. 171—Kurtz v. City of Columbus, 22 N.E.2d 747, 61 Ohio App. 423, affirmed 28 N.E.2d 587, 137 Ohio St. 184.

Okl.—Faught v. City of Sapulpa, 292 P. 15, 145 Okl. 164.

44 C.J. p 1127 note 7 [a].

(2) It has been held, however, under a constitutional provision limiting the municipal debt to a fixed percentage of the assessed value of taxable property that, where a loan to the city was authorized and subsequently bonds covering the loan were issued by the city, the assessed value of the property at the time of the authorization of the loan determines the validity of the bonds, as against a contention that the issue was invalid because of a decline in the assessed valuation of the property making the debt greater than the legal percentage of the assessed valuation.—Duane v. City of Philadelphia, 185 A. 401, 322 Pa. 33.

99. Ind.—Logansport v. Jordan, 85 N.E. 959, 171 Ind. 121, 37 L.R.A., N.S., 1036, 17 Ann.Cas. 415—Laporte v. Gamewell Fire Alarm Tel. Co., 45 N.E. 588, 146 Ind. 466, 58 Am.S.R. 359, 35 L.R.A. 686.

1. Okl.—Faught v. City of Sapulpa, 292 P. 15, 145 Okl. 164.

2. Okl.—Faught v. City of Sapulpa, *supra*.

3. Okl.—Alexander v. Board of Education of Town of Carmen, 18 P. 2d 863, 161 Okl. 287.

Funding as not creating new debt within constitutional limitation see *infra* § 1854.

Judgment providing for refunding of indebtedness cannot give validity to indebtedness incurred in violation

of constitution—Faught v. City of Sapulpa, 292 P. 15, 145 Okl. 164.

4. Ill.—East St. Louis & Interurban Water Co. v. City of Belleville, 196 N.E. 442, 360 Ill. 490—Austin v. Healy, 35 N.E.2d 78, 376 Ill. 633.

44 C.J. p 1127 note 9.

5. Pa.—Lesser v. Warren, 85 A. 839, 237 Pa. 501, 43 L.R.A., N.S., 839.

6. Ind.—Jefferson School Tp. v. Jefferson Tp. School Building Co., 10 N.E.2d 608, 212 Ind. 542.

Tex.—Corpus Juris quoted in Ward v. City of Big Spring, Civ.App. 161 S.W.2d 821, 826, reversed on other grounds City of Big Spring v. Ward, 169 S.W.2d 151, 140 Tex. 609.

44 C.J. p 1126 note 4.

7. Wis.—Prueher v. City of Bloomer, 4 N.W.2d 186, 241 Wis. 17.

8. Wis.—Prueher v. City of Bloomer, *supra*.

9. Ill.—Culbertson v. Fulton, 18 N.E. 781, 127 Ill. 30.

10. Minn.—Struble v. Nelson, 15 N.W.2d 101, 217 Minn. 610.

Mont.—Farmers State Bank of Conrad v. City of Conrad, 47 P.2d 853, 100 Mont. 415.

44 C.J. p 1126 note 6.

Contract for water, light, etc., to be furnished in future see *infra* § 1852 b.

11. Ky.—Jones v. Rutherford, 10 S.W.2d 296, 225 Ky. 773.

Purchase price of property payable in installments see *infra* § 1852 b.

12. Ill.—Kocsis v. Chicago Park Dist., 198 N.E. 847, 362 Ill. 24.

13. Ky.—Payne v. City of Covington, 123 S.W.2d 1045, 276 Ky. 380, 122 A.L.R. 321.

14. Ky.—Payne v. City of Covington, *supra*.

15. Ill.—Austin v. Healy, 35 N.E.2d 78, 376 Ill. 633—City of Springfield v. Edwards, 84 Ill. 626.

Ky.—Payne v. City of Covington, 123

assumed, or is implied in fact, or is implied in law.¹⁶ According to some decisions, an agreement to pay for material purchased creates an indebtedness no matter from what source the funds are to be derived from which the payment is to be made,¹⁷ and the fact that an indebtedness incurred by a municipality is to be paid only from some source other than ad valorem taxation does not render inoperative the constitutional limitation,¹⁸ although, as discussed *infra* § 1853 b (1), the general rule is that restrictions on municipal indebtedness are not applicable to obligations which are payable only out of a fund derived from the income and revenue of specific revenue-producing properties constructed or purchased by the municipality. The limitation applies to obligations on which the municipality pledges full faith and credit, called general obligations,¹⁹ and, as considered *infra* § 1853 b, in some jurisdictions, but not in others, it is held to apply also to obligations to secure which the municipality pledges existing property or revenue from existing sources to be derived in the future. It applies to debts incurred by proprietary functionings as well as to expenses of governmental functions.²⁰

In determining whether the constitutional debt limitation is exceeded, the law will look to the substance of the transaction, regardless of its form or color.²¹ Unless indebtedness for a particular pur-

pose is expressly excepted from the limitation, or is made subject to a different limitation, a limitation of the amount of municipal indebtedness applies to all municipal indebtedness voluntarily created regardless of its form²² or purpose.²³ It has been held, however, that a constitutional provision, prohibiting municipalities whose debt has reached the limit from contracting any further liability, will not prevent a municipality whose indebtedness is up to the constitutional limit from contracting for the services of an agent or attorney to contest the validity of any part of the indebtedness, or to secure a reduction of the amount thereof.²⁴

Contingent liabilities. An obligation imposing on the municipality merely contingent future liability does not create an indebtedness before the happening of the contingency,²⁵ at least where the arising of the contingency is solely within the control of the municipality and can occur only by its subsequent choice voluntarily made;²⁶ but it has been held otherwise where the contingency is morally certain to take place irrespective of any action taken or option exercised by the municipality in the future,²⁷ and it has been held that a debt payable on a contingency, as on the happening of some event, such as the rendering of service or the delivery of property, is some kind of a debt, and, therefore, within the prohibition.²⁸ A contract, lease,

- S.W.2d 1045, 276 Ky. 380, 122 A. L.R. 321.
- Mass.—*Browne v. City of Boston*, 60 N.E. 934, 179 Mass. 321.
16. U.S.—*American La France Fire Engine Co., to Use of American La France & Foamite Industries, v. Borough of Shenandoah*, D.C.Pa., 30 F.Supp. 251, affirmed, C.C.A., 115 F.2d 866.
- 44 C.J. p 1137 note 14 [a].
17. U.S.—*Oklahoma Utilities Co. v. City of Hominy*, D.C.Okl., 2 F. Supp. 849.
- Okl.—*Layne-Western Co. v. City of Depew*, 59 P.2d 269, 177 Okl. 338—*Zachary v. City of Wagoner*, 292 P. 345, 146 Okl. 268.
18. Okl.—*Zachary v. City of Wagoner*, *supra*.
19. Ala.—*Norton v. Lusk*, 26 So.2d 849, 248 Ala. 110.
20. Okl.—*Public Service Co. of Oklahoma v. City of Wagoner*, 73 P. 2d 464, 181 Okl. 281—*Oklahoma Natural Gas Corporation v. City of Enid*, 65 P.2d 440, 179 Okl. 283—*Layne-Western Co. v. City of Depew*, 59 P.2d 269, 177 Okl. 338—*Public Service Co. of Oklahoma v. City of Tulsa*, 50 P.2d 166, 174 Okl. 58.
- Wis.—*Roberts v. City of Madison*, 27 N.W.2d 233, 250 Wis. 317.
21. Ind.—*Hively v. School City of Nappanee*, 169 N.E. 51, 202 Ind. 28, 71 A.L.R. 1311, rehearing denied 171 N.E. 381, 202 Ind. 28, 71 A.L.R. 1311.
22. Ky.—*Hardin v. Owensboro Educational Ass'n*, 50 S.W.2d 968, 244 Ky. 390.
- 44 C.J. p 1127 note 14.
- Indebtedness incurred for special objects as not subject to restrictions on indebtedness for general purpose see *supra* § 1846 b.
- Limitations for particular purposes see *supra* § 1848.
23. Ill.—*Austin v. Healy*, 35 N.E.2d 78, 376 Ill. 633—*City of Springfield v. Edwards*, 84 Ill. 626.
- Ky.—*Payne v. City of Covington*, 123 S.W.2d 1045, 276 Ky. 380, 122 A.L.R. 321.
- 44 C.J. p 1127 note 15.
24. Ind.—*Logansport v. Dykeman*, 17 N.E. 587, 116 Ind. 15.
- La.—*Talbott v. Iberville*, 24 La. Ann. 135.
25. Hawaii.—*E. E. Black, Ltd. v. Conkling*, 33 Hawaii 731.
- Mo.—*Woodmansee v. Kansas City*, 144 S.W.2d 137, 346 Mo. 919.
- N.Y.—*Davidson v. City of Elmira*, 44 N.Y.S.2d 302, 180 Misc. 1052, affirmed 46 N.Y.S.2d 655, 247 App. Div. 797, appeal denied 47 N.Y.S. 2d 604, 267 App.Div. 926.
- N.D.—*Marks v. City of Mandan*, 296 N.W. 39, 70 N.D. 474.
- Tex.—*Corpus Juris quoted in Ward v. City of Big Spring*, Civ.App., 161 S.W.2d 821, 825, 826, reversed on other grounds *City of Big Spring v. Ward*, 169 S.W.2d 151, 140 Tex. 609.
- Wash.—*Kelly v. City of Sunnyside*, 11 P.2d 230, 168 Wash. 95, followed in *Liberty Savings & Loan Ass'n v. City of Sunnyside*, 11 P.2d 232, 168 Wash. 695.
- 44 C.J. p 1126 note 1.
26. Tex.—*Corpus Juris quoted in Ward v. City of Big Spring*, Civ. App., 161 S.W.2d 821, 826, reversed on other grounds *City of Big Spring v. Ward*, 169 S.W.2d 151, 140 Tex. 609.
- 44 C.J. p 1126 note 2.
- Option to purchase property see *infra* § 1852.
27. Iowa.—*Burlington Water Co. v. Woodward*, 49 Iowa 58.
- Mont.—*Davenport v. Kleinschmidt*, 13 P. 249, 6 Mont. 502, appeal dismissed 12 S.Ct. 983, 145 U.S. 644, 36 L.Ed. 859.
28. Ill.—*Austin v. Healy*, 35 N.E.2d 78, 376 Ill. 633—*City of Springfield v. Edwards*, 84 Ill. 626.

and option obligating the municipality to replace the leased premises at any time during the term in the event of total or partial destruction thereof has also been held to constitute the assumption of an indebtedness.²⁹

Involuntary obligations or liabilities. While it has been held that the fact that the debt of a municipal corporation is involuntary rather than voluntary does not of itself remove the constitutional

limitation on the power of the municipality to become indebted beyond a certain amount,³⁰ as a general rule, limitations of the amount of municipal indebtedness apply only to debts created by voluntary act or contract³¹ and not to obligations imposed on the corporation by law³² or against its will,³³ or to liabilities for what is done without right,³⁴ or what is done negligently,³⁵ or to obligations arising ex delicto;³⁶ but, if the law will not imply a promise

Indirect or contingent liabilities

Constitutional provision limiting indebtedness includes indirect or contingent liabilities.—*Smith v. Town of Guin*, 155 So. 865, 229 Ala. 61.

Inchoate liabilities

Constitutional provision limiting municipal indebtedness applies to debts payable in future and includes inchoate liabilities and contract debts where future payments are called for.—*East St. Louis & Interurban Water Co. v. City of Belleville*, 196 N.E. 442, 360 Ill. 490.

29. Ky.—*Booth v. City of Owensboro*, 118 S.W.2d 684, 274 Ky. 325.

30. Wash.—*State ex rel. Keck v. City of Sunnyside*, 43 P.2d 621, 181 Wash. 511, 98 A.L.R. 741.

31. Ill.—*Indiana Harbor Belt R. Co. v. Calumet City*, 63 N.E.2d 369, 391 Ill. 280.—*Austin v. Healy*, 35 N.E.2d 78, 376 Ill. 633.—*Hancock v. Village of Hazel Crest*, 47 N.E.2d 557, 318 Ill.App. 170.

Ky.—*Knepple v. City of Morehead*, 192 S.W.2d 189, 301 Ky. 417.

N.M.—*Barker v. State ex rel. Napoleon*, 49 P.2d 246, 39 N.M. 434.—*Gutierrez v. Middle Rio Grande Conservancy Dist.*, 282 P. 1, 34 N.M. 346, 70 A.L.R. 1261, certiorari denied 50 S.Ct. 158, 280 U.S. 610, 74 L.Ed. 653.

44 C.J. p 1127 note 18.

Firemen's salaries

Where city fixed the number of firemen necessary in its discretion, the obligation to pay an amount equivalent to their combined salary fixed by law was a "voluntary obligation" and not a "preferred claim" absolutely fixed by law within the rule that all voluntary obligations incurred after the exhaustion of the full amount of revenues on hand or in valid expectancy are "debts" which are invalid as to their payment by a city which has incurred debts in an amount equal to the limit fixed by the constitution, and any deficit on salaries which is carried over into the next year becomes a "debt" within the contemplation of the constitutional limitation if thereby the total indebtedness of the city is exceeded and is invalid.—*State ex rel. Hyland v. Baumhauer*, 12 So.2d 326, 244 Ala. 1, answer to certified

question conformed to 12 So.2d 340, 31 Ala.App. 35, certiorari denied 12 So.2d 342, 244 Ala. 71.—*State ex rel. Mantell v. Baumhauer*, 12 So.2d 326, 244 Ala. 1, answer to certified question conformed to 12 So.2d 332, 31 Ala.App. 27, certiorari denied 12 So.2d 340, 244 Ala. 77.

32. Ky.—*Knepple v. City of Morehead*, 192 S.W.2d 189, 301 Ky. 417. N.M.—*Gutierrez v. Middle Rio Grande Conservancy Dist.*, 282 P. 1, 34 N.M. 346, 70 A.L.R. 1261, certiorari denied 50 S.Ct. 158, 280 U.S. 610, 74 L.Ed. 653.

44 C.J. p 1127 note 18.

Obligations incurred in performance of mandatory duties

Obligations of municipalities incurred in the performance of duties made mandatory by the constitution are not debts within the constitutional limitation.—*Goff v. City of Seattle*, 86 P.2d 222, 197 Wash. 665.—*Sainer v. Thurston County*, 44 P.2d 179, 181 Wash. 552.—*Love v. King County*, 44 P.2d 175, 181 Wash. 462.—*State ex rel. Keck v. City of Sunnyside*, 43 P.2d 621, 181 Wash. 511, 98 A.L.R. 741.—44 C.J. p 1127 note 18.

Improvement assessment

Municipal obligation to pay improvement assessment against municipally owned property was not an obligation imposed by law.

Cal.—*City of Pasadena v. McAllister*, 267 P. 873, 204 Cal. 267.

Wash.—*State ex rel. Keck v. City of Sunnyside*, 43 P.2d 621, 181 Wash. 511, 98 A.L.R. 741.

Obligation of municipality to pay sales tax on sales of electric energy from municipal light plant to consumers residing within corporate limits of city, being a liability imposed by statute, is not a contractual obligation within debt-limiting provision of constitution.—*City of Claremore v. Oklahoma Tax Commission*, 169 P.2d 299, 197 Okl. 223.

In Illinois

(1) It has been said that the constitutional provision imposing debt limitations on municipalities applies even to obligations imposed by law.—*Hancock v. Village of Hazel Crest*, 47 N.E.2d 557, 318 Ill.App. 170.

(2) But it has been held that the right of the holder of special assess-

ment bonds to bring an action in assumpsit against city for money had and received is based, not on consent of the parties, but on a fiction which the law supplies, and is not the kind or character of assent on part of the city that is covered by constitutional provision prohibiting municipality from incurring excessive indebtedness.—*Indiana Harbor Belt R. Co. v. Calumet City*, 63 N.E.2d 369, 391 Ill. 280.

(3) Where civil engineer rendered services in connection with proposed construction of a new sewerage system, and thereafter voters at election held voted against the improvement, municipality's liability for engineer's services constituted a debt within constitutional debt limitations as against contention that liability was imposed by quasi contract.—*Hancock v. Village of Hazel Crest*, supra.

33. Ky.—*Knepple v. City of Morehead*, 192 S.W.2d 189, 301 Ky. 417. 44 C.J. p 1127 note 18.

34. Ky.—*Knepple v. City of Morehead*, supra. 44 C.J. p 1127 note 18.

35. Ky.—*Knepple v. City of Morehead*, supra. 44 C.J. p 1127 note 18.

36. Ill.—*Hancock v. Village of Hazel Crest*, 47 N.E.2d 557, 318 Ill. App. 170.

Mo.—**Corpus Juris** cited in *State v. City of Mound City*, 73 S.W.2d 1017, 1021, 335 Mo. 702.—*State ex rel. Pyle v. University City*, 8 S.W.2d 73, 320 Mo. 451.

N.M.—*Barker v. State ex rel. Napoleon*, 49 P.2d 246, 39 N.M. 434.

Or.—*Morris v. City of Salem*, 174 P.2d 192, 179 Or. 666.

44 C.J. p 1127 note 18 [a] (2).

Breach of duty

(1) The constitutional provision limiting indebtedness which city may incur does not apply to indebtedness based on city officials' breach of duty in making proper application of proceeds of special assessments collected, and bonds issued by city in payment of judgments based on such breach of duty were valid, although debt limitation was exceeded.—*Indiana Harbor Belt R. Co. v. Calumet City*, 63 N.E.2d 369, 391 Ill. 280.

to refund money because as a promise it would be a prohibited debt, it will not under the same circumstances and for the same reason fix a so-called involuntary duty to refund the money as damages for the tort committed in its conversion.³⁷ The quasi-contractual theory of recovery for the value of benefits received and accepted cannot be applied so as to permit municipalities to be plunged into debt by officials acting in utter disregard of the constitution.³⁸

§ 1851. — Current Expenses

According to some authorities limitations on the amount of municipal indebtedness are not violated by

incurring indebtedness for current expenses at least where such indebtedness is payable from current revenues; and some authorities take the view that a municipal corporation having an aggregate indebtedness exceeding the limitation imposed by law is powerless to create an additional debt for current expenses, but hold that no such debt is created where there are sufficient funds available to pay such expenses.

According to some authorities limitations of the amount of municipal indebtedness are not violated by incurring indebtedness for ordinary current expenses,³⁹ at least where such indebtedness can be paid from current revenues,⁴⁰ that is, money in the treasury,⁴¹ taxes levied but not collected,⁴² and, in some jurisdictions, taxes which can be lawfully levied during the current year,⁴³ even though such

(2) Judgment rendered against city for breach of duty in collection of improvement warrant assessments was held not to create a debt within constitutional provision.—*G. W. Jones Lumber Co. v. City of Mar-marth*, 272 N.W. 190, 67 N.D. 309.

(3) If court should assume that city officers would negligently fail to perform their duties with respect to issuance of revenue bonds for acquisition to toll bridge, such failure would not create a debt within constitutional provision limiting municipal indebtedness, since at most such neglect of city officers might give rise to action for damages against city.—*Mettet v. City of Yankton*, S.D., 25 N.W.2d 460.

(4) Where municipality agrees to pay out of a fund to be realized in a certain way, there is an implied obligation to set up the mechanism to provide for payment, and a failure to set up the fund to liquidate its obligation imposes a general liability sounding in tort against municipality irrespective of constitutional inhibitions.

U.S.—*Reconstruction Finance Corp. v. Municipal Bldg. Corp. of Ellsworth*, D.C.Me., 63 F.Supp. 587.
Or.—*Morris v. City of Salem*, 174 P. 2d 192, 179 Or. 666.

(5) Where city, in order to avoid constitutional limitation on indebtedness in construction of municipal building, entered into arrangement whereby private corporation borrowed funds from Reconstruction Finance Corporation and thereafter on completion of building conveyed it to the city, subject to mortgage, and neither private corporation, nor city complied with provision of federal statute requiring a method of self-liquidating the loan to be set up, city could be held generally liable for full amount of mortgage debt, although it exceeded its constitutional debt limitations, on special fund analogy.—*Reconstruction Finance Corp. v. Municipal Bldg. Corp. of Ellsworth*, *supra*.

37. Ala.—*Oppenheim v. City of Florence*, 155 So. 859, 229 Ala. 50.

38. U.S.—*American La France Fire Engine Co., to Use of American La France & Foamite Industries v. Borough of Shenandoah*, C.C.A.Pa., 115 F.2d 866.

Pa.—*Pittsburgh Paving Co., for Use of Iron & Glass Dollar Sav. Bank of Birmingham, v. City of Pittsburgh*, 3 A.2d 905, 332 Pa. 563.

39. N.Y.—*Heaton v. City of Cohoes*, 279 N.Y.S. 1, 244 App Div. 19, reversed on other grounds 200 N.E. 795, 270 N.Y. 222, reargument denied 3 N.E.2d 212, 271 N.Y. 616.

44 C.J. p 1128 note 21.

Inclusion of current expenses in computation of existing indebtedness see *supra* § 1849 a.

Limitations on borrowing money see *infra* § 1869.

Necessity of:

Assent of electors see *infra* § 1859.
Provision for payment see *infra* § 1867.

40. Ala.—*State ex rel. Radcliff v. City of Mobile*, 155 So. 872, 229 Ala. 93.

Fla.—*State v. City of Miami*, 7 So. 2d 146, 150 Fla. 270.

Me.—*Corpus Juris* cited in *Moore v. Inhabitants of Town of Springfield*, 64 A.2d 569, 577.

N.D.—*Schieber v. City of Mohall*, 268 N.W. 445, 66 N.D. 593.

Pa.—*Greenhalgh v. Woolworth*, 64 A.2d 659, 361 Pa. 543—*Scranton Electric Co. v. Borough of Old Forge*, 163 A. 154, 309 Pa. 73, followed in *Manufacturers' Trust Co. v. Borough of Old Forge*, 163 A. 156, 309 Pa. 83—*Eyer v. Borough of Old Forge*, 163 A. 156, 309 Pa. 81—*Shamokin Banking & Trust Co. v. Coal Tp. Poor Dist.*, 18 Pa. Dist. & Co. 57.

Tex.—*City of Fort Worth v. Bobbitt*, 41 S.W.2d 228, 121 Tex. 14.

44 C.J. p 1128 note 22.

Quasi contract

(1) A municipality may undertake to pay out of current revenues for equipment or supplies to be used or

services to be rendered notwithstanding constitutional limitation has been exceeded, since no debt is added thereby to the sum total of municipal indebtedness, and a quasi contract may be imposed on a municipality to pay for fair rental value of equipment furnished to, and used by, it under similar circumstances.—*American La France Fire Engine Co., to Use of American La France & Foamite Industries v. Borough of Shenandoah*, C.C.A.Pa., 115 F.2d 866.

(2) So, where written contract under which municipality used fire trucks was invalid because its execution was not properly authorized by ordinance, but there was no showing that there had been any conscious attempt to evade municipal debt limitations, and fair rental value for trucks sought to be recovered was well within the reasonably anticipated ability of the municipality to pay out of current revenues, the fair rental value of trucks could be recovered.—*American La France Fire Engine Co., to Use of American La France & Foamite Industries, v. Borough of Shenandoah*, D.C.Pa., 30 F.Supp. 251, affirmed, C.C.A., 115 F. 2d 866.

41. Mont.—*Helena Waterworks Co. v. Helena*, 78 P. 220, 31 Mont. 243.
44 C.J. p 1128 note 23.

42. Ind.—*Brashear v. Madison*, 36 N.E. 252, 42 N.E. 349, 142 Ind. 685, 33 L.R.A. 474.

Anticipation of current revenues generally see *infra* § 1855.

43. U.S.—*American La France Fire Engine Co., to Use of American La France & Foamite Industries v. Borough of Shenandoah*, D.C. Pa., 30 F.Supp. 251, affirmed, C.C. A., 115 F.2d 866.

44 C.J. p 1128 note 25.

Special taxes

When a contract made by a municipal corporation pertains to its ordinary expenses and is, together with other like expenses, within the limits of its current revenues and

expenses are not actually paid out of current revenues and some portion of them is carried over into succeeding years;⁴⁴ but it has been held that an obligation for a current expense to be paid out of current revenues will be a debt or liability within the debt limitations if there are no current revenues available for its payment at the time the current expense is incurred.⁴⁵ A municipality already overburdened may not, by contract, increase annual expenses beyond annual revenue.⁴⁶

According to some authorities, a municipal corporation having an aggregate indebtedness exceeding the limitation imposed by law is powerless to create any additional debt even for its ordinary current expenses;⁴⁷ but it has been held that, if the municipality has in its treasury or at its immediate command by the collection of taxes levied or presently payable sufficient funds to pay current expenses, then as to such expenses no debt is created within constitutional or statutory limitations,⁴⁸ the rule being that as long as the current expenses of the municipality are kept within the limits of the moneys and assets actually in the treasury, and the

current revenues collected or in process of immediate collection, the municipality may be fairly regarded as doing business on a cash basis, and not on credit, even though there may be for a short time some unpaid liabilities.⁴⁹ Furthermore, the levying of a tax is not the incurring of an indebtedness, and, if a municipality is indebted beyond the amount which it may constitutionally contract, it may still levy taxes for the payment of its current expenses.⁵⁰

Obligations necessary to maintain corporate existence. Obligations necessary to maintain corporate existence are not debts within the constitutional limitation.⁵¹ Furthermore there is authority to the effect that in order to authorize the incurring of municipal obligations in excess of the debt limit, it is not enough that they be incurred for municipal purposes, convenient and useful, or broadly intended to promote the public good; the purposes must be such as are strictly essential to the continued existence of the municipality.⁵² The fact that services for which expenditures are made are autho-

such special taxes as it may legally and in good faith intend to levy therefor, such contract does not constitute increases of indebtedness within the meaning of the constitutional provision limiting the power of municipal corporations to contract debts—*American La France Fire Engine Co., to Use of American La France & Foamite Industries, v. Borough of Shenandoah, D.C.Pa.*, 30 F.Supp. 251, affirmed, C.C.A., 115 F.2d 866.

44. U.S.—*American La France Fire Engine Co., to Use of American La France & Foamite Industries, v. Borough of Shenandoah, D.C.Pa.*, 30 F.Supp. 251, affirmed, C.C.A., 115 F.2d 866.

Pa.—*Scranton Electric Co. v. Borough of Old Forge*, 163 A. 154, 309 Pa. 73, followed in *Manufacturers' Trust Co. v. Borough of Old Forge*, 163 A. 156, 309 Pa. 83.

45. Me.—*Moores v. Inhabitants of Town of Springfield*, 64 A.2d 569.

46. Pa.—*Shamokin Banking & Trust Co. v. Coal Tp. Poor Dist.*, 13 Pa. Dist. & Co. 57.
44 C.J. p 1128 note 26.

47. Ill.—*Chicago v. McDonald*, 52 N.E. 982, 176 Ill. 404.
44 C.J. p 1128 note 20.

48. Ill.—*Randolph-Perkins Co. v. City of Highland Park*, 85 N.E.2d 826, 311 Ill.App. 308.

49. Ill.—*Randolph-Perkins Co. v. City of Highland Park*, supra.

Wis.—*Prueher v. City of Bloomer*, 4 N.W.2d 186, 241 Wis. 17—*Earles v. Wells*, 68 N.W. 964, 94 Wis. 285, 59 Am.S.R. 886.

50. Ill.—*People ex rel. Toman v. B. Mercil & Sons Plating Co.*, 37 N.E.2d 839, 378 Ill. 142—*People ex rel. Cool v. Illinois Cent. R. Co.*, 140 N.E. 843, 309 Ill. 277—*People ex rel. Scoon v. Chicago & A. R. Co.*, 97 N.E. 310, 253 Ill. 191—*People ex rel. Trobaugh v. Chicago & T. R. Co.*, 79 N.E. 151, 223 Ill. 448.

Whether limitation on amount of indebtedness constitutes limitation on taxing power see supra § 1846 b.

51. Wash.—*Goff v. City of Seattle*, 86 P.2d 222, 197 Wash. 665—*Sainer v. Thurston County*, 44 P.2d 179, 181 Wash. 552—*Love v. King County*, 44 P.2d 175, 181 Wash. 462—*State ex rel. Keck v. City of Sunnyside*, 43 P.2d 621, 181 Wash. 511, 98 A.L.R. 741.

44 C.J. p 1128 note 21.

Fire and police service

(1) Indebtedness, incurred by city for corporate purposes, to maintain its existence, and as essential to health, safety, and general welfare of people thereof, as for fire and police service, is not covered by constitutional debt limitation.—*Weisfield v. City of Seattle*, 40 P.2d 149, 180 Wash. 288, 96 A.L.R. 1190.

(3) Validity or payment of such indebtedness, is not dependent on emergency under debt limit clauses in constitution.—*Weisfield v. City of Seattle*, supra.

52. Wash.—*Goff v. City of Seattle*, 86 P.2d 222, 197 Wash. 665.

Municipality held unauthorized to incur debt in excess of constitutional limitation for:

(1) Services of driver of automobile, used jointly by city council, planning commission, and other city bodies in viewing proposed improvements and making trips to certain rivers in connection with city's light and water plants.—*Goff v. City of Seattle*, supra.

(2) Maintenance of employment office by city civil service department.—*Goff v. City of Seattle*, supra.

(3) Operation of tuberculosis sanatorium.—*Goff v. City of Seattle*, supra.

(4) Current street maintenance, not mandatory or essential to city's existence, and maintenance of automotive equipment for park department, sanatorium, and library department.—*Goff v. City of Seattle*, supra.

(5) Dues paid to association of cities, and codification of city ordinances and reclassification survey by civil service department.—*Goff v. City of Seattle*, supra.

(6) Support of county humane society.—*Goff v. City of Seattle*, supra.

(7) Special assessment imposed by drainage district.—*State ex rel. Keck v. City of Sunnyside*, 43 P.2d 621, 181 Wash. 511, 98 A.L.R. 741.

ized by the charter does not make them necessary to municipal existence.⁵³

§ 1852. — Property, Utilities, Improvements, and Works

- a. In general
- b. Rental or installment contracts

a. In General

Indebtedness for public works or improvements or for the purchase or improvement of public utilities is subject to a limitation of the amount of municipal indebtedness, unless authority to transcend the limitation for such purpose is specially granted or payment is to be made out of current revenues or cash in the treasury; and, in the absence of constitutional or statutory authority, a municipal corporation may not avoid debt limitations by purchasing property for public purposes subject to liens.

The question whether a municipal corporation already indebted to the constitutional limit has power to incur a further indebtedness for a local improvement cannot arise before the municipality incurs or proposes to incur a debt for this purpose.⁵⁴ Indebtedness incurred by a municipality for the purchase or construction of a public utility,⁵⁵ or for the subscription to, or purchase of, stock therein,⁵⁶ does not violate a limitation of the amount of indebtedness where the amount for which the municipality becomes obligated, together with its other indebtedness, does not exceed the limitation. Or-

dinarily excessive indebtedness may not be incurred for the purchase of property on the ground that it is worth more than the price⁵⁷ and will increase the municipal revenue;⁵⁸ but under some constitutions bonds issued for a specific undertaking from which the city or town may derive revenue is not subject to the limitation,⁵⁹ and, as shown *infra* § 1853, a municipality already indebted to the limit may purchase property where the purchase price is payable exclusively from a special fund to be derived from the income and revenue of the property.

Indebtedness for streets, sewers, or other public works or improvements is subject to a limitation of the amount of municipal indebtedness,⁶⁰ unless authority to transcend the limitation for such purposes is specially granted,⁶¹ or the improvement is to be paid for out of current revenues,⁶² cash in the municipal treasury,⁶³ or, as discussed *infra* § 1853 a, the proceeds of special assessments. In a suit to determine the validity of improvement bonds, where the controlling question turns on the validity of other obligations held by bondholders not made parties to the suit, as to whom no binding adjudication can be made, no question is presented for consideration.⁶⁴

A constitutional or statutory limitation of the amount of indebtedness applies to indebtedness for

53. Wash.—Goff v. City of Seattle, 86 P.2d 222, 197 Wash. 665.

54. Ill.—Jacksonville R. Co. v. Jacksonville, 2 N.E. 478, 114 Ill. 562.

Indebtedness payable from special fund or assessment see *infra* § 1853.

Limitations for special purposes see *supra* § 1848.

55. Mo.—Palmer v. City of Liberal, 64 S.W.2d 265, 334 Mo. 266.

Or.—Public Market Co. of Portland v. City of Portland, 83 P.2d 440, 160 Or. 155.

56. Ind.—Bollenbacher v. Harris, 148 N.E. 417, 196 Ind. 657. 44 C.J. p 1129 note 40.

Subscription to stock of corporation generally see *infra* §§ 1870-1877.

57. Iowa.—Scott v. Davenport, 84 Iowa 208.

58. Iowa.—Scott v. Davenport, *supra*.

59. Va.—McDaniel v. Clifton Forge, 120 S.E. 143, 137 Va. 650.

60. Ala.—Balsden v. City of Greenville, 111 So. 2, 215 Ala. 512.

Ga.—Byars v. City of Griffin, 147 S. E. 66, 168 Ga. 41.

Ill.—People *ex rel.* Toman v. Crane, 22 N.E.2d 337, 372 Ill. 228—People

ex rel. Scoon v. Chicago & A. R. Co., 97 N.E. 310, 258 Ill. 191. 44 C.J. p 1128 note 31.

61. Fla.—Charles v. City of Miami, 169 So. 589, 125 Fla. 110.

Or.—Shainwald v. City of Portland, 55 P.2d 1151, 153 Or. 167. 44 C.J. p 1129 note 32.

Sewage disposal plant

Construction of sewage disposal plant essential for operation of sewer system of city constitutes construction of sewer within constitution authorizing city to become indebted in specified amount without regard to existing indebtedness for purpose of constructing sewers.—Anderson v. City of Fargo, 250 N.W. 794, 64 N.D. 178.

"Sewerage"

(1) Under constitutional and statutory provisions relating to limit on indebtedness for purpose of construction of a system of "sewerage," the term "sewerage" is usually applied to a system of sewers and "sewage" to the matter carried off, although the terms are frequently used interchangeably.—Anselmi v. City of Rock Springs, 80 P.2d 419, 53 Wyo. 223, 116 A.L.R. 1250.

(2) In the absence of provisions limiting sewers to sanitary sewers, proposed storm ditch to carry off flood waters within municipality was authorized by such provision, and

general bonds of municipality could be issued therefor, since the term "sewer" includes a storm sewer as well as a sanitary sewer.—Anselmi v. City of Rock Springs, *supra*.

Public housing project

If a school is a facility incidental or appurtenant to a public housing project within meaning of constitutional and statutory provisions authorizing additional debt limit of two per cent, it is for city alone to determine whether cost of school should be financed within general ten per cent debt limit or within two per cent additional debt limit, but, if the school is not such a facility, then cost can not be charged against two per cent additional debt limit, and such charge would be an illegality justifying judicial interference.—Diehl v. O'Dwyer, 84 N.Y.S.2d 109, 193 Misc. 1032.

Authority held not granted

Pa.—Appeal of Borough of Summit Hill, 44 Pa. Dist. & Co. 180, 51 Dauph. Co. 435.

62. W. Va.—Harrold v. Huntington, 82 S.E. 476, 74 W. Va. 538.

63. U.S.—Collins v. City of Phoenix, C.C.A. Ark., 54 F.2d 770. 44 C.J. p 1129 note 35.

64. Ala.—Merchants' Securities Corporation v. City of Atmore, 126 So. 871, 220 Ala. 682.

the purchase or construction of light or water plants or other public utilities,⁶⁵ or for the improvement, enlargement, or extension thereof,⁶⁶ unless the constitution itself;⁶⁷ or a statute enacted pursuant to constitutional authority,⁶⁸ provides an exception to, or extension of, the limitation in the case of indebtedness for this purpose, or the municipality has on hand sufficient available funds to meet contract payments as they fall due;⁶⁹ but a constitutional provision excepting debts contracted for supplying water to a city or town has been construed not to mean that there are no limitations whatever on an indebtedness which may be incurred for water

supply, and not to prevent the legislature from otherwise prescribing conditions.⁷⁰

Effect of mortgage or lien. A municipal corporation cannot avoid restrictions on the amount of indebtedness which it may incur by purchasing property for public purposes subject to liens,⁷¹ or by pledging the property itself for payment,⁷² unless such mortgage is authorized by a constitutional provision⁷³ or a valid statute.⁷⁴ An arrangement for the purchase of property which is liable for the payment of an indebtedness, and which the city must pay or lose the property, is the creation of an in-

65. U.S.—*Illinois Power & Light Corporation v. City of Centralia*, D.C.Ill., 11 F.Supp. 874, vacated on other grounds and cause remanded, C.C.A., *City of Centralia v. Illinois Power & Light Corporation*, 89 F.2d 985.

Ga.—*Morton v. City of Waycross*, 160 S.E. 330, 173 Ga. 298.

Ky.—*Juett v. Town of Williamstown*, 58 S.W.2d 411, 248 Ky. 235.

Or.—*Public Market Co. of Portland v. City of Portland*, 83 P.2d 440, 160 Or. 155.

Pa.—*Madden v. Borough of Mt. Union*, 185 A. 275, 322 Pa. 109.

Tex.—*Cameron v. City of Waco*, Civ. App., 8 S.W.2d 249.

44 C.J. p 1129 note 36.

Reimbursement

A city can reimburse itself for funds already advanced from general funds for acquisition of waterworks utility if city does not thereby exceed the constitutional debt limit.—*Roberts v. City of Madison*, 27 N.W.2d 233, 250 Wis. 317.

66. U.S.—*Illinois Power & Light Corporation v. City of Centralia*, D.C.Ill., 11 F.Supp. 874, vacated on other grounds and cause remanded, C.C.A., *City of Centralia v. Illinois Power & Light Corporation*, 89 F.2d 985.

Ga.—*Morton v. City of Waycross*, 160 S.E. 330, 173 Ga. 298.

Wis.—*State v. Portage*, 184 N.W. 376, 174 Wis. 588.

67. U.S.—*Busch-Sulzer Bros.-Diesel Engine Co. v. City of Walters*, C.C.A.Okl., 133 F.2d 65.

Ala.—*Kendrick v. City of Birmingham*, 5 So.2d 82, 242 Ala. 112.

Mo.—*State ex rel. City of Clarence v. Drain*, 73 S.W.2d 804, 335 Mo. 741.

N.D.—*Stark v. City of Jamestown*, 37 N.W.2d 516.

Okl.—*State ex rel. R. J. Edwards, Inc. v. Keith*, 66 P.2d 1059, 179 Okl. 563—*Zachary v. City of Waggoner*, 292 P. 245, 146 Okl. 268.

Pa.—*Atkins v. City of Philadelphia*, 14 A.2d 423, 339 Pa. 845.

44 C.J. p 1129 note 38.

Submission to popular vote see *infra* § 1860.

Constitutional authorization held self-executing grant of power
Okl.—*Toohey v. Town of Canton*, 60 P.2d 729, 177 Okl. 426.

The words "managing a public utility" in constitutional provision authorizing municipal indebtedness in excess of constitutional limitation for managing a public utility mean an act performed by one vested with power of management, and authorize indebtedness for hiring manager, but do not authorize issuance of municipal waterworks mortgage revenue bonds to reimburse city for waterworks expenditures from general funds.—*Roberts v. City of Madison*, 27 N.W.2d 233, 250 Wis. 317.

"Public utilities" within constitutional exception held to include:

(1) Sewers.—*Sharp v. Hall*, 181 P. 2d 772, 198 Okl. 678—*Toohey v. Town of Canton*, 60 P.2d 729, 177 Okl. 426—*State v. Millar*, 96 P. 747, 21 Okl. 448.

(2) Other enterprises.—*Williams v. Norman*, 205 P. 144, 85 Okl. 230—44 C.J. p 1129 note 38 [a].

"Public utilities" held not to include:

(1) Street improvements.—*State ex rel. City of Shawnee v. Williamson*, 97 P.2d 74, 186 Okl. 278, 125 A.L.R. 1389—*Hood v. Jones*, 50 P.2d 1124, 174 Okl. 372—44 C.J. p 1129 note 38 [a] (8).

(2) Other enterprises.—*In re Miami*, 141 P. 1174, 43 Okl. 205—44 C.J. p 1129 note 38 [a] (9).

68. Mont.—*Edmunds v. City of Glasgow*, 300 P. 203, 89 Mont. 596.

Revenues devoted to payment of debt

Constitutional provision that municipalities might exceed limit of indebtedness if authorized by legislature for purpose of procuring water supply, where revenues thereof were devoted to payment of debt incurred, was held to authorize contract whereby city was to obtain water supply from water conservation board, since "revenue" meant net revenue, and net revenues realized

from water sales would be materially increased by lower cost of water obtained from water conservation board.—*Farmers State Bank of Conrad v. City of Conrad*, 47 P.2d 853, 100 Mont. 415.

"Water purposes"

Statutory provision excepting bonds issued for "water purposes" from operation of statute prohibiting issuance of municipal bonds where net debt exceeds a designated per cent of assessed valuation was held to include bonds issued to build water and sewer systems.—*Lamb v. City of Randleman*, 175 S.E. 293, 206 N.C. 837.

69. Mont.—*McClintock v. Great Falls*, 163 P. 99, 53 Mont. 221.

70. Colo.—*City of Aurora v. Krauss*, 59 P.2d 79, 99 Colo. 12.

71. Ind.—*Eddy Valve Co. v. Town of Crown Point*, 76 N.E. 536, 186 Ind. 613, 3 L.R.A., N.S., 684.

44 C.J. p 1130 note 45.

Effect of mortgage or lien securing payment of obligation payable from revenue of income-producing property see *infra* § 1853 b (1).

Mortgage held not to cover realty

Ill.—*Hairgrove v. City of Jacksonville*, 8 N.E.2d 187, 366 Ill. 163

Mortgage exceeding authorized debt

A municipal corporation may not purchase property which is mortgaged for a sum in excess of the amount of indebtedness which it is authorized to incur.

U.S.—*Fidelity Trust, etc. Co. v. Fowler Water Co.*, C.C.Ind., 113 F. 560

Ind.—*Voss v. Waterloo Water Co.*, 71 N.E. 208, 163 Ind. 69, 106 Am.S.R. 201, 66 L.R.A. 95.

72. Pa.—*Lesser v. Warren*, 85 A. 839, 237 Pa. 501, 43 L.R.A., N.S., 839.

73. Mich.—*Michigan United Light, etc. Co. v. Hart*, 209 N.W. 937, 235 Mich. 682.

74. Wis.—*State v. Portage*, 184 N.W. 376, 174 Wis. 588.

44 C.J. p 1130 note 48.

debtedness.⁷⁵

A mere option to purchase property does not, before it is exercised, constitute an indebtedness.⁷⁶

Damages from improvement. Excess of the lawful limit of indebtedness is no defense to an action for damages resulting from the negligent or unskillful construction of a street gutter⁷⁷ or from the change of a street grade.⁷⁸

b. Rental or Installment Contracts

Although there is some authority to the contrary, it is generally held that a contract by a municipal corporation to pay for water, lights, etc., at stated times in the future does not, within the meaning of debt limitation provisions, create an indebtedness for the aggregate amount of all the payments; but, where the consideration is received in the present and all at one time, an indebtedness for the full amount of the contract price is created notwithstanding the price is to be paid in installments.

A contract by a municipal corporation to pay for water, lights, sewerage, and the like, at stated times in the future, is generally held not to create an indebtedness within the meaning of a provision limiting the indebtedness of municipalities,⁷⁹ or, if it does create an indebtedness, it is one only for the amount of the payment or payments due the first year,⁸⁰ and not for the aggregate amount of all the payments.⁸¹ Each installment becomes a debt as it falls due.⁸² In a few jurisdictions, however, such a contract is, within the meaning of limitations of the amount of indebtedness, deemed to create a debt⁸³

for the aggregate amount of the payments,⁸⁴ but the rule has been held not to apply where the city is not obligated, under the contract, to continue to take and pay, but may at any time, without violating the contract, decline and refuse to do so.⁸⁵

A contract for the purchase or construction of a public utility plant or for the purchase of other property, the consideration being received in the present and all at one time, creates an indebtedness for the full amount of the contract price, notwithstanding the price is to be paid in installments during a series of years⁸⁶ or an attempt is made to avoid a debt limitation by contracting in form to pay rental.⁸⁷

§ 1853. — Indebtedness Payable from Special Fund or Assessment

- a. In general
- b. Revenues of municipally-owned property

a. In general

Although a municipal corporation has exceeded the debt limit, it may generally contract a debt payable out of a special fund or payable out of the proceeds of a special assessment; but an obligation payable out of a fund which is the product of a tax levy or out of a fund which must be replenished by funds raised by taxation is generally held a debt within the limitation.

As a general rule, the fact that a municipal cor-

75. Ind.—Hively v. School City of Nappanee, 169 N.E. 51, 202 Ind. 28, 71 A.L.R. 1311, rehearing denied 171 N.E. 381, 202 Ind. 28, 71 A.L.R. 1311—Eddy Valve Co. v. Town of Crown Point, 76 N.E. 536, 166 Ind. 613, 3 L.R.A.N.S., 684.

76. Ind.—Jefferson School Tp. v. Jefferson Tp. School Building Co., 10 N.E.2d 608, 212 Ind. 542—Hively v. School City of Nappanee, 169 N.E. 51, 202 Ind. 28, 71 A.L.R. 1311, rehearing denied 171 N.E. 381, 202 Ind. 28, 71 A.L.R. 1311.

44 C.J. p 1130 note 49.

77. Iowa.—Bartle v. Des Moines, 38 Iowa 414.
Tort liability generally see supra § 1850.

78. Conn.—Cook v. Ansonia, 34 A. 183, 66 Conn. 413.

Mo.—Smith v. St. Joseph, 27 S.W. 344, 122 Mo. 643.

79. Mich.—Bacon v. City of Detroit, 275 N.W. 800, 282 Mich. 150.

Minn.—Struble v. Nelson, 15 N.W. 2d 101, 217 Minn. 574—Corpus Juris cited in Ambrozich v. City of Eveleth, 274 N.W. 635, 641, 200 Minn. 473.

Utah.—Corpus Juris cited in Utah Power & Light Co. v. Provo City, 74 P.2d 1191, 1195, 94 Utah 203,

certiorari denied 59 S.Ct. 92, 305 U.S. 628, 83 L.Ed. 402—Corpus Juris cited in Fjeldsted v. Ogden City, 28 P.2d 144, 154, 83 Utah 278.

44 C.J. p 1130 note 53.

Executory contracts generally see supra § 1850.

80. W.Va.—Corpus Juris cited in Huntington Water Corporation v. City of Huntington, 177 S.E. 290, 292, 115 W.Va. 531.

44 C.J. p 1130 notes 54, 55.

Amount

Where contract between city and government required city to pay for its supply of water annually, in addition to principal payments, amount of operation and maintenance charges of joint works, the amount of which could not be definitely determined in advance, court could not assume that total annual payments would equal or approximate the statutory limitations.—Robbins v. Rapid City, S.D., 23 N.W.2d 144.

81. Ark.—Incorporated Town of Ozark v. Ozark Water Co., 81 S.W.2d 920, 190 Ark. 872.

Ind.—Jefferson School Tp. v. Jefferson Tp. School Building Co., 10 N.E.2d 608, 212 Ind. 542—Hively v. School City of Nappanee, 169 N.E. 51, 202 Ind. 28, 71 A.L.R. 1311,

rehearing denied 171 N.E. 381, 202 Ind. 28, 71 A.L.R. 1311.

Mich.—Drain Com'r of Oakland County v. City of Royal Oak, 10 N.W.2d 435, 306 Mich. 124

S.D.—Corpus Juris cited in Robbins v. Rapid City, 23 N.W.2d 144, 149.

44 C.J. p 1130 note 55

82. Mo.—Kansas City Power & Light Co. v. Town of Carrollton, 142 S.W.2d 849, 346 Mo. 802.

83. Ill.—East St. Louis & Interurban Water Co. v. City of Belleville, 196 N.E. 442, 360 Ill. 490.

44 C.J. p 1130 note 56.

84. Ill.—East St. Louis & Interurban Water Co. v. City of Belleville, supra.

44 C.J. p 1130 note 57.

85. Ill.—Simpson v. City of Highland, 23 N.E.2d 62, 372 Ill. 212, 124 A.L.R. 1459.

Ky.—Williams v. City of Raceland, 53 S.W.2d 370, 245 Ky. 212.

86. Mo.—Corpus Juris quoted in Sager v. City of Stanberry, 78 S.W.2d 431, 438, 336 Mo. 213.

44 C.J. p 1131 note 58.

87. Mo.—Corpus Juris quoted in Sager v. City of Stanberry, 78 S.W.2d 431, 438, 336 Mo. 213.

44 C.J. p 1131 note 59.

poration has exceeded its debt limit does not prevent it from contracting a debt payable expressly out of a special fund,⁸⁸ but the rule is subject to some qualifications and exceptions.⁸⁹

Indebtedness payable out of fund raised by taxation. Some authorities have held that any obligation paid or contracted to be paid out of a fund which is the product of a tax levy is a debt within the purpose of the constitutional limitation;⁹⁰ and, under this view a municipality which has

reached the constitutional limit of indebtedness cannot create a debt to be paid directly or indirectly, in whole or in part, from funds raised by taxation, or from a fund which must be replenished by funds raised by taxation.⁹¹ An indebtedness or liability is incurred when by the terms of the transaction a municipality is obligated directly or indirectly to feed the special fund from general or other revenues in addition to those arising solely from the specific improvement contemplated.⁹²

88. U.S.—Fairbanks, Morse & Co. v. City of Wagoner, C.C.A.Okl., 81 F.2d 209, modified on other grounds 86 F.2d 288—Reconstruction Finance Corp. v. Municipal Bldg. Corp. of Ellsworth, D.C.Me., 63 F.Supp. 587.

Ala.—Balsden v. City of Greenville, 111 So. 2, 215 Ala. 512.

Ariz.—*Corpus Juris* quoted in Guthrie v. City of Mesa, 56 P.2d 655, 657, 47 Ariz. 336

Del.—Town of Seaford v. Eastern Shore Public Service Co., 24 A.2d 436, 2 Terry 438

Hawaii.—E. E. Black, Limited, v. Conkling, 33 Hawaii 731.

Ill.—De Leuw, Cather & Co. v. City of Joliet, 64 N.E.2d 779, 327 Ill. App. 453.

Ind.—Letz Mfg. Co. v. Public Service Commission of Indiana, 4 N.E.2d 194, 210 Ind. 467—Underwood v. Fairbanks, Morse & Co., 185 N.E. 118, 205 Ind 316.

Mo.—Grossman v. Public Water Supply Dist. No. 1 of Clay County, 96 S.W.2d 701, 339 Mo. 344—Sager v. City of Stanberry, 78 S.W.2d 431, 336 Mo. 213.

Mont.—Farmers State Bank of Conrad v. City of Conrad, 47 P.2d 853, 100 Mont. 415.

N.M.—Seward v. Bowers, 24 P.2d 253, 37 N.M. 385.

N.D.—State ex rel. Syvertson v. Jones, 23 N.W.2d 54, 74 N.D. 465.

Or.—Morris v. City of Salem, 174 P.2d 192, 179 Or. 666—*Corpus Juris* cited in Shainwald v. City of Portland, 55 P.2d 1151, 1159, 153 Or. 167.

Pa.—Frickville Sewerage Co. v. Jones, Quar.Sess., 81 Mun.L.R. 75, 6 Sch.Reg. 368.

Tex.—*Corpus Juris* quoted in City of Fort Worth v. Bobbitt, 41 S.W.2d 228, 234, 121 Tex. 14.

Wash.—Kelly v. City of Sunnyside, 11 P.2d 230, 168 Wash. 95, followed in Liberty Savings & Loan Ass'n v. City of Sunnyside, 11 P.2d 232, 168 Wash. 895.

44 C.J. p 1131 note 61.

Pledging faith, credit, and taxing power

It has been said that bonds issued by political subdivisions of state which are payable out of special funds do not create debts of the po-

litical subdivisions, within constitutional limitations or indebtedness of the subdivisions, although the full faith, credit, and taxing powers of the subdivisions are pledged for payment of such bonds.—Clarke v. South Carolina Public Service Authority, 181 S.E. 481, 177 S.C. 427.

Municipal improvement district bonds do not constitute a debt of the municipality in the constitutional sense of the word, or an obligation which is payable from the general funds of the municipality, although bonds issued in name of the municipality to be paid only from the special fund created by the enabling act, and so limited on the face of the obligation, are the bonds of the municipality.—Montgomery v. City and County of Denver, 80 P.2d 434, 102 Colo. 427.

89. Ala.—In re Opinion of the Justices, 148 So. 111, 226 Ala. 570.

Utah.—Fjeldsted v. Ogden City, 28 P.2d 144, 83 Utah 278.

44 C.J. p 1131 note 60.

90. U.S.—City of Ottumwa v. City Water Supply Co., C.C.A.Iowa, 119 F. 315, 59 L.R.A. 604.

Colo.—Reimer v. Town of Holyoke, 27 P.2d 1032, 93 Colo. 571.

Ill.—People ex rel. City of Chicago v. Barrett, 26 N.E.2d 478, 373 Ill. 393.

Iowa.—Brunk v. City of Des Moines, 291 N.W. 395, 228 Iowa 287, 134 A.L.R. 1391, overruling Grunewald v. City of Cedar Rapids, 91 N.W. 1059, 118 Iowa 222 and Swanson v. City of Ottumwa, 91 N.W. 1048, 118 Iowa 161, 59 L.R.A. 620.

"Where the improvement is to be paid by general tax levy, then it becomes a debt of the municipality . . . and the purpose for which the taxes are levied does not affect the liability. Neither is it important that the contractual liability is not to be in effect unless assessments remain unpaid. Where the contract pledges the city to pay, even as an eventuality, it is a debt."—Schlieber v. City of Mohall, 268 N.W. 445, 450, 66 N.D. 593.

Rule held not to apply as to indebtedness incurred by municipality for engineering services in exploring needs with respect to a lighting sys-

tem and rental paid by power company for realty and office space belonging to municipality, where it was not shown that services entered into computation of cost of plant or that results were used in establishing plant, and it was shown that rental items were paid from income of plant into municipality's general funds.—Town of Seaford v. Eastern Shore Public Service Co., 24 A.2d 436, 2 Terry, Del., 438.

91. Colo.—Reimer v. Town of Holyoke, 27 P.2d 1032, 93 Colo. 571.

Fla.—Kathleen Citrus Land Co. v. City of Lakeland, 169 So. 356, 124 Fla. 659.

Mo.—Grossman v. Public Water Supply Dist. No. 1 of Clay County, 96 S.W.2d 701, 339 Mo. 344—Sager v. City of Stanberry, 78 S.W.2d 431, 336 Mo. 213—Hight v. City of Harrisonville, 41 S.W.2d 155, 328 Mo. 549.

N.D.—Schlieber v. City of Mohall, 268 N.W. 445, 66 N.D. 593.

Pa.—In re City of Philadelphia, 21 A.2d 876, 343 Pa. 47—In re Petition of City of Philadelphia, 16 A.2d 32, 340 Pa. 17.

92. Utah.—Fjeldsted v. Ogden City, 28 P.2d 144, 83 Utah 278

Payment for water or electricity

(1) City's obligation to pay hydrant rental, which, with rates to be paid by private consumers, provides fund for payment of principal and interest on revenue bonds issued by city for construction of waterworks, would create an indebtedness obnoxious to constitution if in excess of limitations thereof.—State ex rel. City of Blue Springs v. McWilliams, 74 S.W.2d 363, 335 Mo. 816.

(2) So contract for purchase of equipment for municipal electric plant, payable in installments from net revenues of plant, was held to create indebtedness prohibited by constitution, where city was to pay at regular rate for power used by city for public purposes and debt limitation was exceeded.—Hagler v. City of Salem, 62 S.W.2d 751, 333 Mo. 330—Hight v. City of Harrisonville, 41 S.W.2d 155, 328 Mo. 549.

Indebtedness payable out of proceeds of special assessment. A municipal corporation may, without increasing its indebtedness within the meaning of constitutional and statutory limitations, contract an indebtedness payable out of the proceeds of a special assessment,⁹³ provided, at the time of the making of the contract, no liability on the part of the municipality, other than to pay over the assessment when collected, is created.⁹⁴

Assessment against municipality. Where an assessment to pay for an improvement is made against the municipality for benefits received, the question whether its liability for the amount of such assessment comes within a constitutional debt limitation depends on whether the assessment is to be paid by general taxation, including taxation of personal

property, or whether the assessment is made only on abutting real property owned by the municipality, the limitation being applicable in the former case⁹⁵ but not in the latter.⁹⁶ Although a special assessment levied against a city within an improvement district for special benefits accruing to the city has been held a debt within the constitutional limitation,⁹⁷ it has also been held that, where an assessment for an improvement involving a territory much wider than the city itself is imposed by a district corporate entity, a state agency, under legislative authority, and is required to be paid by uniform tax on all taxable property in the municipality, such assessment does not create an indebtedness.⁹⁸

Loss accruing where special fund insufficient. A municipality has been held to incur an indebtedness

(3) However, a stipulation, that, if city should, from time to time, voluntarily elect to take electric energy from hydroelectric system for its own use, it would pay to special account an amount equal to the cost of furnishing the energy so taken, in no event to exceed a fair and reasonable amount, was held not a covenant importing liability to taxation available to bondholders, so as to invalidate revenue bonds as a general indebtedness of city, but was rather an assurance on part of city to pay for such energy as a necessary municipal expense out of current revenues.—*McGuinn v. City of High Point*, 8 S.E.2d 462, 217 N.C. 449, 128 A.L.R. 608.

(4) Contract requiring city to credit fund established to pay for electric plant with cost of electricity used for public purposes was held not to create indebtedness, within constitutional limitations.—*Barnes v. Lehi City*, 279 P. 878, 74 Utah 321.

93. U.S.—*Bank of Burlington v. City of Murphysboro*, C.C.A.Ill., 96 F.2d 899.

Ga.—*City of Dawson v. Bolton*, 143 S.E. 119, 166 Ga. 232.

Hawaii.—*E. E. Black, Limited, v. Conkling*, 33 Hawaii 731.

Ill.—*Wall v. Chicago Park Dist.*, 37 N.E.2d 752, 378 Ill. 81.—*Randolph-Perkins Co. v. City of Highland Park*, 35 N.E.2d 826, 311 Ill.App. 308.

Ky.—*Coke v. Dowell*, 136 S.W.2d 3, 281 Ky. 362.

Mich.—*Callahan v. City of Berkley*, 12 N.W.2d 431, 307 Mich. 701, rehearing denied 14 N.W.2d 87, 307 Mich. 701.

Mo.—*State ex rel. Webster Groves Sanitary Sewer Dist. v. Smith*, 115 S.W.2d 818, 342 Mo. 365.—*State ex rel. Webster Groves Sanitary Sewer Dist. v. Smith*, 87 S.W.2d 147, 337 Mo. 855.—*State ex rel. Gentry v. Curtis*, 4 S.W.2d 467, 319 Mo. 316.

N.Y.—*Longken, Inc. v. City of Long Beach*, 198 N.E. 390, 268 N.Y. 632.

—*Gaynor v. Marohn*, 198 N.E. 13, 268 N.Y. 417.—*People ex rel. Tick Realty Corporation v. City of Long Beach*, 16 N.Y.S.2d 372, 258 App. Div. 917, reargument denied 17 N.Y.S.2d 1000, 258 App. Div. 967, and 29 N.Y.S.2d 149, 262 App. Div. 850.

N.D.—*Marks v. City of Mandan*, 296 N.W. 39, 70 N.D. 474.—*Schieber v. City of Mohall*, 268 N.W. 445, 66 N.D. 593.—*Lang v. City of Cavalier*, 228 N.W. 819, 59 N.D. 75.

Pa.—*Continental Rubber Works v. City of Erie*, 23 Pa. Dist. & Co. 701, 17 Erie Co. 89.

Tex.—*Corpus Juris* quoted in *City of Fort Worth v. Bobbitt*, 41 S.W.2d 228, 234, 121 Tex. 14.

44 C.J. p 1131 note 64.

Recognition of necessity

The statute permitting municipalities to borrow money outside the debt limit for sewer system when the cost thereof is to be financed by sewer rents or sewer easements is a recognition of the imperative necessity for the establishment of sewers by providing that their cost shall not be subject to the ordinary limitations on the public debt.—*Town of Meredith v. State Board of Health*, 48 A.2d 489, 94 N.H. 123.

94. U.S.—*Corpus Juris* cited in *Lumbermen's Trust Co. v. Town of Ryegate*, D.C.Mont., 50 F.2d 219, 225.

Tex.—*Corpus Juris* quoted in *City of Fort Worth v. Bobbitt*, 41 S.W.2d 228, 234, 121 Tex. 14.

44 C.J. p 1131 note 65.

Loans from revolving fund

The possibility that part of bonds issued by special improvement district may have to be paid with moneys obtained from revolving fund, which in turn is created by tax levy on property of the city, does not mean that the bonds create a city debt within constitutional provision

fixing debt limitation, since plan is merely an arrangement whereby the city, through the revolving fund, lends money to the district.—*Hansen v. City of Havre*, 114 P.2d 1053, 112 Mont. 207, 135 A.L.R. 1278.

Substitution of general obligations of city for improvement warrants

Where city proposes to issue new improvement warrants under provisions of statute, and special improvement warrants have been legally issued and are in default, city council may issue refunding special improvement warrants, but, where city has already exceeded its debt limit, city council cannot make such refunding warrants general obligations of city, and city council will be restrained from doing so.—*Schieber v. City of Mohall*, 268 N.W. 445, 66 N.D. 593.

Contingent liability for deficiency held not to create debt

Wash.—*Kelly v. City of Sunnyside*, 11 P.2d 230, 168 Wash. 95, followed in *Liberty Savings & Loan Ass'n v. City of Sunnyside*, 11 P.2d 232, 168 Wash. 695.

95. Ill.—*People v. Chicago & A. R. Co.*, 97 N.E. 310, 253 Ill. 191.

Tex.—*Corpus Juris* quoted in *City of Fort Worth v. Bobbitt*, 41 S.W.2d 228, 234, 121 Tex. 14.

96. Cal.—*Southlands Co. v. City of San Diego*, 297 P. 621, 211 Cal. 646.

Okl.—*Perry v. Johnson*, 233 P. 679, 106 Okl. 32.

Tex.—*Corpus Juris* quoted in *City of Fort Worth v. Bobbitt*, 41 S.W.2d 228, 234, 121 Tex. 14.

97. Wash.—*State ex rel. Keck v. City of Sunnyside*, 43 P.2d 621, 181 Wash. 511, 98 A.L.R. 741.

98. Colo.—*People v. Lee*, 212 P. 583, 72 Colo. 598.

N.M.—*Gutierrez v. Middle Rio Grande Conservancy Dist.*, 282 P. 1, 34 N.M. 346, 70 A.L.R. 1261, certiorari denied 50 S.Ct. 153, 280 U.S. 810, 74 L.Ed. 653.

or liability when by the terms of the transaction it may suffer a loss if the special fund is insufficient to pay the obligation incurred.⁹⁹

b. Revenues of Municipally-Owned Property

- (1) In general
- (2) Improvements to, or extensions of, existing property or system

(1) In General

As a general rule, restrictions on municipal indebtedness are not applicable to obligations payable only out of a fund derived from the revenue of specific revenue-producing properties constructed or purchased by the munic-

ipal corporation; but, where a lien is imposed on property already owned by the municipality, or on property other than that purchased, an indebtedness is incurred within debt limitation provisions.

Although there is some authority to the contrary,¹ it is the general rule that restrictions on municipal indebtedness are not applicable to obligations which are payable only out of a fund derived from the income and revenue of specific revenue-producing properties constructed or purchased by the municipal corporation,² such as public housing projects³ or light or waterworks plants or other public utilities,⁴ particularly where no part of the system has

99. Utah.—Fjeldsted v. Ogden City, 28 P.2d 144, 83 Utah 278.

1. Okl.—Zachary v. City of Wagoner, 292 P. 345, 146 Okl. 268.

Reason for rule

The rule followed in some jurisdictions that the purchase of property does not create an indebtedness if the purchase price is to be paid out of the income therefrom is but another attempt to nullify and evade the wholesome constitutional limitations on the power of municipalities to create indebtedness and to usurp powers never intended to be granted to municipal officers.—Zachary v. City of Wagoner, *supra*.

2. Ariz.—Crawford v. City of Prescott, 83 P.2d 789, 52 Ariz. 471.

Del.—Town of Seaford v. Eastern Shore Public Service Co., 24 A.2d 436, 2 Terry 438.

Fla.—Dickey v. City of Fort Lauderdale, 186 So. 427, 136 Fla. 241—State v. City of Clearwater, 184 So. 790, 135 Fla. 148.

Ill.—Krause v. Peoria Housing Authority, 19 N.E.2d 193, 370 Ill. 356.

Iowa.—Interstate Power Co. v. Incorporated Town of McGregor, 296 N.W. 770, 230 Iowa 42, 146 A.L.R. 315.

Ky.—McKinney v. City of Owensboro, 203 S.W.2d 24, 305 Ky. 254—Klein v. City of Louisville, 6 S.W.2d 1104, 224 Ky. 624.

Mich.—Ritchie v. Council of City of Harrisville, 289 N.W. 197, 201 Mich. 415.

Mo.—Woodmansee v. Kansas City, 144 S.W.2d 137, 346 Mo. 919.

N.Y.—Robertson v. Zimmerman, 196 N.E. 740, 268 N.Y. 52.

N.C.—McGuinn v. City of High Point, 8 S.E.2d 462, 217 N.C. 449, 128 A.L.R. 608.

S.D.—Mettett v. City of Yankton, 26 N.W.2d 460.

Utah.—Barnes v. Lehi City, 279 P. 878, 74 Utah 321.

Reason for rule

The special fund doctrine is based on theory that an obligation incurred in acquisition, construction, or extension of income-bearing prop-

erty, and payable solely from income of that property, is not a debt of the municipality.—People ex rel. City of Chicago v. Barrett, 26 N.E.2d 478, 373 Ill. 393.

Specific constitutional authorization

Legality of contractual provisions which made bonds which city undertook to issue payable out of revenues from passenger terminal could not be questioned where such provisions were specifically authorized by constitutional amendment permitting city to construct and operate passenger stations.—Hotard v. City of New Orleans, 35 So.2d 752, 213 La. 843, appeal dismissed 69 S.Ct. 67, 335 U.S. 803, 93 L.Ed. —.

Parking meters

Or.—Morris v. City of Salem, 174 P. 2d 192, 179 Or. 666.

3. Ariz.—Humphrey v. City of Phoenix, 102 P.2d 82, 55 Ariz. 374.

Ill.—Krause v. Peoria Housing Authority, 19 N.E.2d 193, 370 Ill. 356.

Ind.—Edwards v. Housing Authority of City of Muncie, 19 N.E.2d 741, 215 Ind. 330.

Mont.—Rutherford v. City of Great Falls, 86 P.2d 656, 107 Mont. 512.

Bonds held not debts of taxpayers

Ky.—Webster v. City of Frankfort Housing Commission, 168 S.W.2d 344, 293 Ky. 114.

Statute construed

The statute providing for slum clearance and low-cost housing with provision for financing by means of self-liquidating revenue bonds could not be construed as authorizing a violation by the city of debt limit imposed by legislature on home-rule cities.—In re Brewster Street Housing Site in City of Detroit, 289 N.W. 493, 291 Mich. 313.

Obligations of housing authority

Statutes creating authorities for purpose of eliminating and rehabilitating blighted sections of municipalities, and specifically providing that bonds or any other obligations of an authority created under the law which are payable from its revenues generally, shall not be debts or liabilities of any municipality, are

not violative of constitutional provisions relating to debt limits for counties, cities, and other municipalities and incorporated districts.—Belovsky v. Redevelopment Authority of City of Philadelphia, 54 A.2d 277, 357 Pa. 329, 172 A.L.R. 953—Dorman v. Philadelphia Housing Authority, 200 A. 834, 331 Pa. 209.

4. U.S.—Iowa Southern Utilities Co. v. Cassill, C.C.A.Iowa, 69 F.2d 703—City of Jerseyville, Ill., v. Connett, C.C.A.Ill., 49 F.2d 246.

Ala.—Smith v. Waterworks Board of City of Cullman, 175 So. 380, 234 Ala. 418—Randall v. State ex rel. City of Tuskegee, 172 So. 277, 233 Ala. 446—State ex rel. Radcliff v. City of Mobile, 155 So. 872, 229 Ala. 93—In re Opinions of the Justices, 145 So. 481, 226 Ala. 18.

Ariz.—Crandall v. Town of Safford, 56 P.2d 660, 47 Ariz. 402—Corpus Juris quoted in Guthrie v. City of Mesa, 56 P.2d 655, 657, 47 Ariz. 336.

Ark.—City of Harrison v. Braswell, 194 S.W.2d 12, 209 Ark. 1094—McCutchin v. City of Siloam Springs, 49 S.W.2d 1037, 185 Ark. 846.

Del.—Town of Seaford v. Eastern Shore Public Service Co., 24 A.2d 436, 2 Terry 438.

Fla.—Trudnak v. City of Fort Pierce, 185 So. 353, 135 Fla. 573—Corpus Juris cited in State v. City of Clearwater, 184 So. 790, 135 Fla. 148—State v. City of Pensacola, 184 So. 763, 135 Fla. 239—State v. City of Port St Joe, 180 So. 29, 131 Fla. 858—State v. City of Miami, 152 So. 6, 113 Fla. 280.

Ga.—Reed v. City of Smyrna, 39 S.E. 2d 668, 201 Ga. 228.

Ill.—Branigar v. Village of Riverdale, 72 N.E.2d 201, 396 Ill. 534—People v. Chicago Transit Authority, 64 N.E.2d 4, 392 Ill. 77—Wolcott v. Village of Lombard, 57 N.E. 2d 351, 387 Ill. 621—City of Edwardsville v. Jenkins, 33 N.E.2d 698, 376 Ill. 327, 184 A.L.R. 891—People ex rel. City of Chicago v. Barrett, 26 N.E.2d 478, 373 Ill. 393—Simpson v. City of Highwood, 33 N.E.2d 62, 372 Ill. 212, 124 A.L.

been theretofore owned by the municipality, and no | revenue has been theretofore created from it,⁵ even

R. 1459—Hairgrove v. City of Jacksonville, 8 N.E.2d 187, 366 Ill. 163.
 Iowa.—**Corpus Juris** cited in Interstate Power Co. v. Incorporated Town of McGregor, 296 N.W. 770, 778, 230 Iowa 42, 146 A.L.R. 315—Wyatt v. Town of Manning, 250 N.W. 141, 217 Iowa 929.
 Ky.—Selle v. City of Henderson, 218 S.W.2d 645, 309 Ky. 599—Cawood v. Coleman, 172 S.W.2d 548, 294 Ky. 858—Francis v. City of Bowling Green, 82 S.W.2d 804, 259 Ky. 525.
 Mich.—Young v. City of Ann Arbor, 255 N.W. 579, 267 Mich. 241.
 Minn.—Struble v. Nelson, 15 N.W. 2d 101, 217 Minn. 610—Williams v. Village of Kenyon, 244 N.W. 558, 187 Minn. 161.
 Mo.—**Corpus Juris** cited in City of Springfield v. Monday, 185 S.W.2d 788, 792, 353 Mo. 981—Grossman v. Public Water Supply Dist. No. 1 of Clay County, 96 S.W.2d 701, 339 Mo. 344—Sager v. City of Stanberry, 78 S.W.2d 431, 336 Mo. 213.
 Mont.—Farmers State Bank of Conrad v. City of Conrad, 47 P.2d 853, 100 Mont. 415.
 Neb.—State ex rel. Consumers Public Power Dist. v. Boettcher, 291 N. W. 709, 138 Neb. 22.
 N.C.—Williamson v. City of High Point, 195 S.E. 90, 213 N.C. 96.
 N.D.—Stark v. City of Jamestown, 37 N.W.2d 516—State ex rel. Syvertson v. Jones, 23 N.W.2d 54, 74 N. D. 465—Marks v. City of Mandan, 296 N.W. 39, 70 N.D. 474—**Corpus Juris** cited in Thomas v. McHugh, 256 N.W. 763, 772, 65 N.D. 149—**Corpus Juris** cited in Lang v. Cavalier, 228 N.W. 819, 826, 59 N.D. 75.
 Or.—City of Cascade Locks v. Carlson, 90 P.2d 787, 161 Or. 557.
 Tex.—City of Waco v. McCraw, 93 S.W.2d 717, 127 Tex. 268—**Corpus Juris** quoted in City of Fort Worth v. Bobbitt, 41 S.W.2d 228, 234, 121 Tex. 14—City of Seymour v. Municipal Acceptance Corporation, Civ.App., 96 S.W.2d 814, error dismissed.
 Utah.—Utah Power & Light Co. v. Ogden City, 79 P.2d 61, 95 Utah 161—Utah Power & Light Co. v. Provo City, 74 P.2d 1191, 94 Utah 203, certiorari denied 59 S.Ct. 92, 305 U.S. 628, 83 L.Ed. 402—Wadsworth v. Santaquin City, 28 P.2d 161, 83 Utah 321—**Corpus Juris** cited in Fjeldsted v. Ogden City, 38 P.2d 144, 150, 83 Utah 278.
 Wis.—Flottum v. City of Cumberland, 291 N.W. 777, 234 Wis. 654—State ex rel. Morgan v. City of Portage, 184 N.W. 376, 174 Wis. 588.

44 C.J. p 1181 note 62.

Contract whereby city agreed to purchase water from another city was held not violative of constitutional limitation on theory that water rentals due under contract would be charge against general revenues, since rentals were to be paid from revenue derived from distribution of water.—McGehee v. Williams, 87 S. W.2d 46, 191 Ark. 643.

Cost partly derived from general funds

Proposed municipal revenue bonds to be issued in obtaining a portion of funds needed for construction of municipal water system did not create a debt in excess of statutory limitations, notwithstanding part of cost of project was to be derived from general fund of city and part from sale of general obligation bonds.—Ritchie v. Council of City of Harrisville, 289 N.W. 197, 291 Mich. 415.

Voluntary contributions from general funds

A city may voluntarily, but not as a matter of obligation, make contributions from general revenue sources to liquidate revenue bonds payable solely from income arising from operation of enterprise built or purchased from proceeds of such bonds, and such contributions do not invalidate the issue of such bonds because of constitutional debt limitations, where they are made from existing or presently available revenues.—State ex rel. Public Institutional Bldg. Authority v. Griffith, 22 N.E.2d 200, 135 Ohio St. 604.

County revenue bonds

Where expense for constructing proposed sewage disposal system for district in county would be paid by grant from federal government and by issuance of county revenue bonds, bond issue was not an obligation of political subdivisions of the district within debt limitation provisions of statute and constitution.—Drain Com'r of Oakland County v. City of Royal Oak, 10 N.W.2d 435, 306 Mich. 124.

Test whether city contract for purchase of machinery is within constitutional limitation of indebtedness is whether price is to be paid wholly out of earnings of improvement or otherwise.—Bell v. City of Fayette, 28 S.W.2d 356, 325 Mo. 75.

Provision affording notice of bondholders' rights

Provision, in revenue bonds issued by municipality for purpose of financing construction of hydroelectric system, that bonds should be payable solely out of revenues of the system would put bondholders on notice that they had no right to compel levy of any tax to enforce

payment of principal or interest, as respects whether bonds were invalid as a general indebtedness of city.—McGuinn v. City of High Point, 8 S.E.2d 462, 217 N.C. 449, 128 A.L.R. 608.

Source of supply

Stipulation that city would not purchase, for resale through its presently owned electric distribution system, electric energy from any source other than proposed municipal hydroelectric system when and as long as energy from system was available, to be paid for solely out of the gross revenues of the presently owned electric distribution system and to be considered merely as an expense of operating such system, was in harmony with special-fund doctrine, as respects whether bonds were invalid as a general indebtedness of the city.—McGuinn v. City of High Point, supra.

5. Ala.—Norton v. Lusk, 26 So.2d 849, 248 Ala. 110—Chamberlain v. Board of Com'rs of City of Mobile, 11 So.2d 724, 243 Ala. 662—Kendrick v. City of Birmingham, 6 So.2d 82, 242 Ala. 112—Smith v. Town of Guin, 155 So. 865, 229 Ala. 61—Oppenheim v. City of Florence, 155 So. 859, 229 Ala. 50—In re Opinions of the Justices, 152 So. 901, 228 Ala. 140—In re Opinions of the Justices, 148 So. 111, 226 Ala. 570.

Indebtedness payable from revenue of improved or extended system see infra subdivision b (2) (b) of this section.

Completion of unfinished system

(1) Where proposed improvements will be, in effect, the completion of an unfinished system left incomplete through error or miscalculation or will, in effect, create a new system, a proposed issue of bonds has been held not invalid as causing a city to exceed its constitutional debt limit.—Fuller v. City of Cullman, 27 So. 2d 203, 248 Ala. 236.

(2) Thus where sewage disposal system of city was inadequate as originally constructed, system would not produce further revenue if it remained unfinished, outstanding bondholders agreed to purchase proposed additional bonds for completion of the system, to be issued on a parity with outstanding bonds, and no revenue of city other than that derived from operation of the system would be pledged to payment of the additional bonds, the proposed bond issue would not create an indebtedness of city affected by constitutional debt limitations.—Fuller v. City of Cullman, 199 So. 2, 240 Ala. 309.

though the municipality is obligated to fix and maintain rates sufficient to pay the principal and interest,⁶ especially where it is stipulated that the breach thereof shall never constitute an indebtedness.⁷

Effect of mortgage or lien. Where, in order to secure payment of an obligation payable from the revenue of income-producing property, a mortgage or lien is imposed on property already owned by a municipality, or on property other than that purchased, an indebtedness is incurred within the limitations on indebtedness,⁸ even though the mortgage itself cannot be foreclosed⁹ and although the city does not otherwise obligate itself to pay;¹⁰ but the mortgaging of property purchased to the party from whom it is purchased is not a violation of the debt limitation provisions.¹¹

(2) Improvements to, or Extensions of, Existing Property or System

(a) Indebtedness payable exclusively

6. Ala.—*Oppenheim v. City of Florence*, 155 So. 859, 229 Ala. 50—*Smith v. Town of Guin*, 155 So. 865, 229 Ala. 61.

Iowa.—*Interstate Power Co. v. Incorporated Town of McGregor*, 296 N.W. 770, 230 Iowa 42, 146 A.L.R. 315.

S.D.—*Mettet v. City of Yankton*, 25 N.W.2d 460.

Utah.—*Utah Power & Light Co. v. Provo City*, 74 P.2d 1191, 94 Utah 203, certiorari denied 59 S.Ct. 92, 305 U.S. 628, 83 L.Ed. 402—*Barnes v. Lehi City*, 279 P. 878, 74 Utah 321.

Covenant to maintain existing rates

A municipality did not incur a "general obligation" by covenanting to maintain existing water rates to assure payment of revenue warrants.—*Struble v. Nelson*, 15 N.W.2d 101, 217 Minn. 610.

7. Ala.—*Smith v. Town of Guin*, 155 So. 865, 229 Ala. 61—*Oppenheim v. City of Florence*, 155 So. 859, 229 Ala. 50.

Reason for rule

Obligation of city to fix and maintain rates sufficient to pay principal and interest on bonds, to be paid from operation of electric distribution system, with stipulation that breach shall never constitute indebtedness, is covenant to do act, and does not make bonds a debt of city within constitutional provision.—*Oppenheim v. City of Florence*, supra.

8. Ala.—*Norton v. Lusk*, 26 So.2d 849, 248 Ala. 110—*Town of Opp v. Donaldson*, 163 So. 332, 230 Ala. 680—In re Opinions of the Justices, 148 So. 111, 226 Ala. 570.

Ariz.—*Corpus Juris* quoted in *Guthrie v. City of Mesa*, 56 P.2d 655, 657, 47 Ariz. 336.

Mont.—*Farmers State Bank of Conrad v. City of Conrad*, 47 P.2d 553, 100 Mont. 415.

Tex.—*Corpus Juris* quoted in *City of Fort Worth v. Bobbitt*, 41 S.W.2d 228, 234, 121 Tex. 14.

Wis.—*Roberts v. City of Madison*, 27 N.W.2d 233, 250 Wis. 317—*State ex rel. Morgan v. City of Portage*, 184 N.W. 376, 174 Wis. 588.

44 C.J. p 1131 note 63.

Effect of mortgage or lien on property purchased for public purposes generally see supra § 1852 a.

Rule held inapplicable

(1) Inclusion of land purchased, in pursuance of obligation imposed by waterworks contract, by village as situs for waterworks as property incumbered by trust deed securing mortgage certificates given in payment for waterworks was held not to make entire purchase price additional municipal indebtedness so as to exceed constitutional limit, where trust deed and certificates provided that no municipal liability was thereby created, since land when acquired became a part of the property and plant which village agreed to buy.—*Morris v. Ellis*, 266 N.W. 921, 221 Wis. 307.

(2) Addition of new well to village water system was held not to constitute increase of municipal indebtedness so as to increase indebtedness beyond debt limit, where trust deed on system securing mortgage certificates given in payment therefor provided that it should constitute lien on additions, and that no municipal liability was thereby created.—*Morris v. Ellis*, supra.

9. Ala.—In re Opinion of the Justices, 148 So. 111, 226 Ala. 570.

from revenues of addition or improvement

(b) Indebtedness payable from revenues of entire system

(a) Indebtedness Payable Exclusively from Revenues of Addition or Improvement

According to some authorities, where improvements to, or extensions of, an existing system measurably increase the revenues of the system, the making of a contract will be upheld where the increased revenue or savings alone are pledged to the payment of the price.

There are decisions which hold that, where improvements to, or extensions of, an existing system increase the revenues of the system and such increase can be segregated and measured, the making of a contract or purchase will be upheld where the increased revenues or savings alone are pledged to the payment of the purchase price,¹² and that a breach of such a contract which might

Reason for rule

If the property once owned by the city may be thereby taken out of its control and operation, and put in the control of a receiver for the bondholders and the income from its operation may be taken away from the city, such authority has the effect of creating a debt, even though no foreclosure is authorized. Thereby the effects theretofore owned by the city became subject to be taken from it and devoted to the payment of the claim. This creates a debt, although its payment is thus limited.—In re Opinion of the Justices, supra.

10. Ala.—In re Opinion of the Justices, supra.

11. Iowa.—*Interstate Power Co. v. Incorporated Town of McGregor*, 296 N.W. 770, 230 Iowa 42, 146 A.L.R. 315.

Mont.—*Farmers State Bank of Conrad v. City of Conrad*, 47 P.2d 553, 100 Mont. 415.

S.C.—*Clarke v. South Carolina Public Service Authority*, 181 S.E. 481, 177 S.C. 427.

12. Mo.—*Bell v. City of Fayette*, 28 S.W.2d 356, 325 Mo. 75.

Contract held not to create debt

U.S.—*Fairbanks, Morse & Co. v. City of Wagoner*, 86 F.2d 288, modifying, C.C.A.Okl., 81 F.2d 209.

Deduction for depreciation

(1) Provision, in contract for purchase of equipment for municipally-owned electric utility to be paid for solely out of saving in cost of production of electricity, that cost of production should include operation, maintenance, and upkeep of plant, equipment, and building, was provision for deduction of depreciation,

create a liability is not a debt created by the contract within the constitutional limitation;¹³ and there is authority holding that the sale of bonds to acquire and improve certain property secured by mortgage on such property only and payable out of the income to be derived from such property does not create a debt within the constitutional limitation.¹⁴

(b) Indebtedness Payable from Revenues of Entire System

The authorities are in conflict on the question whether an indebtedness is created, within the meaning of constitutional or statutory limitations, where a municipal corporation improves or extends an existing public project or utility plant and pledges or sets aside the revenue of both the existing plant and the additions or improvements for the payment of the cost of the improvement or extension.

Where a municipal corporation improves or extends an existing public project or utility plant and

pledges or sets aside the revenue both of the existing plant and of the additions or improvements for the payment of the cost of the improvement or extension, the authorities are in conflict on the question whether an indebtedness is thereby created within the meaning of constitutional or statutory limitations on municipal indebtedness. There is authority holding that such a transaction does not create a debt or liability;¹⁵ but the rule that net revenues from the plant can be pledged for the construction of, or improvements to, the plant does not authorize the creation of debts independent of, and not merely incidental to, the main transaction.¹⁶ On the other hand, there is authority holding that, where the purchase price of property sold to the city is not to come solely from the earnings of such property, an obligation to pay income from property other than that purchased is not different from an obligation to pay with any

which is an operating cost or expense, and hence, contract did not cast incidental tax burden on city, so as to be void under constitutional provision limiting municipal indebtedness payable out of tax revenues.—*Fairbanks, Morse & Co. v. City of Wagoner, C.C.A.Okla.*, 81 F.2d 209, modified on other grounds 86 F.2d 288.

(2) Where equipment purchased for municipally-owned utility was to be paid for solely from savings in cost of production of electricity, reasonable reserve for depreciation should be deducted in computing savings.—*Fairbanks, Morse & Co. v. City of Wagoner, Okla.*, *supra*.

Voluntary application of income of existing facilities

Where provision of municipal light plant ordinance regarding mortgaging of property specifically excluded existing utility property or income therefrom, and city was not obligated to apply income from existing facilities to payment of utility certificates secured by mortgage, city's voluntary application of such income to payment of certificates would not create debt within constitutional limitation.—*Hairgrove v. City of Jacksonville*, 8 N.E.2d 187, 366 Ill. 168.

Contract authorized by statute
Ga.—*Lawson v. City of Moultrie*, 22 S.E.2d 592, 194 Ga. 699.

13. Mo.—*Bell v. City of Fayette*, 28 S.W.2d 356, 325 Mo. 75.

14. Mo.—*State ex rel. City of Excelsior Springs v. Smith*, 82 S.W.3d 27, 336 Mo. 1104.

Reason for rule

In effect the sale of bonds, purchase of property, and execution of mortgage were simultaneous. Un-

der the statute authorizing the transaction, the city has not and will not contribute property or expend money in aid of the improvement. The sale of the bonds, purchase of the lands, and execution of the mortgage lodged in the city no beneficial interest in the properties covered by the mortgage. The city holds only the legal title to the properties, conditioned on acquiring, if ever, the beneficial interest by payment of the bonds from income derived from the properties. It follows that the city could lose no property by a foreclosure of the mortgage. In this connection it may be argued that a debt is inherent in the nature of the mortgage, but even so, it may not be a debt within the meaning of the constitution.—*State ex rel. City of Excelsior Springs v. Smith*, *supra*.

15. Ariz.—*Guthrie v. City of Mesa*, 56 P.2d 655, 47 Ariz. 336.

Colo.—*Reimer v. Town of Holyoke*, 27 P.2d 1032, 93 Colo. 571—*Searle v. Town of Haxtun*, 271 P. 629, 84 Colo. 494.

Fla.—*State v. City of Miami*, 152 So. 6, 113 Fla. 280.

Ill.—*City of Edwardsville v. Jenkins*, 33 N.E.2d 598, 376 Ill. 327, 184 A.L.R. 891—*Ward v. City of Chicago*, 173 N.E. 810, 342 Ill. 167—*Maffit v. City of Decatur*, 152 N.E. 602, 322 Ill. 82—*Schumacher v. Klitzing*, 269 Ill.App. 60, affirmed 187 N.E. 458, 353 Ill. 580.

Ind.—*Letz Mfg. Co. v. Public Service Commission of Indiana*, 4 N.E.2d 194, 210 Ind. 467—*Underwood v. Fairbanks, Morse & Co.*, 185 N.E. 118, 205 Ind. 316.

Ky.—*Walker v. City of Maysville*, 220 S.W.2d 96, 310 Ky. 118—*Security Trust Co. v. City of Paris*, 95 S.

W.2d 781, 264 Ky. 846—*Jones v. City of Corbin*, 13 S.W.2d 1013, 227 Ky. 674.

Mich.—*Gilbert v. Traverse City*, 255 N.W. 585, 267 Mich. 257.

Minn.—*Struble v. Nelson*, 15 N.W.2d 101, 217 Minn. 610—*Williams v. City of Kenyon*, 244 N.W. 558, 187 Minn. 161.

Mo.—*Woodmansee v. Kansas City*, 144 S.W.2d 137, 346 Mo. 919.

Mont.—*Farmers State Bank of Conrad v. City of Conrad*, 47 P.2d 853, 100 Mont. 415.

N.M.—*Seward v. Bowers*, 24 P.2d 253, 37 N.M. 385.

N.D.—*Stark v. City of Jamestown*, 37 N.W.2d 516.

16. Colo.—*Reimer v. Town of Holyoke*, 27 P.2d 1032, 93 Colo. 571.

Contract held to create debt within constitutional limitation

Colo.—*Reimer v. Town of Holyoke*, *supra*.

Insurance coverage

(1) A municipality did not incur a debt by covenanting to carry insurance on municipally-owned waterworks, the premiums for which were presumably payable out of revenue of the waterworks and which provided for protection of holders of warrants issued to pay for addition to and improvement of system, since such covenant was for the performance of an act.—*Struble v. Nelson*, 15 N.W.2d 101, 217 Minn. 610.

(2) Payment for insurance coverage to protect holders of warrants issued to raise money to pay for addition to, and improvement of, municipally-owned utility and to be paid wholly out of revenue from the utility was a legitimate expense of selling such warrants.—*Struble v. Nelson*, *supra*.

other funds,¹⁷ and accordingly it has been held that, where a contract for machinery for a municipally-owned public utility contemplates payment from the earnings of the entire plant, such a contract creates a debt within the constitutional limitation,¹⁸ and this rule has been held to apply where a municipality having an existing public project or utility plant issues bonds for constructing extensions and improvements thereto and pledges revenues from the entire system for payment.¹⁹ The status which creates a city debt by pledging revenue from its property then owned contemplates such revenue as the city would own free of restraint but for the pledge of it,²⁰ and, where income from property is held by a city in trust for a specific purpose and the income cannot be used for any other purpose, enlargement of that purpose and pledge of such income to that end are a use within the contemplation of the trust, and do not create a debt within the constitutional limitation.²¹

§ 1854. — Transactions Involving Existing Debts or Funds

A constitutional or statutory limitation on municipal indebtedness neither authorizes repudiation nor affects the making of terms for the payment of existing legal liabilities; and, accordingly, a municipal corporation does not incur a new debt or increase its indebtedness within the

meaning of the limitation when it compromises, funds, or extends an existing debt, or issues duplicate bonds in lieu of bonds which have been lost, destroyed, or mutilated.

A constitutional or statutory limitation on municipal indebtedness neither authorizes repudiation nor affects the making of terms for the payment of existing legal liabilities.²² A municipal corporation does not incur a new debt or increase its indebtedness, within the meaning of constitutional or statutory limitations, when it expends accrued funds;²³ draws a check on funds in the treasury²⁴ or a warrant on such funds;²⁵ enters into a contract or incurs an obligation which is to be, and can lawfully be, satisfied out of money on hand;²⁶ compromises a debt;²⁷ issues duplicate bonds in lieu of bonds which have been lost, destroyed, or so mutilated as to be unfit for circulation;²⁸ or uses a trust fund for which it is already liable.²⁹ A judgment against a city does not create a debt within the constitutional limitation; it is evidence and an adjudication of an indebtedness already created.³⁰

Funding or refunding indebtedness. A municipal corporation does not incur a new debt or increase its indebtedness, within the meaning of constitutional or statutory limitations, when it funds³¹

17. U.S.—City of Campbell, Mo., v. Arkansas-Missouri Power Co., C.C. A.Mo., 55 F.2d 560.

18. U.S.—Fairbanks, Morse & Co. v. City of Wagoner, C.C.A.Okla., 81 F. 2d 209, modified on other grounds 86 F.2d 288—City of Campbell, Mo., v. Arkansas-Missouri Power Co., C.C.A.Mo., 55 F.2d 560.

19. Ala.—Chamberlain v. Board of Com'rs of City of Mobile, 11 So.2d 724, 243 Ala. 662—Fuller v. City of Cullman, 199 So. 2, 240 Ala. 309—Town of Opp v. Donaldson, 163 So. 332, 230 Ala. 689—In re Opinions of the Justices, 148 So. 111, 226 Ala. 570.

Del.—Town of Seaford v. Eastern Shore Public Service Co., 24 A.2d 436, 2 Terry 438.

Utah.—Wadsworth v. Santaquin City, 28 P.2d 161, 83 Utah 321—Fjeldsted v. Ogden City, 28 P.2d 144, 83 Utah 278.

"The rationale of these decisions is that such an arrangement would freeze funds or property already acquired, actually or potentially, and if a county or city could thus freeze a portion of its income, it might by different transactions freeze it all, and cripple its power to function as a governmental institution to the detriment of taxpayers."—Norton v. Lusk, 26 So. 849, 854, 248 Ala. 110.

In Wisconsin

(1) The rule of the text was followed under the constitutional debt limitation as originally adopted.—State ex rel. Morgan v. City of Portage, 184 N.W. 376, 174 Wis. 588.

(2) But the constitution was subsequently amended "to partially avoid the result of" State ex rel. Morgan v. Portage, supra—Roberts v. City of Madison, 27 N.W.2d 233, 235, 250 Wis. 317.

(3) Mortgage bonds financing extension of municipal sewerage system, which pledged property and income of entire system, as authorized by statute, were, under constitutional provision as amended, held not a municipal indebtedness included in debt limitation.—Payne v. City of Racine, 259 N.W. 437, 217 Wis. 550.

20. Ala.—Chamberlain v. Board of Com'rs of City of Mobile, 11 So.2d 724, 243 Ala. 662.

21. Ala.—Chamberlain v. Board of Com'rs of City of Mobile, supra.

22. Ill.—Kocsis v. Chicago Park Dist., 198 N.E. 847, 362 Ill. 24.

23. W.Va.—Camden Clay Co. v. New Martinsville, 68 S.E. 118, 67 W.Va. 525.

24. Ill.—Maffit v. Decatur, 152 N.E. 602, 322 Ill. 82.

25. Ga.—City of Abbeville v. Eureka

Fire Hose Mfg. Co., 170 S.E. 23, 177 Ga. 204—City of Eastman v. Georgia Power Co., 25 S.E.2d 47, 69 Ga. App. 182.

44 C.J. p 1132 note 71.

26. Pa.—Stratton v. Allegheny County, 91 A. 894, 245 Pa. 519.

44 C.J. p 1132 note 72.

Anticipation of current revenue see infra § 1855.

Obligations for particular matters payable from money in treasury:

Current expenses see supra § 1851. Improvements see supra § 1852.

27. N.D.—G. W. Jones Lumber Co. v. City of Marmarth, 272 N.W. 190, 67 N.D. 309—Schieber v. City of Mohall, 268 N.W. 445, 66 N.D. 593. 44 C.J. p 1132 note 73.

28. Kan.—Ottawa First Nat. Bank v. Brown, 230 P. 1038, 117 Kan. 339, 39 A.L.R. 1242.

29. Me.—Ayer v. Bangor, 27 A. 523, 85 Me. 511.

30. S.D.—State v. City of Veblen, 237 N.W. 555, 58 S.D. 451.

31. Fla.—Corpus Juris cited in Sullivan v. City of Tampa, 134 So. 211, 218, 101 Fla. 298.

Ga.—City of Eastman v. Georgia Power Co., 25 S.E.2d 47, 69 Ga. App. 182.

Mont.—Hotchkiss v. Marion, 29 P. 821, 12 Mont. 218.

or extends³² an existing indebtedness, as by issuing funding bonds.³³ This rule is universally followed where a municipality issues new securities and exchanges them directly for old ones, or in the payment of a valid existing indebtedness, since the new securities as soon as issued extinguish the old debt, and, therefore, the aggregate outstanding indebtedness is the same at all times;³⁴ and the rule is generally followed even where the

scheme is for the issuance of new securities in the market and the proceeds thereof are to be used to pay outstanding indebtedness at a later date;³⁵ but there is authority holding that in the latter case the issue and sale of the new securities increase the indebtedness of the municipality within the constitutional prohibition against incurring indebtedness beyond a specified amount.³⁶ Under constitutional provisions prescribing one limit for

Okl.—City of Anadarko v. Kerr, 285 P. 975, 142 Okl. 86.

Pa.—Schuchman v. City of Pittsburgh, 41 A.2d 642, 351 Pa. 527, 157 A.L.R. 785—Appeal of Babich. Com.Pl., 55 Dauph.Co. 188, 35 Mun. L.R. 177.

S.C.—Corpus Juris quoted in Williams v. City of Rock Hill, 180 S.E. 799, 801, 177 S.C. 82.

Funding judgment

(1) Issuance of bonds by village for funding of valid judgment against it on tort claim did not create new indebtedness within constitutional limitation.—Elmhurst Nat. Bank v. Village of Bellwood, 23 N.E.2d 41, 372 Ill. 204.

(2) Where local improvements were completed and accepted by city which obtained credit for the public benefits, confirmation judgments assessing public benefits in the proceeding were debts within the constitutional debt limitation, and substitution of bonds for payment of the judgments in a subsequent year did not create a new debt, and, hence, the constitutional debt limitation was not exceeded in subsequent year by including the judgments in bond issue for that year.—People ex rel. Toman v. Crane, 23 N.E.2d 337, 372 Ill. 228.

Transfer from one municipality to another

(1) An act which transferred obligations of existing poor districts to cities of first class was not invalid as increasing city's debt to amount in excess of limit fixed by constitution.—Managers for Relief and Employment of Poor of Germantown Tp. v. Witkin, 196 A. 837, 329 Pa. 410.

(2) Thus, the constitutional limitation is not violated by transfer of debts of one public corporation to another in connection with annexation or consolidation.—Managers for Relief and Employment of Poor of Germantown Tp. v. Witkin, supra—43 C.J. p 118 note 50 [a] (4).

32. Fla.—Corpus Juris cited in Sullivan v. City of Tampa, 134 So. 211, 218, 101 Fla. 298.

Ky.—City of Frankfort v. Harrod, 143 S.W.2d 292, 283 Ky. 755.

La.—Corpus Juris quoted in State v. Board of Liquidation of State Debt, 182 So. 661, 669, 190 La. 520

—Corpus Juris quoted in Tonry v. Board of Levee Com'rs, 171 So. 836, 837, 186 La. 159.

N.Y.—Poughkeepsie v. Quintard, 32 N.E. 764, 136 N.Y. 275.

Pa.—Shamokin Banking & Trust Co. v. Coal Tp. Poor Dist., 13 Pa. Dist. & Co. 57.

S.C.—Corpus Juris quoted in Williams v. City of Rock Hill, 180 S.E. 799, 801, 177 S.C. 82.

33. U.S.—Corpus Juris cited in Board of Education of Town of Carmen, Okl., v. James, C.C.A.Okl., 49 F.2d 91, 98.

Ariz.—Citrus Growers' Development Ass'n v. Salt River Valley Water Users' Ass'n, 268 P. 773, 34 Ariz. 105.

Fla.—Richard v. City of Fort Lauderdale, 1 So.2d 202, 146 Fla. 349—Corpus Juris cited in Sullivan v. City of Tampa, 134 So. 211, 218, 101 Fla. 298—State v. City of Okeechobee, 127 So. 339, 99 Fla. 617.

Ill.—Elmhurst Nat. Bank v. Village of Bellwood, 23 N.E.2d 41, 372 Ill. 204—Kocsis v. Chicago Park Dist., 198 N.E. 847, 362 Ill. 24—People ex rel. Charles De Leuw & Co. v. Village of Midlothian, 26 N.E.2d 419, 305 Ill.App. 626.

Ky.—Abbott v. Oldham County Board of Education, 114 S.W.2d 1128, 272 Ky. 654—Penrod v. City of Sturgis, 107 S.W.2d 277, 269 Ky. 315—City of Frankfort v. Fuss, 29 S.W.2d 603, 235 Ky. 143.

La.—Corpus Juris quoted in State v. Board of Liquidation of State Debt, 182 So. 661, 669, 190 La. 520—Corpus Juris quoted in Tonry v. Board of Levee Com'rs, 171 So. 836, 837, 186 La. 159.

Mo.—Corpus Juris cited in State v. Smith, 152 S.W.2d 1, 7, 348 Mo. 7—Corpus Juris cited in State v. Smith, 121 S.W.2d 150, 164, 343 Mo. 288.

N.C.—Corpus Juris cited in Hammond v. City of Charlotte, 175 S.E. 148, 151, 206 N.C. 604—Corpus Juris cited in Bolich v. City of Winston-Salem, 164 S.E. 361, 362, 202 N.C. 786.

N.D.—G. W. Jones Lumber Co. v. City of Marmarth, 272 N.W. 190, 67 N.D. 309.

Ohio.—State ex rel. Alden Corporation v. Village of Solon, 7 N.E.2d 550, 133 Ohio St. 362.

Okl.—Kansas City Southern Ry. Co. v. City of Heavener, 54 P.21 165, 175 Okl. 517—Faught v. City of Sapulpa, 292 P. 15, 145 Okl. 164—In re Chicago, R. I. & P. Ry Co., 287 P. 1023, 143 Okl. 170—City of Anadarko v. Kerr, 285 P. 975 142 Okl. 86—City of Madill v. Dabney, 285 P. 832, 142 Okl. 92.

Pa.—Madden v. Borough of Mt. Union, 185 A. 275, 322 Pa. 109—Halpin v. Borough of Rochester, 126 A. 241, 281 Pa. 109.

S.C.—Corpus Juris quoted in Williams v. City of Rock Hill, 180 S.E. 799, 801, 177 S.C. 82.

44 C.J. p 1132 note 76.

Validity of funded debt

The validity of city funding bonds, as respects constitutional limitation on indebtedness of city, depended on whether such limitation was exceeded when any of the debts funded were created, and not on the financial condition of city when bonds were issued.—City of Hickman v. First Nat. Bank in City & State of N. Y., 211 S.W.2d 801, 307 Ky. 702.

34. U.S.—District Township of Doon, Lyon County, Iowa v. Cummins, Iowa, 12 S.Ct. 220, 142 U.S. 366, 35 L.Ed. 1044.

Ariz.—Citrus Growers' Development Ass'n v. Salt River Valley Water Users' Ass'n, 268 P. 773, 34 Ariz. 105.

Wash.—Dearling v. Funk, 32 P.2d 548, 177 Wash. 349.

44 C.J. p 1132 note 76.

35. Ariz.—Citrus Growers' Development Ass'n v. Salt River Valley Water Users' Ass'n, 268 P. 773, 34 Ariz. 105.

La.—State ex rel. Maestri v. Cave, 190 So. 631, 193 La. 419.

44 C.J. p 1132 note 76.

36. U.S.—District Township of Doon, Lyon County, Iowa v. Cummins, Iowa, 12 S.Ct. 220, 142 U.S. 366, 35 L.Ed. 1044.

Wash.—Dearling v. Funk, 32 P.2d 548, 177 Wash. 349.

Reason for rule

It is evident that, if new bonds are issued without a cancellation or surrender of the old ones, the aggregate debt outstanding, and on which the corporation is liable to be sued, is at once and necessarily increased, and, if new bonds equal in amount to the old ones are so issued at one

debts authorized by the council and a different limit for debts authorized by the electorate, a bond issue authorized by the council to refund bonds authorized by the electorate is properly classified as a debt authorized by the electorate.³⁷ The debt limit cannot be extended by the process of bond refunding unless the limit is extended by competent lawmaking authority.³⁸

§ 1855. — Anticipation of Current Revenues

An overburdened municipal corporation may enter into a contract, make an appropriation, or draw a warrant in anticipation of its revenues for the current year; and an indebtedness valid when incurred will not be invalidated by subsequent acts or events; but municipalities should not be permitted to anticipate their revenue to such an extent as to impair the force or nullify the spirit of constitutional or statutory debt limitations.

A contract may be entered into, appropriation made, or a warrant drawn by an overburdened municipal corporation in anticipation of its revenues

for the current year,³⁹ such as taxes already levied and to be collected subsequently,⁴⁰ and according to some,⁴¹ although not other,⁴² authorities, taxes which may thereafter be lawfully levied during the current year. An indebtedness incurred in anticipation of current revenues, which was valid when incurred, will not be rendered invalid by the mere fact that it was in excess of the amount actually collected;⁴³ nor will it be invalidated by the subsequent acts of the municipality,⁴⁴ or by its failure to meet this and other obligations when they matured,⁴⁵ or because the municipal officers failed to pay it out of the proper tax money when collected;⁴⁶ and it has been held that judgment may be entered on such contract in the absence of allegation and proof that taxes available for payment had been collected from the levy of the year in which it was made.⁴⁷ However, municipal corporations should not be permitted to anticipate their revenue to such an extent as to impair the force or nullify the spirit of constitutional or statutory provisions limiting indebtedness;⁴⁸ and it has been

time, is doubled; and it will remain at the increased amount until the proceeds of the new bonds are applied to the payment of the old ones, or until some of the obligations are otherwise discharged.—District Township of Doon, Lyon County, Iowa v. Cummins, Iowa, 12 S.Ct. 220, 142 U.S. 366, 35 L.Ed. 1044.

37. Wash.—Dearling v. Funk, 32 P. 2d 548, 177 Wash. 349, overruling Tabb v. Funk, 17 P.2d 18, 170 Wash. 545.

38. Fla.—City of Miami v. State, 190 So. 774, 139 Fla. 598.

39. U.S.—City of Florence v. Anderson, C.C.A.S.C., 95 F.2d 777—City of Georgetown v. Elliott, C.C.A.S.C., 95 F.2d 774.

Ky.—Kockritz v. City of Henderson, 107 S.W.2d 245, 269 Ky. 334.

La.—Dresser v. Recreation and Park Commission of Parish of East Baton Rouge, 34 So.2d 384, 213 La. 85.

Pa.—Bosak State Bank v. Borough of Old Forge, 163 A. 155, 309 Pa. 79.

44 C.J. p 1132 note 80.

Indebtedness for current expenses payable from current revenues as not subject to limitation on amount of municipal indebtedness generally see supra § 1851.

Estimated income of fire district was properly determined by considering amount of cash on hand, amount required to meet lawful expenditures of fire district during year, amount of taxes which could be lawfully levied for year and properly excluded figures covering prospective improvements, capital out-

lay, and reservoir, including interest and legal expenses, in determining whether district fire commissioners had power to authorize building of a dam—Holman v. Santa Cruz County, Cal.App., 205 P.2d 767.

Express constitutional or statutory authority

Me.—Wakem v. Inhabitants of Town of Van Buren, 15 A.2d 873, 137 Me. 127.

N.J.—Phelps v. Borough of Fort Lee, 188 A. 689, 14 N.J. Misc. 895, affirmed 191 A. 836, 118 N.J. Law 181.

Newly formed municipality

A public utility district, created under statute authorizing officers to borrow money or issue warrants in anticipation of revenue to be derived from tax levies, could operate as going concern and incur indebtedness from effective date of organization, notwithstanding budget required by statute could not be adopted until almost a year after such date, especially in view of provision that statute should not be strictly construed.—Boddy v. Spada, 69 P. 2d 830, 190 Wash. 596.

40. Ala.—Smith v. Town of Guin, 155 So. 865, 229 Ala. 61.

Ill.—Randolph-Perkins Co. v. City of Highland Park, 35 N.E.2d 826, 311 Ill.App. 308.

Mich.—Callahan v. City of Berkley, 12 N.W.2d 431, 307 Mich. 701, rehearing denied 14 N.W.2d 87, 307 Mich. 701.

S.D.—Farrar v. Britton Independent School Dist. of Marshall County, 32 N.W.2d 627.

44 C.J. p 1132 note 81.

Reasonable estimate of unpaid taxes

Debt contracted by municipality in anticipation of taxes will be sustained if debt is within reasonable estimate of unpaid taxes due and collectible.—U. S. Rubber Products v. Town of Batesburg, 190 S.E. 120, 183 S.C. 49, 110 A.L.R. 144.

41. Wash.—Boddy v. Spada, 69 P. 2d 830, 190 Wash. 596—Comfort v. Tacoma, 252 P. 929, 142 Wash. 249. Anticipation of taxes for payment of current expenses see supra § 1851.

42. Ill.—Springfield v. Edwards, 84 Ill. 626.

43. Okl.—Blake v. Abraham, 299 P. 488, 149 Okl. 112.

S.C.—U. S. Rubber Products v. Town of Batesburg, 190 S.E. 120, 183 S.C. 49, 110 A.L.R. 144.

44. Pa.—Bosak State Bank v. Borough of Old Forge, 163 A. 155, 309 Pa. 79.

45. Pa.—Bosak State Bank v. Borough of Old Forge, supra.

46. Me.—Wakem v. Inhabitants of Town of Van Buren, 15 A.2d 873, 137 Me. 127.

S.C.—U. S. Rubber Products v. Town of Batesburg, 190 S.E. 120, 183 S.C. 49, 110 A.L.R. 144.

47. U.S.—City of Georgetown v. Elliott, C.C.A.S.C., 95 F.2d 774.

48. Iowa.—French v. Burlington, 42 Iowa 614.

Or.—Corpus Juris quoted in State ex rel. Umatilla County v. Davis, 85 P.2d 379, 383, 161 Or. 127 rehearing denied 88 P.2d 314, 161 Or. 127.

held that the rule permitting anticipation of taxes in process of collection is limited to the ordinary expenses of the municipality.⁴⁹ Under a statute limiting the power of a district board to borrow and incur indebtedness in anticipation of revenue

for the current year in which the indebtedness is incurred or of the ensuing year thereafter, a loan may be obtained in anticipation of an indebtedness for the current year or of the ensuing year, but not under both plans.⁵⁰

4. EXERCISE OF POWER

§ 1856. In General

There must be a substantial compliance with constitutional, statutory, and charter provisions as to the mode of exercising a municipal power to incur indebtedness or make expenditures. Apart from statute, such power is to be exercised by the governing body of the municipal corporation.

The power of a municipal corporation to incur indebtedness or to make expenditures is to be exercised by its governing body⁵¹ rather than by other boards, officers, or committees,⁵² unless author-

ity is conferred on the latter by statute⁵³ or authorized action of the municipal council.⁵⁴ Constitutional,⁵⁵ statutory,⁵⁶ and charter⁵⁷ provisions as to the mode of exercising the power to incur indebtedness or to make expenditures are mandatory, and a substantial departure therefrom invalidates the corporate action;⁵⁸ statutory provisions with reference to the incurring of public indebtedness by a municipality must be strictly construed if proceedings are instituted before the

49. Or.—State ex rel. Umatilla County v. Davis, 85 P.2d 379, 161 Or. 127, rehearing denied 88 P.2d 314, 161 Or. 127.

50. Cal.—Holman v. Santa Cruz County, App., 205 P.2d 767.

51. La.—Duggan v. New Orleans, 15 La. Ann. 449.

City council of city of the first class had implied power to purchase overcoats for firemen—Calmenon Clothing Co. v. Kruger, 281 N.W. 203, 66 S.D. 224.

Appropriation for volunteer fire companies

Under statute authorizing annual appropriation of money to be paid to volunteer fire companies, the power to appropriate could be exercised only through mayor and city council, and only they could prescribe permitted statutory condition to grant, and the council could not delegate any part of such power to its fire committee, although it could provide that disbursement should be under supervision of such committee, such supervision being required to be essentially administrative and not of a policy-making nature; and neither the committee alone nor mayor and committee together had power to make any agreement with fire companies, concerning distribution of money, that would be binding on council.—Greenwood Volunteer Fire Co. v. Dearden, 12 A.2d 408, 64 R.I. 868.

52. La.—Duggan v. New Orleans, 15 La. Ann. 449.

53. La.—Duggan v. New Orleans, supra.

Liabilities in invitum

Liabilities resting on city in invitum, such as state and county taxes and judgments of courts, do not fall within act providing that city

departments shall not incur liability except with approval of board of finance.—Broadhurst v. City of Fall River, 179 N.E. 586, 278 Mass. 167.

Approval of state board; routine business

(1) The statute creating the state bond and tax board and declaring void any contract incurred by any of named political subdivisions, including municipalities, without consent and approval of the board, was not intended to affect obligations incurred by a public body in the conduct of its routine business.—Smith v. Town of Vinton, 25 So.2d 237, 209 La. 587.

(2) Application of such statute is not restricted to political subdivisions specifically granted power to levy taxes under state constitution and laws.—National Bank of Commerce in New Orleans v. Board of Supervisors of La. State University and Agricultural and Mechanical College, 20 So.2d 264, 206 La. 913.

54. La.—Duggan v. New Orleans, 15 La. Ann. 449.

44 C.J. p 1132 note 90.

Mode of expenditure

Special appropriation by city council for improvements, to be expended under direction of committee, was held valid, since exercise of authority to designate committee to direct expenditure necessarily entitled committee to determine, within limits voted for uses and purposes, how and where appropriation should be expended.—Grimes v. Keenan, 187 A. 100, 88 N.H. 230.

55. Ky.—Belknap v. Louisville, 36 S.W. 1118, 99 Ky. 474, 18 Ky.L. 313, 59 Am.S.R. 478, 34 L.R.A. 256.

44 C.J. p 1132 note 91, p 1133 note 92.

Compliance with provisions held shown

Md.—Johnson v. City of Baltimore, 148 A. 209, 158 Md. 93, 66 A.L.R. 1488.

56. Mass.—Burt v. Municipal Council of City of Taunton, 176 N.E. 511, 275 Mass. 535.

Okl.—Blumenauer v. Kaw City, 77 P.2d 1143, 182 Okl. 409.

Pa.—Shamokin Banking & Trust Co. v. Coal Tp. Poor Dist., 13 Pa. Dist. & Co. 57.

44 C.J. p 1132 note 91, p 1133 note 93. Constitutionality of statutes prescribing mode of exercising power see supra § 1833.

Requirements as to procedure for payment of compensation to employees see supra § 728.

Funds for compliance with health department orders

Statute prescribing manner in which funds are to be provided by municipalities for compliance with orders of state health department is mandatory.—State v. City of Van Wert, 184 N.E. 12, 126 Ohio St. 78.

Adoption by majority vote of council required

N.J.—Boscia v. City of Garfield, 25 A.2d 251, 128 N.J. Law 267.

Nature of emergency held sufficiently set out.—Jamouneau v. Board of Com'rs of City of Newark, 39 A. 2d 420, 132 N.J. Law 240.

57. N.Y.—Schieffelin v. Hylan, 140 N.E. 689, 236 N.Y. 254.

44 C.J. p 1132 note 91.

58. N.J.—Boscia v. City of Garfield, 25 A.2d 251, 128 N.J. Law 267.

Okl.—Blumenauer v. Kaw City, 77 P.2d 1143, 182 Okl. 409.

Pa.—Shamokin Banking & Trust Co. v. Coal Tp. Poor Dist., 13 Pa. Dist. & Co. 57.

44 C.J. p 1133 note 95.

indebtedness has actually been incurred,⁵⁹ and when it is proposed by ordinance to create an indebtedness against the city for which the property of every citizen will be liable, and at least part of which must be paid by future generations, there should be a strict compliance with every preliminary prerequisite.⁶⁰ Where no method or procedure for the disbursement of funds is prescribed, a municipal council is free to adopt any usual, reasonable, and adaptable means.⁶¹

An ordinance is necessary when expressly required,⁶² but not when not required by any law;⁶³ and the approval of a public service commission has been held not required for the purchase of a city hall with utilities surpluses and the crediting of utilities with part payment of a debt to the city.⁶⁴ The mayor may be given power by charter to veto all orders, resolutions, or ordinances of the council for the expenditure of money.⁶⁵

A municipal indebtedness may be created by contract at the time the contract is made or may be created, or undertaken to be created, at a later date pursuant to contract.⁶⁶ A contract between a municipality and a housing authority obligating the former to eliminate unsafe and unsanitary dwelling units, to open and close streets, and to supply other municipal services, but providing that none of its provisions shall be construed as obligating the municipality to levy taxes or as creating a financial obligation on its part, has been held not to necessitate the creation of a debt against the municipality.⁶⁷

Obligation on one dealing with municipal body. One deals at one's own hazard with a municipal body expending public funds,⁶⁸ and is required to

see that the transaction be done and recorded as required by law.⁶⁹

Delegation of authority. Under a statutory provision vesting in the mayor and council the care, management, and control of municipal finances, a council is not authorized to delegate, by resolution, to the mayor or other members of the council authority to incur financial obligations for the municipality by contract not approved or ratified by the council.⁷⁰ An ordinance empowering the board of trustees of a municipal employees' retirement system to determine the amount of the municipality's contribution to a reserve fund without fixing any standards to guide the board except by provisions that it shall adopt mortality and other tables deemed necessary and compute such amount on the basis of actuarial valuation of the system's assets and liabilities under such tables, has been held invalid as delegating the power to make appropriations to an administrative board, contrary to statute;⁷¹ but a contract under which money is to be deposited with trustees, to be paid out by them to persons entitled thereto, has been held not invalid as an unlawful delegation of the right to disburse public funds, where no discretionary power is conferred.⁷²

Emergency. Where a municipal charter provides that an ordinance may be declared an emergency measure on certain grounds, in which case the period required by charter for an ordinance to go into effect may be remitted, it is competent to raise, in an injunction suit, the question whether an emergency exists as to an ordinance appropriating money for the payment of special counsel but containing no declaration as to what the emergency

59. Ohio.—Mehling v. Moorehead, 14 N.E.2d 15, 133 Ohio St. 395.

60. Or.—Henderson v. City of Salem, 4 P.2d 321, 137 Or. 541.

61. Cal.—Sacramento Chamber of Commerce v. Stephens, 299 P. 728, 212 Cal. 607.

Methods of exercise of powers generally see supra § 158.

Funds for advertising city

Cal.—Sacramento Chamber of Commerce v. Stephens, supra.

62. U.S.—Bosworth-Chanute v. Brighton, C.C.A.Colo., 212 F. 964.
Md.—Johnson v. City of Baltimore, 148 A. 209, 158 Md. 93, 66 A.L.R. 1488.

Increase of indebtedness requires ordinance or vote.—Beaver v. Hille, 12 Pa. Dist. & Co. 83.

63. Tex.—Tyler v. Jester, 78 S.W. 1053, 97 Tex. 344.

44 C.J. p 1133 note 97.

64 C.J.S.—25

Constitutional provision held inapplicable

As used in constitutional provision that no town shall contract any "debt by loan in any form" except by means of an ordinance, quoted phrase does not include indebtedness incurred by town for expenses, as evidenced by warrants, or case where supplies are provided or services rendered to municipality without receiving payment at time.—Georgetown Bank of Idaho Springs, 64 P.2d 132, 99 Colo. 519.

Statute held inapplicable

Under statute forbidding cities to contract any "pecuniary liability" except by ordinance, the prohibition did not extend to a debt for gas lighting of streets, which was for the city's current expenses, and payable out of the current revenues of the several years in which it was contracted.—Laycock v. Baton Rouge, 35 La. Ann. 475.

64. Wis.—Reetz v. Kitch, 283 N.W. 348, 230 Wis. 1.

65. N.Y.—People v. Amsterdam, 36 N.Y.S. 59, 90 Hun 488.

66. Okl.—City of Tulsa v. Langley, 168 P.2d 116, 196 Okl. 680.

67. Ga.—Hogg v. City of Rome, 6 S.E.2d 48, 189 Ga. 298.

68. Ill.—Sebastian v. School Directors of School Dist. No. 103, Montgomery County, 47 N.E.2d 121, 317 Ill. App. 524.

69. Ill.—Sebastian v. School Directors of School Dist. No. 103, Montgomery County, supra.

70. Okl.—Blumenauer v. Kaw City, 77 P.2d 1143, 182 Okl. 409.

71. Mich.—Thiesen v. Parker, 31 N.W.2d 806, 320 Mich. 446.

72. S.C.—Green v. City of Rock Hill, 147 S.E. 346, 149 S.C. 234.

consists of, and no showing of the grounds named by the charter as constituting an emergency.⁷³

Statement of indebtedness; showing of validity of debt. A municipal corporation may be required to file a statement of indebtedness before it can incur additional obligations.⁷⁴ An ordinance providing for the funding of the floating indebtedness of a municipality has been held not invalid because of its failure to set forth facts showing the validity of the debt.⁷⁵

Waiver of autonomy. Municipalities within a waterworks district, by joining in an authorization to incur debt for constructing and maintaining a waterworks system for the district as created, surrender or waive any independent autonomy they may possess with reference to the subject matter at issue.⁷⁶

§ 1857. Petition by Property Owners

A statutory requirement of a petition of citizens or property owners as evidence of assent to the incurring of municipal indebtedness is mandatory.

A statutory requirement of a petition of a majority of citizens or property owners, as evidence of taxpayers' assent to the incurring of municipal indebtedness, does not confer power, but is a condition precedent to the exercise of power conferred by statute.⁷⁷ Such a provision is mandatory,⁷⁸ and compliance therewith is essential to the validity of the corporate act creating a debt;⁷⁹ but such a petition is not a condition precedent to

a valid contract for lighting the streets for a number of years,⁸⁰ since such a contract does not create a debt or liability;⁸¹ and it has been held that such a requirement covers only current indebtedness and such matters as ordinarily arise from year to year in the administration of municipal affairs,⁸² and does not apply to a debt incurred for an indispensable matter.⁸³ The petition is not annulled by an election not required by law.⁸⁴ The representations of municipal officers, who are authorized to borrow money on obtaining the written assent of a certain proportion of taxpayers, that such assent has been obtained do not bind the municipality.⁸⁵

§ 1858. Submission to Popular Vote

Constitutional or statutory provisions requiring the submission to popular vote of the question of municipal expenditure or indebtedness confer no power on municipal corporations to incur debts, but are a limitation on such power; ordinances, by-laws, and contracts in violation of these requirements are void.

While it has been declared that, as a general rule, a municipal corporation may evidence its legal obligations by the issuance of nonnegotiable warrants payable in future years out of taxes levied for the purpose, without first submitting the matter to a vote of the qualified voters of the municipality,⁸⁶ the submission to a popular vote of the question of municipal expenditure or indebtedness in certain cases is frequently required by constitutional, statutory, or charter provisions,⁸⁷ and or-

73. Fla.—Fuller v. Gardner, 190 So. 442, 138 Fla. 837.

Borrowing in emergency see *infra* § 1869.

74. Pa.—Schuylkill Co. v. Snyder, 20 Pa.Co. 649.

Statement held not to comply with statute

Pa.—Shamokin Banking & Trust Co. v. Coal Tp. Poor Dist., 13 Pa.Dist. & Co. 57.

75. Ky.—Pace v. City of Paducah, 44 S.W.2d 574, 575, 241 Ky. 568.

"If, in fact, the debt was valid when created, the ordinance is valid."—Pace v. City of Paducah, *supra*.

76. La.—Middleton v. Police Jury, Parish of Jefferson, 125 So. 447, 169 La. 458.

77. N.D.—W. S. Nott Co. v. Sawyer, 161 N.W. 202, 35 N.D. 587.

Petition for:

Election see *infra* § 1832.

Issuance of bonds see *infra* § 1917.

78. Ind.—Pratt v. Luther, 45 Ind. 250.

S.D.—Hubbell v. Custer City, 87 N.W. 520, 16 S.D. 55.

79. Ind.—Pratt v. Luther, 45 Ind. 250.

S.D.—Hubbell v. Custer City, 87 N.W. 520, 16 S.D. 55.

80. Ind.—Seward v. Liberty, 42 N.E. 39, 142 Ind. 551.

81. Ind.—Seward v. Liberty, *supra*.

82. Va.—Ennis v. Town of Herndon, 191 S.E. 655, 168 Va. 539.

Bond issue for sewer and water system held not within requirement —Ennis v. Town of Herndon, *supra*.

83. Ind.—Fowler v. F. C. Austin Mfg. Co., 32 N.E. 596, 5 Ind.App. 489.

84. N.D.—W. S. Nott Co. v. Sawyer, 161 N.W. 202, 35 N.D. 587.

85. N.Y.—Starin v. Genoa, 23 N.Y. 439.

86. Tex.—City of Del Rio v. Lowe, Civ.App., 111 S.W.2d 1208, reversed on other grounds Lowe v. City of Del Rio, 122 S.W.2d 191, 182 Tex. 111.

87. U.S.—Scofield Engineering Co. v. City of Danville, C.C.A.Va., 128 F. 2d 942.

Fla.—State v. City of Clearwater, 184 So. 675, 135 Fla. 112.

Idaho.—Cruzen v. Boise City, 74 P. 2d 1037, 68 Idaho 406.

Md.—Mayor and City Council of Baltimore v. Hofrichter, 11 A.2d 375, 178 Md. 91—Johnson v. City of Baltimore, 148 A. 209, 158 Md. 93, 66 A.L.R. 1488.

Mich.—Salzer v. City of East Lansing, 249 N.W. 16, 263 Mich. 626.

Neb.—O. M. Campbell Co. v. City of Howard, 243 N.W. 653, 123 Neb. 539—Moore v. Central City, 224 N.W. 690, 118 Neb. 326.

N.J.—Jersey Central Power & Light Co. v. Borough of Seaside Heights in Ocean County, 187 A. 533, 117 N.J.Law 253.

N.M.—Henning v. Town of Hot Springs, 102 P.2d 25, 44 N.M. 321.

Okl.—City of Alva v. Mason, 300 P. 784, 150 Okl. 25.

W.Va.—McMillan Motors v. Walker, 178 S.E. 278, 116 W.Va. 6.

44 C.J. p 1133 note 11.

Submission to popular vote of questions of:

Aid to corporations see *infra* § 1873.

finances, by-laws, and contracts in violation of | these requirements are void⁸⁸, and do not give rise

Bond issue see *infra* §§ 1920-1929.
Making of improvement see *supra* § 1066.

Legislative permission for creation of debt was held necessary before the matter could be submitted to the jury.—*City of Baltimore v. Board of Sup'rs of Elections of Baltimore City*, 143 A. 800, 156 Md. 196.

Municipal expenditures for professional services are not debts within constitution requiring an election before expenditures creating municipal debts can be made.—*Hidalgo County Water Imp. Dist. No. 2 v. Feick*, Tex.Civ.App. 111 S.W.2d 742, 746, error dismissed.

District; district bonds

(1) Conservancy district held not within provision.—*People ex rel. Rogers v. Letford*, 79 P.2d 274, 102 Colo. 284.

(2) Special district assessment bonds issued by village which pledged its full faith and credit in payment thereof did not require vote of electors.—*Callahan v. City of Berkley*, 12 N.W.2d 431, 307 Mich. 701, rehearing denied 14 N.W.2d 87, 307 Mich. 701.

The issuance of self-liquidating bonds is not within constitutional provision requiring submission of question involving direct expenditure of public money or issue of bonds for approval of property-owning electors.—*Huron-Clinton Metropolitan Authority v. Boards of Sup's of Wayne, Washtenaw, Livingston, Oakland and Macomb Counties*, 1 N.W.2d 430, 300 Mich. 1.

Housing authority

(1) Housing authority created pursuant to statutory authority for rehabilitation of congested city areas is a municipal corporation entitled to incur indebtedness without approval of voters.—*Cox v. City of Kinston*, 8 S.E.2d 252, 217 N.C. 391.—*Wells v. Housing Authority of City of Wilmington*, 197 S.E. 693, 213 N.C. 744.

(2) A housing authority is not a municipal corporation or political division within constitutional provision prohibiting them from incurring debts without consent of qualified voters, and such authority's obligations will not be debts of a municipality or political division within the provision.—*Stegall v. Southwest Georgia Regional Housing Authority*, 30 S.E.2d 196, 197 Ga. 571.

(3) Housing authority is not a city, town, township or other subdivision of state within constitutional provision limiting indebtedness incurred by such subdivisions unless two thirds of electors approve indebtedness.—*Lloyd v. Twin Falls*

Housing Authority, 113 P.2d 1102, 62 Idaho 592.

Initiative and referendum

(1) Initiative and referendum provisions of city charter were held inapplicable to appropriation ordinances required to make statutory budget system effective.—*State ex rel. Keefe v. City of St. Petersburg*, 145 So. 175, 106 Fla. 742.

(2) Under statute relating to referendums in certain municipalities, the statutory provision relative to effective date of an ordinance adopted by popular vote must be considered, where future municipal expenditures are involved, in light of other statutes requiring preparation, adoption, and publication of an annual budget and an annual appropriation ordinance based on budget, and must be construed to establish merely the right of the beneficiary to receive, and the duty of the municipality to provide, as expeditiously as it legally may, the requisite money.—*Rives v. City of Paducah*, 155 S.W.2d 33, 287 Ky. 709.

(3) Ordinances under initiative and referendum laws generally see *supra* §§ 449-461.

88. U.S.—*Scofield Engineering Co. v. City of Danville*, C.C.A.Va., 126 F.2d 942.—*City of Hamlin v. Brown-Crummer Inv. Co.*, C.C.A.Tex., 93 F.2d 680, certiorari denied *Brown-Crummer Inv. Co. v. City of Hamlin*, 58 S.Ct. 831, 303 US 664, 82 L.Ed. 1122.—*Lumbermen's Trust Co. v. Town of Ryegate*, D.C.Mont., 50 F.2d 219, reversed on other grounds, C.C.A., 61 F.2d 14.—*Washington Water Power Co. v. City of Coeur d'Alene*, D.C.Idaho, 9 F.Supp. 263.

Cal.—*City of Los Angeles v. Offner*, 122 P.2d 14, 19 Cal.2d 483, 145 A.L.R. 1358.—*Garrett v. Swanton*, 13 P.2d 725, 216 Cal. 220.

Idaho.—*General Hospital v. City of Grangeville*, 201 P.2d 750.

Ky.—*Booth v. City of Owensboro*, 118 S.W.2d 684, 274 Ky. 325.—*Jones v. Rutherford*, 10 S.W.2d 296, 225 Ky. 773.—*Little v. Town of Southgate*, 299 S.W. 587, 221 Ky. 604.

Neb.—*O. M. Campbell Co. v. City of Howard*, 243 N.W. 653, 123 Neb. 539.—*Moore v. Central City*, 224 N.W. 690, 118 Neb. 326.

N.C.—*Westbrook v. Town of Southern Pines*, 1 S.E.2d 95, 215 N.C. 20.—*Madry v. Town of Scotland Neck*, 199 S.E. 618, 214 N.C. 461.

Okl.—*Consolidated School Dist. No. 6, Dewey County, v. Panther Oil & Grease Mfg. Co.*, 168 P.2d 613, 197 Okl. 66.—*City of McAlester v. State ex rel. Board of Public Affairs*, 154 P.2d 579, 195 Okl. 1.—*Board of Com'rs of Tulsa County*

v. Summers, 73 P.2d 409, 181 Okl. 312.—*Herd Equipment Co. v. Township of Eagle*, 68 P.2d 420, 180 Okl. 172.—*Cobb v. City of Norman*, 64 P.2d 901, 179 Okl. 126.—*Board of Com'rs of Tulsa County v. Morningside Hospital & Training School for Nurses*, 51 P.2d 928, 175 Okl. 242.—*Hood v. Jones*, 50 P.2d 1124, 174 Okl. 372.—*Board of Com'rs of Okmulgee County v. Alexander*, 42 P.2d 884, 171 Okl. 288.—*City of Tecumseh v. Butler*, 298 P. 256, 148 Okl. 151.—*Zachary v. City of Wagoner*, 292 P. 345, 146 Okl. 268.—*Faught v. City of Sapulpa*, 292 P. 15, 145 Okl. 161.—*In re Bliss*, 285 P. 73, 142 Okl. 1.—*Aaronson v. Smiley*, 285 P. 59, 142 Okl. 29.—*C. D. Coggeshall & Co. v. Smiley*, 285 P. 48, 142 Okl. 8.—*School Dist. No. 2, Consolidated, Pushmataha County, v. Gossett*, 283 P. 249, 140 Okl. 243.—*Town of Red Fork v. Gantt-Baker Co.*, 266 P. 444, 130 Okl. 175.—*Flood v. Town of Shidler*, 260 P. 52, 127 Okl. 148.—*Wilson v. Oklahoma City*, 251 P. 484, 120 Okl. 266.—*Gentis v. Hunt*, 247 P. 358, 121 Okl. 71.

Tex.—*Radford v. City of Cross Plains*, 86 S.W.2d 204, 126 Tex. 153.—*W.Va.—Kanawha Mfg. Co. v. City of Charleston*, 141 S.E. 520, 105 W. Va. 98.

44 C.J. p 1133 note 12.

Effect of invalidity of debt or expenditure see *supra* § 1834.

Executive as well as executed contracts

Okl.—*Herd Equipment Co. v. Township of Eagle*, 68 P.2d 420, 180 Okl. 172.

Emergency

(1) Indebtedness held not authorized as emergency measure without vote.—*Jones v. Rutherford*, 10 S.W.2d 296, 225 Ky. 773.

(2) Emergency as affecting borrowing see *infra* § 1869 b.

Ordinance held not to violate budget law so as to justify refusal to submit it to popular vote.—*State ex rel. Payne v. City of Spokane*, 134 P.2d 950, 17 Wash.2d 22.

Certificates; guaranteeing or paying deficiency

(1) If municipality is liable generally on certificates, such as sewer certificates, debt is created within constitution requiring antecedent vote by qualified electors.—*Henning v. Town of Hot Springs*, 102 P.2d 25, 44 N.M. 321.—*City of Santa Fé v. First Nat. Bank*, 65 P.2d 857, 41 N. M. 130.

(2) City did not have constitutional power, without such vote, to guarantee any deficiency in special fund for payment of sewer certificates, to be paid from general revenues of the city.

to an action on quantum meruit or implied contract;⁸⁹ nor may a municipality, in advance of such approval, enter into a contract which will give rise to an indebtedness,⁹⁰ even though the contract is conditioned on such approval.⁹¹ The action of a city council may, however, be validated by an election held subsequent to such action.⁹²

A constitutional provision of this nature confers no powers on municipalities to incur debts;⁹³ it is a limitation on such power⁹⁴ and, as discussed in Constitutional Law § 52, is not self-executing. Such a provision is a restriction imposed on the municipality alone⁹⁵ and not on the legislature;⁹⁶ so, within the limits permitted by the constitution,⁹⁷ a legislature may authorize a municipality to incur a debt with or without an election.⁹⁸

Under a statute requiring a stated number of days' publication for ordinances, within which a petition for referendum may be called for, and exempting ordinances necessary for the support of existing public institutions of the municipality, a desired municipal auditorium for the construction of which the electors have authorized a bond issue is not such an institution.⁹⁹

Pledge or obligation of taxing power. Any scheme, which may involve or be interpreted as constituting a direct, indirect, or contingent pledge or obligation of a municipality's taxing power will bring it within a constitutional inhibition of the creation of an indebtedness without the consent of the freeholders in an election called to determine the question.¹

§ 1859. — Indebtedness or Expenditure Exceeding Prescribed Limit

- a. Per cent of value of taxable property
- b. Income and revenue of year
- c. Other limitations

a. Per Cent of Value of Taxable Property

Constitutional or statutory provisions precluding a municipal corporation from incurring indebtedness exceeding a specified per cent of the value of the taxable property therein, unless authorized by a prescribed portion of the voters, are mandatory.

Under some constitutional or statutory provisions, a municipal corporation is precluded from incurring an indebtedness in excess of a specified per cent of the value of the taxable property therein,

U.S.—Purcell v. City of Carlsbad, C. C.A.N.M., 126 F.2d 748.

N.M.—City of Santa Fé v. First Nat. Bank, 65 P.2d 857, 41 N.M. 130

(3) Hence, such certificates, payable from special assessments, were void in so far as they made any deficiency payable, without such election, from general revenues of city, although valid in so far as they were payable from special assessments.—City of Santa Fé v. First Nat. Bank, supra.

(4) The provision of a city charter that the city shall pay bonds of special improvement districts which have paid four fifths of the bonds outstanding is not invalid as providing for the creation of a debt or as issuance of bonds or creation of loan, without required authorization by electors.—Montgomery v. City and County of Denver, 80 P.2d 434, 102 Colo. 427.

89. U.S.—Schofield Engineering Co. v. City of Danville, C.C.A.Va., 126 F. 2d 942—City of Hamlin v. Brown-Crummer Inv. Co., C.C.A.Tex., 93 F. 2d 680, certiorari denied Brown-Crummer Inv. Co. v. City of Hamlin, 58 S.Ct. 831, 303 U.S. 664, 82 L. Ed. 1122—Lumbermen's Trust Co. v. Town of Ryegate, D.C.Mont., 50 F.2d 219, reversed on other grounds, C.C.A., 61 F.2d 14.

Implied contracts generally see supra § 975.

90. U.S.—Schofield Engineering Co.

v. City of Danville, C.C.A.Va., 126 F.2d 942, 948.

91. U.S.—Schofield Engineering Co. v. City of Danville, supra.

"The provision that such contract be dependent upon happenings which would give it validity means merely that what was in form a contract was a mere offer which created no obligation until accepted by the city after it had authority to make such contract."—Schofield Engineering Co. v. City of Danville, supra.

92. Mo.—Lamar Water, etc., Co. v. Lamar, 26 S.W. 1025, 31 S.W. 756, 128 Mo. 188, 32 L.R.A. 157.

44 C.J. p 1134 note 13.

93. N.M.—Henning v. Town of Hot Springs, 102 P.2d 25, 44 N.M. 321 —Varney v. City of Albuquerque, 55 P.2d 40, 40 N.M. 90, 106 A.L.R. 222—Lanigan v. Town of Gallup, 131 P. 997, 17 N.M. 627.

94. N.M.—Henning v. Town of Hot Springs, 102 P.2d 25, 44 N.M. 321 —Varney v. City of Albuquerque, 55 P.2d 40, 40 N.M. 90, 106 A.L.R. 222.

44 C.J. p 1133 note 11 [c].

Power to create present debt

N.Y.—Davidson v. City of Elmira, 44 N.Y.S.2d 302, affirmed 46 N.Y.S.2d 655, 267 App.Div. 797, appeal denied 47 N.Y.S.2d 604, 267 App.Div. 928.

Purpose of constitutional provision prohibiting city from borrowing money, except by act of legislature and approval by voters, save in

emergency, is to enable the people themselves to maintain a check on the financial policies of the public officials, and thus protect themselves and their descendants against what they consider an unwarranted and unnecessary increase of the public debt.—Mayor and City Council of Baltimore v. Hofrichter, 11 A.2d 375, 178 Md. 91.

95. Pa.—Vansciver v. Sharon Hill Borough, 33 Pa.Dist. & Co. 383, 28 Del.Co. 41, 30 Mun.L.R. 43.

96. Pa.—Vansciver v. Sharon Hill Borough, supra.

Jurisdiction as to procedure

Legislature has sole jurisdiction to set up procedure whereby body, seeking approval under constitutional amendment providing that limitations on expenditures can be exceeded if voters of municipality authorize excess, can present its application for permission to exceed the allowable.—Skelly Estate Co. v. City and County of San Francisco, 69 P. 2d 171, 9 Cal.2d 28.

97. Iowa.—Chitwood v. Lanning, 257 N.W. 345, 218 Iowa 1256.

98. Iowa.—Chitwood v. Lanning, supra.

99. S.D.—State ex rel. Saylor v. Wait, 278 N.W. 12, 66 S.D. 14.

1. Fla.—Kathleen Citrus Land Co. v. City of Lakeland, 169 So. 356, 124 Fla. 659.

unless authorized to do so by a prescribed portion of the voters,² but within that limit it may incur indebtedness without a vote,³ provided, as discussed supra § 1850, its total indebtedness does not exceed the general limit prescribed by law. Also, under at least one statute a village cannot make expenditures exceeding a specified per cent of the value of the taxable property unless authorized to do so by a majority of the voters.⁴

b. Income and Revenue of Year

- (1) In general
- (2) Meaning and application of terms

(1) In General

A provision that a municipal corporation shall not incur any indebtedness or liability in any year in excess of the income and revenue provided for such year, unless authorized by the electors, is to be construed so as to effectuate its purpose, and any liability not incurred in

conformity therewith is void. Whether an indebtedness is valid under such provision must be determined as of the date of incurring it.

It is not infrequently provided by constitution, statute, or charter that a municipal corporation shall not incur any indebtedness or liability in any year in excess of the income and revenue provided for such year unless authorized by a vote of a stated proportion of the electors.⁵ Under such a provision the validity of a claim against a municipality depends on whether, at the time the indebtedness was incurred, unappropriated revenues remained to meet such indebtedness,⁶ and a claim is valid if at that time such indebtedness, together with all previous valid indebtedness incurred during that fiscal year, did not exceed the income and revenue of the municipality provided for that year.⁷ Such a provision is mandatory⁸ and should be strictly interpreted⁹ so as to make effective the obvious and salutary purposes sought to be ac-

2. U.S.—Lumbermen's Trust Co. v. Town of Ryegate, D.C.Mont., 50 F. 2d 219, reversed on other grounds, C.C.A., 61 F.2d 14.

Pa.—Atkins v. City of Philadelphia, 14 A.2d 423, 339 Pa. 345—Ward v. City of Pittsburgh, 184 A. 240, 321 Pa. 414, 105 A.L.R. 682.

44 C.J. p 1134 note 16.

Limitation of aggregate indebtedness to per cent of value of taxable property see supra § 1847.

Park district

Statute authorizing park district to assume indebtedness of superseded park districts held not to violate statute prohibiting superseded districts from incurring indebtedness in excess of a designated per cent of total assessed value of taxable property therein without referendum.—Kocsis v. Chicago Park Dist., 198 N. E. 847, 362 Ill. 24.

3. Pa.—Schuldice v. Pittsburg, 82 A. 1125, 234 Pa. 90.

44 C.J. p 1134 note 17.

Refunding operation of municipal indebtedness need not be submitted for approval of the electorate.—Schuchman v. City of Pittsburgh, 41 A.2d 642, 351 Pa. 527, 157 A.L.R. 785.

4. N.Y.—Matter of Monticello, 205 N.Y.S. 839, 123 Misc. 556, affirmed 206 N.Y.S. 970, 211 App.Div. 826.

5. U.S.—Iron Products Inv. Co. v. City of Picher, C.C.A.Okl., 83 F.2d 443.

Idaho—General Hospital v. City of Grangeville, 201 P.2d 750—Cruzen v. Boise City, 74 P.2d 1037, 58 Idaho 406.

Ky.—Knepple v. City of Morehead, 192 S.W.2d 189, 301 Ky. 417—Miles v. Lee, 143 S.W.2d 843, 284 Ky. 39—Premier Const. Co. v. Kimmell, 30 S.W.2d 77, 230 Ky. 439.

Mo—Kansas City Power & Light Co. v. Town of Carrollton, 142 S. W.2d 849, 346 Mo. 802.

Okl.—City of McAlester v. State ex rel. Board of Public Affairs, 154 P.2d 579, 195 Okl. 1—Borin v. City of Erick, 125 P.2d 768, 190 Okl. 519—Hood v. Jones, 50 P.2d 1124, 174 Okl. 372—Faught v. City of Sapulpa, 292 P. 15, 145 Okl. 164.

Or.—Fullerton v. Central Lincoln People's Utility Dist., 201 P.2d 524. Utah.—Wadsworth v. Santaquin City, 28 P.2d 161, 83 Utah 321.

44 C.J. p 1134 note 20.

Limitation:

Of indebtedness to yearly revenue generally see supra § 1847.

On exercise of power of employment see supra § 707.

Construction with other provision

Such a provision must be read together with another provision relating to limitation on municipal indebtedness.—Payne v. City of Covington, 123 S.W.2d 1045, 276 Ky. 380, 122 A.L.R. 321.

Such constitutional provision does not conflict with constitutional provisions governing amount of ad valorem tax and increased rate for public buildings.—Oklahoma County Exercise Board v. Kurn, 115 P.2d 113, 189 Okl. 203.

Municipal utility district is not within constitutional prohibition against incurring indebtedness to be repaid from revenues of a succeeding year without assent of two thirds of electors; but under statute an ordinary indebtedness of municipal utility district may not be incurred to be paid from resources derived in future years, without approval of electors.—Strain v. East Bay Municipal Utility Dist., 69 P.2d 191, 21 Cal.App.2d 281.

Claim for legal services to municipality held within provision.—Incorporated Town of Jenks v. Pratt, 278 P. 331, 137 Okl. 156.

6. Okl.—Murrell v. City of Sapulpa, 297 P. 241, 148 Okl. 16.

7. Okl.—Murrell v. City of Sapulpa, supra—Faught v. City of Sapulpa, 292 P. 15, 145 Okl. 164—In re Protest of Texas Pipe Line Co. of Oklahoma, 288 P. 334, 143 Okl. 177.

Assessments in future years

The provision does not require that money be available in one year to pay assessments in future years.—City of Pasadena v. Chamberlain, 36 P.2d 387, 1 Cal.App.2d 125, hearing denied 36 P.2d 392, 1 Cal.App.2d 125.

8. Idaho.—Marsing v. Gem Irr. Dist., 48 P.2d 1099, 56 Idaho 29.

Ky.—Payne v. City of Covington, 123 S.W.2d 1045, 276 Ky. 380, 122 A.L.R. 321.

Okl.—City of McAlester v. State ex rel. Board of Public Affairs, 154 P.2d 579, 195 Okl. 1.

Or.—Fullerton v. Central Lincoln People's Utility Dist., 201 P.2d 524.

9. Ky.—Miles v. Lee, 143 S.W.2d 843, 284 Ky. 39.

"The prohibition against issuing either general obligation or revenue bonds without voter approval is so explicit that we believe that it cannot be overcome by anything short of a clear and positive implication to be found in the language of the statute."—Fullerton v. Central Lincoln People's Utility Dist., Or., 201 P.2d 524, 531.

No discretion

The provision leaves nothing to the discretion of the legislature, judiciary, or administrative officials but to obey and scrupulously regard

complished thereby,¹⁰ although it has also been held that the provision should be liberally construed¹¹ so as to accomplish its wholesome purpose.¹² Any liability sought to be incurred otherwise than in conformity with the constitutional or statutory requirement is void and unenforceable,¹³ despite the

it.—Payne v. City of Covington, 123 S.W.2d 1045, 276 Ky. 380, 122 A.L.R. 321.

10. Ky.—Miles v. Lee, 143 S.W.2d 843, 284 Ky. 89.

Purpose

(1) The primary purpose of such a constitutional provision is to require the political subdivisions of the state enumerated to do business on a cash basis and to avoid reckless expenditures and improvident bond issues.—Marsing v. Gem Irr. Dist., 48 P.2d 1099, 56 Idaho 29.

(2) The intention and plain purpose of such a provision is to require municipal corporations to carry on their corporate operations on a cash or pay-as-you-go plan or basis.

Okl.—Consolidated School Dist. No. 6, Dewey County, v. Panther Oil & Grease Mfg. Co., 168 P.2d 613, 197 Okl. 66—City of Tulsa v. Langley, 168 P.2d 116, 196 Okl. 675—Board of Com'rs of Tulsa County v. Summers, 73 P.2d 409, 181 Okl. 312—Herd Equipment Co. v. Township of Eagle, 68 P.2d 420, 180 Okl. 172—Cobb v. City of Norman, 64 P.2d 901, 179 Okl. 126—Board of Com'rs of Tulsa County v. Morningside Hospital & Training School for Nurses, 51 P.2d 928, 175 Okl. 242—Board of County Com'rs of Okmulgee County v. Alexander, 42 P.2d 884, 171 Okl. 288—In re Bliss, 285 P. 73, 142 Okl. 1—Aaronson v. Smiley, 285 P. 59, 142 Okl. 29—C. D. Coggeshall & Co. v. Smiley, 285 P. 48, 142 Okl. 8—School Dist. No. 2, Consolidated, Pushmataha County ex rel. Hixon v. Gossett, 283 P. 249, 140 Okl. 243—Town of Red Fork v. Gantt-Baker Co., 266 P. 444, 130 Okl. 175—Flood v. Town of Shidler, 260 P. 52, 127 Okl. 148—Wilson v. Oklahoma City, 251 P. 484, 120 Okl. 266—Gentis v. Hunt, 247 P. 358, 121 Okl. 71.

Or.—Fullerton v. Central Lincoln People's Utility Dist., 201 P.2d 524, 44 C.J. p 1134 note 20 [b] (1).

(3) The manifest purpose of the provision was to inaugurate and perpetuate the pay-as-you-go plan of government in the subordinate branches mentioned and to prevent fiscal authorities invested with the power to appropriate public moneys from incurring obligations in excess of the income and revenue actually provided for by levy or otherwise.—Payne v. City of Covington, 123 S.W.2d 1045, 276 Ky. 380, 122 A.L.R. 321.

11. Ky.—Payne v. City of Covington, supra.

12. Ky.—Payne v. City of Covington, supra.

13. U.S.—Iron Products Inv. Co. v. City of Picher, C.C.A.Okl., 83 F.8d 443—Washington Water Power Co. v. City of Coeur d'Alene, D.C. Idaho, 9 F.Supp. 263.

Cal.—City of Los Angeles v. Offner, 122 P.2d 14, 19 Cal.2d 483, 145 A.L.R. 1858—Garrett v. Swanton, 13 P.2d 725, 216 Cal. 220.

Idaho.—General Hospital v. City of Grangeville, 201 P.2d 750—Williams v. City of Emmett, 6 P.2d 475, 51 Idaho 500.

Ky.—Booth v. City of Owensboro, 118 S.W.2d 684, 274 Ky. 325—Jones v. Rutherford, 10 S.W.2d 296, 225 Ky. 773.

Mo.—Kansas City Power & Light Co. v. Town of Carrollton, 142 S.W.2d 849, 346 Mo. 802.

Okl.—Consolidated School Dist. No. 6, Dewey County, v. Panther Oil & Grease Mfg. Co., 168 P.2d 613, 197 Okl. 66—Board of Com'rs of Tulsa County v. Summers, 73 P.2d 409, 181 Okl. 312—Herd Equipment Co. v. Township of Eagle, 68 P.2d 420, 180 Okl. 172—Cobb v. City of Norman, 64 P.2d 901, 179 Okl. 126—Layne-Western Co. v. City of Depew, 59 P.2d 269, 177 Okl. 338—Board of Com'rs of Tulsa County v. Morningside Hospital & Training School for Nurses, 51 P.2d 928, 175 Okl. 242—Hood v. Jones, 50 P.2d 1124, 174 Okl. 372—Board of Com'rs of Okmulgee County v. Alexander, 42 P.2d 884, 171 Okl. 288—Protest of Kansas City Southern Ry. Co., 11 P.2d 500, 157 Okl. 246—City of Tecumseh v. Butler, 298 P. 256, 148 Okl. 151—Zachary v. City of Wagoner, 292 P. 345, 146 Okl. 268—Fought v. City of Sapulpa, 292 P. 15, 145 Okl. 164—In re Bliss, 285 P. 73, 142 Okl. 1—Aaronson v. Smiley, 285 P. 59, 142 Okl. 29—C. D. Coggeshall & Co. v. Smiley, 285 P. 48, 142 Okl. 8—School Dist. No. 2, Consolidated, Pushmataha County, v. Gossett, 283 P. 249, 140 Okl. 243—Town of Red Fork v. Gantt-Baker Co., 266 P. 444, 130 Okl. 175—Flood v. Town of Shidler, 260 P. 52, 127 Okl. 148—Wilson v. Oklahoma City, 251 P. 484, 120 Okl. 266—Gentis v. Hunt, 247 P. 358, 121 Okl. 71.

44 C.J. p 1134 note 20.

Effect of invalidity of debt or expenditure see supra § 1834.

Express or implied contract

Okl.—Consolidated School Dist. No. 6, Dewey County, v. Panther Oil & Grease Mfg. Co., 168 P.2d 613, 197 Okl. 66—Herd Equipment Co. v. Township of Eagle, 68 P.2d 420, 180 Okl. 172—Cobb v. City of Norman, 64 P.2d 901, 179 Okl. 126—

Board of County Com'rs of Okmulgee County v. Alexander, 42 P.2d 884, 171 Okl. 288—Wilson v. Oklahoma City, 251 P. 484, 120 Okl. 266—O'Neill Engineering Co. v. Ryan, 124 P. 19, 32 Okl. 738.

Executory as well as executed contracts

Okl.—Consolidated School Dist. No. 6, Dewey County, v. Panther Oil & Grease Mfg. Co., 168 P.2d 613, 197 Okl. 66—Herd Equipment Co. v. Township of Eagle, 68 P.2d 420, 180 Okl. 172—Cobb v. City of Norman, 64 P.2d 901, 179 Okl. 126—Board of Com'rs of Okmulgee County v. Alexander, 42 P.2d 884, 171 Okl. 288—Wilson v. Oklahoma City, 251 P. 484, 120 Okl. 266—O'Neill Engineering Co. v. Ryan, 124 P. 19, 32 Okl. 738.

Estoppel

A municipal corporation prohibited by such provision from incurring an indebtedness cannot thereafter become bound by estoppel with respect to that which it was without power to do in the first instance.—Layne-Western Co. v. City of Depew, 59 P.2d 269, 177 Okl. 338.

Agreement to furnish water to state institution

While a contract to furnish water does not constitute a debt within meaning of statutes pertaining to municipal fiscal affairs, a contract whereby city, in consideration of state board's construction of a lake as part of city's water system, agreed to furnish water at city's expense to a state penitentiary over a period of years at a specified price to be credited against the construction cost, constituted a charge against city's funds beyond current fiscal year and, in absence of assent of city's voters as provided by constitution, was void.—City of McAlester v. State ex rel. Bd. of Public Affairs, 154 P.2d 579, 195 Okl. 1.

Provision held not violated

Cal.—City and County of San Francisco v. Boyd, 110 P.2d 1036, 17 Cal.2d 606.

Idaho.—Foster's, Inc., v. Boise City, 118 P.2d 721, 63 Idaho 201.

Ky.—City of Henderson v. Thomy, 212 S.W.2d 303, 307 Ky. 783—Payne v. City of Covington, 146 S.W.2d 54, 285 Ky. 14—Coffman v. Central City, 101 S.W.2d 204, 267 Ky. 26—Williams v. Raceland, 53 S.W.2d 370, 245 Ky. 212—Premier Const. Co. v. Kimmell, 20 S.W.2d 77, 230 Ky. 439—Cahill-Swift Mfg. Co. v. City of Bardwell, 294 S.W. 171, 219 Ky. 649—City of Covington v. O. F. Moore Co., 290 S.W. 1066, 218 Ky. 102.

fact that such a provision may have the effect of compelling a municipality to pay a higher rate of interest on its borrowings than it otherwise might have to pay.¹⁴ Rights under a charter provision are subject to a constitutional provision of this nature.¹⁵

The determination of whether or not an indebtedness that has been incurred is valid must be made as of the date of the incurring thereof,¹⁶ and not as of the time when the claim is presented for payment,¹⁷ or the warrants¹⁸ or bonds¹⁹ evidencing the indebtedness are issued, or as of the date on which the indebtedness is merged into judgment;²⁰ if

the indebtedness is valid when incurred, it remains valid²¹ without regard to the form of the evidence thereof²² or any subsequent change in conditions.²³ In the absence of some showing on the subject, it will not be presumed that a violation of the constitutional provision will result.²⁴

Every person contracting with a municipal corporation must take notice of such a provision at his peril;²⁵ since, under such a provision, the income or revenues of each year must take care of the expenditures, indebtedness, or liabilities of that year,²⁶ where the indebtedness is contracted without the approval of the electors, he must look

Mo.—State ex rel. Rothrum v. Darby, 137 S.W.2d 532, 345 Mo. 1002.
Okl.—Chicago, R. I. & P. Ry. Co. v. Excise Board of Stephens County, 25 P.2d 630, 165 Okl. 188.

Lien on principle of unjust enrichment

Where debt contracted by loan for purpose of constructing a hospital was a contract expressly prohibited by such constitutional provision, and hospital was constructed on land owned by city, lender was not entitled under principle of unjust enrichment to lien on the hospital and its furnishings and equipment to secure the loan, in absence of an offer to pay city reasonable value of its land.—General Hospital v. City of Grangeville, Idaho, 201 P.2d 750.

14. Or.—Fullerton v. Central Lincoln People's Utility Dist., 201 P.2d 524.

15. Okl.—City of Tulsa v. Sikes, 164 P.2d 863, 196 Okl. 306.

Right of policemen to hold position

Okl.—City of Tulsa v. Sikes, supra—City of Tulsa v. Blair, 148 P.2d 165, 194 Okl. 192—City of Tulsa v. Devine, 148 P.2d 170, 194 Okl. 190—City of Tulsa v. Jacobs, 148 P.2d 172, 194 Okl. 189—City of Tulsa v. Johnson, 145 P.2d 198, 193 Okl. 501, followed in City of Tulsa v. Lynch, 145 P.2d 202, 193 Okl. 505.

16. Cal.—American Co. v. City of Lakeport, 32 P.2d 622, 220 Cal. 548.

Ky.—City of Winchester v. Winchester Bank, 205 S.W.2d 997, 306 Ky. 45—Knepple v. City of Morehead, 192 S.W.2d 189, 301 Ky. 417—City of Covington v. O. F. Moore Co., 290 S.W. 1066, 218 Ky. 102.
Okl.—Murrell v. City of Sapulpa, 297 P. 241, 148 Okl. 16—Faught v. City of Sapulpa, 292 P. 15, 145 Okl. 164—In re Protest of Texas Pipe Line Co., 288 P. 334, 143 Okl. 177.

17. Okl.—Murrell v. City of Sapulpa, 297 P. 241, 148 Okl. 16—Faught v. City of Sapulpa, 292 P. 15, 145 Okl. 164.

18. Okl.—Faught v. City of Sapulpa, supra.

19. Okl.—Faught v. City of Sapulpa, supra.

20. Okl.—Faught v. City of Sapulpa, supra.

21. Ky.—Knepple v. City of Morehead, 192 S.W.2d 189, 301 Ky. 417.
Okl.—Faught v. City of Sapulpa, 292 P. 15, 145 Okl. 164.

22. Okl.—Faught v. City of Sapulpa, supra.

23. Okl.—Faught v. City of Sapulpa, supra.

Subsequent expenditures for other purposes

If the contract was valid when made, it could not thereafter be invalidated by the municipality by making expenditures for other purposes in excess of its revenue for the year.—City of Winchester v. Winchester Bank, 205 S.W.2d 997, 306 Ky. 45—City of Jackson v. First Nat. Bank of Jackson, 157 S.W.2d 321, 289 Ky. 1—City of Covington v. O. F. Moore Co., 290 S.W. 1066, 218 Ky. 102.

Deficiencies not reasonably anticipated

City's liability for deficiencies arising from failure of special assessment liens to yield enough to satisfy bonds payable out of money collected on special assessments did not exist when bonds were issued, but arose when deficiencies developed after exhaustion of legal remedies to collect full assessments, and where such deficiencies could not reasonably have been anticipated, constitutional debt limitation did not preclude enforcement of liability therefor.—Knepple v. City of Morehead, 192 S.W.2d 189, 301 Ky. 417.

Failure to collect city's notes, which were valid when executed, during the year in which they were contracted, did not constitute a forfeiture making the obligations void.—City of Winchester v. Winchester Bank, 205 S.W.2d 997, 306 Ky. 45.

24. Cal.—City of Oakland v. Williams, 103 P.2d 168, 15 Cal.2d 542.

25. Okl.—Herd Equipment Co. v. Township of Eagle, 68 P.2d 420, 180 Okl. 172—Cobb v. City of Norman, 64 P.2d 901, 179 Okl. 126—Board of Com'rs of Tulsa County v. Morningside Hospital & Training School for Nurses, 51 P.2d 928, 175 Okl. 242—Anadarko Funeral Home v. Scarth, 46 P.2d 539, 178 Okl. 103—Town of Red Fork v. Gantt-Baker Co., 266 P. 444, 130 Okl. 175—Flood v. Town of Shidler, 260 P. 52, 127 Okl. 148—Wilson v. Oklahoma City, 251 P. 484, 120 Okl. 266—O'Neil Engineering Co. v. Ryan, 124 P. 19, 32 Okl. 738.
44 C.J. p 1134 note 21.

"If . . . [a municipality] can become indebted only by pursuing a prescribed course, which it has failed to follow, such fact can be easily ascertained and action taken accordingly."—Payne v. City of Covington, 123 S.W.2d 1045, 1049, 276 Ky. 380, 122 A.L.R. 321.

Rule limited

Persons entering into contracts with a municipality are bound to take notice of the constitutional provision and to know the rights and powers of the city officials to make contracts, but they are not bound to anticipate that illegal claims will be incurred by officers willing to violate the constitution.—City of Covington v. O. F. Moore Co., 290 S.W. 1066, 218 Ky. 102.

26. Cal.—Doland v. Clark, 76 P. 958, 143 Cal. 176—Payne v. City of Covington, 123 S.W.2d 1045, 276 Ky. 380, 122 A.L.R. 321.

Okl.—Consolidated School Dist. No. 6, Dewey County, v. Panther Oil & Grease Mfg. Co., 168 P.2d 613, 197 Okl. 66—Board of Com'rs of Tulsa County v. Summers, 73 P.2d 409, 181 Okl. 312—Herd Equipment Co. v. Township of Eagle, 68 P.2d 420, 180 Okl. 172—Cobb v. City of Norman, 64 P.2d 901, 179 Okl. 126—Board of Com'rs of Tulsa County v. Morningside Hospital and Training School for Nurses, 51 P.

for satisfaction of his claim to the income of the year in which the obligation is contracted,²⁷ and the municipality is precluded, in such case, from paying,²⁸ or contracting to pay,²⁹ the indebtedness out of the income and revenue of future years. However, where indebtedness incurred in a particular year without approval by the electors is limited to the revenue of that year, provision may properly be made for payment after the expiration of the year;³⁰ and where money is available for the payment of an obligation during the fiscal year in which it is incurred, but it is not paid during that year, the creditor is not barred from subsequently recovering³¹ even though such available funds were subsequently expended for other purposes.³² The provision applies without regard to whether the expenditure is on the governmental or the corporate side of municipal powers.³³

Such a provision is not a limitation on the power of a municipality to become indebted in any manner or for any purpose to an amount not exceeding, in any year, the income and revenue provided for that year;³⁴ it is not a limitation on the amount of indebtedness which may exist,³⁵ and is only a

limitation on the amount of indebtedness that may be incurred and the manner in which it may be incurred.³⁶

Such a constitutional provision has been held a limitation on the power of the municipality only,³⁷ and not to restrict the power of the legislature in taxation matters;³⁸ but it has also been held that it is binding on the legislature as well as the municipality,³⁹ that it is not a mere restriction on the power of the legislature to enact laws respecting the subject with which it deals,⁴⁰ and that the legislature may no more impose the debt on the city than the city may voluntarily incur it.⁴¹ Such a provision does not apply to a board of commissioners which is an independent legal entity.⁴²

Emergency. The existence of an emergency has been held not to authorize a bond issue without the vote required by the constitution or statute;⁴³ and it has been held that the only emergency which can legalize municipal expenditure exceeding constitutional limitations without such a vote is the performance of a constitutional governmental duty imposed by law.⁴⁴

2d 928, 175 Okl. 242—Board of Com'rs of Okmulgee County v. Alexander, 42 P.2d 884, 171 Okl. 288—Town of Red Fork v. Gantt-Baker Co., 266 P. 444, 130 Okl. 175—Flood v. Town of Shidler, 260 P. 52, 127 Okl. 148—Wilson v. Oklahoma City, 251 P. 484, 120 Okl. 266—O'Neill Engineering Co. v. Ryan, 124 P. 19, 32 Okl. 788.

27. Cal.—Montague v. English, 51 P. 327, 119 Cal. 225.
Mo.—State v. Weinrich, 236 S.W. 872, 291 Mo. 461.

Income collected from redemption of property from delinquent taxes of a previous year is revenue for such previous year, available to pay a debt of that year.—Newton v. Brodie, 290 P. 1058, 107 Cal.App. 512.

28. Cal.—Doland v. Clark, 76 P. 958, 143 Cal. 176.

Ky.—Payne v. City of Covington, 123 S.W.2d 1045, 276 Ky. 380, 122 A.L.R. 321.

44 C.J. p 1134 note 23.

A casual deficit which occurs notwithstanding a good-faith anticipation and reasonable estimate of revenues and expenditures is not invalid, but should be carried over as an obligation to be paid during following year; such deficits must be deemed to have been so carried over, even though they were actually ignored in preparing budget for succeeding year.—Swinburne v. City of Newport, 181 S.W.2d 421, 297 Ky. 820.

29. Ky.—Southern Bitulithic Co. v.

De Treville, 161 S.W. 560, 156 Ky. 513, 522.

44 C.J. p 1134 note 24.

30. Utah.—Muir v. Murray City, 186 P. 433, 55 Utah 368.

44 C.J. p 1135 note 25.

31. Cal.—Title Guarantee & Trust Co. v. City of Long Beach, 47 P.2d 472, 4 Cal.2d 56—C. J. Kubach Co. v. City of Long Beach, 48 P.2d 181, 8 Cal.App.2d 567.

32. Cal.—Title Guarantee & Trust Co. v. City of Long Beach, 47 P.2d 472, 473, 4 Cal.2d 56.

Rights of creditor

Such "expenditure . . . cannot be permitted to defeat the rights of the creditor."—Title Guarantee & Trust Co. v. City of Long Beach, supra.

33. Okl.—Layne-Western Co. v. City of Depew, 59 P.2d 269, 177 Okl. 338.

Powers as governmental or corporate generally see supra § 110.

34. U.S.—Iron Products Inv. Co. v. City of Picher, C.C.A.Okl., 83 F.2d 443.

Okl.—Kansas City Southern Ry. Co. v. City of Heavener, 54 P.2d 165, 175 Okl. 517—Faught v. City of Sapulpa, 292 P. 15, 145 Okl. 164—In re Protest of Texas Pipe Line Co., 288 P. 334, 143 Okl. 177.

35. Okl.—Kansas City Southern Ry. Co. v. City of Heavener, 54 P.2d 165, 175 Okl. 517—Faught v. City of Sapulpa, 292 P. 15, 145 Okl. 164.

36. Okl.—Kansas City Southern Ry.

Co. v. City of Heavener, 54 P.2d 165, 175 Okl. 517—Faught v. City of Sapulpa, 292 P. 15, 145 Okl. 164.

37. Ky.—Covington, etc., Bridge Co. v. Davison, 102 S.W. 339, 31 Ky.L. 425.

38. Ky.—Covington, etc., Bridge Co. v. Davison, supra.

39. Okl.—Hood v. Jones, 50 P.2d 1124, 174 Okl. 372.

40. Ky.—Payne v. City of Covington, 123 S.W.2d 1045, 276 Ky. 380, 122 A.L.R. 321.

41. Okl.—Hood v. Jones, 50 P.2d 1124, 1127, 174 Okl. 372.

"The only power under the Constitution to authorize such indebtedness is in the voters of such city voting at an election held for that purpose."—Hood v. Jones, supra.

42. Cal.—Mesmer v. Los Angeles Public Service Com'rs, 138 P. 935, 23 Cal.App. 578.

43. Or.—Fullerton v. Central Lincoln People's Utility Dist., 201 P. 2d 524.

Emergency as affecting borrowing see infra § 1869 b.

44. Okl.—Layne-Western Co. v. City of Depew, 59 P.2d 269, 177 Okl. 338.

Purchase of pump for waterworks system was not justified as emergency purchase.—Layne-Western Co. v. City of Depew, supra.

Public utilities. A constitutional provision permitting incorporated cities and towns, by an election of the voters, to become indebted for the purpose of purchasing, constructing, or repairing public utilities, to be owned exclusively by the municipality, is mandatory⁴⁵ and must be strictly construed.⁴⁶ There is no inconsistency between such a provision and a further provision of the constitution requiring the assent of the voters to an indebtedness exceeding current revenues and also placing a limitation on the amount of indebtedness which may be so incurred.⁴⁷ The provision is a grant of power to the people of municipalities to incur debt in an amount larger than that permitted for debts incurred for other purposes,⁴⁸ and not a limitation on the legislature;⁴⁹ more particularly, it is a grant of power to cities and towns of the state,⁵⁰ and not a limitation on the legislature preventing it from conferring such powers on other municipal corporations,⁵¹ such as water improvement districts.⁵² Such a provision applies without regard to the source from which the funds pledged to the payment of the indebtedness are to be derived⁵³ or to whether the expenditure is on

the governmental or the corporate side of municipal powers.⁵⁴

(2) Meaning and Application of Terms

- (a) Income and revenue
- (b) Indebtedness or liability
- (c) Year

(a) Income and Revenue

The term "income and revenue," in a provision limiting the indebtedness which a municipal corporation may incur in any year, without the voters' assent, to the income and revenue of that year, includes taxes and sums from other sources. License fees or taxes collectable during the current year are to be included if the return thereon has become stabilized and dependable, but not fines, or miscellaneous receipts, to be received in the future.

The term "income and revenue," as used in a provision limiting the indebtedness and liability which a municipal corporation may incur in any year, without the assent of the voters, to the income and revenue of that year, includes not only taxes,⁵⁵ but also sums coming into the municipal treasury from sources other than taxation;⁵⁶ and even where the word "taxes" is used it is interpreted as having the same meaning as "revenue."⁵⁷ "Or-

45. U.S.—Oklahoma Utilities Co. v. City of Hominy, D.C.Okla., 2 F. Supp. 849.

Okl.—City of McAlester v. State ex rel. Board of Public Affairs, 154 P.2d 579, 195 Okl. 1.

Indebtedness for public utilities generally see *infra* § 1860 c.

Exclusive method

Such provision provides the exclusive method by which a municipality may finance the cost of an electric power plant, other than from current funds on hand or presently to be made available from lawful tax levies already made from current earnings, or from the proceeds of a bond issue authorized by other constitutional provision.—Fairbanks, Morse & Co. v. City of Wagoner, C. C.A.Okla., 86 F.2d 288.

Provision held not complied with

U.S.—Iron Products Inv. Co. v. City of Picher, C.C.A.Okla., 83 F.2d 443.
Okl.—Zachary v. City of Wagoner, 292 P. 345, 146 Okl. 268.

46. U.S.—Oklahoma Utilities Co. v. City of Hominy, D.C.Okla., 2 F. Supp. 849.

Title not acquired when indebtedness created

City's indebtedness is contrary to constitutional provision if acquisition of title to public utility is not contemporaneous with creation of indebtedness, but is postponed until contract price is paid.—Oklahoma Utilities Co. v. City of Hominy, *supra*.

47. Okl.—Layne-Western Co. v. City of Depew, 59 P.2d 269, 177 Okl. 338.

48. Okl.—Lowery v. Water Improvement Dist. No. 5, Tulsa County, 251 P. 748, 122 Okl. 116—State v. Millar, 96 P. 747, 21 Okl. 448.

49. Okl.—Lowery v. Water Improvement Dist. No. 5, Tulsa County, 251 P. 748, 122 Okl. 116—State v. Millar, 96 P. 747, 21 Okl. 448.

50. Okl.—Lowery v. Water Improvement Dist. No. 5, Tulsa County, 251 P. 748, 122 Okl. 116.

51. Okl.—Lowery v. Water Improvement Dist. No. 5, Tulsa County, *supra*.

52. Okl.—Lowery v. Water Improvement Dist. No. 5, Tulsa County, *supra*.

53. Okl.—Layne-Western Co. v. City of Depew, 59 P.2d 269, 177 Okl. 338.

Indebtedness payable from earnings of water or electric system see *infra* subdivision b (2) (b) cc of this section.

54. Okl.—Layne-Western Co. v. City of Depew, *supra*.

Powers as governmental or corporate generally see *supra* § 110.

55. Ky.—Overall v. Madisonville, 102 S.W. 278, 125 Ky. 684, 31 Ky. L. 278, 12 L.R.A.N.S., 433.

Assessed valuation of property and maximum rate of taxation au-

thorized by law may be considered.—Coffman v. Central City, 101 S.W. 2d 204, 267 Ky. 26.

Reasonable estimate of return from poll tax may be used.—Coffman v. Central City, *supra*.

Delinquent taxes

(1) Collectable delinquent taxes of previous years are included.—Overall v. Madisonville, 102 S.W. 278, 125 Ky. 684, 31 Ky.L. 278, 12 L.R.A.N.S., 433.

(2) If due allowance is made in estimating revenue for a possible failure to collect one hundred per cent of current taxes, anticipated collections of delinquent taxes based on experience and a reasonable regard for prospective economic conditions may be included in estimate of revenue.—Swinburne v. City of Newport, 181 S.W.2d 421, 297 Ky. 820.

(3) However, neither estimated nor actual receipts from delinquent taxes could be considered where duplication was involved in that full amount of assessed taxes was considered with respect to preceding year in which taxes concerned became delinquent.—Coffman v. Central City, 101 S.W.2d 204, 267 Ky. 26.

56. Ky.—Coffman v. Central City, *supra*.

44 C.J. p 1135 note 30.

57. Utah.—Muir v. Murray City, 136 P. 433, 55 Utah 368.

44 C.J. p 1135 notes 31, 32.

inary annual income and revenue" has been held, in this connection, to mean net income.⁵⁸ License or occupational fees or taxes collectable, or to be collected, during the current year are to be included,⁵⁹ where an adequate experience of the taxing body has demonstrated that the return on such fees or taxes has become stabilized and dependable.⁶⁰ However, "income and revenue" does not include money borrowed,⁶¹ such as money realized from a sale of bonds issued by the municipality;⁶² nor does it include fines to be received in the future,⁶³ because of their nature, uncertainty, and indefiniteness,⁶⁴ although it includes fines already received;⁶⁵ and this is also true as to miscellaneous receipts.⁶⁶

Revenue from a municipal waterworks, acquired through general obligation bonds which are a direct burden on the taxpayers, is revenue to the municipality and must be taken into consideration in computing its annual income and revenue.⁶⁷

"The phrase 'taxes of the current year,' in . . . the Constitution, means revenues of the current year, and includes all revenues of the city, including taxes, license fees, waterworks income, and departmental fees."—*Fjeldstad v. Ogden City*, 28 P.2d 144, 153, 83 Utah 278.

58. Or.—*Fullerton v. Central Lincoln People's Utility Dist.*, 201 P. 2d 524.

Reason for rule

As far as being a basis for the creation of indebtedness is concerned, "income" can only mean net income, as net income is the only available source from which such indebtedness may be discharged.—*Fullerton v. Central Lincoln People's Utility Dist.*, *supra*.

59. Mo.—*Lamar Water, etc., Co. v. Lamar* 26 S.W. 1025, 31 S.W. 756, 128 Mo. 188, 32 L.R.A. 157.
44 C.J. p 1135 note 35.

60. Ky.—*Coffman v. Central City*, 101 S.W.2d 204, 267 Ky. 26—*Premier Const. Co. v. Kimmell*, 20 S.W.2d 77, 230 Ky. 439, limiting *Overall v. Madisonville*, 102 S.W. 278, 125 Ky. 684, 31 Ky.L. 278, 12 L.R.A., N.S., 433.

61. Mo.—*Webb City, etc., Waterworks Co. v. Carterville*, 43 S.W. 625, 142 Mo. 101.

62. Mo.—*Webb City, etc., Waterworks Co. v. Carterville*, *supra*.

63. Ky.—*Swinburne v. City of Newport*, 181 S.W.2d 421, 297 Ky. 820—*Coffman v. Central City*, 101 S.W.2d 204, 267 Ky. 26—*Overall v. Madisonville*, 102 S.W. 278, 125 Ky. 684, 31 Ky.L. 278, 12 L.R.A., N.S., 433.

64. Ky.—*Swinburne v. City of Newport*, 181 S.W. 421, 297 Ky. 820.

65. Ky.—*Swinburne v. City of Newport*, *supra*.

66. Ky.—*Swinburne v. City of Newport*, *supra*.

67. U.S.—*Iron Products Inv. Co. v. City of Picher*, C.C.A.Okl., 83 F.2d 443.

68. Ky.—*Franklin v. City of Dayton*, 107 S.W.2d 338, 269 Ky. 484—*Havely v. City of Lexington*, 95 S.W.2d 598, 264 Ky. 737—*Hill v. City of Covington*, 95 S.W.2d 278, 264 Ky. 618—*City of Providence v. Providence Electric Light Co.*, 91 S.W. 664, 122 Ky. 237, 28 Ky.L. 1015.

44 C.J. p 1135 note 29 [a] (2).

69. Ky.—*Swinburne v. City of Newport*, 181 S.W.2d 421, 297 Ky. 820.

70. Ky.—*Payne v. City of Covington*, 123 S.W.2d 1045, 276 Ky. 380, 122 A.L.R. 321.

Indebtedness incurred before effective date of opinion

(1) An indebtedness incurred prior to the effective date of the opinion in *Payne v. City of Covington*, *supra*, was valid as long as the expenditures did not exceed in any one year the amount of revenue which might have been produced had the city made maximum levy.—*Mitchell v. City of Glasgow*, 156 S.W.2d 824, 288 Ky. 512.

(2) Payments which city was required to make prior to such effective date on its bonded indebtedness would be excluded from consideration in determining whether floating indebtedness was contracted in violation of the constitution.—*Payne v. City of Covington*, 123 S.W.2d 1045, 276 Ky. 380.

Taxes actually levied or permissible. In Kentucky, under a constitutional provision fixing maximum tax rates and providing that no municipality shall become indebted to an amount exceeding, in any year, "the income and revenue provided for such year," without the assent of two thirds of the voters thereof, it was formerly held that the quoted phrase did not mean the revenue actually levied, but the revenue which would have been produced from a levy of the maximum amount specified in the provision;⁶⁸ but a later decision, referred to as revolutionary⁶⁹ and declared, by itself, to be prospective only,⁷⁰ expressly overruled the prior decisions on this point,⁷¹ so that the validity of a proposed indebtedness depends on whether an amount equivalent thereto would have been available to the municipality had it realized its anticipated revenue based on the taxes actually levied for the year in which it is proposed to incur the indebtedness.⁷²

(3) Where uncollected taxes for the year in which the opinion became effective, plus additional taxes which city might have levied for the year within limitations prescribed by the constitution, would exceed the floating indebtedness, as much of the floating indebtedness as accrued during such year was not incurred in violation of the constitutional provision.—*Payne v. City of Covington*, 123 S.W.2d 1045, 276 Ky. 380, 122 A.L.R. 321.

71. Ky.—*Payne v. City of Covington*, 123 S.W.2d 1045, 276 Ky. 380, 122 A.L.R. 321.

Reason for decision

To say that the words "income and revenue provided for such year" contemplate or mean the maximum levy that might have been made under the section is to license officials to make levies below the maximum allowed in order to curry public favor and then to make expenditures in excess of the income and revenue provided by such levies and otherwise, and thus from year to year incur floating indebtedness to be later funded and passed on to future generations; such a construction subverts and defeats the clear and manifest purpose of the constitution.—*Payne v. City of Covington*, 123 S.W.2d 1045, 276 Ky. 380, 122 A.L.R. 321.

72. Ky.—*Payne v. City of Covington*, 123 S.W.2d 1045, 276 Ky. 380, 122 A.L.R. 321.

The acquirement of immediate and necessary funds, when not exceeding a bona fide anticipation of final collections by municipality for year in which funds are procured, is not creation of inhibited indebtedness.—*Waddle v. City of Somerset*, 134 S.W.2d 956, 281 Ky. 30.

(b) Indebtedness or Liability.

- aa. In general
- bb. Obligation as to payments in future years
- cc. Source of funds for payment

aa. In General

While the terms "indebtedness" and "liability," as used in provisions prohibiting municipal corporations from incurring indebtedness or liability, without the voters' assent, in any one year exceeding the amount of income and revenue provided for that year, have been broadly interpreted, such provisions have been held to apply only to liabilities voluntarily incurred, and contracted for, and to the creation of new debts, and not to liabilities imposed by law, or arising out of tort, or to speculative or contingent liabilities.

As used in a provision prohibiting municipal corporations from incurring indebtedness or liability, without the voters' assent, in any one year exceeding the amount of income and revenue provided for that year, the words "indebtedness or liability" have been held to cover all character of debts and ob-

ligations for which the corporation may become bound.⁷³ However, such a provision has been held not to apply to liabilities which are not voluntarily incurred,⁷⁴ and "indebtedness" has been held to mean a liability to pay money voluntarily contracted by a municipality.⁷⁵ The word "liability" as used in such a provision is a term of broad import,⁷⁶ more sweeping and comprehensive than the word "indebtedness;"⁷⁷ it signifies the state of being bound to pay a debt or discharge some obligation,⁷⁸ and is not dependent on the ability of the creditor to enforce his claim by a judgment for money.⁷⁹

Such a provision has been held to apply only to an indebtedness which the municipality contracts⁸⁰ or to a liability which results in whole or in part from some act or conduct on its part,⁸¹ or, in other words, its application is limited to debts or liabilities which the municipality has discretion to incur or not to incur;⁸² it does not apply to other obligations or liabilities imposed on the municipi-

73. U.S.—Washington Water Power Co. v. City of Cœur d'Alene, D.C. Idaho, 9 F.Supp. 263.

Assessments

(1) Municipal obligation to pay assessment on municipally owned property for improvement constituted indebtedness within constitutional limitation.—City of Pasadena v. McAllaster, 267 P. 873, 204 Cal. 267.

(2) Assessments by city against itself, as authorized by statute, held not within provision.—City of Enid ex rel. Versluis v. Robinson, D.C. Okl., 39 F.Supp. 923.

74. Cal.—American Co. v. City of Lakeport, 32 P.2d 622, 220 Cal. 548.—City of Pasadena v. McAllaster, 267 P. 873, 204 Cal. 267.—Mills v. Houck, 12 P.2d 101, 124 Cal.App. 1.

Okl.—Liberty Nat. Bank v. Excise Board of Jefferson County, 52 P.2d 51, 175 Okl. 245.—Hume v. Wyand, 173 P. 813, 68 Okl. 261.

More fact that city council initiated proceedings does not characterize incurring of obligation as voluntary.—Liberty Nat. Bank v. Excise Board of Jefferson County, 52 P.2d 51, 175 Okl. 245.

Obligation held voluntarily incurred Cal.—City of Pasadena v. Chamberlain, 36 P.2d 387, 1 Cal.App.2d 125, hearing denied 36 P.2d 392, 1 Cal. App.2d 125.

75. Idaho.—Corpus Juris cited in Cruzen v. Boise City, 74 P.2d 1037, 1042, 58 Idaho 408.

Ky.—Knepple v. City of Morehead, 192 S.W.2d 189, 301 Ky. 417.—Overall v. Madisonville, 102 S.W. 278, 125 Ky. 684, 31 Ky.L. 376, 12 L.R. A.N.S., 483.

Okl.—Public Service Co. of Oklahoma v. City of Tulsa, 50 P.2d 166, 174 Okl. 58.—Corpus Juris cited in City of Lawton v. Morford, 293 P. 1068, 1070, 146 Okl. 222.

Contract for engineering services to town payable out of bonds to be issued, and not voted on or authorized at time of making contract, was void as attempt to create present indebtedness contrary to constitution.—Town of Red Fork v. Gantt-Baker Co., 266 P. 444, 130 Okl. 175.

Bonds not municipal obligation

(1) Act authorizing creation of municipal housing commissions and issuance of bonds thereby is not invalid as violating such provision, since such bonds do not constitute debts of municipal taxpayers.—Webster v. City of Frankfort Housing Commission, 168 S.W.2d 344, 293 Ky. 114.

(2) Issuance of sewer improvement bonds in amount exceeding revenue for year was not violative of constitutional provision, since city incurred no liability on bonds.—Carey-Reed Co. v. Sisco, 64 S.W.2d 430, 251 Ky. 22.

(3) Where municipality and bondholders by bond contract waived statutory lien against the physical property, bonds did not constitute an indebtedness against the municipality in violation of constitution.—Cawood v. Coleman, 172 S.W.2d 548, 294 Ky. 558.

76. Cal.—Chester v. Carmichael, 201 P. 925, 187 Cal. 287.

Liability for cost of paving streets held included.—Hood v. Jones, 50 P. 2d 1124, 174 Okl. 372.

77. Idaho.—Feil v. Cœur d'Alene,

129 P. 643, 23 Idaho 32, 43 L.R.A., N.S., 1095.

78. Idaho.—Boise Dev. Co. v. Boise City, 143 P. 531, 26 Idaho 347.—Feil v. Cœur d'Alene, 129 P. 643, 23 Idaho 32, 43 L.R.A., N.S., 1095.

79. Cal.—Chester v. Carmichael, 201 P. 925, 187 Cal. 287.

Mo.—Corpus Juris quoted in State ex rel. Emerson v. City of Mound City, 73 S.W.2d 1017, 1023, 335 Mo. 702, 94 A.L.R. 923.

80. Ky.—Francis v. City of Bowling Green, 82 S.W.2d 804, 259 Ky. 525.—City of Frankfort v. Fuss, 29 S.W.2d 603, 235 Ky. 143.

44 C.J. p 1135 note 42.

Option as to use of sewerage system

Where ordinance left city free to use or not to use sewerage system, and to discontinue its use at any time, paying only for such use as it should make of system, the only debt created would be that incurred for the time during which the service was rendered.—Wheeler v. Board of Com'rs of City of Hopkinsville, 53 S.W.2d 740, 245 Ky. 388.

81. Cal.—Lewis v. Widber, 33 P. 1128, 99 Cal. 412.—Lotts v. Board of Park Com'rs of City of Los Angeles, 57 P.2d 215, 13 Cal.App.2d 625.

82. Cal.—Lotts v. Board of Park Com'rs of City of Los Angeles, supra.

44 C.J. p 1135 note 44.

Salaries of employees or officers of municipality are not within constitutional provision.—Lotts v. Board of Park Com'rs of City of Los Angeles, supra—44 C.J. p 1135 note 44 [a].

pality by law⁸³ or by the sovereign power as expressed in the constitution and valid acts of the legislature,⁸⁴ or arising out of tort⁸⁵ or out of the neglect of municipal officials to do their duty.⁸⁶ Also, such a provision applies only to the creation of a new debt,⁸⁷ and does not prevent the funding,⁸⁸ refunding,⁸⁹ or renewal⁹⁰ of an existing debt without an election; but it is held that a new debt is created when the municipality agrees to pay a definite amount in settlement of uncertain, contingent, and unliquidated claims for damages.⁹¹ Such a provision does not apply to an indebted-

ness or liability before it is definitely contracted or incurred;⁹² it does not apply to an optional obligation before the option is exercised,⁹³ to a remote and speculative obligation,⁹⁴ to a contingent liability, before the happening of the contingency,⁹⁵ or, before the authority is exercised, to a mere authorization to contract an indebtedness at a future time;⁹⁶ and the happening of the contingency has been held not to constitute the incurring of a debt within the meaning of the constitutional provision.⁹⁷

83. Cal.—Wulff-Hansen & Co. v. Silvers, 131 P.2d 373, 21 Cal.2d 253—American Co. v. City of Lakeport, 32 P.2d 622, 220 Cal. 548—Lotta v. Board of Park Com'rs of City of Los Angeles, 57 P.2d 215, 13 Cal.App.2d 625.

Ky.—Francis v. City of Bowling Green, 82 S.W.2d 804, 259 Ky. 525, 44 C.J. p 1135 note 45.

"It was not the purpose of the Constitution to disable a municipality to perform its civic duties imposed on it by law and necessary to its existence"—City of Frankfort v. Fuss, 29 S.W.2d 603, 606, 235 Ky. 143.

Action performed without right or negligently

Indebtedness does not include a liability imposed by law for what is done without right or what is done negligently.—Kneple v. City of Morehead, 192 S.W.2d 189, 301 Ky. 417—City of Frankfort v. Fuss, 29 S.W.2d 603, 235 Ky. 143.

Liability to pay costs for abandoning eminent domain proceedings held liability imposed by law.—Mills v. Houck, 12 P.2d 101, 124 Cal.App. 1.

Obligations held not imposed by law (1) In general.—City of Pasadena v. Chamberlain, 36 P.2d 387, 1 Cal. App.2d 125, hearing denied 36 P.2d 392, 1 Cal.App.2d 125.

(2) Obligation to pay improvement assessment.—City of Pasadena v. McAllister, 267 P. 873, 204 Cal. 267.

84. Okl.—Liberty Nat. Bank v. Exercise Board of Jefferson County, 52 P.2d 51, 175 Okl. 245—Hume v. Wyand, 173 P. 813, 68 Okl. 261.

85. Cal.—Mills v. Houck, 12 P.2d 101, 124 Cal App. 1.

Idaho.—Corpus Juris cited in Cruzen v. Boise City, 74 P.2d 1037, 1042, 58 Idaho 406.

Mo.—Corpus Juris cited in State ex rel. Emerson v. City of Mound City, 78 S.W.2d 1017, 1021, 335 Mo. 702, 94 A.L.R. 923.

Wash.—Corpus Juris cited in Raynor v. King County, 97 P.2d 696, 708, 2 Wash.2d 199.

44 C.J. p 1135 note 46.

Negligence

Idaho.—Cruzen v. Boise City, 74 P. 2d 1037, 58 Idaho 406.

86. Wyo.—Henning v. City of Casper, 57 P.2d 1264, 50 Wyo. 1, rehearing denied 52 P.2d 304, 50 Wyo. 1.

87. Ky.—Culbertson v. Louisville, 128 S.W. 292, 129 S.W. 95, 138 Ky. 747.

88. Cal.—Los Angeles v. Teed, 44 P. 580, 112 Cal. 319.

Ky.—City of Frankfort v. Fuss, 29 S.W.2d 603, 235 Ky. 143.

Funding bonds see infra § 1920.

The indebtedness must be a valid one before it can be funded.—Henderson v. Town of Mt. Vernon, 132 S.W.2d 322, 279 Ky. 829.

Unwarranted overestimate of anticipated revenue collections and failure to levy maximum tax rate for years in which deficits occurred disclosed such a lack of due regard for finances of municipality as to preclude judicial approval of bond issue to fund floating debt created by casual deficits in the revenue during preceding years.—Swinburne v. City of Newport, 181 S.W.2d 421, 297 Ky. 820.

89. Cal.—City of Los Angeles v. Aldrich, 66 P.2d 647, 8 Cal.2d 541. Idaho.—Veatch v. Moscow, 109 P. 722, 18 Idaho 313, 21 Ann.Cas. 1332. Refunding bonds see infra § 1920.

Validity of debts; limitations on indebtedness

A valid floating debt of a municipality may be refunded without a vote of people, provided debts when created were valid and did not violate constitutional provisions limiting municipal indebtedness.—Williams v. Taylor County, 118 S.W.2d 526, 274 Ky. 217—McHargue v. Laurel County, 110 S.W.2d 419, 270 Ky. 638.

90. Ky.—Culbertson v. Louisville, 128 S.W. 292, 129 S.W. 95, 138 Ky. 747.

91. Idaho.—Boise Dev. Co. v. Boise City, 143 P. 531, 26 Idaho 347.

92. Cal.—O. T. Johnson Corp. v. Los Angeles, 245 P. 164, 198 Cal. 303,

followed in Bogue v. Los Angeles, 245 P. 173, 198 Cal. 327.

44 C.J. p 1135 note 52.

93. Ky.—Overall v. Madisonville, 102 S.W. 278, 125 Ky. 684, 31 Ky. L. 278, 12 L.R.A., N.S., 433.

94. Ky.—Premier Const. Co. v. Kimmell, 20 S.W.2d 77, 230 Ky. 439.

95. Cal.—American Co. v. City of Lakeport, 32 P.2d 622, 220 Cal. 548.

Mo.—City of Lebanon v. Schneider, 163 S.W.2d 588, 349 Mo. 712—State ex rel. City of Hannibal v. Smith, 74 S.W.2d 367, 335 Mo. 825.

44 C.J. p 1135 note 54.

"A sum payable upon a contingency is not a debt, nor does it become a debt until the contingency has happened."—City of Oakland v. Williams, 103 P.2d 168, 173, 15 Cal.2d 542—Doland v. Clark, 76 P. 958, 960, 143 Cal. 176—McBean v. City of Fresno, 44 P. 358, 361, 112 Cal. 168, 53 Am.S.R. 191, 31 L.R.A. 794.

Possible defaults in payment of assessments

Cal.—City of Pasadena v. Chamberlain, 36 P.2d 387, 1 Cal.App.2d 125, hearing denied, Sup., 36 P.2d 392, 1 Cal.App.2d 125.

Leading cases

Cal.—McBean v. City of Fresno, supra—Doland v. Clark, 76 P. 958, 143 Cal. 176.

96. U.S.—New York Audit Co. v. Louisville, Ky., 185 F. 349, 107 C. C.A. 467.

Ky.—Louisville v. Parsons, 150 S. W. 498, 150 Ky. 420.

44 C.J. p 1135 note 55.

97. Cal.—American Co. v. City of Lakeport, 32 P.2d 622, 220 Cal. 548.

Reason for rule

(1) The validity of the obligation must be determined as of the time it was incurred; otherwise, the whole doctrine of contingent liability is repudiated.—American Co. v. City of Lakeport, supra.

(2) Validity as of time of incurring indebtedness generally see supra subdivision b (1) of this section.

Judgments. Since a liability in tort is not within the provision, a judgment for a tort,⁹⁸ or the funding of such a judgment,⁹⁹ is likewise exempt from the operation of the provision; but a claim otherwise within such a provision is not withdrawn from its application by being reduced to judgment.¹

Ordinary or necessary expenses. Such a provision has been held not to apply to necessary governmental expenses;² and ordinary and necessary expenses authorized by the general laws of the state are sometimes expressly excepted from the operation of a provision requiring approval by popular vote in order to authorize a municipality to incur any indebtedness or liability in any year exceeding the income and revenue provided for that year.³

bb. Obligation as to Payments in Future Years

The sums which a municipal corporation contracts to pay over a series of years generally cannot be added so as to make a present indebtedness, in the year in which the contract is made, of the entire aggregate, as where the consideration is to be received from time to time in the future; but where the entire consideration is received when the contract is entered into, as in the case of a sale, an indebtedness for the aggregate of the yearly payments is deemed incurred at that time.

The sums which a municipal corporation may be required, under a contract, to pay over a series of years generally cannot be added together so as to make a present indebtedness, in the year in which the contract is made, of the entire aggregate.⁴ However, notwithstanding an arrangement for yearly payments or expenditures by the municipality, an indebtedness for the aggregate amount of the payments is deemed to be incurred during the year when the contract is entered into where the entire consideration is received at that time,⁵ or where each installment is not in payment of the consideration furnished that year,⁶ as where, despite its form, the transaction is really a single purchase of property;⁷ but, despite authority to the contrary,⁸ the rule is otherwise where the consideration is to be received from time to time in the future,⁹ as where there is a contract for water supply¹⁰ or the disposal of sewage,¹¹ or a lease of land to a municipality, for municipal purposes, at an annual rental for a term of years with option to purchase,¹² or an agreement for the construction and leasing of an incinerator to a municipality at a monthly rental, with option to purchase,¹³ it being sufficient in such cases if sufficient income may be provided in each year to meet the payments falling due in that year.¹⁴

98. Mo.—State ex rel. Emerson v. City of Mound City, 73 S.W.2d 1017, 335 Mo. 702.

44 C.J. p 1136 note 68.

99. Cal.—Long Beach v. Lisenby, 179 P. 198, 180 Cal. 52.

1. Cal.—Arthur v. Petaluma, 165 P. 698, 175 Cal. 216—Higgins v. San Diego Water Co., 45 P. 824, 50 P. 670, 118 Cal. 524.

2. Ky.—Francis v. City of Bowling Green, 82 S.W.2d 804, 259 Ky. 525 —City of Covington v. O. F. Moore Co., 290 S.W. 1066, 218 Ky. 102.

3. Idaho.—Hickey v. Nampa, 124 P. 280, 22 Idaho 41.

44 C.J. p 1136 note 71.

4. Ky.—Francis v. City of Bowling Green, 82 S.W.2d 804, 259 Ky. 525.

Annual rentals or charges for services to the municipality are payable only after the performance of the services, and there is no way by which the payments may be precipitated.—Francis v. City of Bowling Green, *supra*.

5. Ky.—Jones v. Rutherford, 10 S.W.2d 296, 225 Ky. 773—Flanders v. Little Rock Graded School, 186 S.W. 506, 170 Ky. 627.

Mo.—Corpus Juris quoted in Sager v. City of Stanberry, 78 S.W.2d 431, 438, 336 Mo. 213.

Rental or installment contracts as affected by provisions limiting indebtedness see *supra* § 1852.

Lease requiring payment in future years creates present indebtedness or liability within constitutional provision.—Williams v. City of Emmett, 6 P.2d 475, 51 Idaho 500.

6. Cal.—City of Los Angeles v. Offner, 122 P.2d 14, 19 Cal.2d 483, 145 A.L.R. 1358—Garrett v. Swanton, 13 P.2d 725, 216 Cal. 220.

"This is so whether the contract be denominated a mortgage, lease, or conditional sale."—City of Los Angeles v. Offner, 122 P.2d 14, 19 Cal.2d 483, 145 A.L.R. 1358—Garrett v. Swanton, 13 P.2d 725, 216 Cal. 220.

7. Cal.—City of Los Angeles v. Offner, 122 P.2d 14, 19 Cal.2d 483, 145 A.L.R. 1358—Garrett v. Swanton, 13 P.2d 725, 216 Cal. 220.

Ky.—Jones v. Rutherford, 10 S.W.2d 296, 225 Ky. 773.

Mo.—Corpus Juris quoted in Sager v. City of Stanberry, 78 S.W.2d 431, 438, 336 Mo. 213.

44 C.J. p 1136 note 57.

Annual purchase of land

However, municipality with purpose of acquiring large tract, total cost to exceed revenue of one year, could yearly purchase land in small parcels without violating constitution or charter.—California Pacific Title & Trust Co. v. Boyle, 287 P. 968, 209 Cal. 398, distinguishing Mahoney v. San Francisco, 257 P. 49, 201 Cal. 248, San Francisco v. Boyle,

233 P. 965, 195 Cal. 426; and Chester v. Carmichael, 201 P. 925, 187 Cal. 287.

8. Mich.—Niles Water-Works v. Niles, 26 N.W. 525, 59 Mich. 311.

9. Cal.—City of Los Angeles v. Offner, 122 P.2d 14, 19 Cal.2d 483, 145 A.L.R. 1358—City of Oakland v. Williams, 103 P.2d 168, 15 Cal.2d 542—Krenwinkle v. City of Los Angeles, 51 P.2d 1098, 4 Cal.2d 611 —California Title & Trust Co. v. Boyle, 287 P. 968, 209 Cal. 398.

10. Cal.—Higgins v. San Diego Water Co., 45 P. 824, 50 P. 670, 118 Cal. 524.

Mo.—State v. Continental Zinc Co., 197 S.W. 112, 272 Mo. 43.

11. Cal.—McBean v. Fresno, 44 P. 358, 112 Cal. 159, 53 Am.S.R. 191, 31 L.R.A. 794.

12. Cal.—Krenwinkle v. City of Los Angeles, 51 P.2d 1098, 4 Cal.2d 611.

13. Cal.—City of Los Angeles v. Offner, 122 P.2d 14, 19 Cal.2d 483, 145 A.L.R. 1358.

14. Cal.—City of Los Angeles v. Offner, *supra*—City of Oakland v. Williams, 103 P.2d 168, 15 Cal.2d 542—California Pacific Title & Trust Co. v. Boyle, 287 P. 968, 209 Cal. 398.

44 C.J. p 1136 note 62.

Leading cases

Cal.—McBean v. Fresno, 44 P. 358.

Sec. Source of Funds for Payment

A provision of the character under consideration has been held to apply regardless of the source of the funds pledged to the payment of the indebtedness, and to a contract for the purchase of utility to be paid for out of the revenue therefrom; under other authority it does not ordinarily apply to an obligation which is payable solely out of a special fund and is not a general obligation of the municipal corporation, such as an improvement payable solely from special assessments.

A provision limiting the indebtedness and liability which a municipal corporation may incur in any year, without the assent of the voters, to the income and revenue of that year, has been held to apply regardless of the source from which the funds pledged to the payment of the indebtedness incurred are to be obtained or derived;¹⁵ but under other authority it does not apply to an obligation which is payable solely out of a special fund and is not a general obligation of the municipality,¹⁶ except when by the terms of the transaction the municipality is obligated directly or indirectly to feed the special fund from general or other reve-

nues in addition to those arising solely from the specific improvement contemplated,¹⁷ or when, by the terms of the transaction, the municipality may suffer a loss if the special fund is insufficient to pay the obligation incurred.¹⁸ The requirement does not apply to indebtedness for an improvement the cost of which is payable only from special assessments,¹⁹ but it does apply to an indebtedness for an improvement which is payable from the proceeds of a sale of bonds which are the obligations of the city,²⁰ even though the city is entitled to reimburse itself from special assessments on abutting property;²¹ and it has been held that the requirement applies to a contract for the purchase of a waterworks system²² or an electric power plant or system, or electric power machinery,²³ to be paid for out of the revenue or earnings thereof, to a bond issue for the improvement of an existing waterworks system, to be paid for out of revenues from the operation of the system,²⁴ to transactions connected with a municipally owned public utility

112 Cal. 159, 53 Am.S.R. 191, 31 L. R.A. 794.

15. Ky.—Jones v. Rutherford, 10 S. W.2d 296, 225 Ky. 773.

Okl.—Layne-Western Co. v. City of Dewey, 59 P.2d 269, 177 Okl. 338—Zachary v. City of Wagoner, 292 P. 345, 146 Okl. 268.

"A city cannot pledge its revenues from any source whatever without creating an indebtedness subject to this constitutional restriction."—Williams v. City of Emmett, 6 P.2d 475, 477, 51 Idaho 500.

16. Cal.—Department of Water and Power of City of Los Angeles v. Vroman, 22 P.2d 698, 218 Cal. 206—Garrett v. Swanton, 13 P.2d 725, 216 Cal. 220—Shelton v. City of Los Angeles, 275 P. 421, 206 Cal. 544.

Low-rent housing and slum-clearance project, to be paid for solely from the revenues thereof and any annual contributions made by the federal authority, held not within provision.—Housing Authority of Los Angeles County v. Dockweiler, 94 P.2d 794, 14 Cal.2d 437.

Utilities

(1) In Missouri, if the obligation to pay the municipal indebtedness is not payable in whole or in part from taxation, the constitutional provision is not violated.—Dodds v. Kansas City, 152 S.W.2d 128, 347 Mo. 1193.

(2) Bonds payable solely from the revenue of a municipal utility do not come within such provision; hence the provision of an ordinance as to the maturing and callability of revenue bonds is not in conflict with such provision, since the latter pro-

vision does not apply to revenue bonds.—Dodds v. Kansas City, supra.

(3) Where municipal bonds for part of cost of constructing bridge are payable solely from tolls collected, they need not be submitted to voters for approval, since they do not create indebtedness within constitutional provision, and ordinances providing that, if such tolls are insufficient, municipality will pay operation, maintenance, and repairs from moneys derived from other sources, did not create indebtedness within provision.—State ex rel. City of Hannibal v. Smith, 74 S.W.2d 867, 335 Mo. 825.

(4) Use of income from an existing utility as well as from extensions thereof to pay bonds issued for the extensions does not create indebtedness within such provision, if the extensions are necessary to make the utility function adequately; where proposed extensions were necessary, fact that ordinance authorizing waterworks bond issue provided that net income from the existing system and from any extensions should be placed in a special fund and used to pay the bonds did not create indebtedness within provision.—City of Lebanon v. Schneider, 163 S.W.2d 588, 349 Mo. 712.

17. Cal.—Garrett v. Swanton, 13 P. 2d 725, 216 Cal. 220.

Rule applied to contract for pumping plant

Cal.—Garrett v. Swanton, supra.

18. Cal.—Garrett v. Swanton, supra.

19. Ky.—Catlettsburg v. Self, 74 S. W. 1064, 115 Ky. 669, 25 Ky.L. 161

—Adams v. Ashland, 80 S.W. 1105, 26 Ky.L. 184.

Indebtedness payable from special assessment as affecting limitation of amount of indebtedness see supra § 1853.

Street improvement bonds to be paid only from special assessments against abutting property are not within the requirement.—Knepple v. City of Morehead, 192 S.W.2d 189, 201 Ky. 417—City of Prestonsburg v. People's State Bank of Frankfort, 72 S.W.2d 1043, 255 Ky. 252.

Indebtedness not payable only from special assessments

Agreement to pay for use of street sprinkler held that of municipality and not one pledging only revenues from special assessments of local improvement district.—Williams v. City of Emmett, 6 P.2d 475, 51 Idaho 500.

20. Ky.—Schuster v. Oakdale, 203 S.W. 715, 180 Ky. 760.

21. Ky.—Schuster v. Oakdale, supra.

22. Idaho.—Fell v. Cour d'Alene, 129 P. 643, 23 Idaho 82, 48 L.R.A., N.S., 1095.

44 C.J. p 1136 note 66.

System acquired through general obligation bonds

Cal.—Iron Products Inv. Co. v. City of Picher, 83 P.2d 443.

23. U.S.—Fairbanks, Morse & Co. v. City of Wagoner, C.C.A.Okl., 86 F. 2d 288.

Idaho.—Miller v. City of Buhl, 284 P. 843, 48 Idaho 668, 72 A.L.R. 682.

Ky.—Jones v. Rutherford, 10 S.W.2d 296, 225 Ky. 773.

24. Utah.—Fjeldsted v. Ogden City, 28 P.2d 144, 88 Utah 278.

when the method of operation is such that the funds derived from its operation are directly or indirectly connected with taxation,²⁵ and to a debt contracted by a loan for the purpose of constructing a hospital, to be repaid out of the proceeds of the operation thereof.²⁶ An ordinance authorizing the payment of interest on unpaid registered warrants of a municipality has been held not invalid as creating an indebtedness or liability exceeding the year's revenue, since interest as well as principal is payable from such revenue.²⁷

(c) Year

The word "year," as used in a provision prohibiting a municipal corporation from incurring any indebtedness or liability in any year in excess of the income and revenue provided for such year, unless properly authorized by the voters, means a calendar, and not a fiscal, year.

The word "year," as used in a provision prohibiting a municipality from incurring any indebtedness or liability in any year in excess of the income and revenue provided for such year, unless authorized by a specified proportion of the electors, means a calendar,²⁸ and not a fiscal,²⁹ year; hence, the showing that a deficit between receipts and disbursements would exist at the end of a fiscal year because taxes levied and payable during the year became delinquent and were not collected does not show a violation of such provision.³⁰

c. Other Limitations

In a provision that no vote by the common council or any branch of a municipal government "which shall require" an expenditure of more than a stated amount for certain purposes shall be valid unless approved by vote at a municipal meeting, the quoted words mean that the test is the cost to the municipality as estimated by the proper municipal board.

It is to be assumed that the legislature, in enacting a charter provision that no vote by the common council or any branch of a municipal gov-

ernment "which shall require" an expenditure of more than a stated amount for certain purposes shall be valid unless approved by vote at a municipal meeting, had in mind the other provisions of the municipal charter.³¹ The reasonable meaning to be attributed to the quoted words is that the test is the cost to the municipality as estimated by the proper municipal board,³² rather than the ultimate cost to which the municipality may be put by reason of facts which neither such board nor the common council could anticipate.³³

§ 1860. — Indebtedness or Expenditure for Particular Purposes

- a. New debts other than for temporary loans
- b. Debts other than for necessary expenses
- c. Indebtedness for public utilities
- d. Extraordinary expenditures
- e. Business enterprises
- f. Other purposes

a. New Debts Other than for Temporary Loans

Whether a particular contract violates a provision prohibiting a municipal corporation from incurring any new debt, except for a temporary loan to supply casual deficiencies of revenue, without the assent of the electors, is to be determined by considering the beneficial purpose and intent of the provision. No new debt is incurred, within the provision, by a contract to pay a specified sum from money on hand or which can be collected from taxes that have been, or may lawfully be, collected during the year in which the contract is made.

In at least one jurisdiction a municipal corporation is prohibited by constitutional provision from incurring any new debt, except for a temporary loan to supply casual deficiencies of revenue, without the assent of two thirds of the qualified electors of the municipality.³⁴ The question whether or not a particular contract violates such a pro-

25. *Okl.—City of Tulsa v. Langley*, 168 P.2d 116, 196 Okl. 680.

26. *Idaho.—General Hospital v. City of Grangeville*, 201 P.2d 750.

27. *Cal.—Voorhees v. Morse*, 34 P. 2d 153, 1 Cal 2d 179.

28. *Iowa.—Corpus Juris cited in Trepp v. Independent School Dist. of Pocahontas*, 240 N.W. 247, 250, 213 Iowa 944.

Mo.—*State ex rel. Rothrum v. Darby*, 137 S.W.2d 532, 345 Mo. 1002.

44 C.J. p 1136 note 72.

"Year" as meaning calendar year generally see the C.J.S. title Time § 9, also 62 C.J. p 963 notes 65-72.

29. *Mo.—State ex rel. Rothrum v. Darby*, supra—*Union Trust, etc., Bank v. Sedalia*, 254 S.W. 28, 300 Mo. 399.

Necessity of vote

It has, however, been held that without vote of people city could not by making contract incur liability which, when added to other liabilities, exceeded revenue for fiscal year.—*Premier Const. Co. v. Kimmell*, 20 S.W.2d 77, 230 Ky. 439.

30. *Mo.—State ex rel. Rothrum v. Darby*, 137 S.W.2d 532, 345 Mo. 1002.

31. *Conn.—Delaney v. City of Hartford*, 7 A.2d 659, 125 Conn. 587.

32. *Conn.—Delaney v. City of Hartford*, supra.

33. *Conn.—Delaney v. City of Hartford*, supra.

Cost of street improvement

Provision was inapplicable to street improvement, the cost of

which as estimated by board of street commissioners was less than the specified amount, notwithstanding, on property owner's appeal, damages appraised to him were increased to such an extent that the total damages would exceed such amount.—*Delaney v. City of Hartford*, supra.

34. *Ga.—Miller v. Head*, 193 S.E. 680, 186 Ga. 694, 44 C.J. p 1136 note 74.

Effect of constitutional amendment

(1) Debt limitation held not altered by constitutional amendment.—*DeJarnette v. Hospital Authority of Albany*, 23 S.E.2d 716, 195 Ga. 189.

(2) Where constitutional amendment limited municipal authority to issue revenue anticipation certifi-

vision is not to be determined merely by prescribing any exact, exhaustive definition of the word "debt," covering all cases; and applying it as a verbal yardstick to the particular contract,³⁵ but rather by considering the beneficial purpose of the constitution and the intent of that instrument in making the provision.³⁶ In various cases a municipality has been held to incur,³⁷ or not to incur,³⁸ a new debt, without the assent of the electors, within the meaning of the provision. The fact that a municipality may not be generally bound for the debt beyond the assets pledged for its repayment will not change the character of the transaction and prevent it from constituting a debt.³⁹

A municipality may, without the assent of the electors and without incurring a new debt within the meaning of the constitution, obligate itself to act as agent in collecting and paying over special assessments for improvements,⁴⁰ or contract to pay a specified sum from money on hand⁴¹ or which can be collected from taxes⁴² that have been⁴³ or may lawfully be⁴⁴ levied during the year in which the contract is made; but a municipality is not justified in incurring a debt without the as-

sent of the electors on the ground that it has sources of revenue consisting of fines and forfeitures⁴⁵ or charges for water and light⁴⁶ from which it is contemplated that money will arise which can be used to discharge the debt.

b. Debts Other than for Necessary Expenses

A constitutional provision prohibiting a municipal corporation from contracting any debt, except for necessary expenses, without authorization by the voters, must be rigidly observed. What constitutes a "necessary expense" is a matter for judicial, rather than legislative, determination; the term is restricted to expenses involving some phase of municipal government.

Some constitutional provisions prohibit a city, town, or other municipal corporation from contracting any debt, or incurring any indebtedness or liability, except for necessary expenses, or ordinary and necessary expenses, unless authorized to do so by a vote of a majority of the qualified voters.⁴⁷ Such a provision is mandatory⁴⁸ and a rigid observance thereof is necessary.⁴⁹ On the other hand, where such a constitutional provision exists, a popular vote is not necessary to authorize a debt for necessary expenses⁵⁰ unless required by

cases for acquisition of revenue-producing undertakings to projects specifically authorized and enumerated, not including electric distribution systems, city was without power to issue certificates to acquire such system without a vote.—*City of Valdosta v. Singleton*, 28 S.E.2d 759, 197 Ga. 194.

Hospital authorities act does not violate such constitutional provisions and limitations.—*DeJarnette v. Hospital Authority of Albany*, 23 S.E.2d 716, 195 Ga. 189.

35. Ga.—Renfroe v. Atlanta, 78 S.E. 449, 140 Ga. 81, 45 L.R.A., N.S., 1178.

36. Ga.—Renfroe v. Atlanta, *supra*.

37. Ga.—DeJarnette v. Hospital Authority of Albany, 23 S.E.2d 716, 195 Ga. 189—*Dortch v. Southeastern Fair Ass'n*, 186 S.E. 685, 182 Ga. 633.

44 C.J. p 1136 note 77.

38. Ga.—Hogansville v. Planters' Bank, 94 S.E. 310, 147 Ga. 346. 44 C.J. p 1136 note 78.

Contract for sale of electric service to municipality
Ga.—*Morton v. City of Waycross*, 160 S.E. 330, 173 Ga. 298.

Lease of tract by municipality to hospital corporation, in consideration of treatment of municipality's poor, no promise being made by the municipality to pay or deliver any sum of money or other thing of value at any time, does not create any debt against the municipality.—

Aven v. Steiner Cancer Hospital, 5 S.E.2d 356, 189 Ga. 126.

39. Ga.—Dortch v. Southeastern Fair Ass'n, 186 S.E. 685, 182 Ga. 633.

40. Ga.—Bainbridge v. Jester, 121 S.E. 798, 157 Ga. 505.

41. Ga.—Jeffersonville v. Cotton States Belting, etc., Co., 118 S.E. 442, 30 Ga.App. 470.

44 C.J. p 1137 note 80.

42. Ga.—Augusta v. Thomas, 126 S.E. 144, 159 Ga. 435.

43. Ga.—Tietjen v. Savannah, 129 S.E. 653, 161 Ga. 125.

44. Ga.—Whigham v. Gulf Refining Co., 93 S.E. 238, 20 Ga.App. 427. 44 C.J. p 1137 note 83.

45. Ga.—Tate v. Elberton, 71 S.E. 420, 136 Ga. 301.

46. Ga.—Tate v. Elberton, *supra*—*Whigham v. Gulf Refining Co.*, 93 S.E. 238, 20 Ga.App. 427.

47. Idaho.—Williams v. City of Emmett, 6 P.2d 475, 51 Idaho 500. N.C.—*Boney v. Board of Trustees of Kinston Graded Schools*, 48 S.E.2d 56, 229 N.C. 136—*Westbrook v. Town of Southern Pines*, 1 S.E.2d 95, 215 N.C. 20—*Madry v. Town of Scotland Neck*, 199 S.E. 618, 214 N.C. 461—*Sing v. City of Charlotte*, 195 S.E. 271, 213 N.C. 60—*Wharton v. Greensboro*, 59 S.E. 1043, 146 N.C. 356.

48. N.C.—Henderson v. Wilmington, 182 S.E. 25, 191 N.C. 269.

49. N.C.—Henderson v. Wilmington, *supra*.

50. N.C.—Sing v. City of Charlotte, 195 S.E. 271, 213 N.C. 60.

44 C.J. p 1137 note 89.

Special legislative authority

The municipal authorities may exceed the constitutional limitation on municipal debt for necessary expenses by special legislative authority without a vote of the people.—*Sing v. City of Charlotte*, *supra*—44 C.J. p 1137 note 89 [a].

Debt up to or beyond constitutional limitation

(1) A city has authority to contract debt for necessary expense up to constitutional limitation without vote of majority of qualified voters or legislative authority and in excess of such limitation by legislative authority without vote of people.—*Williamson v. City of High Point*, 195 S.E. 90, 213 N.C. 96.

(2) Limitation of amount of debt generally see *supra* §§ 1846-1855.

Limitation on issuance of bonds

(1) Purpose of amendment to constitutional limitation on increase of public debt is to limit authority of governing boards of local units to issue bonds for necessary expenses without vote of the people; under such amendment, local unit may create debts and issue bonds for necessary expenses without vote of people or approval of legislature if taxes in excess of constitutional limitation are not required and total

some charter or statutory provision.⁵¹

What constitutes "necessary expenses," within the meaning of a constitutional provision of this character, is a matter for judicial,⁵² rather than legislative,⁵³ determination; the courts determine whether a given project is a necessary expense of the municipality,⁵⁴ but the governing authorities of the municipality determine in their discretion whether such project is necessary or needed in the designated locality,⁵⁵ and, except in cases of fraud, the courts cannot control the exercise of discretion on the part of the authorities.⁵⁶

The term "necessary expenses" cannot be defined

generally so as to fit all cases which may arise in the future;⁵⁷ what is a necessary expense for one locality may not be for another.⁵⁸ The test of a necessary expense is the purpose for which the expense is to be incurred;⁵⁹ while the term is not confined to expenses incurred for purposes absolutely necessary to the very life and existence of a municipality,⁶⁰ it is restricted to expenses which involve some phase of municipal government.⁶¹

Particular matters held to come within the meaning of the term include a necessary municipal building,⁶² a municipal market,⁶³ the maintenance, repair, or improvement of streets⁶⁴ and sidewalks,⁶⁵ provision for light, water, and sewerage,⁶⁶ the ex-

amount of bonds issued during year does not exceed two thirds of amount of reduction of unit's debt during preceding year, in determining which question all bonds issued, whether or not approved by vote, must be included, except bonds issued for specified purposes which render popular vote unnecessary under constitution.—Gill v. City of Charlotte, 195 S.E. 368, 213 N.C. 160.

(2) Limitation of amount of bonds generally see *infra* §§ 1911-1914.

(3) Submission of issuance of bonds to popular vote see *infra* §§ 1920-1929.

51. N.C.—Ellison v. Williamston, 67 S.E. 255, 152 N.C. 147, 149. 44 C.J. p 1137 note 90.

52. U.S.—Starmount Co. v. Ohio Sav. Bank & Trust Co., C.C.A.N.C., 55 F.2d 649.

N.C.—Sing v. City of Charlotte, 195 S.E. 271, 213 N.C. 60—Starmount Co. v. Town of Hamilton Lakes, 171 S.E. 909, 205 N.C. 514—Henderson v. Wilmington, 132 S.E. 25, 191 N.C. 269—Storm v. Wrightsville Beach, 128 S.E. 17, 189 N.C. 679—Fawcett v. Mt. Airy, 45 S.E. 1029, 134 N.C. 125, 101 Am.S.R. 825, 63 L.R.A. 870.

53. N.C.—Henderson v. Wilmington, 132 S.E. 25, 191 N.C. 269.

54. U.S.—Starmount Co. v. Ohio Sav. Bank & Trust Co., C.C.A.N.C., 55 F.2d 649.

N.C.—Sing v. City of Charlotte, 195 S.E. 271, 213 N.C. 60—Starmount Co. v. Town of Hamilton Lakes, 171 S.E. 909, 205 N.C. 514.

55. U.S.—Starmount Co. v. Ohio Sav. Bank & Trust Co., C.C.A.N.C., 55 F.2d 649.

N.C.—Sing v. City of Charlotte, 195 S.E. 271, 213 N.C. 60—Starmount Co. v. Town of Hamilton Lakes, 171 S.E. 909, 205 N.C. 514—Fawcett v. Mt. Airy, 45 S.E. 1029, 134 N.C. 125, 101 Am.S.R. 825, 63 L.R.A. 870.

56. N.C.—Starmount Co. v. Town of Hamilton Lakes, 171 S.E. 909, 205

N.C. 514—Fawcett v. Mt. Airy, 45 S.E. 1029, 134 N.C. 125, 101 Am.S.R. 825, 63 L.R.A. 870.

Judicial supervision of powers generally see *supra* § 199.

57. N.C.—Storm v. Wrightsville Beach, 128 S.E. 17, 189 N.C. 679.

"It is almost impossible to define, in legal phraseology, the meaning of the words 'necessary expense' as applied to the wants of a city or town government. A precise line cannot be drawn between what are and what are not such expenses . . . It is not to be expected, in the changed conditions which occur in the lines of progressive people, that things deemed unnecessary in the government of municipal corporations in one age should be so considered for all future time."—Martin v. City of Raleigh, 180 S.E. 786, 790, 208 N.C. 369—Fawcett v. Mt. Airy, 45 S.E. 1029, 134 N.C. 125, 101 Am.S.R. 825, 63 L.R.A. 870.

58. N.C.—Storm v. Wrightsville Beach, 128 S.E. 17, 189 N.C. 679. 44 C.J. p 1137 note 94.

59. N.C.—Sing v. City of Charlotte, 195 S.E. 271, 213 N.C. 60—Martin v. City of Raleigh, 180 S.E. 786, 208 N.C. 369—Henderson v. Wilmington, 132 S.E. 279, 191 N.C. 269.

60. N.C.—Storm v. Wrightsville Beach, 128 S.E. 17, 189 N.C. 679.

61. N.C.—Green v. Kitchin, 50 S.E. 2d 545, 229 N.C. 450—Walker v. Town of Faison, 163 S.E. 875, 202 N.C. 694—Henderson v. Wilmington, 132 S.E. 25, 191 N.C. 269.

"If the purpose is the maintenance of the public peace or the administration of justice, if it partakes of a governmental nature or purports to be an exercise by the city of a portion of the state's delegated sovereignty, if, in brief, it involves a necessary governmental expense in these cases the expense required to effect the purpose is necessary within the meaning of . . . [the provision], and the power to incur such expense is not dependent on the will

of the qualified voters"—Sing v. City of Charlotte, 195 S.E. 271, 273, 213 N.C. 60—Martin v. City of Raleigh, 180 S.E. 786, 790, 208 N.C. 369—Henderson v. Wilmington, 132 S.E. 25, 30, 191 N.C. 269.

62. N.C.—Hightower v. Raleigh, 65 S.E. 279, 150 N.C. 569.

63. N.C.—Walker v. Town of Faison, 163 S.E. 875, 202 N.C. 694—Angelo v. City of Winston-Salem, 136 S.E. 489, 193 N.C. 207, 52 A.L.R. 665—Le Roy v. Elizabeth City, 81 S.E. 1072, 166 N.C. 93—Swinson v. Mount Olive, 61 S.E. 569, 147 N.C. 611.

Cotton and truck platform erected for benefit of farmers held not market—Walker v. Town of Faison, 163 S.E. 875, 202 N.C. 694.

64. U.S.—Starmount Co. v. Ohio Sav. Bank & Trust Co., C.C.A.N.C., 55 F.2d 649.

N.C.—Boyce v. City of Gastonia, 41 S.E.2d 355, 227 N.C. 139—Starmount Co. v. Town of Hamilton Lakes, 171 S.E. 909, 205 N.C. 514. 44 C.J. p 1137 note 98.

Issuance of bonds

N.C.—Starmount Co. v. Town of Hamilton Lakes, *supra*.

65. N.C.—Kinston v. Atlantic, etc., R. Co., 110 S.E. 645, 183 N.C. 14—Bramham v. Durham, 88 S.E. 347, 171 N.C. 196.

66. U.S.—Starmount Co. v. Ohio Sav. Bank & Trust Co., C.C.A.N.C., 55 F.2d 649.

N.C.—Starmount Co. v. Town of Hamilton Lakes, 171 S.E. 909, 205 N.C. 514.

44 C.J. p 1137 note 1.

Electric plant

N.C.—Williamson v. City of High Point, 195 S.E. 90, 213 N.C. 96.

Issuance of bonds

N.C.—Starmount Co. v. Town of Hamilton Lakes, 171 S.E. 909, 205 N.C. 514.

pense of a course in police training,⁶⁷ and the expense of providing for the medical treatment and hospital care of the indigent sick and afflicted poor of the municipality.⁶⁸

Wharves, docks, terminals,⁶⁹ public school buildings,⁷⁰ a public library,⁷¹ a municipal airport,⁷² and the maintenance of a municipal hospital⁷³ have been held not to be necessary expenses, and an agreement by a municipality to make payments for the use of a street sprinkler has been held not to evidence an ordinary or necessary expense.⁷⁴

A municipality does not contract a debt or loan its credit without the sanction of a popular vote, within the meaning of such a constitutional prohibition, where it makes an expenditure from funds on hand without imposing further liability on itself or involving the imposition of future taxation.⁷⁵

c. Indebtedness for Public Utilities

There must be a compliance with provisions requiring the submission to popular vote of questions involving the incurring of debt by municipal corporations for public utilities, or the encumbrance of such utilities, and such provisions are applied according to their terms.

Express provision is sometimes made for submission to a popular vote on the question of incurring a debt for the purchase, construction, maintenance, or operation of a public utility by a municipal corporation.⁷⁶ Some provisions of this nature are so worded and construed as to be applicable

where a municipal corporation proposes to incur any general indebtedness for this purpose,⁷⁷ although not otherwise,⁷⁸ but other provisions apply only in particular cases, as where it is proposed to purchase property subject to outstanding indebtedness against it,⁷⁹ or to incur indebtedness which, although in excess of, is within an exception to or extension of, a general limitation of the aggregate amount of municipal indebtedness.⁸⁰

Apart from such a provision, bonds issued by a municipal corporation, under legislative sanction, to finance a self-liquidating public project or utility, the bonds being payable solely out of the revenues from the utility, do not create a debt within the meaning of a constitutional inhibition against the creation of a public debt without a vote of the people.⁸¹

A statute requiring a vote for the encumbrance, over a certain amount, of municipal light, water, or sewer systems except for certain purposes, including extensions, must be complied with;⁸² but such statute has been held not to apply where there has been no attempt to encumber the municipal waterworks system to raise money for the purpose of improving such system.⁸³ As used in such statute, the term "extensions" does not apply to the construction of a water reservoir and a pipe line,⁸⁴ or to a project including the purchase of land, the building of a dam, and the laying of a pipe line to provide an additional supply of wa-

67. N.C.—Green v. Kitchin, 50 S.E. 2d 545, 229 N.C. 450.

68. N.C.—Martin v. City of Raleigh, 180 S.E. 786, 208 N.C. 369.

69. N.C.—Henderson v. Wilmington, 132 S.E. 25, 191 N.C. 269.

70. N.C.—Stephens Co. v. Charlotte, 90 S.E. 588, 172 N.C. 564.

71. N.C.—Westbrook v. Town of Southern Pines, 1 S.E.2d 95, 215 N.C. 20.

72. N.C.—Sing v. City of Charlotte, 195 S.E. 271, 213 N.C. 60.

73. N.C.—Nash v. City of Monroe, 151 S.E. 634, 198 N.C. 306.

74. Idaho.—Williams v. City of Emmett, 6 P.2d 475, 51 Idaho 500.

75. N.C.—Adams v. Durham, 126 S.E. 611, 189 N.C. 232.

Use of "contingent fund"

However, money which was collected pursuant to a tax levy for an undesignated purpose under the name of "contingent fund" which was in fact derived from ad valorem tax could not be used without a vote for a use which would not be for necessary expense within the constitution, which would authorize a direct tax for such purpose, and municipal authorities could not do indi-

rectly what the constitution forbade them to do directly.—Sing v. City of Charlotte, 195 S.E. 271, 213 N.C. 60, distinguishing Adams v. Durham, 126 S.E. 611, 189 N.C. 232.

76. Pa.—Morganstern Electric Co. v. Borough of Coraopolis, 191 A. 603, 326 Pa. 154.

Wash.—Jones v. City of Centralia, 289 P. 3, 157 Wash. 194.

44 C.J. p 1137 notes 6-10.

Provisions as to income and revenue for year as affecting public utilities see supra § 1859 b (1).

Pledge of receipts

Statute authorized municipality to pledge receipts of its self-liquidating utilities as security for payment of funds borrowed for construction, improvement, or extension thereof, where approval of majority of qualified electors is obtained.—Guthrie v. City of Mesa, 56 P.2d 655, 47 Ariz. 336.

77. Wash.—Asia v. Seattle, 206 P. 366, 119 Wash. 674.—State v. Newport, 126 P. 637, 70 Wash. 286.

78. Mich.—Michigan Gas & Electric Co. v. City of Dowagiac, 270 N.W. 772, 278 Mich. 522.

Minn.—Struble v. Nelson, 15 N.W.2d 101, 217 Minn. 610.

Wash.—Twichell v. Seattle, 179 P. 127, 106 Wash. 32.

79. Cal.—Miller v. Los Angeles, 197 P. 342, 185 Cal. 440.

80. U.S.—Lumbermen's Trust Co. v. Town of Ryegate, D.C. Mont., 50 F. 2d 219, reversed on other grounds, C.C.A., 61 F.2d 14.

44 C.J. p 1137 note 10.

Indebtedness for public utilities as within exception or extension of general limitation see supra § 1852.

81. W.Va.—Casto v. Town of Ripley, 173 S.E. 886, 114 W.Va. 668.

82. Tex.—Radford v. City of Cross Plains, 86 S.W.2d 204, 126 Tex. 153.—City of Dayton v. Allred, 68 S.W.2d 172, 123 Tex. 60.—City of Del Rio v. Lowe, Civ.App., 111 S.W.2d 1208, reversed on other grounds Lowe v. City of Del Rio, 122 S.W.2d 191, 132 Tex. 111.

83. Tex.—City of Del Rio v. Lowe, Civ.App., 111 S.W.2d 1208, reversed on other grounds Lowe v. City of Del Rio, 122 S.W.2d 191, 132 Tex. 111.

84. Tex.—Radford v. City of Cross Plains, 86 S.W.2d 204, 126 Tex. 153.

ter,⁸⁵ since such a project is rather for the building, improvement, and enlargement of the water system.⁸⁶

Under a statute requiring a referendum for the purchase of plant or equipment for a public utility, the purchase of a city hall with utilities surpluses is not such a purchase of plant or equipment, but an investment,⁸⁷ so that a referendum is not required,⁸⁸ and an adverse vote on a referendum held is not binding on the municipal council.⁸⁹

Debts contracted for the supplying of water to a city or town may be expressly excepted by the constitutional provision from the requirement of a vote of electors.⁹⁰ Under a statute requiring a vote for the establishment and maintenance of a waterworks, a municipality cannot incur an indebtedness to complete such works unless the electors authorized the expenditure for the entire system.⁹¹

Loan of credit. A statute authorizing a municipality to sell bonds to governmental agencies in order for the municipality to acquire an electric power plant and distribution system has been held not to authorize the municipality to lend its credit to any outside agency, so as to come within a constitutional requirement of an election.⁹²

d. Extraordinary Expenditures

A municipal charter may require a popular vote on the question whether an extraordinary expenditure shall be made.

The charters of some municipal corporations require a submission to a vote of the taxpayers or electors of the question whether an extraordinary expenditure shall be made.⁹³ Expenditures for a municipal lighting plant⁹⁴ and for voting machines⁹⁵ have been held extraordinary.

e. Business Enterprises

Operation of a public transportation system by a municipal corporation is not a business enterprise within a provision denying it the power to engage in certain business enterprises without the electors' prior approval.

The operation of a public transportation system by a municipal corporation, as empowered by charter, is not a business enterprise, but a public purpose, within a charter provision denying it the power to engage in certain business enterprises without prior approval by the electors.⁹⁶

f. Other Purposes

Provisions prohibiting the creation of a municipal debt without the assent of the voters have been applied with respect to various purposes.

In addition to the particular purposes discussed in the preceding subdivisions of this section, provisions prohibiting the creation of a municipal debt without the assent of the voters have been applied with respect to various purposes.⁹⁷ A statute providing that if a city undertakes to prohibit live stock from running at large within the corporate limits it shall fence off the city and provide gates is not violative of a constitutional provision prohibiting the creation of a municipal debt without the assent of the voters;⁹⁸ and revenue bonds issued by a municipality to aid in the completion of a hospital owned by it, pursuant to an act authorizing municipalities to issue bonds for the construction or maintenance of municipal public works, do not constitute an indebtedness within a similar prohibition,⁹⁹ despite the fact that the ordinance authorizing the issuance of the bonds provides that the municipality shall pay the legally established rates for the use of the hospital.¹

A statute providing that the expenses of new

85. U.S.—City of Hamlin v. Brown-Crummer Inv. Co., C.C.A. Tex., 93 F.2d 680, certiorari denied Brown-Crummer Inv. Co. v. City of Hamlin, Tex., 58 S.Ct. 831, 303 U.S. 664, 82 L.Ed. 1122.

86. U.S.—City of Hamlin v. Brown-Crummer Inv. Co., C.C.A. Tex., 93 F.2d 680, certiorari denied Brown-Crummer Inv. Co. v. City of Hamlin, Tex., 58 S.Ct. 831, 303 U.S. 664, 82 L.Ed. 1122.

87. Wis.—Reetz v. Kitch, 283 N.W. 348, 230 Wis. 1.

88. Wis.—Reetz v. Kitch, supra.

89. Wis.—Reetz v. Kitch, supra.

90. Colo.—People ex rel. Rogers v. Letford, 79 P.2d 274, 102 Colo. 284.

91. Iowa.—Mote v. Incorporated Town of Carlisle, 233 N.W. 695, 211 Iowa 392.

92. Tenn.—Tennessee Electric Pow-

er Co. v. City of Chattanooga, 114 S.W.2d 441, 172 Tenn. 505.

93. N.Y.—Burns v. Watertown, 213 N.Y.S. 90, 126 Misc. 140, 44 C.J. p 1137 note 11.

94. N.Y.—Burns v. Watertown, supra.

95. N.Y.—People v. Geneva, 92 N.Y. S. 91, 45 Misc. 237, affirmed 90 N.Y.S. 275, 98 App.Div. 383.

96. Mich.—Cleveland v. City of Detroit, 33 N.W.2d 747, 322 Mich. 172.

Aid to corporations and stock subscriptions see infra §§ 1870-1877.

97. Sewer system, water pipes, and fire hydrants

A statutory provision for a permissive referendum must be complied with in order to authorize reimbursement, to one dedicating roads to a municipality, for the cost of a sewer system, water pipes, and

fire hydrants installed in the roads at private expense.—Scarborough Properties Corporation v. Village of Briarcliff Manor, 16 N.E.2d 369, 278 N.Y. 370.

98. Ga.—Pierce v. Powell, 4 S.E.2d 192, 188 Ga. 481.

Reason for rule

The act does not require the erection of a fence, and thus create a municipal debt or require the imposition of a tax for such erection.—Pierce v. Powell, supra.

99. W.Va.—Warden v. City of Grafton, 26 S.E.2d 1, 125 W.Va. 658.

1. W.Va.—Warden v. City of Grafton, supra.

Reason for rule

The municipality is not required to make use of the hospital and, therefore, no debt is established against it by the ordinance or the

buildings or alterations shall first be authorized by the city governing board has been held not repealed by a subsequent statute providing that an appropriation of money by the council for such purposes shall be subject to review by referendum;² the statutes are valid, harmonious, and consistent, and can be enforced together;³ thus, a resolution appropriating money for constructing an addition to a city hospital is subject to review by referendum.⁴

§ 1861. — Debts Not Payable in Current Year

Some statutes or charter provisions prohibit a municipal corporation from contracting debts not payable during the current year without a popular vote.

Under some statutes or charter provisions debts not payable during the current year shall not be contracted by a municipal corporation without the assent of a specified proportion of the voters or taxpayers or a referendum.⁵

§ 1862. Sufficiency of Submission

In an election on the incurring of municipal indebtedness,

the proposition submitted must clearly disclose the purpose and amount of the indebtedness, and, where more than one proposition is submitted, opportunity to vote separately on each must be given, unless a statute provides otherwise. There must be a compliance with constitutional or statutory provisions as to petition for election, notice of election, ballots, method of voting, and conduct of the election.

Where an election is held on the question of incurring municipal indebtedness, the proposition must be submitted to the voters in such form as clearly to disclose the purpose⁶ and amount⁷ of the indebtedness or expenditure, and, where more than one proposition is submitted, so as to afford the voters an opportunity to vote separately on each proposition,⁸ unless the statute under which the election is held expressly or by clear implication allows a departure from the rule.⁹ Municipal officials have been held to have discretion as to the form of proposition, not inconsistent with constitutional provisions, to be submitted to the voters for their approval.¹⁰ The vote must be on a question which proposes a lawful purpose unencumbered by a purpose which is unlawful and therefore cannot be

statute.—*Warden v. City of Grafton*, supra.

2. N.Y.—*Drake v. City of Buffalo*, 221 N.Y.S. 114, 220 App.Div. 233, affirmed 157 N.E. 848, 245 N.Y. 537.

3. N.Y.—*Drake v. City of Buffalo*, supra.

4. N.Y.—*Drake v. City of Buffalo*, supra.

5. N.Y.—*Davidson v. City of Elmira*, 44 N.Y.S.2d 302, 180 Misc. 1052, affirmed 46 N.Y.S.2d 655, 267 App. Div. 797, appeal denied 47 N.Y.S. 2d 604, 267 App.Div. 926, 44 C.J. p 1138 note 12.

Guaranty by city; default

Where city guaranty of amount borrowed by municipal housing authority from state would become a debt only if and when the authority defaulted, the guaranty was not a debt or pecuniary obligation within such charter provision.—*Davidson v. City of Elmira*, supra.

6. Kan.—*Corpus Juris* cited in *Kansas Electric Power Co. v. City of Eureka*, 45 P.2d 877, 880, 142 Kan. 117.

Okl.—*Borin v. City of Erick*, 125 P. 2d 768, 190 Okl. 519.

Pa.—*Wentz v. City of Philadelphia*, 151 A. 833, 301 Pa. 261.

44 C.J. p 1138 note 13.

"To obtain the authority of the electors to incur an indebtedness, or to enter into a contract otherwise prohibited, the matter must be sub-

mitted to them in such specific language as to apprise the voters of the full purpose and the exact and particular thing upon which they are called upon to vote and decide."—*Borin v. City of Erick*, 125 P.2d 768, 770, 190 Okl. 519—*O'Neill Engineering Co. v. Ryan*, 124 P. 19, 32 Okl. 738, 750.

Ordinance and ballot as source of information

In determining purpose for which revenue measure submitted at special election was to be authorized, electors had right to look to ordinance and ballot to ascertain what they were asked to approve and not to discussions in council meetings, street conversations, or speeches made at mass meeting.—*Arkansas-Missouri Power Corp. v. City of Hector*, Ark., 217 S.W.2d 335.

Failure to include alternative

Under constitutional provision authorizing a city to submit to voters the question of becoming indebted for purpose of purchasing or constructing an electric plant, city was authorized to submit question of issuance of bonds for construction of a plant without including the alternative of purchase.—*Missouri Power & Light Co. v. City of Pattonsburg*, 125 S.W.2d 30, 342 Mo. 1128.

Nature of utility to be purchased, constructed, or repaired

Okl.—*Borin v. City of Erick*, 125 P. 2d 768, 190 Okl. 519—*Coleman v. Frame*, 109 P. 928, 26 Okl. 193, 24 L.R.A., N.S., 556.

Purpose held insufficiently stated

Okl.—*Borin v. City of Erick*, 125 P. 2d 768, 190 Okl. 519.

7. Mo.—*State ex rel. Webster Groves Sanitary Sewer Dist. v. Smith*, 87 S.W.2d 147, 337 Mo. 855.

44 C.J. p 1139 note 30 [a].

Amount held stated with sufficient definiteness

Mo.—*State ex rel. Webster Groves Sanitary Sewer Dist. v. Smith*, supra.

8. Miss.—*Corpus Juris* cited in *In re Validation Bonds, City of Moss Point*, 156 So. 516, 170 Miss. 886.

44 C.J. p 1138 note 14.

This rule is founded on the general policy or principle that elections must be conducted by such means and in such manner as to ascertain, as far as practicable, the true and untrammelled will of the electorate.—*In re Validation Bonds, City of Moss Point*, 156 So. 516, 170 Miss. 886.

Only one proposition held embraced in ballot submitting question of ratification of previous ordinance and contracts and question of construction of electric plant.—*Jones v. City of Centralia*, 289 P. 3, 157 Wash. 194.

9. Miss.—*In re Validation Bonds, City of Moss Point*, 156 So. 516, 170 Miss. 886.

10. Okl.—*City of Alva v. Mason*, 300 P. 784, 150 Okl. 25.

carried out.¹¹ Where the election is necessary in order to authorize the creation of a debt in excess of a certain limit, as discussed supra §§ 1859, 1860, it has been held sufficient to submit a proposition to issue bonds in a specified amount for a specific purpose,¹² without also submitting a proposition to incur indebtedness in excess of the limit¹³ or to enter into a contract calling for the expenditure of the money to be raised by the issuance and sale of the bonds.¹⁴

The legislature may prescribe the mode of submission,¹⁵ as well as the method of voting.¹⁶ Under at least one statute the first step to be taken by the municipal authorities is to give expression by ordinance or vote of their desire to increase the indebtedness of the city,¹⁷ but a separate ordinance is not necessary for this purpose,¹⁸ and it is sufficient to include the subject matter in the ordinance which provides for a submission of the question to the voters.¹⁹

A resolution or order authorizing an election is sufficient where a formal ordinance is not expressly required;²⁰ such an order, in the absence of a statutory requirement to that effect, need not state generally or specifically the rate of taxes to be levied.²¹ An ordinance providing for submission of the question to the voters is not subject to attack on the

ground that it was not passed until after the regular registration day.²²

Petition for election. Under a statute providing for the calling of an election on the question of incurring a municipal indebtedness for the acquisition of a public utility on the filing of a petition for such election signed by a specified percentage of qualified electors, a petition has been held not insufficient because of the lack of indorsement or affidavit as to the authenticity of the signers or their qualifications as electors.²³ A person is a qualified elector, within such statute, if he satisfies the requirements of the state constitution for voting,²⁴ even though he is not registered.²⁵ A person alleging the insufficiency of the petition on the ground of the ineligibility of petitioners has the burden of proving the ineligibility of a sufficient number of the names appearing on the petition to render it ineffective.²⁶

In the absence of a statutory requirement to that effect, a petition for an election need not state generally or specifically the rate of taxes to be levied.²⁷

The notice of election must comply with constitutional or statutory requirements,²⁸ but need not conform to an order or ordinance of the municipal council which departs from the requirements prescribed by law;²⁹ any information gained by voters

11. Del.—*Eastern Shore Public Service Co. v. Town of Seaford*, 187 A. 115, 21 Del.Ch. 214.

12. Mont.—*Carlson v. Helena*, 102 P. 39, 39 Mont. 82, 17 Ann.Cas. 1233.

44 C.J. p 1138 note 17.

13. Ky.—*Hunter v. Louisville*, 270 S.W. 841, 208 Ky. 326.

44 C.J. p 1138 note 18.

14. Cal.—*Heilbron v. Sumner*, 200 P. 409, 186 Cal. 648.

15. Md.—*Stanley v. Baltimore*, 126 A. 151, 146 Md. 277.

Mont.—*Carlson v. Helena*, 114 P. 110, 43 Mont. 1.

Statute repeals by implication earlier statute, to extent to which they conflict.

Mont.—*Weber v. City of Helena*, 297 P. 455, 89 Mont. 109.

N.J.—*Perry v. Borough of Deal*, 135 A. 788, 103 N.J.Law 810, affirmed 138 A. 922, 104 N.J.Law 182—*Wethling v. Board of Com'rs of City of Orange*, 110 A. 133, 94 N.J.Law 36.

16. N.C.—*Winston v. Wachovia Bank, etc., Co.*, 74 S.E. 611, 153 N.C. 512.

Aye and nay vote

A statute requiring a recorded aye and nay vote on propositions to create any liability against a city or

for the expenditure of its money has been held to pertain only to those matters wherein the council has a discretionary power, and not to matters which may be initiated and finally determined by the electors themselves.—*State v. Axness*, 139 N.W. 791, 81 S.D. 125.

17. Pa.—*Hoffman v. Pittsburgh*, 78 A. 26, 229 Pa. 36.

44 C.J. p 1139 note 22.

18. Pa.—*Egan v. Claysville*, 86 A. 860, 239 Pa. 259.

19. Pa.—*Egan v. Claysville*, supra.

20. Ky.—*Bernheim v. Anchorage*, 167 S.W. 139, 159 Ky. 315.

44 C.J. p 1139 note 25.

21. Tex.—*Goodnight v. City of Wellington*, Civ.App., 15 S.W.2d 1071.

22. Ky.—*Harris v. Morganfield*, 257 S.W. 1032, 201 Ky. 588.

44 C.J. p 1139 note 26.

23. Iowa.—*Pluser v. Sioux City*, 262 N.W. 551, 220 Iowa 308, 100 A.L.R. 1298.

Petition by property owners see supra § 1857.

Petition for election on issuance of bonds see infra § 1921.

Qualifications of voters at election see infra § 1863.

24. Iowa.—*Pluser v. Sioux City*, 262 N.W. 551, 220 Iowa 308, 100 A.L.R. 1298.

25. Iowa.—*Pluser v. Sioux City*, 262 N.W. 551, 220 Iowa 308, 100 A.L.R. 1298.

26. Iowa.—*Pluser v. Sioux City*, 262 N.W. 551, 220 Iowa 308, 100 A.L.R. 1298.

Fact that petition contained forged signatures did not render it invalid where it contained sufficient number of signers after striking forgeries.—*Pluser v. Sioux City*, supra.

27. Tex.—*Goodnight v. City of Wellington*, Civ.App., 15 S.W.2d 1071.

28. Mo.—*State ex rel. City of Berkeley v. Holmes*, 219 S.W.2d 650. Pa.—*Ulrich v. Borough of Fleetwood*, Com.Pl., 30 Berks Co. 54, 29 Mun. L.R. 77.

43 C.J. p 1139 note 27.

Notice by proclamation

Okl.—*City of Alva v. Mason*, 300 P. 784, 150 Okl. 25.

Statute held unaffected by later statute

Mont.—*Weber v. City of Helena*, 297 P. 455, 89 Mont. 109.

Notice held insufficient

Wash.—*Jones v. City of Centralia*, 289 P. 3, 157 Wash. 194.

29. Mo.—*State v. Gordon*, 116 S.W. 1099, 217 Mo. 103.

44 C.J. p 1139 note 28.

about a proposed election from unofficial or informal sources cannot dispense with the official notice required by law.³⁰ Statutory requirements as to the time or length of notice are mandatory,³¹ and giving less notice than that called for in the statute cannot be regarded as a substantial compliance therewith;³² but variations as to the form of notice which could not mislead voters may reasonably be held to be a substantial compliance.³³

The ballots used must be official ballots³⁴ in the form prescribed by a valid statute;³⁵ variations as to the form of ballots, which could not mislead voters, may reasonably be held to be substantial compliance with statutory requirements.³⁶ The details of expenditure need not appear on the ballot.³⁷

Conduct of election. The election is usually conducted in accordance with the general election laws of the state, applicable to municipalities,³⁸ unless special provision is made.³⁹ In at least one jurisdiction it has been held that the counting or canvassing of the returns by a court is not required or contemplated by any statute.⁴⁰

Resubmission. Where a statute so provides, a proposition rejected at an election may not be resubmitted until after the lapse of a specified period

of time.⁴¹ However, a general statute prohibiting resubmission of the question within a specified period of time after its rejection at an election is not applicable to a municipality incorporated under a special law containing provisions inconsistent in this respect with the general law.⁴²

§ 1863. — Vote Required and Qualifications of Voters

- a. Vote required
- b. Qualifications of voters

a. Vote Required

Except where a constitution or statute provides otherwise, a proposition to incur municipal indebtedness is carried when it receives the required proportion of the votes cast thereon, and need not receive such proportion of all the votes cast at the election or of all the eligible voters.

It has generally been held that a proposition to incur municipal indebtedness is carried when it receives the required proportion of the votes cast on the proposition,⁴³ and that it is not necessary for it to receive the stated proportion of all the votes cast at the election at which the question is submitted⁴⁴ or the concurrence of a stated proportion of all the eligible voters or electors of the municipality;⁴⁵ but it is sometimes expressly provided by the constitu-

30. Mo.—State ex rel. City of Berkeley v. Holmes, 219 S.W.2d 650.

31. Mo.—State ex rel. City of Berkeley v. Holmes, supra.

32. Mo.—State ex rel. City of Berkeley v. Holmes, supra.

33. Mo.—State ex rel. City of Berkeley v. Holmes, supra.

34. Pa.—McLaughlin v. Summit Hill Borough, 73 A. 975, 224 Pa. 425.

44 C.J. p 1139 note 29.

35. Pa.—Stem v. Bethlehem Borough, 80 A. 984, 231 Pa. 461.

44 C.J. p 1139 note 30.

Ballot held to conform to voting machine law

Fla.—State v. City of Tallahassee, 195 So. 402, 142 Fla. 476.

36. Mo.—State ex rel. City of Berkeley v. Holmes, 219 S.W.2d 650.

37. Wash.—Scymour v. Tacoma, 32 P. 1077, 6 Wash. 138.

44 C.J. p 1138 note 15.

38. Ga.—Jacoba v. Dallis, 41 S.E. 611, 115 Ga. 272.

Pa.—Clough v. Shreve, 16 Pa.Co. 398.

Vote on primary election day on question of increasing municipal indebtedness held proper.—Nyce v. Board of Com'rs of West Nerriton Tp., 179 A. 584, 319 Pa. 358.

General election as for particular purpose

Where propositions authorizing ex-

cess levies by municipalities were submitted at a general election, the election as far as it related to the propositions was a special election within meaning of constitutional provision prohibiting municipalities from becoming indebted in an excessive amount without assent of three fifths of voters voting at an "election to be held for that purpose."—American Smelting & Refining Co. v. Tacoma School Dist. No. 10, 129 P.2d 531, 15 Wash.2d 1.

39. Mo.—Southworth v. Glasgow, 132 S.W. 1168, 232 Mo. 108, Ann. Cas.1912B 1367.

Statutes controlling

Statutes relating to posting list of registered electors, pollbooks, and compensation of county clerk are controlling in election on proposal to create or increase indebtedness of city.—Weber v. City of Helena, 297 P. 455, 89 Mont. 109.

Approval of electors as distinguished from officers

Statute provides procedure for all elections to increase or create indebtedness of political units therein mentioned whenever laws require approval of electors as distinguished from executive officer.—Weber v. City of Helena, supra.

40. Pa.—Knight v. Coudersport Borough, 92 A. 299, 246 Pa. 284.

41. Pa.—Keppelman v. Reading, 14 Pa.Dist. 61.

42. N.Y.—O'Connor v. Waterford, 156 N.Y.S. 933, 171 App.Div. 425.

43. Ky.—Nall v. Elizabethtown, 254 S.W. 893, 200 Ky. 321.

44 C.J. p 1140 note 38.

Combining votes on separate questions

Where issuance of bonds and extension of constitutional indebtedness limit were separately submitted at one election, negative votes on both questions could not be added and opposed to affirmative votes on either question in determining whether questions submitted received majority of votes cast.—Commonwealth Public Service Co. of Montana v. City of Deer Lodge, 29 P.2d 667, 96 Mont. 48.

44. Ky.—Winchester Board of Education v. Winchester, 87 S.W. 768, 120 Ky. 591, 27 Ky.L. 994.

44 C.J. p 1140 note 39.

45. Cal.—City of Fairfield v. Hutchison, 202 P.2d 745.

Fla.—State v. City of Tallahassee, 195 So. 402, 142 Fla. 476.

La.—Dresser v. Recreation and Park Commission of Parish of East Baton Rouge, 34 So.2d 384, 213 La. 85.

Mo.—State ex rel. Keillett v. Johnson, 60 S.W.2d 131, 330 Mo. 452.

44 C.J. p 1140 note 40.

tion⁴⁶ or a valid statute⁴⁷ that the concurrence of a specified proportion of all the voters of the city is necessary. A constitutional provision requiring, for the creation of a debt for other than necessary expenses, the approval of a majority of the qualified voters, does not conflict with a provision under which, in order to overcome the restriction placed thereby on the creation of debt, it is only necessary to have the approval of the majority of those voting.⁴⁸

b. Qualifications of Voters

The qualifications of persons participating in an election on the incurring of municipal indebtedness are determined by constitutional or statutory provisions.

The provisions of the constitution or statute under which an election on the question of incurring municipal indebtedness is held are the sole criterion as to the qualifications of those who participate therein.⁴⁹ Constitutional provisions dealing with the qualifications of voters prevail over statutory provisions dealing with the same subject.⁵⁰ A statute requiring submission to the "taxpaying electors" is

to be distinguished from another statute requiring submission to the "electors;"⁵¹ particular constitutional and statutory provisions have been held to limit an election to qualified freeholders, as against the contention that all registered and qualified electors of the municipality were entitled to vote,⁵² and to require the construction of "public taxpayers of the parish" as meaning "property taxpayers."⁵³ Within a constitutional provision that in an election for expending money only voters who own taxable property in the city shall be qualified to vote, the fixing of minimum salaries for city officers and employees does not constitute "expending money."⁵⁴

§ 1864. — Invalidity and Contest of Election

Elections on the question of incurring municipal indebtedness may be held invalid on the ground of departures from constitutional or legislative requirements.

Elections on the question of incurring municipal indebtedness may be held invalid on the ground of departures from constitutional or legislative requirements.⁵⁵ However, such an election will not be set

46. S.D.—Williamson v. Aldrich, 108 N.W. 1063, 21 S.D. 13.

44 C.J. p 1140 note 41.

47. Mo.—Bauch v. Cabool, 148 S.W. 1003, 165 Mo.App. 486.

48. N.C.—Twining v. City of Wilmington, 200 S.E. 416, 214 N.C. 655.

49. Fla.—State v. City of Tallahassee, 195 So. 402, 142 Fla. 476.

Qualifications of petitioners for election see supra § 1862

Requirements as to qualifications held satisfied

Fla.—State v. City of Tallahassee, supra.

Mich.—Huron-Clinton Metropolitan Authority v. Boards of Sup'rs of Wayne, Washtenaw, Livingston, Oakland and Macomb Counties, 1 N.W.2d 430, 300 Mich. 1.

Payment of taxes

(1) City cannot require payment of taxes as condition to right of elector, otherwise qualified under statute, to vote on proposal to create or increase city's indebtedness, statute respecting elections on proposals to create or increase indebtedness of city supersedes statute relating to who are taxpayers in so far as elections for purposes specified in former are concerned.—Weber v. City of Helena, 297 P. 455, 89 Mont. 109.

(2) The purpose of constitutional provision permitting "qualified property taxpaying voter" to vote is to render ineligible on those qualified voters who do not pay taxes on real or personal property; such provision

and statute defining "qualified property taxpaying voter" as qualified elector paying taxes and having legal tax receipt therefor dated within twelve months prior to election, did not require voter to possess physically a receipt and to present it to election officers as proof of his eligibility to vote, as, for example, where, due to press of business, no receipt had been issued for taxes paid, but voter could establish his eligibility by other means; election officials must decide what proof convinces them of the fact that voter is a qualified taxpaying voter, and their decision should be exercised reasonably so as not to disfranchise a voter, and, in absence of statute to contrary, they can accept from prospective electors affidavits of their eligibility to vote, and the attorney general's advice for many years to that effect amounts to an administrative construction of the law on the subject.—Henry v. Oklahoma City, 108 P.2d 148, 188 Okl. 308.

Rendition of property for taxation

Purpose of constitutional provision that only property owners who have duly rendered their property for taxation shall be qualified to vote is to restrict and limit power of nonproperty owning or nontaxpaying citizens to pile tax burdens and obligations on citizens who own and hold property and pay taxes, and statutes governing rendition of property for taxes or relating to collection of taxes cannot, in absence of fraud or wrongdoing, deprive property owner who has duly rendered property for

taxation of right to vote; citizen whose property is on tax rolls and who is liable for taxes assessed, in regular order, has "duly rendered" property for taxation, as far as right to vote is concerned, without regard to particular manner or form through which rendition was made; husband and wife may be represented by each other in renditions of property for taxation without losing right to vote.—Campbell v. Wright, Tex.Civ.App., 95 S.W.2d 149.

50. Ga.—Goolsby v. Stephens, 117 S.E. 429, 155 Ga. 529.

Okla.—State v. Millar, 96 P. 747, 21 Okl. 448.

51. N.Y.—Squire v. Preston, 31 N.Y.S. 174, 82 Hun 88.

52. Fla.—State v. City of Clearwater, 184 So. 675, 135 Fla. 112

53. La.—Dresser v. Recreation and Park Commission of Parish of East Baton Rouge, 34 So.2d 384, 213 La. 85.

54. Tex.—Taxpayers' Ass'n of Harris County v. City of Houston, 105 S.W.2d 655, 129 Tex. 627.

Limited application of provision

Constitutional provision applies only when election is held for issuance of bonds or otherwise lending city credit.—Taxpayers' Ass'n of Harris County v. City of Houston, Civ.App. 100 S.W.2d 1066, affirmed 105 S.W.2d 655, 129 Tex. 627.

55. Pa.—Stem v. Bethlehem Borough, 80 A. 984, 231 Pa. 451.

44 C.J. p 1140 note 43.

Expenditures made after void election see infra § 1865.

aside unless it is made to appear that it was not properly and fairly held;⁵⁶ so, such an election will not be held invalid by reason of mere irregularities, unaccompanied by fraud and not preventing a fair and honest expression of the will of the voters,⁵⁷ or even on the ground of improper influence on the electorate where it does not appear that any voter was actually coerced to cast his ballot contrary to his wishes.⁵⁸ The invalidity of the election on one proposition may not affect its validity as to another proposition separately submitted on the same ballot.⁵⁹ In a jurisdiction where no method of contesting the result of the election is provided by constitution or statute, a court of equity will afford relief in a proper case,⁶⁰ but after certification of the result it will not interfere on any ground relating simply to the conduct of the election.⁶¹

Questions which go to the preliminaries of a popular submission on the question of increase of municipal indebtedness must be raised before the vote takes place;⁶² if not raised until afterward, the action of the electorate will be regarded as having been intelligently taken, with full notice and knowledge of the resulting burdens,⁶³ and if, in the question voted on, there was sufficient and proper indi-

cation of the main purpose intended, effect is to be given to the voters' approval.⁶⁴

Cure by validating acts. Irregularities and defects in connection with an election may be cured by subsequent validating acts.⁶⁵

§ 1865. Operation and Effect of Submission

Municipal indebtedness or expenditures authorized at a valid election may be incurred; the expenditure must be confined to the purpose and amount so authorized. Apart from special statutory provision, approval by popular vote does not validate indebtedness exceeding the legal limit.

Municipal indebtedness or expenditures authorized by vote at a valid election authorized or required by law may be incurred,⁶⁶ even though its amount exceeds that which could be incurred without a vote.⁶⁷ Proper methods of executing the authority granted may be adopted,⁶⁸ and a single election is sufficient to authorize original and supplementary expenditures within the amount limited.⁶⁹

The authorization by the municipal voters to the municipal authorities to contract a debt, as required by the constitution, must be clear and explicit.⁷⁰ The expenditure must be confined to the purpose⁷¹

Sufficiency of election see *supra* § 1862.

Discretion

In contest of election on incurring indebtedness for municipally-owned public utility improvements, evidence was held to show that refusal to order ballot boxes opened to permit an examination of affidavits that were used to investigate eligibility of affiants to vote was not abuse of discretion.—*Henry v. Oklahoma City*, 108 P.2d 148, 188 Okl. 308.

Election held not invalidated by repeal of law

Pa.—*Ulrich v. Borough of Fleetwood*, Com.Pl., 80 Berks Co. 54, 29 Mun. L.R. 77.

56. Tex.—*Goodnight v. City of Wellington*, Civ.App., 15 S.W.2d 1071.

Election held properly held

Tex.—*Goodnight v. City of Wellington*, *supra*.

57. Mo.—*Southworth v. Glasgow*, 132 S.W. 1168, 232 Mo. 108, Ann. Cas.1912B 1267.

44 C.J. p 1140 note 44.

58. Ga.—*Epping v. Columbus*, 43 S. E. 803, 117 Ga. 263.

59. N.D.—*Kerlin v. Devils Lake*, 141 N.W. 756, 25 N.D. 207, Ann.Cas. 1915C 624.

60. Pa.—*Holtzman v. Braddock*, 30 Pa.Cs. 287.

44 C.J. p 1140 notes 47, 48.

Bill not filed by plaintiff as taxpayer

Where a bill of a water company to enjoin a borough from issuing bonds and laying mains for the supply of water is not filed by plaintiff as a taxpayer, the validity of an election to ascertain whether the municipal indebtedness should be increased cannot be determined.—*Bethlehem City Water Co. v. Bethlehem Borough*, 80 A. 984, 231 Pa. 454.

61. Pa.—*Wilson v. Blaine*, 105 A. 555, 262 Pa. 367.

62. Pa.—*Ruler v. York County*, 139 A. 186, 290 Pa. 427.

63. Pa.—*Ruler v. York County*, *supra*.

64. Pa.—*Ruler v. York County*, *supra*.

65. Pa.—*In re Brookville's Election*, 5 Pa.Dist. & Co. 54, 15 Mun.L.R. 77.

66. U.S.—*Iron Products Inv. Co. v. City of Pilcher*, C.C.A.Okla., 83 F.2d 443.

Fla.—*State v. City of Clearwater*, 184 So. 675, 135 Fla. 112.

N.C.—*Boney v. Board of Trustees of Kingston Graded Schools*, 48 S.E.2d 66, 229 N.C. 136.

Okla.—*Kansas City Southern Ry. Co. v. City of Heavener*, 54 P.2d 165, 175 Okl. 517.—*Faught v. City of Sapulpa*, 292 P. 15, 145 Okl. 164.—*In re Protest of Texas Pipe Line Co.*, 288 P. 334, 143 Okl. 177.

44 C.J. p 1140 note 50.

67. Ky.—*Ballard v. Shelbyville*, 201 S.W. 452, 180 Ky. 135.

Effect of failure to sell bonds

Fact that municipality had not sold municipal water issue bonds did not make contract for construction of water system invalid as in excess of constitutional indebtedness limit, where, at same election, held prior to making of contract, extension of indebtedness limit was authorized.—*Commonwealth Public Service Co. of Montana v. City of Deer Lodge*, 29 P.2d 667, 96 Mont. 48.

68. Pa.—*Major v. Aidan Borough*, 58 A. 490, 209 Pa. 247.

44 C.J. p 1140 note 52.

69. Mo.—*Aurora Water Co. v. Aurora*, 31 S.W. 946, 129 Mo. 540.

44 C.J. p 1140 note 53.

70. W.Va.—*McMillon Motors v. Walker*, 178 S.E. 278, 116 W.Va. 6.

71. Fla.—*State v. City of Tallahassee*, 195 So. 402, 142 Fla. 476.

Okla.—*State ex rel. City of Cushing v. King*, 19 P.2d 138, 162 Okl. 69.

W.Va.—*McMillon Motors v. Walker*, 178 S.E. 278, 116 W.Va. 6.

44 C.J. p 1140 note 54.

Purchase of airport site; building hangars

The approval of the qualified voters of the purchase of an airport site was not implied authority to the governing body of the city to spend tax money to build hangars.—*Sing v. City of Charlotte*, 195 S.E. 271, 213 N.C. 60.

and amount⁷² authorized or approved by the vote; and approval by popular vote does not validate municipal indebtedness exceeding the amount limited by law,⁷³ unless the case falls within a provision allowing the limit to be exceeded either generally, or for a particular purpose, on approval of the excessive indebtedness by a specified proportion of the electors, as discussed supra §§ 1859, 1860, and even then a higher limitation imposed by the law authorizing the vote must be observed.⁷⁴

Expenditures made after a void election are unauthorized;⁷⁵ but voters have been held not prevented by statute from ratifying a previous ordinance and contracts, where a previous election was void for defective procedure.⁷⁶

The fact that the electors of a municipality have approved the issuance of bonds for a municipal building project does not preclude a referendum election on the question whether the municipality should accept a conditional offer of the government to buy the bonds and give additional financing, where the conditions imposed by the government require serious practical and legal questions and may prove extremely burdensome.⁷⁷

§ 1866. Appropriation or Provision for Payment

a. In general

b. Construction of provisions generally

a. In General

Constitutional and statutory provisions prohibiting the incurring of a municipal indebtedness without a prior appropriation or provision for payment are mandatory, and ordinances and contracts not complying therewith are generally void. The validity of a contract, under such a provision, must be determined as of the time when the indebtedness or liability is incurred.

There is no general principle of law that a municipal corporation is not bound by a contract made in its behalf, by officers duly authorized, merely because no appropriation exists out of which the contract can be performed;⁷⁸ and, in the absence of a requirement of prior appropriation or provision for payment, a contract is not ultra vires, even though no appropriation has been made or funds provided for the performance of the contract.⁷⁹ The failure of a municipality to make provision for the payment of a debt in a certain way does not prevent recovery on the debt where the statute authorizes, but does not require, the municipality to make such provision.⁸⁰

It is frequently provided by constitution, statute, or charter that a municipal corporation, or an officer or department thereof, shall not incur an expense or indebtedness, or stated types thereof, unless an appropriation covering it has been previously made,⁸¹ with exceptions, in some instances, in case

72. Mo.—Aquamsi Land Co. v. City of Cape Girardeau, 142 S.W.2d 332, 346 Mo. 524.

Neb.—Moore v. Central City, 224 N.W. 690, 118 Neb. 326.

Pa.—Raff v. Philadelphia, 100 A. 815, 256 Pa. 312.

73. N.J.—Public Service Electric & Gas Co. v. City of Camden, 192 A. 222, 118 N.J.Law 245.

44 C.J. p 1141 note 57.

74. Minn.—Purcell v. East Grand Forks, 98 N.W. 351, 91 Minn. 486.

44 C.J. p 1141 note 59.

75. Wash.—Jones v. City of Centralia, 289 P. 3, 157 Wash. 194.

76. Wash.—Jones v. City of Centralia, supra.

Reason for rule

Where the procedure followed has not been in accordance with law, proceedings had thereunder must be held void, but this in no way precludes the ultimate municipal authority, the people, from again exercising in a lawful manner its authority for the purpose of correcting errors due, not to a basic want of power, but to defective procedure; the case does not involve an attempted ratification of acts essentially and

inherently ultra vires.—Jones v. City of Centralia, 289 P. 3, 157 Wash. 194.

77. S.D.—State ex rel Saylor v. Walt, 278 N.W. 12, 66 S.D. 14.

78. Mass.—McHenry v. City of Lawrence, 3 N.E.2d 262, 295 Mass. 119. Requirement of appropriation or means of payment as to improvements see supra § 1084.

Subsequent provision for payment for property

(1) If a municipal corporation has no funds which can be appropriated to the payment of the purchase price of property it purchases, it may purchase on credit and may issue its obligations promising to pay its indebtedness at a future time, and make subsequent provision for payment.—People v. Brennan, 39 Barb. N.Y., 522.

(2) Purchase on credit generally see supra § 957.

79. Mich.—DiPonto v. Garden City, 30 N.W.2d 849, 320 Mich. 230.

80. Conn.—Bohannon v. Stamford, 67 A. 372, 80 Conn. 107.

81. U.S.—R. M. Grant & Co. v. City of Lake Worth, C.C.A.Fla., 40 F. 2d 579, certiorari denied City of Lake Worth v. R. M. Grant & Co.,

51 S.Ct. 82, 282 U.S. 878, 75 L. Ed. 775.

Hawaii—Gamewell Co. v. City and County of Honolulu, 33 Hawaii 817.

Idaho—Reynard v. City of Caldwell, 21 P.2d 527, 53 Idaho 62, 90 A.L.R. 1124.

Ill.—Branigar v. Village of Riverdale, 72 N.E.2d 201, 396 Ill. 534—Avery v. City of Chicago, 178 N.E. 351, 345 Ill. 640—De Leuw, Cather & Co. v. City of Joliet, 64 N.E.2d 779, 327 Ill.App. 453—Chicago Law Printing Co. v. Village of Justice, 24 N.E.2d 201, 302 Ill.App. 441—Selby v. Village of Winfield, 255 Ill.App. 67—Stripe v. City of Waukegan, 254 Ill.App. 74—Arnold v. Village of Ina, 244 Ill.App. 239.

Ind.—Hamer v. City of Huntington, 21 N.E.2d 407, 215 Ind. 594.

Iowa—Corpus Juris cited in Carlson v. City of Marshalltown, 236 N.W. 421, 425, 212 Iowa 373.

Kan.—City of Iola v. Hobart, 42 P. 2d 977, 141 Kan. 709.

La.—U. S. Rubber Co. v. Town of Breaux Bridge, App., 165 So. 721.

Mass.—Continental Const. Co. v. City of Lawrence, 9 N.E.2d 550, 297 Mass. 513, 111 A.L.R. 699—Peters v. City of Medford, 4 N.E.2d 338, 295 Mass. 538—McHenry v. City of

of extreme emergency⁸² or of continuing contracts.⁸³ A statute embodying such a provision takes precedence over general provisions of law⁸⁴ such as are found in a statute permitting a particular board to appoint officers and fix their compensa-

tion.⁸⁵ Similar provisions are that municipal indebtedness, or a certain class thereof, shall not be incurred unless funds for the payment thereof are on hand, or available,⁸⁶ or provision is made for the

Lawrence, 3 N.E.2d 262, 295 Mass. 119.

Mich.—City of Pontiac v. Ducharme, 270 N.W. 754, 278 Mich. 474—Salzer v. City of East Lansing, 249 N.W. 16, 263 Mich. 626.

Neb.—Le Barron v. City of Harvard, 257 N.W. 261, 127 Neb. 899, reheard 262 N.W. 26, 129 Neb. 460, 100 A. L.R. 767—O. M. Campbell Co. v. City of Harvard, 243 N.W. 653, 123 Neb. 539—Moore v. Central City, 224 N.W. 690, 118 Neb. 326. N.H.—Stocklan v. Brackett, 61 A.2d 140.

N.Y.—Smith v. City of New York, 47 N.E.2d 35, 289 N.Y. 517—Chambers v. City of New York, 36 N.E.2d 313, 286 N.Y. 308—Barry v. City of New York, 26 N.Y.S.2d 27, 175 Misc. 712, affirmed 27 N.Y.S.2d 425, 261 App.Div. 957, appeal denied 27 N.Y.S.2d 783, 261 App.Div. 1073—People v. Prendergast, 163 N.Y.S. 583, 99 Misc. 8, affirmed 163 N.Y.S. 1128, 177 App.Div. 928.

N.D.—Harding v. City of Dickinson, 33 N.W.2d 626—Scott v. City of Jamestown, 217 N.W. 668, 56 N.D. 454.

Ohio.—Industrial Rescue Mission v. City of Columbus, 81 N.E.2d 254, 83 Ohio App. 188.

Pa.—Appeal from Ordinance, Borough of Canonsburg, Quar. Sess., 23 Wash.Co. 13.

Tex.—McKenzie Const. Co. v. City of San Antonio, Civ.App., 50 S.W.2d 349, error refused.

44 C.J. p. 1141 note 60. Appropriations generally see *infra* §§ 1885-1889.

Want of appropriation or funds as defense against contractor see *supra* § 1024.

Purpose

(1) The purpose of these enactments is to narrow and limit the powers of public officials in making contracts.—Dyer v. City of Boston, 172 N.E. 235, 272 Mass. 265.

(2) The object sought by such a provision is to place a curb on tax-spending municipal bodies and to protect the people against extravagant expenditures and burdensome taxation.—Tribune Co. v. Thompson, 174 N.E. 561, 342 Ill. 503.

(3) The purpose of the budget law is to prevent a deficit in the funds of the municipality at the end of the fiscal year—Shouse v. Board of Com'rs of Cherokee County, 99 P.2d 779, 151 Kan. 458.

(4) Other purposes stated. Ariz.—Yanke v. School Dist. No. 65

of Maricopa County, 105 P.2d 966, 56 Ariz. 93—City of Phoenix v. Kidd, 94 P.2d 428, 54 Ariz. 123, followed in City of Phoenix v. Price, 94 P.2d 433, 54 Ariz. 137, City of Phoenix v. Enriquez, 94 P.2d 434, 54 Ariz. 138, and City of Phoenix v. Wilson, 94 P.2d 434, 54 Ariz. 139.

Hawaii.—Gamewell Co. v. City and County of Honolulu, 33 Hawaii 817.

Mass.—McCarthy v. City of Malden, 22 N.E.2d 104, 303 Mass. 563.

N.Y.—Van Derzee v. City of Long Beach, 32 N.Y.S.2d 954, 178 Misc. 29, affirmed 39 N.Y.S.2d 401, 265 App.Div. 1059.

Provision in budget or authorization by ordinance

N.J.—Samuel v. Borough of South Plainfield, 54 A.2d 717, 136 N.J. Law 187—Murphy v. Town of West New York, 42 A.2d 5, 132 N.J. Law 595—Frank Grad & Son v. City of Newark, 193 A. 177, 118 N.J. Law 376—McMahon v. City of Bayonne, 163 A. 28, 10 N.J. Misc. 1215—Viracola v. Long Branch, 142 A. 252, 1 N.J. Misc. 200.

Effect of reasonable necessity of expenditure

Officials had no authority to contract for expenditures exceeding appropriation for construction of plant, even though such expenditures might be found reasonably necessary in building the structure for which the money was appropriated.—Dyer v. City of Boston, 172 N.E. 235, 272 Mass. 265.

Inclusion in budget; "contemplates"

The word "contemplates," in charter providing that expenditure which initiative ordinance contemplates and which is not included in current budget shall not be lawful until next budget, means to have in view as contingent, probable, or possible.—State ex rel. Thorp v. Devin, 173 P.2d 994, 26 Wash.2d 333.

Independence from assessment power

Power of enacting assessment ordinances and power and purpose of adopting appropriation ordinances or appropriation bills vested in certain cities are derived from distinct grants of power, found in separate legislative provisions, and are mutually independent and unrelated except as statute provides to the contrary.—LeBarron v. City of Harvard, 262 N.W. 26, 129 Neb. 460, 100 A.L.R. 767. Particular cities held within budget law

(1) In general.—City of Tucson v.

Tucson Sunshine Climate Club, 164 P.2d 598, 64 Ariz. 1.

(2) Home-rule cities.—City of Phoenix v. Kidd, 92 P.2d 513, 54 Ariz. 75, reheard 94 P.2d 428, 54 Ariz. 123, followed in City of Phoenix v. Price, 94 P.2d 433, 54 Ariz. 137, City of Phoenix v. Enriquez, 94 P.2d 434, 54 Ariz. 138, and City of Phoenix v. Wilson, 94 P.2d 434, 54 Ariz. 139—American-La France & Foamite Corp. v. City of Phoenix, 54 P.2d 258, 47 Ariz. 133.

82. Mass.—Adalian Bros. v. City of Boston, 84 N.E.2d 35, 323 Mass. 629.

Wyo.—Tobin v. Town Council of City of Sundance, 17 P.2d 666, 45 Wyo. 219, 84 A.L.R. 902.

Order of council; snow removal

An order of city council declaring extreme emergency involving health and safety of people due to extreme amount of snow and directing director of engineering to expend necessary sums to relieve condition was held not compliance with statute; such order did not have any presumptive or evidential force in establishing existence of emergency; there is no analogy between powers of council acting under such statutory limitations and power of general court to declare a law an emergency law under the constitution.—Continental Const. Co. v. City of Lawrence, 9 N.E.2d 550, 297 Mass. 513, 111 A.L.R. 699.

Purchase of rugs for mayor's office held not in consequence of any extreme emergency involving the health or safety of the people or their property—Adalian Bros. v. City of Boston, 84 N.E.2d 35, 323 Mass. 629.

83. N.C.—Gilbert C. White Co. v. City of Hickory, 141 S.E. 494, 195 N.C. 42.

Contract to plan and supervise waterworks project, contemplating performance of services extending over more than one fiscal year, was held a continuing contract, not invalidated because entered into without appropriation therefor.—Gilbert C. White Co. v. City of Hickory, *supra*.

84. Mass.—McCarthy v. City of Malden, 22 N.E.2d 104, 303 Mass. 563.

85. Mass.—McCarthy v. City of Malden, *supra*.

86. La.—Hotard v. City of New Orleans, 35 So.2d 752, 213 La. 843, appeal dismissed 69 S.Ct. 57, 335 U.S. 893, 93 L.Ed. —.

payment thereof,⁸⁷ such as a provision for the levy of a tax or assessment to defray the cost and expense of the contract,⁸⁸ or a provision for the levy and collection of an annual tax sufficient to pay the

interest on, and also the principal of, a debt within a stated period, or when due,⁸⁹ or sufficient to pay the interest as it falls due and to create a sinking fund for the payment of the principal.⁹⁰ Likewise,

Minn.—*Ambrozich v. City of Eveleth*, 274 N.W. 835, 200 Minn. 473, 112 A.L.R. 289.

Miss.—*City of Louisville v. Chambers*, 1 So.2d 771, 190 Miss. 833. 44 C.J. p 1141 note 61.

Purpose of law

(1) In general—*Greenville v. Laurent*, 23 N.Y.S. 185, 75 Misc. 456—44 C.J. p 1141 note 61 [a].

(2) The purpose of the cash-basis law is to prevent a deficit in the funds of the municipality at the end of the fiscal year.—*Shouse v. Board of Com'rs of Cherokee County*, 99 P. 2d 779, 151 Kan. 458, opinion adhered to 102 P.2d 1043, 152 Kan. 41.

87. U.S.—*Potts v. Village of Haverstraw*, C.C.A.N.Y., 79 F.2d 102—*Stevens v. City of Brookhaven*, C.C.A.Miss., 64 F.2d 659.

Ga.—*Morton v. City of Waycross*, 160 S.E. 330, 173 Ga. 298.

La.—*Smith v. Town of Vinton*, 25 So.2d 237, 209 La. 587—*U. S. Rubber Co. v. Town of Breau Bridge*, App., 165 So. 721—*Lilley v. City of Shreveport*, App., 163 So. 722.

Okl.—*City of Morris v. Thompson*, 138 P.2d 92, 192 Okl. 41—*Jurd v. City of Tulsa*, 80 P.2d 596, 183 Okl. 239—*First Nat. Bank v. City of Norman*, 75 P.2d 1109, 182 Okl. 7—*City of Sand Springs v. Kraus*, 72 P.2d 726, 181 Okl. 6—*Public Service Co. of Oklahoma v. City of Tulsa*, 50 P.2d 166, 174 Okl. 58.

Tex.—*Clay Bldg. Material Co. v. City of Wink*, Civ App., 141 S.W.2d 1040—*Panhandle Const. Co. v. City of Spearman*, Civ.App., 83 S.W.2d 425, error dismissed—*McKenzie Const. Co. v. City of San Antonio*, Civ App., 50 S.W.2d 349, error refused. 44 C.J. p 1141 note 62.

Payment of indebtedness generally see *infra* § 1890.

Popular vote on indebtedness in excess of income provided for year see *supra* § 1859 b.

Provision for payment of bonded indebtedness see *infra* § 1918.

Workmen's Compensation Act provision classifying municipal corporations as "employers" was held not violative of such provision—*City of Atlanta v. Pickens*, 169 S.E. 99, 176 Ga. 833.

Engineer's services; miscellaneous expenses

U.S.—*Potts v. Village of Haverstraw*, C.C.A.N.Y., 79 F.2d 102.

Obligation within reasonably anticipated revenues

(1) Where no provision for payment was made at time when contract was entered into, obligation could escape being a "debt," in vio-

lation of such requirement, only if obligation came within total appropriations not exceeding the reasonably anticipated revenues for the year.—*Southland Ice Co. v. City of Temple*, C.C.A.Tex., 100 F.2d 825.

(2) What will constitute the creation of obligations against general fund beyond the reasonably anticipated revenues for such purpose is a matter of judgment, and the judgment of the municipal officials must be controlling until it is clearly made to appear that they are acting unlawfully or fraudulently or in abuse of their discretion.—*Spears v. City of South Houston*, 150 S.W.2d 74, 136 Tex. 218.

88. Mich.—*Bacon v. City of Detroit*, 275 N.W. 800, 282 Mich. 150.

89. U.S.—*Bessemer Inv. Co. v. City of Chester*, D.C.Pa., 22 F.Supp. 311, modified on other grounds, C.C.A., 113 F.2d 571.

N.D.—*Marks v. City of Mandan*, 296 N.W. 39, 70 N.D. 474.

Pa.—*Schuchman v. City of Pittsburgh*, 41 A.2d 642, 351 Pa. 527, 157 A.L.R. 785—*Gemmill v. Calder*, 3 A.2d 7, 332 Pa. 281.

W.Va.—*Warden v. City of Grafton*, 176 S.E. 706, 115 W.Va. 438.

Debt for any purpose

N.M.—*Henning v. Town of Hot Springs*, 102 P.2d 25, 44 N.M. 321.

Certainty

In order to comply with such a statute the debt must be fixed, definite, and certain in amount at the time when it is incurred—*Henning v. Town of Hot Springs*, *supra*.

Municipal Authorities Act held not unconstitutional as violating constitutional provision requiring imposition of such tax—*Williams v. Samuel*, 2 A.2d 834, 332 Pa. 265.

Town sewer certificates payable from proceeds of special sewer improvement assessments are "debts" within section of constitution to this effect.—*Henning v. Town of Hot Springs*, 102 P.2d 25, 44 N.M. 321.

90. U.S.—*Southland Ice Co. v. City of Temple*, C.C.A.Tex., 100 F.2d 825—*American La France & Foamite Industries v. City of Floydada*, D.C.Tex., 15 F.Supp. 390, modified on other grounds, C.C.A., *City of Floydada v. American La France & Foamite Industries*, 87 F.2d 820.

Idaho.—*Lloyd v. Twin Falls Housing Authority*, 113 P.2d 1102, 62 Idaho 592—*Straughan v. City of Coeur d'Alene*, 24 P.2d 321, 53 Idaho 494—*Miller v. City of Buhl*, 284 P. 843, 48 Idaho 668, 72 A.L.R. 682.

Ill.—*Tribune Co. v. Thompson*, 174 N.E. 561, 342 Ill. 503—*Ward v. City of Chicago*, 173 N.E. 810, 342 Ill. 167.

Ky.—*Swinburne v. City of Newport*, 181 S.W.2d 421, 297 Ky 820.

Mo.—*Kansas City Power & Light Co. v. Town of Carrollton*, 142 S.W.2d 849, 346 Mo. 802.

Tex.—*Sowell v. Griffith*, Com App., 294 S.W. 521, rehearing denied 296 S.W. xxi—*Stevenson v. Blake*, Civ. App., 88 S.W.2d 773, affirmed 113 S.W.2d 525, 131 Tex. 103—*Panhandle Const. Co. v. City of Spearman*, Civ.App., 83 S.W.2d 425, error dismissed.

44 C.J. p 1141 note 63.

Constitutional provision as self-executing see *Constitutional Law* § 52.

Sinking funds generally see *infra* § 1953.

All obligations regardless of purpose

Tex.—*Clay Bldg. Material Co. v. City of Wink*, Civ App., 141 S.W.2d 1040.

The essence of the provision is that no debt can be created without provision for payment.—*Clay Bldg. Material Co. v. City of Wink*, *supra*.

Bonds; warrants

(1) The constitutional provision to this effect is designed to protect bondholders—*Pulaski County v. Ben Hur Life Ass'n of Crawfordsville, Ind.*, 149 S.W.2d 738, 286 Ky. 119.

(2) Under such provision, political subdivisions in creating public debt are required not only to raise by annual taxation money sufficient to discharge interest on bond issue, but also to raise by taxation, annually and from inception of debt, amount sufficient to amortize bond issue when it becomes due—*McDonald v. City of Lexington*, 69 S.W.2d 1065, 253 Ky. 585.

(3) Municipal bonds do not create a debt within the meaning of such provision until they are issued, sold, and delivered to a purchaser.—*Town of Freeport v. Sellers*, 190 S.W.2d 813, 144 Tex. 389.

(4) The issuance of bonds secured by a mortgage on a city's waterworks system, to finance improvements to the system, is not the incurring of a debt within the provision.—*City of Hamlin v. Brown-Crummer Inv. Co.*, C.C.A.Tex., 93 F. 2d 680, certiorari denied *Brown-Crummer Inv. Co. v. City of Hamlin*, 58 S.Ct. 831, 303 U.S. 664, 82 L.Ed. 1122.

under some provisions a municipality is prohibited from making any contract, or issuing any evidence of indebtedness, in excess of the revenue for the year in which the contract is made,⁹¹ or from incurring any liability, to be paid in any fiscal year, in excess of the revenues for such year,⁹² or from incurring an indebtedness that cannot be met out of the revenue of the current fiscal year;⁹³ or it may be provided that no contract shall be entered into in excess of the funds provided for carrying it out,⁹⁴ or that no fiscal body may enter into a contract the performance of which involves the expenditure of money in

excess of funds legally at the disposal of such body.⁹⁵

A person claiming compensation under a contract with a municipality subject to such a requirement must show compliance with the requirement⁹⁶ or that it is not applicable to the obligation in question,⁹⁷ and may not claim exemption from the provisions of the law by reason of the fact that he did not know it had been violated,⁹⁸ but it has also been held that the burden of proving a failure to provide for payment rests on the party setting up the illegality.⁹⁹

When applicable, such provisions are mandatory¹

(5) Under such provision, city was not required to make provision for payment of street improvement debt before warrants were issued, since no debt exists until such issuance.—*Simms v. City of Mt. Pleasant*, Tex. Civ. App., 12 S.W.2d 833, error dismissed.

Deferment of payment

Under such provision, debts within lawful power of municipality to incur may be contracted without providing for direct annual tax, unless payment is deferred to fixed future period.—*Stripe v. Yager*, 180 N.E. 915, 348 Ill. 362.

The number of a town's inhabitants is to be determined as of time town asserts a right given it under such provision, and not at time of last federal census.—*Town of Freeport v. Sellers*, 190 S.W.2d 818, 144 Tex. 389.

91. Ark.—*City of Paris v. Street Improvement Dist. No. 2 of Paris*, 191 S.W.2d 968, 209 Ark. 683.—*Eureka Fire Hose Mfg. Co. v. City of Ozark*, 158 S.W.2d 679, 203 Ark. 709.—*City of Little Rock v. White Co.*, 103 S.W.2d 58, 193 Ark. 837.—*Chesnutt v. Yates*, 9 S.W.2d 37, 177 Ark. 894.

92. Or.—*Public Market Co. of Portland v. City of Portland*, 130 P.2d 624, 171 Or. 522, opinion amplified on other grounds 138 P.2d 916, 171 Or. 522.

Revenue provided for year

Such provision precludes a city from incurring valid obligations to pay any more than its revenue already provided will enable it to pay; provision means that liabilities incurred in a particular year, which exceed revenues provided for the year in which they are to be paid, are void.—*Public Market Co. of Portland v. City of Portland*, supra.

93. Ky.—*City of Jackson v. First Nat. Bank of Jackson*, 157 S.W.2d 321, 289 Ky. 1.

Overdraft

Where it was not pleaded or established that in creating overdraft, and in effect borrowing money from bank, the municipality exceeded an-

ticipated revenues for the year, the overdraft was to be considered a valid indebtedness of the municipality.—*City of Jackson v. First Nat. Bank of Jackson*, supra.

Effect of failure to pledge revenues

The fact that current revenues were not specifically pledged by ordinance of municipality directing execution of note or by the note itself did not render note invalid, since the current revenues would be pledged by operation of law and the holder of the note had the right to compel the application of the revenues to the discharge of the note.—*City of Jackson v. First Nat. Bank of Jackson*, supra.

94. Fla.—*State ex rel. Cole v. Keller*, 176 So. 176, 129 Fla. 276.

95. W.Va.—*Mountain State Water Co. v. Town of Kingwood*, 9 S.E.2d 532, 122 W.Va. 374.—*Appalachian Electric Power Co. v. City of Huntington*, 177 S.E. 431, 115 W.Va. 588.—*McCoy v. Town of Riverside*, 158 S.E. 539, 109 W.Va. 670.

Items of budget of municipality are not necessarily controlling in determining what funds are legally at its disposal at time contract is entered into during year for which budget was adopted.—*Mountain State Water Co. v. Town of Kingwood*, 9 S.E.2d 532, 122 W.Va. 374.—*Appalachian Electric Power Co. v. City of Huntington*, 177 S.E. 431, 115 W.Va. 588.

96. U.S.—*City of Floydada v. American La France & Foamite Industries*, C.C.A. Tex., 87 F.2d 820.

Ill.—*Chicago Law Printing Co. v. Village of Justice*, 24 N.E.2d 201, 302 Ill. App. 441.

Mass.—*Continental Const. Co. v. City of Lawrence*, 9 N.E.2d 550, 297 Mass. 513, 111 A.L.R. 699.

Tex.—*McNeal v. Waco*, 33 S.W. 322, 89 Tex. 83.—*Panhandle Const. Co. v. City of Spearman*, Civ. App., 83 S.W.2d 425, error dismissed.

Petition held demurrable for failure to allege appropriation.—*Industrial Rescue Mission v. City of Columbus*, 81 N.E.2d 254, 83 Ohio App. 188.

Compliance held shown

Ark.—*Chesnutt v. Yates*, 9 S.W.2d 37, 177 Ark. 894.

Colo.—*City and County of Denver v. Bossie*, 286 P. 214, 83 Colo. 329.

Ill.—*Tribune Co. v. Thompson*, 174 N.E. 561, 342 Ill. 503.—*Marr, Green & Co. v. Village of Grays Lake*, 15 N.E.2d 64, 295 Ill. App. 624.

N.H.—*Stocklan v. Brackett*, 61 A.2d 140.

N.D.—*Marks v. City of Mandan*, 296 N.W. 39, 70 N.D. 474.

Tex.—*City of San Antonio v. Frizell*, 91 S.W.2d 1056, 127 Tex. 119.—*Ward v. City of Big Spring*, Civ. App., 161 S.W.2d 821, reversed on other grounds *City of Big Spring v. Ward*, 169 S.W.2d 151, 140 Tex. 609.

Wash.—*State ex rel. Henderson v. City of Mt. Vernon*, 20 P.2d 29, 172 Mont. 414.

97. Tex.—*McNeal v. Waco*, 33 S.W. 322, 89 Tex. 83.—*Panhandle Const. Co. v. City of Spearman*, Civ. App., 83 S.W.2d 425, error dismissed. Application of requirement see infra § 1867.

98. Ariz.—*City of Phoenix v. Kidd*, 92 P.2d 513, 54 Ariz. 75, reheard 94 P.2d 428, 54 Ariz. 123, followed in *City of Phoenix v. Price*, 94 P.2d 433, 54 Ariz. 137, *City of Phoenix v. Enriquez*, 94 P.2d 434, 54 Ariz. 138 and *City of Phoenix v. Wilson*, 94 P.2d 434, 54 Ariz. 139.

"All those who enter into any contractual relations with the cities . . . are bound at their peril to know whether such contract will cause the budget law to be violated."—*City of Phoenix v. Kidd*, 92 P.2d 513, 54 Ariz. 75, reheard 94 P.2d 428, 54 Ariz. 123, followed in *City of Phoenix v. Price*, 94 P.2d 433, 54 Ariz. 137, *City of Phoenix v. Enriquez*, 94 P.2d 434, 54 Ariz. 138 and *City of Phoenix v. Wilson*, 94 P.2d 434, 54 Ariz. 139.

99. Okl.—*Pawhuska v. Dahlstrom*, 243 P. 248, 116 Okl. 21.

1. U.S.—*Bessemer Inv. Co. v. City of Chester*, D.C. Pa., 22 F.Supp. 311, modified on other grounds, C.C.A., 113 F.2d 571.

and, under most authorities, render ultra vires and void all ordinances,² resolutions,³ contracts,⁴ bonds,⁵ and warrants⁶ made without compliance with them, although there is some authority to the contrary.⁷

In the absence of any compliance therewith, there is no obligation or liability on the part of the municipality,⁸ and, where an appropriation has been made or a fund has been provided, liability exists to, and

Fla.—State ex rel. Cole v. Keller, 176 So. 176, 129 Fla. 276.

Hawaii.—Gamewell Co. v. City and County of Honolulu, 33 Hawaii 817.

Ill.—Avery v. City of Chicago, 178 N.E. 351, 345 Ill. 640.

N.Y.—Van Derzee v. City of Long Beach, 39 N.Y.S.2d 401, 265 App. Div. 1059.

N.D.—Marks v. City of Mandan, 296 N.W. 39, 70 N.D. 474—Lang v. City of Cavalier, 228 N.W. 819, 59 N.D. 75—Roberts v. City of Fargo, 86 N.W. 726, 10 N.D. 230.

Pa.—Ohlinger v. Malden Creek Tp., 167 A. 882, 312 Pa. 289, 90 A.L.R. 1227.

44 C.J. p 114 note 27, p 1141 note 67.

"These are peremptory legislative mandates designed to incorporate sound business principles and practices into the fabric of the local economy, with particular reference to the avoidance of waste, extravagance and ill-considered spending, and thus to safeguard the interests of those laden with the tax burden and otherwise to serve the common good; and it is axiomatic that they cannot be evaded by any pretense or device whatsoever."—Samuel v. Borough of South Plainfield, 54 A.2d 717, 719, 136 N.J.Law 187—Murphy v. Town of West New York, 42 A.2d 5, 7, 132 N.J.Law 595.

Private interests yield to the legislative policy in this respect—Murphy v. Town of West New York, supra.

Payment from general funds

Provisions held mandatory as to contracts and expenses payable from the general funds of the municipality—Simpson v. City of Highwood, 23 N.E.2d 62, 372 Ill. 212, 124 A.L.R. 1459.

2. Mass.—Shannon v. Rockwood, 121 N.E. 31, 231 Mass. 322.

Wash.—State ex rel. Thorp v. Devin, 173 P.2d 994, 26 Wash.2d 333.

W.Va.—Warden v. City of Grafton, 176 S.E. 706, 115 W.Va. 438.

3. N.J.—Standard Oil Co. of New Jersey v. City of Newark, 11 A.2d 119, 127 N.J.Eq. 106.

Effect of prior invalid resolution

Where resolution appropriating money for intended litigation was set aside by judicial action, subsequent resolution to pay a portion of former sum as a retaining fee was invalid under statute prohibiting municipalities from spending money for purpose for which no appropriation is provided in budget or by temporary appropriation.—Murphy v. Town of West New York, 34 A.2d 78,

130 N.J.Law 569, adhered to 42 A.2d 5, 132 N.J.Law 595.

4. U.S.—City of Floydada v. American La France & Foamite Industries, C.C.A.Tex., 87 F.2d 820.

Ariz.—City of Phoenix v. Kidd, 92 P.2d 513, 54 Ariz. 75, reheard 94 P.2d 428, 54 Ariz. 123, followed in City of Phoenix v. Price, 94 P.2d 433, 54 Ariz. 137, City of Phoenix v. Enriquez, 94 P.2d 434, 54 Ariz. 138, and City of Phoenix v. Wilson, 94 P.2d 434, 54 Ariz. 139.

Ark.—City of Little Rock v. White Co., 103 S.W.2d 58, 193 Ark. 837.

Fla.—State ex rel. Cole v. Keller, 176 So. 176, 129 Fla. 276.

Ga.—Morton v. City of Waycross, 160 S.E. 330, 173 Ga. 298.

Hawaii.—Gamewell Co. v. City and County of Honolulu, 33 Hawaii 817.

Ill.—Avery v. City of Chicago, 178 N.E. 351, 345 Ill. 640—Stripe v. City of Waukegan, 254 Ill.App. 74—Arnold v. Village of Ina, 244 Ill. App. 239.

Ind.—Hamer v. City of Huntington, 21 N.E.2d 407, 215 Ind. 594—Indianapolis v. Wann, 42 N.E. 901, 144 Ind. 175, 31 L.R.A. 743.

Mass.—Commissioners of Woburn Cemetery v. Treasurer of Woburn, 64 N.E.2d 627, 319 Mass. 86—Peters v. City of Medford, 4 N.E.2d 338, 295 Mass. 588.

Mo.—Kansas City Power & Light Co. v. Town of Carrollton, 142 S.W.2d 849, 346 Mo. 802.

Neb.—O. M. Campbell Co. v. City of Harvard, 243 N.W. 653, 123 Neb 539.

N.J.—Samuel v. Borough of South Plainfield, 54 A.2d 717, 136 N.J. Law 187—Murphy v. Town of West New York, 42 A.2d 5, 132 N.J. Law 595—Frank Grad & Son v. City of Newark, 193 A. 177, 118 N.J. Law 376—Standard Oil Co. of New Jersey v. City of Newark, 11 A.2d 119, 127 N.J.Eq. 106.

Okl.—First Nat. Bank v. City of Norman, 75 P.2d 1109, 182 Okl. 7—Public Service Co. of Oklahoma v. City of Tulsa, 50 P.2d 166, 174 Okl. 58—Anadarko Funeral Home v. Scarth, 46 P.2d 539, 173 Okl. 103.

Or.—Public Market Co. of Portland v. City of Portland, 130 P.2d 624, 171 Or. 522, opinion amplified on other grounds 138 P.2d 916, 171 Or. 522.

Tex.—Panhandle Const. Co. v. City of Spearman, Civ.App., 83 S.W.2d 425, error dismissed.

W.Va.—McCoy v. Town of Riverside, 158 S.E. 539, 109 W.Va. 670.

Wyo.—Tobin v. Town Council of City of Sundance, 17 P.2d 666, 45 Wyo. 219, 84 A.L.R. 902.

44 C.J. p 114 note 28, p 1141 note 70. Employment contract see supra § 707.

Self-liquidating project

Pa.—Appeal from Ordinance, Borough of Canonsburg, Quar.Sess., 23 Wash.Co. 13.

A mere expression of policy on the part of a municipality, in a contract, as to future annual appropriations from its general funds does not render the contract violative of a constitutional provision forbidding a municipality to incur any debt or obligation unless sufficient funds, not otherwise appropriated, to pay such debt are actually in the treasury when the debt is incurred—Hotard v. City of New Orleans, 85 So.2d 752, 213 La. 843, appeal dismissed 69 S.Ct. 57, 335 U.S. 803, 93 L.Ed. —.

5. W.Va.—Warden v. City of Grafton, 176 S.E. 706, 115 W.Va. 438. Provision for payment of bonds generally see infra § 1918.

6. U.S.—American La France & Foamite Industries v. City of Floydada, D.C.Tex., 15 F.Supp. 390, modified on other grounds, C.C.A., City of Floydada v. American La France & Foamite Industries, 87 F.2d 820.

Tex.—Aransas Pass v. Eureka Fire Hose Mfg. Co., Civ.App., 227 S.W. 330.

Validity of warrants generally see infra § 1833.

7. U.S.—Bessemer Inv. Co. v. City of Chester, D.C.Pa., 22 F.Supp. 311, modified on other grounds, C.C.A., 113 F.2d 571.

Pa.—Vansciver v. Sharon Hill Borough, 33 Pa.Dist. & Co. 383, 28 Del. Co. 41, 30 Mun.L.R. 43.

"Section 10 [of the constitution, requiring the imposition of a tax] is purely regulatory."—Ohlinger v. Malden Creek Tp., 167 A. 882, 312 Pa. 289, 90 A.L.R. 1227.

Contract for acquisition of realty for airport was held not to require expenditures other than those provided for.—Wentz v. City of Philadelphia, 151 A. 883, 301 Pa. 261.

8. Ill.—Avery v. City of Chicago, 178 N.E. 351, 345 Ill. 640.

Mass.—Adalian Bros. v. City of Boston, 84 N.E.2d 36, 323 Mass. 629—Commissioners of Woburn Cemetery v. Treasurer of Woburn, 64 N.E.2d 627, 319 Mass. 86—McCarthy v. City of Malden, 22 N.E. 2d 104, 303 Mass. 563—Contin-

only to, the extent thereof.⁹

In determining whether a contract violates a provision of this nature, the contract must be regarded as an entirety.¹⁰ The validity of a contract, under such a provision, must be determined as of the time when the indebtedness or liability is incurred;¹¹ so, subject to any exceptions created by statute,¹² a contract in conformity with the requirement of the law when entered into cannot be invalidated by any subsequent malversation or diversion of the fund or appropriation,¹³ or by the fact that a rea-

sonable expectation of ability to pay from anticipated revenues is not realized.¹⁴ Persons seeking payment from budgeted appropriations have been held to have no action against the municipality until there are funds to the credit of such appropriations.¹⁵

An appropriation¹⁶ or a provision for payment¹⁷ is in time when made before the indebtedness is created, and an objection that no appropriation has been made is premature where an ordinance gives only authority to enter into a contract, and no con-

tal Const. Co. v. City of Lawrence, 9 N.E.2d 550, 297 Mass. 513, 111 A.L.R. 699—McHenry v. City of Lawrence, 3 N.E.2d 262, 295 Mass. 119—Dyer v. City of Boston, 172 N.E. 235, 272 Mass. 265.

44 C.J. p 1142 note 72.

Compensation of municipal officers or employees

Okl.—City of Morris v. Thompson, 138 P.2d 92, 192 Okl. 41—Jurd v. City of Tulsa, 80 P.2d 596, 183 Okl. 239—City of Sand Springs v. Kraus, 72 P.2d 726, 181 Okl. 6—Cobb v. City of Norman, 64 P.2d 901, 179 Okl. 126.

Appropriation

(1) Where a provision in a city's charter is mandatory and requires an appropriation, lack of an actual appropriation does not constitute a defense on the part of the city; where pertinent charter provisions required publication of notices, such requirement plainly implied that the reasonable cost thereof should be paid by the city, notwithstanding there had been no budget appropriation therefor—Brooklyn Citizen v. City of New York, 17 N.Y.S.2d 765, 258 App.Div. 657.

(2) Open market orders by city for lease of pump not exceeding one thousand dollars were not authorized because of charter provision prohibiting expenditures for work or supplies involving less than one thousand dollars unless expenditure was duly authorized and appropriated, since such section did not prevent department head from ordering work until appropriation had been made.—53-04 Ninety-Seventh Place Corporation v. City of New York, 282 N.Y. S. 519, 156 Misc. 706.

9. Okl.—City of Sand Springs v. Kraus, 72 P.2d 726, 181 Okl. 6.
44 C.J. p 1142 note 73.

Contract on quantum basis

(1) Where contract of municipality for future services or supplies fails to prescribe definite or immediately ascertainable total sum to become payable, but prescribes payment on quantum basis, only that quantum of services or supplies may

be paid for as were performed or furnished up to time the funds or provided revenues became exhausted or depleted to such an extent that further services could not be paid for.—City of Tulsa v. Langley, 168 P.2d 116, 196 Okl. 680—Public Service Co. of Oklahoma v. City of Tulsa, 50 P.2d 166, 174 Okl. 58—Anadarko Funeral Home v. Scarth, 46 P.2d 539, 173 Okl. 103.

(2) Rule applied to compensation to attorneys for legal services rendered.—City of Tulsa v. Langley, supra.

Participation in unexpended balance

Employees would not be barred from recovery of pay for month in which they worked, and for which appropriation was insufficient to pay full salary, because of statute forbidding any department to incur liability in excess of appropriation made for use of department, where unexpended balance remained on first day of month in which such employees were entitled to participate.—Barnard v. City of Lynn, 3 N.E.2d 264, 295 Mass. 144.

Classified civil service

The fact that appropriation for particular year was exhausted did not excuse city for nonpayment of salary of one holding position in the classified civil service.—Forbes v. City of Woburn, 27 N.E.2d 733, 306 Mass. 67.

10. Tex.—Ward v. City of Big Spring, Civ.App., 161 S.W.2d 821, reversed on other grounds City of Big Spring v. Ward, 169 S.W.2d 151, 140 Tex. 609.

11. Or.—Public Market Co. of Portland v. City of Portland, 130 P.2d 624, 171 Or. 522, opinion amplified on other grounds 138 P.2d 916, 171 Or. 522.

12. Okl.—City of Tulsa v. Langley, 168 P.2d 116, 196 Okl. 680.

13. Ark.—City of Paris v. Street Improvement Dist. No. 2 of Paris, 191 S.W.2d 968, 209 Ark. 683.

La.—Wilkinson v. Poag, App., 181 So. 27.

Okl.—City of Tulsa v. Langley, 168 P.2d 116, 196 Okl. 680—City of Healdton v. Blackburn, 37 P.2d 311, 169 Okl. 357.

S.C.—U. S. Rubber Products v. Town of Batesburg, 190 S.E. 120, 183 S.C. 49, 110 A.L.R. 144.

44 C.J. p 115 note 46 [a], p 1142 note 75.

Insufficiency or exhaustion of fund or appropriation generally see infra § 1891.

Effect of seller's lack of diligence

Where, during the year in which goods were sold to city, there were funds out of which the seller might have been paid, but he did not bring suit to recover balance due until three years later, and did not ask that suit be tried until seven years thereafter, and at time of trial it was shown that city did not have any funds brought over from year of sale, out of which claim might be paid, seller lost right to collect the claim out of revenues in subsequent years because of lack of diligence.—Eureka Fire Hose Mfg. Co. v. City of Ozark, 158 S.W.2d 679, 203 Ark. 709.

14. S.C.—U. S. Rubber Products v. Town of Batesburg, 190 S.E. 120, 183 S.C. 49, 110 A.L.R. 144.

Tex.—Clay Bldg. Material Co. v. City of Wink, Civ.App., 141 S.W.2d 1040.

15. La.—Wadsworth v. New Orleans, 19 So. 935, 48 La. Ann. 886.

16. Mo.—Kansas City v. Woerishoeffer, 155 S.W. 779, 249 Mo. 1. N.Y.—People v. Prendergast, 163 N.Y.S. 583, 99 Misc. 8, affirmed 163 N.Y.S. 1128, 177 App.Div. 928.

17. Ky.—Fowler v. Oakdale, 166 S.W. 195, 158 Ky. 603.

Bonds

In case of the issuance of bonds, a debt is not contracted by a municipality until bonds are negotiated, even though they were previously authorized.—Kansas City Power & Light Co. v. Town of Carrollton, 142 S.W.2d 849, 346 Mo. 802—44 C.J. p 1142 note 77 [a].

tract has been entered into.¹⁸ A contract is valid, even though there is no appropriation until after the bid has been made, provided it is available after the approval of the bid and before the contract is awarded,¹⁹ but an appropriation made after a contract is executed will not validate the contract.²⁰

Splitting contract. Where the amount of available funds is limited and the power of the authorities is restricted to making contracts within that amount, they may not evade these provisions by splitting a contract for a larger amount into separate agreements, each within the sum limited.²¹

Appropriation by county. The statutory requirements that money be appropriated or provided by the city are not met by evidence of an appropriation by the county for the same work which the contract was made to cover.²²

b. Construction of Provisions Generally

Provisions prohibiting the incurring of a municipal indebtedness without a prior appropriation or provision for payment must be reasonably construed so as to effectuate their purposes; they constitute limitations on the power of municipal corporations to incur debts. Such a provision has been held not retroactive.

A provision prohibiting the incurring of a municipal indebtedness or expenditure not covered by a prior appropriation or provision for payment must be given a reasonable construction²³ protective of the municipal corporation against official extravagance,²⁴ but not such as to hamstring the munici-

pal corporation in the exercise of its powers;²⁵ it is intended to have some effect in limiting the powers of a municipal body in the incurring of indebtedness,²⁶ and it is the court's duty to give it effect according to the meaning of the words used.²⁷ The terms of such a statute by implication become terms of a contract entered into by a municipality.²⁸ The prohibitions of such a statute must not be weakened, or the exceptions enlarged, by constructions which might tend to break down the safeguards designed to be set up or to admit of the evils intended to be prevented.²⁹

A provision requiring provision for a tax has been held to confer no power on municipalities to incur debts,³⁰ but to be a limitation on such power,³¹ and, as appears in Constitutional Law § 52, not self-executing; such a provision has been held to be a restriction on the municipality alone and not on the legislature.³² Likewise, a provision prohibiting the entering into of any contract in excess of the funds provided for carrying it out limits the power of a municipality to raise and spend public funds.³³

A statute imposing a requirement of prior appropriation has been denied a retroactive effect.³⁴ The requirement of a general statute or charter provision as to prior appropriation or provision for payment is subject to subsequent legislation which may operate to repeal, modify, or create an exception to it,³⁵ and, of course, an exception created

18. N.D.—Harding v. City of Dickinson, 33 N.W.2d 626, 633.

"It must be presumed that the Board . . . will obey the law and make whatever appropriation is necessary before entering into the contract or incurring any liability under it."—Harding v. City of Dickinson, supra.

19. N.Y.—People v. Prendergast, 163 N.Y.S. 583, 99 Misc. 8, affirmed 163 N.Y.S. 1128, 177 App.Div. 928, reversed on other grounds 116 N.E. 1068, 220 N.Y. 725.

44 C.J. p 1142 note 76 [a].

20. Ill.—De Kam v. Streater, 146 N.E. 550, 316 Ill. 123.

Pa.—Bullitt v. Philadelphia, 19 Pa. Dist. 1091.

Supplementary budget making available funds for purchase, passed after filing of petition to enjoin purchase, could not be basis of affirmative mandatory relief ordering award of contract, since such budget did not relate back to and cure fatal defect in order directing purchase.—Burt v. Municipal Council of City of Taunton, 176 N.E. 511, 275 Mass. 535.

21. Mass.—May v. Gloucester, 55 N.E. 465, 174 Mass. 583.

44 C.J. p 115 note 55.

22. Ga.—Gulf Pav. Co. v. Atlanta, 99 S.E. 374, 149 Ga. 114.

44 C.J. p 115 note 53, p 1141 note 60 [e].

23. Mich.—Bacon v. City of Detroit, 275 N.W. 800, 282 Mich. 150.

24. Mich.—Bacon v. City of Detroit, supra.

25. Mich.—Bacon v. City of Detroit, supra.

26. Or.—Public Market Co. of Portland v. City of Portland, 130 P.2d 624, 171 Or. 522, opinion amplified 138 P.2d 916, 171 Or. 522.

27. Or.—Public Market Co. of Portland v. City of Portland, supra.

28. N.H.—Stocklan v. Brackett, 61 A.2d 140.

29. Mass.—McCarthy v. City of Malden, 22 N.E.2d 104, 303 Mass. 563—Continental Const. Co. v. City of Lawrence, 9 N.E.2d 550, 297 Mass. 513, 111 A.L.R. 699.

30. N.M.—Henning v. Town of Hot Springs, 102 P.2d 25, 44 N.M. 321.

31. N.M.—Henning v. Town of Hot Springs, supra.

32. Pa.—Vansciver v. Sharon Hill Borough, 33 Pa. Dist. & Co. 383, 28 Del. Co. 41, 30 Mun. L.R. 43.

Statute as to bonds

Failure to impose a tax has been held not to render unconstitutional a statute validating municipal assessment bonds and making them obligations of the municipality, or to render void provisions of the statute imposing indebtedness on the city, where the constitution contains no provision stating that any indebtedness of the municipality shall be void if the tax is not provided at or before the incurring thereof.—Bessemer Inv. Co. v. City of Chester, D.C. Pa., 22 F. Supp. 311, modified on other grounds, C.C.A., 113 F.2d 571.

33. Fla.—State ex rel. Cole v. Keller, 176 So. 176, 129 Fla. 276.

34. N.J.—Frank Grad & Sons v. City of Newark, 9 A.2d 676, 17 N.J. Misc. 354.

35. U.S.—U. S. v. New Orleans, La., 98 U.S. 381, 25 L. Ed. 225.

44 C.J. p 115 note 56, p 1142 note 78.

by the charter or statute imposing the requirement will be given effect in a case falling within it.³⁶

A constitutional provision requiring a municipality to devote all revenues derived from the water-works, which it is thereby authorized to acquire, to the payment of the debt incurred therefor does not impliedly prohibit the grant of authority to a municipality to make additional provision for payment of the debt.³⁷

§ 1867. — Application of Requirement

- a. In general
- b. Public service contracts
- c. Source and time of payment

a. In General

The applicability of provisions prohibiting the incurring of municipal indebtedness without prior appropriation or provision for payment depends on the language of the particular provision; such provisions generally apply only to claims arising *ex contractu* and do not apply to expenses or liabilities imposed on the municipal corporation by law.

Some provisions prohibiting the making of a con-

tract or the incurring of an expense without a prior appropriation are limitations on the powers of all officers and departments of municipal corporations,³⁸ but are not limitations on the power of the municipal council³⁹ or an independent board;⁴⁰ but another such provision has been held a limitation on the lawful exercise of the powers of the council.⁴¹ A prohibition against the incurring of indebtedness or liability without provision for the collection of a tax sufficient to pay it has been held inapplicable to a housing authority.⁴²

While a provision prohibiting the incurring, in any year, of any indebtedness or liability, in any manner or for any purpose, exceeding the income and revenue provided for that year, without provision for the collection of a tax sufficient to pay it has been held to cover all character of debts and obligations for which the city may become bound,⁴³ in general, provisions prohibiting the incurring of municipal indebtedness, liabilities, or expenses, unless funds for the payment thereof are on hand, or a prior appropriation or provision for payment has been made, refer and apply to,⁴⁴ and only to,⁴⁵

Repeal, amendment, or superseding held not shown, either expressly or by implication.—*Gamewell Co. v. City and County of Honolulu*, 33 Hawaii 817.

36. U.S.—*Slocum v. North Platte*, Neb., 192 F. 252, 112 C.C.A. 510. 44 C.J. p 1142 note 79.

Capital projects; swimming pool N.J.—*Frank Grad & Sons v. City of Newark*, 9 A.2d 676, 17 N.J.Misc. 354.

37. Mont.—*Carlson v. Helena*, 102 P. 39, 39 Mont. 82, 17 Ann.Cas. 1233.

38. Mass.—*Dyer v. City of Boston*, 172 N.E. 235, 272 Mass. 265. 44 C.J. p 1142 note 82.

"The effect of . . . [a statute embodying such a provision] is not to destroy the authority of such boards to contract on behalf of the municipality, but rather to place a limitation on that authority."—*McCarthy v. City of Malden*, 22 N.E.2d 104, 107, 303 Mass. 563.

Officers and departments of all classes of cities

Ind.—*Brayton v. Rushville*, 120 N.E. 48, 68 Ind.App. 238.

Particular boards, departments, or officers

(1) Board of guardians of the poor.—*Mathews v. Philadelphia* 93 Pa. 147—44 C.J. p 114 note 30 [a].

(2) Licensing board.—*Peters v. City of Medford*, 4 N.E.2d 338, 295 Mass. 588.

(3) Board of health.—*Marble v. Town of Clinton*, 9 N.E.2d 532, 298 Mass. 87, 111 A.L.R. 1101.

(4) Water department of city—*McQuade v. City of Springfield*, 84 N. E.2d 30, 323 Mass. 715.

(5) Street commissioner.—*Grimes v. Keenan*, 187 A. 100, 88 N.H. 230.

(6) A board of commissioners having care and management of cemetery.—*Commissioners of Woburn Cemetery v. Treasurer of Woburn*, 64 N.E.2d 627, 319 Mass. 86.

(7) A city alderman acting as director of department of engineering.—*Continental Const. Co. v. City of Lawrence*, 9 N.E.2d 550, 297 Mass. 513, 111 A.L.R. 699.

Determination of amount of appropriation

In determining whether liability incurred is in excess of departmental appropriation, amounts needed for satisfaction of all preëxisting contracts, including salaries for whole fiscal year of persons already in office at time of incurring of liability in question, must be deducted from appropriation.—*McHenry v. City of Lawrence*, 3 N.E.2d 262, 295 Mass. 119.

39. N.Y.—*Smith v. City of New York*, 47 N.E.2d 35, 289 N.Y. 517—*Chambers v. City of New York*, 36 N.E.2d 313, 286 N.Y. 308—*Barry v. City of New York*, 25 N.Y.S.2d 27, 175 Misc. 712, affirmed 27 N.Y.S.2d 425, 261 App.Div. 957, appeal denied 27 N.Y.S.2d 783, 261 App.Div. 1073.

44 C.J. p 1142 note 84.

40. Ill.—*Barber Asphalt Pav. Co. v.*

South Park Comrs., 84 N.E. 243, 233 Ill. 362.

44 C.J. p 1142 note 85.

41. Mass.—*Continental Const. Co. v. City of Lawrence*, 9 N.E.2d 550, 297 Mass. 513, 111 A.L.R. 699.

42. Idaho.—*Lloyd v. Twin Falls Housing Authority*, 113 P.2d 1102, 62 Idaho 592.

43. U.S.—*Washington Water Power Co. v. City of Coeur d'Alene, Idaho*, D.C.Idaho, 9 F.Supp. 263.

44. Ky.—*Swinburne v. City of Newport*, 181 S.W.2d 421, 297 Ky. 820. 44 C.J. p 1142 note 86.

Supplemental contracts for extra work

Okl.—*Michael v. Atoka*, 185 P. 96, 76 Okl. 266.

44 C.J. p 114 note 32.

45. La.—*Lilley v. City of Shreveport*, App., 163 So. 722.

44 C.J. p 1142 note 87.

Contingent liability

Under provision that no debt shall be created by city unless provision be made to collect sufficient funds to pay interest and create sinking fund, obligation imposing merely contingent future liability does not create "debt" before happening of contingency, at least where arising of contingency is solely within control of city and can occur only by its subsequent choice voluntarily made.—*Ward v. City of Big Spring, Civ.App.*, 161 S.W.2d 821, reversed on other grounds *City of Big Spring v. Ward*, 169 S.W.2d 151, 140 Tex. 609.

claims arising *ex contractu*, or indebtedness voluntarily incurred by the municipality,⁴⁶ or as to which it has discretion,⁴⁷ or expenditures which are optional;⁴⁸ they do not apply to an expense or liability imposed on the municipality by law,⁴⁹ or to contracts entered into in the performance of a public duty imposed by statute.⁵⁰ Such restrictions are not to be construed as prohibiting a contract for a reasonable term of years when it is for the best interests of a municipality.⁵¹ As used in such a provision, "liabilities" is a broader term than "debt,"⁵² and includes any kind of debt or liability, absolute or contingent, express or implied.⁵³

It has been decided that such inhibitions do not apply to contracts not involving the creation of debts;⁵⁴ to contracts outside the scope of an appropriation statute expressly limited in its operation to a particular class of contracts;⁵⁵ to necessary current expenses,⁵⁶ as distinguished from extraordinary expenditures such as contracts for permanent improvements;⁵⁷ to ordinary and necessary administrative expenses payable, and expected to be paid, out of the current revenues;⁵⁸ to contracts made in the exercise of implied powers necessary to carry out powers expressly granted;⁵⁹ or to municipal salaries,⁶⁰ although as to the last point there is also authority to the contrary.⁶¹ It is held by some,⁶²

Contract not fixing amount of liability from date

Under provisions that no debt shall be created by city unless provision be made to collect sufficient funds to pay interest and create sinking fund, contract by city which does not fix amount of liability from its date does not create present "debt."—*Ward v. City of Big Spring*, Civ.App., 161 S.W.2d 821, reversed on other grounds *City of Big Spring v. Ward*, 169 S.W.2d 151, 140 Tex. 609.

Work to be done and paid for in future

Under a requirement of the provision of a tax, an obligation to pay for work to be done in the future and to be paid for when performed does not become a debt until the performance of the work.—*Ward v. City of Big Spring*, Civ.App., 161 S.W.2d 821, reversed on other grounds *City of Big Spring v. Ward*, 169 S.W.2d 151, 140 Tex. 609.

46. U.S.—*Bessemer Inv. Co. v. City of Chester*, D.C.Pa., 22 F.Supp. 311, modified on other grounds, C.C.A., 113 F.2d 571.

47. Ill.—*People ex rel. Ledbetter v. Hadfield*, 45 N.E.2d 45, 316 Ill.App. 245.

48. Ariz.—*City of Phoenix v. Kidd*, 92 P.2d 513, 54 Ariz. 75, reheard 94 P.2d 428, 54 Ariz. 123, followed in *City of Phoenix v. Price*, 94 P.2d 433, 54 Ariz. 137, *City of Phoenix v. Enriquez*, 94 P.2d 434, 54 Ariz. 138, and *City of Phoenix v. Wilson*, 94 P.2d 434, 54 Ariz. 139.

49. U.S.—*Bessemer Inv. Co. v. City of Chester*, D.C.Pa., 22 F.Supp. 311, modified on other grounds, C.C.A., 113 F.2d 571.

Ariz.—*City of Phoenix v. Kidd*, 92 P.2d 513, 54 Ariz. 75, reheard 94 P.2d 428, 54 Ariz. 123, followed in *City of Phoenix v. Price*, 94 P.2d 433, 54 Ariz. 137, *City of Phoenix v. Enriquez*, 94 P.2d 434, 54 Ariz. 138, and *City of Phoenix v. Wilson*, 94 P.2d 434, 54 Ariz. 139.

Ill.—*People ex rel. Ledbetter v. Hadfield*, 45 N.E.2d 45, 316 Ill.App. 245.

La.—*Lilley v. City of Shreveport*, App., 163 So. 722.

N.H.—*Grimes v. Keenan*, 187 A. 100, 88 N.H. 230.

S.C.—*U. S. Rubber Products v. Town of Batesburg*, 190 S.E. 120, 183 S.C. 49, 110 A.L.R. 144.

44 C.J. p 1142 note 88.

Counsel fees

Miss.—*City of Louisville v. Chambers*, 1 So.2d 771, 190 Miss. 833.

50. Ill.—*Kankakee v. McGrew*, 52 N.E. 893, 178 Ill. 74.

44 C.J. p 114 note 36.

51. N.H.—*Stocklan v. Brackett*, 61 A.2d 140.

52. Or.—*Public Market Co. of Portland v. City of Portland*, 130 P.2d 624, 171 Or. 522, opinion amplified on other grounds 138 P.2d 916, 171 Or. 522.

53. Or.—*Public Market Co. of Portland v. City of Portland*, supra.

54. Ill.—*Danville v. Danville Water Co.*, 54 N.E. 224, 180 Ill. 235.

Wis.—*Superior v. Douglas County Tel. Co.*, 122 N.W. 1023, 141 Wis. 363.

44 C.J. p 114 note 33.

55. U.S.—*New York Audit Co. v. Louisville, Ky.*, 185 F. 349, 107 C.C.A. 467.

44 C.J. p 114 note 35.

56. Or.—*Public Market Co. of Portland v. City of Portland*, 130 P.2d 624, 171 Or. 522, opinion amplified on other grounds 138 P.2d 916, 171 Or. 522.

44 C.J. p 1142 note 90.

Current expenses as subject to limitation of amount see supra § 1851.

57. Or.—*Public Market Co. of Portland v. City of Portland*, supra. Requirement of appropriation or means of payment as to improvements see supra § 1084.

58. La.—*Smith v. Town of Vinton*, 25 So.2d 237, 209 La. 587.

Emergency repair of municipal electrical system

La.—*Smith v. Town of Vinton*, supra.

59. Colo.—*Denver v. Webber*, 63 P. 804, 15 Colo.App. 511.

60. Ohio.—*Youngstown v. Youngstown First Nat. Bank*, 140 N.E. 176, 106 Ohio St. 563.

44 C.J. p 1142 note 89.

Payment, and appropriation therefor, of compensation to municipal employees generally see supra § 728.

61. Mass.—*McCarthy v. City of Malden*, 22 N.E.2d 104, 303 Mass. 563.

Okl.—*City of Morris v. Thompson*, 138 P.2d 92, 192 Okl. 41—*Jurd v. City of Tulsa*, 80 P.2d 596, 183 Okl. 239—*City of Sand Springs v. Kraus*, 72 P.2d 726, 181 Okl. 6—*Cobb v. City of Norman*, 64 P.2d 901, 179 Okl. 126.

Firemen and policemen

Mass.—*McHenry v. City of Lawrence*, 3 N.E.2d 262, 295 Mass. 119.

Mechanical or manual labor on public works

Ariz.—*City of Phoenix v. Kidd*, 92 P.2d 513, 54 Ariz. 75, reheard 94 P.2d 428, 54 Ariz. 123, followed in *City of Phoenix v. Price*, 94 P.2d 433, 54 Ariz. 137, *City of Phoenix v. Enriquez*, 94 P.2d 434, 54 Ariz. 138, and *City of Phoenix v. Wilson*, 94 P.2d 434, 54 Ariz. 139.

62. U.S.—*City of Floydada v. American La France & Foamite Industries*, C.C.A.Tex., 87 F.2d 820.

Ark.—*Eureka Fire Hose Mfg. Co. v. City of Ozark*, 158 S.W.2d 679, 203 Ark. 709.

Ind.—*Hamer v. City of Huntington*, 21 N.E.2d 407, 215 Ind. 594.

La.—*U. S. Rubber Co. v. Town of Breaux Bridge*, App., 165 So. 721. Tex.—*Fabric Fire Hose Co. v. Teague*, Civ.App., 152 S.W. 506.

although not other,⁶³ authorities that the requirements apply to a contract for the purchase of fire apparatus; and such a requirement has been applied to the purchase of real property,⁶⁴ although there is authority to the contrary,⁶⁵ and to expenditures for materials.⁶⁶ A requirement of a prior appropriation is applicable to a contract for the purchase of voting machines where the requirement and the statutory grant of authority to make the purchase are not inconsistent,⁶⁷ but the rule is otherwise where the requirement and the statutory grant of authority are so inconsistent as to preclude the view that the legislature intended that appropriations for the purchase of machines should precede their acquisition.⁶⁸

The requirements apply to the renewal of debts barred by the statute of limitations,⁶⁹ but not to the refunding of valid obligations without increase of liability.⁷⁰ Some requirements are limited to funded debts,⁷¹ and are not applicable to such a debt until its amount is definitely fixed.⁷²

b. Public Service Contracts

Provisions requiring prior appropriation or other provision for payment in the case of municipal contracts involving the creation of debt have been held by some authorities, but not by others, to apply to contracts for furnishing a public utility service, such as water or light.

In some jurisdictions, statutory or charter provisions requiring prior appropriations or other provi-

sion for payment in the case of municipal contracts involving the creation of debts have been held to apply to contracts for furnishing a public utility service, such as water or light,⁷³ to a municipality or its inhabitants;⁷⁴ and, where such contract is made for a term of years, it is held in these jurisdictions to be void in the absence of a statute excepting such contracts from the rule.⁷⁵ Other authorities have held that the requirements do not apply to contracts for water, sewerage, and light.⁷⁶

The exemption of public utility contracts from the operation of the requirements may be secured by express statutory provision in the form of an exception to the general statute;⁷⁷ where such exception is made, it has been held to apply only to contracts expressly within its terms.⁷⁸ In other jurisdictions, such exception may be brought about either by a judicial construction of the statutes, the legislature being held not to have intended to nullify its grant of a power to provide for a public service by the enactment of the appropriation statute,⁷⁹ or by considering such a contract as not creating an indebtedness beyond the year for which appropriation is made.⁸⁰

c. Source and Time of Payment

A pecuniary obligation of a municipal corporation is within a requirement of prior provision for payment where it is payable in whole or in part from revenues of future fiscal years, but not where it is intended to, and lawfully can, be paid out of the revenues of the year in

63. S.C.—*U. S. Rubber Products v. Town of Batesburg*, 190 S.E. 120, 183 S.C. 49, 110 A.L.R. 144.
44 C.J. p 1143 note 94.

64. Ill.—*Stripe v. City of Waukegan*, 254 Ill.App. 74.

Kan.—*City of Iola v. Hobart*, 42 P.2d 977, 141 Kan. 709.

Mich.—*Salzer v. City of East Lansing*, 249 N.W. 16, 263 Mich. 626.

Designation of fund for compensation in taking by eminent domain see *Eminent Domain* § 101.

65. N.Y.—*Lowe v. City of New York*, 270 N.Y.S. 216, 240 App.Div. 484, affirmed 193 N.E. 331, 265 N.Y. 583.

Obligation not payable out of tax money

Charter provisions requiring appropriations for municipal contracts were held inapplicable to contract of city, authorized by board of estimate and apportionment to acquire real property by purchase in lieu of condemnation, since obligation was not "payable out of money raised by tax."—*Lowe v. City of New York*, supra.

66. Ariz.—*City of Phoenix v. Kidd*, 92 P.2d 513, 54 Ariz. 75, reheard 94 P.2d 428, 54 Ariz. 123, followed in

City of Phoenix v. Price, 94 P.2d 433, 54 Ariz. 137, *City of Phoenix v. Enriquez*, 94 P.2d 434, 54 Ariz. 138, and *City of Phoenix v. Wilson*, 94 P.2d 434, 54 Ariz. 139.

67. U.S.—*Empire Voting Mach. Co. v. Chicago*, C.C.A.Ill., 267 F. 162, certiorari denied 41 S.Ct. 14, 254 U.S. 642, 65 L.Ed. 453.
44 C.J. p 1143 note 96.

68. Mich.—*Darling v. Manistee*, 131 N.W. 450, 166 Mich. 35.

69. Tex.—*Tyler v. Jester*, Civ.App., 74 S.W. 359.

70. Tex.—*Tyler v. Jester*, supra.

Issuance of refunding bonds.
Miss.—*City of Louisville v. Chambers*, 1 So.2d 771, 190 Miss. 833.

Pa.—*Schuchman v. City of Pittsburgh*, 41 A.2d 642, 351 Pa. 527, 157 A.L.R. 785.

71. Pa.—*Appeal of Tatham*, 80 Pa. 465.

72. N.Y.—*Waverly v. Waverly Water Co.*, 111 N.Y.S. 541, 127 App.Div. 440, affirmed 87 N.E. 1129, 194 N.Y. 545.

73. Minn.—*Kilchli v. Minnesota*

Brush Electric Co., 59 N.W. 1088, 58 Minn. 418, 49 Am.S.R. 523.

44 C.J. p 114 note 28 [a], p 1143 note 93.

74. U.S.—*Nelson v. Murfreesboro, C. Tenn.*, 179 F. 905.

N.J.—*Humphreys v. Bayonne*, 26 A. 81, 55 N.J.Law 241.

Requirement of means of payment for improvements see *supra* § 1084.

75. U.S.—*Nelson v. Murfreesboro, C. Tenn.*, 179 F. 905.

76. Mich.—*Mitchell v. Negaunee*, 71 N.W. 646, 113 Mich. 359, 67 Am.S.R. 468, 38 L.R.A. 157.

44 C.J. p 1143 note 92.

77. U.S.—*Slocum v. North Platte, Neb.*, 192 F. 252, 112 C.C.A. 510.

44 C.J. p 115 note 61.

78. U.S.—*Nelson v. Murfreesboro, C. Tenn.*, 179 F. 905.

44 C.J. p 115 note 60.

79. Colo.—*Denver v. Hubbard*, 68 P. 993, 17 Colo.App. 346.

44 C.J. p 115 note 62.

80. Ill.—*Cain v. Wyoming*, 104 Ill. App. 538—*Carlyle Water, Light, etc., Co. v. Carlyle*, 31 Ill.App. 325.

which the obligation is incurred, or out of some fund in the control of the municipality; likewise, a prior appropriation is not necessary where a special fund is provided for payment and the general funds of the municipality are not obligated, or where the contract is covered by special legislation providing for the raising of funds therefor.

As used in a provision prohibiting the incurring of a debt by a municipal corporation without at the same time providing for a tax to pay the interest and provide a sinking fund, the meaning of the word "debt" in any given case, and the application of the limitation, may be said to hinge on the facts peculiar to that case.⁸¹ In some jurisdictions the test applied in determining whether a pecuniary obligation of a municipality is within the meaning of a requirement of prior provision for its payment is whether it is payable in whole or in part from the revenues of future fiscal years,⁸² since it is within the application of the requirement where it is so payable,⁸³ but not where it is in good faith intended to, and lawfully can, be paid out of the current revenues of the year in which the obligation is in-

curred⁸⁴ or out of some fund within the immediate control of the municipality,⁸⁵ even though it is not in fact paid out of the revenues or fund contemplated.⁸⁶ However, in other jurisdictions a statute prohibiting cities from making any contracts involving the expenditure of money, unless the funds therefor are in the treasury, has been held not to apply to a contract calling for payments only in future years;⁸⁷ and a lease has been held not to create an obligation for the payment of which there is not money available at the time of incurring or authorizing it.⁸⁸

A prior appropriation is not necessary where a special fund is provided for the payment of the expense and the general funds of the municipality are not obligated.⁸⁹ The statutory requirements are met without a specific appropriation, if funds for payments under the contract are available in the form of a general⁹⁰ or contingent⁹¹ fund, or a departmental provision,⁹² or in some other form;⁹³ and this is so, even though there are other claims on

81. Tex.—Stevenson v. Blake, Civ. App., 88 S.W.2d 773, affirmed 113 S.W.2d 525, 131 Tex. 103.

82. Tex.—Cleburne v. Gutta Percha, etc., Mfg. Co., Civ.App., 127 S.W. 1072.

83. Ark.—City of Little Rock v. White Co., 103 S.W.2d 58, 193 Ark. 837.

Tex.—Andrus v. Crystal City, Com. App., 265 S.W. 550—Stevenson v. Blake, Civ.App., 88 S.W.2d 773, affirmed 113 S.W.2d 525, 131 Tex. 103.

Taxes collected in future

Attempt of municipality to obligate itself to pay debt from indirect taxes to be collected in future years violates such provision.—Warden v. City of Grafton, 176 S.E. 706, 115 W. Va. 438.

Warrants wrongly made payable

Under a statutory provision prohibiting certain municipalities from incurring an indebtedness which cannot be met out of the revenue of the current fiscal year, the fact that warrants issued to cover purchase price of a lot were payable out of future years' revenues did not invalidate them where the indebtedness was a valid one and the warrants should have been made payable out of current years' revenues.—City of Jackson v. First Nat. Bank of Jackson, 157 S.W.2d 221, 289 Ky. 1.

84. U.S.—Southland Ice Co. v. City of Temple, C.C.A.Tex., 100 F.2d 825.

Pa.—Gemmell v. Calder, 3 A.2d 7, 332 Pa. 281.

Tex.—Stevenson v. Blake, 113 S.W.2d 525, 131 Tex. 103—Clay Bldg. Material Co. v. City of Wink, Civ.

App., 141 S.W.2d 1040—Panhandle Const. Co. v. City of Spearman, Civ.App., 83 S.W.2d 425, error dismissed—McKenzie Const. Co. v. City of San Antonio, Civ.App., 60 S.W.2d 349, error refused.

44 C.J. p 1143 note 6.

All current revenues appropriated

Where all the current revenues have already been appropriated, and no attempt has been made to amend the budget by transferring funds and devoting them to a new purpose not mentioned therein, another obligation incurred becomes a debt within a requirement of prior provision for payment or for the assessment and levy of a tax.—Southland Ice Co. v. City of Temple, C.C.A.Tex., 100 F.2d 825.

85. U.S.—Southland Ice Co. v. City of Temple, supra.

Tex.—Stevenson v. Blake, 113 S.W.2d 525, 131 Tex. 103—Clay Bldg. Material Co. v. City of Wink, Civ. App., 141 S.W.2d 1040—Panhandle Const. Co. v. City of Spearman, Civ.App., 83 S.W.2d 425, error dismissed—McKenzie Const. Co. v. City of San Antonio, Civ.App., 60 S.W.2d 349, error refused.

44 C.J. p 1143 note 7.

86. Tex.—McNeal v. Waco, 33 S.W. 322, 89 Tex. 83.

44 C.J. p 1143 note 8.

87. U.S.—Defiance Water Co. v. Defiance, C.C.Ohio, 90 F. 753.

Mich.—Conroy v. City of Battle Creek, 22 N.W.2d 275, 314 Mich. 210.

44 C.J. p 1143 note 9.

88. Minn.—Ambrosich v. City of Eveleth, 274 N.W. 635, 200 Minn. 473, 112 A.L.R. 269.

Reason for rule

The obligation prohibited is a present liability or duty to pay money, and unaccrued rent is not a debt or present obligation.—Ambrosich v. City of Eveleth, supra.

89. Ill.—Branigar v. Village of Riverdale, 72 N.E.2d 201, 396 Ill. 534—Simpson v. City of Highwood, 23 N.E.2d 62, 372 Ill. 212, 124 A.L.R. 1459—Ward v. City of Chicago, 173 N.E. 810, 342 Ill. 167—De Leuw, Cather & Co. v. City of Joliet, 64 N.E.2d 779, 327 Ill.App. 453. N.Y.—Muller v. New York, 63 N.Y. 353.

Federal loan and grant

Ill.—De Leuw, Cather & Co. v. City of Joliet, 64 N.E.2d 779, 327 Ill. App. 453.

Special assessment

Ill.—Markman v. Calumet City, 18 N.E.2d 75, 297 Ill.App. 531—Charles DeLeuw & Co. v. Village of Midlothian, 7 N.E.2d 506, 289 Ill.App. 620.

90. Iowa.—Corpus Juris cited in Carlson v. City of Marshalltown, 236 N.W. 421, 425, 212 Iowa 373—Brooks v. Brooklyn, 124 N.W. 868, 146 Iowa 136, 26 L.R.A. N.S., 425.

91. N.J.—Heston v. Atlantic City, 107 A. 820, 93 N.J.Law 317.

44 C.J. p 114 note 42.

92. Ky.—Louisville v. Gosnell, 60 S.W. 411, 61 S.W. 476, 22 Ky.L. 1524. 44 C.J. p 115 note 43.

93. Cal.—Williams v. Stockton, 235 P. 986, 195 Cal. 743.

44 C.J. p 115 note 44.

the funds exceeding the total amount thereof,⁹⁴ or the funds are subsequently exhausted, provided at the time the contract was made there was enough of the fund unexpended to meet all claims thereunder,⁹⁵ and even though there is a failure to comply with the requirements of a special statute designed to apply if there are no general funds available for the purpose.⁹⁶ Likewise, a general statute requiring an appropriation will not apply to contracts expressly covered by special legislation providing for the raising of funds therefor by taxation,⁹⁷ or by the issuing of certificates of indebtedness,⁹⁸ unless the statute limits the amount of the tax to be raised and the contract calls for payments in excess of that amount,⁹⁹ in which case the contract is void to the extent of such excess if no appropriation therefor is made.¹

Charter restrictions on the power to incur obligations without providing funds to meet them may be such as to relate only to charges against the general fund which must be raised annually by general taxation in advance of its use;² and a provision requiring prior appropriation has been held to be concerned only with obligations payable out of funds raised, made up, or replenished by general taxation,³ and to be inapplicable to a conditional obligation payable only out of funds on hand and net earnings of a municipal lighting plant, and not a general indebtedness of the municipality,⁴ or to payments to be made for the purchase of a public utility to be paid for exclusively out of the net earnings derived therefrom, where such earnings do not become a part of the general funds of the municipality;⁵ but another such provision has been held to apply not only to funds raised by taxation, but to miscellaneous receipts which are a part of the

general funds.⁶ The contract is valid where there is an unexpended portion of a specific appropriation sufficient to meet the contract requirements, regardless of the comptroller's advice to the contrary and the mayor's refusing to approve because of the comptroller's recommendation.⁷

A requirement of the levy of a tax or assessment to defray the cost and expense of a contract has been held not to require taxes to be levied years in advance of their need and the holding of the money for year-to-year distribution on the contract,⁸ particularly where the amount of the tax over the contract term cannot be known in advance;⁹ likewise, a provision prohibiting an expenditure beyond the amount appropriated does not mean that, where a contract is made to run for more than a year, the entire sum to be paid at intervals during the several years must be appropriated at the start.¹⁰

Under a provision prohibiting the incurring of an indebtedness without the provision of a tax, the pledging of the general revenues of a municipality, or any part thereof, on the municipality's promise to pay constitutes a debt.¹¹

The word "revenue," as used in a provision prohibiting the incurring of liability, to be paid in any fiscal year, in excess of the revenue for that year, does not mean the actual money which shall be received in the municipal treasury,¹² but it is the estimated revenues which are contemplated;¹³ such estimates must relate to sources of income which are definite and certain, and not contingent.¹⁴ It has been held that the power to contract debts for municipal purposes should be restricted to such debts as the council could reasonably expect, and

94. Cal.—Williams v. Stockton, 235 P. 986, 195 Cal. 743.

N.J.—Curtis v. Jersey City, 82 A. 875, 82 N.J.Law 250.

95. Okl.—Tulsa v. Oklahoma Natural Gas Co., 234 P. 588, 109 Okl. 43.

44 C.J. p 115 note 46.

96. Iowa.—Brooks v. Brooklyn, 124 N.W. 868, 146 Iowa 136, 26 L.R.A., N.S., 425.

44 C.J. p 115 note 47.

97. N.J.—Townsend v. Atlantic City, 65 A. 509, 72 N.J.Law 474.

44 C.J. p 114 note 27, p 1142 note 78 [a].

98. Mich.—Darling v. Manistee, 131 N.W. 450, 166 Mich. 35.

44 C.J. p 114 note 38.

99. N.M.—Hagerman v. Hagerman, 141 P. 613, 19 N.M. 113, L.R.A. 1915A 904.

1. N.M.—Hagerman v. Hagerman, supra.

2. N.Y.—Van Arsdale v. Justice, 133 N.Y.S. 661, 75 Misc. 495.

3. Neb.—Carr v. Fenstermacher, 228 N.W. 114, 119 Neb. 172—Moore v. Central City, 224 N.W. 690, 118 Neb. 326.

N.D.—Lang v. City of Cavalier, 228 N.W. 819, 59 N.D. 75.

4. Neb.—Carr v. Fenstermacher, 228 N.W. 114, 119 Neb. 172.

5. N.D.—Lang v. City of Cavalier, 228 N.W. 819, 59 N.D. 75.

6. Ill.—Simpson v. City of Highwood, 23 N.E.2d 62, 372 Ill. 212, 124 A.L.R. 1459.

7. Mo.—Con P. Curran Printing Co. v. St. Louis, 111 S.W. 812, 213 Mo. 22.

8. Mich.—Bacon v. City of Detroit, 275 N.W. 800, 282 Mich. 150.

9. Mich.—Bacon v. City of Detroit, supra.

10. Mass.—Marble v. Town of Clinton, 9 N.E.2d 522, 298 Mass. 87, 111 A.L.R. 1101—Clarke v. City of Fall River, 107 N.E. 419, 219 Mass. 580.

Contract for future services

N.H.—Stocklan v. Brackett, 61 A.2d 140.

11. W.Va.—Warden v. City of Grafton, 176 S.E. 706, 115 W.Va. 438.

12. Or.—Public Market Co. of Portland v. City of Portland, 130 P.2d 624, 171 Or. 522, opinion amplified on other grounds 138 P.2d 916, 171 Or. 522.

13. Or.—Public Market Co. of Portland v. City of Portland, supra.

14. Or.—Public Market Co. of Portland v. City of Portland, supra.

did expect, to pay from the ordinary revenue of the municipality for the current fiscal year.¹⁵

§ 1868. — Certificate as to Funds

A provision requiring, for the creation of municipal indebtedness, a certificate by a designated officer that money sufficient to pay the debt has been appropriated or is available is constitutional and mandatory, and an attempt to create municipal indebtedness without compliance therewith is invalid.

A certificate by a designated officer that an amount of money sufficient to pay the debt involved has been appropriated or is available is sometimes made a condition precedent by statute or charter to the creation of municipal indebtedness by contract or ordinance.¹⁶ Such a provision is constitutional¹⁷ and mandatory,¹⁸ but not retroactive.¹⁹ A requirement of this nature has been held applicable to various contracts and transactions²⁰ and inapplicable to others;²¹ accordingly, such requirements

have been construed not to apply to contracts for municipal utilities for a term of years,²² to public utility rate ordinances²³ or service contracts;²⁴ to cases involving the appropriation of the proceeds of bonds issued by the municipality to meet the expenditures authorized by the bond issue ordinance;²⁵ to obligations for the payment of the salaries or compensation of public officers,²⁶ whether elected or appointed;²⁷ to ordinances merely expressing the public policy of the municipality by stipulating minimum salaries and wages for municipal officers and employees;²⁸ to certain emergencies;²⁹ or to cases where the municipal authorities refused to execute the contract.³⁰

Where such requirement is applicable, a resolution, ordinance, or contract attempting to create municipal indebtedness without compliance therewith is ultra vires and invalid,³¹ and a petition failing to

15. S.C.—U. S. Rubber Products v. Town of Batesburg, 190 S.E. 120, 183 S.C. 49, 110 A.L.R. 144.

16. Hawaii.—Gamewell Co. v. City and County of Honolulu, 33 Hawaii 817.

Ohio.—Industrial Rescue Mission v. City of Columbus, 81 N.E.2d 254, 83 Ohio App. 188.

44 C.J. p 119 notes 18–20, p 1143 note 13.

Certificate of officers as to sufficiency of funds for improvements see supra § 1085.

Countersignature see supra § 1007.

Filing statement of indebtedness see supra § 1856.

Omission to certify as defense in action on municipal contract see supra § 1024.

Purpose

(1) The object of a statute so requiring is not only to show the presence in the treasury of sufficient funds unappropriated, but also to prevent such funds from being taken out of the treasury for any other purpose.—Findlay v. Pendleton, 56 N.E. 649, 62 Ohio St. 80.

(2) Such a requirement is the most important provision for safeguarding the people from the reckless extravagance of those who, themselves often irresponsible, incur debts for those responsible to pay.—City of Ft. Pierce v. Scofield Engineering Co., C.C.A.Fla., 57 F.2d 1026.

Only a subdivision or taxing unit is referred to by statutory provision.—State ex rel. Columbus Blank Book Mfg. Co. v. Ayres, 51 N.E.2d 636, 142 Ohio St. 216.

Availability of insurance premium

Such requirement was satisfied, as respects contract with mutual insurance company for insurance of municipally-owned streetcar system,

by certificate that amount of premium was available, without certifying availability of amount of contingent liability.—Burt v. City of Cleveland, 62 N.E.2d 274, 76 Ohio App. 451.

Payment without tax authority's affirmation

The statutory power of municipal fiscal officer to authorize payment under contract without taxing authority's affirmation is conditioned on compliance with statutory requirement of filing of such certificate.—Schumacher Stone Co. v. Village of Columbus Grove, 57 N.E.2d 251, 73 Ohio App. 557.

17. Cal.—Pollok v. San Diego, 50 P. 769, 118 Cal. 593.

Mo.—Donovan v. Kansas City, 179 S.W.2d 108, 352 Mo. 430, appeal dismissed 64 S.Ct. 1049, 322 U.S. 707, 88 L.Ed. 1557.

18. U.S.—City of Ft. Pierce v. Scofield Engineering Co., C.C.A.Fla., 57 F.2d 1026.

19. Ohio.—Ryan v. Hoffman, 26 Ohio St. 109.

20. U.S.—City of Ft. Pierce v. Scofield Engineering Co., C.C.A.Fla., 57 F.2d 1026.

44 C.J. p 1144 note 17.

21. Ohio.—Village of Mayfield Heights v. Irish, 191 N.E. 129, 128 Ohio St. 329.

44 C.J. p 1143 note 16.

Funds not derived from taxation

(1) A provision requiring certification of availability of money required for contract was inapplicable to insurance contract for coverage of municipally-owned streetcar system, where funds to be expended would be derived from operation of system and not from taxation.—Burt v. City of Cleveland, 62 N.E.2d 274, 76 Ohio App. 451.

(2) A contract for leasing of parking meters to city with option to purchase was not void because no certificate was made by auditor as to funds applicable, where statute applies only to disbursements of funds arising from a levy on general tax list and payments required by contract were to be made from coins deposited in meters.—Hines v. City of Bellefontaine, 57 N.E.2d 164, 74 Ohio App. 393.

22. Ohio.—Defiance v. Defiance, 23 Ohio Cir.Ct. 96.

44 C.J. p 119 note 24.

23. Ohio.—Ohio Water Service Co. v. City of Washington, 3 N.E.2d 422, 131 Ohio St. 459.

Ordinance fixing water rates

Ohio.—Ohio Water Service Co. v. City of Washington, supra.

24. Ohio.—Ohio Water Service Co. v. City of Washington, supra.

25. Ohio.—Akron v. Dobson, 90 N.E. 123, 81 Ohio St. 66.

26. Ohio.—City of Youngstown v. First Nat. Bank of Youngstown, 140 N.E. 176, 106 Ohio St. 563.

27. Ohio.—City of Youngstown v. Nat. Bank of Youngstown, supra.

28. Tex.—Taxpayers' Ass'n of Harris County v. City of Houston, 105 S.W.2d 655, 129 Tex. 627.

29. Ohio.—City of Youngstown v. First Nat. Bank of Youngstown, 140 N.E. 176, 106 Ohio St. 563.

30. N.Y.—Beckwith v. New York, 106 N.Y.S. 175, 121 App.Div. 462.

31. U.S.—City of Ft. Pierce v. Scofield Engineering Co., C.C.A.Fla., 57 F.2d 1026.

Cal.—Williams Bros. & Haas, Inc. v. City and County of San Francisco, 128 P.2d 56, 53 Cal.App.2d 415.

Hawaii.—Gamewell Co. v. City and

allege compliance with such requirement is demurrable,³² although in a proper case recovery may be had where the municipality has enjoyed the fruits of the contract.³³ The council³⁴ or the electors³⁵ cannot dispense with the certificate, and the presence of the necessary funds in the treasury does not, in legal effect, dispense with the certificate;³⁶ but where, although it was not placed on the contract until after its execution, it could properly have been placed thereon at the time of its execution and the municipality subsequently ratifies the contract, it is bound.³⁷

Where a statute imposing a requirement of this nature is absolutely irreconcilable with the various statutes regulating and controlling public utilities, and the provisions of the latter particularly and specifically apply, the latter must prevail and become determinative of the necessity of such certificate.³⁸

Duty of official. Where a statute requires certification of a municipal contract by a designated official, it becomes his duty to certify the contract on

proof of the existence of the facts which the certificate is designed by statute to cover;³⁹ and, where a sufficient appropriation has been made, the officer's duty to certify to that fact is ministerial,⁴⁰ and he has no discretion to consider other grounds of attack or to base a refusal of certification thereon.⁴¹

§ 1869. Borrowing Money

- a. In general
- b. Submission to popular vote; emergency

a. In General

Municipal corporations have no inherent power to borrow money; when authorized by constitutional or statutory provisions to do so, a municipal corporation must comply with all the requirements of such provisions.

Municipal corporations have no inherent power to borrow money,⁴² but they may be authorized to do so by constitution, charter, or statute;⁴³ in the

County of Honolulu, 33 Hawaii 817.

Mo.—Donovan v. Kansas City, 175 S.W.2d 874, 352 Mo. 430, modified on other grounds 179 S.W.2d 108, 352 Mo. 430, appeal dismissed 64 S.Ct. 1049, 322 U.S. 707, 88 L.Ed. 1551.

Ohio.—Hawley v. City of Toledo, 191 N.E. 827, 47 Ohio App. 246—Soeder v. Cleveland, 16 Ohio Cir.Ct., N.S., 260.

Va.—City of Bristol v. Dominion Nat. Bank, 149 S.E. 632, 153 Va. 71.

44 C.J. p 119 note 23, p 1144 note 18.

Contract for several years; severable consideration

Where each year's consideration is severable from the remainder of a proposed plan, and municipality's obligation to pay under a contract is conditioned on the rendition of services, the contract is not prohibited by such provision; a municipality's contract to procure the services of an individual for a period of five years is not invalid under such provision and provision requiring certification that revenue anticipated and properly applicable to meet the expenditure will be available to meet it as it becomes due, unless it is shown that any installment coming due in any year is in excess of the incoming revenue of that year.—City and County of San Francisco v. Boyd, 110 P.2d 1036, 17 Cal.2d 606.

Circumstances not constituting non-compliance

To promise payment on the performance of a contract for temporary service out of an unencumbered and unexpended fund set aside for

such expenditure is not to contract a liability in violation of such provision, since there is no debt until the service has been rendered, even though some of the contingent payments may become payable five years later; facts that an initial payment by municipality under such contract might prove to have been injudiciously made, and that the scheme might fail of execution for want of appropriation, are immaterial on question of validity of contract under such provision.—City and County of San Francisco v. Boyd, supra.

32. Ohio.—Industrial Rescue Mission v. City of Columbus, 81 N.E. 2d 254, 83 Ohio App. 188—Schumacher Stone Co. v. Village of Columbus Grove, 57 N.E.2d 251, 73 Ohio App. 557—Soeder v. Cleveland, 16 Ohio Cir.Ct., N.S., 260.

33. U.S.—Transbay Const. Co. v. City and County of San Francisco, D.C.Cal., 35 F.Supp. 433, reversed on other grounds, C.C.A., 134 F.2d 468, certiorari denied 64 S.Ct. 52, 320 U.S. 749, 88 L.Ed. 445.

34. U.S.—Continental Constr. Co. v. Altoona, Pa., 92 F. 822, 35 C.C.A. 27.

35. U.S.—Continental Constr. Co. v. Altoona, supra.

36. Ohio.—Findlay v. Pendleton, 56 N.E. 649, 62 Ohio St. 80.

37. Pa.—Harrisburg v. Shepler, 7 Pa.Super. 491, affirmed 42 A. 893, 190 Pa. 374.

Ratification of unauthorized or excessive indebtedness generally see supra § 1834.

38. Ohio.—Ohio Water Service Co.

v. City of Washington, 3 N.E.2d 422, 131 Ohio St. 459.

39. Pa.—F. W. Mark Const. Co. v. Hadley, 139 A. 157, 290 Pa. 544.

44 C.J. p 119 notes 18, 19.

40. Pa.—Commonwealth v. Brown, 13 Pa.Dist. 53.

41. Pa.—Commonwealth v. Larkin, 64 A. 908, 216 Pa. 128.

44 C.J. p 119 notes 21, 22.

Unconstitutionality of contract

Pa.—F. W. Mark Const. Co. v. Hadley, 139 A. 157, 290 Pa. 544.

42. Ill.—Randolph v. Town of Bernadotte, 243 Ill.App. 581.

Mass.—Brown v. Newburyport, 95 N. E. 504, 209 Mass. 259, Ann.Cas. 1912B 495.

44 C.J. p 1144 note 23.

Bonds and other securities and sinking funds see infra §§ 1902-1977.

Effect of invalidity of debt or expenditure see supra § 1834.

Implied liability to repay unauthorized loan see supra § 1834.

Lending of money by municipality see infra § 1881.

Power to issue bonds implied from power to borrow money see infra § 1902.

Unauthorized loan see supra § 1834.

43. Fla.—Trudnak v. Gustafson, 183 So. 494, 133 Fla. 834.

Ill.—Randolph v. Bernadotte, 243 Ill. App. 581.

La.—Ziemer v. City of New Orleans, 197 So. 754, 195 La. 1054.

Pa.—Ward v. City of Pittsburgh, 184 A. 240, 321 Pa. 414, 105 A.L.R. 682.

44 C.J. p 1144 notes 24, 25, p 1145 note 26.

absence of express authority, the power may be necessarily implied by some special authority granted,⁴⁴ or duty imposed,⁴⁵ for the exercise or discharge of which the power to borrow money is not only convenient but necessary. The right to borrow money, as applied to a municipal corporation, is a power to create indebtedness and procure for its payment funds from others to be paid at a future date;⁴⁶ and the origin of any municipal borrowing power has been said to be in its power to exercise the governmental function of taxation in its area.⁴⁷

When money is borrowed under the provisions of a constitution or statute, there must be a compliance with the constitutional or statutory provision;⁴⁸ so, the power must be exercised in the mode,⁴⁹ and only after compliance with conditions precedent,⁵⁰ prescribed by charter or statute; the procedure necessary to give effect to the borrowing power is not an incident of the power, but a regulation for its proper exercise.⁵¹ Also, constitutional or statutory limitations of amount must be observed;⁵² and a municipality may not so exer-

Valid purpose

(1) A municipal loan from state trust fund, in order to be valid, must be made for a lawful purpose.—*Handlos v. Town of State Line*, 288 N.W. 748, 233 Wis. 145.

(2) Purpose of indebtedness or expenditure generally see *supra* §§ 1835-1845.

Borrowing on notes or certificates of indebtedness

Mass.—National Shawmut Bank of Boston v. City of Waterville, Me., 189 N.E. 92, 285 Mass. 252.

Particular purposes

(1) Housing; slum clearance. Fla.—*Marvin v. Housing Authority of Jacksonville*, 183 So. 145, 133 Fla. 590.

Neb.—*Lennox v. Housing Authority of City of Omaha*, 291 N.W. 100, 137 Neb. 582.

(2) Payment for services rendered pursuant to contract to bring about location of paper and pulp mills within city.—*City of Fernandina v. State*, 197 So. 454, 143 Fla. 802.

(3) Poor relief.—*Jennings v. City of St. Louis*, 58 S.W.2d 979, 332 Mo. 173, 87 A.L.R. 365.

(4) City held empowered to borrow moneys from a federal agency, to sell or pledge securities to such agency, and to accept a grant therefrom to construct sewage disposal plant.—*Shainwald v. City of Portland*, 55 P.2d 1151, 150 Or. 167.

(5) Power of city to borrow to make up water system deficit applies only to deficit caused by difference between water rents received and operating charges and obligations on bonds, and does not authorize borrowing for purpose of extending water system.—*Schrivver v. Mayor and City Council of Cumberland*, 181 A. 443, 169 Md. 286.

(6) Purpose of public works act relating to borrowing of money and acceptance of grants from federal government and financing of public works projects was to enable political subdivisions of state to avail themselves of the federal government's lending program in aid of industrial and economic recovery and to relieve against and suspend for

the purposes of the act certain restrictions in the general law which would unduly delay or prevent a present exercise of municipal power of borrowing; such act is essentially an enabling act.—*Mann v. Board of Education of City of Artesia*, 85 P.2d 595, 43 N.M. 78.

(7) Other purposes.—*Richard v. Bellaire*, 116 N.W. 1066, 153 Mich. 560—44 C.J. p 1144 note 24 [b].

44. Wyo.—*Whipps v. Town of Greybull*, 109 P.2d 805, 56 Wyo. 355, 146 A.L.R. 596.
44 C.J. p 1144 note 25.

45. La.—*Allen v. La Fayette*, 8 So. 30, 89 Ala. 641, 9 L.R.A. 497.
44 C.J. p 1145 note 26.

46. N.C.—*Jones v. Guilford County Board of Education*, 117 S.E. 37, 185 N.C. 303.

47. US.—*Bryant v. Commissioner of Internal Revenue*, C.C.A.9, 111 F.2d 9.

Pledge of assessments or revenues

(1) Statute empowering board of sewer improvement district to pledge assessments to secure money borrowed does not compel board to pledge assessments and does not of itself create any pledge or lien in favor of persons advancing money or services to district, but merely permits district board to create such pledge.—*Whitaker & Co. v. Grable*, C.C.A.Ark., 109 F.2d 710.

(2) Municipal corporation has authority to pledge the revenues, less operating expense, of the port facilities created, over a period of years for repayment of loan, where no obligation was created which would be made a burden on the taxpayers.—*Trudnak v. Gustafson*, 183 So. 494, 133 Fla. 834.

48. Wis.—*Handlos v. Town of State Line*, 288 N.W. 748, 233 Wis. 145.

Strict compliance

Ill.—*Randolph v. Town of Bernadotte*, 243 Ill.App. 581.

Use for purpose specified

Okl.—*State ex rel. City of Cushing v. King*, 19 P.2d 138, 162 Okl. 69—*Protest of Reid*, 15 P.2d 995, 160 Okl. 3—*In re Bliss*, 285 P. 73, 142 Okl. 1.

Postponement of effective date of ordinance

Ordinance approving agreement for federal loan to city of third class for construction of new municipal electric plant was held not effective until ten days after its passage, in absence of emergency.—*Kentucky Utilities Co. v. Ginsberg*, 72 S.W.2d 738, 255 Ky. 148.

49. Pa.—*Elliot v. Philadelphia*, 78 A. 107, 229 Pa. 215—*Miners Savings Bank of Pittston v. Duryea Borough, Com.Pl.*, 32 Luz Leg Reg. 9, 29 Mun.L.R. 145, 9 Som.Leg.J. 25.

44 C.J. p 1145 note 27.

50. Ill.—*Randolph v. Town of Bernadotte*, 243 Ill.App. 581.

44 C.J. p 1145 note 28.

Consent and approval of state bond and tax board

La.—*National Bank of Commerce in New Orleans v. Board of Supervisors of Louisiana State University & Supervisors of Louisiana State University and Agricultural and Mechanical College*, 20 So.2d 264, 206 La. 913.

"Casualty" or "accident," consisting of continuous floods from Dec. 20, 1933, until after first part of July, 1934, occurred after city adopted annual appropriation bill on June 11, 1934, so as to authorize it, in accordance with statute, to borrow money to repair and restore damaged sewers without taxpayers' sanction, although bill failed to provide for such expenditures.—*Ramstedt v. City of Wallace*, 36 P.2d 772, 55 Idaho 1.

51. Pa.—*Georges Tp. v. Union Trust Co. of Uniontown*, 143 A. 10, 293 Pa. 364—*Shamokin Banking & Trust Co. v. Coal Tp. Poor Dist.*, 13 Pa.Dist. & Co. 57.

52. Ark.—*Johnston v. City of Dermott*, 75 S.W.2d 243, 189 Ark. 830. Pa.—*Ward v. City of Pittsburgh*, 184 A. 240, 321 Pa. 414, 105 A.L.R. 682.
44 C.J. p 1145 note 29.

Limitation of amount of municipal indebtedness or expenditure generally see *supra* §§ 1846-1855.

Borrowing for current expenses

A charter limitation on the power of borrowing money has been held

cise its authority to borrow as to impair its power to perform the essential functions of its government and existence.⁵³

In exercising the power to borrow money conferred on it by charter, a municipal corporation is not exercising sovereign power,⁵⁴ but is responsible for the acts of its agents.⁵⁵ However, a city treasurer has no authority by virtue of his office to borrow money on behalf of the city;⁵⁶ his authority to borrow is limited to that conferred on him by the city council.⁵⁷ Where the council authorizes the treasurer to borrow money from time to time with the approval of the finance committee, the members of the committee may not delegate their duties to the mayor,⁵⁸ but are required to exercise their individual judgment and discretion⁵⁹ as to each separate borrowing.⁶⁰

Various transactions have been held to constitute⁶¹ or not to constitute⁶² a borrowing of money by a municipality. Statutory restrictions on the power of a municipality to borrow money have been held to have no application to money received by it in return for valid bonds sold by it,⁶³ since such money is not an ordinary loan.⁶⁴

Terms of promise to pay. A municipality about to borrow money may fix the terms of its promise to pay.⁶⁵

Interest. It is not against public policy for a municipal corporation to agree to pay interest on money borrowed by it,⁶⁶ but in some instances it is precluded by constitutional provision from doing

so.⁶⁷ Where, by the agreement under which money is advanced to a municipality, the funds were not to bear interest, and the municipality has had no beneficial use of the funds equivalent to the interest demanded, a recovery of interest should not be had in a suit based on equitable principles.⁶⁸

Redress of federal government or agency. In case of default in the payment of loans made to the housing authority of a municipality, the federal government, or any governmental agency thereof authorized to make such loans, would have the same redress in the courts in the enforcement of payment as any person or private corporation would have under like circumstances.⁶⁹

Irregularities in papers. Municipal loans otherwise regular ought not to be avoided by irregularities and mistakes, made in the papers filed, which can be corrected by the filing of proper certificates and papers;⁷⁰ such irregularities and mistakes ought to be corrected before approval is granted.⁷¹

b. Submission to Popular Vote; Emergency

Under some constitutional and statutory provisions a municipal corporation may not borrow money unless it is authorized to do so by the vote of its citizens. Where it is provided that such a vote is not necessary in case of an emergency, the existence of an emergency is a question of fact.

Under some constitutional and statutory provisions, a municipal corporation may not borrow money unless it is authorized to do so by the vote of its citizens.⁷² The fact that nonresident property own-

not to apply to liabilities incurred by borrowing money for current expenses.—Barrett v. East St. Louis, 89 Ill. 175.

53. Ark.—Johnson v. City of Dermott, 75 S.W.2d 243, 189 Ark. 830.

54. Va.—De Voss v. Richmond, 18 Gratt. 338, 59 Va. 338, 98 Am.D. 646.

55. Va.—De Voss v. Richmond, supra.

56. Mass.—Brown v. Boston First Nat. Bank, 103 N.E. 780, 216 Mass. 293.

57. Mass.—Brown v. Newburyport, 95 N.E. 504, 209 Mass. 259, Ann. Cas.1912B 495.

58. Mass.—Brown v. Newburyport, supra.

59. Mass.—Brown v. Newburyport, supra.

60. Mass.—Brown v. Newburyport, supra.

61. U.S.—Mitchell v. Burlington, Iowa, 4 Wall. 270, 18 L.Ed. 350.

62. Ind.—Richmond v. McGirr, 78 Ind. 192.

44 C.J. p 1145 note 38.

63. Wyo.—Henning v. City of Casper, 57 P.2d 1264, 50 Wyo. 1, rehearing denied 62 P.2d 304, 50 Wyo. 1.

64. Wyo.—Henning v. City of Casper, supra.

65. Pa.—Philadelphia Sav. Fund Soc. v. City of Bethlehem, 17 A.2d 750, 143 Pa.Super. 449.

66. Ill.—Merchants' L. & T. Co. v. Chicago, 105 N.E. 726, 264 Ill. 76.

67. Ark.—Bourland v. First Nat Bank Bldg. Co., 237 S.W. 681, 152 Ark. 139.
44 C.J. p 1145 note 40.

68. U.S.—Brownell v. City of St Petersburg, Fla., C.C.A.Fla., 128 F. 2d 721.

69. Neb.—Lennox v. Housing Authority of City of Omaha, 291 N. W. 100, 137 Neb. 582.

70. Pa.—Appeal of Palmer, 161 A. 543, 307 Pa. 426.

71. Pa.—Appeal of Palmer, supra.

72. Ill.—Lockport v. Gaylord, 61 Ill. 276.

44 C.J. p 1145 note 28 [a].

Submission to popular vote of question of:

Bond issue see infra §§ 1920-1929.
Municipal expenditure or indebtedness see supra §§ 1858-1865.

Purpose

Purpose of the legislature in limiting authority of directors of people's utility district to borrow money without previous approval of the legal voters is to require the directors to conduct affairs of district on a pay-as-you-go basis.—Fullerton v. Central Lincoln People's Utility Dist., Or., 201 P.2d 524.

Ordinance approving federal loan and grant agreement held subject to referendum.—Board of Com'rs of City of Middlesboro v. Kentucky Utilities Co., 101 S.W.2d 414, 267 Ky. 99.

City, in anticipation of taxes for current year, may borrow or otherwise contract with reference thereto without vote of people.—Fjeldsted v. Ogden City, 28 P.2d 144, 83 Utah 278.

ers are not permitted to vote at a municipal election on a proposal to borrow money on the faith and credit of the municipality has been held not to render the election illegal.⁷³

It has been said to be settled that a municipal corporation may borrow in excess of contemplated current revenues to the extent reasonably necessary, and within constitutional limitations, to cope with extraordinary emergencies in municipal affairs.⁷⁴ In a constitutional provision that a mayor and council may, without submission of the matter to the voters, temporarily borrow any amount of money to meet any deficiency in the municipal treasury and may borrow any amount at any time to provide for any emergency arising from the necessity of maintaining the police, or preserving the health, safety, and sanitary arrangements of the municipality, the word "emergency" means a sudden, unexpected, and unforeseen condition or occurrence in municipal affairs as to require forthwith municipal action for which the requisite public money is not presently procurable by the usual and regular methods of acquiring funds for municipal use.⁷⁵ The existence of an emergency, within this provision, is a question of fact,⁷⁶ as to which a finding by the municipal council is primarily sufficient,⁷⁷ but not conclusive,⁷⁸ although such finding is entitled to great weight⁷⁹ and will not be set aside or an-

nulled by a court unless clearly and unmistakably erroneous.⁸⁰ The courts are not permitted, by such a constitutional provision, to make an exception of any one emergency because of fault, or even illegality, in its origin.⁸¹ The term "maintaining the police," in such provision, applies not only to police officers or other agents employed to administer and enforce the laws existing for the protection of the public, but also the measures themselves adopted for that purpose,⁸² and may be accepted as referring to any system of laws and regulations found necessary for preserving the public safety, and to the enforcement of such laws.⁸³ The extent of the power given to the municipality by such constitutional provision cannot be cut down, but is added to, by a statute authorizing emergency borrowing by a municipality to restore funds spent for relief.⁸⁴ As used in such constitutional provision, the natural and ordinary interpretation of the words "deficiency in the city treasury" is the lack of funds needed to perform some imperative and peremptory function of government.⁸⁵ A temporary loan to meet such a deficiency can only mean a loan to meet some casual and unforeseeable expense resulting from the ordinary administration of the business of the city, or some shortage in funds for immediate needs resulting from delay in the payment of taxes, or debts due the city, or from some other like cause.⁸⁶ The

73. Del.—*Dupont v. Mills*, 196 A. 168, 9 W.W.Harr. 42, 119 A.L.R. 174.

74. Pa.—*Philadelphia & Reading Coal & Iron Co. v. Directors of Poor of Coal Tp.*, 166 A. 772, 311 Pa. 236.

Reason for rule

If that were not so, local government might fall when most needed.—*Philadelphia & Reading Coal & Iron Co. v. Directors of Poor of Coal Tp.*, *supra*.

75. Md.—*Mayor and City Council of Baltimore v. Hofrichter*, 11 A.2d 375, 178 Md. 91.

A city's lack of funds for ordinary expenses because of insufficiency of state taxes appropriated by legislature to reimburse city for relief expenditures created emergency.—*Geisendaffer v. Mayor and Council of City of Baltimore*, 3 A.2d 860, 176 Md. 150, concurring opinion 4 A.2d 460, 176 Md. 150.

Necessity for immediate use of voting machines held emergency.—*Norris v. Mayor and City Council of Baltimore*, 192 A. 531, 172 Md. 667.

Sanitation; sewage

Evidence held insufficient to show that emergency existed with respect to sanitation and sewage.—*Mayor*

and City Council of Baltimore v. Hofrichter, 11 A.2d 375, 178 Md. 91.

76. Md.—*Geisendaffer v. Mayor and Council of City of Baltimore*, 3 A.2d 860, 176 Md. 150, concurring opinion 4 A.2d 460, 176 Md. 150.—*Norris v. Mayor and City Council of Baltimore*, 192 A. 531, 172 Md. 667.

77. Md.—*Geisendaffer v. Mayor and Council of City of Baltimore*, 3 A.2d 860, 176 Md. 150, concurring opinion 4 A.2d 460, 176 Md. 150.—*Norris v. Mayor and City Council of Baltimore*, 192 A. 531, 172 Md. 667.

78. Md.—*Geisendaffer v. Mayor and Council of City of Baltimore*, 3 A.2d 860, 176 Md. 150, concurring opinion 4 A.2d 460, 176 Md. 150.—*Norris v. Mayor and City Council of Baltimore*, 192 A. 531, 172 Md. 667.

79. Md.—*Geisendaffer v. Mayor and Council of City of Baltimore*, 3 A.2d 860, 176 Md. 150, concurring opinion 4 A.2d 460, 176 Md. 150.—*Norris v. Mayor and City Council of Baltimore*, 192 A. 531, 172 Md. 667.

80. Md.—*Geisendaffer v. Mayor and Council of City of Baltimore*, 3 A.2d 860, 176 Md. 150, concurring opinion 4 A.2d 460, 176 Md. 150.—

Norris v. Mayor and City Council of Baltimore, 192 A. 531, 172 Md. 667.

81. Md.—*Geisendaffer v. Mayor and Council of City of Baltimore*, 3 A.2d 860, 176 Md. 150, concurring opinion 4 A.2d 460, 176 Md. 150.

82. Md.—*Norris v. Mayor and City Council of Baltimore*, 192 A.2d 531, 172 Md. 667.

Elections

As unregulated elections have long been recognized as a highly dangerous menace to the public safety, the duty of maintaining the police must include the duty of regulating public elections.—*Norris v. Mayor and City Council of Baltimore*, *supra*.

83. Md.—*Norris v. Mayor and City Council of Baltimore*, *supra*.

84. Md.—*Geisendaffer v. Mayor and Council of City of Baltimore*, 3 A.2d 860, 176 Md. 150, concurring opinion 4 A.2d 460, 176 Md. 150.

85. Md.—*Norris v. Mayor and City Council of Baltimore*, 192 A. 531, 172 Md. 667.

86. Md.—*Norris v. Mayor and City Council of Baltimore*, *supra*.

Voting machines

Power to create debt to meet requisitions made under authority of

term of such a loan should not be longer than the period between the date of its negotiation and the date on which funds will be available to pay it either from the collection of new taxes or the collection of taxes already levied.⁸⁷

The declaration of an emergency because of the

need for the immediate preservation of the public peace, health, and safety in an ordinance approving an agreement for a loan to construct a municipal elective plant has been held not to take the ordinance out of a referendum provision of a municipal charter.⁸⁸

5. AID TO CORPORATIONS AND STOCK SUBSCRIPTIONS

§ 1870. Existence and Extent of Power

- a. In general
- b. Constitutional provisions
- c. Status or purpose of corporation
- d. Particular aid or transactions

a. In General

A municipal corporation has no inherent or implied power to grant aid to, or subscribe to the stock of, a private corporation, and may validly do so only when empowered by valid charter or statutory provision.

A municipal corporation has power to grant aid to,⁸⁹ or to subscribe to the stock of,⁹⁰ a private corporation when, and only when, such power is clearly and expressly conferred on it by the legislature.

A municipal corporation has no inherent or implied power in this respect,⁹¹ and hence it has no implied power to make donations to,⁹² or to subscribe to the stock of,⁹³ a railroad company, to provide funds for the performance of the duty of a railroad company,⁹⁴ or to make donations to an electric company.⁹⁵ All unauthorized municipal transactions of this character are ultra vires and void;⁹⁶ they create no liability on the part of the municipality,⁹⁷ and, where money has been paid in pursuance thereof, it may be recovered back.⁹⁸

On the other hand, when not restrained by constitutional provisions, the legislature may confer on a municipal corporation the power to subscribe to

legislative act directing purchase and use of voting machines was not conferred by constitutional authority to borrow money "temporarily" to meet deficiency in city treasury.—*Norris v. Mayor and City Council of Baltimore*, supra.

87. Md.—*Norris v. Mayor and City Council of Baltimore*, supra.

88. Ky.—*Kentucky Utilities Co. v. Ginsberg*, 72 S.W.2d 738, 744, 255 Ky. 148.

"Convenient as an electric light plant is and inconvenient as it would be to be deprived of its service, yet it is not apparent how the public health and safety will be imperiled by the delay necessary to be incurred in permitting a referendum petition to be filed and an election to be held thereon. . . . The additional time needed for the referendum will not adversely affect the public health and safety."—*Kentucky Utilities Co. v. Ginsberg*, supra.

89. U.S.—*Kerr v. Enoch Pratt Free Library of Baltimore City*, D.C. Md., 54 F.Supp. 514, reversed on other grounds, C.C.A., 149 F.2d 212, certiorari denied *Enoch Pratt Free Library of Baltimore City v. Kerr*, 66 S.Ct. 26, 326 U.S. 721, 90 L.Ed. 427.

44 C.J. p 1147 note 72.

Aid of private manufacturing establishment see supra § 1842.
Donations or loan of credit to individuals and associations see supra §§ 1835, 1837, 1841.

Issuance of bonds in aid of private corporations see infra § 1909.

Mandamus to enforce right of corporations to aid see *Mandamus* § 138.

Public aid to canals see *Canals* § 8.

90. N.C.—*Union Bank v. Oxford*, 25 S.E. 966, 119 N.C. 214, 34 L.R.A. 487.

44 C.J. p 1147 note 73—14 C.J. p 105 note 31.

Authorizing statutes as not violating due process see *Constitutional Law* § 647 d.

Power under charter

Cal.—*Smith v. City of Glendale*, 36 P.2d 1083, 1 Cal.App.2d 463.

91. U.S.—*Ottawa v. Carey*, Ill., 2 S.Ct. 361, 108 U.S. 110, 27 L.Ed. 669.
44 C.J. p 1147 note 75.

92. U.S.—*Lewis v. Shreveport, La.*, 2 S.Ct. 634, 108 U.S. 282, 27 L.Ed. 728.

44 C.J. p 1147 note 76.

Public aid to railroads generally see the C.J.S. title *Railroads* §§ 32-44, also 51 C.J. p 460 note 53-p 468 note 60.

93. U.S.—*Jonesboro City v. Cairo*, etc., R. Co., Ill., 4 S.Ct. 67, 110 U.S. 192, 28 L.Ed. 116.

44 C.J. p 1147 note 77.

94. Minn.—*Bybee v. City of Minneapolis*, 292 N.W. 617, 208 Minn. 55.

Duty as to alteration of railroad bridges

Minn.—*Bybee v. City of Minneapolis*, supra.

95. Minn.—*Village of Courtland v.*

Courtland Electric Co., 215 N.W. 673, 172 Minn. 392.

96. U.S.—*Kerr v. Enoch Pratt Free Library of Baltimore City*, D.C. Md., 54 F.Supp. 514, reversed on other grounds, C.C.A., 149 F.2d 212, certiorari denied *Enoch Pratt Free Library of Baltimore City v. Kerr*, 66 S.Ct. 26, 326 U.S. 721, 90 L.Ed. 427.

Minn.—*Bybee v. City of Minneapolis*, 292 N.W. 617, 208 Minn. 55—*Village of Courtland v. Courtland Electric Co.*, 215 N.W. 673, 172 Minn. 392.

44 C.J. p 1148 note 78.

Construction of belt railroad track

An ordinance granting the right to use certain lands belonging to the municipality for a belt railroad track, and providing for the construction of such track at the expense of various railroads, and for permitting other railroads to use the tracks on the same terms without discrimination as those agreed on, was not void as ultra vires.—*Behrman v. Louisiana Ry. & Nav. Co.*, 54 So. 25, 127 La. 775, affirmed *Louisiana R. & Nav. Co. v. Behrman*, 35 S.Ct. 62, 235 U.S. 164, 59 L.Ed. 175—*Capdevielle v. New Orleans & S. F. R. Co.*, 34 So. 868, 110 La. 904.

97. Kan.—*Genesee v. Genesee Natural Gas, etc., Co.*, 40 P. 655, 65 Kan. 358.

98. Minn.—*Village of Courtland v. Courtland Electric Co.*, 215 N.W. 673, 172 Minn. 392.

44 C.J. p 1148 note 80—9 C.J. p 446 note 95.

the stock of,⁹⁹ or to make appropriations from public moneys for the benefit of,¹ private corporations. The power may be conferred by a general law,² the charter of the municipal corporation,³ or the charter of the corporation to be aided.⁴ A statute empowering municipal corporations generally to aid in the construction of a railway, or to subscribe to the capital stock of railroad companies, may operate to confer such power on a municipality incorporated thereafter⁵ or under a special charter;⁶ but power conferred on a particular class of municipal or public corporations does not extend to another class.⁷

The statutes conferring power should be strictly construed⁸ and not held to confer authority beyond their terms.⁹ It has been asserted that the extent of the legislative authority is merely to confer on a municipal corporation power to be exercised or not exercised at its option;¹⁰ but the fact that a particular statute employs mandatory language does not prevent it from conferring on the municipal corpo-

ration the power to act voluntarily thereunder.¹¹

Repeal of statutes. The rules governing the repeal of statutes generally, discussed in the C.J.S. title Statutes §§ 278-303, also 59 C.J. p 899 note 1-p 940 note 67, are applicable in determining whether a statute empowering municipal corporations to grant aid to, or to subscribe to the stock of, private corporations has been repealed by subsequent legislation.¹²

b. Constitutional Provisions

Constitutional provisions prohibiting such aid by a municipality to a private corporation as making a donation, lending or pledging credit, or subscribing to or purchasing stock, or forbidding the legislature to authorize a municipality to take such action, should be construed with reference to the evils they were intended to correct, and such provisions render void any municipal or legislative action prohibited thereby.

Constitutional provisions prohibiting a municipality from making any gift or donation, or an appropriation,¹³ or lending or pledging its faith or cred-

99. U.S.—Van Hostrup v. Madison City, Ind., 1 Wall. 291, 17 L.Ed. 538.

44 C.J. p 1148 note 82.

Validity of retrospective curative acts with respect to municipal subscriptions in aid of corporations see Constitutional Law § 430

Right to purchase stock in electric company

Under governing statutes, whatever right a municipality might have to purchase stock in a local electric company is subject to the right of the company to sell its property with the consent of the holders of three fourths of its stock and the approval of the public service commission.—Public Service Commission v. City of Indianapolis, 137 N.E. 705, 193 Ind. 37.

1. U.S.—Kerr v. Enoch Pratt Free Library of Baltimore City, D.C.Md., 54 F.Supp. 514, reversed on other grounds, C.C.A., 149 F.2d 212, certiorari denied Enoch Pratt Free Library of Baltimore City v. Kerr, 66 S.Ct. 26, 326 U.S. 721, 90 L.Ed. 427.

2. Ill.—Sampson v. People, 30 N.E. 781, 141 Ill. 17.

Tex.—Madry v. Cox, 11 S.W. 541, 73 Tex. 538.

3. Ind.—Thompson v. Peru, 29 Ind. 305.

Pa.—Commonwealth v. Perkins, 43 Pa. 400.

4. U.S.—Enfield v. Jordan, Ill., 7 S. Ct. 358, 110 U.S. 680, 30 L.Ed. 523. 44 C.J. p 1148 note 86.

5. Wis.—Perrin v. New London, 30 N.W. 628, 67 Wis. 416. 44 C.J. p 1148 note 88.

6. Iowa.—Bartemeyer v. Rohlf, 82 N.W. 673, 71 Iowa 582

7. Ill.—Welch v. Post, 99 Ill. 471. 44 C.J. p 1148 note 90.

8. U.S.—Allen v. Louisiana, Mo., 103 U.S. 80, 26 L.Ed. 318. 44 C.J. p 1148 note 91.

9. U.S.—Purdy v. Lansing, N.Y., 9 S. Ct. 172, 128 U.S. 557, 32 L.Ed. 531. 44 C.J. p 1148 note 92.

10. Ill.—Choisser v. People, 29 N.E. 546, 140 Ill. 21.

44 C.J. p 1149 note 94.

Subscription for stock in railroad company

It rests exclusively with the people of the municipality to decide whether it will subscribe for stock in a railroad company.

Mich.—People v. State Treasurer, 23 Mich. 499.

N.Y.—People v. Batchellor, 53 N.Y. 128, 13 Am.R. 480.

11. N.Y.—Williams v. Duanesburgh, 66 N.Y. 129.

12. U.S.—Savannah v. Kelly, Ga., 2 S.Ct. 468, 108 U.S. 184, 27 L.Ed. 696.

44 C.J. p 1149 note 97.

Constitutionality of repealing statute see Constitutional Law §§ 308, 328.

13. Ariz.—City of Phoenix v. Michael, 148 P.2d 253, 61 Ariz. 238.

Cal.—Housing Authority of Los Angeles County v. Dockweiler, 94 P. 2d 794, 14 Cal.2d 437—Butler v. Compton Junior College Dist. of Los Angeles County, 176 P.2d 417, 77 Cal.App.2d 719.

Colo.—Chitwood v. City and County of Denver, 201 P.2d 605—McNichols v. City and County of Denver, 74 P.2d 99, 101 Colo. 316

Ill.—Cremier v. Peoria Housing Authority, 78 N.E.2d 276, 399 Ill. 579—People v. City of Chicago, 182 N.E. 419, 349 Ill. 304—Furlong v. South Park Com'rs, 172 N.E. 757, 340 Ill. 363.

Miss.—Craig v. North Miss. Community Hospital, 39 So.2d 523—Bristler v. Leflore County, 125 So. 816, 156 Miss. 240.

Mo.—Vrooman v. City of St. Louis, 88 S.W.2d 189, 337 Mo. 933—Dysart v. City of St. Louis, 11 S.W.2d 1045, 321 Mo. 514, 62 A.L.R. 762.

N.J.—Fraser v. Teaneck Tp., 53 A.2d 610, 137 N.J.Law 119, affirmed 64 A.2d 345, 1 N.J. 503.

N.M.—City of Clovis v. Southwestern Public Service Co., 161 P.2d 878, 49 N.M. 270, 161 A.L.R. 504.

N.Y.—Union Free School Dist. No. 3 of Town of Rye, Westchester County v. Town of Rye, 21 N.E.2d 681, 280 N.Y. 469—Sun Printing, etc., Ass'n v. New York, 46 N.E. 499, 152 N.Y. 257, 37 L.R.A. 788—Atlantic Gulf & West Indies S. S. Lines v. City of New York, 63 N.Y. S.2d 11, 271 App.Div. 196, motion denied 72 N.E.2d 23, 296 N.Y. 835, affirmed 74 N.E.2d 181, 297 N.Y. 474

—Davidson v. City of Elmira, 44 N.Y.S.2d 302, 180 Misc. 1052, affirmed 46 N.Y.S.2d 655, 267 App. Div. 797, appeal denied 47 N.Y.S. 2d 604, 267 App.Div. 926.

N.D.—Marks v. City of Mandan, 296 N.W. 39, 70 N.D. 474.

Tex.—City of Beaumont v. Priddie, Civ.App., 65 S.W.2d 434, reversed on other grounds Texas & N. O. R.

it,¹⁴ to, or in aid of, a private corporation, raising money for a corporation,¹⁵ becoming responsible for its debts, contracts, or liabilities,¹⁶ subscribing to or purchasing its stock,¹⁷ or becoming a joint owner therewith,¹⁸ or forbidding the legislature to authorize a municipality to take such action,¹⁹ or restrict-

Co. v. Priddie, 95 S.W.2d 1290, 127 Tex. 629.

44 C.J. p 1149 note 99.

Purpose

(1) The reason why such provision was put in the constitution was that a practice had grown up very largely in the west in the furtherance of aid to railroads and other private corporations.—Carr v. Borough of Merchantville, 142 A. 1, 102 N.J.Law 553—City of Camden v. South Jersey Port Commission, Super.Ch., 63 A.2d 552.

(2) Such provisions were intended to prevent aid to private corporations not constituting public agencies controlled by the state.—City of Camden v. South Jersey Port Commission, supra.

14. Ala.—Atkinson v. City of Gadsden, 192 So. 510, 238 Ala. 556.

Ariz.—City of Phoenix v. Michael, 148 P.2d 353, 61 Ariz. 238.

Ark.—City of Paris v. Street Improvement Dist. No. 2 of Paris, 175 S.W.2d 199, 206 Ark. 926.

Cal.—Housing Authority of Los Angeles County v. Dockweiler, 94 P.2d 794, 14 Cal.2d 437—Pacific Telephone & Telegraph Co. v. City of Lodi, 137 P.2d 847, 58 Cal.App.2d 888.

Colo.—Chitwood v. City and County of Denver, 201 P.2d 605—People ex rel. Rogers v. Letford, 79 P.2d 274, 102 Colo. 284—McNichols v. City and County of Denver, 74 P.2d 99, 101 Colo. 316.

Del.—Town of Seaford v. Eastern Shore Public Service Co., 24 A.2d 436, 2 Terry 438.

Idaho.—Hansen v. Independent School Dist. No. 1, in Nez Perce County, 98 P.2d 959, 61 Idaho 109.

Ill.—Cremer v. Peoria Housing Authority, 78 N.E.2d 276, 399 Ill. 579—People v. Chicago Transit Authority, 64 N.E.2d 4, 392 Ill. 77—People v. City of Chicago, 182 N.E. 419, 349 Ill. 304—Furlong v. South Park Com'rs, 172 N.E. 757, 340 Ill. 363.

La.—State ex rel. Porterle v. Housing Authority of New Orleans, 182 So. 725, 190 La. 710.

Miss.—Craig v. North Miss. Community Hospital, 39 So.2d 523—Brister v. Leflore County, 125 So. 816, 156 Miss. 240.

Mo.—Vrooman v. City of St. Louis, 88 S.W.2d 189, 337 Mo. 933—Dysart v. City of St. Louis, 11 S.W.2d 1045, 321 Mo. 514, 62 A.L.R. 762.

N.J.—Carr v. Borough of Merchantville, 142 A. 1, 102 N.J.Law 553—City of Camden v. South Jersey Port Commission, Super.Ch., 63 A.2d 552.

N.M.—City of Clovis v. Southwestern Public Service Co., 161 P.2d 878, 49 N.M. 270, 161 A.L.R. 504—Hutcheson v. Atherton, 99 P.2d 462, 44 N.M. 144.

N.Y.—Union Free School Dist. No. 3 of Town of Rye, Westchester County, v. Town of Rye, 21 N.E.2d 681, 280 N.Y. 469—Sun Printing, etc., Assoc. v. New York, 46 N.E. 499, 152 N.Y. 257, 37 L.R.A. 788—Oneida County v. City of Utica, 22 N.Y.S.2d 642, 260 App.Div. 863, affirmed 35 N.E.2d 189, 285 N.Y. 788—Davidson v. City of Elmira, 44 N.Y.S.2d 302, 180 Misc. 1052, affirmed 46 N.Y.S.2d 655, 267 App. Div. 797, appeal denied 47 N.Y.S.2d 604, 267 App.Div. 926.

N.D.—Marks v. City of Mandan, 296 N.W. 39, 70 N.D. 474.

Or.—Hauke v. Ten Brook, 259 P. 908, 122 Or. 485.

Pa.—Williams v. Samuel, 2 A.2d 834, 332 Pa. 265.

44 C.J. p 1149 notes 1, 7 [a] (1).

Purpose

(1) This provision was intended to prevent the investment of public funds in private enterprises—Morris v. City of Salem, 174 P.2d 192, 179 Or. 666—Johnson v. School Dist. No. 1 of Multnomah County, 270 P. 764, 128 Or. 9, rehearing denied 273 P. 386, 128 Or. 9.

(2) It was designed to curb speculation, which in many instances resulted in pecuniary loss to the taxpayers.—Johnson v. School Dist. No. 1 of Multnomah County, supra.

15. Ark.—City of Paris v. Street Improvement Dist. No. 2 of Paris, 175 S.W.2d 199, 206 Ark. 926.

Or.—Hauke v. Ten Brook, 259 P. 908, 122 Or. 485.

Pa.—Williams v. Samuel, 2 A.2d 834, 332 Pa. 265.

44 C.J. p 1149 note 2.

16. Idaho—Twin Falls County School Dist. No. 8 v. Twin Falls County Mut. Fire Ins. Co., 164 P. 1174, 30 Idaho 400.

17. Cal.—Housing Authority of Los Angeles County v. Dockweiler, 94 P.2d 794, 14 Cal.2d 437.

La.—State ex rel. Porterle v. Housing Authority of New Orleans, 182 So. 725, 190 La. 710.

Miss.—Craig v. North Miss. Community Hospital, 39 So.2d 523—Brister v. Leflore County, 125 So. 816, 156 Miss. 240.

Mo.—Dysart v. City of St. Louis, 11 S.W.2d 1045, 321 Mo. 514, 62 A.L.R. 762.

N.Y.—Sun Printing, etc., Assoc. v. New York, 46 N.E. 499, 152 N.Y. 257, 37 L.R.A. 788.

Or.—Johnson v. School Dist. No. 1

of Multnomah County, 270 P. 764, 128 Or. 9, rehearing denied 273 P. 386, 128 Or. 9.

Pa.—Williams v. Samuel, 2 A.2d 834, 332 Pa. 265.

44 C.J. p 1149 note 4.

The provision was intended to prohibit any subdivision of the state from entering into private business by being associated as a stockholder in a private business venture or enterprise.—State ex rel. Johnson v. Consumers Public Power Dist., 10 N.W.2d 784, 143 Neb. 753, 152 A.L.R. 480.

18. Del.—Town of Seaford v. Eastern Shore Public Service Co., 24 A.2d 436, 2 Terry 438.

19. U.S.—City of Coral Gables v. Hayes, C.C.A.Fla., 74 F.2d 989.

Ala.—State ex rel. Austin v. City of Mobile, 28 So.2d 177, 248 Ala. 467.

Fla.—State v. City of Key West, 14 So.2d 707, 153 Fla. 228—State v. Florida Keys Aqueduct Commission, 4 So.2d 662, 148 Fla. 485—City of Fernandina v. State, 197 So. 454, 143 Fla. 802—City of Coral Gables v. Coral Gables, Inc., 160 So. 476, 119 Fla. 30—Tampa Northern R. Co. v. City of Tampa, 140 So. 311, 104 Fla. 481, rehearing denied 141 So. 298, 104 Fla. 481.

Ga.—Avon v. Steiner Cancer Hospital, 5 S.E.2d 356, 189 Ga. 126—City of Macon v. Benson, 166 S.E. 26, 175 Ga. 502.

Ky.—Board of Ed. of City of Corbin v. City of Corbin, 192 S.W.2d 951, 301 Ky. 686—Cawood v. Coleman, 172 S.W.2d 648, 294 Ky. 858.

Ohio.—State ex rel. Mt. Sinai Hospital of Cleveland v. Hickey, 30 N.E.2d 802, 137 Ohio St. 474—Kittel v. City of Cincinnati, 69 N.E.2d 771, 78 Ohio App. 251—Hines v. City of Bellefontaine, 57 N.E.2d 164, 74 Ohio App. 393—City of Cleveland v. Lauscha, 49 N.E.2d 207, 70 Ohio App. 273—Vollmer v. Village of Amherst, 29 N.E.2d 379, 65 Ohio App. 26, appeal dismissed 38 N.E.2d 469, 139 Ohio St. 139, affirmed 43 N.E.2d 235, 140 Ohio St. 257—Warm v. City of Cincinnati, 11 N.E.2d 281, 57 Ohio App. 43—Ohio Traction Co. v. Huwe, 181 N.E. 114, 41 Ohio App. 337, affirmed 189 N.E. 1, 127 Ohio St. 444—Frankenstein v. Goodale, 164 N.E. 363, 30 Ohio App. 110.

Okl.—Fischer v. Oklahoma City, 174 P.2d 244, 198 Okl. 22, appeal denied 67 S.Ct. 1315, 331 U.S. 824, 91 L.Ed. 1840.

Pa.—Belovsky v. Development Authority of City of Philadelphia, 64 A.2d 277, 357 Pa. 329, 172 A.L.R. 959—Harbold v. City of Reading, 49 A.2d 817, 355 Pa. 353—Wents v.

ing the amount of aid which may be authorized,²⁰ should be construed with reference to the evils they were intended to correct. Such a provision is a limitation of power,²¹ and not a grant thereof.²² If a general constitutional provision of this nature conflicts with a special constitutional provision, the latter controls.²³

The constitutional provisions are not retroactive,²⁴ and the obligation of existing contracts is not impaired thereby;²⁵ but any municipal or legislative action which is prohibited thereby, and is taken after the limitation goes into operation, is

null and void²⁶ and cannot be condoned under the guise of a public development²⁷ or on the ground that a highly commendable public purpose is served thereby.²⁸

A constitutional provision forbidding municipal corporations to grant aid withdraws all power to grant such aid under previous statutory authority;²⁹ but a provision that the legislature shall not authorize municipal corporations to grant aid has been held not to forbid municipalities from acting under previous authority,³⁰ the restriction being merely on the future action of the legislature.³¹ A statute au-

City of Philadelphia, 181 A. 883, 301 Pa. 261—Sambor v. Hadley, 140 A. 347, 291 Pa. 395, followed in Turner Const. Co. v. Mackey, 140 A. 353, 291 Pa. 412, and Plumly v. Hadley, 140 A. 353, 291 Pa. 411.

Tex.—Wheeler v. City of Brownsville, 220 S.W.2d 457—Lewis v. Independent School Dist. of City of Austin, 161 S.W.2d 450, 139 Tex. 83—Southern Casualty Co. v. Morgan, Com.App., 12 S.W.2d 200, rehearing denied 16 S.W.2d 533—San Antonio Independent School Dist. v. Board of Trustees of San Antonio Elec. & Gas System, Civ. App., 204 S.W.2d 22, refused no reversible error.

44 C.J. p 1149 notes 5, 7 [a] (3).

Mandatory provision

Tex.—Texas & N. O. R. Co. v. Galveston County, Civ.App., 161 S.W.2d 530, affirmed 169 S.W.2d 713, 141 Tex. 31.

Purpose

(1) The evident purpose of the prohibition was to confine municipalities to the objects for which they were created and to restrain the legislature from authorizing any perversion of them.—Commonwealth ex rel. City of Philadelphia Police Pension Fund Ass'n v. Walton, 38 A. 790, 182 Pa. 373, 61 Am.S.R. 712.

(2) The mischief interdicted by such provision is business partnership between municipality or subdivision of state and private corporations or associations, and such section forbids union of public and private capital or credit in any enterprise.—Walker v. Cincinnati, 21 Ohio St. 14, 8 Am.R. 24—McGuire v. City of Cincinnati, App., 40 N.E.2d 485, appeal dismissed 38 N.E.2d 1023, 139 Ohio St. 218.

Chartered city held not within provision

Cal.—Los Angeles Gas & Electric Corp. v. City of Los Angeles, 305 P. 125, 188 Cal. 307—Smith v. City of Glendale, 86 P.2d 1033, 1 Cal. App.2d 463.

Insurance of public property; Non

Under such a provision, also specifying that it shall not prevent the

insuring of public property in mutual insurance associations or companies, an insurance contract between city transit board and mutual insurance company for coverage of city-owned streetcar system would not be invalid because it involved granting lien on property insured to secure contingent liability.—Burt v. City of Cleveland, 62 N.E.2d 274, 76 Ohio App. 461.

Benefit of particular corporations

Legislature may not, under guise of a municipal organization, authorize borrowing or appropriation of money to particular benefit of certain associations or corporations to practical exclusion of others from such benefit.—State ex rel. Landis v. Town of Lake Placid, 158 So. 497, 117 Fla. 874.

Exception for purely charitable purposes

Ga.—Williamson v. Housing Authority, etc., of Augusta, 199 S.E. 43, 186 Ga. 673.

20. Neb.—State v. Babcock, 27 N.W. 94, 19 Neb. 223.

44 C.J. p 1149 note 6.

21. Ariz.—City of Phoenix v. Michael, 148 P.2d 353, 61 Ariz. 238. Or.—Johnson v. School Dist. No. 1 of Multnomah County, 270 P. 764, 128 Or. 9, rehearing denied 273 P. 386, 128 Or. 9.

Power of legislature

Cal.—Los Angeles Gas & Electric Corp. v. City of Los Angeles, 205 P. 125, 188 Cal. 307.

22. Or.—Johnson v. School Dist. No. 1 of Multnomah County, 270 P. 764, 128 Or. 9, rehearing denied 273 P. 386, 128 Or. 9.

23. N.Y.—Davidson v. City of Elmira, 44 N.Y.S.2d 302, 180 Misc. 1052, affirmed 46 N.Y.S.2d 655, 267 App.Div. 797, appeal denied 47 N.Y.S.2d 604, 267 App.Div. 926.

Ohio.—Vollmer v. Village of Amherst, 29 N.E.2d 379, 65 Ohio App. 26, appeal dismissed 38 N.E.2d 409, 139 Ohio St. 139, affirmed 43 N.E.2d 235, 140 Ohio St. 257.

24. U.S.—Calhoun County v. Gal-

braith, Miss., 99 U.S. 214, 26 L.Ed. 410.

44 C.J. p 1150 note 3.

25. U.S.—Clay County v. Savings Soc., Ill., 104 U.S. 579, 26 L.Ed. 856.

44 C.J. p 1150 note 9.

26. N.M.—Hutcheson v. Atherton, 99 P.2d 462, 44 N.M. 144.

Tex.—San Antonio Independent School Dist. v. Board of Trustees of San Antonio Elec. & Gas System, Civ.App., 204 S.W.2d 22, refused no reversible error.

44 C.J. p 1150 note 10.

Statute held unconstitutional

Miss.—Carothers v. Town of Boonville, 153 So. 670, 169 Miss. 511. Tex.—Lewis v. Independent School Dist. of City of Austin, 161 S.W.2d 450, 139 Tex. 83.

Workmen's compensation; effect of premium payment

Although municipality's subscription to employer's mutual insurance association under workmen's compensation act is prohibited and ultra vires under constitutional provision prohibiting municipality from becoming stockholder in any association or corporation or to lend its credit thereto, workmen's compensation policy on which premiums have been paid by municipality is not void with respect to right of injured municipal employee to compensation.—Southern Casualty Co. v. Morgan, Tex.Com.App., 12 S.W.2d 200, rehearing denied 16 S.W.2d 533.

27. Fla.—City of Coral Gables v. Coral Gables, Inc., 160 So. 476, 119 Fla. 30.

28. N.M.—Hutcheson v. Atherton, 99 P.2d 462, 44 N.M. 144.

29. U.S.—Illinois Grand Trunk R. Co. v. Wade, Ill., 11 S.Ct. 709, 140 U.S. 65, 35 L.Ed. 342.

44 C.J. p 1150 note 11.

30. Ohio.—Cass v. Dillon, 2 Ohio St. 607.

Pa.—Commonwealth v. Walton, 38 A. 790, 182 Pa. 373, 61 Am.S.R. 712.

31. Ohio.—Cass v. Dillon, 2 Ohio St. 607.

thorizing a city to subscribe for stock in a corporation confers a power which may be modified, changed, enlarged, restrained, or repealed by a state constitution,³² as such a statute does not import a contract within the clause of the United States Constitution prohibiting a law which impairs the obligation of a contract, as discussed in Constitutional Law § 308. If the contract by the municipal corporation to subscribe to the stock of, or to make a donation to, a railway company was unauthorized, the company may not claim any vested right which would prevent the operation of a constitutional amendment, afterward adopted, forbidding such a transaction.³³ In order to constitute a violation of a provision prohibiting the lending of credit, it is essential that there be an imposition of liability, directly or indirectly, on the municipal body.³⁴

A constitutional provision against state aid does not apply to municipal corporations.³⁵ Likewise, a constitutional restriction on the power of counties does not apply to cities;³⁶ and a restriction on municipal corporations does not apply to an appropriation made by the legislature directly out of the state treasury.³⁷

c. Status or Purpose of Corporation

(1) In general

(2) Another municipality

(1) In General

The type of corporation to which constitutional inhibitions on municipal aid to corporations will apply depends on the language of the provisions; such provisions generally apply only to private, and not to public, corporations and enterprises.

In the absence of constitutional prohibition municipal aid may be authorized and granted to a plank road company,³⁸ a private corporation performing a charitable function,³⁹ a private corporation furnishing water to a municipality,⁴⁰ or to a hospital which cares for a municipality's indigent sick,⁴¹ but not to corporations engaged in manufacturing⁴² or other private enterprises.⁴³ Under a statute authorizing aid to any company incorporated under the laws of the state in the construction of a highway bridge, aid cannot be given to a foreign corporation.⁴⁴

A constitutional provision prohibiting a municipality from subscribing to the stock of, or making an appropriation or lending its credit in aid of, any corporation, has been held to apply only to private, and not to public, corporations,⁴⁵ and a hospital corporation has been held a private corporation within such provision;⁴⁶ a similar constitutional provision prohibiting such action as to any private corporation has been held to apply only to corporations having a capital stock or organized for profit.⁴⁷ Likewise, a constitutional provision forbidding the legislature to authorize any municipality to appropriate money for, or to lend its credit to, any corporation has no application to a public corporation.⁴⁸

Pa.—Commonwealth v. Walton, 38 A. 790, 182 Pa. 373, 61 Am.S.R. 712.

32. W.Va.—List v. Wheeling, 7 W. Va. 501.

33. U.S.—Buffalo, etc., R. Co. v. Falconer, N.Y., 103 U.S. 821, 26 L.Ed. 471.

34. Idaho.—Hansen v. Independent School Dist. No. 1, in Nez Perce County, 98 P.2d 959, 61 Idaho 109.

35. U.S.—Taylor v. Ypsilanti, Mich., 105 U.S. 60, 26 L.Ed. 1008. 44 C.J. p 1150 note 18.

36. Ind.—Thompson v. Peru, 29 Ind. 305—Aurora v. West, 9 Ind. 74.

37. Miss.—Craig v. North Miss. Community Hospital, 39 So.2d 523.

38. U.S.—Mitchell v. Burlington, Iowa, 4 Wall. 270, 18 L.Ed. 350.

Ala.—Wetumpka v. Winter, 29 Ala. 651.

39. U.S.—Kerr v. Enoch Pratt Free Library of Baltimore City, D.C. Md., 54 F.Supp. 514, reversed on other grounds, C.C.A., 149 F.2d 212, certiorari denied Enoch Pratt Free Library of Baltimore City v. Kerr, 66 S.Ct. 26, 326 U.S. 721, 90 L.Ed. 427.

Corporation operating free library
U.S.—Kerr v. Enoch Pratt Free Li-

brary of Baltimore City, D.C.Md., 54 F.Supp. 514, reversed on other grounds, C.C.A., 149 F.2d 212, certiorari denied Enoch Pratt Free Library of Baltimore City v. Kerr, 66 S.Ct. 26, 326 U.S. 721, 90 L.Ed. 427.

40. Ind.—Vincennes v. Callender, 86 Ind. 484.

41. Ohio.—Zanesville v. Crossland, 8 Ohio Cir.Ct. 652, 4 Ohio Cir.Dec. 363.

42. N.Y.—Weismer v. Douglas, 64 N.Y. 91, 21 Am.R. 586. 44 C.J. p 1150 note 24—14 C.J. p 106 note 33.

Aid to private manufacturing establishment generally see supra § 1842.

43. Kan.—Geneseo v. Geneseo Natural Gas, etc., Co., 40 P. 655, 55 Kan. 358.

Tex.—Cleburne v. Brown, 11 S.W. 404, 78 Tex. 443. 14 C.J. p 106 note 33.

44. Iowa.—Smith v. Omaha, etc., R. Co., 66 N.W. 1041, 97 Iowa 545. 9 C.J. p 446 note 95.

45. Miss.—Brister v. Leflore County, 135 So. 816, 156 Miss. 240.

Test

(1) The test in determining whether a corporation is public or private, within such provision, is whether its continuity, control, and management are under the power of the public through public agents who are responsibly accountable to the government.—Brister v. Leflore County, supra.

(2) Public and private corporations generally see Corporations § 18.

46. Miss.—Brister v. Leflore County, supra.

47. Ill.—Cremer v. Peoria Housing Authority, 78 N.E.2d 276, 399 Ill. 579—People v. Chicago Transit Authority, 64 N.E.2d 4, 392 Ill. 77—Furlong v. South Park Com'rs, 172 N.E. 757, 340 Ill. 363.

Nonprofit museum corporation

Park commissioners' agreement to allocate public building to nonprofit museum corporation was not void as donation or loan of credit to private corporation.—Furlong v. South Park Com'rs, supra.

48. Ala.—State ex rel. Austin v. City of Mobile, 28 So.2d 177, 248 Ala. 467.

or to a private corporation which is really an agency formed and incorporated for the purpose of carrying on a public undertaking to which the municipality, under authority of law, has committed itself and pledged its honor and credit,⁴⁹ but is restricted to the appropriation of public funds to a purely private enterprise.⁵⁰ A constitutional provision may be such as to prevent gifts or loans of public money or property to a private corporation, but not to prohibit gifts of moneys to a public corporation for public purposes,⁵¹ while at the same time permitting the use of its credit by a municipality only for the purposes of such municipality and prohibiting it from giving or lending its credit to or in aid of any public or private corporation;⁵² a school district has been held a public corporation within such provision.⁵³

Municipal aid to railroads falls within the prohibitions contained in some constitutions,⁵⁴ but in the absence of constitutional prohibition it is generally,⁵⁵ although not always,⁵⁶ held that municipalities may be authorized by the legislature to grant such aid; and a statute authorizing cities to aid in the building or reconstruction of a street railway has been upheld as for the promotion of a public purpose.⁵⁷ It has been both affirmed⁵⁸ and denied⁵⁹ that the legislature may authorize a municipal corporation to lend its aid to a corporation engaged in navigation.

A constitutional provision prohibiting a municipality from appropriating money for, or granting aid or making gifts to, a corporation does not apply so as to prevent a municipality from appropriating or paying money for or to such a public corporation as a humane society⁶⁰ or a public library corporation;⁶¹ also, a state normal college,⁶² or the state itself,⁶³ or an agency thereof,⁶⁴ or the United States,⁶⁵ or an agency of the municipality⁶⁶ is not a corporation of the character and kind contemplated by constitutional provisions of the kind discussed in this section, and, even where constitutional prohibitions refer to public and private corporations, the United States has been held, in this connection, neither a public nor a private corporation.⁶⁷ A constitutional prohibition has been held to apply to a gift of money by a municipality to a county to be used for the repair of the county buildings,⁶⁸ but not to prevent an arrangement whereby a city and county unite in making a public improvement.⁶⁹

Where municipal corporations are given power to aid specified corporations or corporations answering a general description, the power cannot be extended by construction so as to embrace corporations not coming within such description.⁷⁰ A statute authorizing municipal aid to railway companies may be so worded and construed as to authorize aid to companies organized after the passage of the act as well as to those formed prior thereto.⁷¹

Pa.—McSorley v. Fitzgerald, 59 A.2d 142, 359 Pa. 264.

Urban redevelopment authority

Pa.—Belovsky v. Redevelopment Authority of City of Philadelphia, 54 A.2d 277, 357 Pa. 329, 172 A.L.R. 953.

49. Pa.—Sambor v. Hadley, 140 A. 347, 291 Pa. 395, followed in Turner Const. Co. v. Mackey, 140 A. 353, 291 Pa. 412, and Plumly v. Hadley, 140 A. 353, 291 Pa. 411.

Celebration

Pa.—Sambor v. Hadley, 140 A. 347, 291 Pa. 395, followed in Turner Const. Co. v. Mackey, 140 A. 353, 291 Pa. 412, and Plumly v. Hadley, 140 A. 353, 291 Pa. 411.

50. Pa.—McSorley v. Fitzgerald, 59 A.2d 142, 359 Pa. 264—Belovsky v. Redevelopment Authority of City of Philadelphia, 54 A.2d 277, 357 Pa. 329, 172 A.L.R. 953.

51. N.Y.—Union Free School Dist. No. 3 of Town of Rye, Westchester County, v. Town of Rye, 21 N. E.2d 681, 280 N.Y. 469.

52. N.Y.—Union Free School Dist. No. 3 of Town of Rye, Westchester County v. Town of Rye, *supra*.

53. N.Y.—Union Free School Dist. No. 3 of Town of Rye, Westchester County, v. Town of Rye, *supra*.

54. Mo.—Dysart v. City of St. Louis, 11 S.W.2d 1045, 321 Mo. 514, 62 A. L.R. 762.

44 C.J. p 1151 note 26.

55. U.S.—Rogers v. Keokuk, Iowa, 14 S.Ct. 1162, 154 U.S. 546, 18 L.Ed 74.

44 C.J. p 1151 note 27.

56. U.S.—Risley v. Howell, C.C. Mich., 57 F. 544, reversed on other grounds 64 F. 453, 12 C.C.A. 218.

44 C.J. p 1151 note 28.

57. Kan.—State v. Kansas City, 4 P.2d 422, 134 Kan. 157, 78 A.L.R. 507.

58. N.C.—Taylor v. Newberne, 55 N. C. 141, 64 Am.D. 566.

Va.—Goddin v. Crump, 8 Leigh 120, 35 Va. 120.

59. Cal.—Low v. Marysville, 6 Cal. 214.

60. Wash.—Storey v. Seattle, 215 P. 514, 124 Wash. 598.

61. Ky.—Lambert v. Public Library, 152 S.W. 802, 151 Ky. 725, Ann.Cas. 1915A 180.

62. Miss.—Turner v. Hattiesburg, 53 So. 681, 98 Miss. 337.

63. Cal.—Sacramento v. Adams, 153 P. 908, 171 Cal. 458—Butler v. Compton Junior College Dist. of

Los Angeles, 176 P.2d 417, 77 Cal. App.2d 719.

64. Ala.—State ex rel. Austin v. City of Mobile, 28 So.2d 177, 248 Ala. 467.

65. Colo.—McNichols v. City and County of Denver, 74 P.2d 99, 101 Colo. 316.

Mo.—Vrooman v. City of St. Louis, 88 S.W.3d 189, 337 Mo. 933.

66. Ark.—City of Paris v. Street Improvement Dist. No. 2 of Paris, 175 S.W.2d 199, 206 Ark. 926.

Street improvement district

Ark.—City of Paris v. Street Improvement Dist. No. 2 of Paris, *supra*.

67. Colo.—People ex rel. Rogers v. Letford, 79 P.2d 274, 102 Colo. 284.

68. N.Y.—Deady v. Lyons, 57 N.Y.S. 448, 39 App Div. 139.

County as corporation see Counties § 3.

69. Ohio.—Purcell v. Riverside, 1 Ohio Cir.Ct. 12, 1 Ohio Cir.Dec. 7.

70. Ill.—Williams v. People, 24 N.E. 647, 132 Ill. 574.

44 C.J. p 1152 note 38.

71. U.S.—James v. Milwaukee, Wis., 16 Wall. 159, 21 L.Ed. 367.

44 C.J. p 1152 note 39.

A constitutional prohibition against a municipal corporation subscribing for stock, or becoming a stockholder, in any corporation is not violated by aid to a public corporation which does not issue stock;⁷² but, by virtue of constitutional prohibition of this nature, municipalities may be barred from becoming members of a mutual insurance association whose subscribers are stockholders in such company,⁷³ although such provision does not prohibit a municipality from being brought under the provisions of a workmen's compensation act if insurance is carried in an old-line insurance company as distinguished from a mutual company.⁷⁴

(2) Another Municipality

A constitutional provision prohibiting aid by a municipal corporation to "any corporation" or a public corporation applies to aid to another municipal corporation, but a provision as to aid to a private corporation does not.

As used in a constitutional provision prohibiting the legislature from authorizing a municipal corporation to become a stockholder in, obtain or appropriate money for, or lend its credit to, any corporation except for certain stated purposes, the word "corporation" has been held to embrace a municipal corporation.⁷⁵ Such provision has been held to prohibit a municipality from making any donation, except for the stated purposes, to another municipal corporation,⁷⁶ such as an independent school district;⁷⁷ while this provision does not prevent a municipality from participating with another municipality in a function which it is permitted or required to perform by itself⁷⁸ and by which its in-

habitants will reap a commensurate benefit,⁷⁹ it does prohibit a municipality from donating to a project from which no benefit may be received by it⁸⁰ or in which it may not independently engage.⁸¹

Within the meaning of a constitutional provision prohibiting a municipality from giving or lending its credit to, or in aid of, any public or private corporation, "public" corporations include municipal corporations,⁸² such as a school district.⁸³ On the other hand, a municipal corporation is not within a constitutional provision prohibiting a municipality from lending its credit in aid of any railroad or private corporation.⁸⁴

Municipality not holding funds in own right. A constitutional provision prohibiting a municipality from making a donation to, or lending it credit in aid of, any railroad or private corporation has been held to apply only to municipalities holding funds or properties in their own right;⁸⁵ thus, it does not apply to a housing authority which must hold in separate accounts funds granted by the state, and which may therefore be regarded as mere conduits between the state appropriation and the corporation developing the housing units.⁸⁶

d. Particular Aid or Transactions

Various particular transactions, or forms of aid, affecting public utilities, railroad companies, and other corporations have been held not to come within the operation of constitutional inhibitions on the giving of aid by municipalities to corporations or on subscription by municipalities to stock.

An absolute donation by a municipal corporation,

72. Cal.—Housing Authority of Los Angeles County v. Deckweiler, 94 P.2d 794, 14 Cal.2d 437.

Housing authority

Cal.—Housing authority of Los Angeles County v. Dockweiler, supra.

73. Tex.—Lewis v. Independent School Dist. of City of Austin, 161 S.W.2d 450, 139 Tex. 83.

Employers' insurance association

Tex.—Tyler v. Texas Employers' Ins. Ass'n, Com.App., 288 S.W. 409, rehearing denied City of Tyler v. Texas Employers' Ins. Ass'n, 294 S.W. 195.

74. Tex.—Southern Casualty Co. v. Morgan, Com.App., 12 S.W.2d 200, rehearing denied 16 S.W.2d 538.

75. Ky.—Board of Ed. of City of Corbin v. City of Corbin, 192 S.W. 2d 951, 301 Ky. 686.

76. Ky.—Board of Ed. of City of Corbin v. City of Corbin, supra.

Tex.—San Antonio Independent School Dist. v. Board of Trustees of San Antonio Elec. & Gas Sys-

tem, Civ.App., 204 S.W.2d 22, refused no reversible error.

77. Tex.—San Antonio Independent School Dist. v. Board of Trustees of San Antonio Elec. & Gas System, supra.

Appropriation to supplement salaries of teachers in independent school district whose boundaries are coterminous with those of municipality was within the prohibition.—Board of Ed. of City of Corbin v. City of Corbin, 192 S.W.2d 951, 301 Ky. 686.

78. Ky.—Board of Ed. of City of Corbin v. City of Corbin, supra.

79. Ky.—Board of Ed. of City of Corbin v. City of Corbin, supra.

80. Ky.—Board of Ed. of City of Corbin v. City of Corbin, supra.

Two municipalities in same territory

(1) Where two municipalities, for their respective purposes, govern the inhabitants of a given territory, one may not, under such constitutional provision, reap a reward at

the expense of the other.—Board of Ed. of City of Corbin v. City of Corbin, supra.

(2) Separate municipalities in same territory generally see supra §§ 85-87.

81. Ky.—Board of Ed. of City of Corbin v. City of Corbin, supra.

82. N.Y.—Union Free School Dist. No. 3 of Town of Rye, Westchester County, v. Town of Rye, 21 N.E.2d 681, 280 N.Y. 469.

83. N.Y.—Union Free School Dist. No. 3 of Town of Rye, Westchester County, v. Town of Rye, supra.

84. Ill.—People v. Chicago Transit Authority, 64 N.E.2d 4, 392 Ill. 77.

Transit authority

Ill.—People v. Chicago Transit Authority, supra.

85. Ill.—Cremer v. Peoria Housing Authority, 78 N.E.2d 276, 399 Ill. 579.

86. Ill.—Cremer v. Peoria Housing Authority, supra.

if authorized, is not invalid.⁸⁷ Where the municipality is to derive a benefit from a contract or transaction,⁸⁸ and there is a legal consideration therefor,⁸⁹ there is no violation of a constitutional prohibition of a donation or gift, or a loan of credit, by a municipality to a corporation.

Under general authority to give aid, a municipal corporation may in its discretion⁹⁰ subscribe for stock⁹¹ or make a donation.⁹² On the other hand, power to subscribe to the stock of a railway company does not authorize a donation in aid of the company⁹³ or a loan of the credit of the municipality.⁹⁴ A contract for the purchase of parking meters is not an illegal appropriation of public funds for the benefit of a private corporation, where the meters are to be paid for only from receipts.⁹⁵

Constitutional provisions prohibiting a municipal-

ity from making donations or lending its credit to, or subscribing to the stock of, corporations do not operate to forbid a municipality to appropriate money to a public agency for a public purpose⁹⁶ or to a branch or agency of the municipality,⁹⁷ or for a public and municipal purpose expressly authorized by act of the legislature,⁹⁸ or to forbid a municipality to construct, own,⁹⁹ purchase,¹ sell, or lease² a public utility, or to forbid a municipality to supply water free of charge, from the municipal waterworks, to public, religious, educational, or charitable institutions.³ Likewise, such provisions do not disable a municipality to have any dealings⁴ or contractual relations⁵ with a railroad company or other private corporation, to purchase all the capital stock of a private corporation solely for the purpose of lawfully acquiring the physical property of such corporation⁶ for a public use constitutionally defined

87. Ala.—Gibbons v. Mobile, etc., R. Co., 36 Ala. 410.

Ind.—Wilkinson v. Peru, 61 Ind. 1.

88. Ill.—People ex rel. Schlaeger v. Bunge Bros. Coal Co., 64 N.E.2d 365, 392 Ill. 153.

N.J.—Borough of Runnemede v. New Jersey Water Co., 8 A.2d 576, 123 N.J.Law 383—Carr v. Borough of Merchantville, 142 A. 1, 102 N.J. Law 553.

Purchase of water company

N.J.—Carr v. Borough of Merchantville, supra.

Payment toward construction of water mains and lines

N.J.—Borough of Runnemede v. New Jersey Water Co., 8 A.2d 576, 123 N.J.Law 383.

Lack of direct financial profit to the municipality is not the test of benefit to the public; the benefit may be indirect.—City of Camden v. South Jersey Port Commission, N.J. Super.Ch., 63 A.2d 552.

89. N.J.—Borough of Runnemede v. New Jersey Water Co., 8 A.2d 576, 123 N.J.Law 383—Carr v. Borough of Merchantville, 142 A. 1, 102 N.J. Law 553.

N.Y.—Atlantic Gulf & West Indies S. S. Lines v. City of New York, 63 N.Y.S.2d 11, 271 App.Div. 196, motion denied 72 N.E.2d 23, 296 N.Y. 835, affirmed 74 N.E.2d 181, 297 N.Y. 474.

44 C.J. p 1152 note 50 [a].

Exchange of considerations; housing

Ill.—Cremier v. Peoria Housing Authority, 78 N.E.2d 276, 399 Ill. 579.

90. Ind.—Indiana, etc., R. Co. v. Attica, 36 Ind. 476.

Tex.—Madry v. Cox, 11 S.W. 541, 78 Tex. 538.

91. Ala.—Wetumpka v. Winter, 29 Ala. 651.

44 C.J. p 1152 note 42—14 C.J. p 106 note 31.

92. Ind.—Wilkinson v. Peru, 61 Ind. 1.

Neb.—State v. Babcock, 27 N.W. 98, 19 Neb. 230.

Conditional donation held invalid under statute.—Indiana North & S. R. Co. v. Attica, 56 Ind. 476.

93. Ill.—Choissac v. People, 29 N.E. 546, 140 Ill. 21.

44 C.J. p 1152 note 44.

94. Ga.—Blake v. Macon, 53 Ga. 172.

95. Minn.—Hendricks v. City of Minneapolis, 290 N.W. 428, 207 Minn. 151.

96. N.J.—City of Camden v. South Jersey Port Commission, Super.Ch., 63 A.2d 552.

Low-rent housing or slum clearance Cal.—Housing Authority of Los Angeles County v. Dockweiler, 94 P. 2d 794, 14 Cal.2d 437.

97. N.J.—City of Camden v. South Jersey Port Commission, Super.Ch., 63 A.2d 552.

Housing authority

Cal.—Housing Authority of Los Angeles County v. Dockweiler, 94 P. 2d 794, 14 Cal.2d 437.

Port commission

N.J.—Town of Camden v. South Jersey Port Commission, Super.Ch., 63 A.2d 552.

98. Pa.—Wentz v. City of Philadelphia, 151 A. 883, 301 Pa. 261.

Establishment of airport

Pa.—Wentz v. City of Philadelphia, supra.

99. N.M.—Corpus Juris quoted in City of Clovis v. Southwestern Public Service Co., 161 P.2d 878, 886, 49 N.M. 270, 161 A.L.R. 504.

44 C.J. p 1152 note 47.

1. N.J.—Carr v. Borough of Merchantville, 142 A. 1, 102 N.J.Law 553.

Water company

N.J.—Carr v. Borough of Merchantville, supra.

Joint adventure not shown

Del.—Town of Seaford v. Eastern Shore Public Service Co., 24 A.2d 436, 2 Terry 438.

2. N.M.—Corpus Juris quoted in City of Clovis v. Southwestern Public Service Co., 161 P.2d 878, 879, 49 N.M. 270, 161 A.L.R. 504.

44 C.J. p 1152 note 48.

Failure to provide for interest

Fact that contract for sale by city to utilities company of its light and water systems for part cash and balance on terms did not provide for payment of interest on unpaid balance, did not establish that there was a donation in violation of constitutional prohibition, where parties, in fixing sale price, were influenced by fact that deferred payments would not bear interest.—City of Clovis v. Southwestern Public Service Co., supra.

3. Ohio—State ex rel. Mt. Sinai Hospital of Cleveland v. Hickey, 80 N.E.2d 802, 137 Ohio St. 474.

4. Ill.—Chicago v. Pittsburg, etc., R. Co., 91 N.E. 422, 244 Ill. 220, 135 Am.S.R. 316.

5. Pa.—Brode v. Philadelphia, 79 A. 459, 230 Pa. 434.

44 C.J. p 1152 note 50.

Contract for parking meters

Or.—Morris v. City of Salem, 174 P.2d 192, 179 Or. 666.

Conveyance of land to railroad

Fla.—Tampa Northern R. Co. v. City of Tampa, 140 So. 311, 104 Fla. 481, rehearing denied 141 So. 208, 104 Fla. 481.

6. Ky.—Cawood v. Coleman, 172 S. W.2d 548, 294 Ky. 858.

Mo.—City of Springfield v. Monday, 185 S.W.2d 788, 352 Mo. 981.

and lawfully authorized by the legislature,⁷ or to acquire realty by condemnation for a park and airport.⁸

Giving premium notes for assessments to meet fire losses,⁹ indorsing on the bonds of a water company certain stipulations as to the payment of rentals,¹⁰ employing a nonprofit corporation to operate a municipal zoölogical garden,¹¹ paying to a county taxes required by law to be collected by the municipality,¹² agreeing with a telephone company to apportion the expenses incurred in responding in damages by reason of the negligence of the municipality and the company in the joint ownership and use of poles,¹³ leasing a municipal water distribution system,¹⁴ or, in particular circumstances, the extension of the lease of a railroad,¹⁵ has been held not a loan of municipal credit.

Also, such constitutional provisions have been held not violated by the closing of a street, the fee of which is not owned by the city, for the benefit of a railroad company and without compensation to the city;¹⁶ by the refusal of the municipal coun-

cil, in the exercise of discretion vested in it by statute, to assess against a street railway company the cost of paving between streetcar tracks;¹⁷ by the lease of municipally owned land to a hospital corporation in consideration of care of the poor of the municipality;¹⁸ by the issuance of bonds for the acquisition, improvement, and development of land for an airport;¹⁹ by expenditures in payment of dues and assessments of a municipality as a member of a municipal league,²⁰ or in payment of dues to a United States conference of mayors;²¹ by the payment by a municipality to a water company, to secure for its inhabitants a water supply and for itself a supply for fire purposes, of certain sums toward the construction of mains and pipe lines;²² by a loan of credit or the making of a donation to a housing authority to cover the administrative expenses and overhead of the authority the first year and from time to time making other donations;²³ or by other transactions.²⁴ Likewise such constitutional provisions have been held not to be violated by various statutes and ordinances authorizing particular municipal action.²⁵

7. Neb.—State ex rel. Johnson v. Consumers Public Power Dist., 10 N.W.2d 784, 143 Neb. 753, 152 A.L.R. 480.
8. Okl.—Fischer v. Oklahoma City, 174 P.2d 244, 198 Okl. 22, appeal denied 67 S.Ct. 1315, 331 U.S. 824, 91 L.Ed. 1840.
9. N.J.—French v. Millville, 51 A. 1109, 67 N.J.Iaw 349.
10. Mont.—State v. Great Falls, 49 P. 15, 19 Mont. 518.
- N.J.—Brady v. Bayonne, 30 A. 968, 57 N.J.Law 379.
11. Ohio—City of Cleveland v. Lausche, 49 N.E.2d 207, 70 Ohio App. 273—McGuire v. City of Cincinnati, App., 40 N.E.2d 435, appeal dismissed 38 N.E.2d 1023, 139 Ohio St. 218.
12. N.Y.—Onelda County v. City of Utica, 22 N.Y.S.2d 642, 260 App. Div. 363, affirmed 35 N.E.2d 189, 285 N.Y. 788.
13. Cal.—Pacific Telephone & Telegraph Co. v. City of Lodi, 137 P.2d 847, 68 Cal.App.2d 888.
14. Fla.—State v. Florida Keys Aqueduct Commission, 4 So.2d 662, 148 Fla. 485.
15. Ohio.—Frankenstein v. Goodale, 164 N.E. 363, 30 Ohio App. 110.
16. N.Y.—McCutcheon v. Terminal Station Commission, 150 N.Y.S. 850, 88 Misc. 148, affirmed 154 N.Y. S. 711, 168 App.Div. 301, affirmed 111 N.E. 661, 217 N.Y. 127, 44 C.J. p 1152 note 53.
17. Ky.—Frankfort v. Morris, 252 S.W. 142, 200 Ky. 59.
18. Ga.—Aven v. Steiner Cancer Hospital, 5 S.E.2d 356, 189 Ga. 126.
19. Mo.—Dysart v. City of St. Louis, 11 S.W.2d 1045, 321 Mo. 514, 62 A.L.R. 762.
20. Ariz.—City of Phoenix v. Michael, 148 P.2d 353, 61 Ariz. 238.
- Ill.—People ex rel. Schlaeger v. Bunge Bros. Coal Co., 64 N.E.2d 365, 392 Ill. 153.
21. Ill.—People ex rel. Schlaeger v. Bunge Bros. Coal Co., supra.
22. N.J.—Borough of Runnemede v. New Jersey Water Co., 8 A.2d 576, 123 N.J.Law 383.
23. Mont.—Rutherford v. City of Great Falls, 86 P.2d 656, 107 Mont. 512.
- Charitable purpose**
Ga.—Williamson v. Housing Authority, etc., of Augusta, 199 S.E. 43, 186 Ga. 678.
- Loans or donations after first year held permissive, and not mandatory.**
—Williamson v. Housing Authority, etc., of Augusta, supra.
24. Colo.—Chitwood v. City and County of Denver, 201 P.2d 605.
- Fla.—City of Fernandina v. State, 197 So. 454, 143 Fla. 802.
- N.Y.—Atlantic Gulf & West Indies S. S. Lines v. City of New York, 63 N.Y.S.2d 11, 271 App.Div. 196, motion denied 72 N.E.2d 23, 296 N.Y. 835, affirmed 74 N.E.2d 181, 297 N.Y. 474—Davidson v. City of El-
- mira, 44 N.Y.S.2d 302, 180 Misc. 1052, affirmed 46 N.Y.S.2d 655, 267 App.Div. 797, appeal denied 47 N.Y. S.2d 604, 267 App.Div. 926.
- N.C.—Boyce v. City of Gastonia, 41 S.E.2d 355, 227 N.C. 139.
- Ohio—Kittel v. City of Cincinnati, 69 N.E.2d 771, 78 Ohio App. 251.
- Licensing of parking meters**
Ohio—Hines v. City of Bellefontaine, 57 N.E.2d 164, 74 Ohio App. 393.
- Appropriation for operation of zoo by corporation**
Ohio.—McGuire v. City of Cincinnati, App., 40 N.E.2d 435, appeal dismissed 38 N.E.2d 1023, 139 Ohio St. 218.
25. Colo.—People ex rel. Rogers v. Letford, 79 P.2d 274, 102 Colo. 284.
- Ga.—City of Macon v. Benson, 166 S.E. 26, 175 Ga. 502.
- Ill.—People v. City of Chicago, 182 N.E. 419, 349 Ill. 304.
- La.—State ex rel. Porterle v. Housing Authority of New Orleans, 182 So. 725, 190 La. 710.
- Mo.—State ex rel. Zoological Board of Control v. City of St. Louis, 1 S.W.2d 1021, 318 Mo. 910.
- N.J.—Redfern v. Board of Com'rs of Jersey City, 59 A.2d 641, 137 N.J. Law 356—Fraser v. Teaneck Tp., 58 A.2d 610, 137 N.J.Law 119, affirmed 64 A.2d 345, 1 N.J. 503.
- N.D.—Marks v. City of Mandan, 296 N.W. 39, 70 N.D. 474.
- Pa.—Williams v. Samuel, 2 A.2d 834, 332 Pa. 285.
- Tex.—Wheeler v. City of Brownsville, 220 S.W.2d 457.

On the other hand, in jurisdictions where constitutional prohibitions exist, it has been held that a municipality cannot enter into a partnership with a railroad company or other private corporation;²⁶ build a section of a railroad in its limits, intended ultimately to form part of a continuous line of road to be operated and equipped by private capital;²⁷ purchase property on credit and donate it to a private corporation;²⁸ donate money, obtained on the forfeiture of its franchise by a railway company, to its successor;²⁹ obtain for a railroad a right of way through municipal boundaries;³⁰ exchange railroad bonds for capital stock;³¹ acquire the controlling stock of an electric company;³² take over paving contracts of a private corporation, issue bonds therefor, and assess abutting property;³³ co-operate with a state centennial corporation and construct auditoriums to effectuate the objects of the corporation and exposition;³⁴ or, under the guise of paying a water company for the use of hydrants, pay a rate so unreasonably high as to amount to double the cost of extending mains which, on completion, will be the property of the company.³⁵

Elimination of grade crossings. Some,³⁶ but not other,³⁷ financial arrangements between a municipality and a railroad company relative to the elevation of tracks or the elimination of grade crossings have been held to come within the scope of constitutional prohibitions.

A guaranty by a municipal corporation of the bonds or other obligations of a private corporation

is not within, and cannot be deduced from, the general powers usually and ordinarily conferred on it,³⁸ but requires special legislative grant which is found in the words "to obtain money on loan on the faith and credit of the city,"³⁹ although not in the words "to subscribe for stock and issue bonds to pay for the same."⁴⁰ A city has no power to execute a guaranty of a promissory note, as incidental to a power given by charter to sell negotiable paper.⁴¹

A release from a pecuniary burden cannot be distinguished in principle, in the application of the constitutional prohibitions, from direct pecuniary aid;⁴² but the cancellation by a municipality of a present debt for a future benefit is not a donation.⁴³

§ 1871. Exercise of Power in General

The power of a municipal corporation to grant aid to, or subscribe to the stock of, private corporations must be exercised in the mode prescribed in the grant of power.

The power conferred on a municipal corporation to grant aid to, or to subscribe to the stock of, private corporations must be exercised in the mode and manner prescribed in the grant of power.⁴⁴ A subsidy is valid when it has been granted in substantial compliance with the essential statutory or constitutional requisites,⁴⁵ but a subscription obtained by fraud and bribery cannot be validated.⁴⁶ A municipality cannot avoid a subscription to the stock of a railway company on the ground that the contract of subscription contains a stipulation in favor of the municipality which the company was unau-

26. Ohio.—Walker v. Cincinnati, 21 Ohio St. 14, 8 Am.R. 24.

44 C.J. p 1152 note 55.

27. U.S.—Pleasant Tp. v. Aetna Life Ins. Co., Ohio, 11 S.Ct. 215, 138 U.S. 67, 34 L.Ed. 864.

28. U.S.—Jarrott v. Moberly, C.C. Mo., 13 F.Cas.No.7,223, 5 Dill. 253, affirmed 103 U.S. 580, 26 L.Ed. 492.

29. Miss.—Adams v. Jackson Electric R., etc., Co., 30 So. 58, 78 Miss. 887.

30. Ga.—Covington, etc., R. Co. v. Athens, 11 S.E. 663, 85 Ga. 367.

31. N.Y.—Wheatland v. Taylor, 29 Hun 70.

32. Fla.—State v. City of Key West, 14 So.2d 707, 153 Fla. 226.

33. Fla.—City of Coral Gables v. Coral Gables, Inc., 160 So. 476, 119 Fla. 30.

Invalid loan of credit

Fla.—City of Coral Gables v. Coral Gables, Inc., supra.

34. N.M.—Hutcheson v. Atherton, 99 P.2d 462, 44 N.M. 144.

Celebrations as purpose of indebtedness or expenditure generally see supra § 1839

Provision of necessary public buildings held not primary purpose of statute authorizing such coöperation and construction.—Hutcheson v. Atherton, supra.

35. N.Y.—Mamaroneck v. New York Interurban Water Co., 212 N.Y.S. 639, 126 Misc. 382.

36. Ill.—Murphy v. Dever, 150 N.E. 663, 320 Ill. 158.

44 C.J. p 1153 note 62.

37. Ohio.—Warm v. City of Cincinnati, 11 N.E.2d 281, 57 Ohio App. 43—Ohio Traction Co. v. Huwe, 181 N.E. 114, 41 Ohio App. 337, affirmed 189 N.E. 1, 127 Ohio St. 444.

Tex.—City of Beaumont v. Priddle, Civ.App., 45 S.W.2d 434, reversed on other grounds, Com.App., Texas & N. O. R. Co. v. Priddle, 95 S.W. 2d 1290, 127 Tex. 629.

44 C.J. p 1153 note 63.

38. Ga.—Blake v. Macon, 53 Ga. 172.

Ky.—Knepple v. Southgate, 238 S.W. 1051, 194 Ky. 346.

39. U.S.—Savannah v. Martin, Ga., 2 S.Ct. 472, 108 U.S. 191, 27 L.Ed. 698—Savannah v. Kelley, Ga., 2 S.Ct. 468, 108 U.S. 184, 27 L.Ed. 696.

40. Ga.—Blake v. Macon, 53 Ga. 172.

41. Iowa.—Carter v. Dubuque, 35 Iowa 416.

42. N.J.—Jersey City v. North Jersey St. R. Co., 73 A. 609, 78 N.J. Law 72.

Or.—Hauke v. Ten Brook, 259 P. 908, 122 Or. 485.

43. Ill.—People v. City of Chicago, 182 N.E. 419, 349 Ill. 304.

44. U.S.—Purdy v. Lansing, N.Y., 9 S.Ct. 172, 128 U.S. 557, 32 L.Ed. 531.

44 C.J. p 1153 note 68.

45. Ala.—Fielder v. Montgomery, etc., R. Co., 61 Ala. 178.

44 C.J. p 1153 note 69.

Curative acts see Constitutional Law § 430.

46. Tenn.—Red River Furnace Co. v. Tennessee Cent. R. Co., 87 S.W. 1016, 113 Tenn. 697.

thorized to make;⁴⁷ such a stipulation, if severable from the remaining portions of the contract, may be disregarded⁴⁸ and the agreement enforced as far as it is valid.⁴⁹ The mere fact that some of the officers who act for the municipality are also stockholders in the railway company aided has been held not per se to invalidate the contract;⁵⁰ but under other authority, when the question of voting aid depends on the discretion of the city officers, councilmen who are stockholders in the railroad company are not competent to act,⁵¹ and a grant of aid carried by their votes will not be valid.⁵² The fact that the municipality has exercised its power by a grant of aid to a particular railway company does not affect its power to grant aid again to the same company.⁵³

§ 1872. Petition of Taxpayers or Electors

It is necessary and, in the absence of fraud, sufficient to comply substantially with a statutory requirement of a petition signed by taxpayers or electors as a condition precedent to municipal aid to, or subscription to the stock of, a private corporation.

Where the statute requires a petition signed by a specified number or proportion of taxpayers or electors of a municipality as a condition precedent to a municipal grant of aid to, or subscription to the stock of, a private corporation or to the calling of an election on the question of making such subscription or grant of aid, substantial compliance with such a requirement is necessary,⁵⁴ and such compliance is sufficient⁵⁵ in the absence of fraud.⁵⁶ A subscription cannot be made to a railroad other than that designated by the petition;⁵⁷ but the corporation aided need not be designated by name if it

is identified by description.⁵⁸ The board, council, or tribunal to which the petition is addressed is called on to determine whether it conforms to legal requirements,⁵⁹ and it has been both held⁶⁰ and denied⁶¹ that its determination is conclusive.

§ 1873. Submission to Popular Vote

- a. In general
- b. Sufficiency

a. In General

A vote by the citizens, taxpayers, or electors of the municipal corporation is essential to municipal aid to, or subscription to the stock of, private corporations if such vote is required by constitution or statute, but not otherwise. Such grant of aid or subscription must conform to the terms of the power granted by the election.

A municipal corporation may be empowered by statute to grant aid to, or subscribe to the stock of, private corporations without any vote by the citizens, taxpayers, or electors of the municipality⁶² unless there is a constitutional provision making an election a condition precedent to valid municipal action.⁶³ The common law gives no recognition to the practice of submitting the question of municipal aid to a railroad or other corporation to a popular vote,⁶⁴ and therefore elections held by municipal corporations without legislative direction or authority are unnecessary⁶⁵ and futile.⁶⁶ On the other hand, where an election is prescribed by constitution or statute as authority for giving municipal aid to corporations, it is indispensable to the validity of municipal action.⁶⁷ Constitutional provisions as to elections are prospective only and do not affect valid action previously taken by a municipality;⁶⁸ but,

47. Ind.—Evansville, etc., R. Co. v. Evansville, 15 Ind. 395.

48. Ind.—Evansville, etc., R. Co. v. Evansville, supra.

49. Ind.—Evansville, etc., R. Co. v. Evansville, supra.

50. Ala.—Gibbons v. Mobile, etc., R. Co., 36 Ala. 410.

51. Ind.—Madison v. Smith, 83 Ind. 502.

52. Ind.—Madison v. Smith, supra.

53. Ill.—People v. Waynesville, 88 Ill. 469.

Minn.—Coe v. Caledonia, etc., R. Co., 6 N.W. 621, 27 Minn. 197.

54. U.S.—Scipio v. Wright, N.Y., 101 U.S. 665, 25 L.Ed. 1037.

44 C.J. p 1154 note 82.

"Representing," as used in a petition stating that the "undersigned, representing a majority of the taxpayers of the town," etc., should be construed to mean that the petitioners were themselves such majority.

—Solon v. Williamsburgh Sav. Bank, 21 N.E. 168, 114 N.Y. 122, 130.

55. Ind.—Bittinger v. Bell, 65 Ind. 445.

44 C.J. p 1154 note 83.

56. La.—Gooden v. Lincoln Parish Police Jury, 48 So. 196, 122 La. 755.

44 C.J. p 1154 note 84.

57. N.Y.—Rochester, etc., R. Co. v. Cuyler, 7 Lans. 431.

58. U.S.—Scipio v. Wright, N.Y., 101 U.S. 665, 25 L.Ed. 1037.

59. La.—Gooden v. Lincoln Parish Police Jury, 48 So. 196, 122 La. 755.

44 C.J. p 1154 note 87.

60. Ind.—Evansville, etc., R. Co. v. Evansville, 15 Ind. 395.

61. Iowa.—Jordon v. Hayne, 36 Iowa 9.

62. Wis.—State v. Tomahawk, 71 N.W. 86, 96 Wis. 73.

44 C.J. p 1154 note 91.

Election on question of:

Incurring indebtedness or expenditure see supra §§ 1858–1865.

Issuing bonds see infra §§ 1920–1929.

Petition for election see supra § 1872.

63. Tenn.—Berry v. Shelby County, 201 S.W. 748, 139 Tenn. 532.

44 C.J. p 1154 note 92.

64. U.S.—Cowdrey v. Caneadea, C.C. N.Y., 16 F. 532, 21 Blatchf. 351.

65. Ill.—Keithsburg v. Frick, 34 Ill. 405.

N.H.—Perry v. Keene, 58 N.H. 40.

66. U.S.—Jarrott v. Moberly, Mo., 103 U.S. 580, 26 L.Ed. 492.

44 C.J. p 1154 note 95.

67. U.S.—Katzenberger v. Aberdeen, Miss., 7 S.Ct. 947, 121 U.S. 172, 30 L.Ed. 911.

44 C.J. p 1154 note 97.

68. U.S.—Louisiana City v. Taylor, Mo., 105 U.S. 454, 26 L.Ed. 1133.

Ill.—Quincy, etc., R. Co. v. Morris, 34 Ill. 410.

when inhibitory, they operate to repeal all authorizing statutes not expressly excepted.⁶⁹ Where the municipal authorities are simply empowered to grant aid on the consent of the taxpayers, such consent does not render a grant of aid obligatory;⁷⁰ but where the statute provides that the authorities shall, in case of the assent of the taxpayers or electors of the municipality, grant the aid, there is merely a ministerial duty on the part of the authorities.⁷¹

In making a grant of aid to, or a subscription to the stock of, a railway company in pursuance of an election, the municipal officers must conform to the terms of the power conferred by the election.⁷² In determining what was voted, consideration will be given to the will of the taxpayers as expressed by ballot,⁷³ but not to mere pre-election arguments or representations.⁷⁴

b. Sufficiency

- (1) In general
- (2) Call or order for, and notice of, election
- (3) Qualification and registration of voters
- (4) Determination and certification of result
- (5) Contest of election
- (6) Second election

(1) In General

Compliance with all legal requirements is essential to the validity of an election on the question of municipal aid to, or subscription to the stock of, a private corporation; but mere irregularities in conducting the election, not affecting the result, do not vitiate it.

In general, compliance with every requirement of the law is essential to the validity of an election on the question of a municipal grant of aid to, or sub-

scription to the stock of, a private corporation.⁷⁵ The proposition submitted must comply with the terms of the statute authorizing the submission.⁷⁶ Where the statute under which the vote is taken does not require the vote to be with reference to a particular railway company, but authorizes the subscription in favor of any railway having a particular location, the proposition submitted need not designate any particular railway company,⁷⁷ but, when the statute so requires, this must be done.⁷⁸ Under at least one statute the question merely of aid or no aid is voted on,⁷⁹ the amount and terms of the grant of aid being left to the discretion of the municipal authorities.⁸⁰ The proposition should be submitted singly and disconnected from any other question;⁸¹ and hence it is improper to submit as one question grants of aid to two railway companies, so that the voters will have to vote either for or against both grants;⁸² but, where the only object of the electors of a town in granting aid to a railway company is to procure the construction of a railway from a certain point to such town, the question may be submitted to them in such a form as to provide that the aid shall be given to that one of two companies which shall first complete its road between such points.⁸³ A form of ballot which is so clear and explicit that no voter could be deceived or led into error as to the effect of his vote is amply sufficient.⁸⁴

The question can be submitted only at elections specified by the statutes.⁸⁵ Where there is no express provision as to the mode of conducting the election, it should be conducted in the usual manner of conducting elections in the municipality.⁸⁶ The proposition is carried when it receives the prescribed majority of the votes cast on the proposition⁸⁷ unless the assent of a majority of all the qualified voters is expressly required;⁸⁸ and the legislature is impotent to reduce the majority pre-

69. Ill.—*People v. Jackson County*, 92 Ill. 441—*Quincy, etc., R. Co. v. Morris*, 84 Ill. 410.

70. Minn.—*State v. Roscoe*, 25 Minn. 445.

71. Kan.—*Wrought Iron Bridge Co. v. Arkansas City*, 62 P. 869, 39 Kan. 259.

44 C.J. p 1155 note 3.

72. U.S.—*Bell v. Mobile, etc., R. Co.*, Miss., 4 Wall. 598, 18 L.Ed. 338.

44 C.J. p 1155 note 4.

73. La.—*Arkansas Southern R. Co. v. Wilson*, 42 So. 976, 118 La. 396.

74. La.—*Arkansas Southern R. Co. v. Wilson*, *supra*.

75. Neb.—*Cook v. Beatrice*, 48 N.W. 328, 32 Neb. 80.

44 C.J. p 1155 note 7.

76. Neb.—*State v. Babcock*, 33 N.W. 247, 21 Neb. 599.

44 C.J. p 1155 note 8.

77. Ill.—*Decker v. Hughes*, 68 Ill. 33.

78. Kan.—*People's Nat. Bank v. Pomona*, 28 P. 1089, 48 Kan. 55.

44 C.J. p 1155 note 10.

79. Ala.—*Winter v. Montgomery*, 65 Ala. 403.

80. Ala.—*Winter v. Montgomery*, *supra*.

81. Neb.—*Jones v. Hurlburt*, 13 N. W. 5, 13 Neb. 125.

44 C.J. p 1155 note 14.

82. N.C.—*Goforth v. Rutherford R. Constr. Co.*, 3 S.E. 361, 96 N.C. 535.

44 C.J. p 1155 note 14.

83. Wis.—*Lynch v. Eastern, etc., R. Co.*, 15 N.W. 743, 57 Wis. 430.

84. Iowa.—*Cattell v. Lowry*, 45 Iowa 478.

44 C.J. p 1155 note 16.

85. Ill.—*Lippincott v. Pana*, 92 Ill. 24.

44 C.J. p 1155 note 17.

86. U.S.—*Oregon v. Jennings*, Ill., 7 S.Ct. 124, 119 U.S. 74, 30 L.Ed. 323.

44 C.J. p 1155 note 18.

87. U.S.—*St. Joseph Tp. v. Rogers*, Ill., 16 Wall. 644, 21 L.Ed. 323.

44 C.J. p 1155 note 19.

88. Mo.—*State v. Walker*, 35 Mo. 41.

44 C.J. p 1155 note 20.

scribed by the constitution as authority for municipal aid.⁸⁹

An election is vitiated by fraud, bribery, or corruption,⁹⁰ but not by mere irregularities, in conducting the election, which do not change the result.⁹¹

(2) Call or Order for, and Notice of, Election

The call, order, or notice of election must conform to statutory requirements.

An election called before the act authorizing it goes into effect is void.⁹² The question as to who is to call the election is a matter of statutory regulation,⁹³ and unless it is called by the officers designated by the statute it confers no authority.⁹⁴ A call or order for an election made before there has been a compliance with statutory conditions precedent is invalid;⁹⁵ but, where the board or officers by whom the election is called are given jurisdiction to determine whether the conditions precedent have been performed, their order calling the election is a finding that such conditions exist,⁹⁶ and their action is not subject to collateral attack.⁹⁷

The notice of election should comply with statutory requirements⁹⁸ and contain such statements as will fairly advise the voters of the object of the election.⁹⁹ When not required by statute, the notice need not state the conditions on which the subscription is to be made as specified in the petition for the election.¹

(3) Qualification and Registration of Voters

Statutory provisions are controlling in determining who is entitled to vote and whether registration is necessary.

Statutory provisions are controlling in determining who is entitled to vote² and whether registra-

tion is necessary.³ The election has been held not to be invalidated by reason of a failure to furnish to the election commissioners a certified list of voters⁴ or because the registration commissioners styled themselves "commissioners of election."⁵

(4) Determination and Certification of Result

The manner of determining the result of the election is generally regulated by statute.

The manner of determining the result of the election is generally expressly regulated by the statutes.⁶ If the managers of the election fail to certify the result, and their certificate is not made exclusive evidence thereof, the result may be determined by the officers of the municipality on whom the duty of granting the aid rests.⁷

(5) Contest of Election

A municipal corporation cannot impugn an election which it held and for which it is responsible.

The election may be contested by a taxpayer, as discussed *infra* § 2134; but the municipality cannot impugn an election which it held and for which it is responsible,⁸ especially after the completion of the railroad for the construction of which the aid was voted.⁹

(6) Second Election

In the absence of statutory restriction, a second election may be held where the first did not result in favor of the grant or was invalid, or may be held for the purpose of authorizing a second grant of aid.

Where there is nothing in the statute to indicate that the power to grant municipal aid is to be considered exhausted after an unsuccessful attempt to exercise it, the question of aid may, in case an election does not result in favor of the grant, be resubmitted to the voters,¹⁰ and this is also true where

89. U.S.—*Jarrold v. Moberly*, Mo., 103 U.S. 580, 26 L.Ed. 492.

44 C.J. p 1155 note 21.

90. Ky.—*Woolley v. Louisville Southern R. Co.*, 19 S.W. 595, 93 Ky. 223, 15 Ky.L. 13.

44 C.J. p 1155 note 22.

91. Ind.—*Demaree v. Johnson*, 49 N.E. 1662, 50 N.E. 376, 150 Ind. 419.

44 C.J. p 1156 note 23.

92. Ark.—*State v. Little Rock, etc.*, R. Co., 31 Ark. 701.

Mo.—*St. Louis v. Alexander*, 23 Mo. 483.

93. Iowa.—*Young v. Webster City, etc.*, R. Co., 39 N.W. 234, 75 Iowa 140.

44 C.J. p 1156 note 25.

94. Ill.—*Jacksonville, etc.*, R. Co. v. Virden, 104 Ill. 339.

44 C.J. p 1156 note 26.

95. La.—*State v. Shreveport*, 27 La. Ann. 623.

96. Ind.—*Bell v. Maish*, 36 N.E. 358, 137 Ind. 226.

Iowa.—*Ryan v. Varga*, 37 Iowa 78.

97. Ind.—*Bell v. Maish*, 36 N.E. 358, 137 Ind. 226.

Iowa.—*Ryan v. Varga*, 37 Iowa 78.

98. U.S.—*Hill v. Memphis, Mo.*, 23 F. 872, affirmed 10 S.Ct. 562, 134 U.S. 193, 33 L.Ed. 837.

44 C.J. p 1156 note 30.

99. Iowa.—*Bras v. McConnell*, 37 N.W. 290, 114 Iowa 401.

44 C.J. p 1156 note 31.

1. Ill.—*Wiley v. Silliman*, 62 Ill. 170—*Marshall v. Silliman*, 61 Ill. 218.

2. U.S.—*Hannibal v. Fauntleroy*, Mo., 185 U.S. 408, 36 L.Ed. 1103.

44 C.J. p 1156 note 33.

3. Wash.—*Graves v. Seattle*, 35 P. 1079, 8 Wash. 248.

44 C.J. p 1156 note 34.

4. La.—*New Orleans v. Cordevielle*, 10 La. Ann. 732—*New Orleans v. De St. Romes*, 9 La. Ann. 573.

5. Tenn.—*Red River Furnace Co. v. Tennessee Cent. R. Co.*, 37 S.W. 1016, 113 Tenn. 697.

6. Tex.—*Austin v. Gulf, etc.*, R. Co., 45 Tex. 234.

7. Ala.—*Winter v. Montgomery*, 65 Ala. 493.

8. La.—*Arkansas Southern R. Co. v. Wilson*, 42 So. 976, 118 La. 395.

9. La.—*Arkansas Southern R. Co. v. Wilson*, *supra*.

10. Ind.—*Bish v. Stout*, 77 Ind. 255.

the first election is invalid.¹¹ Also, where the authority of the municipality is unlimited, it may, after one election has resulted in favor of a grant of aid to a railway company, hold a second election for the purpose of authorizing a second grant of aid.¹² However, where a municipal corporation has voted a conditional subscription to the stock of a railway company, it has no power, unless expressly authorized by statute, to call a second election for the purpose of changing the terms of the subscription.¹³

§ 1874. Conditional Grant or Subscription

Municipal aid to, or subscription to the stock of, a private corporation may be on condition, provided the condition is not inconsistent with statutes or public policy; and no municipal liability arises until performance of the conditions.

General authority of a municipality to grant aid to, or to subscribe to the stock of, a private corporation includes authority to make a conditional subscription or grant of aid,¹⁴ provided the condition is not one prohibited by public policy¹⁵ or inconsistent with the statutes.¹⁶ In particular cases, certain matters have been held not to be conditions precedent;¹⁷ but, where municipal subscriptions are on conditions precedent, no liability on the part of the municipality arises until performance of such conditions.¹⁸ Where the grant of aid is conditional, and the time for the performance of the conditions is specified, the conditions should be performed within such time;¹⁹ and, where no time is fixed within which the conditions are to be performed, performance must take place within a reasonable time.²⁰ Where there has been a breach of a condition, it has been held that the municipality may properly sue to recover damages therefor.²¹

§ 1875. Rescission

A municipal subscription to stock of a railroad company may be rescinded with the latter's consent, or for

its violation of the subscription contract, or when nothing has been done and no rights of third persons have intervened.

A subscription by a municipal corporation to the stock of a railroad company may be rescinded with consent of the beneficiary,²² or on the ground that the company has violated the contract of subscription,²³ or when nothing has been done and no rights of third persons have intervened.²⁴

§ 1876. Application of Proceeds

Where the section of railroad to aid the construction of which a municipal corporation subscribes for stock is paid for out of the company's own means, the municipal payment may, as against a contractor with the company, the municipality not complaining, be applied to a mortgage debt.

Where a municipal corporation subscribes for stock of a railroad company for the purpose of aiding the construction of a designated section of railroad, but such section is completed by the company and paid for out of its own means, the amount paid by the municipality may, as against a contractor with the company, the municipality not complaining, be applied to the discharge of a mortgage debt.²⁵

§ 1877. Rights and Liabilities of Municipality

A municipal corporation which subscribes to the stock of a private corporation generally has the same rights and is subject to the same liabilities as other subscribers or stockholders.

Generally speaking, a municipal corporation which has made a valid subscription to the stock of a railroad company or other private corporation has the same rights²⁶ and is subject to the same liabilities²⁷ as other subscribers or stockholders. A municipality which has in the exercise of statutory authority subscribed to railroad stock and appointed directors to represent such stock cannot without express authority appoint directors to represent an in-

11. Minn.—Hodgman v. Chicago, etc., R. Co., 20 Minn. 48.

12. Minn.—Coe v. Caledonia, etc., R. Co., 6 N.W. 621, 27 Minn. 197.

13. Ill.—People v. Waynesville, 88 Ill. 469.

14. Md.—Baltimore, etc., R. Co. v. Pumphrey, 21 A. 559, 74 Md. 86. 44 C.J. p 1156 note 46.

15. U.S.—Taylor v. Ypsilanti, Mich., 105 U.S. 60, 26 L.Ed. 1008. Minn.—Coe v. Caledonia, etc., R. Co., 6 N.W. 621, 27 Minn. 197.

16. U.S.—Taylor v. Ypsilanti, Mich., 105 U.S. 60, 26 L.Ed. 1008. Minn.—Coe v. Caledonia, etc., R. Co., 6 N.W. 621, 27 Minn. 197.

Conditional donation held invalid under statute.—Indiana North & S. R. Co. v. Attica, 56 Ind. 476.

17. Me.—Lowell v. Washington County R. Co., 37 A. 869, 90 Me. 80.

Tenn.—Sweeney v. Tennessee Cent. R. Co., 100 S.W. 732, 118 Tenn. 297.

18. Minn.—Hinckley v. Kettle River R. Co., 72 N.W. 835, 70 Minn. 105. 44 C.J. p 1157 note 50.

Performance of conditions by railroad company see the C.J.S. title Railroads § 40, also 51 C.J. p 463 note 64—p 467 note 25.

19. Ill.—Chicago, etc., R. Co. v. Marseilles, 84 Ill. 145.

Minn.—McManus v. Duluth, etc., R. Co., 52 N.W. 980, 51 Minn. 30.

20. Ark.—Jacks v. Helena, 41 Ark. 213, error dismissed 6 S.Ct. 39, 115 U.S. 288, 29 L.Ed. 392.

21. Kan.—Missouri, etc., R. Co. v. Ft. Scott, 15 Kan. 435.

22. Kan.—Troy v. Atchison, etc., R. Co., 13 Kan. 70.

23. Pa.—Butler County v. Northwestern R. Co., 28 Leg.Int. 52, 18 P.L.J. 201.

24. Vt.—Estey v. Starr, 56 Vt. 690.

25. Ky.—Myer v. Dupont, 79 Ky. 416, 3 Ky.L. 36.

26. U.S.—Hancock v. Louisville, etc., R. Co., Ky., 12 S.Ct. 969, 145 U.S. 409, 36 L.Ed. 755.

44 C.J. p 1157 note 62.

27. Cal.—French v. Teachemaker, 24 Cal. 518.

44 C.J. p 1157 note 63.

crease of stock derived from a stock dividend,²⁸ and a municipality is not liable on an invalid assessment on corporate stock because its council has voted to pay it.²⁹

B. ADMINISTRATION IN GENERAL, APPROPRIATIONS, WARRANTS, AND PAYMENT

1. IN GENERAL

§ 1878. In General

Municipal corporations generally have the right to control and manage their finances.

Municipal corporations generally have the right to control and manage their finances,³⁰ and control of the finances of a city is usually vested by statute or charter in the city council,³¹ although the power given is merely authority to administer the finances of the city in accordance with law.³² The courts will not administer or supervise the financial affairs of a municipality,³³ nor will they interfere in the absence of fraud or abuse of power.³⁴ The courts will not hear any complaint from strangers of the mismanagement of municipal funds.³⁵

A statute intended to place all cities on a sound financial basis so far as it is possible to do so by legislation³⁶ should be interpreted so as to effectuate its purpose.³⁷ Also, a statute dealing with municipal finance carries with it an implication that all other provisions of law are to yield to its terms.³⁸

Fiscal year. Financial affairs are generally handled on a fiscal year basis.³⁹ Where a statute fixes the commencement of the fiscal year of a village,⁴⁰

but also confers power on the village board to change the date,⁴¹ the only way which the change may be effected by the board is by the passage of a valid ordinance for that purpose.⁴²

Investigation and audit. In some jurisdictions the statutes provide for the summary investigation of municipal expenditures by experts appointed by the courts.⁴³ A commission authorized to conduct an audit is not thereby empowered to survey or review accounting procedures.⁴⁴ A statute requiring an audit of the books of a municipality by state officials on the petition of a certain per cent of its voters has been held to require the proper city officers to request such action when a proper petition is presented, but not to authorize the state officials to act directly on the petition of the voters.⁴⁵

§ 1879. Adjustment of Accounts with Other Political Bodies

Where a municipal corporation collects state funds, it must apportion or pay them to the state or other governmental body in accordance with statute.

Where a municipal corporation collects state

28. U.S.—*Wheeling v. Baltimore*, C. C.Md., 29 F.Cas.No.17,502, 1 Hughes 90.

29. Me.—*Pike v. Bangor, etc.*, R. Co., 68 Me. 445.

30. Tex.—*McCollum v. City of Richardson*, Civ.App., 121 S.W.2d 423, error dismissed.

Cash basis

Town operates on a cash basis if current expenses for calendar year are paid from proceeds of taxes of former years or other available funds without reliance on taxes to be levied for such calendar year.—*People ex rel. Prindable v. New York Cent. R. Co.*, 72 N.E.2d 821, 397 Ill. 56.

31. U.S.—*City of Wheeling v. John F. Casey Co.*, C.C.A.W.Va., 85 F.2d 922.

La.—*Bullis v. Town of Jackson*, App., 4 So.2d 550.

44 C.J. p 1157 note 69.

Village trustees may do all acts expedient or desirable for management of village business, including payment of money out of specific property or revenues, as long as not

inconsistent with law.—*Kelly v. Merry*, 186 N.E. 425, 262 N.Y. 151.

Mayor; supervision and control

Law giving mayor general supervision and control over expenditure of all money appropriated by city "in addition to other powers now conferred upon him" was not inclusive of authority given mayor in earlier section of same law to approve appropriated expenditures in excess of amount expended for same purpose in preceding year, but was a limitation to correct condition not within official discretion.—*Kearns v. Nute*, N.H., 50 A.2d 426.

32. Ill.—*People v. Hummel*, 74 N.E. 78, 215 Ill. 71.

44 C.J. p 1158 note 70.

Motor vehicle tests

Iowa.—*Dyer v. City of Des Moines*, 300 N.W. 562, 230 Iowa 1246.

33. La.—*Bullis v. Town of Jackson*, App., 4 So.2d 550.

43 C.J. p 297 note 55.

34. U.S.—*City of Wheeling v. John F. Casey Co.*, C.C.A.W.Va., 85 F.2d 922.

35. U.S.—*Silver v. Tobin*, C.C.La., 28 F. 545.

36. Mass.—*Decatur v. Peabody*, 146 N.E. 360, 251 Mass. 82.

37. Mass.—*Decatur v. Peabody*, supra.

38. Mass.—*Decatur v. Peabody*, supra.

39. Okl.—*C. D. Coggeshall & Co. v. Smiley*, 255 P. 48, 142 Okl. 8.

Annual tax

All financial affairs are handled on fiscal year basis, and constitutional requirement of annual tax does not change this to calendar year basis.—*C. D. Coggeshall & Co. v. Smiley*, supra.

40. Ill.—*People v. Wabash R. Co.*, 129 N.E. 826, 296 Ill. 527.

41. Ill.—*People v. Wabash R. Co.*, supra.

42. Ill.—*People v. Wabash R. Co.*, supra.—*People v. Chicago, etc.*, R. Co., 100 N.E. 502, 257 Ill. 208.

43. N.J.—*Park Ridge v. Reynolds*, 62 A. 190, 73 N.J.Law 116.

N.Y.—*Matter of Eastchester*, 6 N.Y. S. 120, 53 Hun 181.

44. Ohio.—*State ex rel. Beane v. Krebs*, 62 N.E.2d 526, 75 Ohio App. 427.

45. Okl.—*Kay County Excise Board v. Davis*, 103 P.2d 939, 187 Okl. 494.

funds, it must apportion or pay them to the state or other governmental body in accordance with statute.⁴⁶ Under a statute authorizing the county treasurer to collect special city assessments, the county is not liable to the city for a shortage in the money turned over where liability is not imposed on it by statute⁴⁷ and it has not received either the money diverted⁴⁸ or a resulting benefit therefrom.⁴⁹

Under a statute providing for an apportionment by commissioners among cities and towns constituting a metropolitan park district of the annual payments required to reimburse the state for the cost and maintenance of certain parks and improvements in the district, the commissioners have been held to be clothed with a wide discretion.⁵⁰

2. FUNDS

§ 1880. Collection and Custody

The treasurer or chief fiscal officer of a municipal corporation is charged with the duty of receiving and having the custody of its funds.

The treasurer or other chief fiscal officer of a municipal corporation is charged with the duty of receiving and having the custody of its funds.⁵¹ The word "custody," as used in a statute relating to the custody of money belonging to a municipal corporation, means immediate charge and control under the law,⁵² and not the final and absolute control incident to ownership.⁵³ An ordinance in conflict with a statute relating to the custody of municipal funds is void.⁵⁴ Public moneys in the treasury of a municipal corporation are held in trust for

the benefit of the inhabitants.⁵⁵ A contract provision as to the time when a private corporation shall pay a specified sum into the city treasury will be given effect.⁵⁶

Deposit of funds. Municipal funds may⁵⁷ and, when so required by law, must⁵⁸ be deposited in a bank. The depository may be designated by the council⁵⁹ or the mayor and council,⁶⁰ unless a designation by the treasurer is expressly required by statute.⁶¹ It has been held that a foreign corporation may not legally act as a depository of funds under control of the city treasurer.⁶² An ordinance requiring the depository to give security will be given effect where it does not contravene any constitutional or statutory provision.⁶³ Under some

46. Ky.—Louisville v. Commonwealth, 9 Dana 70.

44 C.J. p 1158 note 82.

Apportionment of taxes as between municipality and state and other government bodies see the C.J.S. title Taxation § 1058 et seq. also 61 C.J. p 1523 note 33 et seq.

47. N.D.—Fargo v. Cass County, 160 N.W. 76, 35 N.D. 372.

48. N.D.—Fargo v. Cass County, supra.

49. N.D.—Fargo v. Cass County, supra.

50. Mass.—In re Metropolitan Park Com'rs, 95 N.E. 866, 209 Mass. 381. 44 C.J. p 1158 note 98.

51. Cal.—Draper v. Grant, App., 205 P.2d 399.

Mo.—City of Macon v. Farmers' Trust Co., App., 21 S.W.2d 643. 44 C.J. p 1159 note 2.

The management of funds collected for improvement assessments under the Barrett Law, being by the legislature vested in the city acting through certain specific officers, may not be taken over by the courts.—Read v. Beczkiewicz, 18 N.E.2d 789, 215 Ind. 365, reheard 19 N.E.2d 465, 215 Ind. 365.

Department of accounts and finance La.—State ex rel. City of Shreveport v. Dickson, App., 150 So. 574.

Supervisors of fire district act in a representative capacity and collect money of the district for benefit of

district and in carrying out its purposes.—Johnson v. Fontana County Fire Protection Dist., 101 P.2d 1092, 15 Cal.2d 380.

Motor vehicle tests

Iowa.—Dyer v. City of Des Moines, 300 N.W. 562, 230 Iowa 1246.

Park funds

Ky.—Hunter v. City of Louisville, 2 S.W.2d 652, 222 Ky. 819.

Compensation for franchise

A municipality may provide that compensation for a franchise be paid to a trustee and not be collectable by the city treasurer or collector.—People v. City of Chicago, 182 N.E. 419, 349 Ill. 304.

52. N.M.—Territory v. Matson, 113 P. 816, 16 N.M. 135.

53. N.M.—Territory v. Matson, supra.

54. Fla.—Tampa v. Salomonson, 17 So. 581, 35 Fla. 446.

Exclusive possession of treasurer

Council cannot interfere with exclusive possession of treasurer of city funds.—City of Macon v. Farmers' Trust Co., Mo.App., 21 S.W.2d 643.

55. Alaska.—Valentine v. Robertson, 7 Alaska 150.

Ill.—People ex rel. Nelson v. People's State Bank of Maywood, 188 N.E. 853, 354 Ill. 519.

56. Mo.—St. Louis v. Terminal R. Assoc., 109 S.W. 641, 211 Mo. 364.

57. Tex.—El Paso v. Two Republics L. Ins. Co., Civ App., 278 S.W. 231. 44 C.J. p 1159 note 7.

Depositories of public moneys generally see Depositories §§ 7-14. Interest on deposit see infra § 1881.

Fire districts have implied power to open bank accounts as a necessary incident to handling of funds needed for exercise of other express powers.—Hellawell v. Grafeld, D.C. N.Y., 22 F.Supp. 765.

58. Ind.—Weidner v. City of Richmond, 165 N.E. 332, 90 Ind.App. 425.

44 C.J. p 1159 note 8.

Mandamus to compel deposit of funds and selection of depository see Mandamus § 140.

Street improvement funds are city funds, required to be deposited in public depositories.—Weidner v. City of Richmond, 165 N.E. 332, 90 Ind. App. 425.

59. Colo.—Babcock v. Rocky Ford, 137 P. 899, 25 Colo.App. 312. 44 C.J. p 1159 note 9.

60. Kan.—Interstate Nat. Bank v. Ferguson, 30 P. 237, 48 Kan. 732.

61. N.M.—Territory v. Matson, 113 P. 816, 16 N.M. 135.

44 C.J. p 1159 note 11.

62. N.D.—State v. Hankinson, 205 N.W. 995, 53 N.D. 346.

63. Or.—Portland v. State Bank, 314 P. 812, 107 Or. 267.

statutes a city depository must keep separate the funds of the city⁶⁴ in order that it may know that the fund on which a treasurer's check is drawn is sufficient to meet the check.⁶⁵ Payments into a depository of money collected from special assessments against abutting property for local improvements may be provided for by contract,⁶⁶ but are not within charter provisions relating to the deposit of public funds or moneys belonging to the city.⁶⁷

Compromise and settlement of municipal claims. Unless forbidden by constitution, charter, or statute, a municipal corporation has power to settle and compromise disputed claims in its favor,⁶⁸ but it may not compromise a liquidated, undisputed claim,⁶⁹ although it has been held that the power exists even in such case if the debtor is in a precarious financial condition so that the amount that may be collected by legal proceedings is uncertain.⁷⁰ A constitutional provision limiting the power of the state legislature to compromise a municipal claim has been held to impose a like limitation on municipal officers.⁷¹

Pledge of securities to secure deposit of city moneys held ultra vires as to both bank and city.—City of Mount Vernon v. Mount Vernon Trust Co., 1 N.E.2d 825, 270 N.Y. 400.

64. Tex.—Texas Electric, etc., Co. v. Vernon, Civ.App., 266 S.W. 600.
65. Tex.—Texas Electric, etc., Co. v. Vernon, supra.

66. Wash.—Seattle v. Stirrat, 104 P. 834, 55 Wash. 560, 24 L.R.A., N.S., 1275.

67. Wash.—Seattle v. Stirrat, supra.

68. Kan.—State ex rel. v. City of Pratt, 85 P.2d 10, 148 Kan. 885. Compromise and settlement of pending actions see *infra* § 2197.
Compromise of claims against municipality see *infra* § 2181.

Municipality's assumption of an obligation is not within the constitutional prohibition against releases or compromises of obligations to the municipality.—Wheeler v. City of Brownsville, Tex., 220 S.W.2d 457.

Liquidated or unliquidated claims

Under some constitutional provisions a liability to the municipality which is fixed and certain may not be compromised, but an unliquidated claim may be settled.—Steele v. Taylor, for Use and Benefit of Laurel County, 113 S.W.2d 423, 272 Ky. 11.

69. U.S.—Getz v. City of Harvey, C. C.A. Ill., 118 F.2d 817, certiorari denied City of Harvey v. Getz, 62 S.Ct. 59, two cases, 314 U.S. 628, 86 L.Ed. 504.

Ill.—People v. Holten, 122 N.E. 540,

287 Ill. 225—People v. Parker, 83 N.E. 282, 231 Ill. 478.

70. N.Y.—City of Mount Vernon v. Mount Vernon Trust Co., 1 N.E.2d 825, 270 N.Y. 400

Consent to reorganization of depository

N.Y.—City of Mount Vernon v. Mount Vernon Trust Co., supra.

71. Ala.—New Farley National Bank v. Montgomery County, 84 So. 815, 203 Ala. 654—Smith v. Hall, 36 So.2d 354, 33 Ala.App. 554, affirmed 36 So.2d 357, 251 Ala. 44.

72. Wash.—City of Aberdeen v. National Surety Co., 275 P. 62, 151 Wash. 55, 65 A.L.R. 794.

Sale of utility on terms

Sale by city to utilities company of its light and water systems for part cash and balance on terms was not void as violating constitutional provision relating to investment of public moneys.—City of Clovis v. Southwestern Public Service Co., 161 P.2d 878, 49 N.M. 270, 161 A.L.R. 504.

Reserve for depreciation

Ind.—Wilkins v. Leeds, 25 N.E.2d 442, 216 Ind. 508.

73. Ky.—Richardson v. Ashland Bd. of Education, 271 S.W. 549, 208 Ky. 464.

44 C.J. p 1159 note 18.

74. Ind.—Storen v. Sexton, 200 N.E. 251, 209 Ind. 589, 104 A.L.R. 1359.

75. Miss.—Pace v. Wedgeworth, 20 So.2d 842.

44 C.J. p 1159 note 18.

§ 1881. Loan or Investment

Surplus money in a municipal treasury, not appropriated for immediate payment ordinarily may be invested or lent until needed for municipal use.

Unless forbidden by constitutional, charter, or statutory provision,⁷² surplus money in a municipal treasury, not appropriated for immediate payment, may be lent or invested by the municipal corporation until needed for municipal use,⁷³ but it has been held that a municipality has no right to lend public funds in the absence of statutory authority.⁷⁴ In any event, where authorized by statute or charter, a municipality may lend or invest its funds.⁷⁵ The loan or investment may be at any lawful rate of interest which may be agreed on,⁷⁶ and a borrower will not be heard to set up the want of corporate power to make his loan.⁷⁷ A municipal officer who is bound to deposit the public money in some bank may contract with the bank that it shall pay interest on the deposit for the benefit of the municipality;⁷⁸ but a bank is not bound to pay interest on such deposit unless it is so agreed.⁷⁹ The fact that

Investment in municipal bonds authorized

Cal.—City of San Diego v. Millan, 16 P.2d 357, 127 Cal.App. 521.

Ill.—Krause v. Peoria Housing Authority, 19 N.E.2d 193, 370 Ill. 356
S.C.—Sanders v. Greater Greenville Sewer Dist., 44 S.E.2d 185, 211 S.C. 141.

76. Ohio—Hillsborough, etc., R. Co. v. Cincinnati, 5 Ohio Dec. (Reprint) 122, 2 Am L.Rec. 724.
44 C.J. p 1159 note 19.

Interest on library fund

Law library is set up as separate entity for public purpose and interest earned on deposits of moneys in law library fund by county treasurer belongs to law library and not to county.—Board of Law Library Trustees of Los Angeles County v. Lowery, 154 P.2d 719, 67 Cal.App.2d 480.

77. Ohio.—Adelphi v. Swinhart, 3 Ohio Dec. (Reprint) 551.
Tex.—Scheussler v. Mason, Civ.App., 28 S.W. 42.

Interest on illegal loan

County treasurer cannot recover interest paid to city on street improvement funds, illegally lent, even if funds are not public funds.—Weidner v. City of Richmond, 165 N.E. 332, 90 Ind.App. 425.

78. N.Y.—New York v. National Broadway Bank, 10 N.Y.S. 555, affirmed 27 N.E. 555, 126 N.Y. 665.

79. N.Y.—New York v. Tradesmen's Nat. Bank, 11 N.Y.S. 95, affirmed 27 N.E. 555, 126 N.Y. 665.

a municipality through its officers holds possession and control of notes given by one of them for an unauthorized loan of the municipal money to himself will not operate as a ratification of the loan.⁸⁰

Time deposit. A time deposit has been held to be a deposit and not an investment,⁸¹ but it has also been held that a time deposit is a loan.⁸²

§ 1882. Apportionment

Charter or statutory provisions that municipal revenue shall be apportioned to the different municipal funds should be complied with.

Charter or statutory provisions that municipal revenue shall be apportioned by the council to the different municipal funds should be complied with.⁸³

§ 1883. Disbursement

Municipal funds may not be legally disbursed unless and until the statutory prerequisites are observed.

Funds may not be legally disbursed unless and until the statutory prerequisites are observed and performed.⁸⁴ Municipal funds must be disbursed through public officers,⁸⁵ and not through private

agencies.⁸⁶ A disbursing officer may pay out municipal funds only as authorized by law,⁸⁷ and a void ordinance affords him no legal protection;⁸⁸ moreover, it has been held that, where municipal funds are disbursed without authority of law, the recipient holds the money in an involuntary trust for the municipal corporation.⁸⁹ It has been held that a city may not refuse to disburse money in its treasury on the ground of doubt of its power to make the levy which brought it in.⁹⁰ An ordinance relating to the disbursement of municipal funds is valid where it falls within the scope of powers conferred or duties imposed by charter or statute⁹¹ and is not in conflict with any charter or statutory provision.⁹²

§ 1884. General or Special Funds

Statutes may classify municipal funds and specify the moneys of which each shall be composed, and the division of municipal revenue into separate funds for administrative purposes is within the discretion of the municipal legislative body.

Statutes may classify municipal funds⁹³ and specify the moneys of which each shall be composed,⁹⁴ and the division of municipal revenue into separate

80. N.H.—*Holderness v. Baker*, 44 N.H. 414.

81. Ky.—*Louisville Trust Co. v. Commissioners of Sinking Fund of City of Louisville*, 84 S.W.2d 30, 260 Ky. 219.

82. Wash.—*City of Aberdeen v. National Surety Co.*, 275 P. 62, 151 Wash. 55, 65 A.L.R. 794.

83. Cal.—*Mahoney v. San Francisco*, 257 P. 49, 201 Cal. 248. 44 C.J. p 1159 note 27.

Approval of state budget director
Iowa.—*State v. Manning*, 259 N.W. 213, 220 Iowa 525.

84. N.J.—*Frank Grad & Son v. City of Newark*, 193 A. 177, 118 N.J. Law 376.

Upkeep of fire department

In absence of express provision therefor, disbursements for upkeep of fire department are classified as current expenditures, to be paid out of current revenue.—*Joy v. City of Terrell*, Tex.Civ.App., 148 S.W.2d 704, error dismissed, judgment correct.—*City of Denison v. Foster*, Tex.Civ. App., 37 S.W. 167.—*City of Sherman v. Smith*, 35 S.W. 294, 12 Tex.Civ. App. 580.

85. Mass.—*Attorney General v. Lowell*, 41 N.E. 45, 246 Mass. 312. 44 C.J. p 1159 note 31.

City commission must approve all expenditures from its treasury.—*City of De Land v. Moorhead*, 119 So. 117, 96 Fla. 737.

86. Mass.—*Attorney General v. Lowell*, 41 N.E. 45, 246 Mass. 312.

87. Cal.—*Draper v. Grant*, App., 205 P.2d 399.

Mass.—*City of Lowell v. Massachusetts Bonding & Insurance Co.*, 23 N.E.2d 91, 304 Mass. 153.

44 C.J. p 1159 note 33.
Necessity of appropriation see infra § 1885.

Personal liability of municipal officers for wrongful disbursements see supra §§ 545, 546.

Authority as shown by records
Ky.—*City of Princeton v. Baker*, 35 S.W.2d 524, 237 Ky. 325.

Fire district
Cal.—*Johnson v. Fontana County Fire Protection Dist.*, 101 P.2d 1092, 15 Cal.2d 380.

Ratification

In absence of unusual circumstances, an illegal payment of public funds cannot be ratified.—*Aebli v. Board of Education of City and County of San Francisco*, 145 P.2d 601, 62 Cal.App.2d 706.

88. Cal.—*Herzo v. San Francisco*, 33 Cal. 134.

89. Cal.—*City of Petaluma v. Hickey*, 266 P. 613, 90 Cal.App. 616.

Payments by municipalities under mistake of law see the C.J.S. title Payment § 156, also 48 C.J. p 757 note 62 et seq.

Payment to municipal officer

City's right as to recovery of illegal payment to city official held same whether he was or was not municipal officer.—*City of Petaluma v. Hickey*, supra.

90. La.—*School Directors v. Shreveport*, 16 So. 563, 47 La. Ann. 21.

91. Tenn.—*Henniger v. Memphis*, 111 S.W. 1115, 120 Tenn. 555.

92. Tenn.—*Henniger v. Memphis*, supra.

93. N.Y.—*Matter of Monticello*, 205 N.Y.S. 839, 123 Misc. 556, affirmed 206 N.Y.S. 970, 211 App.Div. 826, 829.

Use of funds see infra § 2119.

Apportionment mandatory

Cal.—*Mahoney v. City and County of San Francisco*, 257 P. 49, 201 Cal. 248.

Revolving fund

Statute providing for creation by cities of special improvement district revolving fund does not deny equal protection of the laws as applied to districts created for carrying out flood control project designed to control flood waters within the district, although project is partially without the city.—*Hansen v. City of Havre*, 114 P.2d 1053, 112 Mont. 207, 135 A.L.R. 1278.

94. N.Y.—*Matter of Monticello*, 205 N.Y.S. 839, 123 Misc. 556, affirmed 206 N.Y.S. 970, 211 App.Div. 826, 829.

Public housing

Under public housing law it is not illegal to combine four separate developments into a single project for financing purposes or to commingle the funds of the projects.—*Neufeld v. O'Dwyer*, 79 N.Y.S.2d 53, 192 Misc. 538.

funds for administrative purposes is within the discretion of the municipal legislative body;⁹⁵ but a municipal corporation has no power to create a fund for a purpose prohibited by charter or statute.⁹⁶

A general fund of a municipal corporation may be composed of such revenues from enumerated sources as a valid charter or statutory provision requires to be credited to the fund⁹⁷ or of all money coming into the treasury which is not required by statute or otherwise to be kept in a special fund and applied to a particular purpose.⁹⁸ Whether a fund is a special fund, and, if so, the nature, purpose, and extent of its dedication, are to be determined by the statute or ordinance under which it is raised or held.⁹⁹ It has been held that funds whose use is limited to a particular purpose, such as trust funds, or the proceeds of a tax levied for a particular purpose, must be segregated in a special fund and should not be commingled with the general funds of the municipality.¹ Funds which have a

source of income other than from taxes often have special burdens that may not be imposed on other funds.²

Working cash fund. It has been held that a working cash fund may be established;³ and such a fund is a revolving fund to meet the current cash needs of the municipality and the funds therein are not appropriable assets.⁴

Emergency fund. Under some statutes an emergency fund may be created for the purpose of meeting deficiencies in other funds.⁵ The establishment and use of an emergency fund are discretionary with the governing body of the municipality,⁶ but such discretion must be honest and not arbitrary,⁷ and may be subject to the approval of a state board.⁸

A state relief fund, allocated to municipalities according to need for local relief, is not an appropriable asset of a municipality.⁹

95. Cal.—Department of Water and Power of City of Los Angeles v. Vroman, 22 P.2d 698, 218 Cal. 206 —Newton v. Brodie, 290 P. 1058, 107 Cal.App. 512.

La.—Hotard v. City of New Orleans, 35 So.2d 752, 213 La. 843, appeal dismissed 69 S.Ct. 57, 335 U.S. 803, 93 L.Ed. —.

96. Ill.—Chicago v. Brede, 121 Ill. App. 562, affirmed 75 N.E. 1044, 218 Ill. 528.

97. Cal.—Marr v. Southern California Gas Co., 245 P. 178, 198 Cal. 278.

44 C.J. p 1160 note 38.

General asset of municipality
Mont.—State ex rel. Clark v. Bailey, 44 P.2d 740, 99 Mont. 484.

Money credited to wrong fund
Okl.—Gulf, C. & S. F. Ry. Co. v. Excise Board of Love County, 283 P. 1003, 141 Okl. 34.

98. Ky.—Pure Milk Producers & Distributors Ass'ns v. Morton, 125 S.W.2d 216, 276 Ky. 736.

Wash.—Twitchell v. Spokane, 104 P. 150, 55 Wash. 86, 133 Am.S.R. 1021, 24 L.R.A., N.S., 290.

"General fund" defined

As applied to a city, a general fund is a miscellaneous sum for the payment of claims which will arise, and for which it is impossible to remit the exact amount which will be required.—Kelly v. Broadwell, 92 N. W. 643, 645, 3 Neb. (Unoff.) 617.

Public moneys are funds raised by governmental unit or agency for

conduct of government and governmental purposes, not funds incidentally falling into governmental agent's hands while performing his lawful functions, such as alimony payments deposited with friend of circuit court.—Pokorny v. Wayne County, 33 N.W.2d 641, 322 Mich. 10.

99. Md.—Callaway v. Baltimore, 67 A. 661, 99 Md. 315.
44 C.J. p 1160 note 40.

Amount contributed by county to cost of paving city streets is held by city as trustee for abutting property owners.—City of Laurel v. Fox, 122 So. 484, 154 Miss. 755, modified on other grounds on suggestion of error 124 So. 73, 154 Miss. 755.

Title to trust funds

Mass.—Commissioners of Woburn Cemetery v. Treasurer of Woburn, 64 N.E.2d 627, 319 Mass. 86.—City of Boston v. Dolan, 10 N.E.2d 275, 298 Mass. 346.

1. La.—Ziemer v. City of New Orleans, 197 So. 754, 195 La. 1054.

Mass.—Commissioners of Woburn Cemetery v. Treasurer of Woburn, 64 N.E.2d 627, 319 Mass. 86.

Loss

City, mingling trust funds raised by special levies for particular purposes, such as payment of special improvement district bonds, with its general fund and other trust funds, must reimburse special fund suffering loss, if funds legally applicable to meet demand are available.—State ex rel. Clark v. Bailey, 44 P.2d 740, 99 Mont. 484.

2. Ill.—People ex rel. Schlaeger v. Brand, 59 N.E.2d 664, 389 Ill. 298.

3. Ill.—Mathews v. City of Chicago, 174 N.E. 35, 342 Ill. 120.

Limitation of amount

Ill.—People ex rel. McDonough v. Mills Novelty Co., 192 N.E. 236, 357 Ill. 285.

4. Ill.—People ex rel. Nelson v. Beu, 85 N.E.2d 829, 403 Ill. 232.—People ex rel. McDonough v. Mills Novelty Co., 192 N.E. 236, 357 Ill. 285.

5. Iowa.—Mathewson v. City of Shenandoah, 11 N.W.2d 571, 233 Iowa 1368.

6. Iowa.—Mathewson v. City of Shenandoah, supra.

Inadequacy of appropriation

Where the inadequacy, if any, of an appropriation made for street cleaning was due to the action of the board of estimates, but the board has authority to dispose of an emergency fund, or portion thereof, for any purpose it may deem proper, it may and should use some portion of the emergency fund to supply the deficiency in the appropriation.—Baltimore City v. Hampton Court Co., 94 A. 1018, 128 Md. 341.

7. Iowa.—Mathewson v. City of Shenandoah, 11 N.W.2d 571, 233 Iowa 1368.

8. Iowa.—Mathewson v. City of Shenandoah, supra.

9. Ill.—People ex rel. Nelson v. Beu, 85 N.E.2d 829, 403 Ill. 232.

3. APPROPRIATIONS AND PAYMENTS

§ 1885. Appropriations

- a. In general
- b. Budgets

a. In General

As a general rule, an appropriation is necessary to support the disbursement of municipal funds.

As a general rule an appropriation is necessary to support the disbursement of municipal funds.¹⁰ However, where a utility is operated by a municipal corporation without the aid of taxation, operating expenses, replacements, and extensions may be paid from the income of the utility without an appropriation,¹¹ but even in such case it has been held that, whether or not an appropriation ordinance is necessary, it is proper.¹²

Financial statements and reports. Official statements and reports of fiscal conditions constitute the proper basis for administrative or legislative action, when made by officers thereunto duly author-

ized,¹³ and in the manner and form required by law.¹⁴ The municipal corporation may be required to make an annual report showing its true fiscal condition as of the close of the year,¹⁵ and it has been held that the statement should be made as of the close of the fiscal year and there should not be included either receipts or disbursements occurring after the close of the fiscal year.¹⁶ Under some statutes the municipal fiscal officers are required to make annual or semiannual reports as to their financial transactions for the period, and such report must be published in a newspaper in the municipality,¹⁷ and a municipal corporation may be required to publish annually a financial statement of a utility which it owns and operates.¹⁸ A statute requiring the comptroller to make an annual report to the city council does not require the council to accept the figures shown in the report in estimating the surplus available for appropriation.¹⁹ A certificate of the city comptroller that there is in the hands of the treasurer a sum sufficient to pay a particular ap-

10. U.S.—Getz v. City of Harvey, C. C.A. Ill., 118 F.2d 817, certiorari denied City of Harvey v. Getz, 62 S. Ct. 59, two cases, 314 U.S. 628, 86 L. Ed. 504.

Ill.—People ex rel. Gill v. Schiek, 14 N.E.2d 223, 368 Ill. 353.

Ky.—Stone v. Town of Pewee Valley, 140 S.W.2d 1052, 283 Ky. 219.

Mass.—Commissioners of Woburn Cemetery v. Treasurer of Woburn, 64 N.E.2d 627, 319 Mass. 86—McCarthy v. City of Malden, 22 N.E.2d 104, 303 Mass. 563.

Ohio.—Industrial Rescue Mission v. City of Columbus, 81 N.E.2d 254, 83 Ohio App. 188.

Pa.—Appeal from Statement of Audit of Finances of Borough of Monaca, Com.Pl., 35 Mun.L.R. 111.

Necessity of appropriation prior to incurring indebtedness or expense see supra § 1866.

History and origin of requirement

Ill.—People ex rel. Henryson v. City of Elgin, 5 N.E.2d 856, 288 Ill.App. 215.

Word "town," as used in statute providing that money received by any town department shall be paid into the town treasury, and shall not be later used by such department without a specific appropriation thereof, includes a city.—McQuade v. City of Springfield, 84 N.E.2d 30, 323 Mass. 715.

Expenditure in anticipation of appropriation

Order directing committee on fire department to purchase pumping engine, cost to be charged to unexpended balances until further provision

should be made did not fall within statute empowering city officers to make expenditures in anticipation of appropriations.—Burt v. Municipal Council of City of Taunton, 176 N.E. 511, 275 Mass. 535.

Absence of appropriation as not invalidating payment

Fact that there was no appropriation in village's annual appropriation ordinance to govern the fees for which vouchers were issued to village attorney and his two law partners for their services in connection with a village bond issue did not invalidate the payments.—Village of Forest Park v. Collis, 67 N.E.2d 894, 329 Ill.App. 3.

11. Okl.—City of McAlester v. State ex rel. Bd. of Public Affairs, 154 P.2d 579, 195 Okl. 1—Protest of St. Louis-San Francisco Ry. Co., 5 P.2d 763, 153 Okl. 283—In re Bliss, 285 P. 73, 142 Okl. 1.

Where an appropriation is made, it is not subject to attack for lack of particularization.—Protest of St. Louis-San Francisco Ry. Co., 5 P.2d 763, 153 Okl. 283.

12. Okl.—Leonard v. City of Waggoner, 63 P.2d 93, 178 Okl. 553.

13. Pa.—Bullitt v. Philadelphia, 19 Pa.Dist. 1091.

44 C.J. p 1158 note 78.

14. N.Y.—Osterhoudt v. Rigney, 98 N.Y. 222—People v. Wright, 22 N.Y.S. 961, 68 Hun 264.

15. Okl.—Protest of Reid, 15 P.2d 995, 150 Okl. 3.

16. Okl.—Board of Education of Oklahoma City v. Excise Board of

Oklahoma County, 53 P.2d 565, 175 Okl. 363—Protest of Chicago, R. I. & P. Ry. Co., 1 P.2d 383, 150 Okl. 167.

Uncollected taxes for preceding fiscal year constitute no part of balance on hand required to be shown on municipality's financial statement.—Berryman v. Bonaparte, 11 P.2d 164, 155 Okl. 165.

17. Ill.—People ex rel. Ledbetter v. Haddfield, 45 N.E.2d 45, 316 Ill.App. 245—Cassidy v. Kirkpatrick, 211 Ill.App. 196.

Minn.—State ex rel. Markham v. Elmquist, 276 N.W. 735, 201 Minn. 403.

Okl.—Adjustment Realty Co. v. Excise Board of Muskogee County, 284 P. 27, 141 Okl. 130.

W.Va.—State ex rel. Koontz v. Board of Park Com'rs of City of Huntington, 47 S.E.2d 689.

Publication of summary of statement is insufficient.—State ex rel. Markham v. Elmquist, 276 N.W. 735, 201 Minn. 403.

18. Okl.—In re Bliss, 285 P. 73, 142 Okl. 1.

Operation independent of taxation

Whether municipal light and power plant is operated with, or independent of, aid of ad valorem taxation, money collected therefrom must be accounted for by municipality.—Protest of Reid, 15 P.2d 995, 160 Okl. 3.

19. Ill.—People ex rel. Nash v. S. A. Maxwell & Co., 195 N.E. 26, 359 Ill. 570, 98 A.L.R. 494.

propriation has been held to be prima facie true.²⁰ A statute requiring the publication of an audit of the city's accounts by a disinterested auditor has been held to repeal by implication a statute requiring the city officials to prepare and publish annual statements of the funds collected and disbursed by them.²¹

b. Budgets

Many municipal corporations operate under a budget system which requires that a budget be adopted setting forth the income and expenditures of the municipality for the coming fiscal year; and funds may not be expended except as authorized by the budget.

20. Tex.—City of Houston v. Chapman, Civ.App., 145 S.W.2d 669, error dismissed, judgment correct.

21. Ky.—Washburn v. Paducah Newspapers, 121 S.W.2d 911, 275 Ky. 527.

Audit as satisfying statute

An audit, caused by board of commissioners to be made of all accounts of city's officers and published in official newspaper, as required by statute, is substantial compliance with earlier statute requiring general council to publish annually itemized accounts of all money received and paid out during preceding fiscal year.—Washburn v. Paducah Newspapers, *supra*.

22. Mass.—Allen v. City of Cambridge, 55 N.E.2d 925, 316 Mass. 351.

Mich.—School Dist. of City of Pontiac v. City of Pontiac, 247 N.W. 474, 262 Mich. 338, rehearing denied 247 N.W. 787, 262 Mich. 338.
Pa.—Commonwealth ex rel. Kelley v. Pommer, 199 A. 485, 330 Pa. 421—Bickert v. Borough of West View, Com.Pl., 90 Pittsb.Leg.J. 377.

Reason for, and purpose of, budget

(1) Budgetary laws have grown out of a necessity to require governmental entities to live within their income and conduct their affairs with system and dispatch, and the purpose of an annual budget is to limit the power of a city with reference to raising and expending public funds.—State ex rel. Cole v. Keller, 176 So. 176, 129 Fla. 276.

(2) The statutes regulating municipal budgets are designed to incorporate sound business principles and practices into the fabric of local economy.—Murphy v. Town of West New York, 42 A.2d 5, 132 N.J.Law 595.

(3) Similar statements of purpose. Ariz.—City of Phoenix v. Kidd, 92 P. 2d 513, 54 Ariz. 75, affirmed 94 P. 2d 428, 54 Ariz. 123, followed in City of Phoenix v. Price, 94 P.2d 433, 54 Ariz. 137, City of Phoenix v. Enriquez, 94 P.2d 434, 54 Ariz. 138,

and City of Phoenix v. Wilson, 94 P.2d 434, 54 Ariz. 139.

Kan.—State ex rel. Ward v. Board of Com'rs of Republic County, 82 P.2d 84, 148 Kan. 376.

Mass.—Bell v. Assessors of Cambridge, 28 N.E.2d 1, 306 Mass 249
Wash.—State ex rel. Heffernan v. City of Hoquiam, 56 P.2d 1012, 186 Wash. 50.

44 C.J. p 1164 note 27 [a].

Budget statutes are mandatory

Fla.—State ex rel. Cole v. Keller, 176 So. 176, 129 Fla. 276

N.J.—Murphy v. Town of West New York, 42 A.2d 5, 132 N.J.Law 595.

Financial, not legislative, act
N.Y.—Collins v. City of Schenectady, 10 N.Y.S.2d 303, 256 App.Div. 389.

Invoice of municipal activities and cost

Fla.—State ex rel. Cole v. Keller, 176 So. 176, 129 Fla. 276.

Separate budget

Each municipality has full and untrammelled authority to adopt a separate budget for its own needs, and the practice of township to assess and collect taxes for town, and of township to adopt a budget which included the town which was adopted as a matter of expediency and without statutory authority, could not be sanctioned as a matter of law on ground that the practice was of long standing.—Bridgewater Tp. v. Local Government Bd. of Dept. of Taxation and Finance, 60 A.2d 280, 137 N.J. Law 416.

Budget statute held valid

N.Y.—Wright v. Albany Port Dist. Commission, 5 N.Y.S.2d 701, 254 App.Div. 915, affirmed 21 N.E.2d 512, 280 N.Y. 731, certiorari denied 60 S.Ct. 137, 308 U.S. 604, 84 L.Ed. 505, motion granted 35 N.E. 2d 920, 286 N.Y. 566.

Budget of pension system

Cal.—Davidson v. Burns, 101 P.2d 568, 38 Cal.App.2d 188.

23. Ariz.—Yanke v. School Dist. No. 65 of Maricopa County, 106 P.2d 966, 56 Ariz. 93.

Fla.—Fuller v. Gardner, 190 So. 442,

Many municipal corporations operate under a budget system, which requires that a budget be adopted setting forth the income and expenditures of the municipality for the coming fiscal year,²² and funds may not be expended by the municipality except as authorized by the budget and for the purposes specified therein.²³ It has been held that the budget as finally approved and adopted is an appropriation.²⁴ Statutes as to municipal budgets are to be construed in accordance with their plain intent,²⁵ and must be read in the light of the constitution, related statutes, and judicial decisions.²⁶ Statutory and charter provisions as to the preparation²⁷ and

138 Fla. 837—State ex rel. Cole v. Keller, 176 So. 176, 129 Fla. 276.
Appropriation for purpose not provided in budget see *infra* § 1887.

Exhaustion of funds

City budget becomes exhausted when obligations to be paid therefrom are incurred in an amount equaling the total budget, and not when the money set up in budget is actually paid out to creditors for purposes covered by budget.—City of Phoenix v. Kidd, 94 P.2d 428, 54 Ariz. 123, followed in City of Phoenix v. Price, 94 P.2d 433, 54 Ariz. 137, City of Phoenix v. Enriquez, 94 P.2d 434, 54 Ariz. 138, and City of Phoenix v. Wilson, 94 P.2d 434, 54 Ariz. 139.

Excess receipts

Iowa.—Clark v. City of Des Moines, 267 N.W. 97, 222 Iowa 317.

Pa.—Corporation for Relief of Widows and Children of Clergymen in Communion of Protestant Episcopal Church in Commonwealth of Pennsylvania v. City of Philadelphia, 176 A. 727, 317 Pa. 76.

Unexpended balances

Unexpended balances from prior budgets may be used for payments under the current budget.—City of Tucson v. Tucson Sunshine Climate Club, 164 P.2d 598, 64 Ariz. 1.

24. N.Y.—Flaherty v. Craig, 123 N. E. 157, 226 N.Y. 76.

25. Ind.—Johnson v. Lenz, 200 N.E. 249, 209 Ind. 627.

26. Ky.—Swinburne v. City of Newport, 181 S.W.2d 421, 297 Ky. 820.

Budget director, although state appointee, is, in a sense, ex officio a member of tax certifying and tax levying body of each local municipality included within provisions of budget act and that fact must be considered in construing budget act as applied to local municipalities.—State v. Manning, 259 N.W. 213, 220 Iowa 525.

27. N.Y.—Dixon v. La Guardia, 2 N.Y.S.2d 466, 166 Misc. 889, affirmed 2 N.Y.S.2d 477, 253 App.Div. 881, affirmed 13 N.E.2d 450, 277 N.Y. 84.

43 C.J. p 1164 note 27.

adoption²⁸ of the budget must be complied with, and are not subject to waiver by any municipal officer.²⁹ It has been held that the preparation and submission of the budget are executive acts,³⁰ whereas its adoption is a legislative function.³¹

Powers of particular officers, boards, and bodies. Charter and statutory provisions govern as to the board or officials authorized to prepare and adopt a budget.³² Under some charter and statutory provisions the budget is prepared by the mayor or other executive officer, or by the municipality's fiscal officer,³³ or by the board of estimate,³⁴ whose power is in certain respects final,³⁵ as the board of aldermen or city council may not reduce its allowances as to certain items;³⁶ but the council or board may reduce or reject the allowances for other items³⁷ and the council may be without power to increase the total or any item of the proposed budget.³⁸ Even where the council has power to reduce or in-

crease expenditure items in the budget, it may be without power to alter estimates of receipts.³⁹ Under some statutes and charter provisions any revision of the budget by the council is subject to the mayor's veto,⁴⁰ which may be overcome only by a two-thirds vote.⁴¹ In some jurisdictions the budget is prepared by the municipal authorities, but is adopted by a county board;⁴² and the county board may revise and correct the estimates certified to them, and this includes the power to strike or add items, or to reduce or increase them.⁴³ However, the board acts in a dual capacity, as agent of the state in matters as to which the state has a sovereign interest and as a supervising agency for the municipality as to matters of purely local or municipal concern.⁴⁴ In the first class, it may strike or reduce items except as limited by legislative and constitutional provisions,⁴⁵ whereas as to municipal matters it has authority to reduce or strike items

Notice not mandatory

Wash.—*Hillier v. Public Utility Dist.*
No. 3, 63 P.2d 392, 188 Wash 602

Program of interrelated steps

N.Y.—*Dixon v. La Guardia*, 2 N.Y.S. 2d 466, 166 Misc. 889, affirmed 2 N.Y.S.2d 477, 253 App.Div. 881, affirmed 13 N.E.2d 450, 277 N.Y. 84.

28. N.J.—*Mackey v. Belvidere*, 128 A. 859, 101 N.J. Law 250.

N.Y.—*Dixon v. La Guardia*, 2 N.Y.S. 2d 466, 166 Misc. 889, affirmed 2 N.Y.S.2d 477, 253 App.Div. 881, affirmed 13 N.E.2d 450, 277 N.Y. 84.

Pa.—*Commonwealth ex rel. Kelley v. Pommer*, 199 A. 485, 330 Pa. 421—*Rau v. City of Philadelphia*, 44 Pa. Dist. & Co. 679.

One budget

If there was in existence a legal budget for the year, the council of the city had no authority to adopt any other budget, even if it otherwise would have had such power.—*Dixon v. La Guardia*, 2 N.Y.S.2d 466, 166 Misc. 889, affirmed 2 N.Y.S.2d 477, 253 App.Div. 881, affirmed 13 N.E.2d 450, 277 N.Y. 84.

Certification

N.Y.—*Dixon v. La Guardia*, supra.

Time to act

Okl.—*Greer County Excise Board v. Lowden*, 57 P.2d 612, 177 Okl. 7.

29. Mass.—*Bell v. Assessors of Cambridge*, 28 N.E.2d 1, 306 Mass. 249.

30. Mass.—*Bell v. Assessors of Cambridge*, supra.

N.Y.—*Collins v. City of Schenectady*, 10 N.Y.S.2d 303, 256 App.Div. 389.

31. Mass.—*Bell v. Assessors of Cambridge*, 28 N.E.2d 1, 306 Mass. 249.

Power to adopt budget does not include legislative power; provision

of charter referring to budget and powers of board of estimate did not authorize board to prohibit use of city funds for payment of wages of employees who do not give their whole time to their duties.—*Natanson v. Hodson*, 35 N.Y.S.2d 537, 264 App. Div. 384, affirmed 47 N.E.2d 442, 289 N.Y. 844.

32. Combined action

N.Y.—*Rasmussen v. City of New York*, 88 N.Y.S.2d 103.

33. Mass.—*Bell v. Assessors of Cambridge*, 28 N.E.2d 1, 306 Mass. 249.

Minn.—*State ex rel. Gillis v. Goodrich*, 264 N.W. 234, 195 Minn. 644.

34. N.Y.—*Dixon v. La Guardia*, 13 N.E.2d 450, 277 N.Y. 84—*People ex rel. Schieffelin v. Walker*, 160 N.E. 384, 247 N.Y. 320, reargument denied 161 N.E. 191, 247 N.Y. 584—*Application of Hushion*, 2 N.Y.S. 2d 256, 253 App.Div. 376.

Amendment to tentative budget

N.Y.—*Dixon v. La Guardia*, 13 N.E.2d 450, 277 N.Y. 84.

35. N.Y.—*People ex rel. Schieffelin v. Walker*, 160 N.E. 384, 247 N.Y. 320.

Approval by aldermen not required

N.Y.—*Dixon v. La Guardia*, 2 N.Y.S. 2d 466, 166 Misc. 889, affirmed 2 N.Y.S.2d 477, 253 App.Div. 881, affirmed 13 N.E.2d 450, 277 N.Y. 84.

36. N.Y.—*People ex rel. Schieffelin v. Walker*, 160 N.E. 384, 247 N.Y. 320—*Bateman v. City of Mt. Vernon*, 160 N.E. 361, 247 N.Y. 250.

37. N.Y.—*Application of Hushion*, 2 N.Y.S.2d 256, 253 App.Div. 376.

Time to act

N.Y.—*Application of Hushion*, supra.

38. Mass.—*Allen v. City of Cam-*

bridge, 55 N.E.2d 925, 316 Mass. 351.

44 C.J. p 1165 notes 34, 35.

Limited increases

Minn.—*State ex rel. Gillis v. Goodrich*, 264 N.W. 234, 195 Minn. 644.

39. N.Y.—*Robertson v. Hoban*, 288 N.Y.S. 833, 248 App.Div. 262.

40. N.Y.—*Robertson v. Hoban*, supra.

41. N.Y.—*Robertson v. Hoban*, supra.

42. Okl.—*Breeding v. Excise Board of Oklahoma County*, 69 P.2d 638, 180 Okl. 379—*City of Ardmore v. Excise Board of Carter County*, 8 P.2d 2, 155 Okl. 126.

44 C.J. p 1164 note 32.

43. Okl.—*Bartlesville Water Co. v. Brann*, 27 P.2d 345, 166 Okl. 251—*City of Ardmore v. Excise Board of Carter County*, 8 P.2d 2, 155 Okl. 126.

Tax levy must be involved

Okl.—*City of Yale v. Excise Board of Payne County*, 10 P.2d 403, 156 Okl. 192.

Assessment of tax

Correction or revision of estimate by excise board is not assessment of tax within constitutional provision.—*City of Ardmore v. Excise Board of Carter County*, 8 P.2d 2, 155 Okl. 126.

44. Okl.—*Bartlesville Water Co. v. Brann*, 27 P.2d 345, 166 Okl. 251—*City of Ardmore v. Excise Board of Carter County*, 8 P.2d 2, 155 Okl. 126.

45. Okl.—*Bartlesville Water Co. v. Brann*, 27 P.2d 345, 166 Okl. 251—*City of Ardmore v. Excise Board of Carter County*, 8 P.2d 2, 155 Okl. 126.

only where the aggregate of the estimate is in excess of statutory or constitutional limitations, where the item is in plain conflict with a statutory or constitutional provision, or where the item is for an unauthorized purpose.⁴⁶ As a result, where the item is a purely municipal matter, the board must usually approve the estimate and appropriate the requested sum,⁴⁷ and as a general rule the county board may not add or insert items of appropriation not requested by the municipality.⁴⁸ Under such an arrangement the municipality's estimate, within statutory limits, of the income to be derived from sources other than ad valorem taxation may not be disturbed by the county board.⁴⁹

Contents of budget. The statute or charter may provide for the items and amounts that may be included in the budget,⁵⁰ and may require that the budget make provision for certain expenditures, such as the salaries and wages of municipal offi-

cers and employees.⁵¹ Statutes and charters sometimes impose a limitation on the amount that may be budgeted,⁵² but such provision does not relieve the municipality of the duty of appropriating, and budgeting an expenditure which is made mandatory by statute.⁵³ The budget may include an appropriation for salaries for positions not yet created.⁵⁴ It is frequently provided that the budget set forth an itemized and detailed statement of the money required,⁵⁵ but the requirement of an itemized budget has been liberally construed⁵⁶ so as to permit the appropriation of small amounts for necessary expenditures in cases of emergency where particularization is not practical because the contingency may not be foretold.⁵⁷ It has been held that a budget consisting only of lump-sum estimates for each municipal department is insufficient,⁵⁸ but it has also been held that an appropriation in the budget to a department or subdepartment is sufficient.⁵⁹

46. Okl.—Bartlesville Water Co. v. Brann, 27 P.2d 345, 166 Okl. 251—City of Ardmore v. Excise Board of Carter County, 8 P.2d 2, 155 Okl. 126.

47. Okl.—Bartlesville Water Co. v. Brann, 27 P.2d 345, 166 Okl. 251—City of Yale v. Excise Board of Payne County, 10 P.2d 403, 156 Okl. 192—City of Ardmore v. Excise Board of Carter County, 8 P.2d 2, 155 Okl. 126—In re Tax Levies of City of Woodward, 288 P. 458, 143 Okl. 204.

48. Okl.—Kay County Excise Board v. Davis, 103 P.2d 939, 187 Okl. 494—Little v. County Excise Board of Marshall County, 16 P.2d 1080, 161 Okl. 40—Protest of C. R. I. & P. R. Co., 1 P.2d 383, 150 Okl. 167.

49. Okl.—Breeding v. Excise Board of Oklahoma County, 69 P.2d 638, 180 Okl. 379.

Estimate may not exceed receipts of prior year—Blake v. Abraham, 299 P. 488, 149 Okl. 112.

50. N.Y.—Wilmerding v. O'Dwyer, 69 N.Y.S.2d 82, affirmed 69 N.Y.S.2d 90, 272 App.Div. 35, reversed on other grounds 76 N.E.2d 325, 297 N.Y. 664, reversed on other grounds 77 N.E.2d 793, 297 N.Y. 781.

44 C.J. p 1164 note 27 [b].

51. Mass.—James v. Mayor of New Bedford, 64 N.E.2d 638, 319 Mass. 74—Fortin v. City of Chicopee, 17 N.E.2d 441, 301 Mass. 447—Barnard v. City of Lynn, 3 N.E.2d 264, 295 Mass. 144.

44 C.J. p 1164 note 27 [b] (3), (4)—43 C.J. p 288 note 39.

Salaries fixed by law

Mass.—McQuade v. City of Springfield, 84 N.E.2d 30, 323 Mass. 715—

McCarthy v. City of Malden, 22 N. E.2d 104, 303 Mass. 563.

Submission of estimate or report in time

(1) Unless submitted before the statutory time, an increase in salary was properly omitted from the budget for that year, and the board was not bound to include it on any later date on application.—People v. Craig, 183 N.Y.S. 696, 193 App.Div. 911.

(2) Under a provision that the board of estimate shall provide a sum sufficient to amortize bonds as the comptroller shall estimate and certify, the failure of the comptroller to make an estimate did not relieve the board of its duty to provide such amount.—People ex rel. Schiefelin v. Walker, 160 N.E. 384, 247 N.Y. 320.

52. Ariz.—Wise v. First Nat. Bank, 65 P.2d 1154, 49 Ariz. 146.

53. Ariz.—Wise v. First Nat. Bank, supra.

54. N.Y.—Bateman v. City of Mt. Vernon, 225 N.Y.S. 495, 222 App.Div. 416, affirmed 225 N.Y.S. 791, 222 App.Div. 416, affirmed 160 N.E. 361, 247 N.Y. 250.

55. Mass.—Bell v. Assessors of Cambridge, 28 N.E.2d 1, 306 Mass. 249.

N.Y.—Wilmerding v. LaGuardia, 52 N.Y.S.2d 169, 268 App.Div. 496, motion denied 52 N.Y.S.2d 941, 268 App.Div. 1027.

Degree of itemization required

Mich.—Worden v. City of Detroit, 216 N.W. 461, 241 Mich. 139.

N.Y.—Wilmerding v. LaGuardia, 54 N.Y.S.2d 531, 184 Misc. 607—Wilmerding v. LaGuardia, 50 N.Y.S.2d 292, 183 Misc. 142, affirmed 52 N.Y.S.2d 169, 268 App.Div. 496,

motion denied 52 N.Y.S.2d 941, 268 App.Div. 1027.

Itemization held sufficient

Mich.—Worden v. City of Detroit, 216 N.W. 461, 241 Mich. 139.

N.Y.—Wilmerding v. LaGuardia, 50 N.Y.S.2d 292, 183 Misc. 142, affirmed 52 N.Y.S.2d 169, 268 App.Div. 496, motion denied 52 N.Y.S.2d 941, 268 App.Div. 1027.

Itemization held insufficient

N.Y.—Wilmerding v. LaGuardia, 52 N.Y.S.2d 169, 268 App.Div. 496, motion denied 52 N.Y.S.2d 941, 268 App.Div. 1026.

56. N.Y.—Wilmerding v. LaGuardia, 54 N.Y.S.2d 531, 184 Misc. 607.

57. N.Y.—Wilmerding v. LaGuardia, 52 N.Y.S.2d 169, 268 App.Div. 496, motion denied 52 N.Y.S.2d 941, 268 App.Div. 1027—Wilmerding v. LaGuardia, 54 N.Y.S.2d 531, 184 Misc. 607.

Proportion of entire budget

Amount of proposed lump-sum appropriation for emergency items was compared with the whole budget in order to determine whether generalization was in good faith and not for an illegal purpose, and that a further detailed breakdown was impracticable.—Wilmerding v. LaGuardia, 52 N.Y.S.2d 169, 268 App.Div. 496, motion denied 52 N.Y.S.2d 941, 268 App.Div. 1026.

58. Mass.—Bell v. Assessors of Cambridge, 28 N.E.2d 1, 306 Mass. 249.

Resolution curing defect

N.Y.—Wilmerding v. LaGuardia, 54 N.Y.S.2d 531, 184 Misc. 607.

59. N.J.—Becker v. Board of Com'rs of City of Newark, 168 A. 746, 11 N.J.Misc. 902.

It may be provided that an appropriation in the budget for equipment and materials should be to the department of purchase and should show the agency or institution for which the equipment or materials are intended.⁶⁰ The budget may make provision for contingent expenditures,⁶¹ but it is improper to provide for contemplated cost-of-living salary increases by a budget provision for "unforeseen expenditures,"⁶² and a provision for emergencies is limited to such as occur during the year for which the budget is adopted.⁶³

Emergency appropriation. Under a statute authorizing an emergency appropriation after the adoption of the municipal budget, the appropriation resolution must set out the nature of the emergency,⁶⁴ although it need not recite that an emergency exists requiring an emergency appropriation,⁶⁵ and it has been held that whether an emergency in fact exists is subject to judicial review and that the determination of the municipality is not conclusive.⁶⁶

Judicial review. The courts will not substitute their judgment for that of the officials to whom budget matters have been intrusted.⁶⁷ Where a statute provides for an administrative appeal to a state board, judicial review of the adoption of a budget is not available where that remedy has not been exhausted.⁶⁸ Unless the merits of the application are clear, the court will not exercise the prerogative writ of certiorari to review an item in the

budget where to do so would work confusion in the financial affairs of the municipality.⁶⁹

§ 1886. — What Constitutes

An ordinance expressly setting apart and establishing out of the general resources of a municipal corporation a certain fund for a particular purpose is an appropriation ordinance.

An ordinance expressly setting apart and establishing out of the general resources of a municipal corporation a certain fund for a particular purpose is an appropriation ordinance.⁷⁰ Sometimes it is held that the charter itself makes an appropriation,⁷¹ as where it provides that the funds raised by special assessment shall be applied solely to a designated purpose.⁷²

Matters held not to constitute appropriations include the action of the council in ordering the payment out of the general fund of an indebtedness represented by a warrant;⁷³ an ordinance authorizing a purchase;⁷⁴ the legal transfer of money from one fund to another;⁷⁵ the awarding of damages to persons whose property is injured by the location or alteration of a street;⁷⁶ a pledge of the earnings of a power plant for payment of its cost;⁷⁷ an ordinance agreeing to refrain from taxing a slum clearance project;⁷⁸ an ordinance directing the improvement of a street at the expense of the property owners, the city not to be liable therefor;⁷⁹ and a release, for a consideration, of a claim for damages against a railroad company.⁸⁰

Work sheets

N.J.—Becker v. Board of Com'rs of City of Newark, *supra*.

60. N.Y.—Wilmerding v. LaGuardia, 52 N.Y.S.2d 169, 268 App.Div. 496, motion denied 52 N.Y.S.2d 941, 268 App.Div. 1026—Wilmerding v. LaGuardia, 54 N.Y.S.2d 531, 184 Misc. 607.

Requirement not violated

N.Y.—Wilmerding v. LaGuardia, 50 N.Y.S.2d 292, 183 Misc. 142, affirmed 52 N.Y.S.2d 169, 268 App.Div. 496, motion denied 52 N.Y.S.2d 941, 268 App.Div. 1027.

61. La.—Wilkinson v. Poag, App., 181 So. 27.

N.D.—Scott v. City of Jamestown, 217 N.W. 668, 56 N.D. 454.

Advertising

La.—Wilkinson v. Poag, App., 181 So. 27.

62. N.Y.—Wilmerding v. LaGuardia, 54 N.Y.S.2d 531, 184 Misc. 607.

Concealment

N.Y.—Wilmerding v. LaGuardia, 54 N.Y.S.2d 531, 184 Misc. 607.

63. Wash.—Weisfield v. City of Seattle, 40 P.2d 149, 180 Wash. 288, 96 A.L.R. 1190.

64. N.J.—Jamouneau v. Board of Com'rs of City of Newark, 39 A.2d 420, 132 N.J.Law 240—Murphy v. Town of West New York, 32 A.2d 850, 130 N.J.Law 341.

65. N.J.—Murphy v. Town of West New York, *supra*.

66. U.S.—Southland Ice Co. v. City of Temple, C.C.A.Tex., 100 F.2d 825.

N.J.—Murphy v. Town of West New York, 32 A.2d 850, 130 N.J.Law 341.

Emergency held to exist

N.J.—Jamouneau v. Board of Com'rs of City of Newark, 39 A.2d 420, 132 N.J.Law 240.

Emergency held not to exist

N.J.—Murphy v. Town of West New York, 32 A.2d 850, 130 N.J.Law 341.

67. N.J.—In re City Affairs Committee of Jersey City, 30 A.2d 581, 129 N.J.Law 589.

N.Y.—Application of Hushion, 2 N.Y.S.2d 256, 253 App.Div. 376.

68. N.J.—Jamouneau v. Board of Com'rs of City of Newark, 39 A.2d 89, 132 N.J.Law 117.

69. N.J.—Orth v. City of Hackensack, 168 A. 173, 11 N.J.Misc. 767.

70. Pa.—Cummings v. City of Scranton, 86 A.2d 473, 348 Pa. 538. 43 C.J. p. 1162 note 93.

71. Idaho.—McGilveray v. Lewiston, 90 P. 348, 13 Idaho 338.

72. Idaho.—McGilveray v. Lewiston, *supra*.

73. Mich.—Niles Bryant School v. Bailey, 126 N.W. 116, 161 Mich. 193.

74. Ind.—Hamer v. City of Huntington, 21 N.E.2d 407, 215 Ind. 594.

75. Ill.—Chicago v. Berger, 100 Ill. App. 158.

76. Me.—Preble v. Portland, 45 Me. 241.

77. N.D.—Thomas v. McHugh, 256 N.W. 763, 65 N.D. 149.

78. Ky.—Jones v. City of Paducah, 142 S.W.2d 365, 283 Ky. 628.

79. Ky.—Becker v. Henderson, 38 S.W. 857, 100 Ky. 450, 13 Ky.L. 881.

80. Ill.—Chicago v. Pittsburgh, etc., R. Co., 91 N.E. 422, 244 Ill. 220, 135 Am.S.R. 316.

It has been held that an apportionment of revenues is not an appropriation thereof;⁸¹ but there is also authority to the contrary.⁸² An ordinance or resolution fixing the salary of a certain person or a certain number of persons may be considered as equivalent to an appropriation,⁸³ but the rule is otherwise as to an ordinance merely creating positions or fixing the salaries of a class of employees.⁸⁴ The consummation and ratification of a contract of purchase has been held to be a sufficient appropriation where the funds out of which the contract price may be made are then available.⁸⁵ An ordinance which is passed for the purpose of condemnation of land does not necessarily "involve the payment of money" within the meaning of a charter provision relating to ordinances involving the payment of money.⁸⁶

§ 1887. — Conditions Precedent, Requisites, and Validity

- a. In general
- b. Annual appropriation ordinance

a. In General

A municipal corporation has no power except that

derived from charter or statute to appropriate money, and its funds may not be appropriated unless statutory or charter prerequisites are observed and performed.

A municipal corporation has no power except that derived from statute or charter to appropriate money,⁸⁷ and no funds may be appropriated unless statutory or charter prerequisites are observed and performed.⁸⁸ Statutes relating to appropriations are to be read and construed together.⁸⁹ Constitutional, statutory, and charter provisions govern as to the body or official authorized to make appropriations of municipal funds⁹⁰ and such power is generally intrusted to the council or other legislative body of the municipality.⁹¹

Form and procedure. When not otherwise provided by law, in making an appropriation the council of a municipal corporation may put its mandate in any form it chooses;⁹² all that is necessary is that the language shall clearly express its intent to make an appropriation.⁹³ However, there must be a compliance with statutory provisions,⁹⁴ such as provisions requiring a petition signed by a majority of the legal voters,⁹⁵ a popular vote,⁹⁶ publication of notice,⁹⁷ the vote of a certain majority of the municipal council,⁹⁸ a detailed and specific state-

81. Mo.—State v. Kansas City, 58 Mo.App. 124.

82. Wis.—Weik v. Wausau, 128 N. W. 429, 143 Wis. 645.

83. Mich.—Bishop v. Lambert, 72 N.W. 35, 114 Mich. 110—Fournier v. West Bay City, 54 N.W. 277, 94 Mich. 463.

84. Mo.—State ex rel. Hart v. City of St. Louis, 204 S.W.2d 234, 356 Mo. 820—State v. Miller, 285 S.W. 504, 315 Mo. 41.

85. Mich.—City of Pontiac v. Ducharme, 270 N.W. 754, 278 Mich. 474.

86. Mo.—St. Louis v. Breuer, 223 S. W. 108.

87. N.J.—Frank Grad & Son v. City of Newark, 193 A. 177, 118 N.J. Law 376.

Authority to appropriate to volunteer fire companies

Statute authorizing cities or towns to annually appropriate a sum of money to be paid to volunteer fire companies confers a definite power on cities or towns to appropriate, and a right on volunteer fire companies to receive, public money to be used for specified purposes.—Greenwood Volunteer Fire Co. v. Dearden, 12 A.2d 408, 64 R.I. 368.

Appropriation based on negotiations with labor union

(1) A city has been held to have no authority to enter into negotiations with labor union or any organized group, concerning hours,

wages or conditions of employment and to make such negotiations the basis for fiscal appropriations.—Miami Water Works Local No. 654 v. City of Miami, 26 So.2d 194, 157 Fla. 445.

(2) Provisions of city charter creating budgetary system were controlling over provisions of agreement between city and labor union, regarding hours, wages, and working conditions.—Mugford v. Mayor and City Council of Baltimore, 44 A.2d 745, 185 Md. 266, 162 A.L.R. 1101.

88. N.J.—Frank Grad & Son v. City of Newark, 193 A. 177, 118 N.J. Law 376.

Pa.—Community Welfare Chest v. City of Easton, Com.Pl., 87 Pittsb. Leg.J. 372, 31 Mun.L.R. 20, 27 North.Co. 26.

89. Ind.—Johnson v. Lenz, 200 N.E. 249, 209 Ind. 627.

90. Ohio.—Urner v. State ex rel. Alcorn, 200 N.E. 128, 51 Ohio App. 97, error dismissed State ex rel. Alcorn v. Urner, 198 N.E. 485, 180 Ohio St. 196.

Revenue raised by taxation

Ky.—Dieruf v. Louisville & Jefferson County Bd. of Health, 200 S.W.2d 300, 304 Ky. 207.

91. N.H.—Street Com'rs of Portsmouth v. Dale, 85 A.2d 798, 93 N.H. 92.

N.Y.—Hamilton v. Moses, 85 N.Y.S.2d 886, 194 Misc. 112.

44 C.J. p 1162 note 9, p 1164 note 30.

92. Pa.—Commonwealth v. Barker, 61 A. 253, 211 Pa. 610.

44 C.J. p 1163 note 13.

93. Pa.—Commonwealth v. Barker, supra.

94. Colo.—Reimer v. Town of Holyoke, 27 P.2d 1032, 93 Colo. 571.

N.J.—De Muro v. Martini, 64 A.2d 351, 1 N.J. 516.

S.D.—Calmenson Clothing Co. v. Kruger, 281 N.W. 203, 66 S.D. 224.

44 C.J. p 1163 note 15.

Statement of purpose

Ohio.—Knauss v. Columbus, 13 Ohio S. & C.P. 200.

95. Ill.—Hoy v. Kuhn, 128 N.E. 829, 295 Ill. 33.

44 C.J. p 1163 note 16.

96. N.D.—Engstad v. Dinnie, 76 N. W. 292, 8 N.D. 1.

44 C.J. p 1163 note 17.

Referendum petition

Mass.—Gilet v. City Clerk of Lowell, 27 N.E.2d 748, 306 Mass. 170.

97. Idaho.—Reynard v. City of Caldwell, 21 P.2d 527, 53 Idaho 62, 90 A.L.R. 1124.

Ind.—Johnson v. Lenz, 200 N.E. 249, 209 Ind. 627.

44 C.J. p 1163 note 18.

98. Ky.—Stone v. Town of Pewee Valley, 140 S.W.2d 1052, 283 Ky. 219—City of Ravenna v. Boyer Fire Apparatus Co., 291 S.W. 782, 218 Ky. 429.

44 C.J. p 1163 note 19.

ment of the object of expenditure,⁹⁹ a statement of the amount appropriated for each object or purpose,¹ the lapse of a specified period between the introduction and enactment of the appropriation ordinance,² or the passage of the appropriation ordinance at or within a certain time;³ but there is a presumption that the body making the appropriation acted in accordance with law,⁴ and obviously a compliance with inapplicable provisions is unnecessary.⁵

Purpose for which appropriation may be made. Under some statutes an appropriation may not be made for any purpose not provided in the budget⁶ except in case of unforeseen emergencies and contingencies.⁷ An appropriation may not be made to cover a current expense incurred in a prior year,⁸ nor may an appropriation be made for an obligation maturing in a subsequent year;⁹ but this rule does not forbid an appropriation for capital expenditures or for the purchase of equipment which will remain in use after the fiscal year.¹⁰ A statute changing the fiscal year of a municipality so as

to make it end on the last day of the calendar year has been construed to provide for the making of two appropriations, one for local purposes and the other for general purposes, for the period between the close of the present fiscal year and the close of the new fiscal year.¹¹ Authority to appropriate a fund to either of two purposes does not authorize a division of the fund between such purposes.¹²

Recommendation or estimate. Boards, commissions, officers, and heads of departments are sometimes required by charter, statute, or ordinance to submit estimates, requisitions, or recommendations of the amounts to be expended during the ensuing fiscal year.¹³ However, even though the recommendation of a particular officer or committee is provided for by ordinance, the council may waive or abrogate the requirement in a particular case,¹⁴ and is not deprived of the power to act by the mere inaction of the officer or committee.¹⁵ Also, some statutes authorize the council to make an appropriation without a recommendation on the failure of a designated officer to transmit such recommenda-

Expenditure or appropriation not involved

Ky.—Stone v. Town of Pewee Valley, 140 S.W.2d 1052, 283 Ky. 219.

Emergency appropriation

Mont.—State ex rel. Helena Housing Authority v. City Council of City of Helena, 90 P.2d 514, 108 Mont. 347.

99. Ill.—People ex rel. Schlaeger v. Bunge Bros Coal Co., 64 N.E.2d 365, 392 Ill. 153.

44 C.J. p 1163 note 20—43 C.J. p 520 note 6.

Reserve against uncollected taxes

N.J.—Orth v. City of Hackensack, 168 A. 173, 11 N.J. Misc. 767.

Itemisation held sufficient

Okl.—Protest of Downing, 23 P.2d 173, 164 Okl. 181—Protest of St Louis-San Francisco Ry. Co., 5 P.2d 763, 153 Okl. 283.

Lump sum appropriation proper

(1) City's legislative authority, unless restrained by constitutional or charter provision, may make appropriation in lump sum for specified governmental purposes, leaving it to administrative officers to fix salaries.—State ex rel. Pike v. City of Bellingham, 48 P.2d 602, 183 Wash. 439.

(2) A gross sum provided for a municipal department may be expended by the department commissioners as they see fit, provided they confine their expenditures to the objects specified in the statute.—People v. Green, 65 Barb., N.Y., 505.

1. Ill.—Koons v. City of Mt. Vernon, 245 Ill.App. 165.
43 C.J. p 1164 note 21.

Appropriation of unascertained income from license fees of municipality is not invalid for appropriating uncertain amounts.—Koons v. City of Mt. Vernon, supra.

Appropriation for personal services Ohio.—Priest v. City of Wapakoneta, App. 32 N.E.2d 758.

2. Va.—Danville v. Shelton, 76 Va. 325.

Separate meetings

A statute providing that every ordinance or resolution involving an appropriation or expenditure of money shall within three days after the final passage be presented to the mayor for approval does not require by implication that such a resolution shall be passed at two separate meetings as is provided in case of ordinances.—Roberts & Co. v. Paducah, C.C.Ky., 95 F. 62.

3. N.M.—Raton Waterworks Co. v. Raton, 49 P. 898, 9 N.M. 70.

44 C.J. p 1164 note 23.

Validity not affected

Fla.—Keefe v. Adams, 143 So. 644, 106 Fla. 733.

Extension of time

Ill.—People ex rel. Griffin v. City of Chicago, 48 N.E.2d 329, 382 Ill. 500.

4. Ill.—People v. Chicago, etc., R. Co., 100 N.E. 502, 257 Ill. 208.

44 C.J. p 1164 note 24.

Publication

Ill.—People v. Irvin, 156 N.E. 292, 325 Ill. 497.

5. Ill.—Culbertson v. Fulton, 18 N.E. 781, 127 Ill. 80.

44 C.J. p 1164 note 25.

Public hearing

Ill.—People ex rel. Gill v. Hamilton, 9 N.E.2d 243, 366 Ill. 455.

6. Tex.—Moore v. Logan, Civ.App., 10 S.W.2d 428, error dismissed
Purpose for which appropriation may be made generally see supra § 1835 et seq.

7. Tex.—Moore v. Logan, supra.
Emergency appropriation for item not covered by budget see supra § 1885 b.

8. Mass.—McCarthy v. City of Malden, 22 N.E.2d 104, 303 Mass 563
—Remington Typewriter Co. v. Revere, 188 N.E. 634, 283 Mass. 1.

9. Okl.—In re Bliss, 285 P. 73, 142 Okl. 1—In re Gypsy Oil Co., 285 P. 66, 141 Okl. 298—In re St. Louis-San Francisco Ry. Co., 285 P. 65, 141 Okl. 300—Aaronson v. Smiley, 285 P. 59, 142 Okl. 29—C. D. Coggeshall & Co. v. Smiley, 285 P. 48, 142 Okl. 8.

10. Okl.—In re Murray, 285 P. 80, 140 Okl. 240.

11. N.J.—Garrison v. Jersey City, 105 A. 460, 893, 92 N.J. Law 624.
44 C.J. p 1163 note 11.

12. Ill.—People v. Cairo, 50 Ill. 154.

13. Mo.—State ex rel. Beach v. Beach, 28 S.W.2d 105, 325 Mo. 175.
44 C.J. p 1164 note 26.

14. Mass.—Sinclair v. Brightman, 84 N.E. 453, 198 Mass. 248.

15. Mass.—Sinclair v. Brightman, supra.

tion on request.¹⁶ A statute providing that an appropriation for a particular purpose shall be based on the estimate of a specified commission has been held to be directory only,¹⁷ and a provision as to the time of submitting an estimate has been held to be directory only.¹⁸ Some charters provide that no appropriation shall be made on an estimate for work done until a specified number of days after the filing and auditing of the estimate.¹⁹

Duty to make appropriation. The council or other body empowered to appropriate municipal funds is required to make appropriations directed by constitutional, statutory, or charter provisions²⁰ and to make appropriations for mandatory expenditures required by law,²¹ such as, in some cases, salaries,²² and it has been held that such duty is a continuing one.²³ Charter or statutory provisions sometimes make it the duty of the appropriating body of the city to appropriate the amount of the estimate or requisition submitted by the mayor, a head of department, a board or other official,²⁴ although the

validity and legality of particular items included within the estimate may be questioned;²⁵ but in other cases the appropriating body may reduce,²⁶ but not increase,²⁷ the amount of an estimate or requisition.

Supplemental or amended appropriation. Under some statutes an appropriation ordinance may be amended or supplemented.²⁸ It has been held to be a condition precedent to a supplemental or additional appropriation that the income and revenue necessary therefor be accumulated or provided.²⁹

Conditional appropriation. Under the authority conferred by some charter provisions, an appropriation may contain reasonable terms and conditions, not inconsistent with law, as to the expenditure of the amount appropriated.³⁰ In the absence of express charter or statutory provision, it has been held that the council may attach conditions to the appropriation where the expenditure of the amount appropriated depends on some future action by the

16. Mass.—Daly v. Medford, 135 N. E. 307, 241 Mass. 303.

17. Md.—Bond v. Baltimore, 84 A. 258, 118 Md. 159.

18. Cal.—Taylor v. Manson, 99 P. 410, 9 Cal.App. 382.

19. N.J.—Armitage v. Essex Constr. Co., 94 A. 51, 87 N.J.Law 134, affirmed 98 A. 889, 88 N.J.Law 640.

20. Ill.—People ex rel. Gill v. Schlek, 14 N.E.2d 223, 368 Ill. 353. Ky.—Board of Trustees, of Carnegie Public Library v. City of Paducah, 7 S.W.2d 858, 225 Ky. 224.

Mont.—State ex rel. Helena Housing Authority v. City Council of City of Helena, 90 P.2d 514, 108 Mont. 347.

N.Y.—Buffalo Library v. Wanamaker, 293 N.Y.S. 776, 162 Misc. 26.

44 C.J. p 1163 note 10.

Mandamus to compel appropriation see Mandamus § 139.

Funds not appropriated to other purposes

Ga.—Hogg v. City of Rome, 6 S.E.2d 48, 189 Ga. 298.

Deficit in transit system

N.Y.—Peter Reiss Const. Co. v. City of New York, 50 N.Y.S.2d 92, 183 Misc. 617, appeal dismissed 77 N.Y. S.2d 263, 273 App.Div. 823—Timmerman v. City of New York, 69 N.Y.S.2d 102, affirmed 70 N.Y.S.2d 140, 272 App.Div. 758—Wilmerding v. O'Dwyer, 69 N.Y.S.2d 82, affirmed 69 N.Y.S.2d 90, 272 App.Div. 86, reversed on other grounds 76 N.E. 3d 825, 297 N.Y. 664, reversed on other grounds 77 N.E.2d 793, 297 N.Y. 781.

Appropriation not required

Mass.—McQuade v. City of Springfield, 84 N.E.2d 30, 323 Mass. 715.

21. Ill.—People ex rel. Seifried v. City of Chicago, 38 N.E.2d 747, 378 Ill. 479—People v. City of Peoria, 29 N.E.2d 539, 374 Ill. 313.

Mont.—State ex rel. Helena Housing Authority v. City Council of City of Helena, 90 P.2d 514, 108 Mont. 347.

44 C.J. p 1163 note 10.

Interest on debt

N.Y.—Van Derzee v. City of Long Beach, 39 N.Y.S.2d 401, 265 App. Div. 1059.

22. Ill.—People ex rel. Snow v. City of Chicago, 244 Ill.App. 66.

Ind.—Wert v. State ex rel. Andrew, 73 N.E.2d 480, 225 Ind. 158.

La.—Ziemer v. City of New Orleans, 197 So. 754, 195 La. 1054.

N.Y.—McKinney v. McGoldrick, 276 N.Y.S. 593, 243 App.Div. 210, affirmed 195 N.E. 235, 266 N.Y. 632, reargument denied 195 N.E. 872, 266 N.Y. 665—Brower v. LaGuardia, 50 N.Y.S.2d 82.

23. Cal.—McAlpine v. Baumgartner, 74 P.2d 753, 10 Cal.2d 409.

24. Mo.—State ex rel. Beach v. Beach, 28 S.W.2d 105, 325 Mo. 175—State ex rel. Reynolds v. Jost, 175 S.W. 591, 265 Mo. 51, Ann.Cas. 1917D 1102.

44 C.J. p 1164 note 33.

A legally authorized item may not be questioned.—State ex rel. Beach v. Beach, 28 S.W.2d 105, 325 Mo. 175.

Power to audit

N.Y.—Colbert v. Delaney, 291 N.Y.S. 801, 249 App.Div. 209, affirmed 7 N.E.2d 726, 273 N.Y. 626.

Police department held not to have accepted reduced appropriation where it expended more than appro-

riated.—State ex rel. Beach v. Beach, 28 S.W.2d 105, 325 Mo. 175.

25. Mo.—State ex rel. Beach v. Beach, supra.

Excess employees

Mo.—State ex rel. Beach v. Beach, supra.

26. N.Y.—Emerson v. Buck, 130 N. E. 584, 230 N.Y. 380.

44 C.J. p 1165 note 34.

27. Ill.—People ex rel. Nelson v. Beu, 85 N.E.2d 829, 403 Ill. 232.

Mass.—Whalen v. City Forester of Waltham, 181 N.E. 246, 279 Mass. 287.

44 C.J. p 1165 note 35.

28. Ohio.—Priest v. City of Wapakoneta, App., 32 NE 2d 758.

Pa.—Appeal from Statement of Audit of Finance of Borough of Monaca, 35 Mun.L.R. 111.

"Amend" and "supplement" defined and distinguished

Ohio.—Priest v. City of Wapakoneta, App., 32 N.E.2d 758.

29. Okl.—Bartlesville Water Co. v. Brann, 27 P.2d 345, 166 Okl. 251—C. D. Coggeshall & Co. v. Smiley, 285 P. 48, 142 Okl. 8.

"May" as indication of discretion

Use of word "may" in statute authorizing excise board to make supplemental appropriations does not vest board with power to refuse to make them where need therefor is shown and city has properly certified needs, and income and revenue provided or accumulated is available therefor.—Bartlesville Water Co. v. Brann, 27 P.2d 345, 166 Okl. 251.

30. N.Y.—Dobrovolsky v. Prendergast, 114 N.E. 436, 219 N.Y. 380.

council,³¹ but not where the expenditure is reasonably certain to be incurred.³² A proviso in an appropriation for its expenditure by an officer other than the one authorized by law is void.³³

b. Annual Appropriation Ordinance

Under some statutes and charters all appropriations must be made in an annual appropriation ordinance, and, with some exceptions, an appropriation otherwise made is invalid.

Under some statutes and charters all appropriations must be made in an annual appropriation ordinance,³⁴ and an appropriation otherwise made is invalid.³⁵ An exception is sometimes made where the appropriation is sanctioned by a majority of the legal voters of the municipality³⁶ or where the need for the appropriation arises after the adoption of

the annual appropriation bill.³⁷ The appropriation ordinance must be in the form required by statute,³⁸ and, while it has been held that it is not necessary to enumerate countless items,³⁹ it is sometimes required by statute that the ordinance specify in detail the purposes of the appropriations and the amount for each purpose.⁴⁰ Such a statute is accorded a common-sense construction⁴¹ and an appropriation for a general purpose is sufficient to include every expenditure for that purpose, although there may be many items;⁴² but an appropriation for a number of purposes is insufficient where it does not specify the amount to be expended for each.⁴³ Under some statutes the annual appropriation ordinance is required to set forth estimates by classes of all current assets and liabilities of each fund.⁴⁴ It may also be required that the appro-

31. Ill.—Schwartz v. Chicago, 223 Ill. App. 184.

32. Ill.—Schwartz v. Chicago, *supra*.

33. Colo.—Hover v. People, 68 P. 679, 17 Colo. App. 375.

34. Idaho.—Village of Oakley v. Wilson, 296 P. 185, 50 Idaho 334.

Ill.—People ex rel. Schlaeger v. Illinois Cent. R. Co., 71 N.E.2d 39, 396 Ill. 200—People ex rel. Manifold v. Wabash R. Co., 59 N.E.2d 795, 389 Ill. 403—People ex rel. Gill v. Schiek, 14 N.E.2d 223, 368 Ill. 353—People ex rel. Henryson v. City of Elgin, 5 N.E.2d 856, 288 Ill. App. 215.

Neb.—LeBarron v. City of Harvard, 262 N.W. 26, 129 Neb. 460, 100 A. L.R. 767.

Pa.—Cummings v. City of Scranton, 36 A.2d 473, 348 Pa. 538.

Fiscal year

Ill.—People ex rel. Manifold v. Wabash R. Co., 59 N.E.2d 795, 389 Ill. 403—People ex rel. Manifold v. Chicago, B. & Q. R. Co., 54 N.E.2d 389, 386 Ill. 56.

Power to fix salaries "from time to time"

Statute conferring on city council the discretionary power to fix "from time to time" the salaries of employees cannot operate to nullify statute requiring all appropriations to be made annually by general ordinance, but the statutes must be read together.—Cummings v. City of Scranton, 36 A.2d 473, 348 Pa. 538.

Effective date

Ill.—People ex rel. Schlaeger v. Illinois Cent. R. Co., 71 N.E.2d 39, 396 Ill. 200.

35. Pa.—Cummings v. City of Scranton, 36 A.2d 473, 348 Pa. 538.

Expenditure

Where appropriation ordinance has been made, no expenditure in excess of the sum provided for there-

in is permissible—People ex rel. Manifold v. Chicago, B. & Q. R. Co., 54 N.E.2d 389, 386 Ill. 56.

36. Idaho.—Village of Oakley v. Wilson, 296 P. 185, 50 Idaho 334.

37. Ill.—People ex rel. McDonough v. Chicago, M. St. P. & P. R. Co., 188 N.E. 821, 354 Ill. 630.

Ind.—Hammer v. City of Huntington, 21 N.E.2d 407, 215 Ind. 594.

Submission to state tax board

Ind.—City of Gary v. Cosgrove, 6 N.E.2d 940, 211 Ind. 294.

38. S.D.—Calmenson Clothing Co. v. Kruger, 281 N.W. 203, 66 S.D. 224.

39. S.D.—Calmenson Clothing Co. v. Kruger, *supra*.

40. Ill.—People ex rel. Schlaeger v. Bunge Bros. Coal Co., 64 N.E.2d 365, 392 Ill. 153—People ex rel. Ammann v. Wabash R. Co., 62 N.E.2d 819, 391 Ill. 200—People ex rel. Franklin v. Wabash R. Co., 56 N.E.2d 820, 387 Ill. 450—People ex rel. Toman v. Chicago & N. W. Ry. Co., 37 N.E.2d 169, 377 Ill. 547.
44 C.J. p 1163 note 20, p 1164 note 21.

Itemization held sufficient

Ill.—People ex rel. Schlaeger v. Bunge Bros. Coal Co., 64 N.E.2d 365, 392 Ill. 153—People ex rel. Schlaeger v. Reilly Tar & Chemical Corporation, 59 N.E.2d 843, 389 Ill. 434.

43 C.J. p 520 note 6 [a].

Itemization held insufficient

Ill.—People ex rel. Toman v. B. Mercil & Sons Plating Co., 37 N.E.2d 839, 378 Ill. 142.

41. Ill.—Voss v. Chicago Park Dist., 64 N.E.2d 731, 392 Ill. 429—People ex rel. Ammann v. Wabash R. Co., 62 N.E.2d 819, 391 Ill. 200—People ex rel. Schlaeger v. Reilly Tar & Chemical Corporation, 59 N.E.2d 843, 389 Ill. 434.

42. Ill.—People ex rel. Schlaeger v. Bunge Bros. Coal Co., 64 N.E.2d 365, 392 Ill. 153—People ex rel.

Schlaeger v. Reilly Tar & Chemical Corporation, 59 N.E.2d 843, 389 Ill. 434—People ex rel. Franklin v. Wabash R. Co., 56 N.E.2d 820, 387 Ill. 450—People ex rel. Toman v. Sage, 31 N.E.2d 791, 375 Ill. 411—People ex rel. Gill v. Schiek, 14 N.E.2d 223, 368 Ill. 353—People v. Eastern Illinois & Missouri Railroad Co., 167 N.E. 24, 335 Ill. 245—Charles Deleuw & Co. v. City of Charleston, 19 N.E.2d 207, 298 Ill. App. 403.

Every item need not be specified

Ill.—People ex rel. Gill v. Schiek, 14 N.E.2d 223, 368 Ill. 353—Charles Deleuw & Co. v. City of Charleston, 19 N.E.2d 207, 298 Ill. App. 403.

Appropriation held for a single purpose

Ill.—People ex rel. Schlaeger v. Bunge Bros. Coal Co., 64 N.E.2d 365, 392 Ill. 153—People ex rel. Toman v. B. Mercil & Sons Plating Co., 37 N.E.2d 839, 378 Ill. 142.

Operating expense

Ill.—People ex rel. Schlaeger v. Reilly Tar & Chemical Corporation, 59 N.E.2d 843, 389 Ill. 434.

43. Ill.—People ex rel. McWard v. Wabash R. Co., 70 N.E.2d 36, 395 Ill. 243—People ex rel. Toman v. B. Mercil & Sons Plating Co., 37 N.E.2d 839, 378 Ill. 142—People ex rel. Toman v. Sage, 31 N.E.2d 791, 375 Ill. 411.

44. Ill.—People ex rel. Toman v. B. Mercil & Sons Plating Co., 37 N.E.2d 839, 378 Ill. 142.

Legality and validity of each liability need not be passed on in ordinance.—People ex rel. Toman v. B. Mercil & Sons Plating Co., *supra*.

Current asset

A judgment obtained by the municipality may be included as a current asset even though it appears that it will not be collected during the fiscal year.—People ex rel. To-

priation ordinance contain estimates of the amount to be obtained from current taxes and revenue.⁴⁵ The annual appropriation ordinance may include balancing items such as loss and cost of collection or forfeitures and abatements to cover estimated revenue that will not in fact be collected.⁴⁶ There is no fixed per cent or formula governing the amount to be allowed for such balancing items;⁴⁷ the determination of the amount depends on the facts of the particular case⁴⁸ and rests in the discretion of the municipal authorities.⁴⁹

§ 1888. — Construction, Operation, and Effect

It has been held that an appropriation of municipal funds will be strictly construed, and will be construed, if possible, so as to uphold it.

It has been held that an appropriation of municipal funds will be strictly construed,⁵⁰ and will be construed, if possible, so as to uphold it.⁵¹ In the absence of evidence that the council intended something less, an appropriation for a particular purpose will be held to include matters necessary for that purpose;⁵² but a general term following an enumeration of specific matters will be limited to matters of the same class as those specifically mentioned.⁵³ After an appropriation has been made

by the council for a department, the committee in charge thereof may lawfully incur debts and audit bills to be paid out of the appropriation therefor.⁵⁴ However, a voluntary appropriation of public property or the proceeds thereof by a municipality, when such appropriation is not associated with a contract as part of its obligation, does not remove such property or proceeds from the control of the municipality,⁵⁵ and it may alter⁵⁶ or repeal⁵⁷ the appropriation at pleasure; prior to actual payment of the sum appropriated, the person, association, or corporation for whose benefit it was made has no vested right in the fund⁵⁸ and may not sue at law on the appropriation as a contract.⁵⁹ A reappropriation for the same purpose of money previously appropriated and unexpended is unnecessary⁶⁰ and ineffective,⁶¹ even where part of the money appropriated is not disbursed during the year in which the appropriation was made;⁶² but an appropriation of a larger amount than is necessary for a particular purpose does not obligate the city to pay or expend the full amount.⁶³ The estimate of revenues for a current year by the mayor and council of a city, and the appropriation by them, of a large excess to a sinking fund, is prima facie proof of a surplus for the year⁶⁴ which is not overcome by the mayor's opinion that probably the revenues will not exceed the

man v. B. Mercil & Sons Plating Co., supra.

45. Ill.—People ex rel. Toman v. B. Mercil & Sons Plating Co., supra.

Estimate of revenue from illegal source

Ill.—People ex rel. Toman v. B. Mercil & Sons Plating Co., supra.

46. Ill.—People ex rel. Toman v. B. Mercil & Sons Plating Co., supra.
—People ex rel. Toman v. Sage, 31 N.E.2d 791, 375 Ill. 411.

47. Ill.—People ex rel. Schlaeger v. Brand, 59 N.E.2d 664, 389 Ill. 298.
—People ex rel. Schlaeger v. Jourdan Packing Co., 58 N.E.2d 910, 389 Ill. 163.

48. Ill.—People ex rel. Schlaeger v. Brand, 59 N.E.2d 664, 389 Ill. 298.
—People ex rel. Schlaeger v. Jourdan Packing Co., 58 N.E.2d 910, 389 Ill. 163.

49. Ill.—People ex rel. Schlaeger v. Brand, 59 N.E.2d 664, 389 Ill. 298.
—People ex rel. Schlaeger v. Jourdan Packing Co., 58 N.E.2d 910, 389 Ill. 163.

Decline in tax delinquency

Ill.—People ex rel. Schlaeger v. Jourdan Packing Co., supra.

Cost and loss allowance held not unreasonable

Ill.—People ex rel. Schlaeger v. Brand, 59 N.E.2d 664, 389 Ill. 298.
—People ex rel. Schlaeger v. Jourdan Packing Co., 58 N.E.2d 910, 389

Ill. 163—People ex rel. Gill v. Schweitzer, 10 N.E.2d 337, 366 Ill. 568.

50. Mo.—Meyers v. Kansas City, 18 S.W.2d 900, 323 Mo. 200.

51. Ill.—People ex rel. Schlaeger v. Reilly Tar & Chemical Corporation, 59 N.E.2d 843, 389 Ill. 434.
44 C.J. p 1165 note 47.

Money to be paid under supervision of committee

R.I.—Greenwood Volunteer Fire Co. v. Dearden, 12 A.2d 408, 64 R.I. 368.

52. Ill.—Randolph-Perkins Co. v. City of Highland Park, 35 N.E.2d 826, 311 Ill.App. 308.

Mich.—Union Trust Co. v. Detroit, 122 N.W. 521, 158 Mich. 198.

N.J.—City Affairs Committee of Jersey City v. Board of Com'rs of Jersey City, 46 A.2d 425, 134 N.J. Law 180.
44 C.J. p 1165 note 48.

53. Mo.—State v. Dierkes, 113 S.W. 1077, 214 Mo. 578.
44 C.J. p 1165 note 49.

54. R.I.—Pope Mfg. Co. v. Granger, 43 A. 590, 21 R.I. 298.

55. Cal.—San Francisco v. Belde-

man, 17 Cal. 443.
Pa.—Commonwealth ex rel. Taylor Hose & Engine Co. No. 1 v. Borough of Taylor, 52 Pa.Dist. & Co. 104, 45 Lack.Jur. 189, 37 Mun.L.R.

151, 12 Som Leg.J. 118—Commonwealth ex rel. Volunteer Fire Dept. v. Township of Coal, Com Pl., 14 Northumb L.J. 332, 32 Mun L.R. 46. Validity of appropriation for gratuity see supra § 1835.

56. Cal.—San Francisco v. Belde-

man, 17 Cal. 443.

57. Cal.—San Francisco v. Belde-

man, supra.
Pa.—Firemen's Relief Assoc. v. Scranton, 66 A. 1103, 217 Pa. 585.

58. Pa.—Firemen's Relief Assoc. v. Scranton, supra—Commonwealth ex rel. Taylor Hose & Engine Co. No. 1 v. Borough of Taylor, 52 Pa. Dist. & Co. 104, 45 Lack.Jur. 189, 37 Mun.L.R. 151, 12 Som.Leg.J. 118.

59. Mass.—Paine v. Boston, 124 Mass. 486.

60. Ill.—Schwartz v. Chicago, 223 Ill.App. 184.
44 C.J. p 1165 note 56.

61. Ill.—Schwartz v. Chicago, 223 Ill.App. 184.

62. N.J.—Handwerk v. Guttenberg, 105 A. 224, 92 N.J.Law 178.

Pa.—Commonwealth v. Larkin, 27 Pa.Super. 397.

63. Mo.—Schneider Granite Co. v. Gast Realty, etc., Co., 168 S.W. 687, 259 Mo. 153, reversed on other grounds 36 S.Ct. 254, 400, 240 U.S. 55, 60, 50 L.Ed. 523, 1239.

64. Ala.—White v. Decatur, 23 So. 999, 119 Ala. 476.

current expenses.⁶⁵ An appropriation by the council of money for the erection of a school building is a sufficient concurrence by the council in the action of the board of education in making a contract for the construction of the building.⁶⁶

§ 1889. — Transfer or Diversion

Unless the case falls within a charter or statutory provision authorizing a transfer, a municipal appropriation for a particular object or purpose may not be transferred or diverted to another purpose.

Unless the case falls within a charter or statutory provision authorizing a transfer,⁶⁷ a municipal appropriation for a particular object or purpose may not be transferred or diverted to, or used for, another purpose⁶⁸ until the purpose for which the appropriation was made has been accomplished⁶⁹ or has ceased.⁷⁰ It has been held that surpluses from any particular budgeted fund of the city may not be used to pay liabilities which should be charged to

another budgeted fund for the current year,⁷¹ but may be carried over and used in the succeeding year for any purpose authorized by law, whether or not budgeted.⁷² Where the amount of all the taxes collected by a city is sufficient to meet all the necessary expenses, the funds in the treasury may be applied to the full payment of the sum needed to exhaust one appropriation, even if that should not leave money enough to cover the full amount of another appropriation, if the exigencies of the city do not require that the whole of the latter appropriation be expended.⁷³

§ 1890. Payment of Indebtedness Generally

It is the duty of a municipal corporation to make provision for the payment of its valid debts and its usual and current expenses.

It is the duty of a municipal corporation to make provision for the payment of its valid debts,⁷⁴ and

65. Ala.—White v. Decatur, supra.

66. Ill.—Chicago Bd. of Education v. Chicago Bonding, etc., Co., 218 Ill.App. 20.

67. U.S.—Southland Ice Co. v. City of Temple, C.C.A.Tex., 100 F.2d 825.

Fla.—Town of North Miami v. Travis Co., 160 So. 360, 118 Fla. 879. 44 C.J. p 1166 note 67.

Transfer during fiscal year

N.Y.—Wilmerding v. La Guardia, 54 N.Y.S.2d 531, 184 Misc. 607—Wilmerding v. La Guardia, 50 N.Y. S.2d 292, 183 Misc. 142, affirmed 52 N.Y.S.2d 169, 268 App Div. 496, motion denied 52 N.Y.S.2d 941, 268 App Div 1027.

Pa.—Appeal from Statement of Audit of Finances of Borough of Monaca, Com.Pl., 35 Mun.L.R. 111.

Transfer pending litigation

Fact that ordinance transferring to other purposes appropriation made for city building was passed after commencement of mandamus proceedings to compel city comptroller to certify contract for such building did not render ordinance ineffective.—Edwin E. Hollenback, Inc. v. Hadley, 167 A. 574, 312 Pa. 176.

Approval by board of estimate

N.Y.—Broderick v. City of New York, 67 N.E.2d 737, 295 N.Y. 363.

68. Fla.—Town of North Miami v. Travis Co., 160 So. 360, 118 Fla. 879—Keefe v. Adams, 143 So. 644, 106 Fla. 733.

Ill.—Gates v. Sweitzer, 179 N.E. 837, 347 Ill. 353, 79 A.L.R. 1151.

Kan.—Shouse v. Board of Com'rs of Cherokee County, 99 P.2d 779, 151 Kan. 458, opinion adhered to 102 P.2d 1043, 152 Kan. 41.

44 C.J. p 1166 note 64.

Diversion of special fund see infra § 2119

Transfer of money from one fund to another see infra § 2119.

Validity of appropriation

Diversion of some money to improper uses cannot affect validity of appropriation for legitimate municipal purposes.—Davis v. City of Taylor, 67 S.W.2d 1033, 123 Tex. 39.

69. La.—State v. Kennedy, 46 So. 796, 121 La. 757—Shotwell v. New Orleans, 36 La.Ann. 938.

Unexpended appropriation reverts under some charter provisions—Kirby v. Nolte, 164 S.W.2d 1, 349 Mo. 1015

70. N.Y.—Collhan v. Miller, 131 N.Y.S. 99, 72 Misc. 140. 44 C.J. p 1166 note 66.

71. Ariz.—City of Phoenix v. Kidd, 94 P.2d 428, 54 Ariz. 123, followed in City of Phoenix v. Price, 94 P.2d 433, 43 Ariz. 137, City of Phoenix v. Enriquez, 94 P.2d 434, 54 Ariz. 138, and City of Phoenix v. Wilson, 94 P.2d 434, 54 Ariz. 139.

72. Ariz.—City of Phoenix v. Kidd, 94 P.2d 428, 54 Ariz. 123, followed in City of Phoenix v. Price, 94 P.2d 433, 43 Ariz. 137, City of Phoenix v. Enriquez, 94 P.2d 434, 54 Ariz. 138, and City of Phoenix v. Wilson, 94 P.2d 434, 54 Ariz. 139.

Budget funds

Charter provisions that unexpended budget funds became part of treasurer's balance and were deducted from amount to be raised by taxation in following year did not prohibit use of such funds as budget funds in the following year.—City of Tucson v. Tucson Sunshine Climate Club, 164 P.2d 598, 64 Ariz. 1.

Disposition of surplus in appropriation for sinking fund depends on the source from which the surplus was derived; if derived from ad valorem taxes, it must be applied in reduction of the ad valorem tax rate, but if derived from other sources, it may be applied towards an existing deficit of the sinking fund.—Protest of Chicago, R. I. & P. Ry. Co., 23 P.2d 158, 164 Okl. 114.

73. Ill.—Fuller v. Heath, 89 Ill. 296.

74. Alaska—Dickinson v. Petersburg, 6 Alaska 488.

Ariz.—Flagstaff v. Gomez, 242 P. 1003, 29 Ariz. 481.

Payment of:

Bonds see infra § 1955.

Claims see infra § 2185.

Judgments see infra § 2211.

Moral and equitable obligations

(1) Municipalities may be compelled not only to recognize their legal obligations, but also to discharge those of an equitable and moral nature.—Sanger v. City of Bridgeport, 198 A. 746, 124 Conn. 183, 116 A.L.R. 1031.

(2) Municipal corporations are bound by the same principles of honesty and fair dealing as obtain in transactions between individuals, especially in view of statute authorizing a city to pay or compromise claims equitably payable, although not constituting obligations legally binding on city.—Boland v. City of Niagara Falls, 33 N.Y.S.2d 455, 178 Misc. 125.

Cash-basis law requiring municipal corporations to pay or refinance its outstanding obligations is mandatory and not discretionary.—Citizens' Bank of Weir v. Cherokee Tp., 25 P.2d 1019, 138 Kan. 282.

its usual and current expenses,⁷⁵ and actually to pay such debts where it has on hand funds which may be properly devoted thereto and are amply sufficient for the purpose.⁷⁶ Sometimes a statute relating to a particular financial obligation of a municipality does not provide any particular mode for its payment;⁷⁷ but, where a way in which a municipality shall pay its obligations is prescribed by charter or statute, such way must be strictly pursued,⁷⁸ and the same is true of a contract provision,⁷⁹ unless it is in conflict with a charter or statutory provision.⁸⁰

Statutes prescribing a certain vote, resolution, or order by the mayor and council to create municipal indebtedness do not apply to the payment of debts previously incurred,⁸¹ and, as far as the mayor and council are concerned, an obligation of the municipality to pay money is sufficient authority to pay without a new vote, resolution, or order.⁸² It has been held to be within the power of a town or city treasurer to indorse to the bank at which a note of the town or city is made payable a certified check made payable to the town or city, in order to provide the bank with the funds necessary to pay the note.⁸³

Where a municipal creditor accepts municipal securities,⁸⁴ such as bonds,⁸⁵ scrip,⁸⁶ warrants,⁸⁷ or

certificates of indebtedness,⁸⁸ in payment, he has no claim against the municipality for losses incurred by him in realizing on the same. A few statutes provide for the recovery of a penalty from a person who has received payment on a fraudulent contract with a municipality with notice that it was fraudulent.⁸⁹ Where the obligations are of equal degree, a municipality indebted to an individual may deduct from the amount owing him an amount which it is authorized by statute to collect from him.⁹⁰

Funds from which payable. All lawful obligations of a municipality are payable from its general fund in the absence of some special provision calling for payment from some other fund.⁹¹ On the other hand a claim, debt, or expense payable out of a special fund is payable only out of such fund,⁹² and not out of a general fund⁹³ or another special fund;⁹⁴ but a city may become liable for payment out of its general fund where it has failed to pursue its authority to raise money by the sale of bonds.⁹⁵ However, a city may not, by setting up a special fund to meet a general obligation of the city, thereby evade its general liability.⁹⁶ Where a municipal corporation contracts with respect to a particular fund, a debt arising on such contract is

Release of municipality by legislature

Legislature cannot constitutionally release existing municipality from all liability for payment of validly incurred debts, although legislature imposes liability therefor on another public entity, unless creditor accepts new arrangement as novation extinguishing preexisting promise, but as long as there is no default, action of legislature cannot be complained of without showing of injury to creditor.—City of Fort Lauderdale v. State ex rel. Elston Bank & Trust Co., 169 So. 584, 125 Fla. 89.

75. Ky.—Fulton County Fiscal Court v. Southern Bell Telephone & Telegraph Co., 146 S.W.2d 15, 285 Ky. 17.

76. N.Y.—People ex rel. Oswego Falls Corporation v. Foster, 295 N.Y.S. 891, 251 App.Div. 65, motion denied 298 N.Y.S. 742, 251 App.Div. 879, affirmed 15 N.E.2d 433, 278 N.Y. 494.

Wash.—Van Diest v. Yakima County, 65 P.2d 1080, 189 Wash. 411.
44 C.J. p 1166 note 71.

77. N.Y.—Davidson v. White Plains, 90 N.E. 825, 197 N.Y. 266.

78. Colo.—Pueblo v. Dye, 96 P. 989, 44 Colo. 35.
44 C.J. p 1166 note 74.

79. N.Y.—Lighton v. Syracuse, 81 N.E. 464, 188 N.Y. 499.

80. N.D.—Hart v. Wyndmere, 131 N.W. 271, 21 N.D. 383, Ann.Cas.1913D 169.

81. Ga.—Semmes v. Columbus, 19 Ga. 471.

82. Ga.—Semmes v. Columbus, supra.

83. Mass.—Brown v. Boston First Nat. Bank, 103 N.E. 780, 216 Mass. 298.

84. Ill.—First Nat. Bank v. Village of Dolton, 5 N.E.2d 732, 288 Ill. App. 85.

Power to issue securities

Agreement that issuing of securities by municipality should extinguish debt is limited by restrictions, if any, imposed by law on municipality authorized to issue securities.—First Nat. Bank v. Village of Dolton, supra.

85. U.S.—Loudon v. Shelby County Taxing Dist., Tenn., 104 U.S. 771, 26 L.Ed. 923.

Void bonds

The delivery by city to bank of void bonds in payment of an existing indebtedness did not operate as "payment" of that indebtedness but left the debt undischarged.—City of Jackson v. First Nat. Bank of Jackson, 157 S.W.2d 321, 289 Ky. 1.

86. Iowa.—State v. Davenport, 12 Iowa 335.

87. Ill.—Diamond v. Commissioner of Highways of Town of Ottawa, 9 N.E.2d 197, 366 Ill. 503.

88. Ark.—Pugh v. City of Little Rock, 35 Ark. 75.
44 C.J. p 1167 note 88.

89. Okl.—Buckeye Engine Co. v. Cherokee, 153 P. 1166, 54 Okl. 509.

90. Pa.—City of Pittsburgh v. Gribbin, 51 Pa.Dist. & Co. 587, 92 Pittsb Leg.J. 433.

Wash.—State v. Seattle, 132 P. 45, 73 Wash. 396.

91. Wash.—State v. Irwin, 134 P. 484, 135 P. 472, 74 Wash. 589.
44 C.J. p 1161 note 52.

Money for recreation centers was held payable from general fund, without recourse to regular parks' appropriation.—Bryant v. Boyle, 277 P. 1042, 207 Cal. 296.

92. Wash.—Uhler v. Olympia, 151 P. 117, 152 P. 998, 87 Wash. 1.
44 C.J. p 1161 note 53.

93. U.S.—Schieffelin v. Hylan, 176 N.Y.S. 809, 188 App.Div. 192, affirmed 125 N.E. 925, 227 N.Y. 593.
44 C.J. p 1161 note 54.

94. Wash.—State v. Lamprey, 106 P. 501, 57 Wash. 84.

95. U.S.—Simons v. Eugene, C.C.Or., 159 F. 307.

96. Neb.—Chaffee v. City of Omaha, 16 N.W.2d 852, 145 Neb. 413.

payable only from that fund,⁹⁷ at least where the contract so provides.⁹⁸

Current income and expenses. Under some constitutional, statutory, or charter provisions, municipal debts incurred in a certain fiscal year are payable primarily out of the revenue for that year,⁹⁹ and the revenue of the current year may not be applied to the satisfaction of obligations incurred in a preceding year,¹ at least while there are legal outstanding obligations of the current year;² the general fund for a fiscal year may not be employed for any other purpose until all legal obligations of the general fund for that year are paid or provided for.³ It is likewise held that the moneys in a special fund for a particular fiscal year may be used for no other purpose than the payment of the legitimate claims chargeable against the fund and arising during that year⁴ until all such claims have been met and extinguished;⁵ but the charter provisions of some municipalities do not preclude the payment from the revenue of the year of debts and liabilities incurred in a preceding year.⁶ Where a city owning an electric light plant has a surplus of electricity remaining after discharging its public duty, it may expend current funds to put that power in use so as to supply electricity to its citizens for private use.⁷

Place of payment. A municipal corporation is not required to seek its creditors in order to discharge its debts.⁸ In the absence of special statutory authority, municipalities may not bind themselves to pay their indebtedness at any other place than at the municipal treasury;⁹ and a creditor must make

demand there when payment is desired unless provision has been made for another place of payment.¹⁰

Interest. It has been held that a municipality is not liable to pay interest on its debts unless its consent to do so has been manifested by an act of the legislature or by a lawful contract of its executive officers.¹¹ In order to stop the running of interest a municipality is not bound to seek out its creditor and tender him the money due.¹²

Priorities. It has been held that a municipality should provide for and maintain its necessary governmental functions before making other expenditures and its duty of payment of other indebtedness is subordinate to its duty first to apply its income to the payment of governmental expense,¹³ so that, where the interest and principal of municipal bonds are specially charged on the general revenues of the city, only the surplus income, after legitimate expenses have been provided for, can be applied to such debt,¹⁴ but under some constitutional provisions, the payment of the municipality's debt, evidenced by bonds, and the payment of interest and the creation of a sinking fund must be first provided for, since the payment of current expenses is a secondary consideration.¹⁵ An obligation imposed by specific mandate of the legislature must be met out of the funds available for that purpose before those funds may be used for a mere permissive purpose.¹⁶ Priorities in the right to payment, sometimes fixed by statutes, especially in case of surplus revenues,¹⁷ are valid and enforceable.¹⁸ It has been held that, while each creditor is entitled

97. Minn.—Judd v. City of St. Cloud, 272 N.W. 577, 198 Minn. 590.

98. N.D.—Harding v. City of Dickinson, 33 N.W.2d 626.

99. La.—Barber Asphalt Pav. Co. v. New Orleans, 9 So. 484, 43 La. Ann. 464.

44 C.J. p 1161 note 66.

Limitation of indebtedness to current income see supra § 1847.

1. La.—Badger v. New Orleans, 21 So. 870, 49 La. Ann. 804, 37 L.R.A. 540.

44 C.J. p 1161 note 67.

2. Colo.—Ostling v. People, 140 P. 173, 57 Colo. 22.

Okl.—Miami State Bank v. Miami, 144 P. 597, 43 Okl. 809.

3. Okl.—Gallion v. Excise Board of Oklahoma County, 42 P.2d 508, 171 Okl. 76.

4. Cal.—Bilby v. McKenzie, 44 P. 341, 112 Cal. 148.

5. Cal.—Bilby v. McKenzie, supra.

6. N.Y.—In re Plattburgh, 51 N.E. 512, 157 N.Y. 78.

44 C.J. p 1161 note 71, p 1372 note 96.

7. Tex.—Crouch v. McKinney, 104 S.W. 518, 47 Tex. Civ. App. 54.

8. Mont.—Lillis v. City of Big Timber, 62 P.2d 219, 103 Mont. 206.

44 C.J. p 1167 note 91.

9. Ill.—Pekin v. Reynolds, 31 Ill. 529, 83 Am. D. 244—People v. Tazewell County, 22 Ill. 147.

10. Ill.—Williamson v. Farson, 101 Ill. App. 328, affirmed 64 N.E. 1086, 199 Ill. 71.

11. Fla.—Board of Public Instruction for Bay County v. Barefoot, 193 So. 823, 140 Fla. 429, 141 Fla. 522.

12. Pa.—Friend v. Pittsburgh, 18 A. 1060, 131 Pa. 305, 17 Am. S.R. 811, 6 L.R.A. 636.

13. U.S.—Borough of Fort Lee v. U. S. ex rel. Barker, C.C.A.N.J., 104 F.2d 275, certiorari dismissed Borough of Fort Lee v. U. S. ex rel. Barker, 60 S.Ct. 136, 308 U.S. 629, 84 L.Ed. 525.

Ky.—Town of Mt. Vernon v. General Electric Supply Corporation, 158 S.W.2d 649, 289 Ky. 355.

44 C.J. p 1374 note 41.

Priorities in payment of bonds see infra § 1955.

Priority and order of payment of warrants see infra § 1900.

The organic acts of some territories provide that all authorized municipal indebtedness shall be paid in the order of its creation.—Dickinson v. Petersburg, 6 Alaska 488.

14. Ala.—White v. Decatur, 23 So. 999, 119 Ala. 476.

15. Ohio.—State v. City of Van Wert, 184 N.E. 12, 126 Ohio St. 78.

16. Ariz.—Wise v. First Nat. Bank, 65 P.2d 1154, 49 Ariz. 146.

17. Ala.—White v. Decatur, 23 So. 999, 119 Ala. 476.

18. N.J.—Ross v. Walton, 44 A. 430, 63 N.J. Law 435, affirmed 52 A. 1132, 67 N.J. Law 688.

S.D.—Freeman v. Huron, 73 N.W. 260, 10 S.D. 368.

to payment in full if the city is solvent,¹⁹ if the city is insolvent, equitable apportionment of available revenue which is common security for all is necessary.²⁰ It has also been held that general creditors of a municipality, whose claims are secured by the general power of taxation, are entitled to payment in the order in which they demand payment, where payment on presentation is authorized by law, and there is available a fund from which payment may be made;²¹ but this is true only where payment is made.²² Where payment is refused, the controlling factor in determining priority is not the time of the respective demands, but is rather the time of instituting legal proceedings.²³ It has been held that demands arising from the performance of statutory requirements take precedence over demands arising from contracts,²⁴ and that the latter are payable in the order of their maturity and demand for payment.²⁵

§ 1891. Insufficiency or Exhaustion of Fund or Appropriation

The fact that an insufficient sum was appropriated for certain claims or that the special fund out of which certain claims are payable is exhausted will not prevent the payment of such claims if there is money in the municipal treasury which may be applied thereto.

The fact that an insufficient sum was appropriated for certain claims,²⁶ or that a special fund out of which certain claims are payable is exhausted,²⁷ or has been appropriated for other purposes,²⁸ will not prevent the payment of such claims as long as there is money in the municipal treasury which may be applied thereto. Also, the failure or exhaustion of funds appropriated²⁹ or available³⁰ for the payment of a valid claim does not prevent the recovery of judgment on the claim; but, where a claim or debt is payable exclusively from a certain fund, the exhaustion of the fund prior to the filing of suit prevents recovery.³¹

4. WARRANTS AND CERTIFICATES OF INDEBTEDNESS

§ 1892. In General

A municipal warrant is the command of the council, board, or official whose duty it is to pass on the validity and the amount of a claim against the municipal corporation to the treasurer to pay money out of funds in the municipal treasury, which are or may become available for the purpose specified to a designated person whose claim therefor has been duly adjudged and allowed.

A municipal warrant is the command of the council,

board, or official whose duty it is to pass on the validity and the amount of a claim against the municipal corporation to the treasurer to pay money out of funds in the municipal treasury, which are or may become available for the purpose specified to a designated person whose claim therefor has been duly adjudged and allowed;³² it is an instrument generally in the form of a bill of exchange or order,

19. U.S.—*Women's Catholic Order of Foresters v. City of Arlington*, D.C.Tex., 28 F.Supp. 663.

No preference

III.—*People ex rel. Bradford Nat. Bank of Greenville v. School Directors of Dist. No. 62, Franklin County*, 32 N.E.2d 1008, 309 Ill. App. 242.

20. U.S.—*Rittenoure v. City of Edinburg*, C.C.A.Tex., 159 F.2d 989.

21. Fla.—*State ex rel. Du Pont Ball v. Livingston*, 139 So. 360, 104 Fla. 33.

Special funds

As respects order of payment of obligations of a municipality, the "first come, first served rule" applies only to general creditors whose claims are supported by the general power of taxation, and does not apply where the funds attempted to be reached are earmarked for a particular purpose.—*State ex rel. Garland v. City of West Palm Beach*, 193 So. 297, 141 Fla. 244, followed in *State ex rel. Garland v. City of Sarasota*, 193 So. 299, 141 Fla. 256, appeal dismissed *State of Florida ex rel. Garland v. City of Sarasota*, 60 S.Ct. 894, 309 U.S. 640, 84 L.Ed. 995, rehearing denied 60 S.Ct. 1075, 310 U.S. 657, 84 L.Ed. 1420. Appeal dismissed *State*

of Florida ex rel. Garland v. City of West Palm Beach, 60 S.Ct. 893, 309 U.S. 639, 84 L.Ed. 994, rehearing denied 60 S.Ct. 1074, 310 U.S. 657, 84 L.Ed. 1420.

22. Fla.—*State ex rel. Du Pont Ball v. Livingston*, 139 So. 360, 104 Fla. 33.

23. Fla.—*State ex rel. Du Pont Ball v. Livingston*, supra.

24. Ark.—*City of Paris v. Street Imp. Dist. No. 2 of Paris*, 191 S.W.2d 968, 209 Ark. 683—*Manhattan Rubber Mfg. Division of Raybestos Manhattan v. Bird*, 185 S.W.2d 268, 208 Ark. 167, 159 A.L.R. 1257.

25. Ark.—*City of Paris v. Street Imp. Dist. No. 2 of Paris*, 191 S.W.2d 968, 209 Ark. 683—*Manhattan Rubber Mfg. Division of Raybestos Manhattan v. Bird*, 185 S.W.2d 268, 208 Ark. 167, 159 A.L.R. 1257.

26. W.Va.—*State v. Amos*, 140 S.E. 544, 104 W.Va. 538.
44 C.J. p 1167 note 95.

27. Mich.—*Speed v. Detroit*, 58 N.W. 638, 100 Mich. 92.
44 C.J. p 1167 note 96.

28. N.Y.—*Smith v. New York*, 5 Hun 237.

29. Mass.—*Fortin v. City of Chicopee*, 17 N.E.2d 441, 301 Mass. 447.
N.Y.—*Mosher v. Elmira*, 145 N.Y.S. 964, 83 Misc. 328.

30. Cal.—*Arthur v. Petaluma*, 165 P. 698, 175 Cal. 216.

31. Ga.—*Appling v. Abbeville*, 72 S.E. 31, 136 Ga. 772—*Abbeville v. McMillan*, 72 S.E. 336, 9 Ga.App. 851.

32. Fla.—*Town of Bithlo v. Bank of Commerce*, 110 So. 837, 92 Fla. 975.
Mont.—*Lillis v. City of Big Timber*, 62 P.2d 219, 103 Mont. 208—*State v. McCarthy*, 282 P. 1045, 86 Mont. 100.

Okl.—*Excise Board of Creek County v. Gulf Pipe Line Co. of Oklahoma*, 9 P.2d 460, 156 Okl. 103.

Tex.—*Pulte v. Keel*, Civ.App., 297 S.W. 241, reversed on other grounds *Keel v. Pulte*, Com.App., 10 S.W.2d 694.

44 C.J. p 1167 note 4 [a].

Not synonymous with "contracts"
Okl.—*Protest of St. Louis-San Francisco Ry. Co.*, 11 P.2d 189, 157 Okl. 131.

Distinguished from bond

(1) "Warrant," as distinguished from bond, is written declaration evidencing existing debt.—*Pulte v. Keel*, Tex.Civ.App., 297 S.W. 241, re-

drawn by an officer of a municipality on its treasurer, directing him to pay an amount of money specified to the person named, or his order, or bearer;³³ it is in the nature of an order given by the city on the city;³⁴ it is a general order, payable when funds are found,³⁵ and need not be payable on sight.³⁶ Neither the vote of a municipal corporation authorizing the payment of money to a person,³⁷ nor the minutes of a meeting of municipal officers showing an audit of a claim against the municipality,³⁸ constitute a warrant. While a warrant has been spoken of as being in the nature of, and to all intents and purposes, the promissory note of the municipal corporation,³⁹ strictly speaking, it is merely the means prescribed by law for drawing money from the treasury to pay the indebtedness of the corporation,⁴⁰ and is not a promissory note⁴¹ or bill of exchange.⁴² Municipal certificates of in-

debtedness are not "bills of credit" within the meaning of the federal constitution.⁴³

Warrants used to raise revenue such as tax anticipation warrants are discussed *infra* § 1905 in connection with bonds and other securities.

§ 1893. Power and Duty to Issue; Validity Generally.

Municipal corporations generally have power, either express or implied, to issue warrants or other ordinary evidences of indebtedness.

Municipal corporations generally have power,⁴⁴ either express⁴⁵ or implied,⁴⁶ to issue warrants or other ordinary evidence of indebtedness in certain cases.

Validity. In order to be valid, municipal warrants and certificates of indebtedness must be author-

versed on other grounds *Keel v. Pulte*, Com.App., 10 S.W.2d 694.

(2) "Bond" and "warrant" distinguished generally see *Bonds* § 2.

Warrant as certificate of indebtedness

(1) Warrants are in a sense certificates of indebtedness, but a prohibition of the issuance of any form of certificate of indebtedness by a municipality may be coupled with a requirement that all claims shall be paid by warrant issued against some specified fund otherwise unappropriated—*Glessman v. Garrett County Com'rs*, 44 A.2d 862, 185 Md. 350.

(2) "'Time warrants' are not the ordinary warrants used in the payment of claims duly audited and allowed against municipalities;" they are sometimes regarded as certificates of indebtedness within the meaning of a statute.—*Hubert v. Vero Beach*, 112 So. 52, 93 Fla. 323.

The machinery provided for the payment of the debts of a municipality frequently requires that warrants be issued for the amount of the indebtedness and that they be paid out of the municipal treasury by the municipal treasurer.—*Lillis v. City of Big Timber*, 62 P.2d 219, 103 Mont. 206.

33. Md.—*Glessman v. Garrett County Com'rs*, 44 A.2d 862, 185 Md. 350.

44 C.J. p 1167 note 4.

34. Tex.—*Clay Bldg. Material Co. v. City of Wink*, Civ.App., 141 S.W.2d 1040.

44 C.J. p 1167 note 4 [b].

35. Ala.—*State ex rel. Radcliff v. City of Mobile*, 155 So. 872, 229 Ala. 93.

Wash.—*State v. Pasco Reclamation Co.*, 156 P. 834, 90 Wash. 606.

44 C.J. p 1167 note 5.

36. Kan.—*Burrton v. Harvey County Sav. Bank*, 28 Kan. 390.

37. Mass.—*Paine v. Boston*, 124 Mass. 486.

38. N.Y.—*People v. Wood*, 71 N.Y. 371.

39. Tex.—*Stratton v. Kinney County Comrs.' Ct.*, Civ.App., 137 S.W. 1170.

44 C.J. p 1167 note 9

40. Cal.—*Dana v. San Francisco*, 19 Cal. 486.

41. Cal.—*Dana v. San Francisco*, *supra*.

42. Cal.—*Dana v. San Francisco*, *supra*.

43. La.—*New Orleans v. Mount*, 24 La. Ann. 37.

Md.—*Baltimore v. State*, 15 Md. 376, 74 Am.D. 572.

44. La.—*Dresser v. Recreation and Park Commission of Parish of East Baton Rouge*, 34 So.2d 384, 213 La. 85.

44 C.J. p 1168 note 30.

Power to issue negotiable warrants or certificates see *infra* § 1898.

Refunding warrants

Where city proposes to issue new improvement warrants under provisions of statute, and special improvement warrants have been legally issued and are in default, city council may issue refunding special improvement warrants.—*Schieber v. City of Mohall*, 268 N.W. 445, 66 N. D. 593.

Time warrants

Statutes relating to the power of cities with respect to issuance of time warrants, and to referendum on bond issues, were not repealed by statute limiting the power of cities to encumber their various systems without a vote of the people—*City of Del Rio v. Lowe*, Civ.App., 111 S.W.2d 1208, reversed on other

grounds *Lowe v. City of Del Rio*, 122 S.W.2d 191, 132 Tex. 111.

45. S.C.—*Sullivan v. Charleston*, 180 S.E. 876, 133 S.E. 340, 133 S.C. 189.

44 C.J. p 1168 note 31.

County adjoining military post

The statute authorizing issuance of emergency warrants in any taxing district in any county adjoining federal military post or reservation permits any taxing district in county adjoining army post or military reservation to issue emergency warrants, even though such district does not itself adjoin post or reservation; a county within which federal military reservation is wholly situated "adjoins" reservation, within statute—*Miller v. Hickory Grove School Board Dist. No. 4*, 178 P.2d 214, 162 Kan. 528.

Limited to special fund

Under provisions of municipal home-rule charter providing for issuance of improvement warrants, authority to issue warrants was limited to special fund created by charter provision—*Judd v. City of St. Cloud*, 272 N.W. 577, 198 Minn. 590.

46. Tex.—*Payne v. First Nat. Bank*, Com.App., 291 S.W. 209.

44 C.J. p 1168 note 32.

Lawfully created debt

City has implied authority to issue warrants for lawfully created debt.—*Payne v. First Nat. Bank*, *supra*—*Bridgers v. City of Lampasas*, Tex.Civ.App., 249 S.W. 1083.

Express authority to issue bonds for improvement does not exclude authority to issue warrants for improvement.—*Keel v. Pulte*, Tex.Com.App., 10 S.W.2d 694.

Included in power to issue bonds

Idaho—*First Nat. Bank v. City of Caldwell*, 78 P.2d 1098, 58 Idaho 752.

ized⁴⁷ and not prohibited⁴⁸ by law, and they must be legally issued⁴⁹ by the officer authorized and charged with the duty,⁵⁰ in compliance with,⁵¹ and not in violation of,⁵² the provisions of statutes and ordinances, but statutory and constitutional requisites as to bonds and other evidences of indebtedness have been held inapplicable to warrants.⁵³ Where the only basis of a warrant or certificate of indebtedness is a contract which is invalid, the warrant or certificate is likewise invalid.⁵⁴

Warrants may be issued only in the manner and for the purposes prescribed by law.⁵⁵ A warrant is

not rendered invalid by the repeal of the ordinance under which it was issued.⁵⁶ Under some statutes, it is held that a warrant may not be issued or paid except by authority of an appropriation⁵⁷ and within the limits thereof.⁵⁸ While a warrant is void under some statutes where there are no funds in the treasury to pay it at the time when it is issued or when it is payable,⁵⁹ it has been held that a municipality may lawfully issue a warrant at a time when there are not sufficient funds in the treasury to pay it,⁶⁰ a warrant is not invalid because it is payable in future years.⁶¹

47. Ill.—Edward J. Berwind, Inc. v. Chicago Park Dist., 65 N.E.2d 785, 893 Ill. 317.

44 C.J. p 1168 note 23.

Warrants held valid

Ky.—City of Jackson v. First Nat. Bank of Jackson, 157 S.W.2d 321, 289 Ky. 1.

48. Mich.—Niles Bryant School v. Bailey, 126 N.W. 116, 161 Mich. 193.

44 C.J. p 1168 note 24.

49. Ky.—City of Jackson v. First Nat. Bank of Jackson, 157 S.W.2d 321, 289 Ky. 1.

Tex.—Celaya v. Brownsville, Civ. App., 203 S.W. 153.

Manner of sale

(1) Under public utility act, method to be used by public utility district commissioners in sale of warrants is left to discretion of commissioners, the flood control act and the act relating to sale of municipal bonds to the United States did not deprive district of right to sell its bonds or warrants at private sale.—Bayha v. Public Utility Dist. No. 1 of Grays Harbor County, 97 P.2d 614, 2 Wash.2d 85.

(2) Under public utility act, public utility district commissioners can employ such assistance as they deem necessary in the sale of warrants.—Bayha v. Public Utility Dist. No. 1 of Grays Harbor County, supra.

50. Ohio.—State v. Evans, 165 N.E. 380, 30 Ohio App. 419.

44 C.J. p 1168 note 26.

Mayor and mayor and clerk

(1) Mayor, not authorized by city's governing body, as shown by minutes of meeting thereof, to sign and issue funding warrants could not bind city thereby.—City of Weslaco, Tex., v. Porter, C.C.A.Tex., 56 F.2d 6.

(2) Mayor may be authorized to issue valid warrants on the treasury in lieu of irregular or invalid ones.—State v. Winter, 46 P. 644, 15 Wash. 407.

(3) Mayor of city and clerk of board of council are not authorized to issue warrants against treasurer, except when authorized by law and

after regular appropriation.—City of Princeton v. Baker, 35 S.W.2d 524, 237 Ky. 325.

(4) Municipal warrants, signed and issued by mayor and city clerk without authority of city's governing body, imposed no liability on city.

U.S.—City of Weslaco, Tex., v. Porter, C.C.A.Tex., 56 F.2d 6.—City of Sanford, Fla., v. Chase Nat. Bank of City of New York, C.C.A.N.Y., 50 F.2d 400, certiorari denied Chase Nat. Bank of City of New York v. City of Sanford, Fla., 52 S.Ct. 35, 284 U.S. 650, 76 L.Ed. 559. Ky.—City of Jackson v. First Nat. Bank of Jackson, 157 S.W.2d 321, 289 Ky. 1.

Treasurer

In the absence of an express grant of authority, a city treasurer has no authority to issue city warrants.—Bardsley v. Sternberg, 49 P. 499, 17 Wash. 243.

51. Cal.—Hadley v. Dague, 62 P. 500, 130 Cal. 207.

44 C.J. p 1168 note 27.

Publication of notice

(1) Under statute, warrants were void by reason of city's failure to comply with requirement that notice of intention to issue such warrants be published once a week for two consecutive weeks.—City of Del Rio v. Lowe, Civ.App., 111 S.W.2d 1208, reversed on other grounds Lowe v. City of Del Rio, 122 S.W.2d 191, 132 Tex. 111.

(2) The statute providing for publication of a notice for three successive weeks if length of publication is not otherwise prescribed has no reference to publication of ordinance for issuance of interest-bearing warrants under a statute contemplating the borrowing of money by the city and issuance of warrants as evidence of the loan and security therefor.—Davis v. City of Tusculumbia, 183 So. 557, 236 Ala. 552.

52. U.S.—City of Kingsville v. Meredith, C.C.A.Tex., 103 F.2d 279, 44 C.J. p 1168 note 28.

53. Colo.—Georgetown v. Bank of Idaho Springs, 64 P.2d 132, 99 Colo. 519.

Okl.—Faught v. City of Sapulpa, 292 P. 15, 145 Okl. 164.

54. Colo.—Corpus Juris cited in Swedlund v. Denver Joint Stock Land Bank, 118 P.2d 460, 463, 108 Colo. 400.

Mo.—Tegethoff v. Sidmon, App., 158 S.W.2d 224.

44 C.J. p 1168 note 29.

Warrant held supported by valid debt

Ky.—City of Jackson v. First Nat. Bank of Jackson, 157 S.W.2d 321, 289 Ky. 1.

55. Fla.—Town of Bithlo v. Bank of Commerce, 110 So. 837, 92 Fla. 975.

Warrants held valid

Ill.—People ex rel. Nelson v. H. N. Schuyler State Bank, 278 Ill.App. 529.

56. Tex.—City of San Antonio v. Cullen, Civ.App., 168 S.W.2d 882.

57. Ill.—People ex rel. Gill v. Schiek, 14 N.E.2d 223, 368 Ill. 353. Okl.—Dowler v. State ex rel. Prunty, 66 P.2d 1081.—Leonard v. City of Wagoner, 63 P.2d 93, 178 Okl. 553.

44 C.J. p 1173 note 46 [a]. Necessity of appropriation generally see supra § 1885.

58. Okl.—Dowler v. State ex rel. Prunty, 66 P.2d 1081, 179 Okl. 532.—Leonard v. City of Wagoner, 63 P.2d 93, 178 Okl. 553.

59. Ill.—Euziere v. Highway Com'r of Town of Rockville, 178 N.E. 397, 346 Ill. 131.

Miss.—City of Louisville v. Chambers, 1 So.2d 771, 190 Miss. 833.

Mo.—General Mfg. Co. v. City of Portageville, App., 28 S.W.2d 119, 44 C.J. p 1168 note 33.

Warrants on sinking fund

Sinking fund of municipality may be paid out only on cash vouchers or warrants, and money must be on hand at time vouchers are issued.—Jones v. Blaine, 300 P. 369, 149 Okl. 153.

60. Wash.—State v. Irwin, 134 P. 484, 135 P. 472, 74 Wash. 589.

44 C.J. p 1168 note 34.

61. U.S.—City of Gainesville v. Brown-Crummer Inv. Co., C.C.A.

Amount. Warrants and certificates of indebtedness may be issued to the amount authorized by statute,⁶² but not in excess thereof,⁶³ and, where warrants are issued in numerical order, they are valid in such order until the legal maximum is reached, and those issued thereafter are invalid.⁶⁴ A provision prohibiting the issuance of warrants or certificates of indebtedness in excess of the revenue for the year does not affect the validity of warrants issued at a time when the year's revenues have not been exhausted.⁶⁵

Validating invalid warrants. Where warrants are issued by a municipal corporation in excess of its authority, and the legislature could have authorized their issuance in the first instance, it may render them valid by a curative act.⁶⁶ The court will not, however, construe a statute as validating outstanding invalid warrants unless such is clearly the intent of the legislature.⁶⁷ Warrants issued in violation of a constitutional provision may not be validated by the courts⁶⁸ or by a vote of the electors.⁶⁹ An ordinance merely referring to and recognizing as valid an aggregate amount of outstanding warrant indebtedness is insufficient to establish a ratification of a particular warrant issued with-

out authority.⁷⁰

§ 1894. Form, Contents, Execution, and Delivery

Municipal orders or warrants should be dated, signed and countersigned as required, and contain whatever statements are required by charter or statute.

Municipal orders or warrants must be dated,⁷¹ signed and countersigned as required,⁷² and contain whatever statements are required by charter or statute.⁷³ The purpose for which they are drawn should be stated therein;⁷⁴ but it is not essential that they should specify from what particular fund they are payable,⁷⁵ unless a special fund for a special purpose has been created,⁷⁶ or they are expressly required by charter or statute to designate the fund against which they are drawn or from which they are payable.⁷⁷ If receivable for taxes they may so show on their face.⁷⁸ A warrant issued to an assignee of a contractor is not fatally defective because it omits the name of the contractor.⁷⁹ Some statutes require warrants to be sealed,⁸⁰ but, in the absence of such a requirement, the corporate seal is not essential to their validity.⁸¹ The delivery of a warrant⁸² to the person authorized to receive it⁸³ is essential to its complete issuance.

Tex., 20 F.2d 497, reversed on other grounds 48 S.Ct. 454, 277 U.S. 54, 72 L.Ed. 781, conformed to, C. C.A., 31 F.2d 1009, certiorari denied 50 S.Ct. 27, 280 U.S. 569, 74 L.Ed. 622.

44 C.J. p 1168 note 34 [b].

62. Okl.—Blake v. Abraham, 299 P. 488, 149 Okl. 112—Murrell v. City of Sapulpa, 297 P. 241, 148 Okl. 16.

63. Okl.—Blake v. Abraham, 299 P. 488, 149 Okl. 112.

64. Ill.—Edward J. Berwind, Inc., v. Chicago Park Dist., 65 N.E.2d 785, 393 Ill. 317.

65. Ark.—Chesnutt v. Yates, 9 S.W. 2d 37, 177 Ark. 894.

66. Iowa.—Mote v. Incorporated Town of Carlisle, 233 N.W. 695, 211 Iowa 392.

Minn.—Merchants' Nat. Bank v. East Grand Forks, 102 N.W. 703, 94 Minn. 246.

44 C.J. p 1169 note 46.

Effect of pending action

Curative act may remedy defect in town warrants, if it does not contain limiting proviso, although action attacking validity was pending.—Mote v. Incorporated Town of Carlisle, 233 N.W. 695, 211 Iowa 392.

Purchase-money notes

(1) City's purchase-money notes were held enforceable, although issued when city commissioner was stockholder of payee club, and although charter provided that any contract should be declared void

where city officers were interested in profits therefrom, where city's governing body, after stockholder ceased to be member thereof, passed a resolution declaring obligations on notes to be valid and statute was enacted, validating city's debt on notes.—Green v. City of Stuart, C.C. A.Fla., 81 F.2d 968.

(2) However, defects in purchase-money notes for realty executed by city were held not cured by special act authorizing issuance of bonds to liquidate outstanding floating debts of city and validating such indebtedness, since there was not sufficient identification in the act of the debt so that the act might be held a ratification of the indebtedness.—City of Stuart v. Green, 23 So.2d 831, 156 Fla. 551.

67. Ark.—Lindsey v. Rottaken, 32 Ark. 619.

68. Okl.—In re Afton, 144 P. 184, 43 Okl. 720, L.R.A.1915D 978.

69. Okl.—In re Afton, supra.

70. Ky.—City of Jackson v. First Nat. Bank of Jackson, 157 S.W.2d 321, 289 Ky. 1.

71. Cal.—Shipman v. Forbes, 32 P. 599, 97 Cal. 572.

72. Conn.—Waldo v. Portland, 33 Conn. 363.

44 C.J. p 1169 note 51.

Statute relating to contracts inapplicable

Wis.—Lurye v. State, 265 N.W. 221, 221 Wis. 68.

Form of signature

Ga.—City of Abbeville v. Eureka Fire Hose Mfg. Co., 170 SE 23, 177 Ga. 204.

73. Colo.—Travelers' Ins. Co. v. Denver, 18 P. 556, 11 Colo. 434.

44 C.J. p 1169 note 52.

74. Me.—Biddeford Police Board v. Biddeford, 72 A. 740, 105 Me. 46

44 C.J. p 1169 note 53.

75. Neb.—Abrahams v. Omaha, 114 N.W. 161, 80 Neb. 271, followed in Rogers v. Omaha, 117 N.W. 119, 82 Neb. 118.

44 C.J. p 1169 note 54.

76. Tex.—Minor v. Loggins, 37 S.W. 1086, 14 Tex.Civ.App. 15.

44 C.J. p 1169 note 55.

77. N.J.—Secaucus v. Klesewetter, 84 A. 622, 83 N.J. Law 227.

Tex.—San Antonio v. Routledge, 102 S.W. 756, 46 Tex.Civ.App. 196.

78. Ill.—Fuller v. Heath, 89 Ill. 296.

79. Cal.—Berkeley Dev. Co. v. Marx, 102 P. 278, 10 Cal.App. 410.

80. U.S.—Smeltzer v. White, Iowa, 92 U.S. 390, 23 L.Ed. 608.

81. U.S.—Condon v. Eureka Springs, C.C.Ark., 135 F. 566.

44 C.J. p 1169 note 60.

82. Kan.—State v. Pierce, 35 P. 19, 52 Kan. 521.

83. Wash.—State v. Scott, 173 P. 498, 102 Wash. 510, 516.

44 C.J. p 1169 note 62.

Duty to sign or countersign. The municipal officers by whom warrants are to be signed⁸⁴ and countersigned⁸⁵ are designated by statute or charter. It is generally held that municipal officers should draw, sign, or countersign warrants when ordered to do so by the proper authority,⁸⁶ acting within the scope of its power,⁸⁷ their duties in this respect being merely ministerial.⁸⁸ However, under some charter or statutory provisions the comptroller or other designated officer invested with authority to draw, sign, or deliver warrants is invested with discretionary⁸⁹ or quasi-judicial⁹⁰ powers and is not a mere automaton⁹¹ or ministerial officer,⁹² and under such provisions it may be his duty under some circumstances to refuse to draw or sign a warrant,⁹³ even though authorized or ordered to do so by the council.⁹⁴

§ 1895. Construction and Operation

Municipal warrants properly signed are prima facie valid and establish prima facie the validity of the claims for which they were issued, but the issuance of a warrant is not a final and conclusive adjudication binding on the municipal corporation.

Municipal warrants signed by the proper officers are prima facie valid,⁹⁵ and establish prima facie the validity of the claims for which they are issued,⁹⁶ so as to cast on the municipal corporation the burden of proving a defense of invalidity;⁹⁷ but the allowance of claims by granting orders or warrants therefor establishes the claims only prima facie⁹⁸ and is not a final and conclusive adjudication so as to conclude the municipality.⁹⁹ The municipality is not precluded from setting up defenses

84. Cal.—Robinson v. Moran, 45 P. 2d 206, 3 Cal 2d 636.

N.Y.—Wilaka Const. Co. v. McAneny, 191 N.E. 769, 265 N.Y. 43.

44 C.J. p 1168 note 35.

85. Ind.—Decatur v. McKean, 78 N. E. 982, 167 Ind. 249.

44 C.J. p 1168 note 36.

86. Fla.—State ex rel. Miller v. Marshall, 184 So. 870, rehearing denied 185 So. 428, 135 Fla. 214.

Tex.—Williams v. Tompkins, Civ. App., 42 S.W.2d 106, reversed on other grounds Tompkins v. Williams, Com.App., 62 S.W.2d 70—Chrestman v. Tompkins, Civ.App., 5 S.W.2d 257, error refused.

44 C.J. p 1168 note 37.

Mandamus to compel issuance or countersigning of warrant see Mandamus § 147.

87. Pa.—Commonwealth v. Walton, 84 A. 766, 236 Pa. 220.

Where order is void, officer need not draw or sign warrant.—Tompkins v. Williams, Tex.Com.App., 62 S. W.2d 70—44 C.J. p 1168 note 88 [a].

88. N.Y.—Wilaka Const. Co. v. McAneny, 191 N.E. 769, 265 N.Y. 43.

44 C.J. p 1168 note 39.

89. Colo.—Cross v. McNichols, 195 P.2d 975, 118 Colo. 442.

Pa.—Duncan Meter Corp. v. Gritsavage, 65 A 2d 402, 361 Pa. 607.

44 C.J. p 1169 note 40.

Breach of contract

Under statute requiring controller of city to countersign warrants for money out of treasury when satisfied of legality of payment, controller has neither right nor duty to determine whether a contract of the city is breached or whether a breach should be acted upon.—Duncan Meter Corp. v. Gritsavage, supra.

90. Colo.—Cross v. McNichols, 195 P.2d 975, 118 Colo. 442.

44 C.J. p 1169 note 41.

91. N.Y.—People v. Craig, 187 N.Y. S. 123, 114 Misc. 216.

Or.—Naylor v. McColloch, 103 P. 68, 54 Or. 305.

92. Or.—Naylor v. McColloch, supra.

93. Colo.—Cross v. McNichols, 195 P.2d 975, 118 Colo. 442.

44 C.J. p 1169 note 44.

94. Colo.—Cross v. McNichols, supra.

44 C.J. p 1169 note 45.

95. U.S.—City of Kingsville v. Meredith, C.C.A.Tex., 103 F.2d 279.

Ind.—State v. Abel, 178 N.E. 683, 203 Ind. 44.

Me.—Moores v. Inhabitants of Town of Springfield, 64 A.2d 569.

Okl.—Corpus Juris cited in County Excise Board v. Gulf Pipe Line Co., 9 P.2d 460, 464, 156 Okl. 103.

Tex.—City of San Antonio v. Cullen, Civ.App., 168 S.W.2d 882.

44 C.J. p 1169 note 63.

Interest warrants

Ky.—City of Jackson v. First Nat. Bank of Jackson, 157 S.W.2d 321, 289 Ky. 1.

96. U.S.—City of Kingsville v. Meredith, C.C.A.Tex., 103 F.2d 279.

Ky.—City of Jackson v. First Nat. Bank of Jackson, 157 S.W.2d 321, 289 Ky. 1.

Okl.—Board of Ed. of City of Willson, Carter County, v. Liberty Nat. Bank of Oklahoma City, 173 P.2d 450, 197 Okl. 596—Excise Board of Creek County v. Gulf Pipe Line Co. of Oklahoma, 9 P.2d 460, 156 Okl. 103.

Tex.—Nacogdoches County v. Lafferty, Com.App., 61 S.W.2d 994—City of San Antonio v. Cullen, Civ.App., 168 S.W.2d 882.

44 C.J. p 1169 note 64.

Ordinary borrowing and lending transaction

Ky.—City of Jackson v. First Nat.

Bank of Jackson, 157 S.W.2d 321, 289 Ky. 1.

97. U.S.—City of Kingsville v. Meredith, C.C.A.Tex., 103 F.2d 279.

Colo.—Georgetown v. Bank of Idaho Springs, 64 P.2d 132, 99 Colo. 519.

Ky.—City of Jackson v. First Nat. Bank of Jackson, 157 S.W.2d 321, 289 Ky. 1.

Me.—Moores v. Inhabitants of Town of Springfield, 64 A.2d 569.

Okl.—Board of Education of City of Willson, Carter County, v. Liberty Nat. Bank of Oklahoma City, 173 P.2d 450.

Tex.—Southwestern Lloyds v. City of Wheeler, 109 S.W.2d 739, 130 Tex. 492—City of Del Rio v. Lowe, Civ. App., 111 S.W.2d 1208, reversed on other grounds Lowe v. City of Del Rio, 122 S.W.2d 191, 132 Tex. 111.

44 C.J. p 1169 note 65.

98. Tex.—National Surety Co. v. State Trust & Savings Bank, 29 S. W.2d 1027, 119 Tex. 353—City of Edinburg v. Ellis, Com.App., 59 S.W.2d 99.

99. U.S.—City of West University Place v. Pleasant, C.C.A.Tex., 90 F. 2d 844—City of Sanford, Fla., v. Chase Nat. Bank of City of New York, C.C.A.N.Y., 50 F.2d 400, certiorari denied Chase Nat. Bank of City of New York v. City of Sanford, Fla., 52 S.Ct. 35, 284 U.S. 660, 76 L.Ed. 559.

Okl.—Corpus Juris cited in County Excise Board v. Gulf Pipe Line Co., 9 P.2d 460, 464, 156 Okl. 103.

Tex.—National Surety Co. v. State Trust & Savings Bank, 29 S.W.2d 1027, 119 Tex. 353—Corpus Juris cited in City of Dublin v. H. B. Thornton & Co., Civ.App., 60 S.W. 2d 302, 305.

44 C.J. p 1169 note 66.

Not judicial or quasi-judicial decision

Md.—Glessman v. Garrett County Com'rs, 44 A.2d 882, 185 Md. 350.

of ultra vires,¹ illegality,² fraud,³ want or failure of consideration,⁴ or any other defense which might be made to the claim on which the warrant was founded.⁵ Where the municipality has received no benefit or the consideration has failed, it is not estopped to impeach the warrant,⁶ but, where the municipality has power to issue the warrant and it receives the consideration therefor, the general rules as to estoppel may apply⁷ and the municipality may be estopped to assert that the warrants were not issued at the time⁸ or in the manner⁹ prescribed by the statute.

Recitals in warrants are prima facie correct,¹⁰ but it has been held that they are not conclusive and do not estop the municipality,¹¹ although it has also been held that recitals in warrants may be binding on the municipality¹² in the absence of fraud¹³ or knowledge on the part of purchasers of facts showing invalidity.¹⁴ It has been held that the action of the council in drawing a warrant is not conclusive,¹⁵ or even presumptive,¹⁶ evidence that there are sufficient funds lawfully available for payment; but it has also been held that a city, by drawing warrants against a fund composed largely of as-

City attorney's opinion, given to bank, certifying to legality of certificates of indebtedness issued by city, was held legally inefficacious where charter authorized giving such opinions only to city officials.—*City of Sanford, Fla., v. Chase Nat. Bank of City of New York, C.C.A.N.Y.*, 50 F.2d 400, certiorari denied *Chase Nat. Bank of City of New York v. City of Sanford, Fla.*, 52 S.Ct. 35, 284 U.S. 660, 76 L.Ed. 559.

Liquidated demand

Ga.—*City of Abbeville v. Eureka Fire Hose Mfg. Co.*, 170 S.E. 23, 177 Ga. 204.

1. U.S.—*City of Hughes Springs v. Lips, C.C.A.Tex.*, 118 F.2d 238—*City of Kingsville v. Meredith, C.C.A.Tex.*, 103 F.2d 279—*City of Sanford, Fla., v. Chase Nat. Bank of City of New York, D.C.N.Y.*, 44 F.2d 208, reversed on other grounds, C.C.A., 50 F.2d 400, certiorari denied *Chase Nat. Bank of City of New York v. City of Sanford, Fla.*, 52 S.Ct. 35, 284 U.S. 660, 76 L.Ed. 559.
44 C.J. p 1169 note 67.

2. Fla.—*Town of Blitho v. Bank of Commerce*, 110 So. 837, 92 Fla. 975.
Wyo.—*Peters & Co. v. Town of Rock River*, 260 P. 674, 37 Wyo. 225.

3. U.S.—*City of Kingsville v. Meredith, C.C.A.Tex.*, 103 F.2d 279.
Tex.—*City of Edinburg v. Ellis, Com.App.*, 59 S.W.2d 99.
Wyo.—*Peters & Co. v. Town of Rock River*, 260 P. 674, 37 Wyo. 225.
44 C.J. p 1169 note 68.

4. U.S.—*City of Kingsville v. Meredith, C.C.A.Tex.*, 103 F.2d 279—*City of West University Place v. Pleasant, C.C.A.Tex.*, 90 F.2d 844.
Tex.—*Jenkins Common School Dist. No. 17 v. Guaranty Bond State Bank, Civ.App.*, 103 S.W.2d 394—*City of Dublin v. H. B. Thornton & Co., Civ.App.*, 60 S.W.2d 302, error refused.
Wyo.—*Peters & Co. v. Town of Rock River*, 260 P. 674, 37 Wyo. 225.
44 C.J. p 1169 note 69.

Quit-claim deed

Tex.—*Atascosa County v. City of*

Pleasanton, Civ.App., 117 S.W.2d 484, error dismissed.

5. **Tex.**—*City of Edinburg v. Ellis, Com.App.*, 59 S.W.2d 99.
Wash.—*Adams County v. Ritzville State Bank*, 281 P. 332, 154 Wash. 140.

6. **Tex.**—*National Surety Co. v. State Trust & Savings Bank*, 29 S.W.2d 1027, 119 Tex. 353—*De Witt v. Kent County, Civ.App.*, 148 S.W.2d 213, error dismissed, judgment correct—*City of Del Rio v. Lowe, Civ.App.*, 111 S.W.2d 1208, reversed on other grounds *Lowe v. City of Del Rio*, 122 S.W.2d 191, 132 Tex. 111.

Forged warrant

Tex.—*National Surety Co. v. State Trust & Savings Bank*, 29 S.W.2d 1027, 119 Tex. 353.

7. U.S.—*City of Hughes Springs v. Lips, C.C.A.Tex.*, 118 F.2d 238.
Ark.—*Bank of Commerce v. Huddleston*, 291 S.W. 422, 172 Ark. 999, 50 A.L.R. 1202.
Tex.—*Payne v. First Nat. Bank of Columbus, Ohio, Com.App.*, 291 S.W. 209.

8. **Tex.**—*Payne v. First Nat. Bank of Columbus, Ohio, supra.*

9. U.S.—*Getz v. City of Harvey, C.C.A.Ill.*, 118 F.2d 817, certiorari denied *City of Harvey v. Getz*, 62 S.Ct. 59, two cases, 314 U.S. 628, 86 L.Ed. 504—*City of Kingsville v. Meredith, C.C.A.Tex.*, 103 F.2d 279.
Ark.—*Bank of Commerce v. Huddleston*, 291 S.W. 422, 172 Ark. 999, 50 A.L.R. 1202.

Knowledge of defect

U.S.—*City of Sanford, Fla., v. Chase Nat. Bank of City of New York, C.C.A.N.Y.*, 50 F.2d 400, certiorari denied *Chase Nat. Bank of City of New York v. City of Sanford, Fla.*, 52 S.Ct. 35, 284 U.S. 660, 76 L.Ed. 559.

10. U.S.—*City of West University Place v. Pleasant, C.C.A.Tex.*, 90 F.2d 844.

11. U.S.—*City of West University Place v. Pleasant, supra.*

Okl.—*Exchange Nat. Bank v. City of Garber*, 36 P.2d 11, 169 Okl. 83.

12. U.S.—*City of Kingsville v. Meredith, C.C.A.Tex.*, 103 F.2d 279—*City of Gainesville v. Brown-Crummer Inv. Co., C.C.A.Tex.*, 20 F.2d 497, reversed on other grounds 48 S.Ct. 454, 277 U.S. 54, 72 L.Ed. 781, conformed to, C.C.A., 31 F.2d 1009, certiorari denied 50 S.Ct. 27, 280 U.S. 569, 74 L.Ed. 622.

Tex.—*Payne v. Columbus First Nat. Bank, Com.App.*, 291 S.W. 209.
44 C.J. p 1169 note 72.

Lack of power

If the municipality is without power under any circumstances to issue the certificates, it may not be estopped from setting up its lack of power by any recitals in the instrument.—*City of Sanford, Fla., v. Chase Nat. Bank of City of New York, C.C.A.N.Y.*, 50 F.2d 400, certiorari denied *Chase Nat. Bank of City of New York v. City of Sanford, Fla.*, 52 S.Ct. 35, 284 U.S. 660, 76 L.Ed. 559.

Unauthorized recitals

Mayor and city clerk were held without authority, as respects certificates of indebtedness for improvements, to bind city by recitals therein, where certificates were not authorized by commission.—*City of Sanford, Fla., v. Chase Nat. Bank of City of New York, C.C.A.N.Y.*, 50 F.2d 400, certiorari denied *Chase Nat. Bank of City of New York v. City of Sanford, Fla.*, 52 S.Ct. 35, 284 U.S. 660, 76 L.Ed. 559.

13. U.S.—*City of Gainesville v. Brown-Crummer Inv. Co., C.C.A.Tex.*, 20 F.2d 497, reversed on other grounds 48 S.Ct. 454, 277 U.S. 54, 72 L.Ed. 781, conformed to, C.C.A., 31 F.2d 1009, certiorari denied 50 S.Ct. 27, 280 U.S. 569, 74 L.Ed. 622.

14. U.S.—*City of Sanford, Fla., v. Chase Nat. Bank of City of New York, C.C.A.N.Y.*, 50 F.2d 400, certiorari denied *Chase Nat. Bank of City of New York v. City of Sanford, Fla.*, 52 S.Ct. 35, 284 U.S. 660, 76 L.Ed. 559.

15. **Mich.**—*Niles Bryant School v. Bailey*, 126 N.W. 116, 161 Mich. 193.

16. **Mich.**—*Niles Bryant School v. Bailey, supra.*

assessments and judgments against itself as quasi owner of the streets and public squares, is estopped from denying the validity of those assessments and judgments.¹⁷ The form of a warrant attempting to carry on its face an agreement in accordance with an ordinance in effect prohibiting its acceptance as payment of debts due the city until previous warrants have been paid does not change its legal effect.¹⁸ In the absence of statute providing otherwise, the issuance of certificates of indebtedness does not impose a lien on any property or fund.¹⁹

Construction. General rules apply in the construction of municipal warrants and orders.²⁰ The owners and holders of warrants are chargeable with notice of the provisions of the statute under which the warrants were issued.²¹

§ 1896. Discounting

There is conflict of authority as to whether or not a municipal corporation may issue its warrants at a discount.

According to some authorities, a city may not issue its warrants or certificates of indebtedness at a discount²² in payment of a debt,²³ or for the purpose of borrowing money,²⁴ but it has also been held that a municipal corporation may issue and sell warrants at a discount,²⁵ and a municipality has been held liable for the face value of warrants sold at a discount not so great as to be unconscionable.²⁶

§ 1897. Interest

Unless prohibited from doing so by constitution, statute, or charter, a municipal corporation may lawfully contract to pay interest on its warrants or certificates of indebtedness.

It is sometimes expressly provided by statute, or ordinance that municipal corporations shall be liable for interest on their warrants or certificates of indebtedness.²⁷ Also, unless prohibited from doing so by constitution, statute, or charter,²⁸ a municipality may lawfully contract to pay interest on its warrants or certificates of indebtedness,²⁹ and, where it has agreed to do so, it will be held liable according to the terms of its agreement.³⁰ Interest is not allowable on a warrant or certificate of indebtedness expressly stipulating that it shall not draw interest,³¹ and interest is not allowable where a person has accepted a warrant and payment thereof in the face of an express declaration on the part of city officials that it will not draw interest,³² and with an express acknowledgment on his part that the warrant and amount received thereon are in payment of his demands;³³ nor, it has been held, does a warrant bear interest where it makes no provision for interest.³⁴

In any event, a municipal warrant generally draws interest from presentment or demand³⁵ where there is an express statutory provision or

17. U.S.—*Warner v. New Orleans*, La., 87 F. 829, 31 C.C.A. 238, affirmed *City of New Orleans v. Warner*, 20 S.Ct. 280, 176 U.S. 92, 44 L.Ed. 96.

18. Ark.—*Ex parte Willis*, 86 S.W. 300, 74 Ark. 498.

19. U.S.—*Whitaker & Co. v. Grable*, C.C.A.Ark., 109 F.2d 710.

20. Ill.—*Edward J. Berwind, Inc. v. Chicago Park Dist.*, 65 N.E.2d 785, 393 Ill. 317.

21. N.D.—*Marks v. City of Mandan*, 296 N.W. 34, 70 N.D. 434.

22. Ark.—*Pugh v. Little Rock*, 35 Ark. 75.

Wash.—*Million v. Soule*, 46 P. 284, 15 Wash. 261.

23. Wash.—*Arnott v. Spokane*, 33 P. 1053, 6 Wash. 442.

24. Wash.—*Arnott v. Spokane*, supra.

25. U.S.—*Tyler County v. Branch-Middlekauff Inv. Co.*, C.C.A.Tex., 20 F.2d 504—*City of Gainesville v. Brown-Crummer Inv. Co.*, C.C.A.Tex., 20 F.2d 497, reversed on other grounds 48 S.Ct. 454, 277 U.S. 54, 72 L.Ed. 781, conformed to, C.C.A., 31 F.2d 1009, certiorari denied 50 S.Ct. 27, 280 U.S. 569, 74 L.Ed. 622.

26. U.S.—*City of Gainesville v. Brown-Crummer Inv. Co.*, supra—*South Houston v. Carman*, C.C.A.Tex., 6 F.2d 358, certiorari denied 46 S.Ct. 22, 269 U.S. 563, 70 L.Ed. 413.

27. U.S.—*Drexel State Bank v. La Mours*, D.C.N.D., 207 F. 702, 44 C.J. p 1170 note 83.

Apportionment of interest

The statute relating to apportionment of interest by the state treasurer and the treasurer of each board of education, etc., refers only to warrants unpaid for want of funds.—*Mid-Continent Pipe Line Co. v. Seminole County Excise Board*, 146 F.2d 996, 194 Okl. 40.

28. Ark.—*Bank of Commerce v. Huddleston*, 291 S.W. 422, 172 Ark. 999, 50 A.L.R. 1202.

Cal.—*Voorhees v. Morse*, 34 P.2d 153, 1 Cal.2d 179.

44 C.J. p 1170 note 84.

29. Cal.—*Corpus Juris* cited in *Voorhees v. Morse*, 34 P.2d 153, 160, 1 Cal.2d 179.

Ky.—*City of Jackson v. First Nat. Bank of Jackson*, 157 S.W.2d 321, 389 Ky. 1.

Tex.—*Clark v. W. L. Pearson & Co.*, 32 S.W.2d 27, 121 Tex. 24.

44 C.J. p 1170 note 85.

30. Cal.—*Voorhees v. Morse*, 34 P.2d 153, 1 Cal.2d 179.

Ill.—*Merchants' Loan & Trust Co. v. Chicago*, 105 N.E. 726, 264 Ill. 76—*Harts v. Chicago*, 189 Ill.App. 119. Pa.—*Biddle, to Use of v. City of Philadelphia*, 33 Pa.Dist. & Co. 12, 44 C.J. p 1170 notes 86, 97 [a] (1).

Separate warrant for interest is not required.—*Voorhees v. Morse*, 34 P.2d 153, 1 Cal.2d 179.

Independent action for recovery of interest

Where the payment of interest is provided for by contract, an independent action for its recovery may be sustained notwithstanding payment of the principal as such has been made and accepted.—*Alabama City, etc., R. Co. v. Gadsden*, 64 So. 91, 135 Ala. 263, Ann.Cas.1916C 573.

31. Wash.—*University State Bank v. Bremerton*, 160 P. 439, 36 Wash. 261.

32. Pa.—*Weidner v. Reading*, 20 Pa. Dist. 721.

33. Pa.—*Weidner v. Reading*, supra.

34. Ky.—*City of Jackson v. First Nat. Bank of Jackson*, 157 S.W.2d 321, 289 Ky. 1.

44 C.J. p 1170 note 98.

35. Ky.—*City of Jackson v. First*

ordinance to that effect,³⁶ and even in the absence of a statute, ordinance, or agreement expressly so providing.³⁷ It has been held that the municipality is liable for interest where the basis of the recovery is tort, as where the municipality has misappropriated or diverted the special fund for payment of the warrants.³⁸

Interest on interest due has been allowed from the date of bringing suit.³⁹

§ 1898. Negotiability and Transfer

Municipal warrants are not negotiable instruments and are usually subject in the hands of a bona fide pur-

chaser to all defenses and equities that could have been set up against the original payee.

Municipal warrants or certificates of indebtedness are assignable choses in action,⁴⁰ but are not negotiable instruments in the sense of the law merchant,⁴¹ especially where they are payable out of a particular designated fund,⁴² and even where they are payable from a general fund,⁴³ or are in the ordinary form of commercial paper,⁴⁴ as where they are payable to order⁴⁵ or bearer.⁴⁶ They are transferable by assignment, delivery, or indorsement and delivery,⁴⁷ and the transferee may maintain an action thereon in his own name,⁴⁸ and payment to him

Nat. Bank of Jackson, 157 S.W.2d 321, 289 Ky. 1.

La.—Creole Steam Fire-Engine Co. v. New Orleans, 3 So. 177, 39 La. Ann. 981.

44 C.J. p 1170 note 96.

Presentment before maturity does not entitle holder of warrant to interest.—Soule v. Seattle, 33 P. 384, 1080, 6 Wash. 315.

Institution of action

The commencement of suit on a warrant has been held the equivalent of presentation or demand so as to entitle the holder to interest from such time.—New Orleans v. Warner, La., 20 S.Ct. 44, 175 U.S. 120, 44 L.Ed. 96.

Refusal to indorse date of presentation

The fact that the officer to whom the warrant is presented refuses to indorse thereon the date of presentation does not deprive the holder of the right to interest.

U.S.—New Orleans v. Warner, La., 20 S.Ct. 44, 175 U.S. 120, 44 L.Ed. 96.

Mont.—Territory v. Gilbert, 1 Mont. 371.

36. Pa.—Jaffola & Mark, to Use of Land, Title Bank & Trust Co. v. City of Philadelphia, 195 A. 877, 328 Pa. 436.

44 C.J. p 1171 note 98.

Acceptance "as cash"

Where city ordinances authorized payment of interest on city warrants unpaid because of lack of funds, an agreement of party contracting to do construction work for city that it would accept city warrants in payment "as cash" did not constitute an agreement that warrants should not bear interest, and assignee of warrants was not thereby precluded from recovering interest on warrants which were not paid when first presented because of lack of funds.—Jaffola & Mark, to Use of Land Title Bank & Trust Co. v. City of Philadelphia, supra.

37. Wash.—Seymour v. Spokane, 33 P. 832, 6 Wash. 362.

44 C.J. p 1170 note 92.

64 C.J.S.—30

38. U.S.—Norfolk & W. Ry. Co. v. Board of Education of City of Chicago, C.C.A.Ill., 114 F.2d 859.

39. Ala.—Alabama City, etc., R. Co. v. Gadsden, 64 So. 91, 185 Ala. 263, Ann.Cas.1916C 573.

40. N.D.—Dakota Trust Co. v. Hankinson, 205 N.W. 990, 53 N.D. 356.

Wash.—Barker v. Seattle, 166 P. 1143, 97 Wash. 511.

41. U.S.—City of Kingsville v. Meredith, C.C.A.Tex., 103 F.2d 279—Glover v. State Bank of Birds, C.C.A.Ill., 95 F.2d 151—City of West University Place v. Pleasant, C.C.A.Tex., 90 F.2d 844.

Fla.—Town of Bithlo v. Bank of Commerce, 110 So. 837, 92 Fla. 975.

Md.—Glessman v. Garrett County Com'rs, 44 A.2d 862, 185 Md. 350.

N.Y.—U. S. Pipe & Foundry Co. v. City of Hornell, 263 N.Y.S. 89, 146 Misc. 812.

Okl.—Sebring v. Fagin, 141 P.2d 792, 193 Okl. 142.

Pa.—Fischbach & Moore v. Philadelphia Nat. Bank, 3 A.2d 1011, 134 Pa.Super. 84.

Tex.—National Surety Co. v. State Trust & Savings Bank, 29 S.W.2d 1027, 119 Tex. 353—City of Edinburg v. Ellis, Com.App., 59 S.W.2d 99—City of Del Rio v. Lowe, Civ. App., 111 S.W.2d 1208, reversed on other grounds Lowe v. City of Del Rio, 122 S.W.2d 191, 132 Tex. 111—Jenkins Common School Dist. No. 17 v. Guaranty Bond State Bank, Civ.App., 103 S.W.2d 394.

44 C.J. p 1171 note 3.

Commercial paper

A warrant possesses none of the attributes of commercial paper, except the capacity of being transferred by delivery or assignment.

Mont.—Lillis v. City of Big Timber, 62 P.2d 219, 103 Mont. 206.

Okl.—Sebring v. Fagin, 141 P.2d 792, 193 Okl. 142.

44 C.J. p 1171 note 3.

42. Ill.—Edward J. Berwind, Inc. v. Chicago Park Dist., 65 N.E.2d 785.

393 Ill. 317—Kreiselman v. Stevens,

44 N.E.2d 873, 381 Ill. 73—Folkers v. Butzer, 13 N.E.2d 624, 294 Ill. App. 1—People ex rel. Nelson v. H. N. Schuyler State Bank, 278 Ill. App. 529.

Tex.—City of Dublin v. H. B. Thornton & Co., Civ.App., 60 S.W.2d 302, error refused.

44 C.J. p 1171 note 4.

43. Wash.—Matapan Nat. Bank v. Seattle, 197 P. 789, 115 Wash. 596.

44. Okl.—Sebring v. Fagin, 141 P.2d 792, 193 Okl. 142.

Tex.—Stratton v. Kinney County Comrs.' Ct., Civ.App., 137 S.W. 1170.

45. U.S.—Glover v. State Bank of Birds, C.C.A.Ill., 95 F.2d 151—City of West University Place v. Pleasant, C.C.A.Tex., 90 F.2d 844.

Okl.—Jack v. Wichita Nat. Bank, 89 P. 219, 17 Okl. 430.

46. U.S.—Glover v. State Bank of Birds, C.C.A.Ill., 95 F.2d 151—City of West University Place v. Pleasant, C.C.A.Tex., 90 F.2d 844.

44 C.J. p 1171 note 8.

47. U.S.—City of West University Place v. Pleasant, supra.

Mont.—Lillis v. City of Big Timber, 62 P.2d 219, 103 Mont. 206.

Okl.—Sebring v. Fagin, 141 P.2d 792, 193 Okl. 142.

Pa.—Fischbach & Moore v. Philadelphia Nat. Bank, 3 A.2d 1011, 134 Pa.Super. 84—O'Brien v. Radford, 171 A. 296, 113 Pa.Super. 88.

44 C.J. p 1171 note 9.

Special assignment not required

Pa.—Fischbach & Moore v. Philadelphia Nat. Bank, 3 A.2d 1011, 134 Pa.Super. 84.

48. U.S.—Glover v. State Bank of Birds, C.C.A.Ill., 95 F.2d 151.

44 C.J. p 1172 note 10.

Suit in payee's name

Holder may sue on warrant in payee's name to his use.—Fischbach & Moore v. Philadelphia Nat. Bank, 3 A.2d 1011, 134 Pa.Super. 84.

is a good payment.⁴⁹

Warrants are subject in the hands of a bona fide purchaser to all the defenses and equities that could have been set up against the original payee,⁵⁰ except in so far as the doctrine of estoppel is available.⁵¹ Some authorities assert broadly that a municipal warrant in the hands of a purchaser or assignee is subject to all defenses that may be urged against it,⁵² but other authorities hold that it is subject only to such defenses on the part of the city as existed at the time of the assignment⁵³ or before notice thereof.⁵⁴

General rules have been applied in the construction of a contract for the sale of warrants.⁵⁵ It is held that, in the absence of an express contract to the contrary, there is a warranty, implied by law, on the part of a seller of warrants that they are genuine and legal obligations⁵⁶ and are not, to his knowledge, subject to a set-off or counterclaim,⁵⁷ but the indorser of a warrant payable only from a particular fund is not liable under a statute imposing liability on the assignor of a nonnegotiable con-

tract for the payment of money.⁵⁸ It has been held that one indorsing a warrant and receiving payment guarantees the genuineness of all prior indorsements and the validity of the warrant.⁵⁹ Where a person selling warrants reserves all interest collected thereon, if any shall be paid, he may not recover such interest of the buyer without showing that it has been collected.⁶⁰

Power to issue negotiable warrants or certificates.

A municipal corporation is without power, in the absence of legislative authority either express or clearly implied, to issue negotiable warrants or certificates of indebtedness.⁶¹ In some cases it has been held that a constitutional or statutory provision expressly conferring power to issue certificates of indebtedness and contemplating that they may be sold for the purpose of raising money includes authority to issue them in negotiable form,⁶² since this is almost a condition precedent to obtaining a purchaser;⁶³ but in other cases it has been held that, although the statutes authorize the city to sell its warrants for cash,⁶⁴ the warrants are not negotiable

49. Pa.—Fischbach & Moore v. Philadelphia Nat. Bank, supra.

Warrant in negotiable form

Pa.—Fischbach & Moore v. Philadelphia Nat. Bank, supra.

50. U.S.—City of Hughes Springs v. Lips, C.C.A.Tex., 118 F.2d 238—City of Kingsville v. Meredith, C.C.A.Tex., 103 F.2d 279—Glover v. State Bank of Birds, C.C.A.Ill., 95 F.2d 151—City of West University Place v. Pleasant, C.C.A.Tex., 90 F.2d 844.

Fla.—Town of Bithlo v. Bank of Commerce, 110 So. 837, 92 Fla. 975 Md.—Glessman v. Garrett County Com'rs, 44 A.2d 862, 185 Md. 350.

Mo.—Tegethoff v. Sidmon, App., 158 S.W.2d 224.

Okl.—Exchange Nat. Co. v. City of Garber, 36 P.2d 11, 169 Okl. 83.

Tex.—Nacogdoches County v. Lafferty, Com.App., 61 S.W.2d 994—Jenkins Common School Dist. No. 17 v. Guaranty Bond State Bank, Civ. App., 108 S.W.2d 394.

Wyo.—Petters & Co. v. Town of Rock River, 260 P. 874, 37 Wyo. 225, 44 C.J. p 1172 note 11.

Negotiable Instruments Law

City or town "warrant," being non-negotiable, is not within protection which Negotiable Instrument Law affords innocent purchasers.—Petters & Co. v. Town of Rock River, supra.

51. Tex.—Payne v. Columbus First Nat. Bank, Com.App., 291 S.W. 209—City of Del Rio v. Lowe, Civ. App., 111 S.W.2d 1208, reversed on other grounds Lowe v. City of Del Rio, 122 S.W.2d 191, 132 Tex. 111.

Estoppel to impeach validity of warrant see supra § 1895.

Validity of incorporation

The municipality will not be permitted, as against a purchaser of the warrant, to attack the validity of its incorporation—Columbus First Nat. Bank v. North Pleasanton, Tex. Civ. App., 257 S.W. 609—44 C.J. p 1172 note 15.

52. Wash.—Matapan Nat. Bank v. Seattle, 197 P. 789, 115 Wash. 596, 44 C.J. p 1172 note 12.

53. Neb.—Union Nat. Bank of Fremont v. Village of Beemers, 244 N.W. 303, 123 Neb. 778, 44 C.J. p 1172 note 13.

54. Neb.—Union Nat. Bank of Fremont v. Village of Beemers, supra.

N.D.—Dakota Trust Co. v. Hankinson, 205 N.W. 990, 53 N.D. 356.

Imputed notice

Neb.—Union Nat. Bank of Fremont v. Village of Beemers, 244 N.W. 303, 123 Neb. 778.

55. U.S.—Fifth Third Union Trust Co. v. Continental Ill. Co., D.C.Ill., 81 F.Supp. 350.

56. N.D.—Hart v. Wyndmere, 131 N.W. 271, 21 N.D. 383, Ann.Cas.1913D 169.

57. N.D.—Hart v. Wyndmere, supra.

58. Idaho.—Hughes v. Nichols, 800 P. 361, 50 Idaho 722.

59. Tex.—National Surety Co. v. State Trust & Savings Bank, Civ. App., 17 S.W.2d 499.

Negligence and knowledge

(1) Foreman's indorsement of

names of fictitious payees constituted forgery, rendering bank which cashed warrants without investigation liable to surety protecting city against forgery for amount paid by city on bank's indorsement.—National Surety Co. v. State Trust & Savings Bank, supra.

(2) Negligence of city in delivering warrants to department foreman who forged payee's names did not prevent recovery against bank cashing warrants and obtaining reimbursement.—National Surety Co. v. State Trust & Savings Bank, supra.

(3) City's superintendent's knowledge that payees in warrants were fictitious persons entered by him on time sheet was held not imputable to city.—National Surety Co. v. State Trust & Savings Bank, 29 S.W.2d 1027, 119 Tex. 353.

60. La.—State v. New Orleans, 56 So. 433, 129 La. 537.

61. U.S.—Nashville v. Ray, Tenn., 19 Wall. 468, 22 L.Ed. 164, 44 C.J. p 1172 note 21.

Power to issue negotiable bonds, bills, and notes see *infra* § 1951.

62. U.S.—Denver v. Home Sav. Bank, Colo., 35 S.Ct. 265, 236 U.S. 101, 59 L.Ed. 485.

63. U.S.—Denver v. Home Sav. Bank, supra.

64. N.D.—State v. Hankinson, 205 N.W. 995, 53 N.D. 346.

44 C.J. p 1173 note 24.

instruments.⁶⁵

Warrant to municipality. It has been held that the treasurer of a municipality has no authority to assign a warrant drawn in his favor by a county auditor on the county treasurer for funds due the municipality;⁶⁶ nor can payment be legally made by the county treasurer of the warrant to any person but the duly authorized officer of the municipality.⁶⁷

§ 1899. Calling in, Refunding, or Reissuance

A municipal corporation may be authorized to call in its warrants for cancellation, reissuance, classification, or any lawful purpose.

Under some statutes a municipality may call in its outstanding warrants for cancellation,⁶⁸ reissuance,⁶⁹ classification,⁷⁰ or any lawful purpose.⁷¹ Such a statute is not retroactive so as to apply to warrants issued before its passage.⁷² A call made by de facto municipal officers is sufficient;⁷³ but the act of a city official in canceling certificates of city stock and issuing others therefor at the request of the transferee, without requiring proof of the genuineness of the transfer, is negligence rendering the city liable to one who advanced money on such new certificates, the indorsement of the transferee proving to be a forgery.⁷⁴

Refunding warrants are prima facie valid⁷⁵ and the burden is on the municipality to establish their invalidity.⁷⁶ In general the validity of warrants issued for the purpose of refunding other warrants depends on the validity of the original warrants,⁷⁷ but recitals in the refunding ordinance of the validity of the refunded warrants is sufficient to make

a prima facie case in this respect,⁷⁸ and it has been held that warrants issued in redemption of illegal scrip issued previously by the municipality in payment of bona fide debts are supported by a sufficient consideration⁷⁹ and are valid and binding.⁸⁰ A statute may require the reissuance of warrants which have been lost.⁸¹

General fund warrants issued as a substitute for warrants drawn on a special fund should be so drawn that when paid they will amount to no more than the amount for which the latter were drawn with simple interest thereon.⁸²

§ 1900. Payment

One accepting or purchasing a municipal warrant takes it subject to the mode of payment provided by the warrant or statute; a warrant payable from a special fund is payable only from that fund and does not impose a general or absolute liability on the municipal corporation.

A person accepting or purchasing a municipal warrant takes it subject to the mode of payment provided by the warrant or statute.⁸³ A warrant or certificate of indebtedness is a general obligation of the municipal corporation payable from its general funds where the warrant or certificate so provides⁸⁴ or where neither the warrant nor the statute contains provisions restricting to the contrary,⁸⁵ even though the warrant or certificate is issued to pay for improvements in connection with which the municipality levies a special assessment.⁸⁶ Both warrants and certificates of indebtedness may be made payable out of special funds,⁸⁷ and a warrant drawn on a particular fund is payable from that fund;⁸⁸ moreover the holder of the warrant is gen-

65. N.D.—Dakota Trust Co. v. Hankinson, 205 N.W. 990, 53 N.D. 356.

66. Ind.—Holtsclaw v. State, 92 N.E. 121, 46 Ind.App. 238.

67. Ind.—Holtsclaw v. State, supra.

68. Ark.—Eureka Fire Hose Co. v. Furry, 190 S.W. 427, 126 Ark. 231. 44 C.J. p 1173 note 26.

69. Ark.—Eureka Fire Hose Co. v. Furry, supra.

70. Ark.—Eureka Fire Hose Co. v. Furry, supra.

71. Ark.—Eureka Fire Hose Co. v. Furry, supra.

72. U.S.—Condon v. Eureka Springs, C.C.Ark., 135 F. 566.

73. Ark.—Eureka Fire Hose Co. v. Furry, 190 S.W. 427, 126 Ark. 231.

74. Md.—Metropolitan Sav. Bank v. Baltimore, 63 Md. 6.

75. U.S.—City of Belton v. Brown-Crummer Inv. Co., C.C.A.Tex., 17 F.2d 70.

Presumption of validity of warrants generally see supra § 1895.

76. U.S.—City of Belton v. Brown-Crummer Inv. Co., supra.

77. Tex.—Belton v. Harris Trust, etc., Bank, Civ.App., 273 S.W. 914, affirmed, Com.App., 283 S.W. 164.

78. Tex.—Belton v. Harris Trust, etc., Bank, supra.

79. Iowa—Clark v. Des Moines, 19 Iowa 199, 87 Am.D. 423.

80. Iowa—Clark v. Des Moines, supra.

81. Nev.—Hayes v. Davis, 46 P. 888, 23 Nev. 318.

82. Wash.—Portland Sav. Bank v. Montesano, 45 P. 158, 14 Wash. 570.

83. Colo.—Ostling v. People, 140 P. 173, 57 Colo. 22.

Okl.—Diggs v. Lobsitz, 43 P. 1069, 4 Okl. 232.

84. Minn.—Bergman v. Village of Golden Valley, Hennepin County, 275 N.W. 297, 201 Minn. 28.

Provision for payment out of funds not otherwise appropriated does not make the warrant one payable only from a special fund.—City of San Antonio v. Cullen, Tex.Civ App., 168 S.W. 2d 882.

85. Neb.—Daniels v. City of Gering, 265 N.W. 416, 130 Neb. 443.

86. Minn.—Bergman v. Village of Golden Valley, Hennepin County, 275 N.W. 297, 201 Minn. 28. Neb.—Daniels v. City of Gering, 265 N.W. 416, 130 Neb. 443.

87. Or.—Jones v. Portland, 58 P. 657, 35 Or. 512.

88. U.S.—Federal Deposit Ins. Corporation v. Casady, C.C.A.Okl., 106 F.2d 784.

Ill.—People ex rel. Gill v. Schiek, 14 N.E.2d 223, 368 Ill. 353.

A balance or surplus remaining in a fund at the close of a fiscal year may and should be used to pay warrants or certificates of indebtedness drawn against the fund.

erally required to look solely to the special fund for payment,⁸⁹ and payment may not be made from another fund,⁹⁰ and the city is not liable generally or absolutely to him,⁹¹ even though the remedy to collect from the special fund has been lost.⁹²

Warrants payable only from a particular fund are not contracts or promises to pay and the municipality is not indebted as a result of their issuance.⁹³ It has been held that, if the claim is a general and unconditional claim against the municipal-

ity, the fact that the warrant is drawn in form payable from a particular fund will not deprive the creditor of the right to enforce his claim as a general liability;⁹⁴ but it has also been held that a creditor by accepting the warrant drawn on the particular fund impliedly agrees to rely solely on the warrant and on the fund provided for its payment.⁹⁵ In any event, the city is liable to the warrant holder where it has diverted or misappropriated the special fund.⁹⁶

Iowa.—Peairs v. Des Moines, 191 N. W. 136, 196 Iowa 1222.

R.I.—Hardy v. Lee, 90 A. 383, 36 R.I. 302.

89. U.S.—Norfolk & W. Ry. Co. v. Board of Education of City of Chicago, D.C.Ill., 14 F.Supp. 475, modified on other grounds, C.C.A., Board of Education of City of Chicago v. Norfolk & W. Ry. Co., 88 F.2d 462, appeal dismissed Norfolk & W. Ry. Co. v. Board of Education of City of Chicago, 102 F.2d 1008.

Ill.—People ex rel. Schlaeger v. Frankenstein & Co., 72 N.E.2d 340, 396 Ill. 524—People ex rel. Toman v. Chicago & N. W. Ry. Co., 37 N.E.2d 169, 377 Ill. 547.

N.D.—Stutsman v. Arthur, 16 N.W. 2d 449, 73 N.D. 504, 158 A.L.R. 924.

44 C.J. p 1173 note 47.

90. Ill.—People ex rel. Gill v. Schiek, 14 N.E.2d 223, 368 Ill. 353. Minn.—Judd v. City of St. Cloud, 272 N.W. 577, 198 Minn. 590.

Tex.—City of Seymour v. Municipal Acceptance Corporation, Civ.App., 96 S.W.2d 814, error dismissed.

91. U.S.—Norfolk & W. Ry. Co. v. Board of Education of City of Chicago, D.C.Ill., 14 F.Supp. 475, modified on other grounds, C.C.A., Board of Education of City of Chicago v. Norfolk & W. Ry. Co., 88 F.2d 462, appeal dismissed Norfolk & W. Ry. Co. v. Board of Education of City of Chicago, 102 F.2d 1008.

Idaho.—Hughes v. Nichols, 300 P. 361, 50 Idaho 722—Hughes v. Village of Wendell, 275 P. 1116, 47 Idaho 370.

Ill.—People ex rel. Reconstruction Finance Corporation v. Board of Education of City of Chicago, 54 N.E.2d 508, 386 Ill. 522, certiorari denied 65 S.Ct. 70, 323 U.S. 783, 89 L.Ed. 588, rehearing denied 65 S.Ct. 115, 323 U.S. 814, 89 L.Ed. 648—Leviton v. Board of Education of City of Chicago, 80 N.E.2d 497, 374 Ill. 594—People ex rel. Toman v. M. Born & Co., 26 N.E.2d 848, 378 Ill. 490—People ex rel. Lindheimer v. Axelrod, 26 N.E.2d 512, 373 Ill. 446—People ex rel. Gill v. Hamilton, 9 N.E.2d 243, 366 Ill. 455.

Minn.—Judd v. City of St. Cloud, 272 N.W. 577, 198 Minn. 590.

N.D.—Stutsman v. Arthur, 16 N.W.2d 449, 73 N.D. 504, 158 A.L.R. 924—Schieber v. City of Mohall, 268 N.W. 445, 66 N.D. 593. 44 C.J. p 1173 note 48.

Liability imposed by statute

(1) The legislature may by statute render the city liable either generally or for certain deficiencies arising in special assessment funds.—Marks v. City of Mandan, 296 N.W. 39, 70 N.D. 474.

(2) Where city organized a water district and a sewer district with authority to construct improvements, levy assessments, and issue warrants, city became liable for any deficiency that might arise in the special assessment funds created for the payment of such warrants.—Gunderson v. Maides, 3 N.W.2d 236, 71 N.D. 561.

(3) Statutes providing for creation of municipal revolving fund to insure payment of warrants issued by special improvement districts held not invalid.—Stanley v. Jeffries, 284 P. 134, 86 Mont. 114, 70 A.L.R. 166.

92. Minn.—Judd v. City of St. Cloud, 272 N.W. 577, 198 Minn. 590. 44 C.J. p 1173 note 49.

Exhaustion of fund

Where a municipal warrant is payable out of a particular fund, payment thereof is rightfully refused when there is no money belonging to such fund in the municipal treasury.—Affeld v. Detroit, 71 N.W. 151, 112 Mich. 560—44 C.J. p 1173 note 46.

93. Idaho.—Hughes v. Nichols, 300 P. 361, 50 Idaho 722.

94. Cal.—Argenti v. San Francisco, 16 Cal. 255—Newton v. Brodie, 290 P. 1058, 107 Cal.App. 512.

Iowa.—Clark v. Des Moines, 19 Iowa 199, 87 Am.D. 423.

Void warrant

Mo.—Jensen v. Willson Tp., Gentry County, 145 S.W.2d 872, 846 Mo. 1199.

Tex.—Southwestern Lloyds v. City of Wheeler, 109 S.W.2d 739, 130 Tex. 492.

95. Ill.—People ex rel. Toman v. M. Born & Co., 26 N.E.2d 848, 373 Ill. 490—People ex rel. Toman v. Crane,

23 N.E.2d 337, 373 Ill. 228—Diamond v. Commissioner of Highways of Town of Ottawa, 9 N.E.2d 197, 366 Ill. 503.

Discharge of liability on claim

Ill.—People ex rel. Lindheimer v. Axelrod, 26 N.E.2d 512, 373 Ill. 446—People ex rel. Toman v. Crane, 23 N.E.2d 337, 372 Ill. 228—Diamond v. Commissioner of Highways of Town of Ottawa, 9 N.E.2d 197, 366 Ill. 503—Berman v. Board of Education of City of Chicago, 196 N.E. 464, 360 Ill. 835, 99 A.L.R. 1029.

96. U.S.—Board of Education of City of Chicago v. Norfolk & W. Ry. Co., C.C.A.Ill., 88 F.2d 462, appeal dismissed Norfolk & W. Ry. Co. v. Board of Education of City of Chicago, 102 F.2d 1008.

Ill.—Edward J. Berwind, Inc. v. Chicago Park Dist., 65 N.E.2d 785, 393 Ill. 317.

Mont.—Blackford v. City of Libby, 62 P.2d 216, 103 Mont. 272, 107 A.L.R. 1348.

Wash.—State ex rel. Rand v. City of Seattle, 124 P.2d 207, 13 Wash.2d 107.

44 C.J. p 1173 note 51.

Trust fund

Neb.—Havelock Nat. Bank v. Northport Irr. Dist., 298 N.W. 695, 139 Neb. 747.

Treasurer's misappropriation

(1) Where the special fund is diverted or misappropriated by the treasurer, the city is liable to warrant holders.—Blackford v. City of Libby, 62 P.2d 216, 103 Mont. 272, 107 A.L.R. 1348—44 C.J. p 1173 note 51 [a].

(2) However, a city is not liable in trover to the holder of its warrants, issued without authority and to pay a debt which it could not legally contract, because its treasurer, having collected a tax pledged to the payment of such warrants, has diverted it to other purposes.—Schulenburg, etc., Lumber Co. v. East St. Louis, 63 Ill.App. 214.

Exhaustion of fund

Where a city treasurer has properly received money belonging to a certain fund and has improperly and wrongfully paid it out, he cannot refuse payment on the ground that

According to some,⁹⁷ but not other,⁹⁸ authorities, the municipality is liable generally to the warrant holder where it has failed to create, collect, and provide the special fund. It has been held that a municipality, by drawing a warrant against a particular fund, does not impliedly warrant the existence of such a fund,⁹⁹ so as to impose any additional obligation on it.¹ Sometimes, however, a statute requiring a city to create a fund for the purpose of guaranteeing the payment of special improvement warrants is mandatory,² and by its terms requires the creation of a guaranty fund for the payment of warrants issued and outstanding before,³ as well as those issued after,⁴ the passage of the act. Where void city warrants are ratified by vote of the people, the city council cannot provide for their payment out of a fund other than that on which they are drawn, without creating such a fund.⁵

Duty to pay. Unless ordered by the municipality to refuse payment,⁶ a municipal treasurer is bound to pay on presentation a municipal warrant where he has funds in his hands which may properly be used for that purpose⁷ and the warrant is lawful on its face,⁸ as where it is drawn in proper form⁹ and is issued¹⁰ and signed¹¹ by the proper officers, and presented by the proper person.¹²

What constitutes. Where a city treasurer pays out city money to obtain city warrants from the holders thereof, his mere intent afterward to reissue

them cannot defeat the city's right to treat them as paid.¹³ However, there is no payment or extinguishment of a municipal warrant where it is acquired by a bank, which is a depositary of the fund against which the warrant is drawn, by paying for it with its own funds, and the amount thereof is not withdrawn from, or charged to, the fund.¹⁴ Where it is not provided that interest-bearing warrants shall run any stated time, a payment prior to the expiration of the time it is assumed or estimated that they will run does not violate any contractual right.¹⁵

Amount. Where there are sufficient funds for payment, the holder of a municipal warrant is ordinarily entitled to receive, and the municipality or its treasurer is bound to pay, the principal of the warrant¹⁶ and interest thereon,¹⁷ but no more.¹⁸ In some jurisdictions it is held that a city treasurer, having in his hands money sufficient to pay part, although not all, of the amount of a warrant, may be compelled to pay part;¹⁹ but in other jurisdictions it is held that the treasurer may not be compelled to make a partial payment of a warrant,²⁰ although he is directed to do so by the city council.²¹

Medium of payment; receipt for taxes. Warrants are usually payable in lawful money of the United States, but, in the absence of prohibitory legislation, they may be made payable in gold coin.²² Except where it is expressly provided by statute that warrants shall be receivable in payment of all

there is no money in his possession belonging to such fund.—*Northampton First Nat. Bank v. Arthur*, 54 P. 1107, 12 Colo.App. 90.

Loss of bank deposits

City warrants regularly issued by the proper officers and in the hands of innocent purchasers are not affected by the subsequent loss of bank deposits applicable to their payment, arising from the insolvency of the bank.—*New York Security, etc., Co. v. Tacoma*, 57 P. 810, 21 Wash. 303.

97. *Neb.—Chaffee v. City of Omaha*, 16 N.W.2d 852, 145 Neb. 418—*Miller v. City of Scottsbluff*, 276 N.W. 158, 133 Neb. 547.

N.D.—*Marks v. City of Mandan*, 396 N.W. 39, 170 N.D. 474—*Grand Lodge, A. O. U. W., v. City of Bottineau*, 227 N.W. 363, 58 N.D. 740. 44 C.J. p 1174 note 53.

98. *Wash.—Barker v. Seattle*, 166 P. 1143, 97 Wash. 511.

99. *U.S.—Peake v. New Orleans, C. C.La.*, 38 F. 779, affirmed 11 S.Ct. 541, 139 U.S. 342, 35 L.Ed. 181.

1. *U.S.—Peake v. New Orleans, supra*.

2. *Utah.—Deseret Sav. Bank v. Francis*, 217 P. 1114, 62 Utah 85.

3. *Utah.—Deseret Sav. Bank v. Francis, supra*.

4. *Utah.—Deseret Sav. Bank v. Francis, supra*.

5. *Wash.—La France Fire-Engine Co. v. Davis*, 38 P. 154, 9 Wash. 600.

6. *Neb.—State v. Cook*, 61 N.W. 693, 48 Neb. 318.

7. *Mont.—State v. McCarthy*, 282 P. 1045, 86 Mont. 100.

44 C.J. p 1173 note 40.

8. *Mont.—State v. McCarthy, supra* Pa.—*Chester v. Paxson*, 76 Pa.Super. 40.

9. *Mont.—State v. McCarthy*, 282 P. 1045, 86 Mont. 100. 44 C.J. p 1173 note 42.

10. *Pa.—Hoffacker v. Hanover Borough*, 25 Pa.Dist. 960.

11. *Pa.—Bailey v. Philadelphia*, 31 A. 925, 167 Pa. 569, 46 Am.S.R. 691. 44 C.J. p 1178 note 44.

12. *Mont.—State v. McCarthy*, 282 P. 1045, 86 Mont. 100.

13. *Wash.—Beardsley v. Sternberg*, 49 P. 499, 17 Wash. 243.

14. *U.S.—Maryland Fidelity, etc., Co. v. Cleburne, C.C.A.Tex.*, 296 F.

643, affirmed 46 S.Ct. 99, 269 U.S. 534, 70 L.Ed. 398.

44 C.J. p 1174 note 60.

15. *Wash.—Kenyon v. Spokane*, 48 P. 783, 17 Wash. 57.

16. *Cal.—Jordan v. Hubert*, 54 Cal. 260.

17. *Cal.—Jordan v. Hubert, supra*. Interest generally see *supra* § 1897.

Where the fund is insufficient to pay all outstanding warrants, interest should not be paid.—*State v. New Orleans*, 56 So. 433, 129 La. 537.

18. *Okl.—Seymour v. Oklahoma City*, 134 P. 45, 38 Okl. 547, 47 L.R.A.N.S. 702. 44 C.J. p 1174 note 64.

19. *Wash.—Potter v. Black*, 45 P. 787, 15 Wash. 186.

20. *Or.—State v. Grant*, 49 P. 855, 31 Or. 370.

21. *Or.—State v. Grant, supra*.

22. *Mass.—Foote v. Salem*, 14 Allen 87.

Wash.—Kenyon v. Spokane, 48 P. 783, 17 Wash. 57.

taxes²³ and debts²⁴ due the municipality, as well as in payment of fines and forfeitures imposed in criminal proceedings,²⁵ it would seem that a municipal corporation could not be required to receive its warrants in payment of taxes due to it.²⁶

Priorities and order of payment. In the absence of a statute or ordinance expressly providing in what order municipal warrants shall be paid, the officer whose duty it is to pay them does not possess absolute discretion with regard to the order of payment,²⁷ but they should be paid in the order either of their date or of the time of their presentation for payment.²⁸ It is within the power of the legislature to prescribe the order of payment of municipal warrants;²⁹ but the law in force when they are issued creates a contract for precedence with the warrant holders which may not be impaired³⁰ by subsequent legislation;³¹ and, of course, a municipality may not by ordinance change the provi-

sions of a statute.³²

Different statutes or ordinances variously provide, or at times have provided, for the payment of municipal warrants in the order of their issuance,³³ presentation,³⁴ or registration,³⁵ and it is sometimes held that each warrant holder is entitled to his pro rata share of the fund and that there are no priority rights.³⁶ The order of payment prescribed by law must be followed³⁷ regardless of whether or not the holders of particular warrants have been more diligent than others in pursuing their judicial remedies.³⁸ A municipality which fails to follow the regular order of payment is liable to a warrant holder damaged thereby,³⁹ and the same is true where the municipality pays other warrant holders more than their pro rata share of the fund.⁴⁰

In order to render the municipality liable on this ground, it is necessary and sufficient to show that the payments made exhausted the fund so as to

Payment by worthless draft

N.Y.—U. S. Pipe & Foundry Co. v. City of Hornell, 263 N.Y.S. 89, 146 Misc. 812.

23. Kan.—Thorpe v. Cochran, 52 P. 107, 7 Kan App 726.

44 C.J. p 1167 note 17, p 1168 note 18.

24. Ark.—White v. State, 11 S.W. 765.

44 C.J. p 1167 note 17, p 1168 note 19.

25. Ark.—Lusk v. Perkins, 2 S.W. 847, 48 Ark 238.

44 C.J. p 1167 note 17, p 1168 note 20.

26. La.—State v. Pillsbury, 29 La Ann. 787.

27. Colo.—Northampton First Nat. Bank v. Arthur, 50 P. 738, 10 Colo. App. 283.

Wash.—La France Fire-Engine Co. v. Davis, 38 P. 154, 9 Wash. 600.

28. Wash.—Bardsley v. Sternberg, 52 P. 251, 18 Wash. 612—La France Fire-Engine Co. v. Davis, 38 P. 154, 9 Wash. 600.

Payment in order of accrual need not be made.—Murrell v. City of Sapulpa, 297 P. 241, 148 Okl. 16.

29. Minn.—Buhl First Nat. Bank v. Buhl, 186 N.W. 306, 151 Minn. 206.

Municipal ordinance when not in conflict with statute may fix order of payment.

Cal.—Voorhees v. Morse, 34 P.2d 153, 1 Cal.2d 179.

Idaho.—First Nat. Bank v. City of Caldwell, 78 P.2d 1098, 58 Idaho 752.

30. Iowa.—Phillips v. Reed, 80 N.W. 347, 109 Iowa 188.

31. U.S.—Board of Education of City of Chicago v. Norfolk & Western Ry. Co., C.C.A.III., 88 F.2d 462, appeal dismissed Norfolk & W. Ry.

Co. v. Board of Education of City of Chicago, 102 F.2d 1008.

44 C.J. p 1174 note 79.

32. U.S.—Intermela v. Perkins, Wash., 205 F. 603, 123 C.C.A. 619, certiorari denied 34 S.Ct. 824, 231 U.S. 757, 58 L.Ed. 468.

N.M.—Raton Waterworks Co. v. Raton, 49 P. 898, 9 N.M. 70.

33. Idaho.—First Nat. Bank v. City of Caldwell, 78 P.2d 1098, 58 Idaho 752.

Ill.—Edward J. Berwind, Inc., v. Chicago Park Dist., 65 N.E.2d 785, 393 Ill. 317.

44 C.J. p 1175 note 81.

Repeal by implication

An ordinance requiring warrants to be redeemed in the order of their number and date is not repealed by an ordinance apportioning the revenue raised for distinct funds and providing for its disbursement.—Eidemiller v. Tacoma, 44 P. 877, 14 Wash. 376.

34. Minn.—Buhl First Nat. Bank v. Buhl, 186 N.W. 306, 151 Minn. 206.

44 C.J. p 1175 note 82

Maturity and presentation

N.D.—First Nat. Bank of Buffalo v. Ford, 293 N.W. 789, 70 N.D. 284.

35. Cal.—Corpus Juris cited in Voorhees v. Morse, 34 P.2d 153, 161, 1 Cal.2d 179.

Neb.—Havelock Nat. Bank v. Northport Irr. Dist., 298 N.W. 695, 189 Neb. 747.

44 C.J. p 1175 note 83.

Notice

Neb.—Havelock Nat. Bank v. Northport Irr. Dist., supra.

Ordinance held valid

Colo.—Georgetown v. Bank of Idaho Springs, 64 P.2d 132, 99 Colo. 519.

36. U.S.—Board of Education of City of Chicago v. Norfolk & W. Ry. Co., C.C.A.III., 88 F.2d 462, appeal dismissed Norfolk & W. Ry. Co. v. Board of Education of City of Chicago, 102 F.2d 1008.

Ky.—The Maccabees v. City of Ashland, 109 S.W.2d 29, 270 Ky. 86.

37. U.S.—Intermela v. Perkins, Wash., 205 F. 603, 123 C.C.A. 619, certiorari denied 34 S.Ct. 824, 231 U.S. 757, 58 L.Ed. 468.

38. Wash.—State v. Hardcastle, 124 P. 110, 68 Wash. 548.

44 C.J. p 1175 note 85.

39. Wash.—Northwestern Lumber Co. v. Aberdeen, 60 P. 1115, 22 Wash. 404.

40. U.S.—Board of Education of City of Chicago v. Norfolk & Western Ry. Co., C.C.A.III., 88 F.2d 462, appeal dismissed Norfolk & W. Ry. Co. v. Board of Education of City of Chicago, 102 F.2d 1008.

Ill.—South East Nat. Bank of Chicago v. Board of Education of City of Chicago, 18 N.E.2d 599, 298 Ill. App. 621—South East Nat. Bank of Chicago v. Board of Education of City of Chicago, 18 N.E.2d 601, 298 Ill. App. 621—South East Nat. Bank of Chicago v. Board of Education of City of Chicago, 18 N.E.2d 602, 603, 298 Ill. App. 621—South East Nat. Bank of Chicago v. Board of Education of City of Chicago, 18 N.E.2d 603, 298 Ill. App. 621.

Separate liability to each warrant holder

Ill.—South East Nat. Bank of Chicago v. Board of Education of City of Chicago, 18 N.E.2d 594, 298 Ill. App. 92.

leave other warrants unpaid,⁴¹ and that, if the regular order had been followed, the warrant in question would have been paid,⁴² or, in other words, that the fund in question was sufficient to pay the warrant in question and all warrants prior thereto.⁴³ It has been held that a city council may not divide the amount levied for general city purposes into separate funds and appropriate it to the payment of warrants issued in any particular year, so as to deprive the holder of warrants on the general fund, issued the year previous, of the right to apply the same to the payment of his city taxes as he has a right to do by statute.⁴⁴ Under some statutes, where warrants are issued in connection with an improvement, priority is given to those warrants issued for the costs and expenses of making and levying the assessment and letting the contract.⁴⁵

§ 1901. Actions

The holder of a dishonored warrant or certificate of indebtedness may maintain an action at law against the municipal corporation or enjoin or impose liability for a threatened or actual diversion of the fund provided for payment of the warrants or certificates.

The remedies open to the holder of a dishonored warrant or certificate of indebtedness are: (1) An action at law against the corporation.⁴⁶ (2) Man-

damus against the fiscal officers to compel payment, or against the council to compel a levy to satisfy it, as discussed in *Mandamus* §§ 148, 182. (3) An action to enjoin the diversion to other purposes of moneys applicable to the payment of the warrant where such diversion is threatened or to impose liability on the municipal corporation for such diversion where it occurs.⁴⁷ It is sometimes held that a cause of action does not exist against a city on a warrant until a fund for its payment has been collected,⁴⁸ and a fund for payment of municipal warrants must be provided by the municipality before the statute begins to run in favor of the municipality against an action thereon,⁴⁹ although it has also been held that the fact that there are no funds in the treasury for the payment of the warrant will not prevent the holder from suing thereon.⁵⁰

Except in a few jurisdictions,⁵¹ the presentation of a municipal order or warrant for payment is a condition precedent to the institution of an action thereon,⁵² unless the circumstances are such that a presentation would be futile.⁵³ The holder of void certificates of indebtedness must exhaust his contractual remedies before he may sue for damages.⁵⁴ A municipal treasurer, lawfully investing municipal funds in municipal warrants, may maintain an

41. Wash.—*Matapan Nat. Bank v. Seattle*, 197 P. 789, 115 Wash. 596—*Quaker City Nat. Bank v. Tacoma*, 67 P. 710, 27 Wash. 259.

42. Wash.—*Ames v. Seattle*, 104 P. 199, 55 Wash. 222.

43. Wash.—*Perkins v. Sidney*, 175 P. 301, 103 Wash. 595, 597.
44 C.J. p 1175 note 89.

44. S.D.—*Western Town-Lot Co. v. Lane*, 62 N.W. 982, 7 S.D. 1.

45. Ill.—*Langworthy v. Village of Oak Lawn*, 3 N.E.2d 293, 286 Ill. App. 236.

46. U.S.—*Raton Waterworks Co. v. Town of Raton, N.M.*, 19 S.Ct. 719, 174 U.S. 360, 43 L.Ed. 1005.
Idaho.—*Corpus Juris* cited in *Tingwall v. King Hill Irr. Dist.*, 155 P. 2d 605, 606, 66 Idaho 76.
44 C.J. p 1175 note 92.

Quantum meruit

Holders of warrants issued by city for street paving and other improvements could sue on such warrants, notwithstanding merely formal and procedural defects therein, where city and bondholders were estopped from denying liability, as against contention that suit should be on quantum meruit for value received.—*City of Kingsville v. Meredith*, C.C.A. Tex., 103 F.2d 279.

47. Ill.—*Edward J. Berwind, Inc. v.*

Chicago Park Dist., 65 N.E.2d 785, 393 Ill. 317.

44 C.J. p 1175 note 95.

Accounting

Ill.—*Edward J. Berwind, Inc. v. Chicago Park Dist.*, 65 N.E.2d 785, 393 Ill. 317.

Representative action

Ill.—*South East Nat Bank of Chicago v. Board of Education of City of Chicago*, 18 N.E.2d 599, 298 Ill. App. 621—*South East Nat. Bank of Chicago v. Board of Education of City of Chicago*, 18 N.E.2d 601, 298 Ill. App. 621—*South East Nat Bank of Chicago v. Board of Education of City of Chicago*, 18 N.E.2d 602, 298 Ill. App. 621—*South East Nat. Bank of Chicago v. Board of Education of City of Chicago*, 18 N.E.2d 603, 298 Ill. App. 621—*South East Nat. Bank of Chicago v. Board of Education of City of Chicago*, 18 N.E.2d 584, 298 Ill. App. 92.

Presentation of claim

Wash.—*State ex rel. Rand v. City of Seattle*, 124 P.2d 207, 13 Wash 2d 107—*Perkins v. South Bend*, 233 P. 655, 133 Wash. 349.

Laches

Holder of municipal tax anticipation warrant which commenced suit for proration of taxes collected immediately after notice of ownership of warrants and demand for pro rata payment on discovery that fund rea-

lized from taxes would be insufficient to discharge warrants and that warrants were being paid in full in numerical order was held not guilty of laches or estopped to maintain suit.—*Board of Education of City of Chicago v. Norfolk & Western Ry. Co.*, C.C.A.Ill., 88 F.2d 462, appeal dismissed *Norfolk & W. Ry. Co. v. Board of Education of City of Chicago*, 102 F.2d 1008.

48. Colo.—*Ostling v. People*, 140 P. 173, 57 Colo. 22.

49. Okl.—*Case v. Pinnick*, 97 P.2d 58, 186 Okl. 217.

44 C.J. p 1469 note 16.

Accrual of action on municipal warrant see *Limitations of Actions* § 148.

Limitations of action see *Limitations of Actions* § 57.

50. Okl.—*Corpus Juris* cited in *Case v. Pinnick*, 97 P.2d 58, 60, 186 Okl. 217.

44 C.J. p 1175 note 97.

51. N.Y.—*Read v. Buffalo*, 67 Barb. 526, affirmed 74 N.Y. 463.

52. Okl.—*Sulphur v. State*, 162 P. 744, 62 Okl. 312.

44 C.J. p 1175 note 99.

53. Ind.—*Connersville v. Connersville Hydraulic Co.*, 86 Ind. 184.

Okl.—*Sulphur v. State*, 162 P. 744, 62 Okl. 312.

54. La.—*Newgass v. New Orleans*, 9 So. 25, 43 La. Ann. 78.

action against the municipality to collect the warrants.⁵⁵

Pleading. In an action on a municipal warrant, the petition or complaint must allege facts sufficient to show that plaintiff is entitled to the judgment demanded.⁵⁶ It is necessary to allege presentation and demand⁵⁷ or facts excusing a lack thereof.⁵⁸ An allegation that there is money in the fund on which the warrant was drawn is necessary where the warrant was drawn on a special fund,⁵⁹ but not where it was drawn on the general fund.⁶⁰ In an action based on the diversion of a special fund by the payment out of their order of subsequent warrants, the diversion of sufficient money to have paid all warrants drawn on the special funds, which were prior to those held by plaintiff, must be alleged.⁶¹ It is not necessary to set forth the consideration of a warrant, where by statute it is a negotiable instrument.⁶²

It is necessary to allege the council proceedings by which the person signing warrants became acting mayor.⁶³ An allegation that warrants were registered according to law at the date of presentation is not a mere legal conclusion,⁶⁴ but an allegation that the warrants sued on were given in lieu and substitution of other valid warrants is a mere conclusion of the pleader⁶⁵ and is not sufficient to take the place of an allegation of facts showing that

the warrants were valid and legal obligations of the city.⁶⁶ Where it is claimed that warrants are invalid because the city had exceeded its constitutional limit of indebtedness, the court may not consider, on demurrer to the petition, financial statements of city showing indebtedness not contained in the petition.⁶⁷ It is incumbent on the city to plead such defenses as it wishes to assert,⁶⁸ but a defense that the issuance of the warrants was unauthorized may be raised under a general denial.⁶⁹

Issues and evidence. The holder of the warrant must establish the validity of the warrant.⁷⁰ The holder of a municipal order or warrant payable from the proceeds of a special assessment has the burden of proving that the city has collected the fund⁷¹ and either has it in its possession⁷² or has wrongfully diverted or misapplied it;⁷³ but an indorsee may recover against the indorser of a municipal warrant payable "out of any funds belonging to the city, not before specially appropriated," without proving that funds were appropriated for its payment⁷⁴ and were in the treasury.⁷⁵ Consideration for a warrant need not be proved,⁷⁶ as one will be presumed;⁷⁷ and, where the city pleads failure of consideration, it has the burden of proving its plea.⁷⁸ Where the execution of the warrant or certificate is not denied under oath, it is not necessary to prove the authority of the officers issuing or signing it.⁷⁹

55. U.S.—Federal Deposit Ins. Corporation v. Casady, C.C.A. Okl., 106 F.2d 784.

Okl.—City of Wilburton v. King, 18 P.2d 1075, 162 Okl. 32.

Real party in interest

Okl.—City of Wilburton v. King, supra.

56. Neb.—Miller v. City of Scottsbluff, 265 N.W. 415, 130 Neb. 440. 44 C.J. p 1176 note 3.

Compliance with statutes

Tex.—City of Wheeler v. Southwestern Lloyds, Civ.App., 81 S.W.2d 188.

57. Ky.—Farmers' Bank v. Wickliffe, 112 S.W. 835, 129 Ky. 679. 44 C.J. p 1176 note 4.

58. Ky.—Farmers' Bank v. Wickliffe, supra.

59. Colo.—Travelers' Ins. Co. v. Denver, 18 P. 556, 11 Colo. 434.

60. Ind.—Connersville v. Connersville Hydraulic Co., 86 Ind. 184. Wis.—Reeve v. Oshkosh, 33 Wis. 477.

61. Wash.—Northwestern Lumber Co. v. Aberdeen, 77 P. 1063, 35 Wash. 636.

62. Colo.—Travelers' Ins. Co. v. Denver, 18 P. 556, 11 Colo. 434.

63. Wash.—Stephens v. Spokane, 39 P. 266, 11 Wash. 41.

64. S.D.—Freeman v. Huron, 73 N. W. 260, 10 S.D. 368.

65. Tex.—American Roads Mach. Co. v. Ballinger, Civ.App., 210 S. W. 265.

66. Tex.—American Roads Mach. Co. v. Ballinger, supra.

67. Iowa.—Phillips v. Reed, 80 N. W. 347, 109 Iowa 188.

68. Ill.—Merchants' Loan & Trust Co. v. Chicago, 182 Ill.App. 298, affirmed 105 N.E. 726, 264 Ill. 76. 44 C.J. p 1176 note 15.

69. Tex.—Southwestern Lloyds v. City of Wheeler, 109 S.W.2d 739, 130 Tex. 492.

70. Tex.—City of Wheeler v. Southwestern Lloyds, Civ.App., 81 S.W. 2d 188.

Compliance with statutes

Tex.—City of Wheeler v. Southwestern Lloyds, Civ.App., 81 S.W.2d 188, affirmed Southwestern Lloyds v. City of Wheeler, Com.App., 109 S.W.2d 739.

71. Ill.—Inter Ocean Newspaper Co. v. West Hammond, 189 Ill.App. 110.

72. Ill.—Inter Ocean Newspaper Co. v. West Hammond, supra—Marysville v. Schoonover, 78 Ill.App. 189.

73. Ill.—Inter Ocean Newspaper Co.

v. West Hammond, 189 Ill.App. 110.

74. N.Y.—Bull v. Sims, 23 N.Y. 570.

75. N.Y.—Bull v. Sims, supra.

76. Pa.—O'Donnell v. Philadelphia, 2 Brewst. 481.

77. Ky.—City of Jackson v. First Nat. Bank of Jackson, 157 S.W.2d 321, 289 Ky. 1.

Pa.—O'Donnell v. Philadelphia, 2 Brewst. 481.

Interest

Ky.—City of Jackson v. First Nat. Bank of Jackson, 157 S.W.2d 321, 289 Ky. 1.

78. U.S.—Denver v. Home Sav. Bank, Colo., 200 F. 28, 118 C.C.A. 256, affirmed 35 S.Ct. 265, 236 U.S. 101, 59 L.Ed. 485.

Burden of overcoming prima facie case of validity see supra § 1895.

Burden of showing illegality of consideration is on municipality.—City of Jackson v. First Nat. Bank of Jackson, 157 S.W.2d 321, 289 Ky. 1.

79. Ill.—Merchants' Loan & Trust Co. v. Chicago, 182 Ill.App. 298, affirmed 105 N.E. 726, 264 Ill. 76. 44 C.J. p 1176 note 25.

General rules have been applied as to the admissibility⁸⁰ and weight and sufficiency⁸¹ of the evidence. In order to establish the invalidity of a warrant as in excess of the municipality's revenue, it must appear that at the time of its issuance the municipality had already expended or contracted to expend its entire revenue,⁸² and evidence that warrants were issued in excess of revenue is insufficient to establish the invalidity of any particular warrant.⁸³

Trial and judgment. General rules as to trial, as that issues of fact are for the jury, have been applied in actions on warrants.⁸⁴ In an action by a purchaser of municipal warrants it is permissible for the court to inquire into the whole transaction between the original parties⁸⁵ and determine whether charter provisions were observed in issuing the warrant.⁸⁶ On the other hand, the validity of certificates of indebtedness may not be determined where they have been negotiated and the holders thereof are not before the court.⁸⁷ Where warrants issued in payment of indebtedness exceeding the constitutional limit are void, as discussed *supra* § 1834, a judgment entered against the city on the warrants where the parties know of the excessive is-

sue and purposely acquiesce in the entry of the judgment in order to impose the illegal indebtedness on the municipality is also void;⁸⁸ but the fact that the warrants on which a judgment is entered against a city were issued in excess of the constitutional limit does not alone render the judgment invalid;⁸⁹ the judgment may be valid where it is entered in pursuance of a compromise stipulation made without fraud or collusion.⁹⁰

A finding that, when a certain warrant was issued, the city had exceeded the constitutional limit of indebtedness does not show that such limit was reached when the indebtedness was incurred for which the warrant was issued,⁹¹ and does not establish the invalidity of the warrant.⁹² An action based on municipal warrants is not an action based on contract within a statute relating to judgments against a municipality.⁹³ A warrant holder may not obtain a general or absolute judgment against the municipality on a warrant payable from a particular fund where the fund is insufficient.⁹⁴ The municipality may maintain an action to set aside a consent judgment based on warrants which did not authorize the entry of such judgment.⁹⁵

80. S.D.—Blackman v. Hot Springs, 85 N.W. 996, 14 S.D. 497.

Nonprejudicial error

S.D.—Blackman v. Hot Springs, *supra*.
44 C.J. p 1176 note 26 [a].

81. Ky.—City of Jackson v. First Nat. Bank of Jackson, 157 S.W.2d 321, 289 Ky. 1.

Evidence held sufficient

(1) To support verdict or finding.
Ky.—City of Jackson v. First Nat. Bank of Jackson, *supra*.
Minn.—Judd v. City of St. Cloud, 272 N.W. 577, 198 Minn. 590.
N.D.—Hart v. Wyndmere, 131 N.W. 271, 21 N.D. 383, Ann.Cas.1913D 169.
Tex.—Aransas Pass v. Eureka Fire Hose Mfg. Co., Civ.App., 227 S.W. 330.

(2) To show good faith and due diligence in presenting warrant for payment.—U. S. Pipe & Foundry Co. v. City of Hornell, 263 N.Y.S. 89, 146 Misc. 812.

Evidence held insufficient

(1) To overcome presumption of validity of warrant.—City of Belton v. Brown-Crummer Inv. Co., C.C.A. Tex., 17 F.2d 70.

(2) To show warrant invalid.—Georgetown v. Bank of Idaho Springs, 64 P.2d 132, 99 Colo. 519.

82. Ky.—City of Jackson v. First Nat. Bank of Jackson, 157 S.W.2d 321, 289 Ky. 1.

83. Ky.—City of Jackson v. First Nat. Bank of Jackson, *supra*.

84. Tex.—Southwestern Lloyds v. City of Wheeler, 109 S.W.2d 739, 130 Tex. 492.

Peremptory instruction held proper
Ky.—City of Ravenna v. Boyer Fire Apparatus Co., 291 S.W. 782, 218 Ky. 429.

85. Or.—Clatskanie State Bank v. Ranier, 143 P. 909, 72 Or. 243.
Availability against purchaser of defenses against original payee see *supra* § 1898.

86. Or.—Clatskanie State Bank v. Ranier, *supra*.

87. La.—National Iron Works v. Monroe, 53 So. 563, 127 La. 276.

88. Iowa.—Rankin v. Chariton, 139 N.W. 560, 141 N.W. 424, 160 Iowa 265.

89. Iowa.—Rankin v. Chariton, *supra*.

90. Iowa.—Rankin v. Chariton, *supra*.

91. S.D.—Western Town-Lot Co. v. Lane, 65 N.W. 17, 7 S.D. 599.

92. S.D.—Western Town-Lot Co. v. Lane, *supra*.

93. Okl.—Kansas City Southern Ry. Co. v. Excise Board of Le Flore County, 33 P.2d 493, 168 Okl. 408.
—Protest of St. Louis-San Francisco Ry. Co., 11 P.2d 189, 157 Okl. 131.—Excise Board of Creek County v. Gulf Pipe Line Co. of Oklahoma, 9 P.2d 460, 156 Okl. 103.

94. N.D.—Bankers' Trust, etc., Bank v. Anamoose, 200 N.W. 103, 51 N.D. 596.
44 C.J. p 1173 note 48 [a].

95. Ill.—Village of Hartford v. First Nat. Bank of Wood River, 30 N.E.2d 524, 307 Ill.App. 447.

Laches

A consent judgment could not change the character of the right of the village from a "public right," to a "private right" so as to make applicable the doctrine of laches, and hence bank could not set up defense of laches in action by village against bank to have the judgment set aside.—Village of Hartford v. First Nat. Bank of Wood River, *supra*.

C. BONDS AND OTHER SECURITIES, AND SINKING FUNDS

1. POWER TO ISSUE

a. In General

§ 1902. Bonds

- a. Definitions and distinctions
- b. General considerations
- c. Constitutional, statutory, or charter provisions

a. Definitions and Distinctions

A municipal bond is an agreement by a municipal corporation to pay to the holder of the bond a certain specified amount at a designated future time, and to pay interest thereon. A bond and a note or certificate of indebtedness may have in common the promise of the municipal corporation to pay the face thereof plus interest, but they usually differ in the term of the obligation and the source from which payment is to be made.

A municipal bond is an agreement by a municipal corporation to pay to the holder of the bond a certain specified amount⁹⁶ at a designated future time,⁹⁷ and to pay interest annually or semiannually.⁹⁸ In its ordinary commercial sense, it is a negotiable bond⁹⁹ issued by a municipal corporation to secure its indebtedness.¹ The term itself imports a municipal debt or obligation;² and, in legislative usage, it ordinarily connotes bonded indebtedness.³ Municipal bonds are evidences of indebtedness⁴ intended for sale in the market with the object of raising money for municipal improvements, the expense of which is beyond the immediate resources of reasonable taxation, and payment of which necessarily or logically should be distributed over a period of years.⁵

Negotiable coupon bonds, within the meaning of a statute authorizing the issuance thereof by cities, are bonds with coupons attached to the face thereof indicating interest due on the face of the bonds.⁶

A serial bond, within the contemplation of a statute providing for its issuance by a municipality, is a loan of money by the holder of the bond to the corporate body issuing it.⁷

Temporary evidences of debt distinguished. Municipal bonds are, in nature and purpose, distinguishable from temporary evidences of debt, such as vouchers, certificates of indebtedness, orders, or drafts drawn by one officer on another, and similar devices for liquidating current obligations in anticipation of the collection of taxes.⁸ As used in some statutes authorizing the issuance thereof by municipalities, bonds and certificates of indebtedness may have in common the promise of the municipal corporation to pay the face thereof plus interest at a specified rate,⁹ but differ in that usually bonds are long-term, and certificates are short-term, obligations¹⁰ and in that certificates are issued in anticipation of the revenues to be derived from taxes already levied, while bonds are evidences of debt usually paid by levies of future taxes.¹¹ However, there is nothing inherent in the words "bonds" and "certificates of indebtedness" which makes them in every case either synonymous or different in mean-

96. U.S.—Judith Basin Irr. Dist. v. Malott, C.C.A.Mont., 78 F.2d 142, 97 A.L.R. 504.

Instruments held bonds within meaning of statute.—City of Cascade Locks v. Carlson, 90 P.2d 787, 161 Or. 557.

97. Conn.—City of Stamford v. Town of Stamford, 141 A. 891, 107 Conn. 596.

Ohio.—Muskingum County v. State, 85 N.E. 562, 78 Ohio St. 287.

Provisions in bond for payment see infra § 1941.

98. Ohio.—Muskingum County v. State, supra.

42 C.J. p 1414 note 34 [a].

Provisions in bond as to interest see infra § 1940.

99. Conn.—City of Stamford v. Town of Stamford, 141 A. 891, 107 Conn. 596.

42 C.J. p 1414 note 33.

Negotiability see infra § 1950.

1. Ohio.—Muskingum County v. State, 85 N.E. 562, 78 Ohio St. 287. 42 C.J. p 1414 note 34.

Nature of funding or refunding bonds see infra § 1910.

2. Wash.—State v. Clausen, 82 P. 187, 40 Wash. 95, 107.

42 C.J. p 1414 note 35.

3. U.S.—Bank of Burlington v. City of Murphysboro, C.C.A.Ill., 96 F. 2d 899.

4. Conn.—City of Stamford v. Town of Stamford, 141 A. 891, 107 Conn. 596.

Ohio.—Muskingum County v. State, 85 N.E. 562, 78 Ohio St. 287.

5. Conn.—City of Stamford v. Town of Stamford, 141 A. 891, 107 Conn. 596.

Provisions in bond as to maturity see infra § 1941.

Sale or disposition of bonds by municipality see infra §§ 1930-1934.

Bond issue is usually intended to be distributed among a number of investors and to run over a period of years.—Alabama Power Co. v. City of Scottsboro, 190 So. 412, 238 Ala. 230—Parsons v. City of Birmingham, 137 So. 665, 228 Ala. 610.

6. N.M.—Munro v. City of Albuquerque, 93 P.2d 993, 43 N.M. 334.

7. Okl.—Joint School Dist. No. 132 in Major County and Alfalfa County v. Dabney, 260 P. 486, 127 Okl. 234.

8. Conn.—City of Stamford v. Town of Stamford, 141 A. 891, 107 Conn. 596.

9. N.D.—Tracy v. Barnes County, 289 N.W. 377, 69 N.D. 602.

10. N.M.—Bachechi v. Albuquerque, 234 P. 400, 29 N.M. 572.

N.D.—Tracy v. Barnes County, 289 N.W. 377, 69 N.D. 602.

11. N.D.—Tracy v. Barnes County, supra.

ing;¹² and in order to determine their meaning it is necessary to look to the context and the circumstances in which the words are used.¹³

A note does not have the status and dignity of a bond,¹⁴ and is clearly distinguishable therefrom in that it is usually issued and made payable to a single lender or investor and matures at an earlier date.¹⁵ Instruments which are notes in form and which recite that they are notes will not be treated as bonds;¹⁶ but notes which are bonds in everything except name should be deemed to be bonds.¹⁷

The real distinguishing feature between a bond and a tax anticipation note is that the former represents a primary obligation of the municipality to the payment of which its general credit is pledged, while the latter is but an obligation payable out of a particular fund.¹⁸

b. General Considerations

In the absence of a constitutional provision granting the power, municipal corporations may not issue bonds unless the power to do so is conferred by legislative authority.

Except where, as discussed infra subdivision c of

this section, power to issue bonds is granted directly to municipal corporations by a constitutional provision, municipalities cannot issue bonds or other like securities unless the power to do so is conferred by legislative authority, either express or clearly implied,¹⁹ and any doubt as to the existence of such power ought to be resolved against its existence.²⁰ The power may not be implied merely from the ordinary powers of a municipal corporation;²¹ and there is some authority for the view that the authority of a municipal corporation to issue bonds will not be implied, but must be expressly granted.²²

Bonds issued by a municipality having no power to issue them are not voidable,²³ but void.²⁴

Implication from power to contract. It has been held that power conferred on a municipality to make contracts necessarily includes authority to issue bonds,²⁵ and that power to issue bonds may be implied from power given to a municipality to contract debts.²⁶ On the other hand, where the corporation has no power to incur a particular indebtedness, it has no power to issue a bond therefor.²⁷

Implication from power to borrow money. It has been both affirmed²⁸ and denied²⁹ that authority to

12. N.D.—Tracy v. Barnes County, supra.

13. N.D.—Tracy v. Barnes County, supra.
Whether provisions authorizing refunding of bonds apply to certificates of indebtedness see infra § 1910 c.

Revenue certificates held not bonds Fla.—State v. City of Fort Lauderdale, 5 So.2d 263, 149 Fla. 177.

14. Fla.—Ginsburg v. City of Daytona Beach, 137 So. 253, 103 Fla. 168.

15. Ala.—Alabama Power Co. v. City of Scottsboro, 190 So. 412, 238 Ala. 230—Parsons v. City of Birmingham, 137 So. 665, 223 Ala. 610.

16. Tex.—Tyler v. Jester, 78 S.W. 1058, 97 Tex. 344.

17. S.C.—Bolton v. Wharton, 161 S. E. 454, 163 S.C. 242, 86 A.L.R. 1101.

18. S.C.—Bolton v. Wharton, supra.
19. Kan.—School Dist. No. 6, Chase County, v. Robb, 93 P.2d 905, 150 Kan. 402, 124 A.L.R. 879.

Okl.—Corpus Juris quoted in City of Chickasha v. Foster, 48 P.2d 289, 292, 173 Okl. 217, certiorari denied Foster v. City of Chickasha, Okl., 56 S.Ct. 179, 296 U.S. 643, 80 L.Ed. 457.

Wyo.—Corpus Juris quoted in Lakota Gas & Oil Co. v. City of Casper, 116 P.2d 861, 867, 57 Wyo. 329.
44 C.J. p 1177 note 41.

City council has no authority under its own powers to issue bonds.

—Bolton v. Wharton, 161 S.E. 454, 163 S.C. 242, 86 A.L.R. 1101.

Municipality is without inherent power to issue bonds.—People ex rel. City of Rock Island v. Rudgren, 38 N.E.2d 723, 378 Ill. 408—44 C.J. p 1177 note 41 [a].

Bonds not authorized by any statute are not enforceable as bonds.—Sanders v. City of Coleman, 196 So. 822, 143 Fla. 455.

Consideration of powers connected with taxation

In considering implied power of municipality to issue bonds, the rule restricting powers to those expressly or impliedly granted, or indispensable to municipality's declared objects and purposes, should be read in light of the taxing power conferred on municipal corporations and the power to use funds raised by taxes to pay bonds.—State ex rel. Curators of University of Mo. v. McReynolds, 193 S.W.2d 611, 354 Mo 1199.

20. Kan.—School Dist. No. 6, Chase County, v. Robb, 93 P.2d 905, 150 Kan. 402, 124 A.L.R. 879.

Okl.—Corpus Juris quoted in City of Chickasha v. Foster, 48 P.2d 289, 292, 173 Okl. 217, certiorari denied Foster v. City of Chickasha, Okl., 56 S.Ct. 179, 296 U.S. 643, 80 L.Ed. 457.

Wyo.—Corpus Juris quoted in Lakota Oil & Gas Co. v. City of Casper, 116 P.2d 861, 867, 57 Wyo. 329.

44 C.J. p 1177 note 42.

Clear and manifest legal right to do so must appear when any political subdivision of county undertakes, through its constituted authorities, to exercise power of incurring bonded indebtedness.—Nelms v. Stephens County School Dist., 39 S.E.2d 651, 201 Ga. 274.

21. Ill.—People ex rel. City of Rock Island v. Rudgren, 38 N.E.2d 723, 378 Ill. 408.

22. Iowa.—Van Eaton v. Town of Sidney, 231 N.W. 476, 211 Iowa 986, 71 A.L.R. 820.

Or.—Fullerton v. Central Lincoln People's Utility Dist., 201 P.2d 524

23. Iowa.—Williamson v. Keokuk, 44 Iowa 88.

24. Fla.—State v. Greer, 102 So. 739, 88 Fla. 249, 37 A.L.R. 1298.
44 C.J. p 1226 note 82.

25. Ga.—Black v. Cohen, 52 Ga. 621.
44 C.J. p 1177 note 44.

26. Ky.—Fidelity Trust, etc., Co. v. Morganfield, 29 S.W. 442, 96 Ky. 563.
44 C.J. p 1177 note 45.

27. U.S.—John Hancock Mut. Life Ins. Co. v. Huron, C.C.S.D., 80 F. 552, affirmed 100 F. 1001, 40 C.C. A. 683.
44 C.J. p 1177 note 46.

28. Ill.—Dutton v. Aurora, 28 N.E. 461, 114 Ill. 138.
44 C.J. p 1177 note 47.

29. Mich.—Corpus Juris quoted in

issue bonds may be implied from power to borrow money.

Nature of power. The right of a municipality to issue bonds is not a political³⁰ or governmental³¹ power, but is rather a private³² corporate³³ power conferred for local purposes.³⁴ The issuance of general bonds to be paid for by general taxation is, however, recognized as a governmental act.³⁵

c. Constitutional, Statutory, or Charter Provisions

A municipal corporation has such power to issue bonds as is conferred on it by constitutional provisions or valid statutory provisions. The enactment of a new statute on the subject, after all preliminary steps and proceedings for the issuance of bonds have been taken, does not prevent the execution, sale, and delivery of the bonds.

Some constitutional provisions empower municipal corporations, or certain classes thereof, to issue bonds³⁶ or empower the legislature to enact laws

authorizing municipalities, or certain classes thereof, to do so.³⁷ Also, authority to issue bonds may be granted to municipalities by charter, or statute,³⁸ but such charter or statute must be passed in accordance with constitutional requirements³⁹ and must not violate constitutional provisions;⁴⁰ and, while a municipality possesses such power to issue bonds as is conferred on it by valid statutes⁴¹ or by the state constitution and statutes,⁴² such power is not unrestricted, but is subject to constitutional and statutory limitations.⁴³ Where a housing authority is considered not to be a municipal corporation, it is not subject to constitutional restrictions on the power of municipal corporations to issue bonds.⁴⁴

It has been held in some decisions that statutes relating to the issuance of municipal bonds should be construed strictly against the municipality,⁴⁵ while it has also been held that the statutes should

Bond v. Cowan, 261 N.W. 331, 332, 272 Mich. 296.

44 C.J. p 1177 note 48.

30. Ariz.—Blount v. MacDonald, 155 P. 736, 18 Ariz. 1.

31. Ariz.—Blount v. MacDonald, supra.

32. Ariz.—Blount v. MacDonald, supra.

33. Ariz.—Blount v. MacDonald, supra.

34. Ariz.—Blount v. MacDonald, supra.

35. Ohio.—Pierce v. City of Hamilton, 178 N.E. 432, 40 Ohio App. 338.

36. Ark.—El Dorado v. Jacobs, 294 S.W. 411, 174 Ark. 98.

44 C.J. p 1177 note 55.

37. Ala.—Coleman v. Eutaw, 47 So. 703, 157 Ala. 327.

44 C.J. p 1178 note 56.

38. Fla.—State v. City of Tampa, 3 So.2d 484, 148 Fla. 6.

44 C.J. p 1178 note 57.

Legislature has inherent power to authorize municipalities to issue bonds—State v. City of Tampa, supra.

39. U.S.—Amoskeag Nat. Bank v. Ottawa, Ill., 105 U.S. 667, 26 L.Ed. 1204.

N.C.—Debnam v. Chitty, 43 S.E. 3, 131 N.C. 657.

40. Fla.—State v. City of Tampa, 3 So.2d 484, 148 Fla. 6.

44 C.J. p 1178 note 61.

There are implied organic limitations on the power of legislature to authorize municipalities to issue bonds—State v. City of Tampa, supra.

Constitutional provisions held not violated

Fla.—Klemm v. Davenport, 129 So. 904, 100 Fla. 627, 70 A.L.R. 156.

Ga.—Cochran v. City of Thomasville, 146 S.E. 462, 167 Ga. 579.

Okl.—Armstrong v. Sewer Imp. Dist. No. 1, Tulsa County, 199 P.2d 1012, reversed on other grounds 207 P.2d 917—Joint School Dist. No. 132 in Major County and Alfalfa County v. Dabney, 260 P. 486, 127 Okl. 234.

Or.—State ex rel. First Nat. Bank v. Melville, 41 P.2d 1071, 149 Or. 532.

44 C.J. p 1178 note 61 [a].

41. Ill.—Tribune Co. v. Thompson, 174 N.E. 561, 342 Ill. 503.

44 C.J. p 1178 note 57 [a], [b].

Incidental power

In the absence of explanatory or qualifying language, a legislative grant of authority to a municipality to issue bonds carries with it, as a necessary incident, the power to make the bonds a charge on the general credit of the municipality.—Bank of Burlington v. City of Murphysboro, C.C.A.Ill., 96 F.2d 899.

42. S.C.—Bolton v. Wharton, 161 S. E. 454, 163 S.C. 242, 86 A.L.R. 1101.

43. Pa.—Clark v. City of Philadelphia, 196 A. 384, 328 Pa. 521, 115 A.L.R. 212.

Limitations of amount see *infra* §§ 1911–1914.

Object of, and duty of court to enforce, restraints

Constitutional and statutory restraints on the power of municipal corporations to issue bonds are intended for the protection of minorities, for the protection of posterity, and for the protection of majorities against their own improvidence, and it is the court's duty to enforce them.—Raynor v. King County, 97 P.

2d 696, 2 Wash.2d 199—State ex rel. Potter v. King County, 88 P. 935, 45 Wash. 519.

Organic limitations on taxing powers of a municipality may limit or control the power of the municipality to issue bonds which are to be paid through exercise of the power of taxation—State ex rel. Davis v. Ryan, 158 So. 62, 118 Fla. 42.

Serial or other bonds

(1) Under some statutes a municipality may issue no bonds except serial bonds.—Bolton v. Wharton, 161 S.E. 454, 163 S.C. 242, 86 A.L.R. 1101.

(2) A court has refused to sustain an objection to debentures payable serially that the pertinent statute only authorizes term obligations.—Davis v. City of Melbourne, 170 So. 836, 126 Fla. 282.

Express limitations

It has been held that power to issue bonds conferred on a city in general terms by constitution and statute is subject to only such limitations as are expressly imposed by law.—People v. Chicago, etc., R. Co., 139 N.E. 2, 308 Ill. 54—44 C.J. p 1178 note 62.

44. La.—State ex rel. Porterle v. Housing Authority of New Orleans, 182 So. 725, 190 La. 710.

45. Conn.—Rule v. City of Stamford, 185 A. 178, 121 Conn. 447.

Ind.—Read v. Abe Rosenblum & Sons, 58 N.E.2d 376, 115 Ind.App. 200.

44 C.J. p 1178 note 63.

Uniform Bond Act must be strictly construed and a substantial compliance therewith is insufficient—State v. Rees, 183 N.E. 432, 125 Ohio St. 578.

receive a liberal construction⁴⁶ so as to promote their objects and purposes,⁴⁷ and according to still other authority pertinent constitutional and statutory provisions should be construed more strictly in considering the legality of a proposed bond issue than in determining the validity of bonds already issued and disposed of.⁴⁸ Different sections of the same statute are to be construed together.⁴⁹ Also, statutes dealing with the same subject matter and not in conflict with each other, but enacted for different objects, should be read together in order to arrive at the full legislative intention.⁵⁰ The legislative intent in enacting a statute dealing with interest on municipal bonds may be gathered from the statute as originally enacted and not from an amendment of the statute.⁵¹

Repeal or change. The general rules relating to the repeal of constitutional or statutory provisions by subsequent provisions are applicable in determining whether constitutional or statutory provisions authorizing the issuance of municipal bonds have been repealed by subsequent provisions.⁵² It is a general principle of law that municipal bonds must be issued in conformity with the statute in force at the time of issuance.⁵³ However, this doctrine cannot be effectively invoked to destroy vested rights⁵⁴ or to impair the obligation of contracts,⁵⁵

and an exception to the rule may arise by virtue of a saving clause in a charter or statute.⁵⁶ It has been held that the passage of a statute relating to the issuance of bonds nullifies all pending proceedings for a bond issue;⁵⁷ but a statute may expressly validate all proceedings previously taken under a prior statute⁵⁸ and require only subsequent proceedings to be taken in accordance with the new act.⁵⁹ The passage of a statute after all preliminary steps and proceedings for the issuance of bonds have been taken does not prevent the issuance,⁶⁰ execution,⁶¹ and sale⁶² of the bonds, or performance of a contract to sell.⁶³

§ 1903. Stock

Municipal stock may be issued in pursuance of statutory authority.

When authorized to do so by statute, a municipal corporation may issue stock of the corporation.⁶⁴

§ 1904. Bills and Notes

The authority, if any, of a municipal corporation to issue notes must be expressly or impliedly conferred, and is not inherent.

While a municipal corporation may, under the express provisions of a statute, have authority to issue notes,⁶⁵ within the limitations provided by

46. Mich.—In re School Dist. No. 6, Paris and Wyoming Tps., Kent County, 278 N.W. 792, 284 Mich. 132.

44 C.J. p 1178 note 64.

47. N.Y.—Anderson v. Potsdam, 203 N.Y.S. 220, 122 Misc. 437.

44 C.J. p 1178 note 65.

Presumption of definite purpose

A presumption exists that the legislature had a definite purpose in passing statute regulating issuance of bonds by municipalities of state.—In re School Dist. No. 6, Paris and Wyoming Tps., Kent County, 278 N.W. 792, 284 Mich. 132.

48. N.D.—Stern v. Fargo, 122 N.W. 403, 18 N.D. 289, 26 L.R.A., N.S., 665.

49. Fla.—Lasseter v. State, 64 So. 847, 67 Fla. 240.

Tex.—Fisher v. City of Bartlett, Civ. App., 76 S.W.2d 535, error dismissed.

50. Kan.—Loe v. Palco, 178 P. 299, 103 Kan. 287.

Okl.—McGrath v. Oklahoma City, 9 P.2d 711, 156 Okl. 34.

51. Cal.—Martinez v. Johnson, 257 P. 853, 201 Cal. 397.

52. U.S.—City of Mobile v. Marx & Co., C.C.A. Ala., 75 F.2d 569.

Nev.—State ex rel. Cooper v. Reese, 59 P.2d 647, 57 Nev. 125.

Va.—Ennis v. Town of Herndon, 191 S.E. 685, 168 Va. 539.

44 C.J. p 1178 note 71.

Statutes held repealed

Nev.—State ex rel. Cooper v. Reese, 59 P.2d 647, 57 Nev. 125.

44 C.J. p 1178 note 71 [c].

Statutes held not repealed

U.S.—City of Mobile v. Marx & Co., C.C.A. Ala., 75 F.2d 569.

Mont.—Montana-Dakota Utilities Co. v. City of Havre, 94 P.2d 660, 109 Mont. 164.

44 C.J. p 1178 note 71 [d].

Constitutional amendments held impliedly repealed by subsequent amendment

Ark.—Chesshir v. Copeland, 32 S.W. 2d 301, 182 Ark. 425—Babb v. El Dorado, 278 S.W. 649, 170 Ark. 10.

53. Neb.—State v. Marsh, 176 N.W. 92, 104 Neb. 159—Morgan v. Falls City, 174 N.W. 421, 103 Neb. 795.

54. Neb.—State v. Marsh, 176 N.W. 92, 104 Neb. 159.

55. Neb.—State v. Marsh, supra.

56. Mich.—Detroit v. Engel, 173 N.W. 547, 207 Mich. 106.

Neb.—Morgan v. Falls City, 174 N.W. 421, 103 Neb. 795.

57. Mont.—Brown v. Cascade, 205 P. 823, 52 Mont. 564.

58. N.C.—Crayton v. Charlotte, 94 S.E. 689, 175 N.C. 17.

59. N.C.—Crayton v. Charlotte, supra.

60. Ky.—Newport v. Newport Nat. Bank, 146 S.W. 377, 148 Ky. 213.

Ohio.—State v. Chandler, 138 N.E. 67, 105 Ohio St. 499.

Power held not revoked

Ill.—People ex rel. Nash v. Westminster Bldg. Corporation, 197 N.E. 573, 361 Ill. 153.

61. Ill.—Weinhagen v. City of Herlin, 26 N.E.2d 525, 305 Ill.App. 158.

44 C.J. p 1179 note 79 [a].

62. Mich.—Detroit v. Engel, 173 N.W. 547, 207 Mich. 106.

63. Neb.—State v. Marsh, 176 N.W. 92, 104 Neb. 159.

Delivery of bonds

Where bonds had been authorized and sold prior to repeal of statute under which proceedings were instituted, board acting under new statute could complete the transaction by delivery of the bonds.—Murray v. Tyndall, 63 N.E.2d 703, 223 Ind. 641.

64. Md.—Bond v. Baltimore, 84 A. 258, 118 Md. 159.

65. Fla.—State v. City of Tampa, 183 So. 491, 133 Fla. 840.

44 C.J. p 1179 note 84.

Notes for particular purposes see infra §§ 1905-1910.

law,⁶⁶ or power to give a bill or note for a particular indebtedness may be implied as a necessary incident to the power to incur or contract the indebtedness,⁶⁷ a municipality has no inherent power to issue notes,⁶⁸ or to execute notes without consideration⁶⁹ and as a mere accommodation;⁷⁰ and a note creates no liability where it is given for an indebted-

ness which, by reason of lack of power to incur or otherwise, is not binding.⁷¹ Notes issued by a city, which on their face are made receivable for all debts and demands due the city, are not within the prohibition of the federal constitution against emitting bills of credit.⁷²

b. Purpose of Issue

§ 1905. In General

- a. Bonds
- b. Notes
- c. Tax anticipation warrants

a. Bonds

A municipal corporation may issue bonds for such purposes as are within the scope of charter or statutory authorization, provided the purposes are public or municipal.

Within constitutional limitations of amount, a municipal corporation may incur bonded indebtedness for corporate or public purposes⁷³ when au-

thorized to do so by a valid charter or statutory provision.⁷⁴ Effect is accorded statutes empowering and authorizing municipalities in general terms to issue bonds for corporate⁷⁵ or municipal⁷⁶ purposes, any lawful⁷⁷ or necessary⁷⁸ purposes, or any purpose or purposes for which they may raise or appropriate money.⁷⁹ Also, effect is accorded a charter provision that the city shall have power to issue bonds to carry out any of the powers or purposes which the city possesses or may carry out.⁸⁰

However, the purposes for which a municipality may issue,⁸¹ and for which the legislature may authorize it to issue,⁸² bonds are not unlimited. Mu-

⁶⁶ Ohio.—*Davis v. State ex rel. Pecsok*, 200 N.E. 181, 130 Ohio St. 411.

⁶⁷ U.S.—*Merrill v. Monticello, Ind.*, 11 S.Ct. 441, 138 U.S. 673, 34 L.Ed. 1069.

44 C.J. p 1179 note 85.

Note for attorney's fee

Ala.—*Carter v. Town of Muscle Shoals*, 7 So.2d 74, 242 Ala. 519.

⁶⁸ Mass.—*Brown v. Newburyport*, 95 N.E. 504, 209 Mass. 259, Ann. Cas 1912B 495.

Tex.—*Pulte v. Keel*, Civ.App., 297 S.W. 241.

⁶⁹ Ky.—*Knepple v. Southgate*, 238 S.W. 1051, 194 Ky. 346.

44 C.J. p 1179 note 87.

⁷⁰ Ky.—*Knepple v. Southgate*, supra.

⁷¹ U.S.—*Scott v. Shreveport*, C.C. La., 20 F. 714.

44 C.J. p 1179 note 89.

⁷² La.—*Smith v. New Orleans*, 23 La. Ann. 5.

⁷³ S.C.—*Marshall v. Rose*, 49 S.E. 2d 720, 213 S.C. 428.

Limitations of amount see *infra* §§ 1911-1914.

⁷⁴ Fla.—*City of Winter Haven v. A. M. Klemm & Son*, 181 So. 153, 132 Fla. 334, rehearing denied 182 So. 841, 133 Fla. 525—*Williams v. Town of Dunnellon*, 169 So. 631, 125 Fla. 114.

N.C.—*Briggs v. City of Raleigh*, 141 S.E. 597, 195 N.C. 223.

Connection with state fair

A state fair is a public undertaking and the issuance of municipal

bonds, as authorized by statute, to assist in the establishment and maintenance of the fair in the vicinity of the city is for a public municipal purpose—*Briggs v. City of Raleigh*, supra.

Purposes other than state purposes

Courts have approved issuance of bonds by minor taxing units under legislative authority for purposes other than those for which state is authorized to issue them.—*State v. Ocean Shore Improvement Dist.*, 156 So. 433, 116 Fla. 284.

⁷⁵ Wash.—*Weisfield v. City of Seattle*, 40 P.2d 149, 180 Wash. 288, 96 A.L.R. 1190—*Denman v. City of Tacoma*, 16 P.2d 596, 170 Wash. 406.

44 C.J. p 1179 note 92.

Maintenance and operating costs of the city government are corporate purposes for meeting which city could borrow money on corporation's credit, and issue negotiable bonds therefor.—*Denman v. City of Tacoma*, supra.

Payment of indebtedness

(1) City has power to issue bonds, proceeds of which will be used for corporate purposes for which taxes may be levied to pay warrants, as for payment of policemen's and firemen's back salaries, since power to issue bonds is the same whether for payment of indebtedness already incurred or to be incurred for corporate purposes.—*Weisfield v. City of Seattle*, 40 P.2d 149, 180 Wash. 288, 96 A.L.R. 1190.

(2) Whether city's outstanding

obligations are warrants or other forms of indebtedness is immaterial on question of its power to issue bonds for payment thereof, if indebtedness relates to corporate purposes.—*Weisfield v. City of Seattle*, supra.

(3) Power to issue bonds to fund or refund indebtedness see *infra* § 1910.

⁷⁶ Fla.—*Perry v. Panama City*, 65 So. 6, 67 Fla. 285.

⁷⁷ Ariz.—*Tombstone v. Macia*, 245 P. 677, 46 A.L.R. 828, 30 Ariz. 218.

⁷⁸ Ariz.—*Tombstone v. Macia*, supra.

⁷⁹ U.S.—*Hill v. Elizabeth City, D. C.N.C.*, 291 F. 194, affirmed 298 F. 67.

44 C.J. p 1180 note 96.

⁸⁰ Colo.—*Clough v. Colorado Springs*, 197 P. 896, 70 Colo. 87.

81. Nonpermissible purposes

(1) Municipal bonds cannot be issued for purposes for which taxes cannot be levied.—*City of Clearwater v. State*, 147 So. 459, 108 Fla. 623.

(2) Some statutes are construed not to authorize the issuance of municipal bonds except for a purpose for which the ordinary revenues of the city might lawfully be expended.—*Redondo Beach v. Cate*, 68 P. 586, 136 Cal. 146—44 C.J. p 1180 note 8.

82. Purposes beyond legislative power

(1) General assembly cannot confer on municipality power to issue bonds for illegal purpose or for pur-

municipal bonds to be paid by taxation may be lawfully issued only for municipal⁸³ or public⁸⁴ purposes, and it is beyond the power of the legislature to authorize the issuance of such bonds for any purpose except a public one.⁸⁵ Whether the object for which bonds are to be issued is a municipal purpose may not be arbitrarily determined by legislation without regard to organic limitations;⁸⁶ the ultimate determination of the question of what are corporate purposes for which a municipality may issue bonds is for the judiciary;⁸⁷ but weight must be given to legislative definitions of what are corporate purposes;⁸⁸ and a statutory determination of what is an appropriate municipal purpose will not be disturbed by the courts, where the purpose designated by statute is in fact municipal in its nature⁸⁹ and no provision or principle of organic law is violated in such designation.⁹⁰ In determining the validity of municipal bonds, the purpose of their issuance as shown by a resolution of the municipal governing body is controlling over an alleged different real purpose.⁹¹

Enumeration of specific purposes. While it has been held that charter or statutory authority to issue bonds for enumerated purposes excludes the right to issue bonds for purposes not specified,⁹² a later grant of general power to issue bonds for municipal purposes is not restricted by a prior grant

of power to issue them for specific purposes,⁹³ and where a statute, which originally authorized the issuance of bonds for any corporate purpose, subsequently contains a list of specific purposes for which bonds may be issued, the omission of a certain purpose from the list is not conclusive of the question of whether the omitted purpose is a corporate one for which bonds may be issued.⁹⁴

Expenses or expenditures generally. It seems that a municipality may issue bonds for the present or ultimate payment of a debt for a necessary expense which it has power to incur.⁹⁵ When authorized by statute, municipal bonds may be issued to raise money for expenses other than necessary expenses of the city.⁹⁶ Some charters or statutes expressly authorize the issuance of municipal bonds to raise money for extraordinary expenditures,⁹⁷ or are broad enough to authorize the issuance of bonds to meet so-called "capital expenditures,"⁹⁸ as distinguished from ordinary annual expenses of a department for a coming year.⁹⁹

Poor relief. The issuance of bonds to provide for relief of the poor is for a public purpose¹ and is permissible under authority granted by charter or statute² where there is no transgression of constitutional provisions or other lawful enactments.³

pose of paying debts not incurred by exercise of some authorized corporate function or purpose.—*Berman v. Board of Education of City of Chicago*, 196 N.E. 464, 360 Ill. 535, 99 A.L.R. 1029.

(2) Legislature is without power to authorize a city to issue bonds to pay warrants where taxes levied are insufficient to pay them or to issue bonds to pay judgment based on failure to pay anticipation warrants.—*People ex rel. Reconstruction Finance Corporation v. Board of Education of City of Chicago*, 54 N.E.2d 508, 386 Ill. 522, certiorari denied 65 S.Ct. 70, 323 U.S. 733, 89 L.Ed. 588, rehearing denied 65 S.Ct. 115, 323 U.S. 814, 89 L.Ed. 648.

83. Fla.—*Peterson v. Davenport*, 105 So. 265, 90 Fla. 71.
44 C.J. p 1180 note 2.

84. Mo.—*State v. Orear*, 210 S.W. 392, 277 Mo. 303.

85. U.S.—*Citizens Sav., etc., Ass'n. v. Topeka, Kan.*, 20 Wall. 655, 22 L.Ed. 455.

44 C.J. p 1180 note 4.

86. Fla.—*City of Venice v. State*, 118 So. 308, 96 Fla. 527—*Peterson v. Davenport*, 105 So. 265, 90 Fla. 71.

87. S.C.—*Marshall v. Rose*, 49 S.E. 2d 720, 213 S.C. 428.

88. S.C.—*Marshall v. Rose*, supra.

89. Fla.—*City of Venice v. State*, 118 So. 308, 96 Fla. 527—*Peterson v. Davenport*, 105 So. 265, 90 Fla. 71.

90. Fla.—*City of Venice v. State*, 118 So. 308, 96 Fla. 527—*Peterson v. Davenport*, 105 So. 265, 90 Fla. 71.

91. N.C.—*Westbrook v. Town of Southern Pines*, 1 S.E.2d 95, 215 N.C. 20.

92. Cal.—*Long Beach v. Boynton*, 119 P. 677, 17 Cal.App. 290.
44 C.J. p 1180 note 99.

93. U.S.—*Pierre v. Dunscomb*, S.D., 106 F. 611, 45 C.C.A. 499, certiorari denied 21 S.Ct. 925, 181 U.S. 621, 45 L.Ed. 1032.

94. S.C.—*Marshall v. Rose*, 49 S.E. 2d 720, 213 S.C. 428.

95. N.C.—*Hendersonville v. Webb*, 61 S.E. 670, 148 N.C. 120.
44 C.J. p 1180 note 9.

Working cash fund to meet necessary disbursements

A statute authorizing the issuance of bonds to provide a revolving or working cash fund to meet the ordinary and necessary disbursements for salaries and other corporate purposes after the levy, and in anticipation of the collection, of taxes is not unconstitutional.—*Mathews v.*

City of Chicago, 174 N.E. 35, 342 Ill. 120.

96. N.C.—*Bolich v. City of Winston-Salem*, 164 S.E. 361, 202 N.C. 786.

97. N.Y.—*Arverne-by-the-Sea v. Shepard*, 46 N.Y.S. 653, 20 App.Div. 12.
44 C.J. p 1180 note 10.

98. Mich.—*Detroit v. Engel*, 173 N.W. 547, 207 Mich. 106.

99. Mich.—*Detroit v. Engel*, supra.

1. Mo.—*Jennings v. City of St. Louis*, 58 S.W.2d 979, 332 Mo. 173, 87 A.L.R. 365.

2. Mo.—*Jennings v. City of St. Louis*, supra.

Emergency

Destitution caused by widespread unemployment, together with exhaustion of poor funds and approach of winter, is an emergency within city charter authorizing special bonds.—*City of Muskegon Heights v. Danigelis*, 235 N.W. 83, 253 Mich. 260, 73 A.L.R. 696.

3. Ohio.—*State ex rel. City of Cleveland v. Gesell*, 28 N.E.2d 593, 137 Ohio St. 255.

Statute authorizing issuance is valid
Ohio.—*State ex rel. City of Cleveland v. Gesell*, supra.

County purposes. The charter of a consolidated city and county has been construed not to prevent the creation of bonded indebtedness for county purposes.⁴

Two or more purposes or considerations. Where bonds are issued by a city for two considerations, as to one of which it has power to issue bonds, but as to the other of which it has none, such bonds are wholly void;⁵ and an entire issue of bonds for three purposes is unconstitutional where it is inseparable and is unconstitutional as to one purpose;⁶ but where a municipality issues bonds in separate amounts for several purposes and a severable amount of the bonds may not legally be issued by the city, the bonds that are legal may be sustained.⁷

b. Notes

Budget notes, tax anticipation notes, or bond anticipation notes may be issued by a municipal corporation under authority conferred by a valid statute.

When authorized to do so by a valid statute,⁸ and within the limitations imposed thereby,⁹ a municipal corporation may issue tax anticipation notes, that is, notes in anticipation of taxes to be collected in and for the fiscal year; but a statute authorizing the issuance of such notes can be no broader than a constitutional provision on the subject,¹⁰ and it should be construed in connection with such provision.¹¹ Under the constitution and laws of at least one state, it has been held that tax anticipation notes are the only type of evidence of indebtedness,

other than bonds, which a municipal corporation is authorized to issue;¹² but, according to decisions in other states, a statute authorizing municipalities to issue notes in anticipation of the collection and distribution of a state appropriation for poor relief purposes is constitutional,¹³ a city may, under the terms and construction of a pertinent statute, issue budget notes for any one of certain specified purposes, if the amount included in the budget for the fiscal year is insufficient therefor;¹⁴ notes for money borrowed to carry on necessary and essential functions of government are valid,¹⁵ and, where proposed bonds are valid, bond anticipation notes are likewise valid under a statute authorizing municipalities to give notes in anticipation of the receipt of the proceeds of the sale of bonds to be issued.¹⁶

c. Tax Anticipation Warrants

Under some statutes municipal corporations have authority to issue warrants to anticipate the collection of taxes already levied.

Municipal corporations have authority, under some statutes, to issue warrants to anticipate the collection of taxes levied for the payment of outstanding bonds and interest maturing during the tax year.¹⁷ Tax anticipation warrants may, however, be issued only against taxes already levied.¹⁸

§ 1906. Purpose Connected with War

A statute empowering a municipal corporation to issue bonds for a memorial to soldiers and sailors is not invalid.

4. Cal.—City and County of San Francisco v. Collins, 13 P.2d 912, 216 Cal. 187.

Purposes for which county bonds may be issued see Counties § 268 b.

5. U.S.—Gause v. Clarksville, C.C. Mo., 1 F. 353, 1 McCrary 78.

6. Wis.—Roberts v. City of Madison, 27 N.W.2d 233, 250 Wis. 317.

7. Fla.—Munroe v. Reeves, 71 So. 922, 71 Fla. 612.

8. U.S.—Federal Reserve Bank of Philadelphia v. Ocean City, C.C.A. N.J., 84 F.2d 657, certiorari denied Ocean City, N. J. v. Federal Reserve Bank of Philadelphia, 57 S. Ct. 109, 299 U.S. 584, 81 L.Ed. 431. Ohio.—Davis v. State ex rel. Pecsok, 200 N.E. 181, 130 Ohio St. 411.

Tax anticipation or tax revenue notes

Borough's tax anticipation notes maturing after the last day of the year in which they are issued are, under the law, to be treated as tax revenue notes.—Phelps v. Borough of Fort Lee, 188 A. 639, 14 N.J.Misc. 395, affirmed 191 A. 836, 118 N.J.Law 181.

Delinquent tax anticipation notes may be issued by a city in pursuance of statutory authority.—State v. City of Tampa, 183 So. 491, 133 Fla. 840.

Application of taxes to other purposes

Where the indebtedness evidenced by notes given by city for money borrowed in anticipation of revenue was legal when created, it was not rendered illegal because board improperly applied taxes to other purposes.—Pace v. City of Paducah, 44 S.W.2d 574, 241 Ky. 568.

9. Ohio.—Davis v. State ex rel. Pecsok, 200 N.E. 181, 130 Ohio St. 411.

Requirements

Tax anticipation notes or certificates issued in anticipation of collection of taxes, under some constitutional and statutory provisions, must be issued before taxes are due and in year in which taxes are collectable, and must be payable solely from such taxes.—Bolton v. Wharton, 161 S.E. 454, 163 S.C. 242, 86 A.L.R. 1101.

10. S.C.—Bolton v. Wharton, supra.

11. S.C.—Bolton v. Wharton, supra.

12. S.C.—Bolton v. Wharton, supra.

13. Ohio.—State ex rel. City of Youngstown v. Jones, 24 N.E.2d 442, 136 Ohio St. 130.

14. N.Y.—Wilmerding v. O'Dwyer, 69 N.Y.S.2d 90, 272 App.Div. 35, reversed on other grounds 76 N.E.2d 325, 297 N.Y. 664, motion denied 77 N.E.2d 793, 297 N.Y. 781.

15. Ky.—Chestnut v. City of Bowling Green, 149 S.W.2d 623, 285 Ky. 800.

16. N.C.—Bolich v. City of Winston-Salem, 164 S.E. 361, 202 N.C. 786.

17. Ill.—Edward J. Berwind, Inc. v. Chicago Park Dist., 65 N.E.2d 785, 393 Ill. 317.

Particular warrants held to be anticipation warrants

Ill.—Edward J. Berwind, Inc. v. Chicago Park Dist., supra.

18. Ill.—People ex rel. Toman v. M. Born & Co., 26 N.E.2d 843, 373 Ill. 490.

A municipal corporation has no inherent power to issue bonds for the construction of a memorial to soldiers and sailors who served in the armed forces of the United States during a time of war,¹⁹ but a statute empowering a municipality to issue bonds for such a purpose is not invalid,²⁰ even though some of the soldiers and sailors to whose memory the memorial is to be erected were not residents of the municipality.²¹

Municipal notes and bonds executed and issued in aid of the Confederacy have been held void;²² but bonds issued by municipalities in the northern states to borrow money to be used in giving bounties to soldiers during the War between the States have been sustained as being for a public purpose.²³

§ 1907. Public Improvements, Utilities, and Property

Statutes authorizing the issuance of bonds for the acquisition, construction, or extension of a public utility by a municipal corporation and payable from the revenue derived from the operation of the utility are not uncon-

stitutional; and a municipality has such power to issue bonds for public improvements or utilities, or for the purchase of property for public purposes, as is conferred on it by constitution, statute, or charter.

By virtue of express constitutional, statutory, or charter provisions, cities and other municipalities may have power and authority to issue bonds for public improvements,²⁴ works,²⁵ or utilities,²⁶ or for the purchase of property for public purposes;²⁷ or, by virtue of power conferred on them to make improvements or purchase property, they may have implied power to issue bonds for the purpose of making an improvement²⁸ or purchasing property;²⁹ but sometimes the conferring, by statute or charter, of limited power to issue bonds operates to negative or exclude power to issue bonds for particular improvements,³⁰ or for improvements where property owners have not executed waivers of objections to any illegality or irregularity in the assessments,³¹ or for the purchase of land for particular purposes.³² While a municipality may issue bonds to pay its part of the cost of specific im-

19. Ky.—Barrow v. Bradley, 227 S. W. 1016, 190 Ky. 480.

Indebtedness or expenditures for memorials generally see supra § 1845.

20. Ky.—Hunter v. Louisville, 265 S.W. 277, 204 Ky. 562.

21. Ky.—Hunter v. Louisville, supra.

22. N.C.—Weith v. Wilmington, 68 N.C. 24.

Va.—Isaacs v. Richmond, 17 S.E. 760, 90 Va. 30.

23. Ill.—Johnson v. Campbell, 49 Ill. 316.

44 C.J. p 1180 note 17.
Power of municipality to raise or pay money for bounties generally see Bounties § 5.

24. Ark.—McKenzie v. City of De Witt, 121 S.W.2d 71, 196 Ark. 1115.
Fla.—State v. City of Miami, 26 So. 2d 903, 157 Fla. 747.

La.—Garrison v. City of Shreveport, 154 So. 622, 179 La. 605—Judice v. Village of Scott, 121 So. 592, 168 La. 111, certiorari denied Judice Co. v. Village of Scott, 50 S.Ct. 26, 280 U.S. 566, 74 L.Ed. 620.

Okl.—State ex rel. City of Shawnee v. Williamson, 97 P.2d 74, 186 Okl. 278, 125 A.L.R. 1389.

44 C.J. p 1180 note 18.

Anticipation of collection of assessments

Under some statutes municipalities have power to issue bonds in anticipation of the collection of special assessments.—State ex rel. Ohio Nat. Bank of Columbus v. Village of Hudson, 16 N.E.2d 266, 134 Ohio St. 150.

25. Colo.—Clough v. Colorado Springs, 197 P. 896, 70 Colo. 87.
44 C.J. p 1180 note 19.

26. Ohio.—Priest v. City of Wapakoneta, App., 32 N.E.2d 869, appeal dismissed 9 N.E.2d 292, 132 Ohio St. 527.

Okl.—Schmoltdt v. Oklahoma City, 291 P. 119, 144 Okl. 208.
44 C.J. p 1181 note 20.

General obligation bonds

Municipalities may issue general obligation bonds for utility purposes, as long as such bonds are within the general limit of bonded indebtedness prescribed by law.—City of Middletown v. City Commission of Middletown, 37 N.E.2d 609, 138 Ohio St. 596.

Nature and fixed character of power

(1) Power, conferred by constitutional provisions, to issue bonds for public utilities is plenary, exclusive, and permissive; and, if there is any conflict between such constitutional provisions and provisions of statutes existing at time of or enacted since adoption of constitutional provisions, such statutes must fall.—Priest v. City of Wapakoneta, App., 32 N.E.2d 869, appeal dismissed, 9 N.E.2d 292, 132 Ohio St. 527.

(2) The power conferred by such provisions cannot be restricted or extended by the legislature.—State ex rel. R. J. Edwards, Inc., v. Keith, 66 P.2d 1059, 179 Okl. 563.

(3) Legislature cannot take away rights or relieve city of duties imposed by constitutional provisions permitting cities to issue bonds to buy utilities.—Perrine v. Bonaparte, 282 P. 332, 140 Okl. 165—St. Louis-

San Francisco Ry. Co. v. Andrews, 278 P. 617, 137 Okl. 222.

Judicial control

Action of city authorities under statute authorizing bond issue for public utility, and enacted in pursuance of a constitutional provision, is not subject to judicial control in the absence of fraud, invasion of private rights, manifest oppression, or gross abuse of power.—McCann v. Morgan City, 139 So. 481, 173 La. 1063.

27. N.Y.—Schieffelin v. Craig, 170 N.Y.S. 603, 183 App.Div. 515.
44 C.J. p 1181 note 21.

Bond issue to enable city to perfect title to land, which it had purchased at tax sale, by paying past taxes and assessments and assuming future assessments was held not objectionable on the ground that it was unauthorized by law.—City of Pasadena v. Chamberlain, 36 P.2d 387, 1 Cal.App.2d 125, hearing denied 36 P.2d 392, 1 Cal.App.2d 125.

28. Neb.—State v. Babcock, 35 N.W. 941, 22 Neb. 614.
44 C.J. p 1181 note 24.

29. U.S.—Desmond v. Jefferson, C.C. Tex., 19 F. 483.
44 C.J. p 1181 note 25.

30. Neb.—State v. Weston, 96 N.W. 668, 69 Neb. 695.
Wis.—Uncas Nat. Bank v. Superior, 91 N.W. 1004, 115 Wis. 340.

31. Ind.—Read v. Abe Rosenblum & Sons, 53 N.E.2d 376, 115 Ind.App. 200.

32. Mich.—Detroit v. Engel, 173 N.W. 547, 207 Mich. 106.

provements,³³ it is not authorized to issue bonds to provide a fund from which to pay its part of the cost of improvements that may from time to time be made,³⁴ nor is it authorized to issue bonds to reimburse itself for payments already made for improvements³⁵ or to relieve a property owner from a valid assessment previously made.³⁶

General laws providing for the issuance of bonds for improvements are held not applicable to cities incorporated under special charters;³⁷ and, where a subsequently enacted special or local law is inconsistent with a previously enacted general law on the subject of issuing local improvement bonds, the special or local law is, under constitutional provisions, applicable to the exclusion of the general law.³⁸

Limited area. A statute is not unconstitutional on the ground that it authorizes the issuance of obligations to pay for municipal improvements which are less in area than the municipality.³⁹ A properly organized improvement district may, under authority conferred by statute, issue sufficient bonds to construct the improvement;⁴⁰ but, in so far as local improvement district funds are concerned, a local improvement district bond issued by a city and payable solely from the proceeds of special assess-

ments levied against the property in the local improvement district is, to all intents and purposes, a warrant on the treasurer to make payment and is subject to the law applicable to warrants.⁴¹

Bonds of municipal agency or authority. In the absence of power expressly granted by statute, a permanent public improvement or the acquisition or construction of a public utility plant may not be financed, in whole or in part, by the issuance of bonds on the credit of an agency or authority.⁴²

Revenue or mortgage bonds or certificates. A revenue bond may be negotiable obligation payable entirely from the revenues of a public utility,⁴³ and it has been said that the evidence of such an obligation is generally referred to as a revenue bond to distinguish it from municipal obligations payable from the proceeds of taxation.⁴⁴ Statutes authorizing municipalities to issue revenue bonds⁴⁵ or certificates⁴⁶ for the acquisition, construction, or extension of public utilities, improvements, projects, or undertakings from the operation of which revenue is derived, and payable from such revenue, are not unconstitutional, and the power conferred thereby may be exercised while the statutes remain in effect;⁴⁷ but, where the legislature has repeatedly refused to grant express power for this purpose,

33. U.S.—Brady v. Atlanta, C.C.A. Ga., 17 F.2d 764.

Ohio.—Heffner v. Toledo, 80 N.E. 8, 75 Ohio St. 413.

34. Ohio.—Heffner v. Toledo, supra.

Necessity for prior determination of improvements

Authority of municipal council under charter to issue bonds for public improvements or other permanent municipal works is limited to improvements or works previously determined on by proper action of legislative branch of city government.—Rule v. City of Stamford, 185 A. 178, 121 Conn. 447.

35. Mass.—Chapin v. Lincoln, 104 N.E. 745, 217 Mass. 336.

36. N.Y.—Oneida v. King, 101 N.Y. S. 239, 116 App.Div. 35.

37. Idaho.—Boise City Nat. Bank v. Boise City, 100 P. 93, 15 Idaho 792.

38. Fla.—Sanders v. City of Coleman, 196 So. 822, 143 Fla. 455.

39. U.S.—Township of South Hackensack v. Federal Deposit Ins. Corporation, C.C.A.N.J., 109 F.2d 327, certiorari denied 60 S.Ct. 896, 310 U.S. 624, 84 L.Ed. 1396.

40. Ark.—Morehart v. Mabelvale Road Imp. Dist. No. 29, 36 S.W.2d 68, 183 Ark. 411.

41. Wash.—Keyes v. City of Tacoma, 120 P.2d 533, 12 Wash.2d 54.—Zinser v. Vancouver, 74 P.2d 486, 192 Wash. 622.

42. N.Y.—Tierney v. Cohen, 198 N.E. 225, 268 N.Y. 464.

43. Neb.—State ex rel. Consumers Public Power Dist. v. Boettcher, 291 N.W. 709, 138 Neb. 22.

44. Tex.—Texsan Service Co. v. City of Nixon, Civ.App., 158 S.W.2d 88, error refused.

Distinguishing feature of municipal revenue bonds issued in accordance with statute is that holders of such bonds have no claim on funds raised or to be raised by taxation in order to secure payment of their obligations.—City of El Campo v. South Tex. Nat. Bank of San Antonio, Tex.Civ.App., 200 S.W.2d 252, error refused.

45. Ariz.—Crandall v. Town of Saford, 56 P.2d 660, 47 Ariz. 402.

Ky.—Dunn v. City of Murray, 208 S.W.2d 809, 306 Ky. 426.

Mich.—Cleveland v. City of Detroit, 37 N.W.2d 625, 324 Mich. 527.

Young v. City of Ann Arbor, 255 N.W. 579, 267 Mich. 241.

Mo.—City of Lebanon v. Schneider, 163 S.W.2d 588, 349 Mo. 712.

46. Ga.—Lawson v. City of Moultrie, 22 S.E.2d 592, 194 Ga. 699.

47. Ark.—Portis v. Board of Public Utilities of Lepanto, 209 S.W.2d 864, 213 Ark. 201.

Mo.—City of Springfield v. Monday, 185 S.W.2d 788, 353 Mo. 981.—City

of Lebanon v. Schneider, 163 S.W.2d 588, 349 Mo. 712

Municipality itself, and not board of public utilities, has authority, under the statutes, to issue revenue bonds.—Portis v. Board of Public Utilities of Lepanto, 209 S.W.2d 864, 213 Ark. 201.

Statutes of limited duration considered

Kan.—City of Pittsburg v. Robb, 53 P.2d 203, 143 Kan. 1.

N.C.—McGuinn v. City of High Point, 13 S.E.2d 48, 219 N.C. 56.

Statute held not repealed

Va.—Ennis v. Town of Herndon, 191 S.E. 685, 168 Va. 539.

Statutes held not in conflict with other statutory provisions

(1) For issuance of a different kind of bond.—City of Springfield v. Monday, 185 S.W.2d 788, 353 Mo. 981.

(2) For municipal acquisition of private property for public utilities by eminent domain.—State ex rel. Consumers Public Power Dist. v. Boettcher, 291 N.W. 709, 138 Neb. 22.

Part of charter

When a revenue certificate law and a new constitution were adopted, the provisions of each as to revenue certificates became a part of the charter of every municipality of the state.—Reed v. City of Smyrna, 39 S.E.2d 668, 201 Ga. 228.—Findley v. City of Vidalia, 51 S.E.2d 642, 78 Ga.App. 581.

municipalities are without implied power to issue revenue bonds to pay for the purchase of public utility plants;⁴⁸ and under some statutes a municipality may not finance the construction of a public utility plant by the issuance of securities based solely on the revenues obtained from the operation of the plant.⁴⁹ Bonds secured solely by, and payable solely from, income or revenue are distinguishable from mortgage bonds secured by the property and revenue of a public utility⁵⁰ which a municipality may issue under authority conferred by some constitutional or statutory provisions⁵¹ and which have been held not to be amenable to a uniform bond act.⁵²

A constitutional grant to municipalities of power to issue and sell revenue bonds carries with it by implication such other powers as are necessary to carry the granted authority into effect.⁵³

An ordinance providing for the issuance of revenue bonds to obtain funds for the extension of public utility systems beyond the corporate limits in order to furnish facilities to another community is invalid where the municipality is without authority to extend such systems beyond the corporate limits for this purpose;⁵⁴ but, in view of authority conferred by a statute, public utility revenue bonds to acquire a public utility system may not be invalid because parts of distribution lines to be acquired extend beyond the corporate limits.⁵⁵

Notes. Under some statutes municipalities have power to issue notes in anticipation of the levy of special assessments.⁵⁶ Also, power to execute a note in payment of an improvement has been held to be implied as a necessary incident to power con-

ferred to provide for the construction of the improvement.⁵⁷ Where a city obtained and retained the land it intended to buy, notes issued by it for the purchase price are enforceable notwithstanding the deed to it described the land insufficiently;⁵⁸ but where the city was without power to contract for the purchase of land on long-term payments by the issuance of negotiable promissory notes, it is not liable on vendor's lien notes assumed by it as part of the same transaction.⁵⁹

§ 1908. — Particular Matters

- a. Buildings, sites, and equipment
- b. Streets, sidewalks, bridges, and tunnels
- c. Drainage and sewage disposal
- d. Water supply
- e. Lighting and power
- f. Transportation system
- g. Harbor, levee, and water-front improvements
- h. Recreational areas or facilities
- i. Other matters
- j. Combined undertakings

a. Buildings, Sites, and Equipment

There is generally constitutional, statutory, or charter authority for the issuance of bonds by a municipal corporation to provide funds for the purchase of a site for, and the erection and equipment of, a municipal public building.

Municipal corporations are generally authorized by constitutional, statutory, or charter provisions to issue bonds to provide funds for the purchase of a site for,⁶⁰ and the erection of public buildings⁶¹ and,

Statutes construed

Ala.—Alabama Power Co. v. City of Scottsboro, 190 So. 412, 238 Ala. 230.

Iowa.—Gunnar v. Town of Montezuma, 294 N.W. 895, 229 Iowa 734.

48. Wyo.—Jensen v. Town of Afton, 143 P.2d 190, 59 Wyo. 500.

49. N.Y.—New York Edison Co. v. City of New York, 282 N.Y.S. 936, affirmed Tierney v. Cohen, 282 N.Y.S. 943, 246 App.Div. 511, affirmed 198 N.E. 225, 268 N.Y. 464, followed in New York Edison Co. v. City of New York, 198 N.E. 550, 268 N.Y. 669.

50. Mich.—Young v. City of Ann Arbor, 255 N.W. 579, 267 Mich. 241.

51. Bond as instrument agreed on

A statute authorizing borrowing of money for construction of municipal utility secured by a pledge or mortgage evidenced by such instrument as may be agreed on would be sufficient to justify bond issue if that

were the form of instrument agreed on.—Alabama Power Co. v. City of Scottsboro, 190 So. 412, 238 Ala. 230.

Subsequent change in judicial construction

Village's mortgage utility bonds issued pursuant to constitutional provision which supreme court had held self-executing were valid although village had no statutory or charter provision authorizing issuance, and even though supreme court subsequently overruled such decision.—Gentzler v. Smith, 31 N.W.2d 668, 320 Mich. 394.

52. Ohio.—Vollmer v. Village of Amherst, 43 N.E.2d 285, 140 Ohio St. 257, appeal dismissed 38 N.E.2d 409, 139 Ohio St. 139.

53. Mo.—State ex rel. City of Fulton v. Smith, 194 S.W.2d 302, 355 Mo. 27.

54. Ark.—Mathers v. Moss, 151 S.W.2d 660, 202 Ark. 554.

55. Mo.—City of Springfield v. Monday, 185 S.W.2d 788, 353 Mo. 981.

56. Ohio.—State ex rel. Ohio Nat. Bank of Columbus v. Village of Hudson, 16 N.E.2d 266, 134 Ohio St. 150.

57. Fla.—Ginsberg v. City of Daytona Beach, 137 So. 253, 103 Fla. 168.

58. U.S.—Green v. City of Stuart, C.C.A.Fla., 81 F.2d 968.

59. U.S.—Phoenix Mut. Life Ins. Co. v. City of McAllen, Tex., C.C.A. Tex., 82 F.2d 581.

60. N.C.—Westbrook v. Town of Southern Pines, 1 S.E.2d 95, 215 N.C. 20.

44 C.J. p 1181 note 34.

61. Ala.—Johnson v. City of Sheffield, 183 So. 265, 236 Ala. 411.

44 C.J. p 1181 note 35.

Municipality is bound by provisions of statute under which it has undertaken the issue of bonds for

likewise, under the decisions, for the equipment⁶² of, public buildings, or for the purchase of an existing building to be used for municipal purposes.⁶³ This is true as to such buildings as a city hall,⁶⁴ buildings used by the fire department,⁶⁵ a public library building,⁶⁶ and school buildings;⁶⁷ but the authority of a city does not extend to the issuance of bonds for the erection of county buildings;⁶⁸ and the issuance of bonds for the real and primary purpose of constructing a building for a state agency is not for a municipal public purpose and has been held to be invalid, even though it is likely that a few city offices will be located in the building.⁶⁹

Auditorium. Under some constitutional, statutory or charter provisions, bonds may be issued for the building of a municipal auditorium;⁷⁰ but bonds may not be issued for this purpose where an auditorium is not mentioned in a statutory enumeration of the particular municipal structures for which bonds may be issued.⁷¹

Factory or plant. It has been affirmed in some jurisdictions,⁷² and denied in others,⁷³ that a municipality may lawfully issue bonds for the construction of a factory or plant for the manufacture of artificial ice. The issuance of bonds for a garbage

reduction plant is not authorized by some municipal charters,⁷⁴ and some statutes authorizing the issuance of bonds for this purpose are applicable only where the municipality itself is engaged in the business of incinerating garbage⁷⁵ and not where it has entered into a contract for the removal and disposal of garbage.⁷⁶ The principle that garbage disposal is a governmental function and properly chargeable to the general revenue of a municipal corporation does not render unconstitutional a statute empowering a municipality to issue revenue bonds directly chargeable on the capital investment and earnings of an incinerator plant.⁷⁷

The issuance of bonds for the purpose of repairing and restoring factory property, obtained by the city under a tax deed, so that it can be sold or leased, is for a city purpose.⁷⁸

Housing or slum-clearance project. The issuance of bonds for a temporary housing program for war veterans,⁷⁹ or for slum clearance,⁸⁰ or for a slum-clearance and low-rent housing project,⁸¹ has been upheld.

b. Streets, Sidewalks, Bridges, and Tunnels

When authorized by constitutional, charter or statutory provisions to do so, municipal corporations may

the erection and equipment of municipal buildings.—Twining v. City of Wilmington, 200 S.E. 416, 214 N.C. 655.

62. Wis.—Maxcy v. Oshkosh, 128 N. W. 899, 1136, 144 Wis. 238, 31 L. R.A., N.S., 787.

44 C.J. p 1181 note 36.

63. Idaho.—Thomas v. Gooding, 149 P. 1064, 27 Idaho 624.

64. Idaho.—Thomas v. Gooding, supra.

44 C.J. p 1181 note 38.

65. Ohio.—Akron v. Dobson, 90 N.E. 123, 81 Ohio St. 66.

Okl.—Oklahoma City v. State, 115 P. 1108, 28 Okl. 780.

66. N.M.—Bachechi v. Albuquerque, 224 P. 400, 29 N.M. 572.

Construction and equipment of addition to library

Ark.—Terry v. Overman, 107 S.W.2d 349, 194 Ark. 343.

67. Ala.—Johnson v. City of Sheffield, 183 So. 265, 236 Ala. 411.

Miss.—Bingham v. Woodell, 69 So. 678, 109 Miss. 769.

N.Y.—Spano v. City of Middletown, 7 N.Y.S.2d 14, 169 Misc. 338.

44 C.J. p 1181 note 41.

Municipal purposes

(1) The erection of a school building is a municipal purpose for which a city may issue bonds.—Frost v. Central City, 120 S.W. 367, 134 Ky. 434.

(2) Also, it is a municipal pur-

pose for which legislature may authorize a city to issue bonds.—Hailey v. City of Winston-Salem, 144 S.E. 377, 196 N.C. 17.

Discretionary power

N.Y.—Yonkers Lodge No. 707 of B. P. O. E. of United States v. Condon, 38 N.E.2d 123, 287 N.Y. 44, reargument denied 40 N.E.2d 41, 287 N.Y. 755.

Limited application of authorizing statute

A statute authorizing the governing body of municipalities to issue bonds for school purposes refers only to incorporated towns and cities and does not deal with school districts which include municipal corporations and territory outside the corporate limits.—Hood v. Sutton, 94 S.E. 686, 175 N.C. 98.

68. Ind.—Schneck v. Jeffersonville, 52 N.E. 212, 152 Ind. 204.

69. Mo.—State ex rel. City of Jefferson v. Smith, 154 S.W.2d 101, 348 Mo. 554.

70. Ark.—Vaughan v. City of Searcy, 125 S.W.2d 319, 199 Ark. 585.

44 C.J. p 1181 note 43.

Auditorium-gymnasium

Ky.—Hill v. City of Providence, 211 S.W.2d 846, 307 Ky. 537.

71. Ala.—Colvin v. Ward, 66 So. 98, 189 Ala. 198.

72. Ariz.—Tombstone v. Macia, 245 P. 477, 80 Ariz. 218, 46 A.L.R. 828.

73. Mo.—State v. Orear, 210 S.W. 892, 277 Mo. 303.

74. Mich.—Detroit v. Engel, 153 N. W. 537, 187 Mich. 88.

75. N.J.—Riddle v. Atlantic City, 97 A. 790, 89 N.J.Law 122.

76. N.J.—Riddle v. Atlantic City, supra.

Ordinance not involving issuance of bonds, such as ordinance providing for the letting of a contract for collection and disposal of garbage by incineration and for acquisition of incinerator by city as lessee should successful bidder fail to perform or on option at the expiration of contract period, did not violate the Uniform Bond Act.—Dougherty v. Folk, 46 N.E.2d 807, 70 Ohio App. 304.

77. W.Va.—State ex rel. Klostermeyer v. City of Charleston, 45 S. E.2d 7.

78. N.Y.—Walrath v. City of Salamanca, 6 N.Y.S.2d 513, 255 App. Div. 158.

Bonds in aid of individuals, corporations, or private enterprises see infra § 1909.

79. Conn.—Franco v. City of New Haven, 52 A.2d 866, 133 Conn. 544.

80. Ill.—People ex rel. Tuohy v. City of Chicago, 68 N.E.2d 761, 394 Ill. 477.

81. Fla.—Marvin v. Housing Authority of Jacksonville, 183 So. 145, 133 Fla. 590.

issue bonds for the construction of bridges or tunnels or for the construction or improvement of streets or sidewalks; but, where only limited authority is granted, bonds outside the scope of the authority conferred may not be issued.

Municipal corporations are frequently authorized, either expressly or impliedly, to issue bonds for the construction or improvement of streets,⁸² at least in certain cases;⁸³ but bonds cannot be legally issued for the purpose of improving streets which do not exist.⁸⁴ A few statutes authorizing the issuance of bonds for the construction of streets have been held invalid,⁸⁵ and other statutes authorizing the issuance of bonds do not confer authority to issue bonds for the purpose of cleaning streets,⁸⁶ constructing retaining walls along the side of a street,⁸⁷ improving two streets as though they were one,⁸⁸ or improving a street which does not connect with a hard-surface public highway extending beyond the corporate limits.⁸⁹ A municipal note for paving issued without reasonable expectation that it can and will be paid from the revenues of the current year is not enforceable where it does not

comply with constitutional and statutory provisions authorizing municipal tax anticipation notes.⁹⁰

Sidewalks. Under some,⁹¹ but not other,⁹² statutes, bonds for the construction or improvement of sidewalks may be issued.

Bridges and tunnels. Under some constitutional, statutory, or charter provisions, municipal corporations have authority to issue bonds for the construction of bridges⁹³ or approaches thereto;⁹⁴ but under other constitutional provisions a bond issue for a bridge to be owned jointly by a city and township is not authorized.⁹⁵

c. Drainage and Sewage Disposal

A municipal corporation possesses such authority to issue bonds for sewers, drains, and sewage disposal plants as is conferred on it by constitutional, statutory, or charter provisions.

A municipal corporation possesses such authority to issue bonds for the construction of sewers,⁹⁶ a sewerage system,⁹⁷ a sewerage and drainage sys-

82. Fla.—Crawford v. State ex rel. A. M. Klemm & Son, 149 So. 340, 111 Fla. 301.

44 C.J. p 1182 note 53.

Boulevards

Cal.—San Diego v. Potter, 95 P. 146, 153 Cal. 288.

44 C.J. p 1184 note 81.

Construction of plaza in widening street

Mo.—City of St. Louis v. Senter Commission Co., 85 S.W.2d 21, 337 Mo. 238.

Curbing

Ky.—Hoerth v. City of Sturgis, 299 S.W. 1074, 221 Ky. 835, distinguishing Barry v. Cloverport, 194 S.W. 818, 175 Ky. 548.

Powers and duties of city clerk with reference to paving bonds and bondholders are fixed by statute, and legality of his acts with reference thereto is determined by controlling statute and not by law of agency.
—Security State Bank of Wewoka v. City of Wewoka ex rel. Richter, 119 P.2d 846, 189 Okl. 699.

Statutes authorizing issuance held not unconstitutional

Ga.—City of Dawson v. Bolton, 143 S.E. 119, 166 Ga. 232.

Tenn.—Armstrong v. City of South Fulton, 82 S.W.2d 862, 169 Tenn. 54.

Subway under railroad tracks

Kan.—State v. Atherton, 273 P. 905, 127 Kan. 449.

83. Okl.—Byrum v. Shawnee, 200 P. 183, 83 Okl. 16.

44 C.J. p 1182 note 54.

84. Fla.—City of Ft. Myers v. State, 117 So. 97, 95 Fla. 704.

44 C.J. p 1182 note 55.

85. Ky.—Parkland v. Gaines, 11 S. W. 649, 88 Ky. 562, 11 Ky.L. 64—Tate v. Parkland, 13 S.W. 443, 11 Ky.L. 838.

86. Ohio.—Morgan v. Akron, 19 Ohio Cir.Ct.N.S., 119, affirmed 95 N.E. 1145, 84 Ohio St. 499.

87. Ohio.—Morgan v. Akron, supra.

88. Ind.—Metzger v. Dunn, 161 N.E. 846, 97 Ind.App. 109.

89. Ind.—Metzger v. Dunn, supra.

90. U.S.—Ely Const. Co. v. Town of Timmons ville, S. C., C.C.A.S.C., 138 F.2d 739.

91. Ark.—Logan v. Sidewalk Dist No. 6, 260 S.W. 407, 163 Ark. 591.
La.—Judice v. Village of Scott, 121 So. 592, 168 La. 111, certiorari denied Judice Co. v. Village of Scott, 50 S.Ct. 26, 280 U.S. 566, 74 L.Ed. 620.

Statute held not unconstitutional

La.—Judice v. Village of Scott, 121 So. 592, 168 La. 111, certiorari denied Judice Co. v. Village of Scott, 50 S.Ct. 26, 280 U.S. 566, 74 L.Ed. 620.

Statute is construed to permit street improvement bonds to include sidewalk improvements.—Hancock v. Rush, 183 S.E. 554, 181 Ga. 587.

Formal dedication of village sidewalks was unnecessary in order to authorize issuance of bonds for paving and improving thereof.—Judice v. Village of Scott, 121 So. 592, 168 La. 111, certiorari denied Judice Co. v. Village of Scott, 50 S.Ct. 26, 280 U.S. 566, 74 L.Ed. 620.

92. Ohio.—Morgan v. Akron, 19 Ohio Cir.Ct.N.S., 109, affirmed 95 N.E. 1145, 84 Ohio St. 499.

44 C.J. p 225 note 98 [a].

93. W.Va.—State v. Steen, 145 S.E. 602, 106 W.Va. 325.

44 C.J. p 1182 note 59.

Revenue-producing bridges and tunnels

N.Y.—Robia Holding Corporation v. Walker, 178 N.E. 747, 257 N.Y. 431.

Statute held not repealed

Or.—Rorick v. Dalles City, 12 P.2d 762, 140 Or. 342.

94. Mo.—State v. Hackmann, 240 S. W. 135, 293 Mo. 313.

95. Okl.—In re Miami, 141 P. 1174, 43 Okl. 205.

96. Ark.—Downen v. McLaughlin, 76 S.W.2d 227, 189 Ark. 827.

Bonds for equipment and hauling necessary for construction by federal agency

Wash.—Dearling v. Funk, 32 P.2d 548, 177 Wash. 349.

Whole or definite part of construction cost

A statutory provision, empowering municipalities to issue bonds to pay for construction of sewers, in whole or part, refers to whole or definite and fixed portion of construction cost, separate and apart from that assessed against benefited property, and is inapplicable to town sewer certificates provided for by statute authorizing issuance thereof to amount of such assessments.—Henning v. Town of Hot Springs, 102 P. 2d 25, 44 N.M. 321.

97. Ark.—Freeman v. Jones, 75 S.W. 2d 226, 189 Ark. 815.

tem,⁹⁸ or a sewage disposal plant,⁹⁹ or for the reconstruction and repair of an existing sewerage system,¹ as is conferred on it by constitutional, charter, or statutory provisions; and a like rule obtains as to the authority of a sewer district² or sewer sub-district³ to issue bonds. Sewer certificates, although partly invalid, have been held valid as far as authorized under the constitution of the state.⁴

Drainage is a municipal or corporate purpose for which a municipality may issue bonds under charter or statutory authority;⁵ and, in the absence of a constitutional or statutory limitation of the term "sewer" to sanitary sewers, authority to issue bonds for the construction of sewers includes authority to issue bonds for the construction of storm sewers or permanent drainage improvements for the purpose of carrying off surface and flood waters.⁶ It has been held, however, that, in the absence of statutory authority, a municipality may not issue bonds

for the cleaning of catch basins.⁷

Toilets. When not authorized to do so by the terms, as properly construed, of statutes relating to the issuance of bonds, a municipality having no sewer system may not issue bonds for the purchase of toilets, not designed for use in connection with the city water system, to be rented to individual inhabitants of the city for installment and use in privies.⁸

d. Water Supply

A municipal corporation generally has power and authority, under pertinent constitutional, statutory, or charter provisions, to issue bonds for the purpose of supplying itself and its inhabitants with water.

It is generally within the power and authority of a municipal corporation, under pertinent constitutional, statutory, or charter provisions, to issue bonds for the purpose of supplying itself and its inhabitants with water;⁹ and under some provisions the issuance of revenue certificates for this purpose

N.C.—Lamb v. City of Randleman, 175 S.E. 293, 206 N.C. 837.

Pa.—Frackville Sewerage Co. v. Jones, Quar.Sess., 31 Mun L.R. 75, 6 Sch.Reg. 368.

44 C.J. p 1184 note 78.

Statutes authorizing sewer revenue bonds held not unconstitutional

U.S.—Stevenson v. City of Bluefield, D.C.W.Va., 39 F.Supp. 462.

Ark.—Freeman v. Jones, 75 S.W.2d 226, 189 Ark. 815.

Tex.—City of Dayton v. Allred, 68 S.W.2d 172, 123 Tex. 60.

98. Tex.—Moler v. Galveston, 57 S.W. 1116, 23 Tex.Civ.App. 693.

99. Ark.—Downen v. McLaughlin, 75 S.W.2d 227, 189 Ark. 827.

Construction of plant by two municipalities

Wis.—Behnke v. City of Neenah, 266 N.W. 781, 221 Wis. 411.

Statute authorizing issuance held constitutional

Mich.—Block v. City of Charlevoix, 255 N.W. 579, 267 Mich. 255.

1. Ky.—Kimbley v. Owensboro, 195 S.W. 1087, 176 Ky. 532.

2. Mo.—Bull v. McQuie, 119 S.W.2d 204, 342 Mo. 851.

For improving sewers and sewage disposal works

La.—Cooley v. Sewerage Dist. No. 1 of Town of Slidell, 136 So. 37, 172 La. 1019.

Statutes authorizing issuance held not unconstitutional

S.C.—Rutledge v. Greater Greenville Sewer Dist., 137 S.E. 697, 139 S.C. 188.

3. S.C.—Sanders v. Greater Greenville Sewer Dist., 44 S.E.2d 185, 211 S.C. 141.

4. N.M.—City of Santa Fe v. First

Nat. Bank, 65 P.2d 857, 41 N.M. 130.

5. Fla.—Greeley v. Jacksonville, 17 Fla. 174.

Construction and repair of drains

Utah.—Dickinson v. Salt Lake City, 195 P. 1110, 57 Utah 530.

6. Tex.—Town of Freeport v. Sellers, 190 S.W.2d 813, 144 Tex. 389.

Wyo.—Anselmi v. City of Rock Springs, 80 P.2d 419, 53 Wyo. 223, 116 A.L.R. 1250.

Use

Use for which conduit is made, and not any particular method of construction, determines whether it is sewer or merely a drain, and where building of wall at outlet of drain, erection of pumping plant and extension of drain were necessary to proper functioning of a sanitary sewer, city was authorized to issue bonds for their construction as part of sewer.—Atkinson v. City of Pine Bluff, 76 S.W.2d 982, 190 Ark. 65.

7. Ohio.—Morgan v. Akron, 19 Ohio Cir.Ct.N.S., 119, affirmed 95 N.E. 1145, 84 Ohio St. 499.

8. Tex.—American Nat. Ins. Co. v. Donald, 83 S.W.2d 947, 125 Tex. 597.

9. Ala.—Kendrick v. City of Birmingham, 5 So.2d 82, 242 Ala. 112.

Fla.—State v. Town of Riviera, 197 So. 525, 143 Fla. 705—State v. Town of Belle Glade in Palm Beach County, 163 So. 564, 121 Fla. 200.

Ga.—Scott v. Town of McIntyre, 19 S.E.2d 49, 66 Ga.App. 640.

Miss.—Street v. Town of Ripley, 161 So. 855, 173 Miss. 225.

Mont.—Commonwealth Public Service Co. of Montana v. City of Deer Lodge, 29 P.2d 687, 96 Mont. 48.

N.C.—Lamb v. City of Randleman, 175 S.E. 293, 206 N.C. 837.

Pa.—Atkins v. City of Philadelphia, 14 A.2d 423, 339 Pa. 345.

S.C.—McDaniel v. Bristol, 158 S.E. 804, 160 S.C. 408.

Tenn.—City of Bristol v. Bank of Bristol, 21 S.W.2d 620, 159 Tenn. 647.

Tex.—Cameron v. City of Waco, Civ. App., 8 S.W.2d 249.

Utah.—Fjeldsted v. Ogden City, 28 P.2d 144, 83 Utah 278.

44 C.J. p 1182 note 64.

Water supply for industrial use

Ala.—Kendrick v. City of Birmingham, 5 So.2d 82, 242 Ala. 112.

Maintenance of waterworks

S.C.—Herbert v. Griffith, 82 S.E. 986, 99 S.C. 1.

44 C.J. p 1183 note 67.

Extension and improvement of system lacking complete facilities

Ill.—Simpson v. City of Highwood, 23 N.E.2d 62, 372 Ill. 212, 124 A.L.R. 1459.

Lack of encumbrance on existing plant

Ark.—City of Harrison v. Braswell, 194 S.W.2d 12, 209 Ark. 1094.

Ind.—Letz Mfg. Co. v. Public Service Commission of Indiana, 4 N.E.2d 194, 210 Ind. 467.

Statutes authorizing issuance held not invalid

Kan.—State v. McCombs, 284 P. 618, 129 Kan. 834.

Mo.—City of Lebanon v. Schneider, 163 S.W.2d 588, 349 Mo. 712—State ex rel. City of Excelsior Springs v. Smith, 82 S.W.2d 37, 336 Mo. 1104.

Utah.—Wadsworth v. Santaquin City, 28 P.2d 161, 83 Utah 321.

is authorized.¹⁰ The charter or statutory provisions relied on, however, may not be broad enough to authorize the issuance of the bonds in question;¹¹ and some statutes, and bonds conforming thereto, are so worded and construed as to prohibit and preclude a municipality, after issuing bonds on the security of its waterworks system, from subsequently issuing waterworks revenue bonds while any bonds of the prior issue are outstanding and unpaid.¹²

e. Lighting and Power

In the exercise of power and authority conferred

by constitutional, charter, or statutory provisions, a municipal corporation may issue bonds for the purpose of supplying itself and its inhabitants with electricity or gas; but a provision granting authority to issue bonds for this purpose does not extend to the issuance of bonds to enable the municipality to engage in the power business generally.

A municipal corporation has power and authority, under some constitutional or charter provisions, to issue bonds for the purpose of supplying itself and its inhabitants with electricity¹³ or gas.¹⁴ On the other hand, the authority, if any, of a municipality to issue bonds in connection with the en-

Constitutional provisions held not violated by bonds or issuance thereof

Kan.—Lewis v. City of South Hutchinson, 174 P.2d 51, 162 Kan. 104.
N.M.—Seward v. Bowers, 24 P.2d 253, 37 N.M. 385.

Statute authorizing issuance held not amended or repealed

Tex.—City of Houston v. Allred, 71 S.W.2d 251, 123 Tex. 334.

Statute authorizing issuance held not to repeal another statute

Iowa.—Fowler v. Board of Trustees of Waterworks of City of Ottumwa, 238 N.W. 618, 214 Iowa 395.

Body issuing bonds

Municipal waterworks bonds secured by waterworks property or income are issued by city and not by waterworks system which has no corporate existence apart from city.—Roberts v. City of Madison, 27 N.W.2d 233, 250 Wis. 317.

10. Fla.—State v. City of Pensacola, 197 So. 520, 143 Fla. 823—Reben v. City of Sarasota, 185 So. 607, 135 Fla. 698—State v. City of Hollywood, 179 So. 721, 131 Fla. 584—State v. City of Miami, 152 So. 6, 113 Fla. 280.

Asserted fact of existing emergency is not material to the municipality's right to issue water revenue certificates for the improvement of, and additions to, its water supply system, and it is not necessary to pass the ordinance authorizing the certificates as an emergency measure, since emergency per se cannot create municipal power or remove statutory or constitutional restrictions thereon.—State v. City of Daytona Beach, 158 So. 300, 118 Fla. 29.

11. Ga.—Town of McIntyre v. Baldwin, 6 S.E.2d 372, 61 Ga.App. 489.

Bonds for purchase or construction of system

Ga.—Town of McIntyre v. Baldwin, supra.

N.M.—Gordon v. Hammel, 28 P.2d 522, 38 N.M. 93.

Issuance of management bonds is not authorized by a statute authorizing issuance of municipal water-

works mortgage bonds to reimburse municipality for expenditures from general fund for operation of municipally-owned waterworks system.—Roberts v. City of Madison, 27 N.W.2d 233, 250 Wis. 317.

12. Tex.—City of Houston v. Mann, 164 S.W.2d 548, 139 Tex. 640—City of Houston v. Allred, 71 S.W.2d 251, 123 Tex. 334.

13. U.S.—Ashwander v. Tennessee Valley Authority, D.C.Ala., 9 F. Supp. 800.

Ark.—Todd v. McCloy, 120 S.W.2d 160, 196 Ark. 832.

Fla.—State v. City of Key West, 14 So.2d 707, 153 Fla. 226.

Minn.—Williams v. Village of Kenyon, 244 N.W. 558, 187 Minn. 161.

Neb.—Slepicka v. City of Wilber, 34 N.W.2d 646, 150 Neb. 376—Carr v. Fenstermacher, 228 N.W. 114, 119 Neb. 172.

Ohio.—Pierce v. City of Hamilton, 178 N.E. 432, 40 Ohio App. 338.

Tenn.—Tennessee Electric Power Co. v. City of Chattanooga, 114 S.W.2d 441, 172 Tenn. 505.

44 C.J. p 1183 note 65.

Change from arc-light to "white-way" system

Ark.—Todd v. McCloy, 120 S.W.2d 160, 196 Ark. 832.

Revenue certificates

Fla.—State v. City of Wauchula, 188 So. 365, 137 Fla. 374—Trudnak v. City of Fort Pierce, 185 So. 353, 135 Fla. 573.

Ky.—Security Trust Co. v. City of Paris, 95 S.W.2d 731, 264 Ky. 846.

Statute held to grant new power
Wyo.—Whipps v. Town of Greybull, 109 P.2d 805, 56 Wyo. 355, 146 A.L.R. 596.

General obligation bonds

Statute giving authority to city or village authorities, without vote of people if necessary, to issue and sell bonds of city or village to provide funds to make tender in eminent domain proceeding to acquire power company's property in city or village, authorizes issuance only of general obligation bonds of city or village, and not bonds purporting to pledge and hypothecate revenue and

earnings of the plant.—May v. City of Kearney, 17 N.W.2d 448, 145 Neb. 475.

Incidental right

Right to stipulate in undertakings in connection with acquiring electric distribution plant that payment shall be made only from revenues from sale of bonds and operation of proposed system is incidental to acquisition and operation of plant authorized by statute.—Oppenheim v. City of Florence, 155 So. 859, 229 Ala. 50.

Constitutional provisions held not violated

(1) Generally.—Arkansas Utilities Co. v. City of Paragould, 143 S.W.2d 11, 200 Ark. 1051.

(2) By bonds.—Village of Gilman v. Northern States Power Co., 7 N.W.2d 606, 242 Wis. 130—44 C.J. p 1183 note §5 [a].

(3) By ordinance relating to issuance of bonds.

Fla.—State v. City of Key West, 14 So.2d 707, 153 Fla. 226.

Ohio.—Kurtz v. City of Columbus, 22 N.E.2d 747, 61 Ohio App. 423, affirmed 28 N.E.2d 587, 137 Ohio St. 184.

(4) By charter or statute authorizing issuance of bonds.—Tennessee Electric Power Co. v. City of Chattanooga, 114 S.W.2d 441, 172 Tenn. 505.

City charter held not violated by ordinance relating to bond issue

Ohio.—Kurtz v. City of Columbus, 22 N.E.2d 747, 61 Ohio App. 423, affirmed 28 N.E.2d 587, 137 Ohio St. 184.

Statute held not to repeal general law theretofore in force.—Kennerly v. Town of Dallas, 2 S.E.2d 538, 215 N.C. 532.

14. U.S.—Rio Grande Val. Gas Co. v. City of McAllen, C.C.A.Tex., 152 F.2d 591—Arkansas Louisiana Gas Co. v. City of Texarkana, C.C.A.Tex., 100 F.2d 652.

Ky.—Cook v. City of North Middletown, 121 S.W.2d 719, 275 Ky. 338.

Mont.—Montana-Dakota Utilities Co.

largement, extension, or improvement of a municipal gas or electric plant must be found in the constitution¹⁵ or statutes¹⁶ of the state; and it has been held that, under statutory authority to issue bonds for the purchase, construction,¹⁷ or establishment¹⁸ of a light or light and power plant, bonds cannot be lawfully issued for other purposes connected with the plant; but it has also been held that the constitutional power of a municipality to issue bonds for the purpose of purchasing or constructing an electric or other light plant includes power to issue bonds to purchase or construct extensions or improvements to an existing plant.¹⁹ Bonds for the improvement, repair, and extension of a light plant are properly issued under a statute authorizing the issuance of bonds for these purposes, notwithstanding the existence of another statute authorizing the issuance of bonds for the purpose of purchasing, constructing, or extending a light plant and the overlapping of the statutes in respect of extensions.²⁰ The constitutional or statutory power of a municipality to issue bonds for the purpose of purchasing or constructing light, power, or gas plants does not include power to go into the general public

utility gas business;²¹ and a revenue bond issue to enable a city to engage in the power business generally goes far beyond its statutory power to issue bonds for the acquisition or construction of undertakings for its own use and the use of its inhabitants.²² A local law which calls for the financing of an electric light plant by the issuance of bonds to which the municipal credit is not pledged has been held to be null and void where it violates the prohibitive provisions of a general city law.²³

f. Transportation System

When authorized by constitutional, charter, or statutory provisions to do so, a municipal corporation may issue bonds for the purchase or construction and the maintenance and operation of a system for supplying its inhabitants with transportation.

Under constitutional, charter, or statutory provisions conferring authority to do so, a municipal corporation may issue bonds for the purchase or construction and maintenance and operation of a system for supplying its inhabitants with transportation,²⁴ such as a subway,²⁵ street railway,²⁶ or bus line,²⁷ even though, under some constitutional provisions, the transportation system extends beyond

v. City of Havre, 94 P.2d 660, 109 Mont. 164.

Tex.—Rio Grande Valley Gas Co. v. City of McAllen, Civ.App., 158 S.W.2d 122, error refused.

Natural gas

U.S.—*Fellows v. Walker*, C.C.Ohio, 39 F. 651, appeal dismissed 11 S.Ct. 1020, 140 U.S. 680, 35 L.Ed. 603.

Ohio.—*Merrill v. Toledo*, 6 Ohio Cir.Ct. 430, 3 Ohio Cir.Dec. 524.

Authorizing statute held not repealed

Mont.—*Montana-Dakota Utilities Co. v. City of Havre*, 94 P.2d 660, 109 Mont. 164.

Statute of limited duration

The exception, in a statute providing that bonds shall not be delivered to a purchaser after a specified date except in pursuance of a contract or agreement entered into prior to that date, is accorded effect where, prior to the designated date, there is a meeting of minds and the acceptance of an offer to purchase bonds, although conditions imposed in the offer are not performed before the specified date.—*Montana - Dakota Utilities Co. v. City of Havre*, 94 P.2d 660, 109 Mont. 164.

Right of gas company to complain

Gas company, operating a gas system in a home-rule city, not having been given an exclusive franchise, had no right to complain of city's action in issuance of revenue bonds in payment of the purchase, construction, or maintenance of a gas system in the city.—*Rio Grande Val.*

Gas Co. v. City of McAllen, C.C.A. Tex., 152 F.2d 591.

15. Bonds to replenish fund from which payments made

Right to issue bonds payable by general taxation to replenish operative fund of municipal gas plant from which payments were made for improvements and extensions must be found in constitution or laws of the state.—*Pierce v. City of Hamilton*, 178 N.E. 432, 40 Ohio App. 338.

16. S.D.—*Hesse v. City of Watertown*, 232 N.W. 53, 57 S.D. 325.

Prior improvements

Statutes authorizing city to acquire and operate electric plant and to issue bonds therefor payable exclusively out of revenue of plant, do not contemplate that such bonds shall be issued to refund moneys paid and expended years before, or even recently, in improving and extending facilities of a municipally owned plant.—*Daily v. Smith's Adm'x*, 180 S.W.2d 861, 297 Ky. 689.

17. Wis.—*Neacy v. Milwaukee*, 126 N.W. 8, 142 Wis. 590.

44 C.J. p 1183 note 68.

18. Iowa.—*Muscatine Lighting Co. v. City of Muscatine*, 217 N.W. 468, 205 Iowa 82.

19. Mo.—*City of Rich Hill v. Connelly*, 175 S.W.2d 834, 352 Mo. 18.

Bonds to complete purchase of equipment used as an extension or improvement of the plant may be issued, where the equipment has been purchased under a conditional sales

contract.—*City of Rich Hill v. Connelly*, supra.

20. Kan.—*City of Coffeyville v. Robb*, 194 P.2d 475, 165 Kan. 219.

21. La.—*People's Gas & Fuel Co. v. Town of Ruston*, 141 So. 36, 174 La. 485.

22. N.C.—*Williamson v. City of High Point*, 195 S.E. 90, 213 N.C. 96.

23. N.Y.—*New York Edison Co. v. City of New York*, 282 N.Y.S. 936, affirmed *Tierney v. Cohen*, 282 N.Y.S. 943, 246 App.Div. 511, affirmed 198 N.E. 225, 268 N.Y. 464, followed in *New York Edison Co. v. City of New York*, 198 N.E. 550, 268 N.Y. 669.

24. Cal.—*City of Mill Valley v. Saxton*, 106 P.2d 455, 41 Cal.App.2d 290.

25. N.Y.—*People ex rel. Schieffelin v. Walker*, 160 N.E. 884, 247 N.Y. 320, reargument denied 161 N.E. 191, 247 N.Y. 584.
44 C.J. p 1184 note 88.

26. Ariz.—*Buntman v. Phoenix*, 255 P. 490, 32 Ariz. 18.
44 C.J. p 1184 note 88.

Legislature has power to authorize municipality to issue bonds
Miss.—Love v. Yazoo City, 44 So. 835, 91 Miss. 535.
43 C.J. p 282 note 73 [e].

27. Cal.—*City of Mill Valley v. Saxton*, 106 P.2d 455, 41 Cal.App.2d 290.

the municipal boundaries and renders service of benefit to nonresidents as well as inhabitants.²⁸ On the other hand, some charters have been held not to authorize municipalities to issue bonds to purchase equipment and landing places for ferryboat purposes.²⁹

Notes or certificates. Under a statute authorizing the issuance of budget notes, a city may issue budget notes for the purpose of meeting a deficiency arising from increases in wages granted by the city transportation board to its employees.³⁰ Some statutes have made mandatory the issuance of temporary certificates of indebtedness or corporate stock notes, during a prescribed initial period of public operation of a subway, for the purpose of providing for the payment of the excess of expenses and charges over revenue.³¹

g. Harbor, Levee, and Water-Front Improvements

In the exercise of authority conferred by charter or statute, a municipal corporation may issue bonds for harbor or water-front improvements.

Under some charters or statutes, a municipal cor-

poration may issue bonds for public harbor³² or water-front³³ improvements generally, the purchase,³⁴ construction,³⁵ or improvement³⁶ of wharves, docks, and piers, the construction, maintenance, and operation of a yacht basin,³⁷ the dredging of a ship canal,³⁸ the acquisition of rights of way for a flood wall³⁹ or levee⁴⁰ to be constructed with federal aid, the establishment of barge terminals,⁴¹ or the construction of a wholesale terminal fruit and vegetable market on a public levee.⁴²

Some municipalities, however, have been held not to be authorized by charter or statute to issue bonds for the construction⁴³ or repair⁴⁴ of a pier or wharf.

h. Recreational Areas or Facilities

A municipal corporation has such, but only such, authority to issue bonds for parks, stadiums, or other recreational areas or facilities as is conferred on it by constitutional, charter, or statutory provisions.

A municipal corporation may, in the exercise of authority granted by constitutional or statutory provisions, issue bonds for the construction of a stadium.⁴⁵ Also, municipalities are sometimes,⁴⁶ al-

28. Cal.—City of Mill Valley v. Saxton, *supra*.

29. Miss.—McClure v. Natchez, 103 So. 813, 139 Miss. 187.

30. N.Y.—Wilmerding v. O'Dwyer, 69 N.Y.S.2d 90, 272 App.Div. 35, reversed on other grounds 76 N.E.2d 325, 297 N.Y. 664, motion denied 77 N.E.2d 793, 297 N.Y. 781—Timmerman v. City of New York, 69 N.Y.S.2d 102, affirmed 70 N.Y.S.2d 140, 272 App.Div. 758.

31. N.Y.—Osborn v. La Guardia, 191 N.E. 519, 264 N.Y. 469, reargument denied 191 N.E. 594, 264 N.Y. 620.

32. Fla.—State ex rel. Davis v. Ryan, 158 So. 62, 118 Fla. 42—State ex rel. Ake v. Broward County Port Authority, 158 So. 62, 118 Fla. 42.

44 C.J. p 1183 note 73.

Inclusion of city in county harbor district did not preclude city from issuing bonds for construction of harbor improvements, where harbor district had not taken steps looking toward construction of harbor.—Redwood City v. Myers, 62 P.2d 796, 18 Cal.App.2d 11.

33. N.J.—Bew v. Ventnor City, 80 A. 28, 81 N.J.Law 207.

44 C.J. p 1183 note 74.

34. Fla.—State v. City of Port St. Joe, 180 So. 29, 131 Fla. 858.

35. Cal.—Clark v. Los Angeles, 116 P. 966, 160 Cal. 817—Long Beach v. Boynton, 119 P. 677, 7 Cal.App. 290.

36. Statute authorizing issuance held not unconstitutional

Kan.—State ex rel. Boynton v. Kansas City, 37 P.2d 18, 140 Kan. 471.

37. Fla.—State v. City of Clearwater, 184 So. 790, 135 Fla. 148.

Revenue certificates

Issuance of revenue certificates, payable from anticipated income of yacht basin, to obtain money for construction thereof by erection of steel retaining wall or breakwater and wooden slips on land owned by city in fee simple, seems authorized as for maintenance of existing property of city.—State v. City of Clearwater, *supra*.

38. Fla.—State v. City of Port St. Joe, 180 So. 28, 131 Fla. 854.

39. Ky.—Silk v. City of Louisville, 187 S.W.2d 286, 299 Ky. 736.

40. Ky.—Schatzman v. City of Covington, 193 S.W.2d 447, 301 Ky. 832.

41. Statute authorizing issuance held not unconstitutional

Ark.—Robinson v. Incorporated Town of De Vallis Bluff, 122 S.W. 2d 552, 197 Ark. 391.

42. Kan.—State ex rel. Beck v. Kansas City, 84 P.2d 409, 148 Kan. 623, opinion supplemented 86 P.2d 476, 149 Kan. 252.

Bonds for markets generally see *infra* subdivision i of this section.

Statute authorizing issuance held not unconstitutional

Kan.—State ex rel. Beck v. Kansas City, *supra*.

43. Miss.—Pascagoula v. Delmas, 66 So. 329, 108 Miss. 91.

44. Cal.—Long Beach v. Boynton, 119 P. 677, 7 Cal.App. 290.

45. Tex.—City of Waco v. McCraw, 93 S.W.2d 717, 127 Tex. 268.

Auditorium see *supra* subdivision a of this section.

Under provisions authorizing issuance for park purposes

Ark.—Todd v. McCloy, 120 S.W.2d 160, 196 Ark. 832.

Tex.—City of Waco v. McCraw, 93 S.W.2d 717, 127 Tex. 268.

Statute authorizing issuance held not unconstitutional

S.C.—Cathcart v. City of Columbia, 170 S.E. 435, 170 S.C. 362.

46. Ga.—Watts v. City of Cave Spring, 171 S.E. 382, 177 Ga. 808.

Okl.—Schmoldt v. Oklahoma City, 291 P. 119, 144 Okl. 208.

Tex.—Lewis v. City of Fort Worth, 89 S.W.2d 975, 126 Tex. 458.

44 C.J. p 1184 note 81.

Streets and sidewalks adjacent to park

(1) It has been held that statutory authority to issue bonds for park and boulevard purposes does not extend to the issuance of bonds for the construction of a sidewalk and retaining wall in a street adjacent to a park.—Morgan v. Akron, 19 Ohio Cir.Ct., N.S., 109, affirmed 95 N.E. 1145, 84 Ohio St. 499.

(2) In other decisions, however, it has been held or conceded that, under the view that a park is a public utility, a city may issue bonds for

though not always,⁴⁷ granted authority by constitutional, charter, or charter provisions to issue bonds to obtain funds to acquire and improve land for park purposes. Under some charter and statutory provisions a city is authorized to pledge its receipts from gas and electric franchises, which become part of the general revenues of the city, for payment of recreational facilities bonds which are general obligations of the city;⁴⁸ but a revenue bond act under which civic recreational bonds are issued may require the municipal authorities to prescribe such charges in connection with the activities established on the recreational area that it will be self-supporting and have sufficient revenue to pay the principal of, and interest on, the bonds, as well as the entire expense of its operation and maintenance.⁴⁹

Golf course. A legislative determination that the issuance of municipal bonds for a golf course is for a municipal purpose has been upheld by the courts,⁵⁰ but, in the absence of a specific grant of power to issue bonds for a golf course, authority to issue bonds for this purpose will not be deduced or implied from general powers.⁵¹

1. Other Matters

When authorized to do so by constitutional, statutory, or charter provisions, a municipal corporation may issue bonds for hospital purposes, the purchase of fire-fighting apparatus and equipment, the acquisition of land for use as a cemetery or a landing field for aircraft, the

acquisition and operation of a municipal parking system on streets and property owned by the municipality, or the construction, operation and maintenance of a public market.

The purchase by a municipal corporation of a fire truck and necessary equipment therefor is a valid purpose for which the city may, under statutory authority, issue bonds;⁵² but a mere debt for fire hose and other accessories, not evidenced by any contract in writing, is not a bonded debt, nor is the creation of the debt equivalent to the issuance of a bond, so as to relieve the municipality from liability by reason of failure to comply with constitutional and statutory requirements applicable to the issuance of bonds.⁵³

Airport. The issuance of municipal bonds to pay for the acquisition and improvement of lands outside the city limits for a landing field for aircraft is authorized by some constitutional and statutory provisions.⁵⁴

Cemetery. Under some constitutional, statutory, or charter provisions municipal bonds may be issued for the purchase of land to be used as a cemetery⁵⁵ and to be owned, controlled, and managed exclusively by the municipality.⁵⁶

Hospital. Some,⁵⁷ but not other,⁵⁸ municipalities possess charter or statutory authority to issue bonds for hospital purposes.

Markets. In the exercise of authority conferred

the purpose of constructing sidewalks around, and paving streets surrounding, its public park.—*Schmoldt v. Oklahoma City*, 291 P. 119, 144 Okl. 208.—*Barnes v. Hill*, 99 P. 927, 23 Okl. 207.

(3) Authority to issue bonds for streets and sidewalks generally see supra subdivision b of this section.

Bonds to assist in establishment of national park

Statute authorizing city to issue bonds and contribute proceeds to United States for the purpose of assisting in the acquisition and establishment of national park within city was held not unconstitutional, and it was considered unnecessary to determine the validity of an emergency clause therein.—*Vrooman v. City of St. Louis*, 88 S.W.2d 189, 337 Mo. 933.

47. Miss.—*Hazlehurst v. Mayes*, 51 So. 890, 96 Miss. 656.

N.M.—*Bachechi v. Albuquerque*, 224 P. 400, 29 N.M. 572.

48. Fla.—*State v. City of Daytona Beach*, 33 So.2d 218.

49. Ariz.—*Crawford v. City of Prescott*, 83 P.2d 789, 52 Ariz. 471.

50. Fla.—*Peterson v. Davenport*, 105 So. 265, 90 Fla. 71.

Retirement of indebtedness for preliminary work

In view of express charter provisions, the fact that town contemplated using part of proceeds of general improvement bonds to retire indebtedness for preliminary work on public golf course presented no such excess or abuse of authority in the issue of the bonds as to render them invalid.—*West v. Town of Lake Placid*, 120 So. 361, 97 Fla. 127.

51. Fla.—*Bradentown v. State*, 102 So. 556, 88 Fla. 381, 36 A.L.R. 1297.

52. Ind.—*Hamer v. City of Huntington*, 21 N.E.2d 407, 215 Ind. 594. Bonds for buildings to be used by fire department see supra subdivision a of this section.

53. S.C.—*U. S. Rubber Products v. Town of Batesburg*, 190 S.E. 120, 183 S.C. 49, 110 A.L.R. 144.

54. Ohio.—*State ex rel. Hile v. City of Cleveland*, 160 N.E. 241, 26 Ohio App. 265.

S.C.—*Brailsford v. Walker*, 31 S.E. 2d 385, 205 S.C. 228.

Site for federal air school and bombing field

A proposed city and county bond issue to buy land for donation to United States as site for air corps

technical school and bombing field, in or near the city, is for a local and municipal purpose and is valid as against objections urged against it.—*McNichols v. City and County of Denver*, 74 P.2d 99, 101 Colo. 316.

55. Okl.—*Denton v. Sapulpa*, 189 P. 532, 78 Okl. 178.

Wis.—*State v. Madison*, 7 Wis. 688.

56. Okl.—*Denton v. Sapulpa*, 189 P. 532, 78 Okl. 178.

57. Ala.—*Stokes v. Montgomery*, 82 So. 663, 203 Ala. 307.

Fla.—*State v. City of Miami*, 7 So. 2d 146, 150 Fla. 270.

N.C.—*Burleson v. Board of Aldermen of Town of Spruce Pines*, 156 S.E. 241, 200 N.C. 30.

Tenn.—*Stone v. Town of Crossville*, 212 S.W.2d 678.

W.Va.—*Warden v. City of Grafton*, 26 S.E.2d 1, 125 W.Va. 658.

Certificates

Acts authorizing municipalities to issue mortgage revenue certificates to secure funds to establish hospitals in operation were held not unconstitutional.—*Davis v. City of Melbourne*, 170 So. 836, 126 Fla. 282.

58. Mich.—*Detroit v. Engel*, 153 N. W. 537, 187 Mich. 88.

by charter or statute, a municipality may issue bonds for the construction,⁵⁹ enlargement, improvement,⁶⁰ operation,⁶¹ and maintenance⁶² of municipal public markets.

Parking system. In the exercise of power conferred by a revenue bond act, and without violating constitutional provisions, a municipality may issue revenue bonds for the acquisition and operation of a municipal parking system combining parking facilities on public streets and on off-street property of the municipality, the bonds being payable solely out of the net revenues derived from the operation of the system and such net revenues being pledged for the payment of the bonds.⁶³

j. Combined Undertakings

Under some constitutional, statutory, or charter provisions, the issuance of bonds or revenue certificates by a municipal corporation for a combination of two or more public utility undertakings is authorized.

Under some constitutional, statutory, or charter provisions, a municipal corporation may issue bonds or revenue certificates for a combined or unified waterworks and sewer,⁶⁴ or waterworks and electric light,⁶⁵ plant or system, or for the construction of one plant for the furnishing of water, light, and sewerage,⁶⁶ or for the extension and improvement

of water, gas, and sewerage plants or systems,⁶⁷ or for a public project consisting of a municipal auditorium, field house, and swimming pool.⁶⁸ It has been held, however, that a statute authorizing a combination of any two or more specified revenue-producing undertakings for the purpose of issuing bonds in anticipation of revenue should not be so interpreted as to authorize a combination of undertakings which do not serve a common purpose and are not very closely related in location and in kind;⁶⁹ and it has also been held that an ordinance authorizing the issuance of bonds to extend two utility systems is invalid on the ground that revenues derived from one system cannot be appropriated to pay the cost of construction or operation of another;⁷⁰ but some statutes or charters contemplate and authorize the issuance of bonds or certificates mortgaging or pledging the revenue or income of one utility system to secure funds to build, extend, or improve another system.⁷¹

§ 1909. Aid of Individuals, Corporations, or Private or Quasi-Public Enterprises

Municipal bonds cannot be lawfully issued, nor can the legislature authorize a municipal corporation to issue bonds, in aid of a private enterprise; but the issuance of municipal bonds for an improvement, facility, or project which is of a public nature and will benefit the

59. Tex.—Gillham v. City of Dallas, Civ App., 207 S.W.2d 978, error refused, no reversible error.

60. Mo.—Woodmansee v. Kansas City, 144 S.W.2d 137, 346 Mo. 919.

61. Tex.—Gillham v. City of Dallas, Civ.App., 207 S.W.2d 978, error refused, no reversible error.

62. Tex.—Gillham v. City of Dallas, supra.

Maintenance is for public purpose
Mo.—Woodmansee v. Kansas City, 144 S.W.2d 137, 346 Mo. 919.

63. Mich.—Parr v. Ladd, 36 N.W.2d 157, 323 Mich. 592.

Provision for appointment of receiver

Provision in revenue bond act, authorizing appointment of receiver to administer and operate municipal parking facilities and to fix rates for use thereof under direction of court, does not offend the constitution by imposing administrative duties on the courts.—Parr v. Ladd, supra.

64. Ga.—Reed v. City of Smyrna, 39 S.E.2d 668, 201 Ga. 228.

Ky.—Dunn v. City of Murray, 208 S.W.2d 309, 306 Ky. 426—Jones v. Stearns, 122 S.W.2d 766, 275 Ky. 729.

Combination of proposed and existing systems

Municipality was authorized by

statute to combine proposed sewerage system and its existing water supply system and issue mortgage revenue certificates against combined utility to finance cost of construction of sewerage system and improvements to water system.—State v. Town of River Junction, 169 So. 676, 125 Fla. 267.

Authorizing local acts held not repealed

U.S.—City of Mobile v. Marx & Co., C.C.A.Ala., 75 F.2d 569.

Bonds held not to violate constitutional provision

Tex.—City of Cross Plains v. Radford, Civ.App., 73 S.W.2d 1093, affirmed Radford v. City of Cross Plains, 86 S.W.2d 204, 126 Tex. 153.

Combined issue held free from constitutional or statutory objection
Ark.—City of Harrison v. Braswell, 194 S.W.2d 12, 209 Ark. 1094.

65. Ky.—Eagle v. City of Corbin, 122 S.W.2d 798, 275 Ky. 808.

Bonds for purchase of plant
Minn.—Backus v. Virginia, 143 N. W. 1042, 123 Minn. 48.

Bonds for construction of plant
Kan.—Loe v. Falco, 173 P. 299, 103 Kan. 287.

Bonds for betterment of plant
La.—Gisclard v. Donaldsonville, 106 So. 287, 159 La. 738.

Revenue certificates for extension of system

Fla.—Trudnak v. City of Fort Pierce, 185 So. 353, 135 Fla. 573.

66. Miss.—Green v. Hutson, 104 So. 171, 139 Miss. 471.

67. Fla.—State v. City of Fort Myers, 24 So.2d 50, 156 Fla. 681.

68. Ky.—McKinney v. City of Owensboro, 203 S.W.2d 24, 305 Ky. 254.

69. Ala.—Chamberlain v. Board of Com'rs of City of Mobile, 11 So.2d 724, 243 Ala. 662.

70. Ark.—Mathers v. Moss, 151 S. W.2d 660, 202 Ark. 554.

71. Ark.—City of Harrison v. Braswell, 194 S.W.2d 12, 209 Ark. 1094, distinguishing Mathers v. Moss, 151 S.W.2d 660, 202 Ark. 554.

Fla.—Follansbee v. City of Fort Lauderdale, 22 So.2d 815, 156 Fla. 368.

Tex.—City of Dayton v. Allred, 68 S. W.2d 172, 123 Tex. 60.

In Kentucky

(1) The text rule has been followed under permissive statute.—Dunn v. City of Murray, 208 S.W.2d 309, 306 Ky. 426.

(2) Under statutes previously existing it was otherwise unless the two systems were joined together at the beginning.—Jones v. Stearns, 122 S.W.2d 766, 275 Ky. 729.

public generally is not precluded, even though there will be an incidental benefit to some individuals and private corporations.

Municipal bonds cannot be lawfully issued as a donation to aid mills, factories, or any other private enterprise;⁷² nor can the legislature authorize a municipal corporation to issue bonds in aid of a private manufacturing establishment,⁷³ or to enable individuals, whose property has been burned, to rebuild;⁷⁴ but, when authorized by statute, bonds may be issued in aid of works of internal improvement⁷⁵ or the establishment of a university;⁷⁶ and constitutional prohibitions against donations, or the loan of money or credit, by a municipality to, or in aid of, a corporation, association, or individual do not apply so as to forbid the issuance of bonds or other obligations payable exclusively from the revenues of the agency issuing them,⁷⁷ or the issuance

of municipal bonds for the purpose of repairing and restoring factory property, acquired by the municipality under a tax deed, so that it can be sold or leased,⁷⁸ or for the funding of the indebtedness of a former municipality which, by annexation, has become a part of the municipality issuing the bonds,⁷⁹ or for the acquisition of land to be donated to the state⁸⁰ or the United States,⁸¹ or for any improvement, facility, or project which is of a public nature, is for a public and municipal purpose, and will benefit the public generally, even though it will incidentally result in benefit to some individuals or private corporations.⁸² The issuance of notes by a municipal corporation to obtain funds to subscribe to stock in a private corporation has been condemned as being without constitutional or statutory warrant⁸³ and as not being for a valid public pur-

72. Wis.—*Suring v. Suring State Bank*, 207 N.W. 944, 189 Wis. 400. 44 C.J. p 1184 note 92.

Primary object

Where the primary object of the issue is to benefit the property of a private corporation, and the public is only incidentally interested, the issue violates a constitutional provision—*State v. Town of Belleair*, 170 So. 434, 125 Fla. 669.

73. Miss.—*Carothers v. Town of Booneville*, 153 So. 670, 169 Miss. 511.

44 C.J. p 1184 note 93.

Municipal aid to private manufacturing establishment generally see *supra* § 1842.

Promotional services

Where city contracted to pay for services rendered in bringing about location of pulp and paper mills in the city, which offered no inducement to location of the mills within the city other than natural advantages, and special act authorized issuance of funding bonds for the funding of the city's indebtedness, including indebtedness for such services, the constitutional provision inhibiting legislature from authorizing city to become stockholder in or from loaning its credit to any corporation or association was not violated, and the bonds were entitled to validation.—*City of Fernandina v. State*, 197 So. 454, 143 Fla. 802.

74. Mass.—*Lowell v. Boston*, 111 Mass. 454, 15 Am R. 39. S.C.—*Feldman v. Charleston*, 23 S. C. 57, 55 Am.R. 6.

75. Neb.—*State v. Babcock*, 36 N. W. 474, 23 Neb. 179.

44 C.J. p 1184 note 95 [a].

76. Ill.—*Burr v. Carbondale*, 76 Ill. 455.

Public aid to colleges and universi-

ties generally see *Colleges and Universities* § 9.

In Kansas

The legislature may, under Const. art 6, compel the municipality where the state university is located to issue its bonds in aid of the university, and the power to compel a municipality to furnish aid includes the power to authorize it to do so after submission of the question to the electors of the city.—*State v. Lawrence*, 100 P. 485, 79 Kan. 234—43 C. J. p 289 note 55 [b].

77. Ark.—*Hogue v. Housing Authority of North Little Rock*, 144 S.W.2d 49, 201 Ark. 263.

Municipal aid to corporations generally see *supra* §§ 1870–1877.

City not liable on bonds

Proposed bonds to be issued by waterworks board were not violative of constitutional requirement that city should not lend its credit, where municipality was not liable for payment of principal or interest on bonds.—*Atkinson v. City of Gadsden*, 192 So. 510, 238 Ala. 556.

78. N.Y.—*Walrath v. City of Salamanca*, 6 N.Y.S.2d 513, 255 App. Div. 158.

79. Wash.—*Fisher v. Seattle*, 104 P. 655, 55 Wash. 396.

Funding bonds generally see *infra* § 1910.

80. Cal.—*Butler v. Compton Junior College Dist. of Los Angeles County*, 176 P.2d 417, 77 Cal.App.2d 719.

81. Colo.—*McNichols v. City and County of Denver*, 74 P.2d 99, 101 Colo. 316.

82. Fla.—*Olds v. Alvord*, 191 So. 434, 139 Fla. 745, certiorari denied *Alvord v. Town of Belleair*, 60 S. Ct. 141, 308 U.S. 603, 84 L.Ed. 505 —*State v. Town of Belleair*, 170

So. 434, 125 Fla. 669—*State ex rel. Davis v. Ryan*, 158 So. 62, 118 Fla. 42, *State ex rel. Ake v. Broward County Port Authority*, 158 So. 62, 118 Fla. 42—*West v. Town of Lake Placid*, 120 So. 361, 97 Fla. 127.

Hawaii.—*E. E. Black, Limited, v. Conkling*, 33 Hawaii 731.

Bonds for building approach to toll bridge privately owned and operated

Mo—*State v. Hackmann*, 240 S.W. 135, 293 Mo. 313.

44 C.J. p 1184 note 98.

Street improvement bonds

(1) Issuance of street improvement bonds by city is not loan of city credit to local improvement district, since improvement of streets is a corporate purpose, and a statute authorizing such issuance is not unconstitutional.—*Armstrong v. City of South Fulton*, 82 S.W.2d 862, 169 Tenn. 54.

(2) Action of city in determining to issue its bonds to pave street was not illegal as lending city credit and taxing power to private corporation, notwithstanding one of lot owners to be affected by improvement is a corporation which previously intended, or had agreed with other lot owners, to pave in front of its and their lots.—*City of Coral Gables v. Hayes*, C.C.A.Fla., 74 F.2d 989.

Harbor project

Fla.—*Martha Bright Farms v. Broward County Port Authority*, 158 So. 70, 117 Fla. 361, appeal dismissed *Martha Bright Farms v. Davis*, 55 S.Ct. 209, 293 U.S. 531, 79 L.Ed. 640—*State ex rel. Davis v. Ryan*, 158 So. 62, 118 Fla. 42—*State ex rel. Ake v. Broward County Port Authority*, 158 So. 62, 118 Fla. 42.

83. S.C.—*Bolton v. Wharton*, 161 S. E. 454, 163 S.C. 242, 36 A.L.R. 1101.

pose.⁸⁴

Railroads. Except in some states,⁸⁵ the legislature of a state has power to authorize municipalities to issue bonds in aid of railroads designed to benefit the public interests of the community,⁸⁶ but municipalities are without authority to issue bonds for this purpose unless the power to do so is conferred expressly or by reasonable implication,⁸⁷ and the particular municipality issuing the bonds,⁸⁸ and the particular railroad receiving them,⁸⁹ are within the terms of the authority granted. The power to become a stockholder in a railroad company or to appropriate money thereto, expressly conferred on a municipality by the legislature, does not carry with it the power to issue negotiable bonds in payment of such subscription or appropriation,⁹⁰ unless the latter power is also expressly,⁹¹ or by reasonable implication,⁹² conferred by the statute. It has been held that municipal bonds may be issued to enable a railroad to purchase land for,⁹³ and

erect,⁹⁴ a depot, to erect machine shops,⁹⁵ and to provide terminal facilities.⁹⁶

§ 1910. Funding or Refunding Indebtedness

- a. By bonds generally
- b. By notes or certificates generally
- c. Application of provisions

a. By Bonds Generally

- (1) General considerations
- (2) Powers involved in, or incidental to, funding or refunding

(1) General Considerations

Provided it does not violate constitutional provisions in doing so, the legislature may grant to a municipal corporation authority to fund or refund its indebtedness by the issuance of bonds.

Bonds issued by a municipal corporation to fund or refund an indebtedness do not create a new⁹⁷ or additional⁹⁸ indebtedness, but merely evidence,⁹⁹ change the form of,¹ and extend and renew² an ex-

84. S.C.—Bolton v. Wharton, *supra*.

85. U.S.—Risley v. Howell, C.C. Mich., 57 F. 544, reversed on other grounds 64 F. 453, 12 C.C.A. 218. 44 C.J. p 1184 note 2.

Mandatory statute requiring towns to issue railroad-aid bonds for the benefit of a railroad whose line of construction was to intersect the towns affected was held to be unconstitutional.—People v. Batchellor, 53 N.Y. 128, 13 Am.R. 480.

86. Me.—Shurtleff v. Wiscasset, 74 Me. 130. 44 C.J. p 1185 note 2.

Stock

Where a city pledged its stock in a railroad company as security for its bonds issued in aid of the road, and the bonds provided that the holders might exchange them for a like amount of the stock, and be substituted as stockholders in the place of the city, it was held that the bondholders had a lien on the whole of the stock, but that one bond could not bind more than one share of stock.—Aurora v. Cobb, 21 Ind. 492.

87. U.S.—Lewis v. Shreveport, La., 2 S.Ct. 634, 108 U.S. 282, 27 L.Ed. 728. 44 C.J. p 1185 note 4.

88. Wis.—Perrin v. New London, 30 N.W. 623, 67 Wis. 416. 44 C.J. p 1185 note 5.

Statute authorizing cities to issue bonds in aid of railroads did not include an incorporated town.—Welch v. Post, 99 Ill. 471, distinguishing Burke v. Monroe County, 77 Ill. 610, 615.

89. Conn.—Society of Savings v. City of New London, 29 Conn. 174. 44 C.J. p 1185 note 6.

Companies afterward incorporated
An act of a state legislature authorizing a city to issue its bonds in aid of railroads incorporated and organized does not extend to companies afterward incorporated; and, where a city issues its bonds in aid of such a company without authority of law and receives therefor the bonds of the company, secured with other bonds by a mortgage on its road, the city is not such a lien creditor for a valuable consideration as to entitle it to claim a share of the proceeds of the sale of the mortgaged premises made in satisfaction of the mortgage.—Smith v. Milwaukee, etc., R. Co., D.C.Wis., 22 F.Cas.No. 13,082.

90. U.S.—Hill v. Memphis, 10 S.Ct. 562, 134 U.S. 198, 33 L.Ed. 887. 44 C.J. p 1185 note 8.

91. Ill.—Hutchinson v. Self, 39 N.E. 27, 153 Ill. 542. 44 C.J. p 1185 note 9.

92. Mass.—Commonwealth v. Williamstown, 30 N.E. 472, 156 Mass. 70. 44 C.J. p 1186 note 10 [a], [b].

93. Tex.—Jefferson v. Jennings Banking, etc., Co., 79 S.W. 876, 35 Tex.Civ.App. 74—Jennings Banking, etc., Co. v. Jefferson, 70 S.W. 1005, 30 Tex.Civ.App. 534.

94. N.C.—Hudson v. Greensboro, 117 S.E. 629, 185 N.C. 502.

95. U.S.—Jarrott v. Moberly, Mo., 103 U.S. 580, 26 L.Ed. 492.

96. U.S.—Rock Creek Tp. v. Strong, Kan., 96 U.S. 371, 24 L.Ed. 815.

Tex.—Jefferson v. Jennings Banking, etc., Co., 79 S.W. 876, 35 Tex.Civ.App. 74—Jennings Banking, etc., Co. v. Jefferson, 70 S.W. 1005, 30 Tex.Civ.App. 534.

97. Ky.—Cook v. City of Louisville, 86 S.W.2d 157, 260 Ky. 474—Rowland v. City of Paris, 13 S.W.2d 791, 227 Ky. 570.

Mich.—Council of City of Hamtramack v. Matulewicz, 280 N.W. 801, 285 Mich. 390.

Ohio.—State ex rel. Board of Education of City School Dist. of Cincinnati v. Shafer, 2 NE2d 611, 131 Ohio St. 233.

Okl.—City of Madill v. Dabney, 285 P. 832, 142 Okl. 92.

Application to funding or refunding bonds of limitations of: Indebtedness generally see *supra* § 1854.

Bonded indebtedness see *infra* § 1912.

98. Ill.—Kocsis v. Chicago Park Dist., 198 N.E. 847, 362 Ill. 24.

99. Ill.—Kocsis v. Chicago Park Dist., 198 N.E. 847, 362 Ill. 24.

1. La.—Reuther v City of New Orleans, 9 So.2d 523, 201 La. 209.

Mich.—Council of City of Hamtramack v. Matulewicz, 280 N.W. 801, 285 Mich. 390.

Okl.—Faught v. City of Sapulpa, 292 P. 15, 145 Okl. 164—City of Madill v. Dabney, 285 P. 832, 142 Okl. 92.

2. Fla.—State v. City of Miami, 19 So.2d 790, 155 Fla. 180—State v. Haines City, 188 So. 831, 137 Fla. 616—State v. City of St. Petersburg, 173 So. 434, 127 Fla. 509.

isting indebtedness. While a refunding operation involves the fixing of a new date for payment of the indebtedness³ and the fixing of the interest rate for the extended time,⁴ funding or refunding bonds merely take the place of, and are substitutes for, other bonds or evidences of indebtedness⁵ which are surrendered and canceled.⁶ Bonds are not refunding bonds because part of the proceeds thereof is to be used to pay a preliminary indebtedness in inaugurating a municipal project, but are original

bonds for the purpose, in part, of funding or paying off an expressly authorized floating debt incurred in furtherance of a permissible and expressly authorized municipal project.⁷

Power to issue renewal or refunding bonds does not result merely because of the existence of municipal indebtedness;⁸ but a municipality may, when duly authorized by the legislature, issue its bonds to fund or refund its indebtedness,⁹ since it is unques-

Meaning of terms

(1) To "fund" an outstanding debt of a municipal corporation which is payable presently or at short periods is to convert such indebtedness into a more permanent form with an extended time of payment and with interest which is regular and which also may be reduced.—*Long Beach v. Lisenby*, 179 P. 198, 180 Cal. 52.

(2) As used in constitutional or statutory provisions relating to municipal debts, the term "funded debt" includes all municipal indebtedness embraced within, or evidenced by, a bond, the principal of which is payable at a time beyond the current fiscal year of its issue, with periodical terms for the payment of interest.—*Corpus Juris* quoted in *Corporation for Relief of Widows and Children of Clergymen in Communion of Protestant Episcopal Church in Commonwealth of Pennsylvania v. City of Philadelphia*, 176 A. 727, 730, 317 Pa. 76—27 C.J. p. 929 note 9 [a].

(3) As used in a constitution providing that no funded debt should be contracted for a municipal corporation, unless for a specific object, the term should be construed in its proper etymological sense, and means a debt requiring a variety of things to create it, and certain provisions to be made before it can be contracted, which insure the payment of the interest thereon and provide a sinking fund for the redemption of the principal of the debt, if it is protected by a law of the legislature binding on the corporation, or which in effect pledges all the taxable property for the payment of interest and principal.—*Ketchum v. Buffalo*, 21 Barb., N.Y., 294.

(4) "The expression, funding a debt has been sometimes incorrectly used to signify the aggregating of numerous floating debts of a municipal corporation, created at different times and upon different considerations, and borrowing money upon bond to pay off the whole."—*Ketchum v. Buffalo*, 14 N.Y. 356, 379.

Identity and continuance of obligation

(1) Where refunding bonds are issued and exchanged for outstanding bonds merely to extend the time of payment of the outstanding bonds,

the obligation of the refunding bonds may lawfully be made a continuation of the legal obligation of the outstanding bonds refunded, since the refunding bonds in such case will be construed as mere renewals of the existing bonds on the same terms as to security, thereby carrying forward the identical obligation of the originals, unless it is provided otherwise by the refunding bond provisions or by the statutes under which the refunding bonds are authorized.—*State v. City of Pensacola*, 166 So. 851, 123 Fla. 331.

(2) Refunding bonds carry no greater obligation of the taxing units than did the refunded bonds.—*State ex rel. Georgia Bond & Mortgage Co. v. Cone*, 189 So. 47, 137 Fla. 412.

(3) The fact that amount of village's funding bonds authorized to be issued exceeded the principal amount of notes funded does not render the bond obligation new and independent, where the amount of the bonds actually issued did not exceed the amount of the debt funded.—*State ex rel. Ohio Nat. Bank of Columbus v. Village of Hudson*, 16 N.E.2d 266, 134 Ohio St. 150.

(4) Bonds issued in compromise of, or in exchange for, a judgment partake of the nature of the judgment and are the same sort of obligation as the judgment itself.—*G. W. Jones Lumber Co. v. City of Martmarth*, 272 N.W. 190, 67 N.D. 309—*Schleiber v. City of Mohall*, 268 N.W. 445, 66 N.D. 593.

3. La.—*Reuther v. City of New Orleans*, 9 So.2d 523, 201 La. 209.
Okl.—*Faught v. City of Sapulpa*, 292 P. 15, 145 Okl. 164.

4. Okl.—*Faught v. City of Sapulpa*, 292 P. 15, 145 Okl. 164.

5. Ky.—*Cook v. City of Louisville*, 86 S.W.2d 157, 260 Ky. 474—*Rowland v. City of Paris*, 13 S.W.2d 791, 227 Ky. 570.
Okl.—*City of Madill v. Dabney*, 285 P. 832, 142 Okl. 92.

Refunding bonds have same legal force and effect as the original bonds.—*City of Sebring v. Harder Hall, Inc.*, 9 So.2d 350, 150 Fla. 824.

6. Okl.—*City of Madill v. Dabney*, 285 P. 832, 142 Okl. 92.

Both refunded bonds and coupons thereon should be canceled and permanently retired from circulation; interest on the refunded bonds should be paid only to the date of exchange; and no interest coupons should be paid or left on refunding bonds except for interest at bond rate from date of exchange or sale, payment, and delivery of refunding bonds.—*City of Miami v. State*, 190 So. 774, 139 Fla. 598.

Time of cancellation

Fla.—*Fleeman v. City of Jacksonville*, 191 So. 840, 140 Fla. 478—*City of Miami v. State*, 190 So. 774, 139 Fla. 598.

Okl.—*McGrath v. Oklahoma City*, 9 P.2d 711, 156 Okl. 34—*City of Madill v. Dabney*, 285 P. 832, 142 Okl. 92.

7. Fla.—*West v. Town of Lake Placid*, 120 So. 361, 97 Fla. 127.

8. U.S.—*Oquawka v. Graves, Ill.*, 82 F. 568, 27 C.C.A. 327.

S.C.—*Corpus Juris* quoted in *Williams v. City of Rock Hill*, 180 S. E. 799, 802, 177 S.C. 82.

Tex.—*Corpus Juris* quoted in *San Antonio Union Junior College Dist. v. Daniel*, 206 S.W.2d 995, 999, 146 Tex. 241.

9. Fla.—*State v. City of Miami*, 194 So. 792, 142 Fla. 284—*Atlantic Coast Line R. Co. v. City of Lakeland*, 177 So. 206, 130 Fla. 72—*State v. City of West Palm Beach*, 174 So. 334, 127 Fla. 849—*State v. City of Pensacola*, 166 So. 851, 123 Fla. 331—*Sullivan v. City of Tampa*, 134 So. 211, 101 Fla. 298.

Mo.—*Dodds v. Kansas City*, 152 S.W. 2d 128, 347 Mo. 1193.

Pa.—*Petition of School Dist. of Harbor Creek Tp. for Leave to Issue Funding Bonds*, Quar.Sess., 29 Erie Co. 178, 28 Mun.L.R. 85.

S.C.—*Corpus Juris* quoted in *Williams v. City of Rock Hill*, 180 S. E. 799, 802, 177 S.C. 82.

Va.—*Scott v. Lichford*, 180 S.E. 393, 164 Va. 419.

44 C.J. p. 1186 note 17.

Purpose, intent, and construction of statutes

Cal.—*Los Angeles County v. Jones*, 90 P.2d 802, 13 Cal.2d 554.

Fla.—*State Board of Administration v. Pasco County*, 22 So.2d 387, 156 Fla. 37—*State v. City of Miami*, 19

tionably within the power of the legislature to grant such authority,¹⁰ provided, in so doing, it does not violate constitutional provisions.¹¹ The power conferred on a municipality to borrow money, as discussed supra § 1869, and issue bonds, supra § 1905, for all municipal purposes necessarily includes the power to do so for the purpose of paying or funding the floating indebtedness of the municipality.¹² Also, refunding bonds may properly be said to be within a statute granting power to make contracts of every kind and nature and to execute all instru-

ments necessary or convenient for carrying out the purposes of the statute;¹³ and power to refund outstanding revenue bonds may be implied from powers expressly conferred in respect of the operation, maintenance, and financing of the project or utility,¹⁴ or from express power to issue¹⁵ or redeem¹⁶ the original bonds. There is some authority, however, for the view that the power of a municipal corporation to issue refunding bonds cannot arise by implication,¹⁷ as from express authority to issue original bonds.¹⁸

So.2d 410, 155 Fla. 6—Richard v. City of Fort Lauderdale, 1 So.2d 202, 146 Fla. 349—State v. City of Orlando, 170 So. 887, 127 Fla. 280. Tex.—Dallas County v. Lockhart, 96 S.W.2d 60, 128 Tex. 50—Frio County v. Security State Bank of Pharr, Civ.App., 207 S.W.2d 231.

Consistent statutes

The statute providing for refunding of municipal indebtedness, and statute providing for maintenance and integrity of sinking fund, are not inconsistent, but they established two different methods of liquidating the maturing bonds of municipalities.—Schuchman v. City of Pittsburgh, 41 A.2d 642, 351 Pa. 527, 157 A.L.R. 785.

Conflict between statutes

(1) Where a general refunding statute is inconsistent with a special act, the special act prevails to the extent of the inconsistency.—State v. City of Miami, 134 So. 608, 101 Fla. 292.

(2) A general statute authorizing the issuance of refunding bonds and applying alike to all incorporated cities and towns in the state has, however, been held effective to supersede or amend every charter or municipal ordinance with which it is in conflict.—Burton v. Gibbons, 36 P. 2d 786, 148 Or. 370.

Issuance held not forbidden by constitution or statute

Fla.—State v. City of Clearwater, 169 So. 602, 125 Fla. 73. Pa.—Schuchman v. City of Pittsburgh, 41 A.2d 642, 351 Pa. 527, 157 A.L.R. 785.

Governmental function

A municipality making provision for refinancing of bonded indebtedness was in the performance of a governmental function.—City of Decatur v. Mohns, 180 So. 297, 235 Ala. 640.

10. Fla.—State v. City of Pensacola, 166 So. 851, 123 Fla. 331. Ill.—Hoehamer v. Village of Elmwood Park, 198 N.E. 345, 361 Ill. 422, 102 A.L.R. 196. Or.—Burton v. Gibbons, 36 P.2d 786, 148 Or. 370. S.C.—Corpus Juris quoted in Wil-

liams v. City of Rock Hill, 180 S.E. 799, 802, 177 S.C. 82. 44 C.J. p 1186 note 18.

Authority to change bonding provisions

It is perfectly competent for the legislature to authorize a municipality to change its bonding provisions from a rigid to a more flexible scheme to refund its bonded indebtedness.—State v. City of Arcadia, 187 So. 771, 137 Fla. 146.

11. Ill.—Indiana Harbor Belt R. Co. v. Calumet City, 63 N.E.2d 369, 391 Ill. 280—People ex rel. Reconstruction Finance Corporation v. Board of Education of City of Chicago, 54 N.E.2d 508, 386 Ill. 522, certiorari denied 65 S.Ct. 70, 323 U.S. 733, 89 L.Ed. 588, rehearing denied 65 S.Ct. 115, 323 U.S. 814, 89 L.Ed. 648—People ex rel. Toman v. Granada Apartment Hotel Corporation, 44 N.E.2d 606, 381 Ill. 41.

Kan.—State ex rel. Parker v. State School Fund Commission, 103 P.2d 801, 152 Kan. 427.

N.D.—Stutsman v. Arthur, 16 N.W.2d 449, 73 N.D. 504, 158 A.L.R. 924.

Constitutional limitations of:

Bonded indebtedness see infra § 1912.

Municipal indebtedness generally see supra § 1854.

Statutes held valid and not unconstitutional

U.S.—Christmas v. City of Asbury Park, D.C.N.J., 63 F.Supp. 64. Ark.—Benton v. Nowlin, 62 S.W.2d 16, 187 Ark. 738.

Cal.—Los Angeles County v. Jones, 90 P.2d 802, 13 Cal.2d 554—Culver City v. Reese, 80 P.2d 992, 11 Cal. 2d 441—City of Los Angeles v. Aldrich, 66 P.2d 647, 8 Cal.2d 541—City of Alturas v. Elliott, 76 P.2d 697, 25 Cal.App.2d 191.

Fla.—State v. City of Coral Gables, 154 So. 234, 114 Fla. 326.

Ill.—Indiana Harbor Belt R. Co. v. Calumet City, 63 N.E.2d 369, 391 Ill. 280—People v. Kelly, 192 N.E. 372, 357 Ill. 408.

Iowa.—Ballard-Hassett Co. v. City of Des Moines, 224 N.W. 793, 207 Iowa 1351.

Mich.—Hazel Park Nonpartisan Taxpayers Ass'n v. Royal Oak Tp., 27 N.W.2d 249, 317 Mich. 607, appeal

dismissed 68 S.Ct. 219, 332 U.S. 832, 92 L.Ed. 406.

Ohio.—State ex rel. Board of Education of City School Dist. of Cincinnati, v. Shafer, 2 N.E.2d 611, 131 Ohio St 233.

Okl.—Fitzsimmons v. Rauch, 159 P. 2d 264, 195 Okl. 529.

Statute held not repealed by constitutional amendment

Fla.—Sullivan v. City of Tampa, 134 So. 211, 101 Fla. 298.

Issuance of bonds for purchase of bonds of improvement districts

(1) Statutes authorizing the issuance of municipal bonds for the purpose of acquiring bonds of certain improvement districts within the city have been held not unconstitutional.—City of Dunsmuir v. Porter, 60 P.2d 836, 7 Cal.2d 269—Crescent City v. Moran, 77 P.2d 281, 25 Cal. App.2d 133.

(2) A statute of this nature, however, has been held unconstitutional.—Redwood City v. Meyers, 60 P.2d 291, 7 Cal.2d 283, 108 A.L.R. 727.

(3) However, this decision has been distinguished as involving a statute differing materially from the statutes under consideration.—City of Dunsmuir v. Porter, supra—Crescent City v. Moran, 77 P.2d 281, 25 Cal.App.2d 133.

12. S.D.—Montpellier Nat. L. Ins. Co. v. Mead, 82 N.W. 78, 83 N.W. 335, 13 S.D. 37, 79 Am.S.R. 876, 48 L.R.A. 785.

44 C.J. p 1186 note 21.

13. Ill.—People ex rel. City of Rock Island v. Rudgren, 38 N.E.2d 723, 378 Ill. 408.

14. Ky.—Cook v. City of Louisville, 86 S.W.2d 157, 260 Ky. 474.

15. Fla.—State v. City of Miami, 19 So.2d 790, 155 Fla. 180.

16. Fla.—State v. City of Miami, supra.

17. Tex.—San Antonio Union Junior College Dist. v. Daniel, 206 S.W.2d 995, 146 Tex. 241.

18. Tex.—San Antonio Union Junior College Dist. v. Daniel, supra.

The availability of other means of paying or liquidating indebtedness does not preclude the issuance of funding or refunding bonds to meet it,¹⁹ unless such other means are made exclusive by charter or statute.²⁰ So, also, unless the statutes make the issuance of funding or refunding bonds mandatory,²¹ or grant to holders of indebtedness the right to demand the issuance to them of funding or refunding bonds,²² or confer on a designated court the power to determine the propriety of refunding securities,²³ or the issuance of funding or refunding bonds involves a violation of law,²⁴ the question whether municipal indebtedness shall be funded or refunded by the issuance of bonds or be paid in a manner otherwise provided by law is a matter within the discretion of the municipal officers having control of municipal fiscal affairs;²⁵ a creditor is without right to compel the issuance of the bonds,²⁶ and a court has no concern with the wisdom of the financial policy in issuing refunding bonds²⁷ and has no right to interfere with the judgment of the council to issue refunding bonds instead of levying taxes.²⁸ It has been held, without reference to any statute, that, where the cost of building a municipal power transmission line was met by a bond issue,

and the line was removed in pursuance of an order of the board of county commissioners engaged in making a highway improvement, the expense of removing and rebuilding the line should be regarded as construction cost and funded in the same way as the original construction cost.²⁹

Power granted by constitution. The legislature cannot withdraw the general power of a municipal corporation, as granted by the constitution of the state, to issue refunding bonds.³⁰ The purpose of a constitutional amendment authorizing the issuance of refunding bonds has been held to be to eliminate the necessity for an election and to simplify the procedure for issuance of such bonds.³¹

Agreement. An agreement cannot operate to prevent a city from exercising its statutory authority to issue refunding bonds when it is to the interest of the city and its taxpayers to do so and no controlling law is violated.³² Effect, however, is accorded statutes making an agreement with bondholders and an exchange of refunding bonds for refunded bonds a permissible method of refunding³³ or requiring an agreement between the municipality and holders of judgment indebtedness

19. Pa.—Schuchman v. City of Pittsburgh, 41 A.2d 642, 351 Pa. 527, 157 A.L.R. 785.

44 C.J. p 1187 note 37.

20. N.Y.—Schieffelin v. Hylan, 174 N.Y.S. 506, 106 Misc. 347, affirmed 176 N.Y.S. 809, 188 App.Div. 192, affirmed 125 N.E. 925, 227 N.Y. 593.

21. Miss.—City of Louisville v. Chambers, 1 So.2d 771, 190 Miss. 833.

Statute requiring serial bonds or corporate stock replacing temporary obligations

N.Y.—Osborn v. La Guardia, 191 N.E. 519, 264 N.Y. 469, reargument denied Osborn v. La Guardia, 191 N.E. 594, 264 N.Y. 420.

22. Ill.—Village of Westchester v. Holmes, 62 N.E.2d 410, 390 Ill. 436. 44 C.J. p 1186 note 22.

Right held not barred by limitations or laches

Okl.—Mefford v. Oklahoma City ex rel. Simpson, 155 P.2d 523, 195 Okl. 45.

23. Ill.—Hardin v. Village of Westchester, 50 N.E.2d 689, 383 Ill. 624, transferred, see 53 N.E.2d 493, 321 Ill.App. 644 and Chicago Title & Trust Co. v. Village of Westchester, 53 N.E.2d 493, 321 Ill.App. 644.

Jurisdiction and duty of court

Ill.—Village of Westchester v. Holmes, 62 N.E.2d 410, 390 Ill. 436 —Thayer v. Village of Downers Grove, 16 N.E.2d 717, 369 Ill. 334.

N.J.—Faltoute Iron & Steel Co. v.

City of Asbury Park, 21 A.2d 786, 127 N.J.Law 239, affirmed 62 S.Ct. 1129, 316 U.S. 502, 86 L.Ed. 1629.

24. Pa.—Schuchman v. City of Pittsburgh, 41 A.2d 642, 351 Pa. 527, 157 A.L.R. 785.

Necessity of substantial benefit to taxpayers

Some constitutional and statutory provisions contemplate that bonds shall be refunded only when the best interests of the bonding unit and its citizens and taxpayers will be thereby substantially conserved and advanced.—City of Miami v. State, 190 So. 774, 139 Fla. 598.

Illegality attaching to whole issue

Where a number of bonds purporting to be refunding bonds are issued as one series, and part of them are not in fact refunding bonds but are illegal, their illegality attaches to the whole issue.—Coffin v. Indianapolis, C.C.Ind., 59 F. 221.

25. Okl.—Application of Board of Education of City of Ardmore, 49 P.2d 122, 173 Okl. 296.

Matter is largely discretionary

Fla.—Richard v. City of Fort Lauderdale, 1 So.2d 202, 146 Fla. 349.

26. Cal.—Long Beach v. Lisenby, 179 P. 198, 180 Cal. 52. 44 C.J. p 1186 note 23.

27. Pa.—Schuchman v. City of Pittsburgh, 41 A.2d 642, 351 Pa. 527, 157 A.L.R. 785.

28. Pa.—Schuchman v. City of Pittsburgh, supra.

29. Kan.—Electric Service Co. v. City of Mullinville, 262 P. 536, 125 Kan. 70.

30. Fla.—State v. City of Fort Pierce, 19 So.2d 468, 155 Fla. 58. Constitutional provision authorizing issuance of renewal or funding bonds as self-executing see Constitutional Law § 52.

31. La.—Martin v. Mayor & Board of Aldermen of Town of Westwego, 32 So.2d 711, 212 La. 439. Necessity of election see infra § 1920.

32. Fla.—State v. City of West Palm Beach, 193 So. 839, 141 Fla. 775.

33. Okl.—State ex rel. Town of El Dorado v. Williamson, 60 P.2d 1032, 177 Okl. 526—State ex rel. Town of Nichols Hills v. Williamson, 60 P.2d 1036, 177 Okl. 529—First Nat. Bank v. Board of Education of City of Enid, 49 P.2d 1077, 174 Okl. 164.

Validity of agreement

(1) Under such a statute, either a valid agreement of exchange or a bona fide cash bid is essential.—State ex rel. Town of El Dorado v. Williamson, 60 P.2d 1032, 177 Okl. 526—State ex rel. Town of Nichols Hills v. Williamson, 60 P.2d 1036, 177 Okl. 529.

(2) Where a county treasurer's agreement with the municipality to accept refunding bonds in place of bonds held as county sinking fund investments is invalid as beyond his

of the municipality before such indebtedness can be funded and bonds issued in payment thereof.³⁴

(2) Powers Involved in, or Incidental to, Funding or Refunding

A municipal corporation possessing power to fund or refund an indebtedness by the issuance of bonds has such incidental powers as are expressly conferred and, subject to constitutional or statutory prohibitions or limitations, such other powers as are necessary to make the power to fund or refund effective.

The power to refund clearly includes such other powers as may be essential to make it effective.³⁵ A pledge of such property or revenues for payment of refunding bonds as is authorized by statute, and not prohibited by constitution or statute, may be made.³⁶

Principal and price. Some constitutional provisions authorizing the issuance of refunding bonds indicate that the principal outstanding is to remain the same as under the original bond issue,³⁷ and others contemplate that refunding bonds may be exchanged for equal amounts of the principal of the bonds refunded or that refunding bonds may be sold and the proceeds invested in the purchase of

outstanding bonds, provided the price at which the refunding bonds are sold and the price at which the refunded bonds are purchased do not result in an increase in the outstanding bond indebtedness to be paid by taxation.³⁸ In the absence of a provision calling for a different conclusion, refunding bonds may be issued in an amount less than that of the bonds or indebtedness refunded,³⁹ but they cannot be issued for a larger amount⁴⁰ unless they are sold at less than par under statutory authority.⁴¹

Rate of interest. The right of a municipality to fund or refund an existing obligation includes the right to fix such rate of interest, within the limits prescribed by law, as will make the funding or refunding possible;⁴² and, unless a constitutional or statutory provision contemplates that the rate of interest on refunding bonds shall be the same as on the original bonds,⁴³ refunding bonds are not invalid because they fix a different rate of interest.⁴⁴

b. By Notes or Certificates Generally

In the exercise of authority expressly or impliedly conferred on it, a municipal corporation may issue notes

authority to enter into, approval of a refunding bond issue predicated on such agreement is properly withheld.—*State ex rel. Town of El Dorado v. Williamson*, 60 P.2d 1032, 177 Okl. 526.—*State ex rel. Town of Nichols Hills v. Williamson*, 60 P.2d 1036, 177 Okl. 529.

(3) An ordinance ratifying a contract has been upheld.—*McGrath v. Oklahoma City*, 9 P.2d 711, 156 Okl. 34.

34. Okl.—Application of Board of Education of City of Ardmore, 49 P.2d 122, 173 Okl. 296.

Termination of conditional agreement

Where holders of judgment indebtedness of municipality and municipality agreed to fund such indebtedness by issuance of bonds, provided agreement should be void if not approved by district court and attorney general, refusal of district court to approve bonds terminated agreement, notwithstanding power of court could not extend to control of matters within discretion of officers of municipality.—*Application of Board of Education of City of Ardmore*, supra.

35. Ky.—*Cook v. City of Louisville*, 86 S.W.2d 157, 260 Ky. 474.

Covenant for continuance of rights and remedies

A city could issue refunding bonds and covenant that contractual rights and remedies for the enforcement of the indebtedness refunded by the refunding bonds and the taxes se-

curing them should apply and appertain to the refunding bonds independently of any restrictions or limitations enacted by the legislature of the state, taking effect on or after a certain date, where all original bonds sought to be refunded were issued prior to that date.—*City of Fort Myers*, 198 So. 814, 145 Fla. 135.

36. Ala.—*Kendrick v. City of Birmingham*, 5 So.2d 82, 242 Ala. 112. Fla.—*State v. City of Bartow*, 2 So. 2d 125, 147 Fla. 67.

All property in city

Fla.—*State v. City of Fort Pierce*, 182 So. 799, 133 Fla. 424.

Unlimited tax

If original issue of bonds constituted a valid unlimited tax issue, refunding bonds could likewise be secured by unlimited tax.—*State v. Haines City*, 188 So. 831, 137 Fla. 616.

Creation of reserves

Provisions for creation of reserves to pay proposed refunding bonds did not increase burden of taxation or pledge any new or additional revenues for payment of refunding bonds or interest thereon, since purpose thereof was to make refunding bonds more attractive to investors and to decrease burden of taxpayers.—*State v. City of Miami*, 194 So. 792, 142 Fla. 284.

37. La.—*Martin v. Mayor & Board of Aldermen of Town of Westwego*, 32 So.2d 711, 212 La. 439.

38. Fla.—*City of Miami v. State*, 190 So. 774, 139 Fla. 598.

Obligation for past-due and unpaid interest on an outstanding bond issue could be included in a refunding issue.—*State v. City of Brooksville*, 10 So.2d 342, 151 Fla. 586

39. S.D.—*Ewert v. Mallory*, 91 N.W. 479, 16 S.D. 151.

40. Ohio—*Altaffer v. Nelson*, 18 Ohio Cir.Ct. 145, 9 Ohio Cir.Dec. 599.

Tenn.—*Soukup v. Sell*, 105 S.W.2d 107, 171 Tenn. 491

Application of limitations of bonded indebtedness see *infra* § 1912

Refunding bonds and corporate stock Fla.—*State v. City of Coral Gables*, 154 So. 234, 114 Fla. 326.

41. N.M.—*Padilla v. Socorro*, 212 P. 337, 28 N.M. 334.

Sale for less than par generally see *infra* § 1932.

42. Ohio.—*State ex rel. Ohio Nat. Bank of Columbus v. Village of Hudson*, 16 N.E.2d 266, 134 Ohio St. 150.

43. La.—*Martin v. Mayor & Board of Aldermen of Town of Westwego*, 32 So.2d 711, 212 La. 439.

44. Fla.—*State v. City of Lakeland*, 180 So. 754, 132 Fla. 489.

Lower rate of interest

Fla.—*City of Miami v. State*, 190 So. 774, 139 Fla. 598.—*Sullivan v. City of Tampa*, 134 So. 211, 101 Fla. 298.

Ky.—*Security Trust Co. v. City of Paris*, 95 S.W.2d 781, 264 Ky. 846.

or certificates to refund or renew outstanding indebtedness.

In pursuance of authority conferred by charter or statute, a municipal corporation may issue tax participation certificates in exchange for old evidences of indebtedness⁴⁵ or water revenue certificates to refund outstanding indebtedness.⁴⁶ Notwithstanding the absence of express constitutional or statutory authority for the issuance of new refunding certificates, the specific authority of a city to call and redeem refunding paving certificates necessarily includes authority to issue and sell new refunding obligations to raise money to call and redeem.⁴⁷ The power of the city to issue refunding paving certificates to redeem existing certificates implies power to date the refunding certificates in the year in which they are issued according to the usual practice;⁴⁸ and it is not improper for the city issuing the new refunding certificates to name a sinking fund depository⁴⁹ and paying agents⁵⁰ different from those designated for the certificates being redeemed and refunded.

A note given for money borrowed to pay and retire a matured bond serves the same purpose as the issuance and sale of a refunding bond;⁵¹ a renewal note is as good as the note which it renews;⁵² and a note, regarded as within the power of the mu-

nicipality to give a transferable written evidence of a valid debt, is enforceable by a transferee, even though the instrument is negotiable in form and, by reason of failure to comply with constitutional provisions as to issuing bonds, the city was without power to issue negotiable paper which would be good in the hands of a bona fide holder for value regardless of the merits of the debt.⁵³ Where no new source of revenue is involved, the pledge made for the payment of delinquent tax notes does not prevent the notes from being properly regarded as refunding obligations.⁵⁴

c. Application of Provisions

Such bonds, judgments, floating indebtedness or other indebtedness may be funded or refunded by the issuance of bonds as are valid and existing debts and obligations of the municipal corporation and are within the terms of the constitutional, charter, or statutory provision authorizing the funding or refunding.

The character of the indebtedness which may be funded or refunded by the issuance of bonds under constitutional, charter, or statutory authority depends on the terms of the constitutional, charter, or statutory provision and the construction placed thereon;⁵⁵ and under particular provisions bonds may be issued for the purpose of funding floating indebtedness,⁵⁶ paying, funding, or refunding judg-

45. Fla.—City of Coral Gables v. State, 176 So. 40, 128 Fla. 874.

46. Fla.—Follansbee v. City of Fort Lauderdale, 22 So.2d 815, 156 Fla. 368.

Including waterworks refunding and improvement certificates in same issue is not objectionable.—Reben v. City of Sarasota, 185 So. 607, 135 Fla. 698.

47. La.—State ex rel. Maestri v. Cave, 190 So. 631, 193 La. 419.

Current interest rates as emergency

The determination in ordinance authorizing issuance of refunding paving certificates of city that there was an urgent necessity for taking advantage of current available interest rates for municipal obligations and that this constituted an emergency, so that the ordinance should take effect immediately, was not an abuse of commission council's discretion.—State ex rel. Maestri v. Cave, supra.

Certificates may be issued in two series, one maturing serially and the other maturing at a fixed later date.—State ex rel. Maestri v. Cave, supra.

48. La.—State ex rel. Maestri v. Cave, supra.

49. La.—State ex rel. Maestri v. Cave, supra.

50. La.—State ex rel. Maestri v. Cave, supra.

51. U.S.—Federal Reserve Bank v. Panama City, C.C.A.Fla., 87 F.2d 677.

52. U.S.—Federal Reserve Bank v. Panama City, supra.

Implied authority to execute

Notes executed by city in renewal of demand notes were not new or different obligations, and mayor had implied authority to execute them without specific authority, where he had authority to execute the original notes.—City of Winchester v. Winchester Bank, 205 S.W.2d 997, 306 Ky. 45.

53. U.S.—Federal Reserve Bank v. Panama City, C.C.A.Fla., 87 F.2d 677.

54. Fla.—State v. City of Clearwater, 169 So. 602, 125 Fla. 73.

55. Fla.—Sullivan v. City of Tampa, 134 So. 211, 101 Fla. 298.

Minn.—Leslie v. City of White Bear Lake, 243 N.W. 786, 186 Minn. 543. S.C.—Brailsford v. Walker, 31 S.E. 2d 385, 205 S.C. 228.

44 C.J. p 1186 note 24.

Full scope and broad application may be given to remedial provisions of statute authorizing multiple special improvement district refunding proceedings, in absence of showing that constitutional rights of proper-

ty owner would thereby be violated.—Los Angeles County v. Jones, 90 P. 2d 802, 13 Cal.2d 554.

Statutes held not applicable to bonds issued under general refunding statute

Fla.—State v. City of Sanford, 174 So. 339, 128 Fla. 171—State v. City of St. Petersburg, 173 So. 434, 127 Fla. 509—State v. City of Orlando, 170 So. 887, 126 Fla. 251—State v. City of Clearwater, 169 So. 602, 125 Fla. 73—State v. City of Pensacola, 166 So. 851, 123 Fla. 331.

56. Fla.—State v. City of West Palm Beach, 174 So. 334, 127 Fla. 849.

Ky.—Kockritz v. City of Henderson, 107 S.W.2d 245, 269 Ky. 334—Jones v. City of Paducah, 92 S.W.2d 811, 263 Ky. 542—Pace v. City of Paducah, 44 S.W.2d 574, 241 Ky. 568.

S.C.—Brailsford v. Walker, 31 S.E. 2d 385, 205 S.C. 228.

44 C.J. p 1186 note 24 [a].

Floating indebtedness

(1) The floating indebtedness of a municipal corporation is that mass of lawful and valid claims against the corporation, for the payment of which there is no money in the corporate treasury specifically designed, or any taxation or other means of providing money to pay, particularly provided.—Corpus Juris quoted in Elliott v. Fiscal Court of Pike Coun-

ments,⁵⁷ refunding or renewing bonds or bonded indebtedness,⁵⁸ refunding notes⁵⁹ or certificates of indebtedness,⁶⁰ or refunding securities issued in anticipation of the collection of an assessment or any installment thereof.⁶¹ Constitutional, charter, or statutory authority to issue funding or refunding

ty, 36 S.W.2d 619, 621, 237 Ky. 797—26 C.J. p 742 note 76.

(2) Indebtedness incurred in litigation concerning proposed bond issue did not constitute a floating indebtedness that might be funded by proposed bonds.—First Nat. Bank v. City of Princeton, 117 S.W.2d 210, 273 Ky. 601.

(3) Other debts included within words "floating indebtedness" see 44 C.J. p 1186 note 24 [a].

Short-term refunding bonds

Pa.—Butcher v. City of Philadelphia, 38 Pa Dist. & Co. 198.

57. Fla.—State v. City of Sanford, 174 So. 339, 128 Fla. 171.

Ky.—First Nat. Bank v. City of Princeton, 117 S.W.2d 210, 273 Ky. 601.

44 C.J. p 1186 note 24 [c].

Judgments on bonds

Fla.—State v. City of West Palm Beach, 174 So. 334, 127 Fla. 849.

Judgments based on noncontractual obligations

Ohio.—State ex rel. Gordon v. Barthallow, 83 N.E.2d 393, 150 Ohio St. 499.

Judgments compromised under statutory authority

N.D.—G. W. Jones Lumber Co. v. City of Marmarth, 272 N.W. 190, 67 N.D. 309—Schieber v. City of Mohall, 268 N.W. 445, 66 N.D. 593.

Judgments constitute funded debts for which refunding bonds may be issued under a general refunding statute.—State v. City of Sanford, 174 So. 339, 128 Fla. 171.

Power of municipal body

Where city concedes liability for damages, or when judgment liability is imposed by law, only municipal authority with power to provide means of payment by general bond issue duly authorized is city's legislative body.—Douglass v. City of Los Angeles, 53 P.2d 353, 5 Cal.2d 123.

Objections considered

A municipal refunding plan was applied to a judgment, and a perpetual stay against enforcement of the judgment and a mandamus order directing the levy of a tax for its payment was granted, notwithstanding the judgment creditor was a non-resident of the state and an interest in judgment, based on bonds of municipality, had been sold, and, after approval of municipal refunding plan providing for four per cent interest, city continued to make payments of annual installments on judgment in accordance with mandamus order providing for six per cent interest; and it was held that

judgment and writ of mandamus were rendered impotent to avail creditors any greater recovery on the municipality's obligations than holders of such obligations who had not reduced them to judgment in face of order of court approving and placing in operation a refunding plan.—Christmas v. City of Asbury Park, D.C.N.J., 53 F.Supp. 64.

Class of judgments not included

A statute has been construed not to empower corporate authorities to issue bonds for the satisfaction of judgments which have been incurred for other than corporate purposes.—Indiana Harbor Belt R. Co. v. Calumet City, 63 N.E.2d 369, 391 Ill. 280.

58. Ala.—Lang v. City of Mobile, 195 So. 248, 239 Ala. 331.

Fla.—State v. City of Miami, 19 So. 2d 410, 155 Fla. 6—State v. City of Inverness, 188 So. 767, 137 Fla. 629—State v. City of West Palm Beach, 174 So. 334, 127 Fla. 849—State v. City of Daytona Beach, 171 So. 814, 126 Fla. 728—Sullivan v. City of Tampa, 134 So. 211, 101 Fla. 298.

Ohio.—State ex rel. Stauss v. Cuyahoga County, 196 N.E. 890, 130 Ohio St. 64.

Pa.—Schuchman v. City of Pittsburgh, 41 A.2d 642, 351 Pa. 527, 157 A.L.R. 785—Ziegler v. Municipal Authority, Com.Pl., 93 Pittsb.Leg.J. 165

44 C.J. p 1186 note 24 [b].

Bonds issued after or before passage of refunding statute may be refunded.—State v. City of Miami, 134 So. 608, 101 Fla. 292.

Bonds issued under statutes imposing limited tax provision may be refunded under statutes imposing an unlimited taxing power.—State v. City of Arcadia, 187 So. 771, 137 Fla. 146.

Bonds reduced to judgment

Fla.—State v. Town of Holly Hill, 174 So. 818, 128 Fla. 385—State v. City of Daytona Beach, 171 So. 814, 126 Fla. 728.

Valid refunding bonds may be refunded.—State v. Haines City, 188 So. 831, 137 Fla. 616.

Part of bond issue

(1) Part of a bond issue may be refunded under a statute authorizing a municipality to issue bonds for the purpose of refunding any of its bonded indebtedness and not limiting the power to refund to an entire issue; and the determination of which bonds shall be called for refunding rests in the discretion of the municipality.—Town of Alamogordo v. Beall, 64 P.2d 384, 41 N.M. 93.

(2) Even though the governing statute contemplates that all bonds outstanding and unpaid shall be refunded, and the court does not in general approve the refunding of part only of outstanding unpaid bonds, it will not hold a refunding proceeding void or invalid for omission of one bond, where, at time of refunding, owner of that bond was unknown and could not be found, and there was sufficient money on hand in fund to pay that bond and such bond was set aside as paid or payable from available funds and in that manner was omitted and not refunded with other outstanding bonds.—Mefford v. Oklahoma City ex rel Simpson, 155 P.2d 523, 195 Okl. 45.

(3) It has been held that, where there has been collected, and is in the sinking fund, a sum sufficient to retire some of the outstanding bonds of an issue, it should be used for that purpose and new bonds be issued only to refund the remaining outstanding bonds.—City of Waco v. Mann, 127 S.W.2d 879, 133 Tex. 163.

Permanent improvement notes as bonds

Fla.—Sullivan v. City of Tampa, 134 So. 211, 101 Fla. 298

Certificates of indebtedness as bonds

(1) The meaning of the terms "bonds" and "certificates" of indebtedness, found in act relating to funding and refunding of existing indebtedness of municipalities, must be determined from the context and circumstances under which the terms were used; and a particular refunding statute was held not to indicate a synonymous use of the terms and not to include certificates within the term "bonds" in a provision authorizing the issuance of bonds to refund indebtedness represented by bonds.—Tracy v. Barnes County, 289 N.W. 377, 69 N.D. 602.

(2) On the other hand, guaranty certificates of indebtedness which are long-term interest-bearing certificates under seal importing a general liability of the city thereon were held to be "bonds" within the meaning and intent of that word, as used in a constitutional provision relating to the issuance of bonds to refund the principal and interest of outstanding bonds.—State v. City of St. Petersburg, 157 So. 641, 117 Fla. 300.

59. Fla.—Sullivan v. City of Tampa, 134 So. 211, 101 Fla. 298.

60. Fla.—Sullivan v. City of Tampa, supra.

61. Ill.—Village of Bellwood v. Hunter & Co., 32 N.E.2d 160, 375

bonds extends to the issuance of bonds for the funding or refunding of a valid,⁶² existing⁶³ indebtedness which constitutes a debt⁶⁴ or general obligation⁶⁵ of the municipality; but it does not extend to the issuance of bonds for the funding or refunding of an indebtedness which is invalid or void⁶⁶ or not legally binding on the municipality;⁶⁷ nor does it extend to the issuance of bonds for the

creation of a new indebtedness,⁶⁸ the funding of an anticipated debt,⁶⁹ the creation of a sinking fund for the payment of other bonds,⁷⁰ the reimbursement of the treasury for payments previously made from it,⁷¹ or for a purpose other than the meeting of a specific debt or obligation,⁷² such as the reduction of taxation by increasing the funds available for the general needs of the municipality.⁷³

Ill. 827, certiorari denied *Hunter & Co. v. Village of Bellwood*, 62 S.Ct. 60, 314 U.S. 629, 86 L.Ed. 505—*Village of Downers Grove v. Harley*, 25 N.E.2d 58, 372 Ill. 586—*Scribner v. Village of Downers Grove*, 25 N.E.2d 54, 372 Ill. 614.

62. Fla.—*State v. Town of Lake Placid*, 191 So. 540, 140 Fla. 327.

Ky.—*Tuggle v. City of Barbourville*, 171 S.W.2d 1008, 294 Ky. 351—*Root v. City of Newport*, 117 S.W.2d 594, 273 Ky. 604—*First Nat. Bank v. City of Princeton*, 117 S.W.2d 210, 273 Ky. 601—*Booth v. City of Carrollton*, 114 S.W.2d 93, 272 Ky. 250—*Kockritz v. City of Henderson*, 107 S.W.2d 245, 269 Ky. 334—*Marcum v. Borders*, 106 S.W.2d 122, 269 Ky. 59—*Harris v. Holt*, 99 S.W.2d 759, 266 Ky. 576—*Nourse v. City of Russellville*, 95 S.W.2d 1096, 265 Ky. 96—*Jones v. City of Paducah*, 92 S.W.2d 811, 263 Ky. 542—*City of Richmond v. Durham*, 83 S.W.2d 879, 260 Ky. 95—*Bond v. City of Corbin*, 44 S.W.2d 576, 241 Ky. 663—*Pace v. City of Paducah*, 44 S.W.2d 574, 241 Ky. 568—*Rowland v. City of Paris*, 13 S.W.2d 791, 227 Ky. 570. Okl.—*Faught v. City of Sapulpa*, 292 P. 15, 145 Okl. 164—*City of Anadarko v. Kerr*, 285 P. 975, 142 Okl. 86.

Wash.—*Fisher v. Seattle*, 104 P. 655, 55 Wash. 396.

After void attempt to sell property assessed

The refunding of securities issued in anticipation of collection of assessment was proper, notwithstanding assessment had become delinquent, sale was ordered, and the property was sold to city, where sale was invalid for failure of city to pay the purchase price.

Ill.—*City of Chicago v. Empire Liquidating Corporation*, 19 N.E.2d 576, 370 Ill. 631.

Invalidity of judgment rendered on valid municipal warrant is immaterial and will not defeat refunding bonds issued to refund indebtedness evidenced thereby, since the warrants might have been refunded without the intermediate judgment.—*Faught v. City of Sapulpa*, 292 P. 15, 145 Okl. 164.

Indebtedness to special funds

Where money was wrongfully diverted from special city funds to general fund, liability of city to spe-

cial funds remained fixed, and hence bond issue for purpose of funding or refunding the indebtedness of the general fund to the special funds was authorized, as against contention that bond issue constituted assumption of invalid debt contrary to statute.—*Wheeler v. City of Hopkinsville*, 106 S.W.2d 1016, 269 Ky. 289.

63. Fla.—*City of Miami v. State*, 190 So. 774, 139 Fla. 598.

Ky.—*Coffman v. Central City*, 101 S.W.2d 204, 267 Ky. 26.

44 C.J. p 1187 note 26.

Existence at particular time

Effect is accorded a constitutional or statutory provision granting or limiting authority to issue bonds to pay, fund, or retire indebtedness existing at the date the provision became effective or other designated time.

Ark.—*Cherry v. Overman*, 83 S.W.2d 817, 191 Ark. 126.

Kan.—*State ex rel. Boynton v. Board of Education of City of Topeka*, 21 P.2d 295, 137 Kan. 451.

S.C.—*Brailsford v. Walker*, 31 S.E.2d 385, 205 S.C. 228.

44 C.J. p 1187 note 26 [c].

64. N.C.—*Jones v. New Bern*, 113 S.E. 663, 184 N.C. 131.

44 C.J. p 1187 note 27.

65. Neb.—*Alexander v. Bailey*, 189 N.W. 365, 108 Neb. 717.

66. Ill.—*People ex rel. Toman v. Granada Apartment Hotel Corporation*, 44 N.E.2d 606, 381 Ill. 41.

Ky.—*Henderson v. Town of Mt. Vernon*, 132 S.W.2d 322, 279 Ky. 829—*Rowland v. City of Paris*, 13 S.W.2d 791, 227 Ky. 570.

Okl.—*Faught v. City of Sapulpa*, 292 P. 15, 145 Okl. 164.

Pa.—*Appeal of Borough of Summit Hill*, 44 Pa.Dist. & Co. 180, 51 Dauph.Co. 435.

44 C.J. p 1187 note 29.

Constitutional amendment relating to particular city, however, was held to apply to indebtedness previously incurred for certain purposes, even though it was conceded that the indebtedness was invalid when incurred.—*Brailsford v. Walker*, 31 S.E.2d 385, 205 S.C. 228.

Debts resulting from insufficient tax levy

(1) In Kentucky, bonds may not be issued to fund or pay an indebtedness where the maximum author-

ized tax has not been levied.—*Swinburne v. City of Newport*, 181 S.W.2d 421, 297 Ky. 820—*Chestnut v. City of Bowling Green*, 149 S.W.2d 523, 285 Ky. 800.

(2) Before the overruling of decisions as to the validity of the indebtedness, it was held that bonds might be issued to fund an indebtedness which, together with other indebtedness, did not exceed the revenue and income which the municipality provided, or might have provided, under the constitution.—*Booth v. City of Carrollton*, 114 S.W.2d 93, 272 Ky. 250—*Kockritz v. City of Henderson*, 107 S.W.2d 245, 269 Ky. 334—*Matz v. City of Newport*, Campbell County, 95 S.W.2d 1071, 265 Ky. 126—*Havely v. City of Lexington*, 95 S.W.2d 598, 264 Ky. 737—*Hill v. City of Covington*, 95 S.W.2d 278, 264 Ky. 618—*Davis v. City of Newport*, 6 S.W.2d 693, 224 Ky. 546—*Vaughn v. City of Corbin*, 289 S.W. 1104, 217 Ky. 521.

44 C.J. p 1187 note 27 [a].

(3) The new rule is not retroactive.—*Chestnut v. City of Bowling Green*, supra.

Renewal of invalid note or bond

An invalid note or bond will not be translated into a valid obligation by a renewal thereof.—*Bolton v. Wharton*, 161 S.E. 454, 163 S.C. 242, 86 A.L.R. 1101.

67. Wash.—*Pratt v. Seattle*, 189 P. 565, 111 Wash. 104.

Lack of municipal debt or obligation Ill.—*People ex rel. Lindheimer v. Axelrod*, 26 N.E.2d 512, 373 Ill. 446.

Ky.—*City of Paducah v. Jones*, 118 S.W.2d 753, 274 Ky. 460.

68. N.J.—*Brooks v. Sea Isle City*, Sup., 83 A. 779.

69. Ky.—*Coffman v. Central City*, 101 S.W.2d 204, 267 Ky. 26.

70. Wash.—*Murphy v. Spokane*, 117 P. 476, 64 Wash. 681.

71. U.S.—*Coffin v. Indianapolis*, C. C.Ind., 59 F. 221.

44 C.J. p 1187 note 38.

72. N.Y.—*Schieffelin v. Hylan*, 174 N.Y.S. 508, 106 Misc. 347, affirmed 176 N.Y.S. 809, 188 App.Div. 192, affirmed 125 N.E. 925, 227 N.Y. 593.

73. N.Y.—*Schieffelin v. Hylan*, supra.

However, refunding bonds authorized, issued, and accepted in composition or settlement of an existing and outstanding indebtedness are valid obligations, although the original evidences of debt may not have been enforceable,⁷⁴ where there is a bona fide dispute, not based on total lack of authority to incur the debt, as to the liability of the municipality.⁷⁵

Refunding matured or unmatured obligations. A municipality may refund or renew bonds at the maturity thereof;⁷⁶ and, under some statutes, it may issue bonds to retire outstanding bonds or other obligations prior to maturity thereof,⁷⁷ at least where they are about to mature.⁷⁸ So, too, under some statutes, outstanding bonds may be refunded, although they are not in default,⁷⁹ and, under other statutes, bonds may be refunded where they are about to mature and, in the opinion of the municipal council, there will be a default in payment of principal within one year.⁸⁰ In determining how far in advance of the maturity date of outstanding bonds a municipal corporation may issue refunding bonds, where a specific period is not fixed by statute, the rule of reason must be applied,⁸¹

and no general rule that will fit every case can be stated.⁸²

In at least one jurisdiction, renewal bonds may not be issued and begin to bear interest before the bonds to be renewed are payable, or can be called and paid, where this course necessarily and inevitably results in a duplication of interest;⁸³ but there is no duplication of interest, and, hence, refinancing bonds are not invalid under this rule, where they are not issued and do not begin bearing interest until the maturity date of the bonds they replace;⁸⁴ a city may arrange in advance for funds to retire existing bonds;⁸⁵ and a sale of bonds to refund another issue may be held a reasonable time in advance of the maturity of the issue to be refunded, provided the new issue bears interest from a date not earlier than the maturity of the issue to be refunded and the purchase price is payable on such maturity,⁸⁶ or, if the purchase price is paid in advance of the maturity of the old issue, provided the depository of funds realized from the sale contracts to pay interest on the deposit equal to the interest accruing on the bonds prior to the date of retirement of the old issue.⁸⁷

74. N.Y.—*Hills v. Peekskill Sav. Bank*, 5 N.E. 327, 101 N.Y. 490.
44 C.J. p 1187 note 36.

75. Fla.—*City of Coral Gables v. State*, 176 So. 40, 128 Fla. 874.

76. Ky.—*City of Frankfort v. Harrod*, 143 S.W.2d 292, 283 Ky. 755.

77. Fla.—*State v. City of Okeechobee*, 127 So. 339, 99 Fla. 617.
44 C.J. p 1186 note 24 [b].

In Louisiana

(1) Where there was a provision for redemption before maturity, the fact that city's refunding paving certificates were issued as of July 1 and the certificates being redeemed were being called for the following January 1, did not make the refunding certificates illegal because of the double interest charges incurred during the overlapping period, since such double interest was merely a normal incidental cost of the refunding operation.—*State ex rel. Maestri v. Cave*, 190 So. 631, 193 La. 419.

(2) However, a constitutional amendment authorizing political subdivision to refund bonds permitted issuance of refunding bond only where bonds to be refunded were available for cancellation either because of their voluntary surrender or by reason of their having become

due, and did not permit the refunding before maturity, at a lower interest rate, of bonds bearing fixed-rate of interest for definite term and containing no provision for redemption before maturity.—*Martin v. Mayor & Bd. of Aldermen of Town of Westwego*, 32 So.2d 711, 212 La. 439.

78. Ohio.—*State ex rel. Stauss v. Cuyahoga County*, 196 N.E. 890, 130 Ohio St. 64.

79. Fla.—*Richard v. City of Fort Lauderdale*, 1 So.2d 202, 146 Fla. 349.

80. Pa.—*Schuchman v. City of Pittsburgh*, 41 A.2d 642, 351 Pa. 527, 157 A.L.R. 785.

Insufficiency of taxes to meet the general operating expenses of the municipality and liquidate the bonds maturing during the year may properly be made the basis of the council's opinion that there will be a default.—*Schuchman v. City of Pittsburgh*, *supra*.

81. S.C.—*Kalber v. Stokes*, 9 S.E.2d 785, 194 S.C. 339.

Reasonable lapse of time between the maturity of the outstanding bonds and the issue of the refunding bonds is permissible.—*Fleeman v. City of Jacksonville*, 191 So. 840, 140 Fla. 478.

82. S.C.—*Kalber v. Stokes*, 9 S.E.2d 785, 194 S.C. 339.

Appreciable time

Fla.—*State v. City of Miami*, 19 So. 2d 410, 411, 155 Fla. 6—*State v. City of Miami*, 194 So. 732, 142 Fla. 284—*Fleeman v. City of Jacksonville*, 191 So. 840, 140 Fla. 478—*City of Miami v. State*, 190 So. 774, 139 Fla. 598.

83. Ky.—*Holt v. City of Covington*, 151 S.W.2d 780, 286 Ky. 727, overruling *City of Frankfort v. Harrod*, 143 S.W.2d 292, 283 Ky. 755.

84. Ky.—*Salvers v. Moran*, 177 S.W.2d 143, 296 Ky. 386

Sale deferred until occurrence of deficit

Waterworks bonds which were to bear interest only from time they are used to refund maturing bonds of previous issue, and which were not to be sold until a deficit occurred in fund provided for payment of maturing bonds, could be legally issued by a city.—*First & Peoples Bank of Russell v. City of Russell*, 132 S.W.2d 304, 279 Ky. 849.

85. Ky.—*Holt v. City of Covington*, 151 S.W.2d 780, 286 Ky. 727.

86. Ky.—*Holt v. City of Covington*, *supra*

87. Ky.—*Holt v. City of Covington*, *supra*.

c. Limitation of Amount

§ 1911. In General

Effect is accorded a constitutional or statutory provision limiting the amount of bonds a municipal corporation may issue; but such a limitation is not applicable unless the bond or other obligation in question is a debt of the municipality; and, where the limitation is imposed only by statute, and not by the constitution of the state, it may be changed or removed entirely by the legislature.

Constitutional⁸⁸ or valid statutory⁸⁹ provisions limiting the amount of bonds which a municipal corporation may issue are accorded effect, as are also statutory limitations of the amount of stock a municipality may issue;⁹⁰ and this is true whether the limit prescribed is a specified amount⁹¹ or, as is more common, is a certain percentage of the assessed value of the taxable property within the municipality.⁹² Under the latter limitation the basis of computation is not the actual value of property within the municipality,⁹³ but the value thereof as shown by the last regular tax assessment made by the proper authorities,⁹⁴ and completed at the time the debt is created.⁹⁵

Where a limitation of the bonded indebtedness of a municipality is a statutory, and not a constitu-

tional, one, it may be changed⁹⁶ or dispensed with entirely⁹⁷ at the will of the legislature.

Under some constitutional and legislative provisions, cities have the right to determine what the bonding limit shall be up to eight per cent of the valuation of their real and personal property, but they have no right to prescribe the mode or manner of raising or lowering the bonding limit.⁹⁸ A statutory limitation has been held not applicable to a city operating under a special charter.⁹⁹

Limitation of, or to, taxes. Unless made applicable by reference and adoption,¹ a charter or statutory limitation of the amount or rate of taxes which may be levied does not apply to an issuance of bonds so as to restrict the amount thereof.² Under a statute authorizing municipalities to issue tax warrants in anticipation of taxes levied to the extent of a specified percentage thereof, the amount of the taxes lawfully levied, and not the amount actually extended, determines the amount of anticipation warrants which may be lawfully issued.³ Public benefit vouchers evidencing a general obligation of the city fixed by a confirmation judgment are not a species of tax anticipation warrants so as to be

88. S.C.—*Sullivan v. Charleston*, 130 S.E. 872, 133 S.C. 156.

44 C.J. p 1187 note 40.

Limitation of amount of municipal indebtedness or expenditure generally see *supra* §§ 1846–1855.

Provision is intended as a limitation on power to create a debt by the issuance of bonds.—*City of Georgetown v. Elliott*, C.C.A.S.C., 95 F.2d 774.

Provision is both grant and limitation of power

Va.—*Almond v. Gilmer*, 51 S.E.2d 272, 188 Va. 822.

89. Conn.—*City of Stamford v. Town of Stamford*, 141 A. 891, 107 Conn. 596.

Or.—*Rorick v. Dalles City*, 12 P.2d 762, 140 Or. 342.

44 C.J. p 1187 note 41.

No limitation

Statute referring to cities of the second and third class was held not to affect cities of the first class.—*City of Coffeyville v. Robb*, 194 P.2d 475, 165 Kan. 219.

Power to prescribe limitation

The general assembly may, without violating constitutional provisions, enact laws prescribing a general limit of bonded indebtedness within which a municipality may pledge its full faith and credit.—*City of Middletown v. City Commis-*

sion of Middletown, 37 N.E.2d 609, 138 Ohio St. 596.

90. Md.—*Bond v. Baltimore*, 84 A. 258, 118 Md. 159.

91. Ga.—*Swainsboro v. Coleman*, 74 S.E. 688, 137 Ga. 853.

44 C.J. p 1188 note 43.

92. La.—*State ex rel. Walmsley v. Board of Liquidation of City Debt*, 129 So. 724, 171 La. 110.

44 C.J. p 1188 note 44.

Limitations apply to auditorium district

S.C.—*Ashmore v. Greater Greenville Sewer Dist.*, 44 S.E.2d 88, 211 S.C. 77.

Uniform overvaluation

The only harm, if any, from uniform overvaluation of all properties in city is to increase limit to which city can issue its bonds.—*Cahill v. Goes*, 275 N.Y.S. 55, 242 App.Div. 423.

Limitation held not exceeded

La.—*Woulfe v. Morrison*, 34 So.2d 251, 212 La. 1032.

93. Minn.—*Phelps v. City of Minneapolis*, 219 N.W. 872, 174 Minn. 509.

Neb.—*State v. Babcock*, 39 N.W. 788, 24 Neb. 640—*State v. Babcock*, 31 N.W. 8, 20 Neb. 522.

94. La.—*State ex rel. Walmsley v. Board of Liquidation of City Debt*, 129 So. 724, 171 La. 110.

44 C.J. p 1188 note 46.

95. Minn.—*Phelps v. City of Minneapolis*, 219 N.W. 872, 174 Minn. 509.

44 C.J. p 1188 note 47.

96. Kan.—*State ex rel. Boynton v. Board of Education of City of Topeka*, 21 P.2d 295, 137 Kan. 451.

Or.—*Rorick v. Dalles City*, 12 P.2d 762, 140 Or. 342.

Statutory amendment reducing limitation was construed not to prohibit issuance of bonds, authorized between effective dates of original and amendatory statutes, in amount within original limitation.—*Harvey v. Clark*, 32 P.2d 591, 147 Or. 179.

97. Or.—*Rorick v. Dalles City*, 12 P.2d 762, 140 Or. 342.

98. Mich.—*Jackson v. Vedder*, 176 N.W. 557, 209 Mich. 291.

43 C.J. p 287 note 38.

99. Miss.—*Love v. Yazoo City*, 44 So. 835, 91 Miss. 535.

1. Tex.—*Belton v. Harris Trust, etc., Bank*, Civ.App., 273 S.W. 914.

2. Mich.—*Detroit v. Engel*, 173 N.W. 547, 207 Mich. 106.

44 C.J. p 1188 note 54.

Limitation of amount or rate of municipal taxes generally see *infra* §§ 1989–1991.

3. Ill.—*Edward J. Berwind, Inc., v. Chicago Park Dist.*, 65 N.E.2d 785, 393 Ill. 317.

subject to the limitation applicable to such warrants.⁴

What constitutes bonded indebtedness generally. The important elements of a "bonded debt" or "bonded indebtedness" of a municipality, within the meaning of a constitutional or statutory limitation of the amount thereof, are that the bond or other obligation is a primary obligation of the municipality⁵ and is to be paid out of taxes to be levied on all the property within the corporate boundaries.⁶ Hence, such a limitation is not applicable to, and is not violated by, bonds or other obligations which are not bonds or debts of the city,⁷ or are payable solely from the revenues of a municipal project,⁸ or are secured by the pledge of a fund which may be reasonably expected to be sufficient to meet them without resorting to the levy of a property tax.⁹ Particular notes may partake so fully of the distinctive characteristics of bonded indebtedness as to be subject to the limitation.¹⁰

Interest to accrue is not included in computing the amount of bonds which may be issued.¹¹

Time for application of limitation; aggregate indebtedness. Some statutory limitations refer only to the amount of bonds or stock which are issued at

any one time¹² or within any one fiscal year,¹³ but other charter or statutory limitations, by their express terms, or the construction placed thereon, are applicable to the aggregate bonded indebtedness of the municipality,¹⁴ or the aggregate amount of its outstanding stock.¹⁵ Whether a limitation of bonded indebtedness is exceeded by a particular issue of bonds must be determined as of the time of the actual issuance of the bonds,¹⁶ and not as of a prior date when the bonds are authorized by popular vote,¹⁷ or a subsequent date,¹⁸ such as the date when the bonds are payable,¹⁹ or a date when the tax valuations are lower.²⁰

§ 1912. Bonds for Particular Purposes

Subject to such special limitation, if any, as is provided, bonds in excess of a general limitation of bonded indebtedness may be issued for a special purpose where it is so provided by a constitutional or valid statutory provision.

Municipal corporations are sometimes empowered to issue bonds in excess of a general limitation for such special purposes as municipal improvements generally,²¹ street improvements,²² bridges,²³ schoolhouses,²⁴ drains, canals, or artificial water-

4. Ill.—People ex rel. Toman v. Crane, 23 N.E.2d 337, 372 Ill. 228.

5. S.C.—Thomson v. Christopher, 139 S.E. 178, 141 S.C. 92.

6. S.C.—Bolton v. Wharton, 161 S.E. 454, 163 S.C. 242, 86 A.L.R. 1101—Thomson v. Christopher, 139 S.E. 178, 141 S.C. 92—Jackson v. Breeland, 88 S.E. 128, 103 S.C. 191.

7. Va.—Mumpower v. Housing Authority of City of Bristol, 11 S.E.2d 732, 176 Va. 426.

W.Va.—Brewer v. City of Point Pleasant, 172 S.E. 717, 114 W.Va. 572.

Bonds of housing authority

Va.—Mumpower v. Housing Authority of City of Bristol, 11 S.E.2d 732, 176 Va. 426.

8. S.C.—Roach v. City of Columbia, 174 S.E. 461, 172 S.C. 478—Cathcart v. City of Columbia, 170 S.E. 435, 170 S.C. 362.

Express authorization of bonds for particular purposes in excess of general limitation see *infra* § 1912

9. U.S.—City of Georgetown v. Elliott, C.C.A.S.C., 95 F.2d 774.

Pledge of taxes levied, but not collected, is the pledge of a fund within the rule.—City of Georgetown v. Elliott, *supra*.

10. Conn.—City of Stamford v. Town of Stamford, 141 A. 891, 107 Conn. 596.

11. Fla.—Corpus Juris cited in Sullivan v. City of Tampa, 134 So. 211, 218, 101 Fla. 298.

S.C.—Corpus Juris quoted in Williams v. City of Rock Hill, 180 S.E. 799, 802, 177 S.C. 82.
44 C.J. p 1188 note 59.

12. Ky.—Bohannon v. Louisville, 235 S.W. 750, 193 Ky. 276.

13. Md.—Bond v. Baltimore, 84 A. 258, 118 Md. 159.
44 C.J. p 1188 note 49.

14. Idaho.—Woodward v. Grangeville, 92 P. 810, 13 Idaho 652.
44 C.J. p 1188 note 50.

15. Md.—Baltimore v. Bond, 65 A. 318, 104 Md. 590.
44 C.J. p 1188 note 51.

16. Fla.—Corpus Juris cited in Sullivan v. City of Tampa, 134 So. 211, 218, 101 Fla. 298.

Kan.—Jaeger v. City of Hillsboro, 190 P.2d 420, 164 Kan. 533.
44 C.J. p 1188 note 65.

17. Kan.—Jaeger v. City of Hillsboro, *supra*.
44 C.J. p 1188 note 56.

18. N.Y.—Gibson v. Knapp, 47 N.Y. S. 446, 21 Misc. 499

19. Ohio.—Smith v. Rockford, 9 Ohio Cir. Ct. N.S., 465, 29 Ohio Cir. Ct. 478.

20. Fla.—City of Miami v. State, 190 So. 774, 139 Fla. 598.

21. N.C.—Cottrell v. Lenoir, 61 S.E. 599, 148 N.C. 137.

44 C.J. p 1188 note 61.

Constitutionality of authorizing statute

Statute authorizing municipalities to make public improvements and pay therefor by bonds payable from income to be derived from their operation is not unconstitutional because it authorizes the issuance of bonds in excess of the limit of bonded indebtedness fixed by a statute enacted in pursuance of a constitutional provision, since the bonds are not payable by the city and do not increase the bonded indebtedness of the city.—Young v. City of Ann Arbor, 255 N.W. 579, 267 Mich. 241.

Lack of evidence of less bonding power

Municipal bonds for permanent improvements would not be held invalid as exceeding amount of bonding power available, in absence of evidence from which court could find that bonding power was less than the amount of bonds authorized.—City of Youngstown v. Mitchell, 14 Ohio Supp. 83.

22. Kan.—Junction City v. Central Nat. Bank, 153 P. 28, 96 Kan. 407.
44 C.J. p 1188 note 62.

23. Iowa.—France v. Des Moines, 168 N.W. 208, 183 Iowa 1311.

24. Ala.—Browder v. Montgomery, 93 So. 507, 207 Ala. 589.

44 C.J. p 1188 note 64.

courses,²⁵ waterworks,²⁶ water²⁷ or sewerage²⁸ systems, light plants,²⁹ light and power systems,³⁰ municipally owned public utilities generally,³¹ any public utility which a municipality is authorized to acquire or operate, where the bonds are secured only by the property and revenues of the utility and do not impose any liability on the municipality,³² or any specific undertakings from which the city or town may derive revenue.³³

A statute authorizing a municipality to issue bonds for particular purposes need not designate the precise amount of bonds to be issued,³⁴ but may properly limit the amount³⁵ and authorize the municipality, within the limit prescribed, to issue bonds for such amount as is necessary for the purposes specified.³⁶ Also, a legislative limitation of the amount of bonds which may be issued for particular purposes may be subsequently raised or lowered by the legislature.³⁷

One or more purposes. A charter or statutory limitation of the amount of bonds which may be issued for two or more specified purposes operates on the aggregate amount of bonds issued for such purposes;³⁸ but some limitations, by their express terms, apply only to issues for any one purpose.³⁹

Bonds issued for park purposes only are subject to general limitations of the amount of bonded indebtedness.⁴⁰

Aid of railroads. A charter or statutory provi-

sion authorizing a municipality to issue bonds "in any amount" in aid of a railroad will be construed to mean any amount within the constitutional limit,⁴¹ and, therefore, not in conflict with it.⁴² The limitations imposed by a statute have been held not to control bonds issued under a later statute prescribing limitations of the amount of bonds issuable in aid of a railroad.⁴³

Calamity relief. Under some charter or statutory provisions, a city may issue bonds, within the special limitation imposed by such provisions, for the relief of its inhabitants in case of fire, flood, or other calamity, even though such bonds cause the bonded indebtedness of the city to exceed a general limitation thereof;⁴⁴ but the special limitation may not be exceeded for calamity relief whether there is one or several calamities,⁴⁵ and even though calamity bonds previously issued have been refunded.⁴⁶

Acquisition of lands for airport. A charter provision authorizing the city, within a limitation of amount, to issue bonds for the acquisition and improvement of lands for use as an aviation field has been construed to grant an additional power and not to limit the power granted by another provision authorizing the issuance of bonds in a larger amount to pay for lands acquired for an airport.⁴⁷

Bonds to fund, refund, or liquidate indebtedness. Statutes authorizing municipalities to issue refund-

25. Kan.—City of Council Grove v. Schmidt, 127 P.2d 250, 155 Kan. 515.

26. Va.—Ennis v. Town of Herndon, 191 S.E. 685, 168 Va. 539. 44 C.J. p 1189 note 65.

27. S.C.—Davis v. Town of Saluda, 145 S.E. 412, 147 S.C. 498.

28. S.C.—Davis v. Town of Saluda, supra—Rutledge v. Greater Greenville Sewer Dist., 137 S.E. 597, 139 S.C. 188.

29. Minn.—Woodbridge v. Duluth City, 59 N.W. 296, 57 Minn. 256. 44 C.J. p 1189 note 67.

30. Or.—City of Cascade Locks v. Carlson, 90 P.2d 787, 161 Or. 557.

31. Okl.—Toohey v. Town of Canton, 60 P.2d 729, 177 Okl. 426.

32. Mich.—Michigan Gas & Electric Co. v. City of Dowagiac, 270 N.W. 772, 278 Mich. 522.

Ohio.—Zangerle v. City of Cleveland, Division of Municipal Transp., 61 N.E.2d 720, 145 Ohio St. 347—City of Middletown v. City Commission of Middletown, 37 N.E.2d 609, 138 Ohio St. 596—Pathe v. Donaldson, 163 N.E. 204, 29 Ohio App. 171, error dismissed 166 N.E. 202, 119 Ohio St. 648.

Legal bonding limit of city need not be exhausted to enable city to exercise power to issue bonds limited to liquidation out of revenues of utility.—Michigan Gas & Electric Co. v. City of Dowagiac, 270 N.W. 772, 278 Mich. 522.

33. Va.—Ennis v. Town of Herndon, 191 S.E. 685, 168 Va. 539.

34. N.C.—Tyson v. Salisbury, 66 S. E. 532, 151 N.C. 468.

35. N.C.—Tyson v. Salisbury, supra.

36. N.C.—Tyson v. Salisbury, supra.

37. Miss.—Feemster v. Tupelo, 83 So. 804, 121 Miss. 733.

38. Ga.—Swainsboro v. Coleman, 74 S.E. 688, 137 Ga. 853. 44 C.J. p 1189 note 73.

39. La.—Covington Bank, etc., Co. v. Covington, 105 So. 382, 159 La. 389. 44 C.J. p 1189 note 74.

Issues held for different purposes La.—Houssiere v. City of Jennings, 197 So. 750, 195 La. 1042.

Proposed bond issue of sewerage district held not in excess of limitation

La.—Nanney v. Town of Leesville, 4 So.2d 825, 198 La. 773.

40. Ohio.—Cincinnati v. Puchta, 115 N.E. 278, 94 Ohio St. 431—Henderson v. Cincinnati, 89 N.E. 1072, 81 Ohio St. 27.

41. U.S.—Atlantic Trust Co. v. Darlington, C.C.S.C., 63 F. 76, affirmed 88 F. 849, 16 C.C.A. 28, error dismissed 18 S.Ct. 947, 42 L.Ed. 1214.

42. U.S.—Darlington v. Atlantic Trust Co., S.C., 68 F. 849, 16 C.C.A. 28, error dismissed 18 S.Ct. 947, mem. 42 L.Ed. 1214.

43. Kan.—Chicago, etc., R. Co. v. Manhattan, 25 P. 879, 45 Kan. 419—State v. Rush County, 10 P. 585, 35 Kan. 150.

44. Mich.—City of Muskegon Heights v. Danigella, 235 N.W. 83, 253 Mich. 260, 73 A.L.R. 696.

45. Mich.—Council of City of Hamtramck v. Matulewicz, 280 N.W. 801, 285 Mich. 390.

46. Mich.—Council of City of Hamtramck v. Matulewicz, supra.

47. Neb.—Bruett v. City of Omaha, 241 N.W. 561, 122 Neb. 779.

ing bonds have been held not to violate constitutional provisions limiting the amount of municipal bonded indebtedness;⁴⁸ and some provisions limiting the amount of bonded indebtedness expressly except bonds issued for the purpose of paying, funding, or liquidating indebtedness existing at a particular time.⁴⁹ On the other hand, bonds to fund, refund, or liquidate indebtedness cannot be issued lawfully where they would increase the amount of the bonded indebtedness of the municipality beyond the amount prescribed by an applicable limitation.⁵⁰

Cost of property or improvement. Some statutes authorizing the issuing of bonds for the purchase of property or the making of an improvement limit the amount of the bonds to the cost of the property or improvement.⁵¹ A statutory limitation on the amount of bonds which may be issued for an improvement has been held not to be operative on the cost of the improvement⁵² or the contract price of its construction,⁵³ and a present bond issue within the amount limited by statute is not invalid because it is insufficient for the completion of the project or improvement;⁵⁴ but it has also been held that a bond issue is invalid by reason of its connection with a contract creating an indebtedness in excess of the limitation,⁵⁵ or it has been held valid where the only objection to its validity is predicated on the alleged invalidity of a contract as creating an excessive indebtedness and the contract is held valid.⁵⁶

Amount of assessments. Under some statutes, improvement bonds issued after completion of the

improvement are not limited to the amount of assessments which the property owner has elected to pay in installments.⁵⁷

§ 1913. Computation of Existing Bonded Indebtedness

In computing the existing bonded indebtedness of a municipal corporation, in order to determine whether it equals or exceeds a prescribed limitation so as to preclude another issuance of bonds, it is proper to exclude void bonds, bonds issued by another political subdivision whose territory is coextensive in whole or in part with that of the municipality, and obligations or liabilities of the municipality which are not bonded indebtedness, as well as bonds which are expressly required by law to be excluded. The sinking fund on hand is to be deducted from the amount of outstanding bonds.

In computing the existing bonded indebtedness of a municipal corporation for the purpose of determining whether it equals or exceeds the limit prescribed by law so as to preclude another issuance of bonds, it is proper to exclude obligations or liabilities of the municipality which do not fall within the meaning of the term "bonded debt;"⁵⁸ bonds of the municipality which are void⁵⁹ because in excess of the constitutional limit of indebtedness;⁶⁰ bonds issued by another political subdivision, such as a county, township, or school district, whose territory is coextensive in whole or in part with that of the municipality;⁶¹ money borrowed from a commission which is not a separate entity, but is merely a department of the municipality;⁶² and bonds which are expressly required by constitutional or statutory provision to be excluded, such as bonds issued with the approval of the electors of the corporation,⁶³ and, likewise, under the authorities,

48. S.C.—Williams v. City of Rock Hill, 180 S.E. 799, 177 S.C. 82, followed in Kalber v. Stokes, 9 S.E.2d 785, 194 S.C. 339.

49. Kan.—Goodland v. Nation, 107 P. 542, 82 Kan. 200.

44 C.J. p 1189 note 85.

50. Ky.—Wilson v. Covington, 295 S.W. 1069, 220 Ky. 795.

44 C.J. p 1189 note 86.

51. Del.—Taylor v. Smith, 115 A. 405, 13 Del.Ch. 39, modified on other grounds 115 A. 413, 13 Del.Ch. 57.

Idaho.—Williams v. Caldwell, 114 P. 519, 19 Idaho 514.

52. U.S.—Oshkosh v. Fairbanks, C.C. A.Neb., 8 F.2d 329.

44 C.J. p 1189 note 76.

53. U.S.—Oshkosh v. Fairbanks, supra.

54. Ohio.—Platt v. Toledo, 12 Ohio Cir.Ct., N.S., 279, 31 Ohio Cir.Ct. 305.

55. Idaho.—Woodward v. Grangeville, 92 P. 840, 13 Idaho 652.

44 C.J. p 1189 note 79.

56. Iowa.—Waller v. Pritchard, 202 N.W. 770, 201 Iowa 1364.

57. Ala.—Peoples v. State Sec. Bank, 119 So. 226, 218 Ala. 534.

58. S.C.—Lillard v. Melton, 87 S.E. 421, 103 S.C. 10.

44 C.J. p 1190 note 90.

Prospective indebtedness

Bonded indebtedness of tax district is determined only by amount of bonded indebtedness legally incurred, and not by the amount of prospective indebtedness provided for by petitions.—Bleumel v. State, 184 N.E. 173, 204 Ind. 544, rehearing denied 185 N.E. 113, 204 Ind. 544.

59. Fla.—Olds v. Alvord, 191 So. 434, 139 Fla. 745, certiorari denied Alvord v. Town of Belleair, 60 S. Ct. 141, 308 U.S. 603, 84 L.Ed. 505.

60. U.S.—Ashuelot Nat. Bank v. Lyon County, C.C.Iowa, 81 F. 127, affirmed 87 F. 137, 30 C.C.A. 391.

44 C.J. p 1190 note 91.

61. Mont.—Corpus Juris quoted in House v. School Dist. No. 4 of Park County, 184 P.2d 285, 289.

44 C.J. p 1190 note 92.

Under permissive statute, however, a contrary result may be reached.—City of Stamford v. Town of Stamford, 141 A. 891, 107 Conn. 596.

Separate bonded debt of state as such is not to be prorated to any particular subdivision in order to ascertain whether constitutional limitation on bonded debt has been reached in the territory of the subdivision.—Ashmore v. Greater Greenville Sewer Dist., 44 S.E.2d 88, 211 S.C. 77.

Bonds issued by housing authority
S.C.—McNulty v. Owens, 199 S.E. 425, 188 S.C. 377.

62. S.C.—Tarver v. Town of Johnston, 175 S.E. 821, 173 S.C. 333.

63. Ohio.—Cleveland v. Cleveland, 13 Ohio Cir.Ct., N.S., 436, 15 Ohio Cir.Ct., N.S., 129, 32 Ohio Cir.Ct. 257, affirmed 94 N.E. 1103, 83 Ohio St. 482.

Qualified provision construed

Va.—Town of Galax v. Appalachian Electric Power Co., 12 S.E.2d 778, 177 Va. 29.

bonds such as auditorium bonds,⁶⁴ sewerage bonds,⁶⁵ bonds which are to be paid for by assessments specially levied on abutting property,⁶⁶ and bonds issued prior to a specified date.⁶⁷

Under some constitutional or statutory provisions, bonds issued for municipal utilities are not to be considered in ascertaining the amount of bonds which may be issued for general purposes⁶⁸ or in aid of a railroad,⁶⁹ but railroad aid bonds are to be included in computing the total amount of bonds which may be issued.⁷⁰ Also, under some statutes and the construction placed thereon waterworks bonds may be issued without regard to the general limitation of bonded indebtedness, as discussed *supra* § 1912, but after they have been issued they are to be included in the computation of the existing bonded indebtedness of the municipality,⁷¹ at least with respect to a subsequent issue of bonds other than for general purposes.⁷² Under other constitutional or statutory provisions, however, waterworks bonds are to be excluded from the computation either generally⁷³ or where the income from the waterworks is sufficient for operating expenses, interest charges, and sinking fund purposes.⁷⁴

Bonds issued for the share of the municipality of the cost of permanent street improvements are to be included where they are not exempted by constitutional provision from a constitutional limitation of bonded indebtedness;⁷⁵ but street improvement bonds are to be excluded where the constitution or

a statute so provides.⁷⁶ Bonds for storm sewers are within a provision for exclusion of bonds for erecting, repairing, and maintaining streets and sidewalks,⁷⁷ but are not within a provision for exclusion of sewerage system bonds.⁷⁸

The sinking fund on hand is to be deducted from the amount of outstanding bonds in determining the bonded indebtedness of a municipality;⁷⁹ and, where it more than equals the principal of the outstanding bonds of a particular issue, such issue need not be considered in making the computation.⁸⁰

§ 1914. Validity of Excessive Issues

An excessive bond issue is invalid to, but only to, the extent of the excess.

Where municipal bonds have been already issued to the amount authorized by law, all bonds issued thereafter are void,⁸¹ but, where the limit has not been previously reached, bonds which in the aggregate exceed the limit are void only to the extent of the excessive issue.⁸² Where an issue of bonds is only partially excessive and the bonds are delivered at different dates, those first delivered up to the amount of the debt the municipality can lawfully create should be paid and the others should be treated as nullities;⁸³ but, where the bonds are delivered at the same time so that none has priority over the others, each bond is valid to the extent of its proportionate share of the debt lawfully contracted.⁸⁴ Any tax anticipation warrants issued in excess of the amount limited by statute are invalid.⁸⁵

64. Minn.—Phelps v. City of Minneapolis, 219 N.W. 872, 174 Minn. 509.

Statute providing for exclusion held not repealed

Minn.—Phelps v. City of Minneapolis, *supra*.

65. S.C.—Ashmore v. Greater Greenville Sewer Dist., 44 S.E.2d 88, 211 S.C. 77—Beacham v. Greenville, 89 S.E. 401, 104 S.C. 421.

Bonds for sanitary sewers are within a provision for exclusion of sewerage system bonds.—Marshall v. Rose, 49 S.E.2d 720, 213 S.C. 428.

66. Ohio.—Smith v. Rockford, 9 Ohio Cir.Ct., N.S., 465, 29 Ohio Cir. Ct. 478.

67. Ohio.—Platt v. Toledo, 12 Ohio Cir.Ct., N.S., 279, 31 Ohio Cir.Ct. 305.

68. Kan.—Keplinger v. Kansas City, 251 P. 413, 122 Kan. 158.
44 C.J. p 1190 note 98.

69. Neb.—State v. Babcock, 27 N.W. 94, 98, 19 Neb. 223, 230.

70. Tex.—Waxahachie v. Brown, 4 S.W. 207, 67 Tex. 519.

71. Kan.—State v. Kansas City, 168 P. 907, 101 Kan. 806.
44 C.J. p 1190 note 3.

72. Kan.—Keplinger v. Kansas City, 251 P. 413, 122 Kan. 158.

73. S.C.—Lillard v. Melton, 87 S.E. 421, 103 S.C. 10.

74. Ohio.—Platt v. Toledo, 12 Ohio Cir.Ct., N.S., 279, 31 Ohio Cir.Ct. 305.

44 C.J. p 1190 note 6.

75. S.C.—Rose v. Baskins, 182 S.E. 153, 178 S.C. 69.

76. S.C.—Marshall v. Rose, 49 S.E. 2d 720, 213 S.C. 428.

77. S.C.—Marshall v. Rose, *supra*.

78. S.C.—Marshall v. Rose, *supra*.

79. Conn.—City of Stamford v. Town of Stamford, 141 A. 891, 107 Conn. 596.
44 C.J. p 1190 note 7.

80. S.C.—Marshall v. Rose, 49 S.E. 2d 720, 213 S.C. 428.

81. U.S.—Millsaps v. Terrell, Tex., 60 F. 193, 8 C.C.A. 554.

Ill.—Roberts v. Berwyn Park Dist., 150 N.E. 705, 230 Ill. 160.

82. La.—Kansas City Southern R. Co. v. Hendricks, 90 So. 545, 150 La. 134.

44 C.J. p 1190 note 9.

Where excessive bond issue is voted by people of municipality, only excess is void, and bonds within limitation may be issued.—Boll v. City of Ludlow, 29 S.W.2d 547, 234 Ky. 812—44 C.J. p 1190 note 9 [a].

83. La.—Board of Com'rs of Bayou Terre aux Boeufs Drainage Dist. v. McClellan, 114 So. 694, 164 La. 808.
44 C.J. p 1190 note 10.

84. U.S.—Columbus v. Woonsocket Sav. Inst., Tex., 114 F. 162, 52 C.C. A. 118.
44 C.J. p 1190 note 11.

85. Ill.—Edward J. Berwind, Inc., v. Chicago Park Dist., 65 N.E.2d 785, 393 Ill. 317.

2. PRELIMINARY STEPS OR PROCEEDINGS AND CONDITIONS PRECEDENT

a. In General

§ 1915. In General

Constitutional and statutory prerequisites must be complied with before a municipal corporation is authorized to issue its bonds or obligations, although slight irregularities in the preliminary proceedings are not necessarily fatal.

Before a municipal corporation is authorized to issue its bonds or obligations, all acts which constitutional or statutory provisions require to be done as a prerequisite to such authority must be done,⁸⁶ and, where the legislature has prescribed a particular manner of doing an act, it must be done in the manner prescribed.⁸⁷ While municipal bonds may be valid notwithstanding slight irregularities in the preliminary proceedings,⁸⁸ in general there must be performance or fulfillment of all conditions precedent⁸⁹ and conformity with legal requirements

as to preliminary proceedings;⁹⁰ and, where municipal bonds carry upon their face unmistakable evidence that the forms of law under which they purport to have been issued have not been complied with, they are void.⁹¹ The proceedings leading up to the issuance of municipal bonds may create a relation between the city and its taxpayers which is in the nature of a contractual relation.⁹²

In some states the statutes do not require the particular municipal purpose for which the proceeds of the bonds are intended to be used to be designated in the proceedings preliminary to the issuance of the bonds.⁹³ The amounts to be issued may be determined prior to the drawing of plans or the making of contracts for public works;⁹⁴ and proceedings leading up to a bond issue have been held nei-

86. U.S.—City of Sanford, Fla., v. Chase Nat. Bank of City of New York, D.C.N.Y., 44 F.2d 208, reversed on other grounds, C.C.A., 50 F.2d 400, certiorari denied Chase Nat. Bank of City of New York v. City of Sanford, Fla., 52 S.Ct. 35, 284 U.S. 680, 76 L.Ed. 559.

Ala.—Alabama Power Co. v. City of Scottsboro, 190 So. 412, 238 Ala. 230.

Fla.—State v. City of Tampa, 3 So.2d 484, 148 Fla. 6—City of Miami v. State, 190 So. 774, 139 Fla. 598—City of Jacksonville v. Renfroe, 136 So. 254, 102 Fla. 512.

Ill.—Hoehamer v. Village of Elmwood Park, 198 N.E. 345, 361 Ill. 422, 102 A.L.R. 196.

Ind.—Hamer v. City of Huntington, 21 N.E.2d 407, 215 Ind. 594.

Mo.—State ex rel. City of Blue Springs v. McWilliams, 74 S.W.2d 363, 335 Mo. 816.

Neb.—State v. Marsh, 238 N.W. 760, 121 Neb. 841.

S.C.—Bolton v. Wharton, 161 S.E. 454, 163 S.C. 242, 86 A.L.R. 1101.

Wash.—Robb v. City of Tacoma, 28 P.2d 327, 175 Wash. 580, 91 A.L.R. 1010.

44 C.J. p 1190 note 12.

Extent of limitation on legislature

Power of legislature to prescribe conditions under which municipality may issue bonds is limited only by the constitutional provision relating to power of municipality to create indebtedness, and is not otherwise controlled.—Varney v. City of Albuquerque, 55 P.2d 40, 40 N.M. 90, 106 A.L.R. 222.

Security holders' joinder in petition

A statute requiring as a condition precedent to a refunding that a prescribed portion of the holders of se-

curities should join in the petition to the municipality for such refunding has been held discretionary with the legislature.—Village of Bellwood v. Hunter & Co., 32 N.E.2d 160, 375 Ill. 627, certiorari denied Hunter & Co. v. Village of Bellwood, 62 S.Ct. 60, 314 U.S. 629, 86 L.Ed. 505.

Provision for governing board of district

S.C.—Ashmore v. Greater Greenville Sewer Dist., 44 S.E.2d 88, 211 S.C. 77.

Petition of borough

Pa.—In re Funding Unfunded Debt of Duryea, Quar.Sess., 37 Luz.Leg. Reg. 107.

87. Fla.—Merrell v. St Petersburg, 109 So. 815, 91 Fla. 858.

88. Tex.—City of Waco v. McCraw, 93 S.W.2d 717, 127 Tex. 268. 44 C.J. p 1191 note 16.

Time of signing certificate

N.C.—Board of Education of Watauga County v. State Board of Education, 6 S.E.2d 833, 217 N.C. 90.

89. Del.—Eastern Shore Public Service Co. v. Town of Seaford, 187 A. 115, 21 Del.Ch. 214.

Neb.—State v. Marsh, 238 N.W. 760, 121 Neb. 841.

N.J.—Sherman v. City of Long Branch, 153 A. 109, 9 N.J.Misc. 75, affirmed 158 A. 544, 108 N.J.Law 548 and followed in Yankowski v. City of East Orange, 153 A. 911, 9 N.J.Misc. 312.

Okl.—Pitts v. Allen, 281 P. 126, 138 Okl. 295.

Or.—State ex rel. Fred J. Kiesel Estate v. Bishop, 129 P.2d 276, 169 Or. 448.

S.C.—Bolton v. Wharton, 161 S.E. 454, 163 S.E. 242, 86 A.L.R. 1101.

44 C.J. p 1191 note 14.

Investigation and findings

Or.—State ex rel. Fred J. Kiesel Estate v. Bishop, 129 P.2d 276, 169 Or. 448.

90. Ala.—Alabama Power Co. v. City of Scottsboro, 190 So. 412, 238 Ala. 230.

Cal.—City of Monrovia v. Black, 264 P. 286, 88 Cal.App. 686.

Ill.—Chicago Title & Trust Co. v. Village of Westchester, 34 N.E.2d 744, 310 Ill.App. 498.

Okl.—Faught v. City of Sapulpa, 292 P. 15, 145 Okl. 164.

Tenn.—Terry v. Commissioners of Cookeville, 198 S.W.2d 1010, 184 Tenn. 347.

44 C.J. p 1191 note 15.

Discrepancy in maturity dates of municipal bonds has been held material, invalidating proceedings under bond act.—State v. Rees, 183 N.E. 432, 125 Ohio St. 578.

Publication and posting of notice of hearing

Ill.—Hoehamer v. Village of Elmwood Park, 198 N.E. 345, 361 Ill. 422, 102 A.L.R. 196.

91. U.S.—McClure v. Township of Oxford, Kan., 94 U.S. 429, 24 L.Ed. 129.

92. Cal.—City of San Diego v. Millan, 16 P.2d 357, 127 Cal.App. 521.

93. Fla.—Perry v. Panama City, 65 So. 6, 67 Fla. 285.

Designation of purpose in:

Ordinance see *infra* § 1916.

Submission to electors see *infra* § 1924.

94. Tex.—Texas Power & Light Co. v. City of Sulphur Springs, Civ. App., 103 S.W.2d 859, error dismissed.

ther irregular nor invalid because preliminary procedural steps contemplated a possible issue of bonds for a larger amount than was ultimately proposed.⁹⁵ The procedure prescribed by some statutes need not be followed in issuing bonds payable solely out of the revenues to be derived from a utility to be acquired with the proceeds.⁹⁶ It has been held not necessary to submit a proposed bond issue to a board of budget review.⁹⁷ Under some circumstances bonds may be issued for the construction of a bridge before the city has acquired the land upon which the bridge is to be constructed,⁹⁸ or bonds may be issued for the purpose of obtaining a water supply before provision for a distribution system is made.⁹⁹

Assessment proceedings. It has been held that proceedings for the assessment of benefits should be taken before bonds for a public improvement are issued¹ unless the city is primarily liable on the bonds with a right to reimburse itself by a special assessment,² but it has also been held that the bonds, when issued, are not void because the formalities required in making the assessment have not been complied with.³ Bonds issued by a city to obtain money for public improvements are not void merely because the statutory provision for levying the assessment to pay such bonds is illegal.⁴ Some statutory provisions have been held to authorize the city council, before issuing bonds, to sit as a board of equalization and ascertain and levy the amount of special benefits which may accrue from the public improvement contemplated.⁵

Time to attack bonds or ordinance. An action

questioning the validity of municipal bonds or the ordinance providing therefor must be brought within the time fixed by statute,⁶ such as within a specified number of days after the publication of the ordinance or resolution authorizing or providing for the issuance of the bonds.⁷

§ 1916. Ordinance, Resolution, or By-Law

- a. In general
- b. Contents

a. In General

Passage of an ordinance, resolution, or by-law by the governing body of a municipal corporation is sometimes a prerequisite to the issuance of bonds or securities by a municipality; and notice, publication, or recording of such enactment may be required.

Where the passage of an ordinance, resolution, or by-law by the city council or governing body of the municipality authorizing the issuance of bonds, stock, or notes, is required by statute, such securities are void if issued without any ordinance, resolution, or by-law,⁸ although issued under the corporate seal.⁹ Authorization by the council of the issuance of bonds, notes, or debentures may be evidenced by a resolution¹⁰ unless an ordinance or other form of enactment is required by statute.¹¹ The measure adopted by the council may be a resolution where it was introduced as such¹² and on its face purports to be such,¹³ even though it does not contain the words "be it resolved"¹⁴ or the word "resolution."¹⁵ It has been held that a resolution adopted by a city council by the same vote which is necessary for the adoption of an ordinance has the

95. Kan.—State ex rel. Beck v. Kansas City, 86 P.2d 476, 149 Kan. 252.

96. Utah.—Utah Power & Light Co. v. Provo City, 74 P.2d 1191, 94 Utah 203, certiorari denied 59 S.Ct. 92, 305 U.S. 628, 83 L.Ed. 402. Necessity for popular vote see *infra* § 1920.

97. N.D.—Thomas v. McHugh, 256 N.W. 763, 65 N.D. 149.

98. Wash.—Tennent v. Seattle, 145 P. 83, 83 Wash. 108. 44 C.J. p 1191 note 18.

99. Cal.—In re Validation of East Bay Municipal Utility Dist., 239 P. 38, 196 Cal. 725. 44 C.J. p 1191 note 19.

1. Miss.—Sick v. Bay St. Louis, 74 So. 272, 113 Miss. 175.

2. Miss.—Sick v. Bay St. Louis, *supra*.

3. U.S.—Gladstone v. Throop, Mich., 71 F. 341, 18 C.C.A. 61. 44 C.J. p 1191 note 22.

4. U.S.—Burlington Sav. Bank v. Clinton, C.C.Iowa, 106 F. 269.

N.Y.—Horn v. New Lots, 83 N.Y. 100, 38 Am.R. 402.

Provision for payment as condition of issuance of bonds see *infra* § 1918.

5. Neb.—Burgess-Nash Bldg. Co. v. City of Omaha, 219 N.W. 394, 118 Neb. 862.

6. Okl.—Faught v. City of Sapulpa, 292 P. 15, 145 Okl. 164.

44 C.J. p 1213 note 86. Time of commencement of action attacking bond election see *infra* § 1929 e.

Relative nullities

The application of the plea of prescription is allowed as to relative nullities, but not as to radical and absolute nullities.—Sammons v. City of Lafayette, 185 So. 463, 191 La. 444.

7. La.—Sammons v. City of Lafayette, *supra*.

44 C.J. p 1213 note 86.

8. U.S.—Bryant v. Commissioner of Internal Revenue, C.C.A.9, 111 F.2d 9.

Ohio.—State v. Thatcher, 178 N.E. 843, 124 Ohio St. 382.

Wash.—Bayha v. Public Utility Dist. No. 1 of Grays Harbor County, 97 P.2d 614, 2 Wash.2d 85.

44 C.J. p 1191 note 25.

Entry in minutes

Pa.—Miners Savings Bank of Pittston v. Duryea Borough, Com.Pl., 32 Luz.Leg.Reg. 9, 29 Mun. 145, 9 Som.Leg.J. 25.

9. U.S.—Swan v. Arkansas City, C. C.Kan., 61 F. 478, 69 F. 768, 16 C. C.A. 395.

Cal.—McCoy v. Briant, 53 Cal. 247.

10. Conn.—Rule v. City of Stamford, 185 A. 178, 121 Conn. 447. 44 C.J. p 1191 note 27.

11. Tex.—Tyler v. Tyler Bldg., etc., Ass'n, 86 S.W. 750, 99 Tex. 6. 44 C.J. p 1191 notes 28, 29.

12. Tex.—McCarthy v. McElvaney, Civ.App., 182 S.W. 1181.

13. Tex.—McCarthy v. McElvaney, *supra*.

14. Tex.—McCarthy v. McElvaney, *supra*.

15. Tex.—McCarthy v. McElvaney, *supra*.

same force and effect as though it were in the form of an ordinance.¹⁶

The passage of an ordinance providing for the issuance of bonds to pay for a public improvement is sufficient to show that the governing body of the municipality deemed such action expedient.¹⁷ It has been held that the action of a city council in enacting an ordinance providing for the issuance of bonds is legislative in nature, and not the exercise of a mere ministerial or administrative function;¹⁸ but it has also been held that an ordinance authorizing the issuance of bonds for the acquisition of a utility plant is an administrative ordinance.¹⁹ Where an election on the question of issuing bonds is not necessary, all the municipal legislation necessary to authorize the issuance of bonds may be contained in one ordinance.²⁰ The preliminary ordinance provided for by some statutes may be passed on the same day it is introduced.²¹

Prerequisites to adoption of ordinance or resolution. It is necessary to comply with statutory prerequisites to the adoption of an ordinance or resolution authorizing the issuance of the bonds or securities,²² such as the making and filing of a supplemental debt statement,²³ a determination of the benefits that will accrue to property involved,²⁴ the amount of such benefits,²⁵ and how they will be

prorated.²⁶ Under some statutes it is mandatory that the total estimated cost of the improvements be on file with the city clerk at the time the resolution is adopted.²⁷ A resolution to issue bonds for municipal improvements predicated on a void resolution determining to make the improvements, and an unauthorized estimated cost thereof, has been held illegal and void.²⁸ An ordinance or resolution authorizing the issuance of bonds to pay for improvements, or the city's share of the cost thereof, may be passed before the final order for the improvement is approved by the mayor²⁹ and published,³⁰ or, under some statutes, even before the passage of a resolution declaring the necessity for the improvement.³¹ There is no requirement for public hearings under some statutes.³²

Notice, publication, and recording. Some charters or statutes require the giving of notice prior to the enactment of an ordinance providing for the issuance of bonds;³³ but the legislature has power to authorize the city to issue bonds without giving such a notice.³⁴ Also, some,³⁵ but not other,³⁶ statutes or charters require the publication of an ordinance providing for the issuance of bonds or require publication or posting of notice of the adoption of such ordinance.³⁷ Under some statutory provisions posting copies of the ordinance in public places in the

16. Ill.—Kline v. Streator, 78 Ill. App. 42.

17. Kan.—Smith v. Fuest, 263 P. 1069, 125 Kan. 341.

Good faith

U.S.—City of Coral Gables v. Hayes, C.C.A.Fla., 74 F.2d 989.

18. Ark.—Carpenter v. City of Paragould, 128 S.W.2d 980, 198 Ark. 454.

19. Wash.—Bremerton Municipal League v. City of Bremerton, 124 P.2d 798, 13 Wash.2d 238.

20. Ohio.—Heffner v. Krinn, 120 N. E. 221, 98 Ohio St. 1.
Necessity of election see *infra* § 1920.

21. Cal.—Derby v. Modesto, 38 P. 900, 104 Cal. 515.

22. Fla.—City of Ft. Myers v. State, 117 So. 97, 95 Fla. 704.

N.J.—Sherman v. City of Long Branch, 153 A. 109, 9 N.J.Misc. 75, affirmed 158 A. 544, 108 N.J.Law 548 and followed in Yankowski v. City of East Orange, 153 A. 911, 9 N.J.Misc. 312.

Certification of maximum maturity
Ohio.—Ohio Power Co. v. Craig, 197 N.E. 820, 50 Ohio App. 289.

23. N.J.—Sherman v. City of Long Branch, 153 A. 109, 9 N.J.Misc. 75, affirmed 158 A. 544, 108 N.J.Law 548 and followed in Yankowski v.

City of East Orange, 153 A. 911, 9 N.J.Misc. 312.

24. Fla.—City of Ft. Myers v. State, 117 So. 97, 95 Fla. 704.

25. Fla.—City of Ft. Myers v. State, *supra*.

26. Fla.—City of Ft. Myers v. State, *supra*.

27. Fla.—City of Ft. Myers v. State, *supra*.

Bona fide estimate necessary
Fla.—City of Ft. Myers v. State, *supra*.

28. Fla.—City of Ft. Myers v. State, *supra*.

29. Minn.—Williams v. St. Paul, 142 N.W. 886, 128 Minn. 1.

30. Minn.—Williams v. St. Paul, *supra*.

31. Ohio.—Heffner v. Toledo, 80 N. E. 8, 75 Ohio St. 413.

32. Ill.—Wolcott v. Village of Lombard, 57 N.E.2d 351, 387 Ill. 621.

33. Tex.—City of Dayton v. Allred, 68 S.W.2d 172, 123 Tex. 60.

44 C.J. p 1192 note 42.

Notice held sufficient

Tex.—City of Huntsville v. McCraw, 108 S.W.2d 204, 130 Tex. 121.

34. Miss.—Griffith v. Vicksburg, 58 So. 781, 102 Miss. 1.

35. U.S.—Aurora v. Gates, Colo.,

208 F. 101, 125 C.C.A. 329, L.R.A. 1915A 910.

44 C.J. p 1192 note 44.

Publication held sufficient

(1) Generally.—Warden v. City of Grafton, 26 S.E.2d 1, 125 W.Va. 658—44 C.J. p 1192 note 44 [a].

(2) A publication by title only of ordinance for issuance of bonds by city was held sufficient under city charter.—State v. City of Key West, 14 So.2d 707, 153 Fla. 226.

36. Ill.—Hoeheimer v. Village of Elmwood Park, 198 N.E. 345, 361 Ill. 422, 102 A.L.R. 196.

44 C.J. p 1192 note 45.

37. Fla.—State v. City of Clearwater, 184 So. 675, 135 Fla. 112.

Ohio.—State ex rel. Hile v. City of Cleveland, 160 N.E. 241, 26 Ohio App. 265.

Contents of notice

Fla.—Davis v. City of Melbourne, 170 So. 836, 126 Fla. 282.

Time of publication

Fla.—State v. City of Clearwater, 184 So. 675, 135 Fla. 112.

Notice of preliminary ordinance proposing the construction of a municipal facility and the issuance of revenue debentures need not be published.—Davis v. City of Melbourne, 170 So. 836, 126 Fla. 282.

municipality is sufficient if there is no newspaper published in the municipality.³⁸ Some charter provisions relating to the recording of the ordinance have been regarded as simply directory.³⁹

Vote required. Where the unanimous consent of the appropriate body is not required by either charter or statute, bonds may be issued on approval by a majority of a quorum.⁴⁰

Signature of clerk. A statutory requirement that an ordinance for a bond issue be signed by a clerk may sometimes be fulfilled by the signature of a duly appointed deputy or assistant clerk.⁴¹

b. Contents

It is necessary and sufficient that the contents of an ordinance, resolution, or by-law providing for the issuance of bonds comply, at least substantially, with charter or statutory requirements.

The contents of an ordinance, resolution, or by-law providing for the issuance of bonds should conform to, and comply with, charter or statutory pro-

visions or requirements,⁴² such as provisions requiring a declaration of the maximum amount of money to be raised for the purpose;⁴³ and it has been held that resolutions providing for the issuance of bonds should appropriately contain the essential administrative requirements to be performed in connection with such issuance.⁴⁴

On the other hand, a substantial conformity or compliance is sufficient⁴⁵ and the city council is not required⁴⁶ or permitted⁴⁷ to anticipate changes in the constitutional or statutory law of the state. The ordinance need not show on its face that the issue will not exceed the constitutional limit of indebtedness,⁴⁸ nor need it refer specifically to the statute under which the proceedings are taken and the bonds are issued;⁴⁹ and where it does purport to make such a reference an immaterial error or discrepancy is not fatal.⁵⁰ Bonds or securities are not necessarily invalid merely because of a failure to specify the denominations in which they are to

38. Ill.—Simpson v. City of Highwood, 23 N.E.2d 62, 372 Ill. 212, 124 A.L.R. 1459.

Posting held sufficient

Ill.—Simpson v. City of Highwood, supra.

39. Iowa.—Allen v. Davenport, 77 N.W. 532, 107 Iowa 90.

40. N.C.—Le Roy v. Elizabeth City, 81 S.E. 1072, 166 N.C. 93.

Number of votes required for action by governing body generally see supra § 404.

"Yes and Nay vote"

Ill.—Weinhagen v. City of Herrin, 26 N.E.2d 525, 305 Ill.App. 158.

41. Ky.—Hunter v. City of Louisville, 2 S.W.2d 652, 222 Ky. 819.

42. Fla.—City of Ft. Myers v. State, 117 So. 97, 95 Fla. 704.

N.M.—Munro v. City of Albuquerque, 150 P.2d 733, 48 N.M. 306.

44 C.J. p 1192 note 47.

Contraction of municipal area

Fla.—State v. City of Delray Beach, 191 So. 188, 140 Fla. 132, followed in 3 So.2d 510, 147 Fla. 741.

Provision for insurance

Provision of ordinance that city would maintain insurance on system for benefit of holders of bonds secured only by net per cent of revenue was illegal.—Fjeldsted v. Ogden City, 35 P.2d 825, 84 Utah 302.

43. N.J.—Gehin v. Board of Com'rs of City of Newark, 182 A. 869, 14 N.J.Misc. 121.

Necessity of stating entire amount

The ordinance must state the entire amount of money to be raised for the contemplated improvement, and it is not sufficient for the ordi-

nance to state the amount of money to be presently raised by the issuance of bonds or notes.—Gehin v. Board of Com'rs of City of Newark, supra.

Agreement as to issuance of additional bonds

Fla.—State v. City of Miami, 200 So. 535, 146 Fla. 266.

44. Fla.—City of Miami v. State, 190 So. 774, 139 Fla. 598.

45. Tex.—McCarthy v. McElvaney, Civ.App., 182 S.W. 1181.

44 C.J. p 1192 note 48.

Provisions held proper or sufficient

(1) Generally.

Fla.—State v. City of Miami, 194 So. 792, 142 Fla. 284—State v. City of Dunedin, 180 So. 24, 131 Fla. 857—

State v. City of Clearwater, 169 So. 602, 125 Fla. 73—State v. City of Miami, 157 So. 13, 116 Fla. 517.

Ga.—Lawson v. City of Moultrie, 22 S.E.2d 592, 194 Ga. 699.

Ill.—Wolcott v. Village of Lombard, 57 N.E.2d 351, 387 Ill. 621—Hair-

grove v. City of Jacksonville, 8 N.E.2d 187, 366 Ill. 163.

Ky.—Eagle v. City of Corbin, 122 S.W.2d 798, 275 Ky. 808—Hunter v. City of Louisville, 2 S.W.2d 652, 222 Ky. 819.

Utah.—Fjeldsted v. Ogden City, 35 P.2d 825, 84 Utah 302.

Wash.—Tabb v. Funk, 19 P.2d 668, 172 Wash. 189.

(2) The fact that resolution authorizing issuance of bonds used word "award" instead of "sale" did not invalidate bonds, although the use of the word "award" was inept.—State v. Town of Riviera, 197 So.

525, 143 Fla. 705.

(3) Provisions of ordinance and resolution authorizing the issuance of refunding bonds which merely continued existing obligations and preserved the relative rights and priorities of creditors of the municipality were held proper.—State v. City of New Smyrna Beach, 4 So. 2d 660, 148 Fla. 482.

(4) Provision that ordinance shall constitute contract between city and bondholder, and authorizing holder to enforce performance of any provision by appropriate action, was held not objectionable.—Fjeldsted v. Ogden City, 28 P.2d 144, 83 Utah 278.

(5) Provision naming national banking association located outside state as city's fiscal agent is not invalid.—State v. City of Miami, 27 So.2d 118, 157 Fla. 726.

(6) Resolution was not void because it provided for appointment of a receiver to take charge of office building on default in payment of installments.—State v. City of Tallahassee, 195 So. 402, 142 Fla. 476.

46. Ohio.—Link v. Karb, 104 N.E. 632, 89 Ohio St. 326.

47. Ohio.—Link v. Karb, supra.

48. S.C.—Cleveland v. Spartanburg, 31 S.E. 871, 54 S.C. 83.

44 C.J. p 1192 note 51.

49. N.J.—Livermore v. Millville, 90 A. 380, 85 N.J.Law 655.

44 C.J. p 1192 note 52.

50. Cal.—Marr v. Southern California Gas Co., 245 P. 178, 198 Cal. 278.

44 C.J. p 1192 note 53.

be issued,⁵¹ the date of sale,⁵² or the names of the payees.⁵³ Under some statutes the city council need not always fix the approximate maturities of proposed deficiency bonds.⁵⁴

Statement of purpose. The ordinance may state the purpose of the bond issue,⁵⁵ in which event any doubt which arises out of the use of the words employed is to be resolved in favor of the public by limiting expenditures to the express terms set forth.⁵⁶ However, when not required by statute, the particular or specific municipal purpose to which the proceeds of the bonds are to be devoted need not be mentioned in the ordinance or resolution providing for their issuance.⁵⁷ An ordinance which limits the use of the funds to such extent as may be agreed on with the federal government has been held not objectionable where the federal government is expected to purchase the bonds and in addition to contribute to the cost of the project.⁵⁸ An ordinance authorizing the issuance of bonds to defray the cost of constructing waterworks and connecting sewers is not void as the adoption of a double proposition by a single vote of the council, where it may fairly be assumed that there is only a single scheme including connecting sewers as a part of it.⁵⁹

Rate of interest. It may be proper, depending on the statutes, for the ordinance or resolution to give appropriate officials some latitude in the matter of interest rates on the bonds⁶⁰ or to fix a definite rate

of interest within the limits specified by statute.⁶¹ In the absence of a constitutional requirement, a bond issue is not illegal because neither the statute authorizing it nor an ordinance passed pursuant thereto specifies the rate of interest to be charged.⁶²

Amendment of ordinance. An ordinance providing for the issuance of bonds may be amended in a proper case,⁶³ and an amendment which reduces the amount of bonds to be sold does not necessarily vitiate the form of the proceeding so as to require a new advertisement and the retaking of bids.⁶⁴

§ 1917. Petition or Consent of Taxpayers or Property Owners

A petition or consent in writing of taxpayers or property owners is sometimes required as a prerequisite to the issuance of municipal bonds, in which case the signing must be by a sufficient number of qualified persons. A petition opposing the issue may be filed under some statutes.

In the absence of constitutional restrictions, municipal corporations may be,⁶⁵ and sometimes are,⁶⁶ empowered to issue bonds without any petition from, or consent or approval by, taxpayers or property owners. On the other hand, the legislature may determine what measure of consent of taxpayers shall be required,⁶⁷ and in what form it shall be expressed;⁶⁸ and sometimes a petition or consent in writing is, or at times has been, required by law as a prerequisite to the issuance of municipal bonds,⁶⁹ or at least particular types of bonds.⁷⁰

51. Fla.—*State v. City of Tarpon Springs*, 190 So. 19, 138 Fla. 649—*State v. City of Clearwater*, 169 So. 602, 125 Fla. 73—*State v. City of Miami*, 157 So. 13, 116 Fla. 517.

52. La.—*State ex rel. Maestri v. Cave*, 190 So. 631, 193 La. 419.

53. Ohio.—*Pleasantville Bank v. Cox*, 26 Ohio N.P., N.S., 460.

54. Ohio.—*State ex rel. City of Delaware v. Main*, 194 N.E. 454, 129 Ohio St. 239.

Resolution of necessity under emergency act

Ohio.—*State ex rel. City of Delaware v. Main*, *supra*.

55. Mo.—*Meyers v. Kansas City*, 18 S.W.2d 900, 323 Mo. 200.

Ordinance held not misleading

Utah.—*Fjeldsted v. Ogden City*, 35 P.2d 825, 84 Utah 302.

56. Mo.—*State ex rel. State Bldg. Commission v. Smith*, 81 S.W.2d 613, 336 Mo. 810—*Meyers v. Kansas City*, 18 S.W.2d 900, 323 Mo. 200.

57. N.J.—*Bew v. Ventnor City*, 80 A. 28, 81 N.J.Law 207.
44 C.J. p 1192 note 54.

58. Utah.—*Fjeldsted v. Ogden City*, 35 P.2d 825, 84 Utah 302.

59. Wis.—*Borner v. Prescott*, 136 N.W. 552, 150 Wis. 197.

60. Fla.—*Fleeman v. City of Jacksonville*, 191 So. 840, 140 Fla. 478. Md.—*Douty v. City of Baltimore*, 141 A. 499, 155 Md. 125.

44 C.J. p 1192 note 48 [c] (2).

61. Mont.—*Hansen v. City of Havre*, 114 P.2d 1053, 112 Mont. 207, 135 A.L.R. 1278.

62. Md.—*Douty v. City of Baltimore*, 141 A. 499, 155 Md. 125.

Open coupon rate

Ky.—*Funk v. Town of Strathmoor Village*, 129 S.W.2d 151, 278 Ky 627.

Bidders naming rate

La.—*State ex rel. Maestri v. Cave*, 190 So. 631, 193 La. 419.

63. Ohio.—*City of Youngstown v. Mitchell*, Com.Pl., 14 Ohio Supp 83.

64. Ohio.—*City of Youngstown v. Mitchell*, *supra*.

65. Or.—*Klamath Falls v. Sachs*, 57 P. 329, 35 Or. 325, 76 Am.S.R. 501.
44 C.J. p 1193 note 57.

Petition:

By property owners in connection with incurring of municipal indebtedness generally see *supra* § 1857.

For election on bond issue see *infra* § 1921.

66. Colo.—*Sanborn v. Boulder*, 221 P. 1077, 74 Colo. 358.

44 C.J. p 1193 note 58.

67. N.Y.—*Williams v. Duanesburgh*, 66 N.Y. 129.

Minority landowners bound by majority action

Owners of majority, in area, of lands within improvement district may bind minority landowners by written consent to refunding of district bonds pursuant to statute.—*Los Angeles County v. Jones*, 59 P. 2d 489, 6 Cal 2d 695.

68. N.Y.—*Williams v. Duanesburgh*, 66 N.Y. 129.

69. N.C.—*Brown v. Hillsboro*, 117 S.E. 41, 185 N.C. 368.
44 C.J. p 1193 note 61.

70. Ind.—*Murray v. State ex rel. King*, 42 N.E.2d 1019, 220 Ind. 323.

In cases coming within a statute imposing such a condition precedent, a petition or written consent,⁷¹ containing the requisite statements, recitals, or averments,⁷² and signed⁷³ by the number of persons required,⁷⁴ who possess the prescribed qualifications,⁷⁵ must be presented,⁷⁶ or, if so required, must be filed and recorded,⁷⁷ and unless the statutory requirements are complied with the bonds issued will be void,⁷⁸ at least in the hands of those to whom they are issued,⁷⁹ and even in the hands of bona fide holders.⁸⁰ Attaching conditions to the signatures to a petition for the issue of bonds does not necessarily vitiate it.⁸¹

Withdrawal of assent. Under some,⁸² but not other,⁸³ provisions, persons who have signed a petition for, or consent to, the issuance of municipal bonds may withdraw their names therefrom at any time before a determination has been reached by the officer or board having the duty of passing on such petition or consent.

Remonstrance or petition in opposition. Some statutes provide for the filing, within a specified

number of days after an order for a bond issue,⁸⁴ of a petition by taxpayers opposing the issue;⁸⁵ and under some statutory provisions no bonds may be issued if, within a specified number of days after publication of notice of the issuance of bonds, a remonstrance is filed by a greater number of owners of taxable realty than the number of petitioners seeking issuance of the bonds.⁸⁶

Compliance with petition. Under some statutes relating to the issuance of certain bonds, it is the absolute duty of the council, on the presentation of a proper petition of a majority of freeholders, to comply with the petition by issuing the bonds requested.⁸⁷

§ 1918. Provision for Payment

A municipal corporation may, and sometimes must, prior to the issuance of bonds, make provision for the payment of such bonds and interest thereon; but in the absence of such a requirement the failure to provide for the payment of interest and to create a sinking fund does not affect the legality of the bonds.

A municipal corporation may,⁸⁸ and, when so re-

Bonds in aid of railroad company

U.S.—Whiting v. Potter, C.C.N.Y., 2 F. 517, 18 Blatchf. 165.

44 C.J. p 1193 note 62.

71. N.Y.—Horton v. Thompson, 71 N.Y. 513—Duanesburgh v. Jenkins, 40 Barb. 574, 46 Barb. 294, affirmed 57 N.Y. 177.

72. N.Y.—Solon v. Williamsburgh Sav. Bank, 21 N.E. 168, 114 N.Y. 122.

44 C.J. p 1193 note 64.

73. N.Y.—People v. Hulburt, 46 N.Y. 110.

44 C.J. p 1193 note 65.

74. N.Y.—People v. Hughitt, 5 Lans. 89.

44 C.J. p 1193 note 66.

75. Neb.—Cummings v. Hyatt, 74 N.W. 411, 54 Neb. 35.

44 C.J. p 1194 note 67.

76. N.Y.—Craig v. Andes, 93 N.Y. 405.

77. Vt.—Essex County R. Co. v. Lunenburgh, 49 Vt. 143.

78. N.Y.—Mentz v. Cook, 15 N.E. 541, 108 N.Y. 504.

44 C.J. p 1194 note 70.

79. N.Y.—Angel v. Hume, 17 Hun 374—Duanesburgh v. Jenkins, 40 Barb. 574.

80. N.Y.—Venice v. Woodruff, 62 N.Y. 462, 20 Am.R. 495.

81. Railroad bonds

N.Y.—Cherry Creek v. Becker, 2 N.Y.S. 514, affirmed 25 N.E. 369, 123 N.Y. 161.

44 C.J. p 1194 note 73.

82. N.J.—Biddle v. Riverton, 33 A. 279, 58 N.J.Law 289.

44 C.J. p 1194 note 74.

83. U.S.—North Bennington First Nat. Bank v. Dorset, C.C.Vt., 9 F. Cas.No.4,808, 16 Blatchf. 62.

84. Ind.—State v. Evans, 150 N.E. 788, 197 Ind. 656.

85. Ind.—State v. Evans, supra

86. Ind.—Wallace v. Simpson, 27 N.E.2d 130, 108 Ind.App. 54.

Purpose of statute is to prevent municipalities and taxing units from incurring obligations which would operate to increase tax levies beyond the limits provided in the act.—Wallace v. Simpson, supra.

87. Bonds issued as donation to railroad company
Ind.—Kokomo v. State, 57 Ind. 152.

88. Ark.—Bourland v. City of Fort Smith, 78 S.W.2d 383, 190 Ark. 289.

Fla.—Schmeller v. City of Fort Lauderdale, 38 So.2d 36—Renicks v. City of Lake Worth, 18 So.2d 769, 154 Fla. 694—State v. City of West Palm Beach, 174 So. 334, 127 Fla. 849—State v. City of Daytona Beach, 171 So. 814, 126 Fla. 728—State v. City of Miami, 157 So. 13, 116 Fla. 517.

Utah.—Fjeldsted v. Ogden City, 35 P.2d 825, 84 Utah 302—Wadsworth v. Santaquin City, 28 P.2d 161, 83 Utah 321.

Wash.—Goff v. City of Seattle, 86 P.2d 222, 197 Wash. 665.

44 C.J. p 1210 note 46.

Payment generally see infra § 1955.

Provision for payment:

Of indebtedness generally see supra § 1866.

In bonds see infra § 1941.

Payment in money only

Municipality has authority to de-

clare that it will accept only lawful money of United States in payment of taxes or assessments levied to pay principal and interest on city refunding bonds—State v. City of Delray Beach, 191 So. 188, 140 Fla. 132, followed in 3 So.2d 510, 147 Fla. 741—State v. City of Sanford, 174 So. 339, 128 Fla. 171.

Agreement with federal government that city would pass ordinance appropriating surplus net revenues derived from operation of sanitary sewer and water extensions for repayment of bonds purchased by federal government does not invalidate proposed bond issue for construction of such extensions.—Allison v. City of Phoenix, 33 P.2d 927, 44 Ariz. 66, 98 A.L.R. 354, followed in 33 P.2d 932, 44 Ariz. 81, and 33 P.2d 933, first case, 44 Ariz. 82, 33 P.2d 933, second case, 44 Ariz. 83.

Lien; pledge of net profit

Provision in ordinance authorizing issuance of revenue bonds for completion of building owned by city, which provides that bonds are to be a statutory mortgage lien on building when completed and on equipment and future additions thereto, and which pledges all of net profit therefrom for payment of the revenue bonds and interest thereon, is valid.—Warden v. City of Grafton, 26 S.E.2d 1, 125 W.Va. 658.

Possibility of repeal of statutory authority

Municipality was not precluded from servicing bonds by pledge of revenue of municipal facilities and the proceeds of a utilities service tax because of possibility that leg-

quired by constitution, statute, or charter, must,⁸⁹ prior to the issuance of bonds, make provision for the payment of such bonds and interest thereon, a common requirement being that the municipality shall, at or before the issuance of the bonds, make provision for the collection of an annual tax sufficient to pay the interest on the bonds, and to create a sinking fund for the payment of the principal.⁹⁰ However, in the absence of such a requirement the legality of the bonds is not affected by the absence of a provision for the payment of interest and the creation of a sinking fund⁹¹ or by the making of inadequate provision therefor.⁹² Further, some requirements of this nature are not applicable in all cases.⁹³ Thus bonds payable only from the revenues of a proposed municipal utility, and not out of funds raised by taxation, have been held not to constitute debts within the meaning of

provisions requiring a tax levy on the creation of a debt against the municipality.⁹⁴ Also, the issuance of bonds to refund valid outstanding bonds has been held not to create a new indebtedness, so as to require a provision for collection of a tax to pay interest and provide for a sinking fund.⁹⁵

The requirement of a provision for payment, when applicable, is mandatory,⁹⁶ and no other provision can lawfully be substituted for the provision required by constitution or statute.⁹⁷ However, where the provision required by law is made, the fact that additional provision is also made is not fatal to the validity of the bonds.⁹⁸ Moreover, the right to change the means of payment and provide a different mode is within the legislative power at all times, subject only to constitutional inhibition against impairment of the obligation of contracts.⁹⁹

islature might subsequently repeal statutory authority for servicing bonds in that manner.—*Schmeller v. City of Fort Lauderdale, Fla.*, 38 So. 2d 36.

89. Ill.—*People ex rel. Gill v.* 110 South Dearborn St. Corporation, 2 N.E.2d 68, 363 Ill. 286. 44 C.J. p 1210 note 53.

"May" as meaning "must" or "shall"

(1) Word "may," as used in statute providing that city may convey by way of mortgage to secure public utility certificates, means "must" or "shall," since act nowhere specifies or authorizes issuance of certificate without mortgage.—*Hairgrove v. City of Jacksonville*, 8 N.E. 2d 187, 366 Ill. 163.

(2) However, the word "may," as used in provision that mortgage securing municipal utility certificates may carry privilege to operate public utility and may fix rates or charges, does not mean "must," and it is not essential to existence of valid utility certificates that franchise securing certificates that franchise be granted or rate fixed.—*Hairgrove v. City of Jacksonville*, supra.

Certainty of source of revenue

Profits from future operation of municipal light and water plant were held not source of revenue reasonably certain of collection legally as to justify issuance of sewerage extension bonds secured by avails and residue of alimony tax.—*Miller v. City of Minden*, 158 So. 634, 181 La. 99—44 C.J. p 1210 note 46 [d] (2).

90. U.S.—*Brady v. City of Atlanta*, C.C.A.Ga., 17 F.2d 764.

Colo.—*City of Aurora v. Krauss*, 59 P.2d 79, 99 Colo. 12.

Ga.—*Town of McIntyre v. Scott*, 12 S.E.2d 883, 191 Ga. 473—*Scott v. Town of McIntyre*, 19 S.E.2d 49, 66 Ga.App. 640.

Ky.—*Rowland v. City of Winchester*, 209 S.W.2d 305, 306 Ky. 772.

Okl.—*Pitts v. Allen*, 281 P. 126, 138 Okl. 295.

Tex.—*City of Fort Worth v. Bobbitt*, 41 S.W.2d 228, 121 Tex. 14. 44 C.J. p 1210 note 48.

Sinking fund and provision therefor generally see *infra* § 1953.

Automatic levy

Tex.—*City of Waco v. Mann*, 127 S.W.2d 879, 133 Tex. 163.

91. Fla.—*State v. City of Sanford*, 174 So. 339, 128 Fla. 171.

N.C.—*Jones v. New Bern*, 67 S.E. 173, 152 N.C. 64.

92. N.C.—*Gastonia v. Citizens' Nat. Bank*, 81 S.E. 755, 165 N.C. 507. 44 C.J. p 1210 note 50.

93. Tex.—*City of Waco v. Mann*, 127 S.W.2d 879, 133 Tex. 163. 44 C.J. p 1210 note 51.

Mortgage or franchise security held unnecessary

Under acts authorizing municipalities to operate municipal hospitals, revenue certificates could be issued without mortgage or franchise security specified in acts, which security is not mandatory where authorities decide to proceed without feature of funding security, even where certificates have been submitted to vote of electors.—*Davis v. City of Melbourne*, 170 So. 836, 126 Fla. 282.

94. N.M.—*Seward v. Bowers*, 24 P. 2d 253, 37 N.M. 385.

Tex.—*City of Houston v. Allred*, 71 S.W.2d 251, 123 Tex. 334—*City of Dayton v. Allred*, 68 S.W.2d 172, 123 Tex. 60—*City of Cross Plains v. Radford*, Civ.App., 73 S.W.2d 1093, affirmed *Radford v. City of Cross Plains*, 86 S.W.2d 204, 126 Tex. 153.

95. Tex.—*City of Waco v. Mann*, 127 S.W.2d 879, 133 Tex. 163. 44 C.J. p 1210 note 51 [a] (2).

96. Ariz.—*Allison v. City of Phoenix*, 33 P.2d 927, 44 Ariz. 66, 93 A.L.R. 354, followed in 33 P.2d 932, 44 Ariz. 81, and 33 P.2d 933, first case, 33 P.2d 933, 44 Ariz. 82, second case, 44 Ariz. 83.

Ill.—*People ex rel. McDonough v. New York Cent. R. Co.*, 188 N.E. 807, 355 Ill. 80—*Gates v. Sweltzer*, 179 N.E. 837, 347 Ill. 353, 79 A.L.R. 1151.

Mo.—*Heather v. Palmyra*, 276 S.W. 872, 311 Mo. 32.

97. Ga.—*Wilkins v. Waynesboro*, 43 S.E. 767, 116 Ga. 359. 44 C.J. p 1211 note 54.

Payment from assessment against abutting property

N.M.—*Munro v. City of Albuquerque*, 150 P.2d 733, 48 N.M. 306.

Provision held sufficient

(1) Generally.

La.—*Woulfe v. Morrison*, 34 So.2d 251, 212 La. 1032.

Tex.—*City of Waco v. Mann*, 127 S.W.2d 879, 133 Tex. 163—*McKenzie Const. Co. v. City of San Antonio*, Civ.App., 50 S.W.2d 349, error refused.

(2) An ordinance prescribing the amount to be raised annually by taxes for interest and a sinking fund which erroneously calculated interest at five per cent instead of six per cent was held in substantial compliance with the statute, where a premium was to be paid for the bonds, thus making the deficit very small, and where, in addition, the deficit could be cured by placing an annual payment in an account.—*Kern v. City of Mt. Sterling*, 25 S.W.2d 41, 233 Ky. 156.

98. Ga.—*Sewell v. Tallapoosa*, 88 S.E. 577, 145 Ga. 19.

44 C.J. p 1211 note 55.

99. Fla.—*Day v. City of St. Augustine*, 139 So. 880, 104 Fla. 261.

It has been held that the validity of bonds issued under a statute cannot be affected by the fact that, in providing for their payment, the council may have imposed an illegal tax.¹

Equal installments. Under some statutes provision must be made for the redemption of the bonds in equal annual installments;² but a general statute of this nature does not invalidate a provision for the payment of bonds in unequal installments where the particular municipality has been authorized by special statutes or charter provisions to issue bonds on such conditions as the appropriate officials shall determine.³ Even under statutes requiring payment of the principal of the bonds in equal installments, strict mathematical nicety is not necessary,⁴ a substantial compliance with the statute in this respect being sufficient.⁵

Fiscal year. It has been held not improper for an ordinance authorizing the issuance of bonds to provide that for the purpose of servicing the bonds the fiscal year shall be the same as the calendar year⁶ or some annual period other than a calendar year.⁷

Pledge of entire utility. A municipal corporation operating two plants or properties as a single system ordinarily may pledge both plants and the revenues therefrom in connection with the issuance of securities the proceeds of which are to be used to make bona fide and essential additions to, or extensions of, one of them.⁸ So, under a constitutional

provision permitting a municipality which desires to raise money to acquire, construct, or extend a public utility to issue mortgage bonds secured by the property and revenues of such utility, the mortgage securing the bonds may include the entire utility,⁹ including not only the property acquired or constructed with the proceeds of the sale of the bonds but also such other municipally owned property as is a necessary part of such utility and directly connected with its operation.¹⁰

§ 1919. Determination of Performance or Validity

- a. By officer or board
- b. By court or judge

a. By Officer or Board

- (1) In general
- (2) Hearing and determination

(1) In General

A proposed issue of municipal bonds is sometimes required to be examined and passed on by public officers, either state or municipal, in which case the duties of such officers are supervisory rather than ministerial or perfunctory.

Statutes may impose the duty of examining and passing on a proposed issue of municipal bonds or securities on public officers,¹¹ such as municipal officers,¹² or the attorney general,¹³ or a state board, department, or commission;¹⁴ and some statutory

1. Mont.—Carlson v. Helena, 102 P. 39, 39 Mont. 82, 17 Ann.Cas. 1233.

Invalid tax levy before sale of bonds
Ill.—People ex rel. McDonough v. Chicago, M., St. P. & P. R. Co., 188 N.E. 821, 354 Ill. 630.

2. Nev.—State ex rel. Adams v. Allen, 34 P.2d 1074, 55 Nev. 346.

3. Nev.—Ronnnow v. City of Las Vegas, 65 P.2d 133, 57 Nev. 332.

4. Utah.—Fjeldsted v. Ogden City, 35 P.2d 825, 84 Utah 302—Wadsworth v. Santaquin City, 28 P.2d 161, 83 Utah 321.

5. Utah.—Fjeldsted v. Ogden City, 35 P.2d 825, 84 Utah 302—Wadsworth v. Santaquin City, 28 P.2d 161, 83 Utah 321.

6. Utah.—Fjeldsted v. Ogden City, 28 P.2d 144, 83 Utah 278.

7. Utah.—Wadsworth v. Santaquin City, 28 P.2d 161, 83 Utah 321.

8. Fla.—State v. City of Fort Pierce, 170 So. 742, 126 Fla. 184.
La.—McCann v. Morgan City, 139 So. 481, 173 La. 1063.

9. Ohio.—Vollmer v. Village of Amherst, 29 N.E.2d 379, 65 Ohio App. 26, appeal dismissed 38 N.E.2d 409,

139 Ohio St. 139, affirmed 43 N.E. 2d 235, 140 Ohio St. 257.

10. Ohio.—City of Middletown v. City Commission of Middletown, 37 N.E.2d 609, 138 Ohio St. 596.

Electric generating and distribution system

Ohio.—Vollmer v. Village of Amherst, 29 N.E.2d 379, 65 Ohio App. 26, appeal dismissed 38 N.E.2d 409, 139 Ohio St. 139, affirmed 43 N.E.2d 235, 140 Ohio St. 257.

11. Okl.—Faught v. City of Sapulpa, 292 P. 15, 145 Okl. 164.
Registration by officer see *infra* § 1949.

Delegation of power

(1) A statute providing that, on the taking of certain steps within a specified time after the determination to issue municipal bonds, the state board of tax commissioners shall hold a hearing and decide whether the bonds shall be issued is not invalid as an improper grant or delegation of power.—State v. Leonard, 153 N.E. 777, 198 Ind. 356—44 C.J. p 1212 note 66.

(2) Under some charter provisions the city commission may not delegate to the mayor and clerk the power to determine whether legally pre-

requisite conditions have been complied with for the issuance of municipal bonds.—City of Sanford, Fla., v. Chase Nat. Bank of City of New York, C.C.A.N.Y., 50 F.2d 400, certiorari denied Chase Nat. Bank of City of New York v. City of Sanford, Fla., 52 S.Ct. 35, 284 U.S. 660, 76 L.Ed. 559.

12. U.S.—City of Shidler v. H. C. Speer & Sons Co., C.C.A.Okl., 62 F.2d 544.

44 C.J. p 1211 note 58.

13. Tex.—City of Galveston v. Mann, 143 S.W.2d 1028, 135 Tex. 319.

44 C.J. p 1211 notes 62, 63.

14. Ala.—Landstreet v. City of Fort Payne, 190 So. 420, 238 Ala. 212—Alabama Power Co. v. City of Scottsboro, 190 So. 412, 238 Ala. 230—Alabama Power Co. v. City of Fort Payne, 187 So. 632, 237 Ala. 459, 123 A.L.R. 1337.

Ind.—Citizens' Bank of Anderson v. Town of Burnettsville, 179 N.E. 724, 98 Ind.App. 92.

Time of consent and approval

La.—State ex rel. Maestri v. Cave, 190 So. 631, 193 La. 419.

provisions of this nature are mandatory.¹⁵ The purpose of such statutes is not only to protect the particular locality and its inhabitants against the imposition of unauthorized or illegal obligations,¹⁶ but also to give assurance to intending purchasers of the bonds that, if and when such bonds are purchased, the purchaser will acquire an indefeasible title thereto.¹⁷ The powers and duties of the officials to whom the matter of the issuance of the bonds is submitted are supervisory,¹⁸ and not ministerial¹⁹ or perfunctory.²⁰

Securities affected. Some statutes providing for the examination or approval of municipal bonds,²¹ such as statutes limited to public bonds or securities,²² do not apply to improvement bonds payable solely by special assessments on property benefited by the improvement. In some jurisdictions the certificate of an officer is not required, either by the constitution or by statute, for refunding bonds.²³ A sewer district has been held not to be a political subdivision of the state within the meaning of a constitutional provision requiring proposed bonds of political subdivisions to be presented to a public officer for approval.²⁴

(2) Hearing and Determination

The public officers charged with the duty of examining a proposed issue of municipal securities may be required to hold a hearing and act only on the evidence received; and their determination is sometimes considered to be in the nature of a judgment.

Under statutes in effect so providing, the consent of a board to the issuance and sale of the bonds may not be given unless there has been a public hear-

ing²⁵ and a finding that the issuance or sale of the bonds will serve some public need and be in the public interest.²⁶ Under some provisions the attorney general may inquire into the facts relative to a proposed bond issue to ascertain whether a sufficient ad valorem taxing margin is in existence, and may reasonably be expected to remain in existence, to pay the bonds;²⁷ but where a municipality has sources of revenue which are reasonably stable and sure, other than ad valorem taxes, the attorney general should consider such other sources in passing on the question as to whether or not there is and will be a sufficient margin of ad valorem taxing power to pay the bonds.²⁸ In general, the securities should be approved in the absence of defects or irregularities,²⁹ but not otherwise.³⁰

Intervention. A public utility owning property in the municipality and operating a distribution system therein has been held entitled to intervene and contest the application of the municipality to a board for authority to issue bonds for the purpose of acquiring a similar distribution system.³¹

Evidence. The board must receive and weigh evidence,³² and its order and finding of fact must be based on, and supported by, sufficient competent evidence.³³ It can make no finding of fact in the absence of evidence,³⁴ or supply a lack of evidence by an unaided opinion that issuance of the bonds will serve a public need and is in the public interest,³⁵ or make a finding directly opposed to the undisputed evidence.³⁶

Effect of determination. It has been considered

15. Ind.—Citizens' Bank of Anderson v. Town of Burnettsville, 179 N.E. 724, 98 Ind.App. 92.

16. Tex.—City of Galveston v. Mann, 143 S.W.2d 1028, 135 Tex. 319.

17. Tex.—City of Galveston v. Mann, supra.

18. Mich.—In re School Dist. No. 6, Paris and Wyoming Tps., Kent County, 278 N.W. 792, 284 Mich. 132.

19. Mich.—In re School Dist. No. 6, Paris and Wyoming Tps., Kent County, supra.

20. Tex.—City of Galveston v. Mann, 143 S.W.2d 1028, 135 Tex. 319.

21. Pa.—City of Chester v. Woodward, 13 Pa.Dist. & Co. 201, 33 Dauph Co. 59.

44 C.J. p 1211 note 65.

22. Okl.—Lawton v. West, 126 P. 574, 33 Okl. 395.

23. Okl.—Faught v. City of Sapulpa, 292 P. 15, 145 Okl. 164.

24. Okl.—Armstrong v. Sewer Imp. Dist. No. 1, Tulsa County, 199 P.2d 1012, reheard 207 P.2d 917.

25. Ala.—Alabama Power Co. v. City of Scottsboro, 190 So. 412, 238 Ala. 230—Alabama Power Co. v. City of Fort Payne, 187 So. 632, 237 Ala. 459, 123 A.L.R. 1337.

26. Ala.—Alabama Power Co. v. City of Fort Payne, supra.

More benefit insufficient

Ala.—Alabama Power Co. v. City of Fort Payne, supra.

27. Tex.—City of Houston v. McCraw, 113 S.W.2d 1215, 131 Tex. 127.

28. Tex.—City of Houston v. McCraw, supra.

29. Okl.—City of Wilburton v. King, 18 P.2d 1075, 162 Okl. 32.

Specifications held not improper

Ind.—Letz Mfg. Co. v. Public Service Commission of Indiana, 4 N.E. 2d 194, 210 Ind. 467.

30. **Construction on state land**
The attorney general was unau-

thorized to approve municipal bonds to pay for construction of permanent structures on land belonging to state, or apparently belonging to state, and for erection of which structures no right or permit had been obtained.—City of Galveston v. Mann, 143 S.W. 2d 1028, 135 Tex. 319.

31. Ala.—Alabama Power Co. v. City of Fort Payne, 187 So. 632, 237 Ala. 459, 123 A.L.R. 1337.

32. Ala.—Alabama Power Co. v. City of Fort Payne, supra.

Statutory provision for "public hearing" refers to the tradition of judicial proceedings in which evidence is received and weighed by the trier of the facts.—Alabama Power Co. v. City of Fort Payne, supra.

33. Ala.—Alabama Power Co. v. City of Fort Payne, supra.

34. Ala.—Alabama Power Co. v. City of Fort Payne, supra.

35. Ala.—Alabama Power Co. v. City of Fort Payne, supra.

36. Ala.—Alabama Power Co. v. City of Fort Payne, supra.

that the determination of the officers charged with the duty of deciding questions preliminary to the issuance of bonds is in the nature of a judgment³⁷ which is conclusive until reversed in a direct proceeding by a court.³⁸ Under some provisions, if the bond or evidence of debt has indorsed thereon a certificate signed by an authorized officer stating that the bond or evidence of debt is issued pursuant to law and that the issue is within the debt limit, and is delivered for a present consideration, no question may thereafter be raised as to the indebtedness being within the debt limit or being contracted pursuant to law;³⁹ likewise, under some provisions, after the lapse of a prescribed period from the recording of a certificate of validity, the municipality cannot avoid liability on the bonds because of irregularities in the proceedings for their issuance.⁴⁰ Under other provisions the approval of the bonds by the public officer merely renders the bonds prima facie valid,⁴¹ and such prima facie validity may be destroyed by proof of the nullity and illegality of the bonds;⁴² moreover, it has been held that the municipality cannot bring itself within the protection of a statute providing for the prima facie validity of approved bonds by obtaining such approval during the pendency of a suit to destroy the validity of the bonds.⁴³

Review. The findings and order of a board in a proceeding to obtain its consent to the issuance of municipal bonds have been held subject to judicial review to determine whether, in making its determination, it acted on the basis of substantial evidence or whether it departed from rules of law and was arbitrary and capricious;⁴⁴ and the de-

termination of public officers in a matter of this nature is sometimes reviewable by certiorari.⁴⁵

b. By Court or Judge

- (1) In general
- (2) Proceedings in general
- (3) Matters to be considered or determined
- (4) Conclusiveness and effect

(1) In General

Under some statutes special judicial proceedings may be instituted for the validation of a proposed issue of municipal securities, the purpose thereof being to facilitate an adjudication as to the validity of the securities and the regularity of the preliminary steps.

Under the statutes in some jurisdictions special judicial proceedings may or should be had for the validation of municipal bonds before their issuance, or for the validation of the proceedings preliminary to their issuance;⁴⁶ and the validity of such statutes has been upheld.⁴⁷ Judicial proceedings for validating municipal bonds are statutory⁴⁸ and remedial in their nature,⁴⁹ their purpose being to facilitate an adjudication as to the validity of the bonds and the regularity of the steps taken to issue them,⁵⁰ with a view to aiding in the sale of the securities by creating a sense of security in the mind of the prospective purchasers.⁵¹

Character of bond or security. Under some statutes validation proceedings are appropriate for every form of proposed bonded debt or certificate of indebtedness, negotiable or nonnegotiable, limited or general, which a municipal corporation may undertake to issue under purported authority of law,⁵²

37. N.Y.—*People v. Allen*, 52 N.Y. 538.

Wash.—*Cuddy v. Sturtevant*, 190 P. 909, 111 Wash. 304.

38. Mich.—*Chemical Bank & Trust Co. v. Oakland County*, 251 N.W. 395, 264 Mich. 673—*Spitzer v. Village of Blanchard*, 46 N.W. 400, 82 Mich. 234.

W.Va.—*Warden v. City of Grafton*, 26 S.E.2d 1, 125 W.Va. 658.

44 C.J. p 1211 note 61.
Conclusiveness on municipality as against bona fide purchaser see infra § 1969.

39. Okl.—*Faught v. City of Sapulpa*, 292 P. 15, 145 Okl. 164.

40. Wis.—*Village of Gilman v. Northern States Power Co.*, 7 N.W.2d 606, 242 Wis. 130.
Time to attack bond election see infra § 1929 e.

41. Tex.—*Griffith v. Buchanan*, Civ. App., 5 S.W.2d 211.

42. Tex.—*Griffith v. Buchanan*, supra.

43. Tex.—*Griffith v. Buchanan*, supra.

44. Ala.—*Alabama Power Co. v. City of Fort Payne*, 187 So. 632, 237 Ala. 459, 123 A.L.R. 1337.

45. N.Y.—*People v. Allen*, 52 N.Y. 538.

46. Ky.—*Rohde v. City of Newport*, 55 S.W.2d 368, 246 Ky. 476, 87 A.L.R. 701—*Fox v. Boyle County*, 53 S.W.2d 192, 245 Ky. 27.

44 C.J. p 1212 notes 69, 70.

Ordinance providing for court approval

A statute requiring the approval of the court in advance of the issuance of bonds is not violated by an ordinance which provides that the issuance and sale of bonds shall be subject to the approval of the court.—*Jones v. City of Paducah*, 92 S.W.2d 811, 263 Ky. 542.

47. Ky.—*Rohde v. City of Newport*, 55 S.W.2d 368, 246 Ky. 476, 87 A.L.R. 701.

44 C.J. p 1212 note 69 [b].

48. Fla.—*State v. City of Coral Gables*, 133 So. 892, 101 Fla. 237.

44 C.J. p 1212 note 69 [a] (2).

49. Fla.—*State v. City of Sarasota*, 17 So.2d 109, 154 Fla. 250.

Ky.—*Rohde v. City of Newport*, 55 S.W.2d 368, 246 Ky. 476, 87 A.L.R. 701.

50. Fla.—*Wright v. City of Anna Maria*, 34 So.2d 737—*State v. City of Sarasota*, 17 So.2d 109, 154 Fla. 250—*State v. City of Coral Gables*, 133 So. 892, 101 Fla. 237.

Miss.—*Street v. Town of Ripley*, 161 So. 855, 173 Miss. 225.

44 C.J. p 1212 note 69 [a] (7).

51. Fla.—*Wright v. City of Anna Maria*, 34 So.2d 737—*State ex rel. Harrington v. City of Pompano*, 188 So. 610, 136 Fla. 730.

Miss.—*Street v. Town of Ripley*, 161 So. 855, 173 Miss. 225.

52. Fla.—*State v. City of Miami*, 152 So. 6, 113 Fla. 280.

or for every form of written obligation which might be issued by a municipal corporation;⁵³ and the fact that the evidences of indebtedness are referred to as notes, instead of bonds, does not prevent their validation.⁵⁴ Bonds payable solely out of the revenues of a proposed municipal enterprise are a proper subject of validation proceedings under some statutes;⁵⁵ but other provisions, in effect excluding bonds which are not payable out of the public treasury from taxes collected from the citizens, have been held inapplicable to bonds issued to acquire a municipal facility and payable solely from the income of such facility.⁵⁶

Prospective operation of statute. A statute providing for judicial approval of the issuance of bonds ordinarily applies to all bonds issued or sold after it becomes effective,⁵⁷ and may apply to bonds which have not yet been issued and offered for sale even though the ordinance providing for them was adopted before the statute;⁵⁸ but, in the absence of a provision making such a statute retroactive, it will not affect bonds issued and sold before the effective date of the statute.⁵⁹

Effect of failure to validate. A purchaser of municipal bonds which have not been duly adjudged to be in accord with the controlling law takes them subject to a future adjudication as to the validity of the statute authorizing the issue,⁶⁰ and as to the legal sufficiency of the record of the proceedings in issuing the bonds⁶¹ as well as to the legal effect of the terms of the bonds.⁶² Where the bonds have not been adjudged valid, all parties are conclusively

presumed to know of fundamental or constitutional infirmities in them.⁶³

(2) Proceedings in General

The proceedings prescribed for the validation of municipal securities must be followed at least substantially, although mere irregularities therein are not necessarily fatal. Proper notice must be given; and the usual rules applicable in civil actions with respect to pleadings and evidence ordinarily govern.

The procedure prescribed for validation or approval of municipal securities is usually mandatory⁶⁴ and must be followed⁶⁵ strictly,⁶⁶ or at least substantially in all material respects;⁶⁷ but some provisions have been held to be directory⁶⁸ and certain irregularities have been held not to be fatal.⁶⁹ Under some statutes the validation proceedings are properly instituted after an election on the proposed bond issue.⁷⁰

Jurisdiction and venue. In the absence of authority conferred by statute, a court of equity is without jurisdiction to entertain a bill or information filed for the purpose of obtaining an adjudication that a proposed issue of municipal bonds is valid.⁷¹ However, where authority to issue municipal bonds on the performance of certain conditions is conferred by statute on a particular court or tribunal, such court or tribunal has power to determine whether the conditions have or have not been performed.⁷² The jurisdiction of the court depends on the jurisdictional facts pleaded in good faith,⁷³ regardless of whether or not the proposal itself be ultimately adjudicated to be within the powers of the municipal corporation.⁷⁴ Such jurisdiction at-

53. Miss.—Street v. Town of Ripley, 161 So. 855, 173 Miss. 225.

54. Ga.—Jenkins v. Mayor, etc., of Savannah, 139 S.E. 863, 165 Ga. 121.

55. Miss.—Street v. Town of Ripley, 161 So. 855, 173 Miss. 225.

56. Ky.—Williams v. City of Raceland, 53 S.W.2d 370, 245 Ky. 212.

57. Ky.—Rohde v. City of Newport, 55 S.W.2d 268, 246 Ky. 476, 87 A.L.R. 701.

44 C.J. p 1212 note 69 [c].

58. Ky.—Rohde v. City of Newport, supra.

59. Ky.—Rohde v. City of Newport, supra.

60. Fla.—Richmond v. Town of Largo, 19 So.2d 791, 155 Fla. 226 —Nuveen v. City of Quincy, 156 So. 153, 115 Fla. 510, 94 A.L.R. 600.

61. Fla.—Richmond v. Town of Largo, 19 So.2d 791, 155 Fla. 226 —Nuveen v. City of Quincy, 156 So. 153, 115 Fla. 510, 94 A.L.R. 600.

62. Fla.—Richmond v. Town of Largo, 19 So.2d 791, 155 Fla. 226 —Nuveen v. City of Quincy, 156 So. 153, 115 Fla. 510, 94 A.L.R. 600.

63. Fla.—Nuveen v. City of Quincy, supra.

Trust not created

Where municipal bonds had not been adjudged valid before their purchase from municipality, subsequent adjudication that they were invalid and could not be paid did not raise a trust in favor of purchaser.—Nuveen v. City of Quincy, supra.

64. Ga.—Ray v. Lavonia, 81 S.E. 884, 141 Ga. 626.

44 C.J. p 1212 note 71.

65. Fla.—State v. City of Coral Gables, 138 So. 892, 101 Fla. 237.

66. Ky.—Ballard County v. Kentucky County Debt Commission, 162 S.W.2d 771, 290 Ky. 770.

44 C.J. p 1212 note 71.

67. Fla.—State v. City of Sarasota, 17 So.2d 109, 154 Fla. 250—State

ex rel. Harrington v. City of Pompano, 188 So. 610, 136 Fla. 730.

44 C.J. p 1212 note 72.

68. Ga.—Spencer v. Columbus, 103 S.E. 464, 150 Ga. 312.

44 C.J. p 1213 note 81.

69. Ga.—Thomas v. Blakely, 81 S.E. 218, 141 Ga. 488.

44 C.J. p 1213 note 82.

70. Ky.—Daughaday v. City of Paducah, 118 S.W.2d 699, 274 Ky. 337.

44 C.J. p 1212 note 73 [a].

Constitutional limitation on amount
Ky.—Daughaday v. City of Paducah, supra.

71. Mich.—Attorney General v. Thompson, 133 N.W. 532, 167 Mich. 507.

44 C.J. p 1212 note 67.

72. N.C.—Belo v. Forsythe County, 76 N.C. 489.

73. Fla.—State v. City of Miami, 152 So. 6, 113 Fla. 280.

74. Fla.—State v. City of Miami, supra.

taches on the filing of a petition in the proper court,⁷⁵ and is not lost by the vacation of an order to show cause why the petition should not be granted, where a subsequent order is entered which complies with the statutory provisions.⁷⁶ The venue of a statutory validation proceeding is in the county in which the municipality is situated.⁷⁷

Parties, process, and notice. Under some statutes an action to validate securities to be issued by a municipality must be brought in the name of the state,⁷⁸ whereas under other statutes proceedings for the purpose of legalizing and confirming proceedings taken prior to the issuance and sale of bonds may be instituted by a municipal corporation.⁷⁹ There must be compliance with statutes providing for the publication of a general notice to the public stating the time and place of hearing,⁸⁰ since taxpayers are entitled to notice of the validation proceedings, under some provisions, in order that they may have an opportunity to determine the extent to which their financial interest may be affected and to present their objections.⁸¹ Proper persons may intervene in the validation proceedings and have determined all questions touching the legality and right of the municipality to create the proposed debt;⁸² but the holders of outstanding bonds which are to be refunded or renewed are not necessary parties in an action by a municipality for

judicial approval of a proposed bond issue which is to be used to retire the outstanding bonds.⁸³ The failure of all the members of the municipal council to join in an answer to a petition for validation does not necessarily prevent a judgment of validation.⁸⁴

After the court has acquired jurisdiction of the proceedings by the filing of a petition, jurisdiction of the parties may subsequently be obtained by compliance with provisions pertaining to constructive service.⁸⁵ A statute providing that "upon" the filing of the petition for validation the judge should enter an order to show cause why the petition should not be granted must be given a reasonable interpretation.⁸⁶

Pleadings. The petition⁸⁷ and answer⁸⁸ in validation proceedings are governed by the statutes and the general rules of pleading. Under some statutes the allegations of the petition must show that the proposed debt is within constitutional limitations⁸⁹ and that the indebtedness for which the bonds are to be issued is within the constitutional limitations;⁹⁰ and all items of outstanding indebtedness which were created or which existed during the period in which the debt to be bonded was incurred, and which the proposed bond issue is intended to cover, should be specifically set forth.⁹¹ Under

75. Fla.—State v. City of Sarasota, 17 So.2d 109, 154 Fla. 250.

76. Fla.—State v. City of Sarasota, supra.

77. Ga.—Murray v. Tifton, 84 S.E. 967, 143 Ga. 301.

44 C.J. p 1213 note 83.

78. Ga.—Darby v. City of Vidalia, 44 S.E.2d 454, 75 Ga.App. 804.

State is indispensable and necessary party to the action.—Darby v. City of Vidalia, supra.

79. N.Y.—Petition of Board of Fire Com'rs of Columbia-Litchfield Fire Dist., 29 N.Y.S.2d 605.

A fire district, being authorized to issue bonds, may maintain such proceedings under a statute defining "municipal corporation" to include a city, county, village, town, school district, sewer district, water district, lighting district or any other district or territory authorized by law to issue bonds.—Petition of Board of Fire Com'rs of Columbia-Litchfield Fire Dist., supra.

80. Fla.—Miami v. Romfh, 63 So. 440, 66 Fla. 280.

44 C.J. p 1212 note 74.

81. Miss.—Street v. Town of Ripley, 161 So. 855.

Notice held sufficient

Miss.—Street v. Town of Ripley, supra.

82. Fla.—City of Fort Myers v. State, 176 So. 483, 129 Fla. 166.

Ga.—Gibbs v. Ty Ty Consol. School Dist., 147 S.E. 764, 168 Ga. 379.

44 C.J. p 1212 note 75.

One paying only poll taxes was not citizen within law authorizing intervention in proceeding for validating bond issue.—Belmont v. Town of Gulfport, 122 So. 10, 97 Fla. 688.

83. Ky.—City of Frankfort v. Harrod, 143 S.W.2d 292, 283 Ky. 755.

84. Ga.—Gibbs v. City of Social Circle, 12 S.E.2d 335, 191 Ga. 422.

85. Fla.—State v. City of Sarasota, 17 So.2d 109, 154 Fla. 250.

Publication; "taxpayers"

Where certain land included within limits of city when original bonds were issued was excluded therefrom before issuance of refunding bonds, owners of such land were "taxpayers" of the city in contemplation of law, and publication of notice to citizens and taxpayers requiring them to show cause why bonds should not be validated was sufficient to reach such owners.—State v. City of Venice, 2 So.2d 365, 147 Fla. 70.

86. Fla.—State v. City of Sarasota, 17 So.2d 109, 154 Fla. 250.

Immediate entry unnecessary

Fla.—State v. City of Sarasota, supra.

87. Fla.—State v. City of Tampa, 3 So.2d 484, 148 Fla. 6.

Ky.—Hancock v. Henderson County Board of Education, 114 S.W.2d 523, 272 Ky. 427—Rohde v. City of Newport, 55 S.W.2d 368, 246 Ky. 476, 87 A.L.R. 701.

44 C.J. p 1212 note 73, p 1213 note 82 [a].

Petition held sufficient

Fla.—Fleeman v. City of Jacksonville, 191 So. 840, 140 Fla. 478.

Petition held insufficient

Ga.—Town of McIntyre v. Baldwin, 6 S.E.2d 372, 61 Ga.App. 489.

44 C.J. p 1212 note 73 [b] (4).

88. Ga.—Spencer v. Clarkesville, 59 S.E. 274, 129 Ga. 627.

44 C.J. p 1212 note 75.

Answer held insufficient

(1) To state good defense generally.—Farrow v. City of Hialeah, 181 So. 838, 132 Fla. 621.

(2) To show abuse of discretion by issuing authority.—State v. City of Miami Beach, 16 So.2d 344, 154 Fla. 34.

89. Ky.—Fox v. Boyle County, 53 S.W.2d 192, 245 Ky. 27.

90. Ky.—Havely v. City of Lexington, 95 S.W.2d 598, 264 Ky. 737.

91. Ky.—Rohde v. City of Newport, 55 S.W.2d 368, 246 Ky. 476, 87 A.

other provisions, however, the petition need not allege that the amount of the bonds is within the constitutional limitation of municipal indebtedness.⁹² A petition for validation may be amended in a proper case,⁹³ in which event an adverse party should be allowed an opportunity to take issue on the allegations as amended.⁹⁴ It has been held not improper for the court to vacate an order to show cause why the petition for validation should not be granted, and enter a second order, without requiring the petitioner to file a new petition.⁹⁵ When the facts are presented and undisputed, it is not material which party may have pleaded them.⁹⁶

Evidence. In determining the validity of municipal bonds, proper presumptions may be indulged.⁹⁷ While it has been held that the burden of showing the issuance of bonds without authority is on the party so asserting,⁹⁸ it is generally held that the burden of proving the facts essential to the valida-

tion is on the party seeking validation.⁹⁹ Thus, in proceedings to validate bonds to fund a floating indebtedness, the burden is on the party seeking validation to establish the validity of the indebtedness proposed to be funded¹ and that it was not incurred in violation of constitutional limitations on municipal indebtedness.² An intervener has the burden of sustaining objections based on facts which do not appear in the pleadings of plaintiff and the municipality but which depend for proof of their existence on aliunde evidence.³

General rules prevail as to the admissibility of evidence,⁴ and the weight and sufficiency thereof.⁵ The legality of an indebtedness proposed to be funded must be established by facts and figures, and not by mere conclusions or opinions of witnesses.⁶

Order, judgment, or findings; review. It is necessary and sufficient to comply with statutes providing for the making or rendition of an order, judg-

L.R. 701—Fox v. Boyle County, 53 S.W.2d 192, 245 Ky. 27.

92. Ga.—Sewell v. Tallapoosa, 88 S. E. 577, 145 Ga. 19.

93. Fla.—State v. City of St. Petersburg, 198 So. 837, 145 Fla. 206. Ga.—Town of McIntyre v. Scott, 12 S.E.2d 883, 191 Ga. 473.

Pa.—Petition of School Dist. of Harborcreek Tp. for Leave to Issue Funding Bonds, Quar.Sess., 29 Erie Co. 178, 38 Mun.L.R. 85.

Opportunity to supply deficiencies

Ky.—Payne v. City of Covington, 143 S.W.2d 727, 283 Ky. 848.

94. Fla.—Ingram v. City of Palmetto, 112 So. 861, 93 Fla. 790.

95. Fla.—State v. City of Sarasota, 17 So.2d 109, 154 Fla. 250.

96. Ky.—Fox v. Boyle County, 53 S. W.2d 192, 245 Ky. 27.

97. Ga.—Town of McIntyre v. Scott, 12 S.E.2d 883, 191 Ga. 473.

Debt within constitutional limit

Ill.—Kocsis v. Chicago Park Dist., 198 N.E. 847, 362 Ill. 24.

98. Ill.—People ex rel. Nelson v. Beu, 85 N.E.2d 829, 403 Ill. 232—Kocsis v. Chicago Park Dist., 198 N.E. 847, 362 Ill. 24.

99. Ga.—Harrell v. Whigham, 80 S. E. 1010, 141 Ga. 322—Darby v. City of Vidalia, 44 S.E.2d 454, 75 Ga. App. 804.

Ky.—Havely v. City of Lexington, 95 S.W.2d 598, 264 Ky. 737—Rohde v. City of Newport, 55 S.W.2d 368, 246 Ky. 476, 87 A.L.R. 701—Fox v. Boyle County, 53 S.W.2d 192, 245 Ky. 27.

Burden of making prima facie case

Ga.—Dade County v. State, 48 S.E. 2d 144, 77 Ga.App. 139.

Sources of revenue

Ky.—Hancock v. Henderson County Board of Education, 114 S.W.2d 523, 272 Ky. 427.

1. Ky.—City of Hickman v. First Nat. Bank in City & State of N. Y., 211 S.W.2d 801, 307 Ky. 702—Moss v. City of Paducah, 147 S.W.2d 59, 285 Ky. 100—Payne v. City of Covington, 143 S.W.2d 727, 283 Ky. 848—Ebert v. Board of Education of School Dist. of City of Newport, 128 S.W.2d 185, 278 Ky. 75—Lock v. City of Middlesboro, 101 S.W.2d 203, 267 Ky. 19—Jones v. City of Paducah, 92 S.W. 2d 811, 263 Ky. 542.

Extent of burden

Municipality was required to establish validity of each item of indebtedness only with respect to outstanding warrants, and not with respect to satisfied warrants.—Coffman v. Central City, 101 S.W.2d 204, 267 Ky. 26.

Burden held met

Ky.—Lock v. City of Middlesboro, 104 S.W.2d 991, 268 Ky. 259.

2. Ky.—Coffman v. Central City, 101 S.W.2d 204, 267 Ky. 26—Lock v. City of Middlesboro, 101 S.W.2d 203, 267 Ky. 19.

Burden held met

Ky.—Penrod v. City of Sturgis, 107 S.W.2d 277, 269 Ky. 315.

Burden held not met

Ky.—First Nat. Bank v. City of Princeton, 117 S.W.2d 210, 278 Ky. 601.

3. Ga.—Brown v. Atlanta, 109 S.E. 666, 152 Ga. 283.

44 C.J. p 1213 note 85.

Admissions establishing prima facie case

Where the parties by stipulation

and other admissions admit sufficient material allegations to make out a prima facie case the burden is on interveners to introduce evidence in support of their intervention.—Dade County v. State, 48 S.E.2d 144, 77 Ga.App. 139.

4. Evidence held admissible

Ga.—Dade County v. State, supra.

5. Evidence held sufficient

(1) Generally.

Fla.—State v. City of Clermont, 196 So. 850, 143 Fla. 434—State v. City of Fort Pierce, 182 So. 774, 133 Fla. 348—State v. City of Port St. Joe, 180 So. 29, 131 Fla. 858. Ga.—Dade County v. State, 48 S.E. 2d 144, 77 Ga.App. 139.

(2) To prove validity of floating indebtedness.—Franklin v. City of Dayton, 107 S.W.2d 338, 269 Ky. 484.

(3) To sustain conclusion that notice of election on question of issuance of bonds complied with statutory requirements.—State v. City of Port St. Joe, 180 So. 29, 131 Fla. 858.

(4) To sustain finding that aggregate indebtedness of city for any of years in question did not exceed limits prescribed by constitution.—First Nat. Bank v. City of Princeton, 117 S.W.2d 210, 278 Ky. 601.

Evidence held insufficient

Ill.—People ex rel. Nelson v. Beu, 85 N.E.2d 829, 403 Ill. 232.

Ky.—Lock v. City of Middlesboro, 101 S.W.2d 203, 267 Ky. 19.

6. Ky.—Coffman v. Central City, 101 S.W.2d 204, 267 Ky. 26.

Mode of proof

Ky.—Kockritz v. City of Henderson, 107 S.W.2d 245, 269 Ky. 334.

ment, or decree,⁷ and the taking of the case to a higher court by appeal⁸ or a bill of exceptions.⁹ Under some statutory provisions the court is required to make a statement and finding as to the existence, character, and amount of the outstanding legal indebtedness of the municipality.¹⁰ In general, bonds will be validated or approved where they are properly authorized and all matters, proceedings, and conditions necessary to be performed in connection with their issuance have been performed in due time, form, and manner according to law.¹¹ On appeal from a decree validating the securities involved, where it appears that the members of the appellate court are evenly divided and there is no prospect of an immediate change in the personnel of the court, the decree of validation should be affirmed.¹²

Costs. Under some statutes the costs in a proceeding to test the validity of the bonds are taxable against the municipality even in cases in which the municipality wins the litigation.¹³

(3) Matters to Be Considered or Determined

The court or judge in validation proceedings should consider matters properly before it, such as whether issuance of the proposed securities would be in accordance with statutory and constitutional provisions; but matters which are collateral or otherwise not presented for determination should not be adjudicated.

There must be a consideration and determination by the court or judge of all matters properly involved in the proceeding,¹⁴ including such matters as whether the proposed bonds or securities are valid and authorized by law,¹⁵ and, in the case of a bond issue to fund a floating debt, whether the debts proposed to be funded are valid¹⁶ and were incurred with due regard for the finances of the municipality.¹⁷ In order to justify approval it must appear that the proposed issue does not contravene constitutional limitations,¹⁸ such as constitutional limitations as to the amount of the indebtedness of the municipality.¹⁹ The sufficiency of the resolution determining to make an improvement and to

7. Ga.—Sewell v. Tallapoosa, 88 S. E. 577, 145 Ga. 19.
44 C.J. p 1213 note 77.

Validation of mortgage securing certificates

Fla.—Broward County Port Authority v. State, 175 So. 796, 129 Fla. 73.

Sale of bonds subject to validation

Decree validating bonds was not invalid notwithstanding sale of bonds was made before validation, in view of fact that sale was made subject to validation.—State v. Town of Riviera, 197 So. 525, 143 Fla. 705.

8. Fla.—State v. City of Coral Gables, 133 So. 892, 101 Fla. 237.
44 C.J. p 1213 note 78.

9. Ga.—Gibbs v. Ty Ty Consol. School Dist., 147 S.E. 764, 168 Ga. 379.
44 C.J. p 1213 note 79.

10. Okl.—Application of Board of Education of City of Ardmore, 49 P.2d 122, 173 Okl. 296.

11. Fla.—State v. City of Sebring, 189 So. 702, 138 Fla. 507—State v. City of Melbourne, 185 So. 850, 135 Fla. 870.

Ky.—Smith v. City of Mayfield, 110 S.W.2d 1081, 270 Ky. 784—Fox v. Boyle County, 53 S.W.2d 192, 245 Ky. 27.

Validation or approval held proper

(1) Generally.
Fla.—State v. City of Miami, 26 So. 2d 903, 157 Fla. 747.

N.Y.—Petition of Board of Fire Com'rs of Columbia-Litchfield Fire Dist., 29 N.Y.S.2d 605.

(2) Electric revenue anticipation bonds

—Fuller v. City of Cullman, Ala., 27 So.2d 203.

(3) Funding or refunding bonds.

Fla.—State v. Town of Lake Placid, 191 So. 540, 140 Fla. 327—State v. City of Sebring, 189 So. 702, 138 Fla. 507—City of Lake Worth v. State, 184 So. 681, 135 Fla. 68—City of Coral Gables v. State, 176 So. 40, 128 Fla. 874—State v. City of Coral Gables, 154 So. 234, 114 Fla. 326.

Ky.—Mitchell v. City of Glasgow, 156 S.W.2d 824, 288 Ky. 512—Payne v. City of Covington, 146 S.W.2d 54, 285 Ky. 14—Kockritz v. City of Henderson, 107 S.W.2d 245, 269 Ky. 334—Pace v. City of Greenville, 101 S.W.2d 189, 267 Ky. 83—Matz v. City of Newport, Campbell County, 95 S.W.2d 1071, 265 Ky. 126—Bartlett v. City of Winchester, 88 S. W.2d 698, 261 Ky. 694.

(4) Public utility revenue bonds.—City of Springfield v. Monday, 185 S. W.2d 788, 353 Mo. 931.

(5) Sewer revenue certificates.—State v. City of Clearwater, 184 So. 675, 135 Fla. 112.

(6) Water revenue bonds or certificates.—State v. City of Tampa, 3 So.2d 484, 148 Fla. 6—State v. City of St. Petersburg, 198 So. 837, 145 Fla. 206—State v. Town of Riviera, 197 So. 525, 143 Fla. 705—State v. City of Pensacola, 184 So. 768, 135 Fla. 239—State v. City of Hollywood, 179 So. 721, 131 Fla. 584—State v. Town of Belle Glade in Palm Beach County, 163 So. 564, 121 Fla. 200—State v. City of Daytona Beach, 158 So. 300, 118 Fla. 29.

Securities held not entitled to validation

Fla.—City of Fort Myers v. State, 176 So. 483, 129 Fla. 166—State v.

Town of Belleair, 170 So. 434, 125 Fla. 669.

12. Fla.—State v. City of Tampa, 187 So. 604, 137 Fla. 29.

13. Miss.—Miller v. Silver Creek Separate School Dist., 95 So. 638, 131 Miss. 702.

14. Fla.—Atlantic Coast Line R. Co. v. City of Lakeland, 177 So. 266, 130 Fla. 72.

44 C.J. p 1212 note 76.

Validity of provision in bond ordinance

Miss.—Street v. Town of Ripley, 161 So. 855, 173 Miss. 225.

15. Miss.—Street v. Town of Ripley, supra.

Possibility of validity

A validating decree will be granted only if the proposed issue is valid, and it is not sufficient that it might result in validity.—City of Miami v. State, 190 So. 774, 139 Fla. 598.

16. Ky.—Root v. City of Newport, 117 S.W.2d 594, 273 Ky. 604—McHargue v. Laurel County, 110 S. W.2d 419, 270 Ky. 638—Ballard v. Adair County, 104 S.W.2d 1100, 268 Ky. 347—Harris v. Holt, 99 S.W.2d 759, 266 Ky. 576.

17. Ky.—McHargue v. Laurel County, 110 S.W.2d 419, 270 Ky. 638.

18. Ky.—Fox v. Boyle County, 53 S. W.2d 192, 245 Ky. 27.

19. Ky.—Havely v. City of Lexington, 95 S.W.2d 598, 264 Ky. 737—Fox v. Boyle County, 53 S.W.2d 192, 245 Ky. 27.

issue bonds therefor may be tested in a validation proceeding.²⁰

On the other hand, the court should consider only such matters as are properly to be determined in judicial validation proceedings,²¹ and should not adjudge collateral matters.²² Under some provisions the court should consider only the proceedings which the municipality is required to pursue in the exercise of its power to incur indebtedness or to issue bonds,²³ such as the preliminary resolution giving notice of the issue of the bonds and declaring the purpose for which they are to be issued, the calling of an election, the regulating of the election, and the result thereof;²⁴ and it may not review, or refuse validation because of, matters that are discretionary with the municipal officials²⁵ where there is no showing that such discretion has been abused.²⁶ Validation may not be refused because of a claim of the poverty of, and hardships on, the taxpayers which will result from the issuance of the bonds,²⁷ or because of an objection to the propriety and regularity of a proposed disbursement of the proceeds.²⁸

It is no part of the duty of the court in validation proceedings to determine the boundaries of the political subdivision²⁹ or to determine whether any

territory is illegally embraced within the municipal limits.³⁰ A validating decree will not be denied on the ground that the question of issuing the bonds was not properly submitted to the electors for approval where the bonds were of a type not required to be approved by them.³¹ Special assessments, imposed for the purpose of paying the interest and principal on municipal bonds which are by law a direct obligation of the municipality, cannot generally be attacked in a proceeding to validate³² unless the validity or status of the bonds is made to depend on the validity of the assessments rather than the power of the municipality to issue them.³³

(4) Conclusiveness and Effect

A judgment of validation which is not attacked within the time prescribed by law usually is conclusive as to the validity of the securities as against the municipal corporation and all taxpayers or citizens thereof; but it does not cure a patent violation of the constitution, although it may put in repose constitutional privileges which an individual may waive or which may lawfully be circumscribed by the legislature.

A judgment or decree validating and confirming the bonds or securities, which is either not appealed from, or excepted to, within the time prescribed or is affirmed by the reviewing court, ordinarily is conclusive as to the validity of the bonds or securities³⁴

20. Fla.—City of Ft. Myers v. State, 117 So. 97, 95 Fla. 704.

21. Fla.—Haines City v. Certain Lands Upon Which Taxes and Special Assessments Are Delinquent, 178 So. 143, 130 Fla. 379—State v. City of Sanford, 174 So. 339, 128 Fla. 171.

Ky.—Fox v. Boyle County, 53 S.W.2d 192, 245 Ky. 27.

Pa.—Appeal of Babich, Com.Pl., 65 Dauph.Co. 188, 35 Mun.L.R. 177.

Validity of particular items of indebtedness

Where proof indicated that constitutional debt limit had been exceeded, chancellor properly approved bond issue to the extent of the greatest amount that could lawfully be issued and declined to rule on the validity of certain items of indebtedness in the absence of the alleged creditors, each of whom would be entitled to his day in court, if his debt was questioned, when it came to ascertaining which of the obligations were to be paid from the proceeds of the bonds.—Towe v. City of Scottsville, 107 S.W.2d 326, 269 Ky. 486.

22. Fla.—Renicks v. City of Lake Worth, 18 So.2d 769, 154 Fla. 694—Haines City v. Certain Lands Upon Which Taxes and Special Assessments Are Delinquent, 178 So. 143, 130 Fla. 379—Atlantic Coast

Line R. Co. v. City of Lakeland, 177 So. 206, 130 Fla. 72.

Questions held not properly raised

(1) Whether lands over which a de jure city exercises de facto jurisdiction are subject to taxation to pay bonds.—City of Winter Haven v. A. M. Klemm & Son, 181 So. 153, 132 Fla. 334, rehearing denied 182 So. 841, 133 Fla. 525.

(2) Whether city had power to provide that no taxes could be imposed by city on refunding bonds.—State v. City of Miami, 157 So. 13, 116 Fla. 517.

23. Fla.—Haines City v. Certain Lands Upon Which Taxes and Special Assessments Are Delinquent, 178 So. 143, 130 Fla. 379.

44 C.J. p 1212 note 76 [a] (1).

24. Fla.—Haines City v. Certain Lands Upon Which Taxes and Special Assessments Are Delinquent, supra.

25. Fla.—State v. City of Jacksonville, 31 So.2d 385, 159 Fla. 328.

Ky.—Root v. City of Newport, 117 S.W.2d 594, 273 Ky. 604—Fox v. Boyle County, 53 S.W.2d 192, 245 Ky. 27.

Expediency of borrowing against future earnings

Fla.—State v. City of Daytona Beach, 158 So. 300, 118 Fla. 29.

26. Fla.—State v. City of Jacksonville, 31 So.2d 385, 159 Fla. 328.

27. Fla.—State v. City of Venice, 2 So.2d 365, 147 Fla. 70.

28. Fla.—West v. Town of Lake Placid, 120 So. 361, 97 Fla. 127.

44 C.J. p 1212 note 76 [a] (11).

29. Ga.—Chappell v. Small, 20 S.E. 2d 916, 194 Ga. 143.

30. Fla.—City of Winter Haven v. A. M. Klemm & Son, 181 So. 153, 132 Fla. 334, rehearing denied 182 So. 841, 133 Fla. 525—State v. City of Coral Gables, 154 So. 234, 114 Fla. 326.

31. Fla.—State v. Town of Lake Placid, 191 So. 540, 140 Fla. 327.

32. Fla.—City of Ft. Myers v. State, 117 So. 97, 95 Fla. 704.

33. Fla.—City of Ft. Myers v. State, supra.

34. U.S.—City of Hialeah v. U. S. ex rel. Harris, C.C.A.Fla., 87 F.2d 953.

Fla.—Wright v. City of Anna Maria, 34 So.2d 737—State v. City of Venice, 2 So.2d 365, 147 Fla. 70—Olds v. Alvord, 191 So. 424, 139 Fla. 745, certiorari denied Alvord v. Town of Belleair, 60 S.Ct. 141, 308 U.S. 603, 84 L.Ed. 505—State ex rel. Harrington v. City of Pompano, 188 So. 610, 136 Fla. 730—May Land Co. v. City of Fort Lauderdale, 169 So. 642, 125 Fla. 146.

Ga.—Watts v. City of Cave Spring, 171 S.E. 382, 177 Ga. 808—Gibbs v. Ty Ty Consol. School Dist., 147 S.

against the municipality³⁵ and all taxpayers and citizens thereof.³⁶ The decree may put in repose any matter or thing affecting the right of the municipality to issue the bonds,³⁷ or the regularity or legality of their issue,³⁸ including questions of both law and fact,³⁹ in so far as those matters or things could be lawfully prescribed, regulated, limited, or dispensed with by the legislature in the first instance or subsequently cured by a validating act. A decree of validation forecloses all objections that could have been urged before the court at the hearing of the validation proceedings, where the court had jurisdiction of the subject matter and the parties,⁴⁰ including an objection that no notice was giv-

en to the taxpayers with respect to the intention to issue the bonds.⁴¹

A validation decree does not cure a patent violation of a command or prohibition of the constitution⁴² or supply authority, which would otherwise be entirely absent, to issue municipal bonds.⁴³ However, the decree may put in repose constitutional rights or privileges which are designed solely for the protection of property rights of the individual concerned, and which he may waive, or with reference to which he may estop himself,⁴⁴ or as to which the legislature may lawfully limit the period of time within which such right or privilege may

E. 764, 168 Ga. 379—*Farmer v. Thomson*, 65 S.E. 180, 133 Ga. 94.

Ky.—*Ballard County v. Kentucky County Debt Commission*, 162 S.W. 2d 771, 290 Ky. 770.

44 C.J. p 1214 note 93.

Conclusiveness in favor of subsequent purchaser see *infra* § 1969.

35. U.S.—*North Miami, Fla., v. Meredith*, C.C.A.Fla., 121 F.2d 279, certiorari denied 62 S.Ct. 138, 134 U.S. 674, 86 L.Ed. 539—U.S. ex rel. *Horgan v. Heyward*, C.C.A.Fla., 98 F.2d 433.

Fla.—*State ex rel. Gillespie v. Walshall*, 169 So. 552, 124 Fla. 866.

Ga.—*Gibbs v. City of Social Circle*, 12 S.E.2d 335, 191 Ga. 422.

44 C.J. p 1214 note 91.

36. U.S.—*North Miami, Fla., v. Meredith*, C.C.A.Fla., 121 F.2d 279, certiorari denied 62 S.Ct. 138, 134 U.S. 674, 86 L.Ed. 539—U.S. ex rel. *Horgan v. Heyward*, C.C.A.Fla., 98 F.2d 433.

Fla.—*Thompson v. Frostproof*, 103 So. 118, 89 Fla. 92.

Ga.—*Gibbs v. City of Social Circle*, 12 S.E.2d 335, 191 Ga. 422.

Conclusiveness on citizens and taxpayers of judgment dealing with validity of municipal bonds generally see *Judgments* § 796.

37. Fla.—*Wright v. City of Anna Maria*, 34 So.2d 737—*State ex rel. Ben Hur Life Ass'n v. City of Hialeah*, 177 So. 712, 130 Fla. 375—*Little River Bank & Trust Co. v. Johnson*, 141 So. 141, 105 Fla. 212—*City of Ft. Myers v. State*, 117 So. 97, 95 Fla. 704—*Weinberger v. Board of Public Instruction of St. Johns County*, 112 So. 253, 93 Fla. 470.

Grant of legislative power

Fla.—*Rountree v. State*, 135 So. 894, 102 Fla. 259.

38. Fla.—*Wright v. City of Anna Maria*, 34 So.2d 737—*Ocean Beach Hotel Co. v. Town of Atlantic Beach*, 2 So.2d 879, 147 Fla. 445—*Olds v. Alvord*, 191 So. 434, 139 Fla. 745, certiorari denied *Alvord v. Town of Belleair*, 60 S.Ct. 141, 308

U.S. 603, 84 L.Ed. 505—*State v. Town of Belleair*, 170 So. 434, 125 Fla. 669—*Board of Public Instruction for Dade County v. State ex rel. Tanger Inv. Co.*, 164 So. 697, 121 Fla. 703—*Humphreys v. State*, 145 So. 858, 108 Fla. 92—*Little River Bank & Trust Co. v. Johnson*, 141 So. 141, 105 Fla. 212—*City of Ft. Myers v. State*, 117 So. 97, 95 Fla. 704—*Weinberger v. Board of Public Instruction of St. Johns County*, 112 So. 253, 93 Fla. 470.

Ga.—*Jenkins v. Mayor, etc., of Savannah*, 139 S.E. 863, 165 Ga. 121.

Defects or irregularities

Under statutes limiting the inquiry in validation proceedings to the question of substantial compliance with statutory requirements relating to preliminary proceedings, where an order legalizing and confirming the proceedings is not appealed from within the prescribed time or is confirmed on appeal, the validity of the bonds may not thereafter be in any manner questioned by reason of any defect or irregularity in the preliminary proceedings.—*Matter of Lackawanna*, 143 N.Y.S. 198, 158 App. Div. 263.

Advertisement and procedure

Fla.—*State ex rel. Harrington v. City of Pompano*, 188 So. 610, 136 Fla. 730.

39. Fla.—*Wright v. City of Anna Maria*, 34 So.2d 737—*State v. Town of Belleair*, 170 So. 434, 125 Fla. 669—*Humphreys v. State*, 145 So. 858, 108 Fla. 92—*Little River Bank & Trust Co. v. Johnson*, 141 So. 141, 105 Fla. 212—*City of Ft. Myers v. State*, 117 So. 97, 95 Fla. 704—*Weinberger v. Board of Public Instruction of St. Johns County*, 112 So. 253, 93 Fla. 470.

44 C.J. p 1214 note 93 [a].

40. Miss.—*Town of Decatur v. Brogan*, 185 So. 809, 184 Miss. 402.

41. Miss.—*Town of Decatur v. Brogan*, *supra*.

42. Fla.—*Sanders v. City of Cole-*

man, 196 So. 822, 143 Fla. 455—*Olds v. Alvord*, 191 So. 434, 139 Fla. 745, certiorari denied *Alvord v. Town of Belleair*, 60 S.Ct. 141, 308 U.S. 603, 84 L.Ed. 505—*State ex rel. Harrington v. City of Pompano*, 188 So. 610, 136 Fla. 730—*Haines City v. Certain Lands Upon Which Taxes and Special Assessments Are Delinquent*, 178 So. 143, 130 Fla. 379—*State v. Town of Belleair*, 170 So. 434, 125 Fla. 669—*City of Ft. Myers v. State*, 117 So. 97, 95 Fla. 704.

43. Fla.—*Richmond v. Town of Largo*, 19 So.2d 791, 155 Fla. 226—*Olds v. Alvord*, 191 So. 434, 139 Fla. 745, certiorari denied *Alvord v. Town of Belleair*, 60 S.Ct. 141, 308 U.S. 603, 84 L.Ed. 505—*State ex rel. Harrington v. City of Pompano*, 188 So. 610, 136 Fla. 730.

Nonexistence of taxing district

Statute providing that the decree shall be conclusive as to the validity of the bonds against the taxing district presupposes that there is a taxing district, and, where it appears that a district has never existed, there is no entity in existence against which the bonds could be conclusively validated.—*Municipal Bond & Mortgage Corporation v. Bishop's Harbor Drainage Dist.*, 182 So. 794, 133 Fla. 430.

Incorporation or territorial limits of municipality

Validation decrees may not be binding as to validity of statutory provisions incorporating a municipality or defining its territorial limits and its jurisdiction, unless, perhaps, such enactments have been adjudicated in validating proceedings.—*State ex rel. Harrington v. City of Pompano*, 188 So. 610, 136 Fla. 730.

44. Fla.—*Little River Bank & Trust Co. v. Johnson*, 141 So. 141, 105 Fla. 212—*Abell v. Town of Boynton*, 117 So. 507, 95 Fla. 984—*City of Ft. Myers v. State*, 117 So. 97, 95 Fla. 704—*Weinberger v. Board of Public Instruction of St. Johns County*, 112 So. 253, 93 Fla. 470.

be exercised.⁴⁵ The effect of a validating decree is to put in repose only questions put in issue by the petition or necessarily involved in the proceeding,⁴⁶ and questions of constitutional validity which were not raised and settled in the validation proceeding may be availed of at a later time.⁴⁷

Under a statute providing that a judgment of a county judge authorizing a town to create a bonded debt "shall have the same force and effect as other judgments," the judgment of the county judge may be questioned for want of jurisdiction;⁴⁸ but the burden of proving that such judgment is void for want of jurisdiction is on those who assert it,⁴⁹ and the decree cannot be collaterally attacked where it is not void on its face, but rather adjudicates all the facts necessary to show its validity and was rendered by a court of competent jurisdiction.⁵⁰ A judgment validating bonds in a statutory proceeding is void and nugatory where the petition was not filed within the time prescribed by statute,⁵¹ the notice prescribed by statute was not given,⁵² or the hearing was held and judgment rendered in a county other than the one in which the municipality is situated;⁵³ but the bonds themselves may be valid and binding notwithstanding the refusal of the court to validate and confirm them⁵⁴ or the invalidity of a judgment of validation.⁵⁵ The fact that

the municipality alone answered does not render a judgment of validation subject to attack as being collusive on its face where there is nothing to indicate actual fraud or wrongdoing, and citizens, after having been given due notice, failed to avail themselves of the opportunity afforded by statute of becoming parties and contesting the proceeding,⁵⁶ and the fact that a decree of validation bears an erroneous date, due to a typographical error, is not necessarily fatal.⁵⁷

Effect of validation of refunding bonds. A decree validating and confirming the issuance of refunding bonds puts in perpetual repose the validity of the debt refunded by means of such bonds;⁵⁸ and it also operates to preserve in force, for the benefit of holders of the refunding bonds, such sources of revenue as were pledged by the original bonds and repledged and reaffirmed in the refunding bonds,⁵⁹ even though the validated refunding bonds may contain other and additional attempted pledges of revenue resources that are invalid or unenforceable.⁶⁰

Taxpayers' consent to issuance of railroad bonds. The judgment of a county court that a majority of the taxpayers of a municipality consented to the issuance of railroad bonds creates no absolute right in the railroad company thereto.⁶¹

b. Submission to Popular Vote

§ 1920. Necessity or Propriety

- a. In general
- b. Legislative power
- c. Form or name of security
- d. Funding or refunding bonds or securities

a. In General

The question of the issuance of bonds may, and some-

times must, be submitted to the voters for their approval, the purpose of such requirement being to prevent unnecessary borrowing by the municipality; provisions requiring a vote may be inapplicable to particular securities, such as those payable solely from the revenue of a proposed municipal utility.

It is proper for the municipal authorities, where duly empowered, to submit the question of a bond issue to the voters of the municipal corporation,⁶² such a submission being proper to obtain an indi-

45. Fla.—Abell v. Town of Boynton, 117 So. 507, 95 Fla. 984—City of Ft. Myers v. State, 117 So. 97, 95 Fla. 704—Weinberger v. Board of Public Instruction of St. Johns County, 112 So. 253, 93 Fla. 470.

46. Fla.—State v. Town of Belleair, 170 So. 434, 125 Fla. 669.

Future rates

A validating decree which found and decreed that existing water and sewer rates of a municipality were lawful and reasonable as of a certain date created no estoppel as to future rates.—Mitchell v. City of Mobile, 13 So.2d 664, 244 Ala. 442.

47. Fla.—State v. Town of Belleair, 170 So. 434, 125 Fla. 669.

48. N.Y.—Craig v. Andes, 93 N.Y. 405.

49. N.Y.—Hoag v. Greenwich, 30 N.E. 842, 133 N.Y. 152.

50. Miss.—Town of Decatur v. Brogan, 185 So. 809, 184 Miss. 402.

51. Ga.—Roff v. Calhoun, 36 S.E. 214, 110 Ga. 806.

52. Fla.—Miami v. Romfh, 63 So. 440, 66 Fla. 280.

44 C.J. p 1214 note 99.

53. Ga.—Harrell v. Whigham, 94 S.E. 994, 147 Ga. 558—Ray v. Lavonia, 81 S.E. 884, 141 Ga. 626.

54. Ga.—Harrell v. Whigham, 94 S.E. 994, 147 Ga. 558.

55. Ga.—Durrence v. Statesboro, 93 S.E. 88, 147 Ga. 175.

56. Ga.—Farmer v. Thomson, 65 S.E. 180, 133 Ga. 94.

57. Miss.—Town of Decatur & Brogan, 185 So. 809, 184 Miss. 402.

58. Fla.—State ex rel. Rodgers et al. v. Walthall, 170 So. 115, 125 Fla. 423.

59. Fla.—State ex rel. Rodgers et al. v. Walthall, supra.

60. Fla.—State ex rel. Rodgers et al. v. Walthall, supra.

61. N.Y.—Buffalo, etc., R. Co. v. Collins R. Comrs., 5 Hun 485.

62. Ark.—Vaughan v. City of Searcy, 135 S.W.2d 319, 199 Ark. 585. Kan.—Smith v. Fuest, 263 P. 1069, 125 Kan. 341.

cation of the voters' opinion even when the submission is not indispensable to the issuance of the bonds.⁶³ Where the issuance of municipal bonds or securities is authorized only when the proposition has been submitted to, and approved by, the voters of the municipal corporation, the holding of an election is necessary to the validity of the securities.⁶⁴ The purpose of the prohibitions against the issuance of municipal bonds without a vote is to prevent unnecessary and extravagant borrowing of funds by municipalities,⁶⁵ and some provisions are intended not merely to provide for the determination of whether the electors desire a system of municipal ownership of a utility, but also to enable

them to determine the manner in which the municipality should acquire a municipal system.⁶⁶

Provisions requiring a vote should not be given such a narrow and technical construction as will defeat their evident intent and purpose,⁶⁷ and, if there is any reasonable doubt as to the necessity that proposed evidences of indebtedness be approved at an election, the doubt should be resolved against the issuance of the instruments without a vote.⁶⁸ The assent or approval of the electorate is not considered to have been obtained unless there has been a substantial compliance with the requirement of law.⁶⁹ Conversely, a substantial compliance with certain provisions is sufficient,⁷⁰ even though the

N.C.—*Halley v. City of Winston-Salem*, 144 S.E. 377, 196 N.C. 17.

Discretion of municipal authorities
Wyo.—*Stewart v. City of Cheyenne*, 154 P.2d 355, 60 Wyo. 497.

Extension of public works

Kan.—*Kansas Utilities Co. v. City of Paola*, 80 P.2d 1084, 148 Kan. 267.

63. Iowa.—*Muscatine Lighting Co. v. City of Muscatine*, 217 N.W. 468, 205 Iowa 82.

44 C.J. p 1196 note 94.

64. U.S.—*Phoenix Mut. Life Ins. Co. v. City of McAllen*, C.C.A.Tex., 82 F.2d 581—*Kansas Gas & Electric Co. v. City of Independence*, C.C.A. Kan., 79 F.2d 32, 100 A.L.R. 1479, rehearing denied 79 F.2d 638—*Corpus Juris* cited in *Lumbermen's Trust Co. v. Town of Ryegate*, D.C. Mont., 50 F.2d 219, 225.

Ala.—*Kendrick v. City of Birmingham*, 5 So.2d 82, 242 Ala. 112—*Corpus Juris* quoted in *Fuller v. Knight*, 2 So.2d 605, 608, 241 Ala. 257, 135 A.L.R. 760.

Ariz.—*Morgan v. Board of Sup'rs*, 192 P.2d 236, 67 Ariz. 133.

Ark.—*City of Little Rock v. White Co.*, 103 S.W.2d 58, 193 Ark. 837.

Del.—*Eastern Shore Public Service Co. v. Town of Seaford*, 187 A. 115, 21 Del.Ch. 214.

Fla.—*Spearman Brewing Co. v. City of Pensacola*, 187 So. 365, 136 Fla. 869—*City of Fort Myers v. State*, 176 So. 483, 129 Fla. 166—*Flint v. Duval County*, 170 So. 587, 126 Fla. 18—*Williams v. Town of Dunnellon*, 169 So. 631, 125 Fla. 114—*Charles v. City of Miami*, 169 So. 589, 125 Fla. 110—*Kathleen Citrus Land Co. v. City of Lakeland*, 169 So. 356, 124 Fla. 659—*Leon County v. State*, 165 So. 666, 122 Fla. 505—*Boykin v. Town of River Junction*, 164 So. 558, 121 Fla. 902—*State v. City of Coral Gables*, 154 So. 234, 114 Fla. 326—*Sullivan v. City of Tampa*, 134 So. 211, 101 Fla. 298.

Iowa.—*Fowler v. Board of Trustees of Waterworks of City of Ottumwa*, 238 N.W. 618, 214 Iowa 395.

Mich.—*Gentzler v. Smith*, 31 N.W.2d 668, 320 Mich. 394.

Mo.—*State ex rel. City of Blue Springs v. McWilliams*, 74 S.W.2d 363, 335 Mo. 816.

Mont.—*Weber v. City of Helena*, 297 P. 455, 89 Mont. 109.

Neb.—*May v. City of Kearney*, 17 N.W.2d 448, 145 Neb. 475.

Nev.—*Hard v. Depaoli*, 41 P.2d 1054, 56 Nev. 19.

N.C.—*Gill v. City of Charlotte*, 195 S.E. 368, 213 N.C. 160—*Adcock v. Town of Fuquay Springs*, 140 S.E. 24, 194 N.C. 423.

Ohio.—*City of Middletown v. City Commission of Middletown*, 37 N.E.2d 609, 138 Ohio St. 596—*Behrle v. Board of Education of School Dist. of City of St. Bernard*, 200 N.E. 523, 51 Ohio App. 282.

S.C.—*Hyams v. Carroll*, 144 S.E. 153, 146 S.C. 470.

S.D.—*State ex rel. Hurd v. Blomstrom*, 37 N.W.2d 247.

Tex.—*Radford v. City of Cross Plains*, 86 S.W.2d 204, 126 Tex. 153—*City of Dayton v. Allred*, 68 S.W.2d 172, 123 Tex. 60—*Hayward v. City of Corpus Christi*, Civ.App., 195 S.W.2d 995, error refused, no reversible error—*City of Del Rio v. Lowe*, Civ.App., 111 S.W.2d 1208, reversed on other grounds *Lowe v. City of Del Rio*, 122 S.W.2d 191, 132 Tex. 111—*Texas Power & Light Co. v. City of Sulphur Springs*, Civ.App., 103 S.W.2d 859, error dismissed—*American Nat. Ins. Co. v. Donald*, Civ.App., 77 S.W.2d 1080, affirmed 83 S.W.2d 947, 125 Tex. 597.

Va.—*Town of Galax v. Appalachian Electric Power Co.*, 12 S.E.2d 778, 177 Va. 29—*Town of South Hill v. Allen*, 12 S.E.2d 770, 177 Va. 154—*Wooding v. Leigh*, 177 S.E. 310, 163 Va. 785.

Wyo.—*Whipps v. Town of Greybull*, 109 P.2d 805, 56 Wyo. 355, 146 A.L.R. 596.

44 C.J. p 1194 notes 81, 82.

Nullity of bonds

Bonds secured by a mortgage on a municipal water system issued with-

out a vote of the voters required by statute are nullities and may not be recovered on; nor have the bondholders any equity on which to found a claim against the water system or its revenues.—*City of Hamlin v. Brown-Crummer Inv. Co.*, C.C.A.Tex., 93 F.2d 680, certiorari denied *Brown-Crummer Inv. Co. v. City of Hamlin, Tex.*, 58 S.Ct. 831, 303 U.S. 664, 82 L.Ed. 1122.

65. Ala.—*Fuller v. City of Cullman*, 199 So. 2, 240 Ala. 309.

Fla.—*Clover Leaf, Inc. v. City of Jacksonville*, 199 So. 923, 145 Fla. 341—*Williams v. Town of Dunnellon*, 169 So. 631, 125 Fla. 114.

Va.—*Town of South Hill v. Allen*, 12 S.E.2d 770, 177 Va. 154.

66. Kan.—*Kansas Utilities Co. v. City of Paola*, 80 P.2d 1084, 148 Kan. 267.

67. Fla.—*Sullivan v. City of Tampa*, 134 So. 211, 101 Fla. 298.

68. Fla.—*City of Ft. Lauderdale v. Kraft*, 21 So.2d 461, 155 Fla. 738—*Spearman Brewing Co. v. City of Pensacola*, 187 So. 365, 136 Fla. 869—*Williams v. Town of Dunnellon*, 169 So. 631, 125 Fla. 114.

"Extensions" of utility

U.S.—*City of Corpus Christi v. Hayward*, C.C.A.Tex., 111 F.2d 637, certiorari denied *Hayward v. City of Corpus Christi*, 61 S.Ct. 30, 311 U.S. 670, 85 L.Ed. 430—*City of Hamlin v. Brown-Crummer Inv. Co.*, C.C.A.Tex., 93 F.2d 680, certiorari denied *Brown-Crummer Inv. Co. v. City of Hamlin, Tex.*, 58 S.Ct. 831, 303 U.S. 664, 82 L.Ed. 1122.

69. Del.—*Eastern Shore Public Service Co. v. Town of Seaford*, 167 A. 115, 21 Del.Ch. 214.

Ky.—*Percival v. Covington*, 230 S.W. 300, 191 Ky. 337.

70. N.M.—*Albuquerque v. Water Supply Co.*, 174 P. 317, 34 N.M. 368, 5 A.L.R. 519.

44 C.J. p 1195 note 83.

proceedings purport to have been taken under other provisions.⁷¹

In determining whether a vote is required on a proposed municipal bond issue the result attempted to be brought about by what is proposed is the prime consideration,⁷² and the controlling test is to be found by regarding substance rather than form and by looking at the practical operation and effect of the proposed plan.⁷³ The issuance of bonds without compliance with requirements as to an election cannot be justified on the ground of emergency where the condition complained of did not suddenly appear;⁷⁴ and it has been held that the necessity of a vote is not obviated by the fact alone that the proposed financing is to result in no general obligation of the municipality,⁷⁵ the lender being compelled to look solely to pledged property.⁷⁶ Under constitutional or statutory provisions prohibiting the creation of an encumbrance or lien on municipal property without a vote of the electors, the issu-

ance of instruments secured by a lien on the income, rents, or profits of municipal property or a municipal plant or system, instead of by a direct lien or encumbrance on the property itself, requires a vote.⁷⁷

Particular municipal bonds or securities may be issued without submission of the question of their issuance to the voters where constitutional, statutory, or charter provisions dispense with, or do not require, such submission.⁷⁸ Thus provisions for the submission to the voters of the question of issuing bonds have been held inapplicable to bonds for street or other improvements the cost of which is to be assessed against abutting property,⁷⁹ or to an assumption by a municipality of the bonds of a water company,⁸⁰ or to bonds authorized or issued but not sold at the time of its adoption,⁸¹ or to bonds which do not create in some form a debt of the municipality;⁸² also, to the issuance of bonds for a necessary expense,⁸³ or to raise money to meet out-

Designation of depository for proceeds

Ky.—Hunter v. City of Louisville, 2 S.W.2d 652, 222 Ky. 819.

71. La.—Gooch v. Patterson, 52 So. 555, 126 La. 397.

72. Ala.—Fuller v. City of Cullman, 199 So. 2, 240 Ala. 309.

73. Ala.—Fuller v. City of Cullman, supra.

74. Wash.—Robb v. City of Tacoma, 28 P.2d 327, 175 Wash. 580, 91 A.L.R. 1010.

75. Fla.—Clover Leaf, Inc. v. City of Jacksonville, 199 So. 923, 145 Fla. 341—Spearman Brewing Co. v. City of Pensacola, 187 So. 366, 136 Fla. 869.

76. Fla.—Clover Leaf, Inc. v. City of Jacksonville, 199 So. 923, 145 Fla. 341.

77. Fla.—Charles v. City of Miami, 169 So. 589, 125 Fla. 110.

Tex.—City of Dayton v. Allred, 68 S.W.2d 172, 123 Tex. 60.

78. Cal.—Willmon v. Powell, 266 P. 1029, 91 Cal.App. 1.

Colo.—Cook v. City of Delta, 64 P.2d 1257, 100 Colo. 7.

Fla.—State v. City of Pensacola, 40 So.2d 569—State v. City of Miami, 26 So.2d 672, 157 Fla. 616—State v. City of Tampa, 3 So.2d 484, 148 Fla. 6—State v. City of Tampa, 183 So. 491, 133 Fla. 840—Marvin v. Housing Authority of Jacksonville, 183 So. 145, 133 Fla. 590—City of Hialeah v. State ex rel. Ben Hur Life Ass'n, 174 So. 843, 128 Fla. 46—Williams v. Town of Dunnellon, 169 So. 631, 125 Fla. 114—Sparks v. Ewing, 168 So. 112, 120 Fla. 520.

Ill.—People ex rel. Toman v. Crane, 23 N.E.2d 337, 372 Ill. 228—Simp-

son v. City of Highwood, 23 N.E. 2d 62, 372 Ill. 212, 124 A.L.R. 1459

—People ex rel. McDonough v. Chicago, M., St. P. & P. R. Co., 188 N.E. 821, 354 Ill. 630.

Ky.—City of Sturgis v. Christenson Bros. Co., 31 S.W.2d 386, 235 Ky. 346—City of Bowling Green v. Kirby, 295 S.W. 1004, 220 Ky. 839.

Nev.—State ex rel. Owens v. Doney, 28 P.2d 122, 55 Nev. 186.

N.Y.—Spano v. City of Middletown, 7 N.Y.S.2d 14, 169 Misc. 338.

N.C.—Burt v. Town of Biscoe, 183 S.E. 1, 209 N.C. 70.

N.D.—Anderson v. City of Fargo, 250 N.W. 794, 64 N.D. 178.

Tenn.—Armstrong v. City of South Fulton, 82 S.W.2d 862, 169 Tenn. 54.

Tex.—City of Dayton v. Allred, 68 S.W.2d 172, 123 Tex. 60—Womack v. City of West University Place, Civ.App., 32 S.W.2d 930.

Wis.—Flottum v. City of Cumberland, 291 N.W. 777, 234 Wis. 654. 44 C.J. p 1195 note 88.

Conflict between charter provision and general law

Charter provision authorizing city council without election to provide for issuance of municipal bonds was held to prevail over general law authorizing issuance of municipal bonds only with approval of voters.—Harris v. City of Hialeah, D.C.Fla., 10 F.Supp. 546.

Overruling of decision

Bonds issued pursuant to constitutional provision which supreme court of the state had held self-executing were valid, although issuance was not submitted to electors for approval, even if supreme court later overruled such decision.—Gentzler v. Smith, 31 N.W.2d 668, 320 Mich. 394.

79. U.S.—Bank of Burlington v. City of Murphysboro, C.C.A.Ill., 96 F.2d 899—Collins v. City of Phoenix, C.C.A.Ariz., 54 F.2d 770.

Mich.—Council of Village of Allen Park v. Allen Park Village Clerk, 15 N.W.2d 670, 309 Mich. 361.

44 C.J. p 1196 note 90.

Improvement proceeding unaffected by absence of vote

U.S.—Bank of Burlington v. City of Murphysboro, C.C.A.Ill., 96 F.2d 899.

80. Ala.—Anniston v. Alabama Water Co., 93 So. 409, 207 Ala. 497.

81. Mich.—Schumacher v. City of Flint, 232 N.W. 406, 252 Mich. 1. Tex.—Texas Power & Light Co. v. City of Sulphur Springs, Civ.App., 103 S.W.2d 859, error dismissed.

44 C.J. p 1196 note 92.

82. Ala.—Atkinson v. City of Gadsden, 192 So 510, 238 Ala. 556—Randall v. State ex rel. City of Tuskegee, 172 So. 277, 233 Ala. 446—In re Opinions of the Justices, 148 So. 111, 226 Ala. 570.

83. N.C.—Burt v. Town of Biscoe, 183 S.E. 1, 209 N.C. 70.

44 C.J. p 1195 note 88 [b].

Held for necessary expense

(1) Water and sewer systems. U.S.—Starmount Co. v. Ohio Sav. Bank & Trust Co., C.C.A.N.C., 55 F.2d 649.

N.C.—Burt v. Town of Biscoe, 183 S.E. 1, 209 N.C. 70.

44 C.J. p 1195 note 88 [b] (4).

(2) Street improvement.—Starmount Co. v. Ohio Sav. Bank & Trust Co., C.C.A.N.C., 55 F.2d 649—44 C.J. p 1195 note 88 [b] (5).

(3) Development and equipment of parks and acquisition of lands

standing, completed obligations,⁸⁴ or to that form of municipal financing required to be done in order to keep municipal utilities in operation.⁸⁵

Provisions requiring a vote are not intended to hamper the ordinary powers of public authorities to contract for current governmental needs against contemplated currently budgeted revenues available to be expended.⁸⁶ The fact that a municipal charter provides for a vote on a bond issue does not necessitate such vote where the charter conflicts with statutes dispensing with a vote in the case of the particular bonds involved.⁸⁷ Under constitutional provisions requiring an election only on the bond issues of the state, or a city or town, it has been held that a vote on the bond issues of a specially created district is unnecessary.⁸⁸

Legislative character of act. An ordinance which orders a special election to vote on a charter amendment empowering the city to issue bonds for a public building has been held not to be of a legislative character so as to be subject to initiative and ref-

erendum.⁸⁹ On the other hand, it has been held that a resolution of a municipal board of commissioners directing the mayor to accept an offer to purchase revenue bonds for the acquisition or construction of a utility constitutes a legislative act and is a proper subject matter for a referendum,⁹⁰ although the right to require a referendum in such case ceases on repeal of the resolution.⁹¹

Exemption of securities payable from revenue of municipal facility. Under the constitutional or statutory provisions in some jurisdictions a vote may not be required for the issuance of bonds or securities payable solely from the revenues of a utility or facility which is to be extended, improved, acquired, or constructed by the municipality, without any pledge of the credit or taxing power of the municipality,⁹² particularly if the bonds or securities are not secured either directly or indirectly by mortgage or lien of any kind on the utility or facility.⁹³ Following this rule a vote has been held unnecessary for the issuance of electric or power revenue certificates,⁹⁴ gas plant revenue certifi-

for parks and playgrounds.—Atkins v. City of Durham, 186 S.E. 330, 210 N.C. 295.

Held not for necessary expense

Public hospital was held not necessary expense authorizing bond issue without approval of qualified voters.—Burleson v. Board of Aldermen of Town of Spruce Pines, 156 S. E. 241, 200 N.C. 30.

84. Ala.—Young Women's Christian Ass'n of Plainfield, N. J., v. Gunter, 162 So. 120, 230 Ala. 521.

Colo.—Montgomery v. City and County of Denver, 80 P.2d 434, 102 Colo. 427.

Wash.—Weisfield v. City of Seattle, 40 P.2d 149, 180 Wash. 288, 96 A. L.R. 1190.

Bonds to pay judgments

Ill.—People ex rel. Toman v. Crane, 23 N.E.2d 337, 372 Ill. 228.

85. Fla.—State v. City of Miami, 152 So. 6, 113 Fla. 280.

86. Fla.—Leon County v. State, 165 So. 666, 122 Fla. 505.

87. Tex.—City of Corpus Christi ex rel. Harris v. Flato, Civ.App., 83 S. W.2d 433, error dismissed.

88. S.C.—Ashmore v. Greater Greenville Sewer Dist., 44 S.E.2d 88, 211 S.C. 77.

Water and sewer subdistrict

S.C.—Sanders v. Greater Greenville Sewer Dist., 44 S.E.2d 185, 211 S. C. 141.

89. Or.—Campbell v. Eugene, 240 P. 418, 116 Or. 264.

Ordinances under initiative and referendum laws generally see supra §§ 449-461.

90. Utah.—Keigley v. Bench, 63 P. 2d 262, 90 Utah 569.

Ministerial duty to accept referendum petition

Utah.—Keigley v. Bench, supra.

91. Utah.—Keigley v. Bench, supra.

92. Fla.—State v. City of Jacksonville, 31 So.2d 385, 159 Fla. 328—State v. City of Miami, 27 So.2d 118, 157 Fla. 726—State v. City of Miami, 26 So.2d 672, 157 Fla. 616—Gardner v. Fuller, 22 So.2d 150, 155 Fla. 833—State v. City of Key West, 14 So.2d 707, 153 Fla. 226—State v. City of Tampa, 3 So.2d 484, 148 Fla. 6—Clover Leaf, Inc., v. City of Jacksonville, 199 So. 923, 145 Fla. 341—City of Jacksonville v. May, 192 So. 614, 140 Fla. 826—Neff v. City of Jacksonville, 190 So. 468, 139 Fla. 179—Phillips v. City of Bradenton, 187 So. 258, 136 Fla. 602—Reben v. City of Sarasota, 185 So. 607, 135 Fla. 698—Panama City v. State, 185 So. 452, 135 Fla. 687—State v. City of St. Petersburg, 185 So. 451, 135 Fla. 642—Trudnak v. City of Fort Pierce, 185 So. 353, 135 Fla. 673—Anderson v. City of Wauchula, 185 So. 352, 135 Fla. 628—Anderson v. City of Wauchula, 185 So. 350, 135 Fla. 625—Dickey v. Broward County Port Authority, 185 So. 349, 135 Fla. 622—Bott v. Town of Umatilla, 185 So. 348, 135 Fla. 608—Smoak v. City of Haines City, 185 So. 347, 135 Fla. 606—Sharp v. City of Bradenton, 185 So. 346, 135 Fla. 604—McGoon v. Town of Miami Springs, 185 So. 345, 135 Fla. 583—State v. City of De Land, 185 So. 343, 135 Fla. 540—Trud-

nak v. Gustafson, 183 So. 494, 133 Fla. 834—Hess v. City of Orlando, 183 So. 473, 133 Fla. 831—Broward County Port Authority v. State, 175 So. 796, 129 Fla. 73—Williams v. Town of Dunnellon, 169 So. 631, 125 Fla. 114—Boykin v. Town of River Junction, 164 So. 558, 121 Fla. 902—State v. City of Miami, 152 So. 6, 113 Fla. 280.

Mich.—Huron-Clinton Metropolitan Authority v. Boards of Sup'rs of Wayne, Washtenaw, Livingston, Oakland and Macomb Counties, 1 N.W.2d 430, 300 Mich. 1.

Mo.—City of Springfield v. Monday, 185 S.W.2d 788, 353 Mo. 981—Woodmansee v. Kansas City, 144 S.W.2d 137, 346 Mo. 919.

Mont.—Montana-Dakota Utilities Co. v. City of Havre, 94 P.2d 660, 109 Mont. 164.

N.M.—Seward v. Bowers, 24 P.2d 253, 37 N.M. 385.

N.Y.—Robertson v. Zimmerman, 196 N.E. 740, 268 N.Y. 52.

Tex.—Texas Power & Light Co. v. City of Sulphur Springs, Civ.App., 108 S.W.2d 859, error dismissed.

Reinvestment of proceeds in existing plant

Fla.—Boykin v. Town of River Junction, 169 So. 492, 124 Fla. 827—State v. City of Miami, 152 So. 6, 113 Fla. 280.

93. Fla.—State v. City of Jacksonville, 31 So.2d 385, 159 Fla. 328—State v. City of Miami, 27 So.2d 118, 157 Fla. 726—Hess v. City of Orlando, 183 So. 473, 133 Fla. 831. Mo.—Woodmansee v. Kansas City, 144 S.W.2d 137, 346 Mo. 919.

94. Fla.—State v. City of Jackson-

cates,⁹⁵ harbor revenue certificates,⁹⁶ hospital revenue bonds or certificates,⁹⁷ recreation revenue bonds,⁹⁸ stadium revenue bonds,⁹⁹ sewer revenue bonds,¹ water revenue bonds or certificates,² or water and sewer bonds.³

A vote has been held not required for such bonds or securities even where the municipality is under some obligation to pay for services furnished to it by the utility or system.⁴ The issuance of bonds of a housing authority, payable from the proceeds of a housing project and contributions by the federal government, has been held not to require a vote of the freeholders.⁵ On the other hand, the fact that the securities are to be repaid primarily from the revenues of the utility or supply system does not of itself avoid the necessity of a vote if the plan involves a direct, indirect, or contingent pledge or obligation of other municipal property or the tax-

ing power of the municipality.⁶

Under some provisions, the determination of whether bonds secured by a utility and the income therefrom must be submitted to a vote depends on whether the utility system involved is new to the city ownership;⁷ if the system is new, and nothing is pledged for the security of the bonds other than the system, and the income therefrom, and the proceeds of the bonds, then a vote is not necessary,⁸ whereas if an existing system or the income from such system, or any other property then owned, or any other existing income, is burdened or further burdened by a pledge to pay for the betterments, then a vote is necessary.⁹

Protest against bond issue. Under some statutes, a vote is required if, within a specified time after the publication of an ordinance authorizing the issuance of bonds, a protest against such issuance is

ville, 31 So.2d 385, 159 Fla. 328—Trudnak v. City of Fort Pierce, 185 So. 353, 135 Fla. 573—Anderson v. City of Wauchula, 185 So. 352, 135 Fla. 625—Brooks v. City of Jacksonville, 173 So. 365, 127 Fla. 564—Bradley v. City of Homestead, 169 So. 639, 125 Fla. 137—Boykin v. Town of River Junction, 169 So. 492, 124 Fla. 827—Wilson v. City of Bartow, 168 So. 545, 124 Fla. 356.

95. Fla.—State v. City of St. Petersburg, 185 So. 451, 135 Fla. 642—State v. City of Clearwater, 168 So. 546, 124 Fla. 354.

96. Fla.—State ex rel. Weigel v. Spangler, 190 So. 425, 139 Fla. 201—Dickey v. Broward County Port Authority, 185 So. 349, 135 Fla. 622.

97. Fla.—State v. City of Miami, 7 So.2d 146, 150 Fla. 270—Dickey v. City of Fort Lauderdale, 183 So. 724, 134 Fla. 193—Blocker v. City of St. Petersburg, 169 So. 647, 125 Fla. 156—Roach v. City of Tampa, 169 So. 627, 125 Fla. 621.

98. Fla.—Zinnen v. City of Fort Lauderdale, 32 So.2d 162, 159 Fla. 498.

99. Fla.—State v. City of Miami, 26 So.2d 672, 157 Fla. 616.

1. Fla.—State v. City of Winter Park, 34 So.2d 740—State v. City of Miami, 27 So.2d 118, 157 Fla. 726.

N.Y.—Robertson v. Zimmerman, 196 N.E. 740, 268 N.Y. 52.

Absence of general liability

Under statutes requiring a vote if bonds constitute a general liability of the municipality, bonds issued for the construction of a sewage disposal plant and payable from the revenues therefrom were held not to constitute a general liability,

even though any deficiency in the rental fund was to be made up by a tax levy.—Anderson v. City of Fargo, 250 N.W. 794, 64 N.D. 178.

2. Fla.—State v. City of Miami, 200 So. 535, 146 Fla. 266—State v. City of St. Petersburg, 198 So. 837, 145 Fla. 206—Rowe v. City of Fort Lauderdale, 196 So. 199, 142 Fla. 476—Phillips v. City of Bradenton, 187 So. 258, 136 Fla. 602—Reben v. City of Sarasota, 185 So. 607, 135 Fla. 698—Panama City v. State, 185 So. 452, 135 Fla. 687—Trudnak v. City of Fort Pierce, 185 So. 353, 135 Fla. 573—Anderson v. City of Wauchula, 185 So. 352, 135 Fla. 628—Anderson v. City of Wauchula, 185 So. 350, 135 Fla. 625—Bott v. Town of Umatilla, 185 So. 348, 135 Fla. 608—Smoak v. City of Haines City, 185 So. 347, 135 Fla. 606—Sharp v. City of Bradenton, 185 So. 346, 135 Fla. 604—McGoon v. Town of Miami Springs, 185 So. 345, 135 Fla. 583—State v. City of De Land, 185 So. 343, 135 Fla. 540—State v. City of Pensacola, 184 So. 768, 135 Fla. 239—State v. City of Hollywood, 179 So. 721, 131 Fla. 584—State v. City of St. Augustine, 169 So. 648, 125 Fla. 173—Airth v. City of Live Oak, 169 So. 646, 125 Fla. 155—Pentecost v. City of Fort Myers, 169 So. 645, 125 Fla. 152—Taylor v. City of Miami, 169 So. 644, 125 Fla. 144—Boynton v. City of Safety Harbor, 169 So. 644, 125 Fla. 143—May Land Co. v. City of Fort Lauderdale, 169 So. 642, 125 Fla. 146—Voorhees v. City of Moore Haven, 169 So. 641, 125 Fla. 149—Teachy v. City of Wauchula, 169 So. 640, 125 Fla. 150—Bradley v. City of Homestead, 169 So. 639, 125 Fla. 137—Patton v. Panama City, 169 So. 638, 125 Fla. 140—State v.

City of Punta Gorda, 168 So. 835, 124 Fla. 512—State v. City of Miami, 152 So. 6, 113 Fla. 280.

3. Fla.—State v. City of Daytona Beach, 34 So.2d 309.

N.D.—Stark v. City of Jamestown, 37 N.W.2d 516.

4. Fla.—State v. City of Miami, 200 So. 535, 146 Fla. 266—State v. City of Punta Gorda, 168 So. 835, 124 Fla. 512.

Mo.—City of Springfield v. Monday, 185 S.W.2d 788, 353 Mo. 981.

5. Fla.—Marvin v. Housing Authority of Jacksonville, 183 So. 145, 133 Fla. 590.

6. Fla.—Broward County Port Authority v. State, 175 So. 796, 129 Fla. 73—Williams v. Town of Dunnellon, 169 So. 631, 125 Fla. 114—Hygema v. City of Sebring, 169 So. 366, 124 Fla. 683—Kathleen Citrus Land Co. v. City of Lakeland, 169 So. 356, 124 Fla. 659—Boykin v. Town of River Junction, 164 So. 558, 121 Fla. 902.

7. Ala.—In re Opinions of the Justices, 148 So. 111, 226 Ala. 570.

8. Ala.—Alabama Power Co. v. City of Scottsboro, 190 So. 412, 238 Ala. 230—Fuller v. City of Cullman, 199 So. 2, 240 Ala. 309—Randall v. State ex rel. City of Tuskegee, 172 So. 277, 233 Ala. 446—State ex rel. Radcliff v. City of Mobile, 155 So. 872, 229 Ala. 93—Smith v. Town of Guin, 155 So. 865, 229 Ala. 61—Oppenheim v. City of Florence, 155 So. 859, 229 Ala. 50—In re Opinions of the Justices, 148 So. 111, 226 Ala. 570.

9. Ala.—In re Opinions of the Justices, 148 So. 111, 226 Ala. 570.

S.D.—Hesse v. City of Watertown, 232 N.W. 53, 57 S.D. 325.

filed by a sufficient number of taxpayers.¹⁰ Under such provisions the legislative requirements are satisfied when the necessary number of signatures is attached to the protest and filed with the clerk, and thereafter it is not within the power of any of the protesters or of the clerk to withdraw from the protest any name attached thereto so as to render the statutory requirements nugatory;¹¹ nor, after a sufficient protest has been filed, can it be rendered ineffective by the failure of the clerk properly to perform a mere ministerial duty.¹²

Conditions precedent. Under some statutes, the question of issuing bonds for the purpose of furnishing a water supply to the municipality and its inhabitants should not be submitted to the electors until the approval of the plans by a state board or commission is obtained,¹³ and, where the proposition is to acquire a particular water supply, until it is ascertained that such supply is available¹⁴ and can be acquired for the amount of indebtedness to be incurred.¹⁵ However, in the absence of constitutional or statutory provision so prescribing, plans or specifications for the proposed improvement are not required as a prerequisite to, or concomitant part of, an election on a bond issue;¹⁶ and, under some charter provisions it is held that an election on the question of constructing a waterworks plant is not rendered nugatory by the failure of a commission to ascertain the probable cost of the plant,¹⁷ and determine the date, form, and maturity of the bonds,¹⁸ prior to the election. Although, under some statutes, the question of the issuance of bonds can be submitted to the voters only if the cost will be too great to be paid out of the ordinary annual income and revenue,¹⁹ the fact of such excessive

cost need not be stated in the preliminary resolution.²⁰

b. Legislative Power

The legislature has power to require a popular vote on the issuance of municipal securities notwithstanding the absence of any constitutional provision requiring such submission; and it also has power, unless prohibited by the constitution, to permit the issuance of such securities without approval of the voters.

The legislature has power to require an election on the question of issuing municipal bonds,²¹ even in cases where such election is not required by constitutional provision;²² and, in the absence of any intervening rights of third parties, the legislature can prohibit the sale of bonds by a municipality unless their sale is first ratified by a majority of the votes of the city electors, although at the time of such prohibition the bonds may have been physically issued under valid legislative authority formerly granted authorizing their issuance and sale without such ratification.²³ Where the statute authorizing the issuance of bonds on a favorable vote of the electors does not in terms or meaning conflict with the constitution, it is not invalid because it does not embody the constitutional provision or words of similar import.²⁴

Power to dispense with election. In the absence of a constitutional provision requiring an election, the legislature has power to authorize a municipality to issue bonds without submission of the question to the electorate.²⁵ However, where a constitutional provision requires the submission of the question of issuing municipal bonds to the voters of the municipality, a statute authorizing the issue of bonds without such submission is invalid.²⁶ A pro-

10. N.J.—Sullivan v. Mayor and Council of Borough of Ramsey, 143 A. 364, 105 N.J.Law 142.

11. N.J.—Sullivan v. Mayor and Council of Borough of Ramsey, supra.

Withdrawal of names from petition for referendum see *infra* § 1921.

12. N.J.—Sullivan v. Mayor and Council of Borough of Ramsey, supra.

Failure to file certificate

N.J.—Sullivan v. Mayor and Council of Borough of Ramsey, supra.

13. N.J.—Wilson v. Collingswood, 80 A. 335, 81 N.J.Law 634. 44 C.J. p 1196 note 95.

14. Mont.—Carlson v. Helena, 102 P. 39, 39 Mont. 82, 17 Ann.Cas. 1233.

15. Mont.—Carlson v. Helena, supra.

16. Idaho.—Durand v. Cline, 119 P. 2d 891, 63 Idaho 304.

17. U.S.—Wheeler v. Denver, Colo., 231 F. 2, 145 C.C.A. 196, appeal dismissed 38 S.Ct. 10, 245 U.S. 626, 62 L.Ed. 518. 44 C.J. p 1196 note 98.

18. U.S.—Wheeler v. Denver, supra. 44 C.J. p 1196 note 99.

19. Cal.—City of Monrovia v. Black, 264 P. 286, 88 Cal.App. 686.

Excessive cost of each improvement
The excessive cost must exist separately as to each improvement, the issue of bonds for which is to be separately submitted to the voters. —City of Monrovia v. Black, supra.

20. Cal.—City of Monrovia v. Black, supra.

21. N.C.—Burwell v. Lillington, 87 S.E. 970, 171 N.C. 94. 44 C.J. p 1196 note 1.

22. N.C.—Burwell v. Lillington, 87 S.E. 970, 171 N.C. 94—Red Springs Hotel Co. v. Red Springs, 72 S.E. 837, 157 N.C. 137.

23. Fla.—St. Petersburg v. English, 45 So. 483, 54 Fla. 585.

24. Ky.—Render v. Louisville, 134 S. W. 458, 142 Ky. 409, 32 L.R.A.N.S., 530.

N.C.—Richmond Union Bank v. Oxford, 21 S.E. 410, 116 N.C. 339.

25. N.C.—Adcock v. Town of Fuquay Springs, 140 S.E. 24, 194 N.C. 423.

44 C.J. p 1196 note 5—43 C.J. p 287 note 32.

26. Va.—Town of South Hill v. Allen, 12 S.E.2d 770, 177 Va. 154. 44 C.J. p 1196 note 3.

Absolute limitation on legislative power

Fla.—Fahs v. Kilgore, 187 So. 170, 136 Fla. 701.

vision of a municipal charter that no election should be necessary to authorize the issuance of particular improvement bonds becomes inoperative on the adoption of a constitutional amendment providing otherwise.²⁷

c. Form or Name of Security

The name given to the instruments to be issued is not determinative of the necessity of a popular vote, and certificates, warrants, or notes, as well as bonds, may require approval of the voters when they fall within the intent of the provisions prescribing the necessity of a vote.

Some provisions requiring the submission of a bond issue to a vote have been construed to restrict only the issuance of a certain form of security for a debt, and not to restrict the creation of the debt.²⁸ However, in determining whether a vote is necessary, the criterion is not the name given the instrument issued by the municipal corporation as evidence of the loan,²⁹ but whether the instrument, by whatever name called, falls within the intentment of the provisions requiring a vote;³⁰ and provisions requiring a vote on a proposed bond issue may apply, for example, to the issuance of certificates³¹ or time warrants³² which are in contemplation of law nothing more than a form of bond. In general, any instrument evidencing a municipal indebtedness for a new project, or to be paid by a tax levy or by assessment or charges or the pledge of property or a tax resource of the municipality, may in effect be a bond and require approval of the electors.³³ On the other hand, provisions requiring the submission of a bond issue to the voters are inapplicable to instruments of an entirely different nature,³⁴ such as

a lease³⁵ or a construction contract,³⁶ or to instruments amounting to no more than a mere promise to pay money.³⁷

Notes. A note given in payment of municipal improvements or equipment may be merely evidence of the debt, not occupying the status and dignity of a bond so as to fall within the class of obligations requiring approval of the voters;³⁸ and delinquent tax anticipation notes have been held not to constitute bonds within the contemplation of provisions requiring a vote on the issuance of bonds.³⁹ A provision for the submission of a bond issue to the voters has been held not applicable to a note payable within a year⁴⁰ to a designated payee or his order.⁴¹ On the other hand, a note under seal in the form of a bond, pledging current taxes and the full faith and credit of the municipality, has been held in the nature of a bonded debt requiring a vote of the qualified electors of the municipality.⁴²

Negotiability. The necessity of a vote, under some provisions, depends on whether the written evidences of the indebtedness are negotiable or non-negotiable instruments, a vote being required if the instruments are negotiable,⁴³ but otherwise not;⁴⁴ and the term by which the instruments are to be denominated on their face may have some significance in determining their character as negotiable or nonnegotiable.⁴⁵

d. Funding or Refunding Bonds or Securities

Constitutional or statutory provisions requiring the issuance of municipal bonds to be submitted to a popular vote are frequently held inapplicable to funding or refunding bonds which merely continue an existing in-

27. Fla.—State v. City of Miami, 26 So.2d 903, 157 Fla. 747.

28. Ala.—Parsons v. City of Birmingham, 137 So. 665, 223 Ala. 610.

29. Fla.—Clover Leaf, Inc., v. City of Jacksonville, 199 So. 923, 145 Fla. 341—Leon County v. State, 165 So. 666, 122 Fla. 505.

Tex.—Simms v. City of Mt. Pleasant, Civ.App., 12 S.W.2d 833, error dismissed.

30. Fla.—Clover Leaf, Inc., v. City of Jacksonville, 199 So. 923, 145 Fla. 341—Neff v. City of Jacksonville, 190 So. 468, 139 Fla. 179—Leon County v. State, 165 So. 666, 122 Fla. 505.

31. Fla.—Boykin v. Town of River Junction, 169 So. 492, 124 Fla. 827.

32. Fla.—Spearman Brewing Co. v. City of Pensacola, 187 So. 865, 136 Fla. 869.

33. Fla.—Neff v. City of Jacksonville, 190 So. 468, 139 Fla. 179.

General scope of provisions

(1) Any indebtedness that has the

effect of a bond obligation to be paid by taxation requires a vote.—City of Miami v. State, 190 So. 774, 139 Fla. 598.

(2) A vote is required for the issuance of any financial obligation in the form of a present funding of future tax anticipations, whether general or limited, direct or contingent.—Leon County v. State, 165 So. 666, 122 Fla. 505.

(3) Any contractual device for present funding of tax revenues contemplated to be raised in future, contrived to be issued as legal security to obligee by means of which obligee would acquire legal or equitable right to coerce by judicial processes repayment of a sum advanced on strength thereof, together with interest must be voted on.—Leon County v. State, *supra*.

34. Fla.—State v. Florida Keys Aqueduct Commission, 4 So.2d 662, 148 Fla. 465.

35. Fla.—State v. Florida Keys Aqueduct Commission, *supra*.

36. Fla.—Leon County v. State, 165 So. 666, 122 Fla. 505.

37. Tex.—Keel v. Pulte, Com.App., 10 S.W.2d 694.

38. Ala.—Town of Linden v. American-La France & Foamite Industries, 167 So. 548, 232 Ala. 167
Fla.—Ginsberg v. City of Daytona Beach, 137 So. 253, 103 Fla. 168.

39. Fla.—State v. City of Tampa, 183 So. 491, 133 Fla. 840.

40. Fla.—State ex rel Gibbs v. Gordon, 189 So. 437, 138 Fla. 312.

41. Ala.—Parsons v. City of Birmingham, 137 So. 665, 223 Ala. 610.

42. S.C.—Tarver v. Town of Johnston, 175 S.E. 821, 173 S.C. 333.

43. Tex.—Simms v. City of Mt. Pleasant, Civ.App., 12 S.W.2d 833, error dismissed.

44. Tex.—Keel v. Pulte, Com.App., 10 S.W.2d 694—Simms v. City of Mt. Pleasant, Civ.App., 12 S.W.2d 833, error dismissed.

45. Tex.—Keel v. Pulte, Com.App., 10 S.W.2d 694.

debtedness without any pledge of additional taxes or resources.

Although under some charter provisions refunding bonds or obligations must be authorized by a vote of the electors,⁴⁶ frequently, by virtue of their express terms or the construction placed thereon, constitutional or statutory provisions requiring the question of issuing municipal bonds to be submitted to the voters for approval are held inapplicable to the issuance of funding or refunding bonds,⁴⁷ at least where the refunding bonds continue only the existing indebtedness as it was originally incurred, without pledges of any additional tax, property, or mortgage resources.⁴⁸ In order to dispense with the necessity of a vote, however, the refunding bonds should not directly or indirectly, contingently or otherwise, increase the amount of the indebted-

ness as limited and represented by the original bonds,⁴⁹ or, in general, should not increase the obligation of the contract in a way not embraced in the original bond.⁵⁰ In other words, refunding bonds proposed to be issued without an approving vote of the electors should contain only the substantial provisions relating to the obligation of the taxpayers that are contained in the bonds to be refunded.⁵¹

Character of obligations being refunded. Some provisions dispensing with the necessity of a vote on the issuance of refunding bonds do not apply to the refunding of anything but bonds or the interest thereon,⁵² and have been held not to dispense with the necessity of a vote on the issuance of bonds to refund warrants issued by the municipality⁵³ or cer-

46. Colo.—*Flanders v. City of Pueblo*, 160 P.2d 980, 114 Colo. 1.

47. U.S.—*City of Hamlin v. Brown-Crummer Inv. Co.*, C.C.A.Tex., 93 F.2d 680, certiorari denied *Brown-Crummer Inv. Co. v. City of Hamlin*, Tex., 58 S.Ct. 831, 303 U.S. 664, 82 L.Ed. 1122.

Ala.—*Browder v. Board of Com'rs of City of Montgomery*, 155 So. 366, 228 Ala. 687.

Cal.—*City of Los Angeles v. Aldrich*, 66 P.2d 647, 8 Cal.2d 541.

Fla.—*State v. City of Fort Pierce*, 19 So.2d 468, 155 Fla. 58—*State v. City of Miami*, 19 So.2d 410, 155 Fla. 6—*State v. City of New Smyrna Beach*, 4 So.2d 660, 148 Fla. 482—*State v. City of Venice*, 2 So.2d 365, 147 Fla. 70—*State v. City of Bartow*, 2 So.2d 125, 147 Fla. 67—*Richard v. City of Fort Lauderdale*, 1 So.2d 202, 146 Fla. 349—*State v. City of Fort Myers*, 198 So. 814, 145 Fla. 135—*State v. City of Auburndale*, 197 So. 739, 144 Fla. 210—*State v. City of Punta Gorda*, 197 So. 734, 144 Fla. 73—*State v. City of Clermont*, 196 So. 850, 143 Fla. 434—*Fleeman v. City of Jacksonville*, 191 So. 840, 140 Fla. 478—*State v. City of Palmetto*, 191 So. 531, 140 Fla. 252—*State v. City of Manatee*, 191 So. 529, 139 Fla. 248—*State v. City of Delray Beach*, 191 So. 188, 140 Fla. 132, followed in 3 So.2d 510, 147 Fla. 741—*State v. City of Lakeland*, 180 So. 754, 132 Fla. 489—*State v. City of Dunedin*, 180 So. 24, 131 Fla. 857—*City of Fort Myers v. State*, 176 So. 483, 129 Fla. 166—*State v. City of Sanford*, 174 So. 339, 128 Fla. 171—*State v. City of Daytona Beach*, 171 So. 814, 126 Fla. 728—*State v. City of St. Petersburg*, 157 So. 641, 117 Fla. 300—*State v. City of Coral Gables*, 154 So. 234, 114 Fla. 326—*State v. City of Miami*, 137 So. 261, 103 Fla. 54—*Sullivan v. City of Tampa*, 134 So. 211, 101

Fla. 298—*State v. City of Miami*, 131 So. 143, 100 Fla. 1388—*State v. City of Okeechobee*, 127 So. 339, 99 Fla. 617.

Ga.—*Aycock v. State ex rel. Boykin*, 193 S.E. 580, 184 Ga. 709, followed in *Gillis v. Vickers*, 193 S.E. 893, 184 Ga. 877.

Idaho.—*Marsing v. Gem Irr. Dist.*, 48 P.2d 1099, 56 Idaho 29.

Ky.—*Welch v. City of Nicholasville*, 8 S.W.2d 400, 225 Ky. 312.

N.C.—*Bolich v. City of Winston-Salem*, 164 S.E. 361, 202 N.C. 786.

S.C.—*Williams v. City of Rock Hill*, 180 S.E. 799, 177 S.C. 82.

Tex.—*Womack v. City of West University Place*, Civ.App., 32 S.W.2d 930—*Griffith v. Buchanan*, Civ. App., 5 S.W.2d 211.

44 C.J. p 1195 note 89, p 1196 note 5 [a].

Bonds to fund floating indebtedness
Ky.—*Smith v. City of Mayfield*, 110 S.W.2d 1081, 270 Ky. 784—*Ballard v. Adair County*, 104 S.W.2d 1100, 268 Ky. 347—*Hill v. City of Covington*, 95 S.W.2d 278, 264 Ky. 618—*Griffin v. City of Owensboro*, 50 S.W.2d 514, 244 Ky. 201—*Hall v. City of Hopkinsville*, 46 S.W.2d 497, 242 Ky. 339.

Addition of lands to municipality

Municipality could issue refunding bonds and pledge a tax for the payment thereof on lands lying within its territorial limits, but which were not within its territorial limits at the time its bonds were originally issued without an approving vote of qualified electors who were freeholders or owners of such lands.—*State v. City of Fort Myers*, 198 So. 814, 145 Fla. 135—*State v. City of Fort Pierce*, 182 So. 799, 133 Fla. 424.

Pledge of assessments and tax liens

A city issuing refunding bonds could pledge special assessments and delinquent tax liens in payment of delinquent tax notes without an approving vote of the people.—*State*

v. City of Lakeland, 180 So. 754, 132 Fla. 489.

48. Fla.—*State v. City of Lakeland*, 16 So.2d 924, 154 Fla. 137—*State v. City of West Palm Beach*, 193 So. 839, 141 Fla. 775—*Fahs v. Kilgore*, 187 So. 170, 136 Fla. 701—*State v. City of Sanford*, 174 So. 339, 128 Fla. 171.

44 C.J. p 1195 note 89 [a] (3).

Dates of payments of bonds may be extended or otherwise changed, without a vote of the electorate, provided no greater burden of taxation is imposed.—*City of Miami v. State*, 190 So. 774, 139 Fla. 598.

Amount of interest

Reductions in interest rates of bonds refunded may be made in refunding bonds.—*City of Miami v. State*, supra.

49. Fla.—*Andrews v. City of Winter Haven*, 3 So.2d 805, 148 Fla. 144.

Expenses incurred in the process of refunding bonds should not be directly or indirectly, in any form or manner, added to the bonded or continuing indebtedness of the municipality, unless the expense is duly approved by the vote required by the constitution.—*City of Miami v. State*, 190 So. 774, 139 Fla. 598.

50. Fla.—*State v. City of Lakeland*, 16 So.2d 924, 154 Fla. 137—*State v. City of Venice*, 2 So.2d 365, 147 Fla. 70—*City of Miami v. State*, 190 So. 774, 139 Fla. 598—*Atlantic Coast Line R. Co. v. City of Lakeland*, 177 So. 206, 130 Fla. 72—*City of Fort Myers v. State*, 176 So. 483, 129 Fla. 166.

51. Fla.—*Atlantic Coast Line R. Co. v. City of Lakeland*, 177 So. 206, 130 Fla. 72.

52. Tex.—*Griffith v. Buchanan*, Civ. App., 5 S.W.2d 211.

53. Tex.—*Griffith v. Buchanan*, supra.

tificates of indebtedness.⁵⁴ Under some provisions, general obligation bonds may not be issued without an election if their issuance is to refund revenue bonds which were issued without an election,⁵⁵ whereas an election is not required for the issuance of general obligation bonds to refund other outstanding general obligation bonds.⁵⁶

Simultaneous issuance of new bonds and cancellation of old. It is not necessary, to dispense with a vote in the case of refunding bonds, that the old bonds be simultaneously canceled as the refunding bonds are issued;⁵⁷ and the fact that there is a reasonable lapse between the maturity of the outstanding bonds and the issue of the refunding bonds does not increase the indebtedness or make both sets of bonds outstanding at the same time.⁵⁸

§ 1921. Application or Petition

An election on the question of issuing municipal bonds may be required where an application or petition therefor is made by a sufficient number of taxpayers or freeholders. Such a petition should state the matters required by constitutional or statutory provisions, although a failure to follow the exact language of such provisions is not necessarily fatal.

Under some statutes an application or petition by a certain number or proportion of electors, taxpayers, or freeholders necessitates, or is a condition precedent to, the calling of an election on the question of issuing municipal bonds.⁵⁹ However, the fact that a referendum petition was filed to a prior ordinance proposing a bond issue does not require a vote on a subsequent ordinance providing an entirely new plan of reconstruction and rehabilitation

at a greatly increased cost.⁶⁰ A petition to the mayor or of a city need not be submitted by him to the city council.⁶¹ A provision which requires that the petition be filed with the executive authority of the municipal corporation may be satisfied by filing such petition with the clerk of the municipality.⁶² Where the governing body of the municipality has power to call an election on a proposed issue of bonds without the filing of a petition by taxpayers, and does call such an election, it is immaterial whether a petition signed by taxpayers was presented and considered by such governing body, or whether the petition was legal.⁶³

The application or petition must be made by the persons authorized by law to make it,⁶⁴ and they must not have been induced to sign by false and fraudulent representations;⁶⁵ but an objection that the petition does not bear the requisite number of signatures is waived when not asserted prior to the holding of the election.⁶⁶ Where a petition for a referendum on a proposition to incur a bonded debt has been filed, and the time for filing the names of additional petitioners has passed, the original signers of such a petition may not withdraw their signatures for the purpose of defeating the referendum.⁶⁷

Contents. The contents of the petition depend on the terms of the constitutional and statutory provisions.⁶⁸ The failure to follow the language of the constitution or statutes exactly is not fatal, however, where the words used in the petition are the legal equivalent of those set forth in the constitutional or statutory provisions.⁶⁹ The petition need

54. N.D.—Tracy v. Barnes County, 289 N.W. 377, 69 N.D. 602.

55. Ala.—Kendrick v. City of Birmingham, 5 So.2d 82, 242 Ala. 112.

56. Ala.—Kendrick v. City of Birmingham, supra.

57. Fla.—Fleeman v. City of Jacksonville, 191 So. 840, 140 Fla. 478.

58. Fla.—Fleeman v. City of Jacksonville, supra.

59. Ark.—Carpenter v. City of Paragould, 128 S.W.2d 980, 198 Ark. 454. 44 C.J. p 1197 note 7.

Petition for issuance of bonds see supra § 1917.

Revenue bonds

Ky.—King v. Rowland, 168 S.W.2d 755, 293 Ky. 198.

60. Ky.—Eagle v. City of Corbin, 122 S.W.2d 798, 275 Ky. 808.

61. Kan.—State v. Topeka, 74 P. 647, 68 Kan. 177.

62. Ohio.—State ex rel. Tietje v. Collett, 35 N.E.2d 568, 138 Ohio St. 425.

63. Kan.—Smith v. Fuest, 263 P. 1069, 125 Kan. 341.

64. Ky.—Berkley v. Lexington Board of Education, 58 S.W. 506, 22 Ky L 638.

44 C.J. p 1197 note 8.

65. Neb.—Wullenwaber v. Dunigan, 50 N.W. 428, 33 Neb. 477.

66. S.C.—Sullivan v. Charleston, 116 S.E. 104, 123 S.C. 91.

67. N.Y.—In re Neuendorffer, 7 N.Y. S.2d 269, 169 Misc. 233.

Withdrawal of names from protest against bond issue generally see supra § 1920 a.

68. Iowa.—Iowa Service Co. v. City of Villisca, 213 N.W. 401, 203 Iowa 610.

Ohio.—State ex rel. Tietje v. Collett, 35 N.E.2d 568, 138 Ohio St. 425.

Variance between petition and proposition submitted see infra § 1923.

Terms of bonds

The petition of freeholders need not go into full detail as to the terms of the bonds to be voted on.—

McDaniel v. Bristol, 158 S.E. 804, 160 SC 408.

69. Iowa.—Iowa Service Co. v. City of Villisca, 213 N.W. 401, 203 Iowa 610.

Ohio.—State ex rel. Tietje v. Collett, 35 N.E.2d 568, 138 Ohio St. 425.

"Order" or "demand"

Although the constitution provides for a referendum petition demanding a referendum, a petition employing the word "order" rather than the word "demand" in seeking referendum on ordinance providing for issuance of bonds was not invalid.—State ex rel. Tietje v. Collett, supra.

"Established"

Under a statute requiring the petition to state that the plant or utility for which the bonds are to be issued cannot be "purchased, erected, built or furnished" within a limited per cent of valuation, a petition stating that the desired plant could not be "established" within such limit has been held sufficient.—

not recite that the subscribers are a majority of the freeholders,⁷⁰ and it need not be formally addressed to the officer who is to call the election,⁷¹ since it is sufficient that he receives and acts on it.⁷² Where the governing statute is silent on the subject, the petition need not fix the time when the bonds will mature.⁷³ A petition for a referendum is not invalidated because it incorrectly describes the election procedure for the submission of the question to the electors, where the provisions of law do not require such description in the referendum petition itself.⁷⁴

§ 1922. Order or Call for Election Generally

It is necessary and sufficient that the order, call, or proclamation for a municipal bond election be issued by the proper officers and otherwise comply with statutory requirements.

It is necessary⁷⁵ and sufficient⁷⁶ that the order, call, or proclamation for an election on the question of issuing municipal bonds comply with statutory requirements. It is essential to the validity of the election that it be called by the proper officer or

body⁷⁷ in the mode prescribed by law.⁷⁸ A resolution declaring it to be necessary to issue and sell the bonds of the corporation for a specified purpose authorized by statute, and providing therein for the submission of the question of their issue to the electors at an election to be held for that purpose, has been held to be of a general and permanent nature within the meaning of statutes requiring such resolutions to be read on separate days before enactment.⁷⁹

Some statutes require the election to be called by ordinance;⁸⁰ and, in the absence of such a requirement, a call of the election or submission of the question by ordinance is proper,⁸¹ but not necessary,⁸² it being sufficient to call the election or submit the question by resolution,⁸³ order,⁸⁴ or motion,⁸⁵ without compliance with statutes prescribing the procedure for the enactment of an ordinance.⁸⁶ When so required by statute, the ordinance, resolution, or order for the election should fix the date of the election⁸⁷ and the manner of voting for and against the proposition submitted;⁸⁸ but, in the ab-

Iowa Service Co. v. City of Villisca, 213 N.W. 401, 208 Iowa 610.

70. S.C.—Cleveland v. Spartanburg, 31 S.E. 871, 54 S.C. 83.

71. U.S.—Marcy v. Ohio, C.C.Ill., 17 F.Cas.No.9,457, affirmed 18 Wall. 552, 21 L.Ed. 813.

72. U.S.—Marcy v. Ohio, supra.

73. Ill.—People v. Harp, 67 Ill. 62. S.C.—Harby v. Jennings, 101 S.E. 649, 112 S.C. 479.

74. Ohio.—State ex rel. Tietje v. Collett, 35 N.E.2d 568, 138 Ohio St. 425.

75. Ariz.—Allison v. City of Phoenix, 33 P.2d 927, 44 Ariz. 66, 93 A.L.R. 354, followed in 33 P.2d 932, 44 Ariz. 81, and 33 P.2d 933, first case, 33 P.2d 933, 44 Ariz. 82, second case, 44 Ariz. 83—Luhrs v. City of Phoenix, 262 P. 1002, 33 Ariz. 156.

Ark.—Lewis v. Tate, 195 S.W.2d 640, 210 Ark. 326.

Ga.—Allen v. City of Atlanta, 142 S.E. 262, 166 Ga. 28.

Ky.—Douthitt v. Board of Trustees of Newcastle, 40 S.W.2d 335, 239 Ky. 751.

N.Y.—Tierney v. Cohen, 198 N.E. 225, 268 N.Y. 464, followed in New York Edison Co. v. City of New York, 198 N.E. 550, 268 N.Y. 669.

Va.—Wooding v. Leigh, 177 S.E. 310, 163 Va. 785.

Wis.—Flottum v. City of Cumberland, 291 N.W. 777, 234 Wis. 654. 44 C.J. p 1197 note 16.

76. Ariz.—Allison v. City of Phoenix 33 P.2d 927, 44 Ariz. 66, 93 A.L.R. 354, followed in 33 P.2d 932, 44 Ariz. 81, and 33 P.2d 933, first case,

33 P.2d 933, 44 Ariz. 82, second case, 44 Ariz. 83.

Compliance held sufficient

Ariz.—Luhrs v. City of Phoenix, 262 P. 1002, 33 Ariz. 156.

Cal.—City of Redding v. Holland, 170 P.2d 132, 75 Cal.App.2d 178—Crescent City v. Griffin, 87 P.2d 414, 31 Cal.App.2d 133.

La.—Stoval v. City of Monroe, 5 So. 2d 547, 199 La. 195.

Mo.—Vrooman v. City of St. Louis, 88 S.W.2d 189, 337 Mo. 933.

N.D.—Lang v. City of Cavalier, 228 N.W. 819, 59 N.D. 75.

Tex.—Cameron v. City of Waco, Civ. App., 8 S.W.2d 249, 44 C.J. p 1197 note 16 [a].

77. Ark.—Lewis v. Tate, 195 S.W. 2d 640, 210 Ark. 326.

44 C.J. p 1197 note 17.

Mayor and aldermen

Tenn.—Clay v. Buchanan, 26 S.W.2d 91, 162 Tenn. 204.

Necessity of presence of full board

Where all members of board of commissioners of city had notice of meeting which adopted an ordinance calling an election on the question of the issuance of bonds, and of the purpose of such meeting, and five out of the six members of the board attended, the ordinance and election were not open to attack on the ground that the ordinance was passed at a meeting at which the full board was not present.—Board of Com'rs of Hendersonville v. C. N. Malone & Co., 103 S.E. 134, 179 N.C. 604.

78. Ga.—Shinall v. Cartersville, 87 S.E. 290, 144 Ga. 219.

Mo.—State ex rel. City of Springfield v. Smith, 125 S.W.2d 883, 344 Mo. 150.

Tenn.—Terry v. Commissioners of Cookeville, 198 S.W.2d 1010, 184 Tenn. 347.

Prior resolution of public interest and necessity

Cal.—Crescent City v. Griffin, 87 P. 2d 414, 31 Cal.App.2d 133.

79. Ohio.—Elyria Gas, etc., Co. v. Elyria, 49 N.E. 335, 57 Ohio St. 374.

80. Tenn.—Terry v. Commissioners of Cookeville, 198 S.W.2d 1010, 184 Tenn. 347.

44 C.J. p 1197 note 19.

81. Mo.—State v. Hackman, 202 S. W. 7, 273 Mo. 670.

82. Tex.—Vernon v. Montgomery, Civ.App., 265 S.W. 188.

44 C.J. p 1197 note 21.

83. U.S.—Alma v. Guaranty Sav. Bank, Kan., 60 F. 203, 8 C.C.A. 564. 44 C.J. p 1197 note 22.

84. Tex.—Vernon v. Montgomery, Civ.App., 265 S.W. 188.

44 C.J. p 1197 note 23.

85. Neb.—State v. Babcock, 81 N.W. 8, 20 Neb. 522.

Tex.—Vernon v. Montgomery, Civ. App., 265 S.W. 188.

86. Ala.—Ryan v. Tuscaloosa, 46 So. 638, 155 Ala. 479.

87. Ohio.—Heffner v. Krian, 120 N. E. 221, 98 Ohio St. 1.

Time of election generally see *infra* § 1928.

88. Cal.—Oxnard v. Bellah, 130 P. 701, 21 Cal.App. 33.

44 C.J. p 1198 note 29.

sence of charter or statutory requirement, it need not appropriate money for the expense of the election⁸⁹ or designate the newspaper in which the notice of the election is to be published;⁹⁰ and, where it provides for submission at a general election, it need not rename and redesignate the judges, clerks, and voting places already designated for the general election.⁹¹

Judicial order or call. Under some statutes a valid bond election can be held only pursuant to the direction of the court or courts having jurisdiction over the municipality,⁹² and the proceedings in such case are purely statutory⁹³ and *ex parte*,⁹⁴ although any taxpayer or qualified voter may become a party and show that the proceedings are not in conformity with statutory requirements.⁹⁵ Where statutes give the courts power to perform, during recess, any duty and to transact any business authorized to be transacted by them in vacation, a court order calling an election may be entered by the court in recess.⁹⁶ The time which must elapse between the date of the order calling the election and the day of the election rests in the sound judicial discretion of the judge who calls the election,⁹⁷ subject to the requirement that the order must provide for the giving of due publicity to the election.⁹⁸

Publication or posting. An ordinance, resolution, or order directing a bond election need not be published,⁹⁹ unless it is so provided by statute;¹ and, even where provision is made for publication, such

provision is directory and not mandatory if the statutes do not make the manner of publication essential to the validity of the election.² Under some statutes an election resolution which is printed in a newspaper published and circulating in the municipality need not be posted in public places in the municipality.³

Time of taking effect. Some,⁴ but not other,⁵ general charter or statutory provisions prescribing the time when ordinances or resolutions shall take effect are held applicable to an ordinance or resolution calling a municipal bond election. Where the time of the taking effect of the ordinance is prescribed by statute, it need not be stated in the ordinance.⁶

§ 1923. Proposal and Ballot

- a. In general
- b. Ballot

a. In General

The proposition submitted as to the issuance of bonds should comply with statutory requirements and should not be misleading or obscure. However, a substantial compliance is sufficient, and slight misstatements do not necessarily invalidate the election.

The proposition submitted should comply with statutory requirements,⁷ and should be submitted in such a way as to obtain a full and fair expression of the will of the voters on its merits.⁸ It should be sufficiently definite to apprise the voters with

89. Mo.—Kansas City v. Woerishoeffer, 155 S.W. 779, 249 Mo. 1.

90. Mo.—State v. Hackman, 202 S.W. 7, 273 Mo. 670—Bauch v. Cabool, 143 S.W. 1003, 165 Mo.App. 486.

Notice of election generally see infra § 1926.

Failure to designate newspaper not fatal

Cal.—City of Tulalake v. Roath, 107 P.2d 277, 41 Cal.App.2d 522.

91. Ill.—Central Illinois Public Service Co. v. Taylorville, 138 N.E. 623, 307 Ill. 311.

92. Va.—Vaughan v. Town of Galax, 4 S.E.2d 386, 173 Va. 335.

93. Va.—Vaughan v. Town of Galax, supra.

94. Va.—Vaughan v. Town of Galax, supra.

95. Va.—Vaughan v. Town of Galax, supra.

96. Va.—Ennis v. Town of Herndon, 191 S.E. 685, 168 Va. 539.

97. Va.—Ennis v. Town of Herndon, supra.

Rule as to counties and magisterial districts held inapplicable

Va.—Ennis v. Town of Herndon, supra.

98. Va.—Ennis v. Town of Herndon, supra.

Insufficient time held not shown

Va.—Ennis v. Town of Herndon, supra.

99. Ga.—Heilbron v. Cuthbert, 23 S.E. 206, 96 Ga. 312.
44 C.J. p 1198 note 26.

1. Ky.—Hatfield v. Covington, 197 S.W. 535, 177 Ky. 124.
44 C.J. p 1198 note 27.

Publication held sufficient

Cal.—City of Tulalake v. Roath, 107 P.2d 277, 41 Cal.App.2d 522.

Ohio.—Charls v. City of Cleveland, App., 72 N.E.2d 770.

2. N.C.—Board of Com'rs of City of Hendersonville v. C. N. Malone & Co., 163 S.E. 134, 179 N.C. 604.

Number of publications

An election could not be attacked on the ground that the ordinance was published only once, instead of four times, where the statute did not make four publications essential to the validity of the election.—

Board of Com'rs of Hendersonville v. C. N. Malone & Co., supra.

3. Miss.—Mississippi Power & Light Co. v. Town of Batesville, 193 So. 814, 187 Miss. 737.

4. Ga.—Shinall v. Cartersville, 87 S.E. 290, 144 Ga. 219.
44 C.J. p 1198 note 33.

5. Mo.—Steinbrenner v. St. Joseph, 226 S.W. 890, 285 Mo. 318.
44 C.J. p 1198 note 34.

6. Kan.—C. W. Smith Electric, etc., Co. v. Larned, 149 P. 704, 96 Kan. 33.

7. Del.—Eastern Shore Public Service Co. v. Town of Seaford, 187 A. 115, 21 Del.Ch. 214.

Ga.—Allen v. City of Atlanta, 142 S.E. 262, 166 Ga. 28.
44 C.J. p 1198 note 36.

Unconstitutional statute

A bond issue is valid notwithstanding a failure to comply with statutory provisions prescribing the manner and form of submission where the statutory requirements are unconstitutional.—Booth v. City of Owensboro, 122 S.W.2d 118, 275 Ky. 491.

8. Okl.—Corpus Juris cited in

substantial accuracy of what they are called on to approve,⁹ and must not be misleading, obscure, or equivocal.¹⁰ It is sufficient, however, if the question submitted to the electors is the question required by law to be submitted,¹¹ or if there is a substantial compliance with statutory formalities;¹² and slight misstatements contained in the proposition submitted to the voters do not necessarily invalidate the election where the voters have not been deceived or misinformed in any material respect by the manner in which the proposition was presented.¹³

Within the limitations imposed by the foregoing requirements, the duty of determining the particular phraseology in which the question shall be submitted is cast on the municipal authorities.¹⁴ The proposition may be submitted in broad and general terms,¹⁵ or in terms as narrow and specific as the governing officials are willing to be bound by.¹⁶ The bonds cannot be held void because of a failure

to submit some detail not required by law to be submitted;¹⁷ nor does invalidity necessarily result from the fact that the ordinance submitting the proposition contains a provision conflicting with a statute but dealing with a matter not required by law to be included in the proposition submitted.¹⁸ However, the submission of improper matters may be fatal where it tends to influence the voter in determining his choice on the matter properly submitted.¹⁹ Some statutes contemplate the submission to the voters of the entire ordinance,²⁰ including matters lawfully, although unnecessarily, stated therein.²¹

Variance between petition and submission. A variance between the submission and the petition for the election affects only the application of the proceeds of a sale of the bonds²² and not the validity of the bonds.²³ A slight difference in language between the petition and the submission does not necessarily invalidate the bonds where there is no real

Borin v. City of Erick, 125 P.2d 768, 770, 190 Okl. 519.
44 C.J. p 1198 note 38.

9. Kan.—Eastern Kansas Utilities v. City of Paola, 196 P.2d 199, 165 Kan. 558—City of Coffeyville v. Robb, 194 P.2d 475, 165 Kan. 219—Kansas Electric Power Co. v. City of Eureka, 45 P.2d 877, 142 Kan. 117.

Tex.—City of Beaumont v. Priddie, Civ.App., 65 S.W.2d 434, reversed on other grounds, Texas & N. O. R. Co. v. Priddie, 95 S.W.2d 1290, 127 Tex. 629.

Wyo.—Corpus Juris cited in Anselmi v. City of Rock Springs, 80 P.2d 419, 423, 53 Wyo. 223, 116 A.L.R. 1250.

44 C.J. p 1198 note 37.

10. Kan.—Eastern Kansas Utilities v. City of Paola, 196 P.2d 199, 165 Kan. 558—Kansas Electric Power Co. v. City of Eureka, 45 P.2d 877, 142 Kan. 117.

Tex.—City of Beaumont v. Priddie, Civ.App., 65 S.W.2d 434, reversed on other grounds Texas & N. O. R. Co. v. Priddie, 95 S.W.2d 1290, 127 Tex. 629.

Wyo.—Anselmi v. City of Rock Springs, 80 P.2d 419, 53 Wyo. 223, 116 A.L.R. 1250.

44 C.J. p 198 note 87 [a].

11. Ky.—Daughaday v. City of Paducah, 118 S.W.2d 699, 274 Ky. 337.
44 C.J. p 1198 note 40.

Submission held sufficient

Ill.—People v. City of Paris, 44 N.E. 2d 154, 380 Ill. 503.

Kan.—Robertson v. Kansas City, 56 P.2d 1032, 143 Kan. 726.

La.—Woulfe v. Morrison, 34 So.2d 251, 212 La. 1032—Judice v. Village of Scott, 121 So. 592, 168 La. 111, certiorari denied Judice Co. v.

Village of Scott, 50 S.Ct. 26, 280 U.S. 566, 74 L.Ed. 620.

N.Y.—Balducci v. Strough, 239 N.Y. S. 611, 135 Misc. 346.

Tex.—Texsan Service Co. v. City of Nixon, Civ App., 158 S.W.2d 88, error refused.

44 C.J. p 1198 note 40 [a].

12. Ky.—McDonald v. City of Lexington, 70 S.W.2d 534, 253 Ky. 770, followed in Combs v. City of Lexington, 70 S.W.2d 921, 253 Ky. 813. S.C.—Banister v. Lollis, 190 S.E. 511, 183 S.C. 218.

44 C.J. p 1198 note 41.

13. Fla.—State v. City of West Palm Beach, 174 So. 334, 127 Fla. 849.

N.Y.—Spano v. City of Middletown, 7 N.Y.S.2d 14, 169 Misc. 338.

Reference to city instead of board of education

N.Y.—Spano v. City of Middletown, supra.

14. Cal.—Cary v. Blodgett, 102 P. 668, 10 Cal.App. 463.

15. Cal.—Sacramento Municipal Utility Dist. v. All Parties and Persons, etc., 57 P.2d 506, 6 Cal.2d 197—Sacramento-Yolo Port Dist. v. Rodda, App., 204 P.2d 372.

16. Cal.—Sacramento Municipal Utility Dist. v. All Parties and Persons, etc., 57 P.2d 506, 6 Cal. 2d 197—Sacramento-Yolo Port Dist. v. Rodda, App., 204 P.2d 372.

17. U.S.—Wheeler v. Denver, Colo., 231 F. 8, 145 C.C.A. 196, appeal dismissed 38 S.Ct. 10, 245 U.S. 626, 62 L.Ed. 518.

Kan.—Humphrey v. Pratt, 144 P. 197, 98 Kan. 413.

Full details as to terms of bonds need not be set forth.—McDaniel v. Bristol, 158 S.E. 804, 160 S.C. 408.

Offer of free use of equipment

The fact that, after election on question of issuance of municipal bonds for electric light plant and distribution system, a bidder on construction contract offered to city free use of certain generating equipment did not render election invalid because bond proposition submitted to voters did not disclose such offer.—Jaeger v. City of Hillsboro, 190 P. 2d 420, 164 Kan. 588.

Amount of tax

Where a constitutional amendment imposed a limitation on the amount of tax to be levied, and an ordinance authorized the erection of a city hospital and provided for an election as to the bonds for such purpose, the city election was not invalid on the ground that no definite millage was voted on.—Ralley v. City of Magnolia, 126 S.W.2d 273, 197 Ark. 1047.

18. Neb.—Rasp v. Omaha, 203 N.W. 588, 113 Neb. 463.

44 C.J. p 1198 note 43.

19. N.M.—Corpus Juris cited in Mann v. City of Artesia, 76 P.2d 941, 943, 42 N.M. 224.

Wis.—Neacy v. Milwaukee, 126 N. W. 8, 142 Wis. 590.

20. Md.—Stanley v. Baltimore, 126 A. 151, 130 A. 181, 146 Md. 277.

21. Md.—Stanley v. Baltimore, supra.

22. S.C.—Connolly v. Beason, 84 S. E. 297, 100 S.C. 74.

23. S.C.—Connolly v. Beacon, supra.

difference in meaning and the electors could not have been misled.²⁴

b. Ballot

The ballot should set forth the matters required by statutory or constitutional provisions; a substantial compliance is generally sufficient.

The ballot should set forth the matters required by statute;²⁵ and some constitutional provisions prescribing the form of ballot to be used at municipal elections have been considered to be mandatory,²⁶ at least in the sense that they place a duty on the officer charged with the preparation thereof which he will not be permitted to evade.²⁷ However, while some elections have been held invalid by reason of nonconformity of the ballot to constitutional²⁸ or statutory²⁹ provisions, more frequently an election is upheld notwithstanding an objection to, or irregularity in, the form of the ballot,³⁰ as where there has been a substantial compliance with the constitutional or statutory provisions prescribing the form of the ballot,³¹ the statute prescribing the form is directory only,³² no voter has been deceived or misled³³ or deprived of his right to vote,³⁴ by reason of the form used, or the voters were afforded³⁵ and exercised³⁶ an opportunity fully and fairly to express their opinion. In determining whether the ballots substantially comply with constitutional provisions respecting their form, the purpose of such provisions should be kept in mind.³⁷ In the

absence of a prescribed form of ballot, any ballot which, when voted, clearly shows the intention of the voter is sufficient in form.³⁸

Inclusion of terms or title of ordinance. It is not necessary for the whole of the bond ordinance to be printed on the ballot;³⁹ nor is a ballot which conforms to statutory provisions made invalid by failure to include therein some informative statement contained in the ordinance calling the election,⁴⁰ provided such omission does not mislead or tend to mislead the voters as to the proposition on which they are to vote.⁴¹ Under some charter provisions the title for the ordinance being submitted must be placed on the official ballot⁴² and the title should be a clear concise statement, without argument or prejudice, descriptive of the substance of the ordinance.⁴³

Separate ballots. Under some statutory provisions, the question of a bond issue need not be placed on a separate ballot but may be placed on the regular ballot used at a general election.⁴⁴ The use of separate ballots, one in favor of, and the other against, the proposition, instead of a blanket ballot, is not prohibited by the statutes of some jurisdictions.⁴⁵

"Australian ballot system." The fact that the election was ordered to be held,⁴⁶ or was held,⁴⁷ under some system indefinitely described as the

24. S.C.—Green v. City of Rock Hill, 147 S.E. 346, 149 S.C. 234.

25. W.Va.—Jarrell v. Board of Ed of Raleigh County, 50 S.E.2d 442—State ex rel. Davenport v. Meadows, 199 S.E. 883, 120 W.Va. 602.

26. Ala.—Coleman v. Eutaw, 47 So. 703, 157 Ala. 327.

27. Ala.—Realty Inv. Co. v. Mobile, 61 So. 248, 181 Ala. 184.
44 C.J. p 1199 note 51.

28. Ala.—Coleman v. Eutaw, 47 So. 703, 157 Ala. 327.

29. Ill.—O'Beirne v. Elgin, 187 Ill. App. 581.

30. Kan.—Drenning v. Board of Com'rs of City of Topeka, 81 P.2d 720, 148 Kan. 366, 117 A.L.R. 884.

N.C.—Board of Com'rs of Hendersonville v. C. N. Malone & Co, 103 S.E. 134, 179 N.C. 604.

Wis.—Morris v. Ellis, 266 N.W. 921, 221 Wis. 307.

44 C.J. p 1199 note 54.

Capital letters and punctuation

Kan.—Jaeger v. City of Hillsboro, 190 P.2d 420, 164 Kan. 588.

31. Ala.—Tommie v. City of Gadsden, 158 So. 763, 229 Ala. 521—Salter v. City of Anniston, 124 So. 663, 220 Ala. 199—Dent v. City of Eufaula, 74 So. 369, 199 Ala. 280.

Ill.—People ex rel. McDonough v. Chicago, M., St. P. & P. R. Co., 188 N.E. 821, 354 Ill. 630.

Mich.—Michigan Gas & Electric Co. v. City of Dowagiac, 270 N.W. 772, 278 Mich. 522.

N.D.—Lang v. City of Cavalier, 228 N.W. 819, 59 N.D. 75.

44 C.J. p 1199 notes 55, 56.

32. Mo.—State v. Hackman, 202 S. W. 7, 273 Mo. 670.

44 C.J. p 1199 note 57.

33. Wis.—Morris v. Ellis, 266 N.W. 921, 221 Wis. 307.

44 C.J. p 1199 note 58.

34. Idaho.—Brown v. Grangeville, 71 P. 151, 8 Idaho 784.

Md.—Seyboldt v. Mt. Ranier, 99 A. 960, 130 Md. 69.

35. Mo.—State v. Hackman, 202 S. W. 7, 273 Mo. 670.

36. Mo.—State v. Hackman, supra.
N.J.—Fletcher v. Collingswood, Supp. 59 A. 90.

37. Ala.—Tommie v. City of Gadsden, 158 So. 763, 229 Ala. 521—Dent v. City of Eufaula, 74 So. 369, 199 Ala. 280.

38. W.Va.—Sexton v. Lee, 130 S.E. 437, 100 W.Va. 389.

Preferable form

It is preferable for ballots submit-

ting the question of municipal bond issue for purpose of constructing municipal hospital to present the question in the form, "For Bonds" and "Against Bonds" rather than "For Municipal Hospital" and "Against Municipal Hospital" in order to secure a true expression of the electorate on the issue—Mann v. City of Artesia, 76 P.2d 941, 42 N. M. 224.

39. Md.—Douty v. City of Baltimore, 141 A. 499, 155 Md. 125.

40. Kan.—City of Coffeyville v. Robb, 194 P.2d 475, 165 Kan. 219.

41. Kan.—City of Coffeyville v. Robb, supra.

42. Ohio—Charls v. City of Cleveland, App., 72 N.E.2d 770.

43. Ohio—Charls v. City of Cleveland, supra.

Title held sufficient

Ohio—Charls v. City of Cleveland, supra.

44. Ky.—Theisen v. City of Louisville, 144 S.W.2d 486, 284 Ky. 240.

45. N.J.—Schuck v. Stone Harbor, 95 A. 133, 87 N.J.Law 484.

46. Ga.—Edwards v. Clarkesville, 133 S.E. 45, 35 Ga.App. 306.

47. Ga.—Edwards v. Clarkesville, supra.

"Australian ballot system" does not necessarily render it void.

§ 1924. — Statement of Particular Matters

a. In general

b. Sale of bonds and disposition of proceeds

a. In General

In general, the statutory provisions governing municipal bond elections determine the particular matters required to be stated in the submission, such as the purpose of the bond issue, its amount, the denominations and maturity of the bonds, the interest rate, and the means of payment.

The necessity and sufficiency of the statement of particular matters in connection with the submission of a bond issue to a vote depend, in general, on the statutes of the jurisdiction and the proposal involved.⁴⁸ An ordinance submitting to the voters the question of issuing bonds need not recite the reasons for the submission⁴⁹ or refer to the statute authorizing the submission.⁵⁰ Also, the ordinance need not state the assessed value of the property in the city and the present indebtedness so as to show that the proposed indebtedness will not extend beyond a constitution limitation of amount.⁵¹

Under some statutes when the bonds are for an improvement, the estimated cost of the improvement should be stated in the ordinance calling the election,⁵² but it is not necessary to submit the contract for the improvement;⁵³ nor is it necessary for a proposition to issue bonds to establish municipal electric works to state a precise location of the works.⁵⁴ Under some statutes the time when stock of a municipal corporation is to be issued may,⁵⁵ but need not,⁵⁶ be included in the ordinance providing for the issuance of stock and submitted to the electors for approval or rejection. An offer in a proposition to employ bona fide residents on the work for which it is proposed to issue bonds is not an offer of an unlawful inducement so as to invalidate the bonds.⁵⁷

Purpose. While not required under all charter provisions,⁵⁸ it is generally essential that a proposition to issue municipal bonds shall state the purpose for which the bonds are to be issued.⁵⁹ Although the statement of the purpose need not go into minute detail,⁶⁰ it must be sufficiently definite reasonably to apprise the voters of the general nature, purpose, and scope of the improvement contemplated,⁶¹ and should not be so general as to allow un-

48. Del.—*Eastern Shore Public Service Co. v. Town of Seaford*, 187 A. 115, 21 Del.Ch. 214.

La.—*Woulfe v. Morrison*, 84 So.2d 251, 212 La. 1032.

W.Va.—*State ex rel. Davenport v. Meadows*, 199 S.E. 883, 120 W.Va. 602.

44 C.J. p 198 note 86 [b], note 87 [a].

Investment by federal government
Colo.—*McNichols v. City and County of Denver*, 74 P.2d 99, 101 Colo. 316.

Abolition of board of commissioners

It is not necessary to vote for commissioners of public works at the bond election where the board of commissioners of public works of the city in question has been abolished by statute.—*Harby v. Jennings*, 101 S.E. 649, 112 S.C. 479.

49. Mo.—*State v. Smith*, 259 S.W. 1060, 302 Mo. 594.

50. Wash.—*Lewis v. Port Angeles*, 34 P. 914, 7 Wash. 190.
44 C.J. p 1201 note 1.

51. Ky.—*King v. Katterjohn*, 236 S. W. 250, 193 Ky. 359.

52. Cal.—*Clark v. Los Angeles*, 116 P. 722, 160 Cal. 30—*Inglewood v. Kew*, 132 P. 780, 21 Cal.App. 611.

53. Tenn.—*Knoxville Ice, etc., Co. v. Knoxville*, 284 S.W. 886, 153 Tenn. 536.

54. Cal.—*Clark v. Los Angeles*, 116 P. 722, 160 Cal. 30.

55. Md.—*Stanley v. Baltimore*, 126 A. 151, 130 A. 181, 146 Md. 277.

56. Md.—*Stanley v. Baltimore*, supra.

57. U.S.—*Perkins County v. Graft*, Neb., 114 F. 441, 52 C.C.A. 243, certiorari denied 23 S.Ct. 843, 187 U. S. 642, 47 L.Ed. 346.

58. Tex.—*Conklin v. El Paso*, Civ. App., 44 S.W. 879.

59. Ark.—*Arkansas-Missouri Power Corp. v. City of Rector*, 217 S.W.2d 335.

Mo.—*State ex rel. City of Breckenridge v. Thompson*, 15 S.W.2d 346, 322 Mo. 323.

Okl.—*Corpus Juris cited in Borin v. City of Erick*, 125 P.2d 768, 770, 190 Okl. 519.

Tex.—*City of Beaumont v. Priddie*, Civ.App., 65 S.W.2d 434, reversed on other grounds *Texas & N. O. R. Co. v. Priddie*, 95 S.W.2d 1290, 127 Tex. 629.
44 C.J. p 1199 note 67.

Rule of ejusdem generis

Term "street improvement," following designation of specific improvements in municipal bond election ordinance and proposal, would ordinarily be interpreted to include only improvements incidental to those specified or others ejusdem generis.—*City of Beaumont v. Priddie*, Civ.App., 65 S.W.2d 434, reversed on other grounds, *Texas & N. O. R. Co. v. Priddie*, 95 S.W.2d 1290, 127 Tex. 629.

60. Idaho.—*Durand v. Cline*, 119 P. 2d 891, 63 Idaho 304.

Mont.—*Lloyd v. City of Great Falls*, 86 P.2d 395, 107 Mont. 442.

61. Idaho.—*Durand v. Cline*, 119 P. 2d 891, 63 Idaho 304.

Statements held sufficient

(1) Generally.

Cal.—*Crescent City v. Griffin*, 87 P. 2d 414, 31 Cal.App.2d 133.

Idaho.—*Durand v. Cline*, 119 P.2d 891, 63 Idaho 304.

Kan.—*Kansas Power Co. v. City of Washington*, 67 P.2d 1095, 145 Kan. 962.

Mo.—*State ex rel. City of Breckenridge v. Thompson*, 15 S.W.2d 346, 322 Mo. 323.

Mont.—*Lloyd v. City of Great Falls*, 86 P.2d 395, 107 Mont. 442.

44 C.J. p 1199 note 67 [c].

(2) An election to vote bonds for the construction and equipment of "a public building" for the use of city was not vitiated by use of the quoted phrase in the ballot, instead of the specific term "a municipal auditorium," in view of the fact that the phrase "a public building" was used in the statute under which the city proceeded.—*Drenning v. Board of Com'rs of City of Topeka*, 81 P.2d 720, 148 Kan. 366, 117 A.L.R. 884.

(3) Term "city hall or municipal building," used in ordinance authorizing bond election, was sufficiently definite as to nature of public utility desired.—*Reid v. City of Muskogee*, 278 P. 339, 137 Okl. 44.

limited expenditures not properly connected with, and necessary for, the complete accomplishment of the main purpose.⁶² The joining of two purposes in the proposition, one of which is illegal, is improper.⁶³ A failure to specify in the caption of the ordinance all the purposes for which the proceeds of the bonds are to be used, is not fatal where there is no such statutory requirement.⁶⁴ A slight difference in language between the purpose of the bond issue as stated in a petition of freeholders asking for the election and the resolution ordering the election does not necessarily invalidate the bonds where there is no real difference in meaning and the electors could not have been misled.⁶⁵

Amount and denomination. Ordinarily the proposition must state the amount of the bonds to be issued,⁶⁶ although under some statutes this is not required.⁶⁷ Some courts hold that it is sufficient to state that bonds are to be issued in an amount not to exceed a specified sum,⁶⁸ but other courts take the contrary view.⁶⁹ The fact that there was some discrepancy between the amount specified in the ordinance calling the election and the proposition submitted to the voters was held not to invalidate the bonds where it did not appear that any prejudice arose because of the discrepancy.⁷⁰

Under some statutes or charters the denomination of the bonds need not,⁷¹ and should not,⁷² be speci-

fied either in the ordinance calling the election or in the ballot; and even where the resolution ordering the election is required by charter to state the denomination of the bonds,⁷³ its failure to do so is immaterial where the people are duly informed of the denomination of the bonds by a proclamation issued by the mayor in pursuance of the resolution.⁷⁴

Maturity. Under the provisions passed and enacted in some,⁷⁵ but not other,⁷⁶ jurisdictions the proposition submitted must state the maturity of the bonds; and an illegal provision in the proposition as to the maturity dates of the bonds may invalidate the election notwithstanding the absence of bad faith or any intentional effort to mislead the voters.⁷⁷ A provision for calling the proposed bonds before maturity is not improper where the statutes leave such matters to the issuing authority.⁷⁸ A provision reserving the privilege of refunding the bonds after the expiration of a specified period of time may,⁷⁹ but need not,⁸⁰ be included in the ordinance submitting the proposition.

Interest. Under some,⁸¹ but not other,⁸² provisions the rate of interest to be paid on the bonds must be stated in the proposition submitted. It is not necessary to submit to the voters the question or alternative of making the interest on the proposed bonds payable annually or semiannually.⁸³ A proposition stating that the interest is to be at a

(4) An election to determine whether a city should issue bonds to erect a hospital was not invalid on ground that no provision was made to equip hospital, since authority to erect hospital would imply authority to equip it.—*Railey v. City of Magnolia*, 126 S.W.2d 273, 197 Ark. 1047.

62. Idaho.—*Durand v. Cline*, 119 P. 2d 891, 63 Idaho 304.

63. Del.—*Eastern Shore Public Service Co. v. Town of Seaford*, 187 A. 115, 21 Del.Ch. 214.

64. Ky.—*Kern v. City of Mt. Sterling*, 25 S.W.2d 41, 233 Ky. 156.

Dual purpose stated in body of ordinance

Election was not invalidated by fact that caption of ordinance stated only one purpose where dual purpose was given in body.—*Kern v. City of Mt. Sterling*, supra.

65. S.C.—*Green v. City of Rock Hill*, 147 S.E. 346, 149 S.C. 234.

"Enlargement" or "improvements"
S.C.—*Green v. City of Rock Hill*, supra.

66. Va.—*Williamson v. Graham*, 74 S.E. 393, 113 Va. 449.

44 C.J. p 1199 note 69.

Provision held sufficient

Mo.—*Vrooman v. City of St. Louis*, 88 S.W.2d 189, 337 Mo. 933.

67. S.C.—*Sullivan v. Charleston*, 116 S.E. 104, 123 S.C. 91—*Dick v. Scarborough*, 53 S.E. 86, 73 S.C. 150.

68. Wyo.—*Laramie City First Nat. Bank v. Laramie*, 163 P. 728, 25 Wyo. 287.

44 C.J. p 1199 note 70.

69. N.D.—*Kerlin v. Devils Lake*, 141 N.W. 756, 25 N.D. 207, Ann.Cas. 1915C 624.

44 C.J. p 1199 note 71.

70. Cal.—*Crescent City v. Griffin*, 87 P.2d 414, 31 Cal.App.2d 133.

71. Cal.—*Santa Barbara v. Davis*, 92 P. 308, 6 Cal.App. 342.

72. Cal.—*Santa Barbara v. Davis*, supra.

73. Tex.—*McCarthy v. McElvaney*, Civ.App., 182 S.W. 1181.

74. Tex.—*McCarthy v. McElvaney*, supra.

75. N.M.—*Mann v. City of Artesia*, 76 P.2d 941, 42 N.M. 224.

44 C.J. p 1199 note 76.

76. Okl.—*Oklahoma Utilities Co. v. City of Hominy*, 81 P.2d 932, 168 Okl. 130.

44 C.J. p 1200 note 77.

Inconsistency between ordinance and submission immaterial

Fla.—*State v. City of West Palm Beach*, 174 So. 334, 127 Fla. 849.

77. N.M.—*Mann v. City of Artesia*, 76 P.2d 941, 42 N.M. 224.

78. Mich.—*Michigan Public Service Co. v. City of Cheboygan*, 37 N.W. 2d 116, 324 Mich. 309.

79. Ky.—*Percival v. Covington*, 239 S.W. 300, 191 Ky. 337.

80. Ky.—*Percival v. Covington*, supra.

81. Wyo.—*Cheyenne v. State*, 96 P. 244, 17 Wyo. 90.

44 C.J. p 1200 note 80.

82. Mo.—*State ex rel. City of Breckenridge v. Thompson*, 15 S.W.2d 346, 322 Mo. 323.

N.Y.—*O'Flynn v. Village of East Rochester*, 54 N.E.2d 343, 292 N.Y. 156, certiorari denied 65 S.Ct. 39, 323 U.S. 713, 89 L.Ed. 574.

44 C.J. p 198 note 86 [b], p 1200 note 81.

83. Cal.—*Murphy v. San Luis Obispo*, 51 P. 1085, 119 Cal. 624, 39 L.R.A. 444.

Okl.—*Oklahoma Utilities Co. v. City of Hominy*, 81 P.2d 932, 168 Okl. 130.

rate not to exceed a specified per cent has been held sufficient to comply with provisions requiring the rate of interest to be set forth.⁸⁴

Means of payment. Where statutes require an ordinance or resolution submitting a municipal bond issue to the voters to provide for raising annually, by tax, a sum sufficient to pay the interest and principal as they become due,⁸⁵ or to specify the amount of money necessary to be raised annually by taxation for the purpose of paying interest and creating a sinking fund,⁸⁶ compliance with the provision is necessary; and other statutes are construed to require the ordinance to state the manner of payment of the bonds;⁸⁷ but, in the absence of statutory requirement, it is not necessary for either the ballot or the resolution or ordinance submitting the question to include the manner or method of paying the bonds,⁸⁸ a provision for a sinking fund,⁸⁹ the tax rate,⁹⁰ or formal authorization of a tax.⁹¹ Where the question of the manner of payment of the bonds cannot be legally submitted to the voters, because such matter is expressly set forth by statute, a call submitting the manner of payment is to that extent illegal;⁹² but such provision in the call does not necessarily invalidate the bonds where the voters were not misled thereby.⁹³

b. Sale of Bonds and Disposition of Proceeds

Statements in the submission as to the sale of the bonds and the disposition of the proceeds thereof should be in accordance with statutory provisions relating thereto.

When not expressly made so by statute, it is not

essential that a statutory provision that the bonds shall not be sold below par shall be set forth in the ordinance calling the election.⁹⁴ The inclusion of an illegal provision that the bonds may be disposed of otherwise than by a sale for cash has been held not to affect the validity of the bond issue.⁹⁵ Matters relating to the deposit of the proceeds of a sale of the bonds need not be provided for in the ordinance calling the election where they are specifically provided for by statute.⁹⁶ An election is not rendered illegal by a failure to advise the voters that the proceeds of the proposed bond issue are to be used with, or in addition to, a sum of money which is already on hand and available for the proposed improvement.⁹⁷ Particular ordinances submitting a proposition to issue bonds have been held not to authorize a disposition of the proceeds at variance with statutory provisions.⁹⁸

Apportionment of proceeds. Under some statutes, in the case of a municipal bond issue for different projects, the ordinance and ballot submitting the proposed issue to a vote should clearly specify the amounts to be used for the several projects.⁹⁹ It is sometimes necessary that the call for an election on the question of issuing bonds for the erection of a building and the purchase of a site therefor should state the proportion of the total proceeds of the bond issue which is to be expended in the purchase of a site;¹ and a failure to comply with such provisions prevents the expenditure of any part of the proceeds of the bond issue for the purchase of a site,² although it may not wholly invali-

84. *Ariz.*—Luhrs v. City of Phoenix, 262 P. 1002, 33 Ariz. 156.
44 C.J. p 1200 note 80 [a].

85. *N.Y.*—Bronxville v. Seymour, 106 N.Y.S. 834, 122 App.Div. 377.
44 C.J. p 1200 note 92.
Provision for payment generally see supra § 1918.

86. *Ky.*—McDonald v. City of Lexington, 70 S.W.2d 534, 253 Ky. 770, followed in Combs v. City of Lexington, 70 S.W.2d 921, 253 Ky. 813.
44 C.J. p 1200 note 93.

Invalidity of part of ordinance

Where one section of bond election ordinance, submitting question to voters, complied with statute respecting specification of sinking fund to be raised annually by taxation, invalidity of another section in such respect was held not to invalidate entire ordinance or to render void the election approving bond issue.—McDonald v. City of Lexington, 70 S.W.2d 534, 253 Ky. 770, followed in Combs v. City of Lexington, 70 S.W.2d 921, 253 Ky. 813.

87. *Wash.*—Hansard v. Green, 108

P. 40, 54 Wash. 161, 132 Am.S.R. 1107, 24 L.R.A., N.S., 1273.
44 C.J. p 1200 note 94.

88. *Kan.*—Humphrey v. Pratt, 144 P. 197, 93 Kan. 413.

Utah.—State v. Salt Lake City, 99 P. 255, 35 Utah 25, 18 Ann Cas. 1130.

89. *U.S.*—Wheeler v. Denver, Colo., 231 F. 8, 145 C.C.A. 196, appeal dismissed 38 S.Ct. 10, 245 U.S. 626, 62 L.Ed. 518.

Ala.—Carmichael v. Dothan, 100 So. 642, 211 Ala. 492.

90. *Ky.*—King v. Katterjohn, 236 S.W. 250, 193 Ky. 359.

Tex.—Hunter v. Rice, Civ.App., 190 S.W. 840.

91. *N.Y.*—Balducci v. Strough, 239 N.Y.S. 611, 135 Misc. 346.
44 C.J. p 1201 note 98.

92. *Ariz.*—Allison v. City of Phoenix, 33 P.2d 927, 44 Ariz. 66, 93 A.L.R. 354, followed in 33 P.2d 932, 44 Ariz. 81, and 33 P.2d 933, first case, 33 P.2d 933, 44 Ariz. 82, second case, 44 Ariz. 83.

93. *Ariz.*—Allison v. City of Phoenix, 33 P.2d 927, 44 Ariz. 66, 93

A.L.R. 354, followed in 33 P.2d 932, 44 Ariz. 81, and 33 P.2d 933, first case, 33 P.2d 933, 44 Ariz. 82, second case, 44 Ariz. 83.

94. *Cal.*—Peery v. Los Angeles, 203 P. 992, 187 Cal. 753, 19 A.L.R. 1044.
44 C.J. p 198 note 86 [b].

95. *La.*—Bell v. Shreveport, 53 So. 928, 127 La. 691.

Relates to disposition of bonds

La.—Bell v. Shreveport, supra.

96. *Ky.*—Hunter v. Louisville, 370 S.W. 841, 208 Ky. 326.

97. *Okl.*—Tettleton v. City of Duncan, 198 P.2d 740.

98. *Wash.*—Schooley v. Chehalis, 147 P. 410, 84 Wash. 667.
44 C.J. p 1200 note 91.

99. *W.Va.*—Jarrell v. Board of Education of Raleigh County, 50 S.E. 2d 442—State ex rel. Davenport v. Meadows, 199 S.E. 883, 130 W.Va. 602.

1. *Ariz.*—Cowan v. Tucson, 209 P. 296, 24 Ariz. 330.

2. *Ariz.*—Cowan v. Tucson, supra.

date the bond issue.³ However, the question submitted to the voters should not include an apportionment or subdivision of the total amount of the proceeds of the bond issue into smaller amounts for specific improvements where the power and duty of appropriating and applying the proceeds are conferred by statute on the council rather than the voters;⁴ and, where all the work is incident to one general purpose, rather than separate and independent purposes, it is not necessary to specify the amount of the bonds to be used on each kind of work in making the improvement.⁵

§ 1925. — One or More Propositions

Two or more propositions for the issuance of bonds may be submitted at the same election provided they are so stated as to permit the voters to vote on each proposition separately. Several matters constituting incidents of a single scheme or project may be submitted as one proposition.

Two or more propositions for issuing bonds,⁶ or one proposition for issuing bonds and another proposition for a different object,⁷ may be submitted at the same election, by the same⁸ or different⁹ ordi-

nances, and on a single ballot¹⁰ or separate ballots,¹¹ subject to the limitation that, where the propositions are distinct and unrelated, they shall be so stated and submitted as to afford the voters an opportunity to vote on each proposition separately from the others,¹² or, in other words, subject to the limitation obtaining in most,¹³ although not all,¹⁴ jurisdictions that two or more separate and distinct propositions shall not be combined into one so as to have one expression of the voter answer both or all questions.

Two or more matters may be joined and submitted as one proposition where they are so related and connected with each other as to constitute parts or incidents of one scheme or project.¹⁵ However, the courts are not entirely in accord as to what particular matters may be joined together and submitted as one proposition, and, while it is generally held that the issuance of bonds to purchase or construct a plant may be properly submitted as a single proposition,¹⁶ some courts hold that it is a dual proposition.¹⁷ Also it is held by some courts that the issuance of bonds for a single plant, structure, or fa-

3. *Ariz.*—*Cowan v. Tucson*, *supra*.
44 C.J. p 1200 note 89.

4. *N.J.*—*Brooks v. Sea Isle City*,
Sup., 83 A. 779.

5. *Ark.*—*Rhodes v. City of Stuttgart*,
95 S.W.2d 101, 192 Ark. 822

6. *Ill.*—*Bilek v. City of Chicago*, 71
N.E.2d 789, 396 Ill. 445.

Kan.—*City of Wichita v. Robb*, 179
P.2d 937, 163 Kan. 121.

Va.—*Ennis v. Town of Herndon*, 191
S.E. 685, 168 Va. 539.

44 C.J. p 1201 note 10.

**Separation of single proposition held
not involved**

Ala.—*Kendrick v. City of Birmingham*,
5 So.2d 82, 242 Ala. 112.

7. *Tex.*—*Roberts v. Hall*, *Civ.App.*,
167 S.W.2d 621.

44 C.J. p 1201 note 11.

8. *Idaho.*—*Platt v. Payette*, 114 P.
25, 19 Idaho 470.

44 C.J. p 1201 note 12.

9. *Cal.*—*Oxnard v. Bellah*, 130 P.
701, 21 Cal.App. 33.

44 C.J. p 1201 note 13.

10. *Kan.*—*Kansas Utilities Co. v. City of Paola*, 80 P.2d 1084, 148
Kan. 267.

44 C.J. p 1201 note 14.

Alternatives dependent on federal aid
Election was not vitiated, on ground that ballot presented a dual question, because of the fact that the ballot stated that the project would be completed for an amount not exceeding the bonds voted if federal aid could not be obtained, or for a larger stated amount if federal aid was obtained.—*Drenning v. Board*

of Com'rs of City of Topeka, 81 P.2d
720, 148 Kan. 366, 117 A.L.R. 884.

11. *Ala.*—*Coleman v. Eutaw*, 47 So.
703, 157 Ala. 327.

12. *Kan.*—*Kansas Utilities Co. v. City of Paola*, 80 P.2d 1084, 148
Kan. 267.

Miss.—*In re Validation Bonds, City of Moss Point*, 156 So. 516, 170
Miss. 886.

S.C.—*Waits v. Town of Ninety-Six*,
151 S.E. 576, 154 S.C. 350.

44 C.J. p 1201 note 16.

13. *Cal.*—*City of Monrovia v. Black*,
264 P. 286, 88 Cal.App. 686.

Fla.—*State v. City of Daytona Beach*,
33 So.2d 218.

Miss.—*In re Validation Bonds, City of Moss Point*, 156 So. 516, 170
Miss. 886.

44 C.J. p 1201 note 17.

14. *Ky.*—*Louisville v. Board of Park Comrs.*, 65 S.W. 860, 112 Ky.
409, 24 Ky.L. 38.

W.Va.—*Williamson v. Graham*, 74 S.
E. 393, 113 Va. 449.

15. *Cal.*—*City of Monrovia v. Black*,
264 P. 286, 88 Cal.App. 686.

Fla.—*State v. City of Daytona Beach*,
33 So.2d 218.

Ill.—*Voss v. Chicago Park Dist.*, 64
N.E.2d 731, 392 Ill. 429.

Kan.—*Jaeger v. City of Hillsboro*,
190 P.2d 420, 164 Kan. 588—*Robertson v. Kansas City*, 56 P.2d 1032,
148 Kan. 726—*State v. McCombs*,
284 P. 618, 129 Kan. 834.

Mich.—*Michigan Public Service Co. v. City of Cheboygan*, 37 N.W.2d
116, 324 Mich. 309.

Mo.—*Meyering v. Miller*, 51 S.W.2d
65, 330 Mo. 885.

44 C.J. p 198 note 93 [a] (1), p 1201
note 19—20 C.J. p 149 note 10 [a].

**Purchase of plant and issuance of
bonds**

It is proper to submit to voters as one question matter of purchase of plant and issuance of bonds therefor. —*McDaniel v. Bristol*, 158 S.E. 804,
160 S.C. 408—44 C.J. p 1201 note 11 [a] (1).

Recreational facilities

Purposes of recreational facilities bonds, for city auditorium, for stadium, for boat basin, and for recreational center were so related as to amount to a single purpose, and therefore it was proper to vote on issuance of such bonds as a single issue—*State v. City of Daytona Beach, Fla.*, 33 So 2d 218

16. *N.D.*—*Thomas v. McHugh*, 256
N.W. 763, 65 N.D. 149.

Ohio—*State ex rel. Village of Upper Sandusky v. Snyder*, 194 N.E. 415,
129 Ohio St. 206.

Or.—*Ollilo v. Clatskanie Peoples' Utility Dist.*, 132 P.2d 416, 170 Or.
173.

Tex.—*Texsan Service Co. v. City of Nixon*, *Civ.App.*, 158 S.W.2d 88, error refused.

44 C.J. p 1202 note 21.

17. *Kan.*—*Kansas Utilities Co. v. City of Paola*, 80 P.2d 1084, 148
Kan. 267.

44 C.J. p 1202 note 22.

cility to serve two or more needs,¹⁸ such as water and light,¹⁹ or water and sewerage,²⁰ may be properly submitted and voted on as a single proposition; but other courts hold it improper to submit as one proposition the issuance of bonds for water and light,²¹ or for water and sewerage,²² unless the particular municipality is taken out of the operation of the general rule by a special enactment relating to it.²³ A proposition as to the issuance of bonds to refund other bonds does not become a double proposition merely because it provides for the payment of both principal and interest on the bonds to be refunded.²⁴ It has been held not improper to submit the matter of a general bond issue and a mortgage bond issue at separate elections although both bond issues are for the financing of the same project.²⁵

Failure to submit alternative proposition. Where the authorities have complied with a mandatory provision requiring a submission to the voters of a proposition to issue bonds for the construction of a plant or system, their failure to submit an alternative proposition to acquire an existing plant, as au-

thorized by another provision, does not invalidate the election.²⁶

§ 1926 Notice

Notice of a municipal bond election should comply with statutory requirements prescribing the contents and publication thereof, but an error or irregularity in the contents or publication is not necessarily fatal to the validity of the election.

Proper notice of an election on the question of issuing municipal bonds must be given where the statutes expressly or impliedly provide therefor.²⁷ Such a notice informs the voters that an election will be held²⁸ and that a certain proposition will be voted on at the election;²⁹ but it is not the means by which the election is called,³⁰ and is intended merely to give additional publicity to what has been already determined and announced by the ordinance, resolution, or order calling the election.³¹

The notice of election should contain such particulars as are required by statute³² and must not be misleading or obscure.³³ However, it need not contain statements not required by statute to be included in the notice,³⁴ and sometimes an error,

Phrase "appurtenances thereto," in notice of municipal election for issuance of bonds for erecting electric distributing system, power plant building, and appurtenances thereto for purpose of supplying municipality and its inhabitants with electric light and power, included generating equipment.—*West Missouri Power Co. v. City of Washington, Kan.*, C.C. A.Kan., 80 F.2d 420, certiorari denied 56 S.Ct. 834, 298 U.S. 668, 80 L. Ed. 1392.

33. Kan.—*Eastern Kan. Utilities v. City of Paola*, 196 P.2d 199, 165 Kan. 658—*City of Coffeyville v. Robb*, 194 P.2d 475, 165 Kan. 219. Wyo.—*Anselmi v. City of Rock Springs*, 80 P.2d 419, 53 Wyo. 223, 116 A.L.R. 1250.

34. Ky.—*Corpus Juris* cited in *Mollette v. Board of Education of Van Lear Graded Dist.*, 86 S.W.2d 990, 993, 260 Ky. 737.

Mo.—*State ex rel. City of Springfield v. Smith*, 125 S.W.2d 883, 344 Mo. 150.

Mont.—*Commonwealth Public Service Co. of Montana v. City of Deer Lodge*, 29 P.2d 667, 96 Mont. 43. 44 C.J. p 1203 note 35.

Matters not required to be stated

(1) Details of an offer of federal aid in the construction of a proposed utility.—*Michigan Gas & Electric Co. v. City of Dowagiac*, 270 N.W. 772, 278 Mich. 522.

(2) Full details as to the terms of the bonds.—*McDaniel v. Bristol*, 153 S.E. 804, 160 S.C. 403.

18. Ark.—*Shull v. City of Texarkana*, 2 S.W.2d 18, 176 Ark. 162. Cal.—*Cary v. Blodgett*, 102 P. 668, 10 Cal.App. 463.

19. Mo.—*State v. Wilder*, 98 S.W. 465, 200 Mo. 97.

44 C.J. p 1202 note 24.

20. La.—*Humphreys v. City of Jennings*, 171 So. 41, 185 La. 814.

S.C.—*Watts v. Town of Ninety-Six*, 151 S.E. 576, 154 S.C. 350.

21. N.D.—*Stern v. Fargo*, 122 N.W. 403, 18 N.D. 289, 26 L.R.A.N.S., 665.

S.C.—*State v. Brasington*, 76 S.E. 1086, 93 S.C. 447.

22. N.M.—*Lanigan v. Gallup*, 181 P. 997, 17 N.M. 627.

44 C.J. p 1202 note 26.

23. S.C.—*Lucas v. Barringer*, 112 S.E. 746, 120 S.C. 68.

24. Ala.—*Kendrick v. City of Birmingham*, 5 So.2d 82, 242 Ala. 112.

25. Mich.—*Consumers' Power Co. v. City of Allegan*, 226 N.W. 680, 248 Mich. 34.

26. U.S.—*Wheeler v. Denver, Colo.*, 231 F. 8, 145 C.C.A. 196, appeal dismissed 38 S.Ct. 10, 245 U.S. 626, 62 L.Ed. 518.

27. Conn.—*Pollard v. City of Norwalk*, 142 A. 807, 108 Conn. 145.

Kan.—*City of Wichita v. Robb*, 179 P.2d 937, 163 Kan. 121.

Ky.—*Douthitt v. Board of Trustees of Newcastle*, 40 S.W.2d 335, 239 Ky. 751.

N.M.—*Mann v. City of Artesia*, 76 P. 2d 941, 42 N.M. 224.

28. N.D.—*Stern v. Fargo*, 122 N.W. 403, 18 N.D. 289, 26 L.R.A.N.S., 665.

29. Tex.—*Amarillo v. Slayton*, Civ. App., 208 S.W. 967.

30. Kan.—*Perry v. Davis*, 154 P. 1127, 97 Kan. 369.

Calling of election see *supra* § 1922.

31. Kan.—*Perry v. Davis*, 154 P. 1127, 97 Kan. 369.

32. Ga.—*Allen v. City of Atlanta*, 142 S.E. 262, 166 Ga. 28—*Farmer v. Town of Thomson*, 65 S.E. 180, 133 Ga. 94.

Ky.—*Milton v. City of Lawrenceburg*, 129 S.W.2d 583, 278 Ky. 741.

N.M.—*Mann v. City of Artesia*, 76 P. 2d 941, 42 N.M. 224.

44 C.J. p 1203 note 33.

Notices held sufficient

(1) Generally.

Ill.—*Bilek v. City of Chicago*, 71 N.E.2d 789, 396 Ill. 445.

La.—*Stovall v. City of Monroe*, 5 So. 2d 547, 199 La. 195—*Henning v. Town of Sulphur*, 186 So. 345, 191 La. 979.

N.D.—*Lang v. City of Cavalier*, 228 N.W. 819, 59 N.D. 75.

Tex.—*Cameron v. City of Waco*, Civ. App., 8 S.W.2d 249.

44 C.J. p 1203 note 33 [1], [3].

(2) To state sufficiently the object of the bond issue.—*Cameron v. City of Waco*, Tex.Civ.App., 8 S.W.2d 249.

(3) With respect to statement of interest which bonds should bear.—*Cameron v. City of Waco*, *supra*.

omission, or irregularity in the contents of the notice³⁵ or a signature³⁶ is not fatal, as where the ordinance calling the election covered all the details required to be stated in the notice,³⁷ the informality or irregularity did not violate any specific provision of the statute,³⁸ the legal voters of the municipality had notice that the election was to be held,³⁹ the voters were not misled or deceived,⁴⁰ denied, or deprived of, the right to vote,⁴¹ or no voter failed to vote because of lack of knowledge or notice of the election,⁴² or the result of the election would not have been changed if the law had been followed with literal exactness.⁴³

Statutes as mandatory or directory. Some statutory provisions relating to notice of the election have been construed to be mandatory rather than directory.⁴⁴ However, other provisions,⁴⁵ such as provisions which do not lay down a specific mandate but merely direct the manner in which notice may be given,⁴⁶ have been held to be directory; and, where the statute is merely directory, any method of giving notice of the election which may reasonably be held to have served the purpose for which

the notice was intended is sufficient, provided the manner, method, and time are not such as to affect the fairness of the election.⁴⁷ The construction of statutes relating to notice of a bond election as mandatory or directory is sometimes affected by whether the question is raised before or after the election,⁴⁸ it being held that the statutory directions are mandatory on the officers charged with the duty of calling the election, and will be upheld strictly in a direct action instituted before an election,⁴⁹ whereas, after the election has been held, such statutory requirements are directory unless it appears that the failure to give notice for the full time specified by the statute has prevented electors from giving a full and free expression of their will at the election,⁵⁰ or unless the statute contains a further provision, the necessary effect of which is that failure to give notice for the statutory time will render the election void.⁵¹

Publication, posting, or advertisement. While the notice of election must be published as required by law,⁵² an error, omission, or irregularity in the pub-

(3) Whether there was to be a purchase of a plant already constructed, or a construction of a new plant by the municipality.—Mississippi Power & Light Co. v. Town of Batesville, 193 So. 814, 187 Miss. 737.

35. Ala.—Browder v. Gunter, 125 So. 646, 220 Ala. 407.

Fla.—Town of Baldwin v. State, 40 So.2d 348.

Kan.—City of Coffeyville v. Robb, 194 P.2d 475, 165 Kan. 219.

La.—Miller v. Town of Bernice, 173 So. 192, 186 La. 742.

Minn.—Wester v. Village of Albany, 299 N.W. 214, 210 Minn. 553.

N.D.—Lang v. City of Cavalier, 228 N.W. 819, 59 N.D. 75.

Ohio.—Conley v. City of New Boston, Com.Pl., 11 Ohio Supp. 91.

44 C.J. p 1204 note 37.

36. U.S.—West Missouri Power Co. v. City of Washington, Kan., C.C.A. Kan., 80 F.2d 420, certiorari denied 56 S.Ct. 834, 298 U.S. 668, 80 L.Ed. 1392.

Kan.—Kansas Power Co. v. City of Washington, 67 P.2d 1095, 145 Kan. 962.

44 C.J. p 1204 note 38.

37. Kan.—Perry v. Davis, 154 P. 1127, 97 Kan. 369.

38. La.—State v. Board of Liquidation, 112 So. 894, 163 La. 843.

39. Okl.—Ruth v. Oklahoma City, 287 P. 406, 143 Okl. 62, 266.

Wash.—Loop v. McCracken, 274 P. 793, 151 Wash. 19.

44 C.J. p 1204 note 43.

40. Kan.—City of Coffeyville v. Robb, 194 P.2d 475, 165 Kan. 219.

Minn.—Wester v. Village of Albany, 299 N.W. 214, 210 Minn. 553.

Ohio.—Conley v. City of New Boston, Com.Pl., 11 Ohio Supp. 91.

44 C.J. p 1204 note 44.

Variances from petition of freeholders

S.C.—Green v. City of Rock Hill, 147 S.E. 346, 149 S.C. 234.

41. La.—State v. Board of Liquidation, 112 So. 894, 163 La. 843.

Ohio.—Cincinnati v. Puchta, 115 N.E. 278, 94 Ohio St. 431.

Size of vote cast can be considered in determining whether the notice given was sufficient.—Stuessy v. City of Louisville, 161 S.W. 564, 156 Ky. 523.

42. Okl.—Ardmore v. State, 104 P. 913, 24 Okl. 862.

43. Ala.—Browder v. Gunter, 125 So. 646, 220 Ala. 407.

Fla.—Town of Baldwin v. State, 40 So.2d 348.

Ohio.—Conley v. City of New Boston, Com.Pl., 11 Ohio Supp. 91.

44 C.J. p 1204 note 47.

44. Kan.—City of Wichita v. Robb, 179 P.2d 937, 163 Kan. 121.

Ky.—Milton v. City of Lawrenceburg, 129 S.W.2d 583, 278 Ky. 741.

44 C.J. p 1203 note 33 [b].

45. Ohio.—State v. Eggers, 166 N.E. 386, 31 Ohio App. 131.

44 C.J. p 1204 note 40.

Posting on schoolhouse doors

Kan.—Drum v. French, 25 P.2d 579, 138 Kan. 277.

46. S.C.—Phillips v. City of Rock-

hill, 198 S.E. 604, 188 S.C. 140, 119 A.L.R. 656.

47. S.C.—Phillips v. City of Rockhill, supra.

48. Cal.—City of Tulalake v. Roath, 107 P.2d 277, 41 Cal.App.2d 522.

49. Cal.—City of Tulalake v. Roath, 107 P.2d 277, 41 Cal.App.2d 522.

50. Cal.—City of Tulalake v. Roath, supra.

51. Cal.—City of Tulalake v. Roath, supra.

52. Ark.—Connerly v. Stephenson, 28 S.W.2d 60, 29 S.W.2d 276, 181 Ark 833.

Ga.—Allen v. City of Atlanta, 142 S. E. 262, 166 Ga. 28—Farmer v. Town of Thomson, 65 S.E. 180, 133 Ga. 94.

Ky.—Douthitt v. Board of Trustees of Newcastle, 40 S.W.2d 335, 239 Ky. 751.

Mo.—State ex rel. City of Springfield v. Smith, 125 S.W.2d 883, 344 Mo. 150.

Ohio.—Mehling v. Moorehead, 14 N.E. 2d 15, 133 Ohio St. 395.

44 C.J. p 1203 note 34.

Publication held sufficient

Ariz.—McLoughlin v. City of Prescott, 6 P.2d 50, 39 Ariz. 286.

Del.—Eastern Shore Public Service Co. v. Town of Seaford, 187 A. 115, 21 Del.Ch. 214.

La.—Stovall v. City of Monroe, 5 So. 2d 547, 199 La. 195—State ex rel. O'Keefe v. Board of Liquidation, City Debt, 112 So. 894, 163 La. 843.

Miss.—Mississippi Power & Light Co. v. Town of Batesville, 193 So. 814, 187 Miss. 737.

lication is not necessarily fatal.⁵³ Ordinarily the same form of notice should be given in each of several successive publications,⁵⁴ but an election has been held not invalidated by a change in the form of the notice where such change did not affect its purport or withhold information required to be published, and could not have caused any one to be deceived.⁵⁵ The election need not be advertised by the sheriff when not so required by statute.⁵⁶ The general nature of the election may be presumed to have been made known to the voters by the advertisement required by statute.⁵⁷

Where the notice of the election was not published until after the ordinance calling the election took effect, the fact that it was prepared, signed, and dated prior to that time is immaterial.⁵⁸ Also, where the ordinance takes effect on publication, the notice is not impaired by the fact that it and the ordinance are published simultaneously;⁵⁹ and it has been held that a notice of election posted as required by law is not rendered less effective by a slight irregularity in publishing the resolution ordering the election prior to its approval by the mayor.⁶⁰ Where the statutes do not provide for the giving of any notice of the election, the fact that the notice required by the ordinance providing for the submission of the question of the bond issue was not complied with has been held not to invalidate the election, the ordinance itself having been published for a sufficient length of time before the election.⁶¹

Analogy to town meeting. With respect to the notice required to be given of a meeting for a city election at which the question of a bond issue was voted on, it has been held that the meetings of cities and boroughs authorized by special charter provision are the direct successors of the town meeting, and are governed by the same law.⁶²

§ 1927. Vote Required, and Qualifications of Voters

- a. Vote required
- b. Qualifications of voters

a. Vote Required

It is necessary and sufficient that a proposition as to the issuance of municipal bonds receive the approval of the required proportion of those voting. In the absence of a provision requiring a specified number or proportion of the eligible voters to participate in the election, the fact that only a small number of voters participated is immaterial.

In order that the issuance of municipal bonds may be authorized by popular vote, it is necessary⁶³ and sufficient⁶⁴ that the proposition receive the proportion of votes required by constitutional, statutory, or charter provision. Ordinarily, and in the absence of any constitutional or statutory provision requiring a greater proportion, a majority vote is sufficient.⁶⁵ Under some provisions, however, a two-thirds vote is necessary,⁶⁶ unless a different proportion is prescribed by charter provisions or

Ohio.—Conley v. City of New Boston, Com.Pl., 11 Ohio Supp. 91.

S.C.—Phillips v. City of Rock Hill, 198 S.E. 604, 188 S.C. 140, 119 A. L.R. 656.

44 C.J. p 1203 note 34 [d].

53. Ga.—Scott v. Town of McIntyre, 19 S.E.2d 49, 66 Ga.App. 640.

Kan.—City of Aurora v. French, 268 P. 93, 126 Kan. 393.

La.—State ex rel. O'Keefe v. Board of Liquidation, City Debt, 112 So. 894, 163 La. 843.

44 C.J. p 1204 note 39.

54. La.—State ex rel. O'Keefe v. Board of Liquidation, City Debt, supra.

55. La.—State ex rel. O'Keefe v. Board of Liquidation, City Debt, supra.

56. Ky.—Wilkerson v. Lexington, 222 S.W. 74, 188 Ky. 381.

57. Ala.—Tommie v. City of Gadsden, 158 So. 763, 229 Ala. 521—Salter v. City of Anniston, 124 So. 663, 220 Ala. 199.

58. Kan.—C. W. Smith Electric, etc., Co., v. Larned, 149 P. 704, 96 Kan. 34.

59. Kan.—State v. Clay Center, 91 P. 91, 76 Kan. 386.

60. Minn.—Backus v. Virginia, 142 N.W. 1042, 123 Minn. 48.

61. Ky.—Stuessy v. City of Louisville, 161 S.W. 564, 156 Ky. 523.

62. Conn.—Pollard v. City of Norwalk, 142 A. 807, 108 Conn. 145.

63. Ala.—Fuller v. Knight, 2 So.2d 605, 241 Ala. 257.

Iowa.—Hutchins v. City of Des Moines, 157 N.W. 881, 176 Iowa 189.

N.M.—Varney v. City of Albuquerque, 55 P.2d 40, 40 N.M. 90, 106 A. L.R. 222.

N.C.—Adcock v. Town of Fuquay Springs, 140 S.E. 24, 194 N.C. 423.

Vt.—E. B. & A. C. Whiting Co. v. City of Burlington, 175 A. 35, 106 Vt. 446.

Wash.—Union High School Dist. No. 1, Skagit County v. Taxpayers of Union High School Dist. No. 1 of Skagit County, 173 P.2d 591, 26 Wash.2d 1—Robb v. City of Tacoma, 28 P.2d 327, 175 Wash. 580, 91 A.L.R. 1010.

44 C.J. p 1204 note 51.

Proportion dependent on purpose or nature of bonds

Proportion required sometimes varies in the same jurisdiction or as to the same municipality, according to the purpose or nature of the bonds to be issued.—Lake Superior District Power Co. v. City of Bessemer, 285 N.W. 20, 283 Mich. 455—44 C.J. p 1204 note 51 [a] (1).

64. Neb.—State v. Johnson, 220 N. W. 273, 117 Neb. 301.

Tex.—Lucchese v. Mauermann, Civ. App., 195 S.W.2d 422, certiorari denied 67 S.Ct. 633, 329 U.S. 812, 91 L.Ed. 693.

65. Neb.—State v. Johnson, 220 N. W. 273, 117 Neb. 301.

N.D.—Tracy v. Barnes County, 289 N.W. 377, 69 N.D. 602.

Tex.—Lucchese v. Mauermann, Civ. App., 195 S.W.2d 422, certiorari denied 67 S.Ct. 633, 329 U.S. 812, 91 L.Ed. 693.

66. N.M.—Varney v. City of Albuquerque, 55 P.2d 40, 40 N.M. 90, 106 A.L.R. 222.

Vt.—E. B. & A. C. Whiting Co. v. City of Burlington, 175 A. 35, 106 Vt. 446.

special act of the legislature,⁶⁷ the purpose of such a statute being to make it more difficult for municipal corporations to pay for public improvements by the issuance of bonds.⁶⁸ A constitutional provision fixing a minimum requirement with respect to the number of votes necessary to authorize the issuance of bonds by a municipality does not prevent the legislature from imposing other or additional requirements.⁶⁹

It is generally held that a proposition to issue bonds is carried or adopted when it receives the required proportion of the votes actually cast on the proposition or at the election, where the election is held on this matter alone,⁷⁰ and that it is not necessary for the proposition to receive the assent of a specified proportion of all persons in the municipality entitled to vote⁷¹ or of all the persons voting at the election, where other measures or officers are voted for at the same election;⁷² but a few statutes are construed to require the assent of a majority of all the electors entitled to vote⁷³ or to require a majority of the votes cast at the election, where officers or other measures are voted on at the same election,⁷⁴ and under some statutes or charters, where several propositions to issue municipal bonds are submitted at the same election, it is necessary to the adoption of any one proposition

that it receive two thirds of the votes cast on the proposition on which the highest number of votes was cast.⁷⁵

In ascertaining the total number of votes cast on a proposition to issue municipal bonds it is proper and necessary to count the legal and intelligible ballots found in the ballot box at the close of the polls,⁷⁶ and to disregard ballots which are blank,⁷⁷ or unintelligible,⁷⁸ or which bear distinguishing marks,⁷⁹ or which are for any reason illegal.⁸⁰ However, in the absence of fraud,⁸¹ the reception and counting of some illegal votes does not invalidate the election in the absence of a showing that the result of the election was affected or changed thereby.⁸²

Number of voters required to participate in election. In the absence of a provision to the contrary, the election is not invalidated by the fact that the usual number of voters did not appear and vote at the election⁸³ or by the fact that only a small per cent of the qualified voters participated,⁸⁴ where all the qualified voters had notice and an opportunity to vote. Under some constitutional or statutory provisions, however, the election on a bond issue must be participated in by a prescribed number or proportion of the voters of the municipality,⁸⁵ such as

67. Vt.—E. B. & A. C. Whiting Co. v. City of Burlington, *supra*.

Silence of charter and special act

Where the charter of the municipality and a special act relating to the issuance of bonds were silent on the proportion of votes necessary, a two-thirds vote was required under the statute.—E. B. & A. C. Whiting Co. v. City of Burlington, *supra*.

68. Vt.—E. B. & A. C. Whiting Co. v. City of Burlington, *supra*.

69. N.M.—Varney v. City of Albuquerque, 55 P.2d 40, 40 N.M. 90, 106 A.L.R. 222.

Wash.—Union High School Dist. No. 1, Skagit County, v. Taxpayers of Union High School Dist. No. 1 of Skagit County, 172 P.2d 591, 26 Wash.2d 1—Robb v. City of Tacoma, 28 P.2d 327, 175 Wash. 580, 91 A.L.R. 1010.

70. Alaska.—Howard v. City of Seaward, 11 Alaska 527.

Ark.—City of El Dorado v. Jacobs, 294 S.W. 411, 174 Ark. 98.

Ga.—McKnight v. City of Decatur, 37 S.E.2d 915, 200 Ga. 611.

La.—Dresser v. Recreation & Park Commission of Parish of East Baton Rouge, 34 So.2d 384, 213 La. 85.

Miss.—In re Validation of Municipal Bonds of Natchez, 196 So. 258, 188 Miss. 817.

Mo.—State ex rel. City of Sikeston v. Thompson, 31 S.W.2d 49.

Mont.—Commonwealth Public Service Co. of Montana v. City of Deer Lodge, 29 P.2d 667, 96 Mont. 48.

N.H.—In re Opinion of the Justices, 171 A. 443, 86 N.H. 604.

44 C.J. p 1204 note 52, p 1205 note 53.

71. Alaska.—Howard v. City of Seaward, 11 Alaska 527.

Ark.—City of El Dorado v. Jacobs, 294 S.W. 411, 174 Ark. 98.

Ga.—McKnight v. City of Decatur, 37 S.E.2d 915, 200 Ga. 611.

La.—Dresser v. Recreation and Park Commission of Parish of East Baton Rouge, 34 So.2d 384, 213 La. 85.

Miss.—In re Validation of Municipal Bonds of Natchez, 196 So. 258, 188 Miss. 817.

44 C.J. p 1205 note 54.

72. Cal.—City of Sacramento v. Goddard, 252 P. 329, 200 Cal. 143

44 C.J. p 1205 note 55.

73. N.C.—Surles v. Grady, 199 S.E. 79, 214 N.C. 305.

44 C.J. p 1205 note 56.

74. Neb.—Bryan v. Lincoln, 70 N.W. 252, 50 Neb. 620, 35 L.R.A. 752.

44 C.J. p 1205 note 57.

75. Cal.—Law v. San Francisco, 77 P. 1014, 144 Cal. 384.

44 C.J. p 1205 note 58.

76. Kan.—State v. Topeka, 74 P. 647, 68 Kan. 177.

77. Minn.—Powers v. Chisholm, 178 N.W. 607, 146 Minn. 308.

44 C.J. p 1205 note 60.

78. Ohio.—Wellsville v. Connor, 109 N.E. 526, 91 Ohio St. 28.

Wash.—State v. Clausen, 130 P. 479, 72 Wash. 409, 45 L.R.A.N.S., 714.

79. Cal.—Inglewood v. Kew, 132 P. 780, 21 Cal.App. 611.

Mich.—Wightman v. Tecumseh, 122 N.W. 122, 157 Mich. 326.

80. Fla.—Port of Palm Beach Dist. v. State, 22 So.2d 581, 156 Fla. 99.

Wash.—State v. Clausen, 130 P. 479, 72 Wash. 409, 45 L.R.A.N.S., 714.

81. N.D.—Kerlin v. Devils Lake, 141 N.W. 756, 25 N.D. 207, Ann.Cas. 1915C 624.

82. Tex.—DuBose v. Ainsworth, Civ App., 139 S.W.2d 307, error dismissed.

44 C.J. p 1205 note 65.

83. Ark.—City of El Dorado v. Jacobs, 294 S.W. 411, 174 Ark. 98.

84. Tex.—Lamm v. Chambers, Civ. App., 18 S.W.2d 212.

85. Fla.—State v. City of Miami Beach, 23 So.2d 720, 156 Fla. 546.

Wash.—Carey v. Port of Seattle, 179 P.2d 501.

a majority of the freeholders who are qualified electors,⁸⁶ or a majority of the total number of voters who voted at a previous election,⁸⁷ such as the general county or state election next preceding the bond election.⁸⁸

b. Qualifications of Voters

- (1) In general
- (2) Taxpayers or property owners

(1) In General

The qualifications of the voters at a municipal bond election, as, for example, with respect to residence, sex, or registration, are such as are prescribed by constitutional, statutory, or charter provisions.

The qualifications of voters at an election on the question of issuing municipal bonds are such as may be prescribed by constitutional, statutory, or charter provisions,⁸⁹ and, in determining such qualifications, in some jurisdictions a special or local law prevails over an inconsistent general law.⁹⁰ Such provisions are sometimes regarded as of the substance of the election,⁹¹ and an election participated in by persons not entitled to vote may be inef-

fective;⁹² but the participation of disqualified persons in the election does not render it void where their votes do not affect the result,⁹³ and the unconstitutionality of charter provisions pertaining to the qualifications of voters has been held not to invalidate an election where a majority of the qualified voters participated in the election and there was no suggestion of fraud or any showing that any qualified voter was deceived or prevented from voting because of such provisions.⁹⁴ In a jurisdiction in which no particular method of determining the qualifications of the voters is prescribed or prohibited, the determination of the judges of election of the qualifications of a voter may be final and conclusive.⁹⁵

Under some constitutional or statutory provisions the right to vote in bond elections is limited to residents of the municipality,⁹⁶ and nonresidents may not vote even though they own property in the municipality⁹⁷ which will be subject to an additional tax because of the proposed improvement.⁹⁸ Women may be entitled to vote at a municipal bond election,⁹⁹ at least where they own property or pay

88. Fla.—*State v. City of Miami Beach*, 23 So.2d 720, 156 Fla. 546—*State v. City of Miami Beach*, 18 So.2d 785, 154 Fla. 748.

Majority participation in part of election

(1) Where several series of bonds are submitted for approval, and a majority of the qualified electors participate in the vote on some of the series, a vote on the other series is valid even though less than a majority participate in the vote on that series.—*State v. City of Miami Beach*, 18 So.2d 785, 154 Fla. 748.

(2) However, where a bond election is held simultaneously with an election of candidates to office, a voter who indicates a choice only of candidates signifies an intention not to participate in the election with reference to bonds.—*State v. City of Miami Beach*, 23 So.2d 720, 156 Fla. 546.

87. Iowa.—*Hutchins v. City of Des Moines*, 157 N.W. 881, 176 Iowa 189.

88. Wash.—*Carey v. Port of Seattle*, 179 P.2d 501—*Union High School Dist. No. 1, Skagit County v. Taxpayers of Union High School Dist. No. 1 of Skagit County*, 172 P.2d 591, 26 Wash.2d 1—*Robb v. City of Tacoma*, 28 P.2d 327, 175 Wash. 580, 91 A.L.R. 1010.

What constitutes general county or state election

(1) The general county or state election next preceding the bond election refers to the general election held biennially for county or state

officers.—*Carey v. Port of Seattle*, Wash., 179 P.2d 501.

(2) An election called for the purpose of voting on the repeal of an amendment to the federal Constitution was a special election, and not a general state or county election, and hence was not to be considered as the basis of determining whether a sufficient number of persons voted at a municipal bond election.—*Robb v. City of Tacoma*, 28 P.2d 327, 175 Wash. 580, 91 A.L.R. 1010.

89. Ga.—*Mays v. City of Jackson*, 94 S.E. 1006, 147 Ga. 556.

Mich.—*Huron-Clinton Metropolitan Authority v. Boards of Sup'rs of Wayne, Washtenaw, Livingston, Oakland and Macomb Counties*, 1 N.W.2d 430, 300 Mich. 1.

Tex.—*Cameron v. Connally*, 299 S. W. 221, 117 Tex. 159.

44 C.J. p 1205 note 66.

"Electors" or "legal voters"

Ill.—*Bilek v. City of Chicago*, 71 N. E.2d 789, 396 Ill. 445.

90. Fla.—*State ex rel. Davis v. Ryan*, 158 So. 62, 118 Fla. 42, *State ex rel. Ake v. Broward County Port Authority*, 158 So. 62, 118 Fla. 42.

91. Okl.—*Hughes v. Sapulpa*, 182 P. 511, 75 Okl. 149.

92. Tex.—*City of Houston v. McCraw*, 113 S.W.2d 1215, 131 Tex. 127.

93. Okl.—*Reid v. City of Muskogee*, 278 P. 339, 137 Okl. 44.

44 C.J. p 1205 note 68.

94. Fla.—*Town of Baldwin v. State*, 40 So.2d 348.

95. Mo.—*State ex rel. Webster Groves Sanitary Sewer Dist. v. Smith*, 115 S.W.2d 816, 342 Mo. 365.

96. Mo.—*State ex rel. Webster Groves Sanitary Sewer Dist. v. Smith*, supra.

Tenn.—*Clay v. Buchanan*, 36 S.W.2d 91, 162 Tenn. 204.

44 C.J. p 1205 note 66 [a] (2).

Void annexation of towns

Voters residing in towns annexed to city by ordinances adjudged void by court were properly not permitted to vote in city bond election.—*Lucchese v. Mauermann*, 195 S.W.2d 422, certiorari denied 67 S.Ct. 633, 329 U.S. 812, 91 L.Ed. 693.

97. Tenn.—*Clay v. Buchanan*, 36 S. W.2d 91, 162 Tenn. 204.

98. Ark.—*McKenzie v. City of De Witt*, 121 S.W.2d 71, 196 Ark. 1115.

99. Ga.—*Brown v. Atlanta*, 109 S. E. 666, 152 Ga. 283.

Iowa.—*Sears v. Maquoketa*, 166 N. W. 700, 183 Iowa 1104.

Votes not counted

The votes of women were not counted in determining whether the proposition had received the required number of votes where, under the statute, for the proposition to carry it was required to receive a vote larger than one half of the votes at the last preceding municipal election and only men were entitled to vote at such preceding election.—*Sears v. Maquoketa*, 166 N.W. 700,

taxes in the municipality.¹

Registration is sometimes,² although not always,³ required. An irregularity in the registration is not necessarily fatal,⁴ nor is the election necessarily invalidated by the fact that the books of registration were opened prior to the time specified by statute for the opening of such books.⁵ Under some provisions the eligibility of the voters should be determined as of the date of the election, and not as of the date of the closing of the registration books.⁶ Timely revision of such registration may be made under statutes providing therefor.⁷

(2) Taxpayers or Property Owners

In some jurisdictions only property owners or taxpayers are eligible to vote in a municipal bond election; but the property necessary to qualify a voter, under some provisions, may be either real or personal.

Under some provisions the only persons entitled to vote at a bond election are property taxpayers⁸ or the owners of taxable property in the municipality;⁹ but under other provisions the required number of votes of general electors is sufficient, and it is not necessary that a prescribed proportion of property-qualified electors vote in favor of the proposition.¹⁰ A charter provision limiting the persons qualified to vote in the election to those shown to be taxpayers by the tax rolls, thus excluding those who in fact pay taxes on property in the municipi-

pality but are not so shown, is invalid where it is in conflict with constitutional provisions giving the right to vote to all taxpayers, whether or not shown on the tax rolls;¹¹ and the absence of a person's name from a list of persons owning taxable property duly rendered for taxation does not establish the disqualification of such person where it appears that the list is incomplete.¹² A constitutional provision limiting the voting to property taxpayers in the case of bond issues to be paid out of special taxes does not invalidate a statute permitting persons other than property taxpayers to vote on bonds which are not to be paid out of a special tax;¹³ and thus such persons may vote on bonds which are to be secured exclusively by a mortgage on the property and equipment of a public utility to be constructed, extended, and improved, and by a pledge of the income and revenues from the utility.¹⁴

Property as real or personal. Under some provisions the property necessary to qualify a person as an elector may be either real or personal;¹⁵ but under other provisions the right to vote is confined to real property owners,¹⁶ or to real property taxpayers,¹⁷ that is, persons subject to taxation on realty and regularly paying taxes thereon.¹⁸

Rendition of property. Under some constitutional provisions only electors owning property which has been duly rendered for taxation in the municipi-

183 Iowa 1104—44 C.J. p 1205 note 71

1. N.M.—*Baca v. Belen*, 240 P. 803, 30 N.M. 541.

N.Y.—*Ward v. Kropf*, 120 N.Y.S. 476, affirmed as far as appealed from 127 N.Y.S. 1148, 143 App.Div. 919, affirmed 101 N.E. 469, 207 N.Y. 467.

2. Ga.—*Mays v. City of Jackson*, 94 S.E. 1006, 147 Ga. 556.

Mont.—*Weber v. City of Helena*, 297 P. 455, 89 Mont. 109.

44 C.J. p 1205 note 72.

3. N.D.—*Kerlin v. Devils Lake*, 141 N.W. 756, 25 N.D. 207, Ann.Cas. 1915C 624.

4. N.C.—*Hardee v. Henderson*, 87 S.E. 498, 170 N.C. 572.

44 C.J. p 1206 note 74.

5. S.C.—*Phillips v. City of Rock Hill*, 198 S.E. 604, 188 S.C. 140, 119 A.L.R. 656.

6. Fla.—*Holmer v. State ex rel. Stewart*, 28 So.2d 586, 158 Fla. 397.

7. Mo.—*Dysart v. City of St. Louis*, 11 S.W.2d 1045, 321 Mo. 514, 62 A.L.R. 762.

Necessity of revision

Revision of registration is not required for submission of a bond issue at a regular primary election where the statutes require such re-

vision only in the case of a special election.—*Dysart v. City of St. Louis*, supra.

8. La.—*Dresser v. Recreation and Park Commission of Parish of East Baton Rouge*, 34 So.2d 384, 213 La. 85.

Tex.—*City of Houston v. McCraw*, 113 S.W.2d 1215, 131 Tex. 127.

44 C.J. p 1205 note 66 [a].

Annexation of property after tax payment

Voters owning real estate in city on which they had paid ad valorem taxes, for which they held legal tax receipts, were qualified property tax-paying voters at a bond election, although the real estate had been annexed to the city since the last tax paying period and since the last tax payment.—*Tuttleton v. City of Duncan*, Okl., 198 P.2d 740.

9. Okl.—*City of Richmond v. Allred*, 71 S.W.2d 233, 123 Tex. 365.

Conveyance prior to election

Where voter before election deeded her realty to her son without any reservation or claims or equities, except alleged parol understanding that she should have the privilege of occupying the realty in the future, and the son rendered and paid taxes at all times thereafter, her vote at election with respect to revenue

bonds was illegal.—*Sewell v. Chambers*, Tex.Civ.App., 209 S.W.2d 363.

10. Mich.—*Michigan Gas & Electric Co. v. City of Dowagiac*, 270 N.W. 772, 278 Mich. 522.

11. Tex.—*Cameron v. Connally*, 299 S.W. 231, 117 Tex. 159.

12. Tex.—*Luechese v. Mauermann*, Civ.App., 195 S.W.2d 422, certiorari denied 67 S.Ct. 633, 329 U.S. 812, 91 L.Ed. 693.

13. La.—*McCann v. Morgan City*, 139 So. 481, 173 La. 1063.

14. La.—*McCann v. Morgan City*, supra.

15. Tex.—*Texas Public Utilities Corporation v. Holland*, Civ.App., 123 S.W.2d 1028, error dismissed.

16. Mo.—*State ex rel. Webster Groves Sanitary Sewer Dist. v. Smith*, 115 S.W.2d 816, 342 Mo. 365.

17. Ariz.—*Morgan v. Beard of Sup'rs*, 192 P.2d 236, 67 Ariz. 133 —*Allison v. City of Phoenix*, 33 P.2d 927, 44 Ariz. 66, 93 A.L.R. 354, followed in 33 P.2d 932, 44 Ariz. 81 and 33 P.2d 933, first case, 33 P.2d 933, 44 Ariz. 82, second case, 44 Ariz. 83.

18. Ariz.—*Morgan v. Board of Sup'rs*, 192 P.2d 236, 67 Ariz. 133.

pality are qualified to vote in municipal bond elections,¹⁹ in which case only those who own taxable property and have in due manner given an account of the property or surrendered it for taxation may vote.²⁰ It is sufficient, however, if the elector's property was placed on the assessment rolls in his name by the assessor,²¹ and it is not necessary that the property be rendered in person by the elector or by his agent.²² The amount of property rendered, or the motive prompting the voter to render his property, is immaterial in determining whether he is eligible to vote.²³

Absence of previous provisions for taxes. It has been held that an election is not invalidated by the fact that the voters had not rendered their property for taxes where the only reason they had not done so was that there were no taxes to pay, the municipality never having levied an ad valorem tax;²⁴ but it has also been held, under a statute requiring the issuance of bonds to be ratified by a majority of electors who paid taxes on their property for the preceding year, that a valid election cannot be held if no provision has been made in the preceding year for the levy and assessment of taxes.²⁵

Payment of poll tax. Under some constitutional

and statutory provisions, only those who pay a city poll tax may vote on the question of the issuance of bonds.²⁶

§ 1928. Conduct and Record

- a. In general
- b. Officers
- c. Time
- d. Place

a. In General

An election on a municipal bond issue should be conducted as prescribed by statute, although mere informalities or irregularities not affecting the result are not necessarily fatal. The use of voting machines or secret ballots is proper.

An election on the question of issuing municipal bonds should be conducted in the manner prescribed by statute,²⁷ and an election is legal where it is held and conducted,²⁸ the returns are canvassed,²⁹ and the result declared³⁰ in compliance with statutes. However, an election conducted under the wrong statutes is not validated by the fact that the municipality proceeded in good faith, and in the belief that other statutory provisions were controlling,³¹ or by the fact that no fraud is shown and no proof adduced that a different result would have

19. Tex.—Markowsky v. Newman, 136 S.W.2d 808, 134 Tex. 440, answers to certified questions conformed to, Civ.App., 138 S.W.2d 896—DuBose v. Ainsworth, Civ. App., 139 S.W.2d 307, error dismissed.

Purpose of provision

Tex.—Hanson v. Jordan, 198 S.W.2d 262, 145 Tex. 320—Markowsky v. Newman, 136 S.W.2d 808, 134 Tex. 440, answers to certified questions conformed to, Civ.App., 138 S.W.2d 896.

20. Tex.—Markowsky v. Newman, supra.

Time of rendition

Tex.—Markowsky v. Newman, supra—DuBose v. Ainsworth, Civ.App., 139 S.W.2d 307, error dismissed.

21. Tex.—DuBose v. Ainsworth, supra—Texas Public Utilities Corporation v. Holland, Civ.App., 123 S.W.2d 1028, error dismissed.

22. Tex.—DuBose v. Ainsworth, Civ.App., 139 S.W.2d 307, error dismissed.

Directory statutes

Tex.—Texas Public Utilities Corporation v. Holland, 123 S.W.2d 1028, error dismissed.

23. Tex.—DuBose v. Ainsworth, Civ.App., 139 S.W.2d 307, error dismissed.

Rendition of small amount to qualify for voting

Fact that property owners rendered only property of small value for purpose of qualifying themselves to vote at city bond election did not disqualify them.—DuBose v. Ainsworth, supra.

24. Tex.—Hanson v. Jordan, 198 S.W.2d 262, 145 Tex. 320.

25. U.S.—Olds v. Alvord, 191 So. 434, 139 Fla. 745, certiorari denied Alvord v. Town of Belleair, 60 S.Ct. 141, 308 U.S. 603, 84 L.Ed. 505.

26. Tex.—Powell v. City of Baird, 128 S.W.2d 786, 133 Tex. 486.

27. Ala.—Fuller v. Knight, 2 So.2d 605, 241 Ala. 257.

Fla.—State v. Overseas Road and Toll Bridge District, 170 So. 109, 125 Fla. 481—State v. Town of River Junction, 169 So. 676, 125 Fla. 267.

Ga.—State v. Carswell, 50 S.E.2d 621, 78 Ga.App. 84.

Ky.—Corpus Juris cited in Mollette v. Board of Education of Van Lear Graded Dist., 86 S.W.2d 990, 996, 260 Ky. 737.

Mont.—Weber v. City of Helena, 297 P. 455, 89 Mont. 109.

Va.—Vaughan v. Town of Galax, 4 S.E.2d 386, 173 Va. 335.

44 C.J. p 1206 note 80.

Requirements of special election

An election on different propositions for issuing city bonds was a special election rather than a general election, and therefore matters legally required to validate the result of a special election could not be disregarded.—Bilek v. City of Chicago, 71 N.E.2d 789, 396 Ill. 445.

28. Fla.—State v. City of Delray Beach, 191 So. 188, 140 Fla. 132, followed in 3 So.2d 510, 147 Fla. 741.

Kan.—Robertson v. Kansas City, 56 P.2d 1032, 143 Kan. 726.

N.J.—Schuck v. Stone Harbor, 95 A. 183, 87 N.J.Law 484.

W.Va.—Warden v. City of Grafton, 26 S.E.2d 1, 125 W.Va. 658.

Mailing of pamphlets containing a copy of the measure providing for the issuance of bonds is unnecessary under some statutes—Webber v. Bailey, 51 P.2d 832, 151 Or. 488.

29. Fla.—Lasseter v. State, 64 So. 847, 67 Fla. 240.

30. Fla.—Lasseter v. State, supra. Ga.—Sewell v. Tallapoosa, 88 S.E. 577, 145 Ga. 19.

31. Mont.—Weber v. City of Helena, 297 P. 455, 89 Mont. 109.

been obtained if the proper statutes had been complied with.³²

When not otherwise provided by statute, a fair and impartial election will not be vitiated by mere informalities of the election officers in holding the election³³ or in ascertaining and declaring the result thereof.³⁴ As sometimes stated, mere irregularities in the election are not fatal where they do not affect the result,³⁵ or where, in the absence of a violation of a mandatory statute, they are not of sufficient importance to warrant serious consideration;³⁶ and provisions of an act making irregularities innocuous are usually given effect when the fundamental or substantial rights of the voter are protected.³⁷ In the absence of restriction, the municipality may choose the method for recording the vote cast in the election,³⁸ and it may have the voter's choice marked on a ballot and dropped into a box³⁹ or it may have such choice fixed by means of a voting machine.⁴⁰ The use of one ballot box for voting on two propositions to issue bonds,⁴¹ or at a combined general municipal and special bond issue election,⁴² is not prohibited by statute in some jurisdictions. Where outside territory is annexed to a city at such a time that no provision can be made for the residents of such territory to vote at a bond election, the fact that such residents were

not provided with ballots and booths at such election will not invalidate it.⁴³

Secrecy of ballot. Under some statutes the vote must be by secret ballot.⁴⁴ At any rate, a vote by secret ballot,⁴⁵ rather than viva voce,⁴⁶ is proper, even though the common schools of the city will be the beneficiaries of the proceeds of the bonds when sold.⁴⁷ The failure to erect private booths in polling places as provided by statute does not invalidate the election where each voter was given an opportunity to vote in secrecy and without interference.⁴⁸

Records; destruction of ballots. The requirement of a statute that a record of the election shall be made is directory merely, and a failure to comply therewith does not invalidate the election.⁴⁹ Failure to preserve the ballots in the manner required by statute does not render the election invalid where the election has been honestly and fairly conducted and no one has been injured.⁵⁰ Under some statutory provisions the ballots must be destroyed without inspection at the expiration of a prescribed period after the election,⁵¹ and the fact that the ballots are still in existence after such period does not justify the court in compelling their production for use in an investigation of fraud in the election.⁵²

32. Mont.—Weber v. City of Helena, supra.

33. Colo.—Clough v. Colorado Springs, 197 P. 896, 70 Colo. 87. W.Va.—Knight v. West Union, 32 S. E. 163, 45 W.Va. 194.

34. Colo.—Clough v. Colorado Springs, 197 P. 896, 70 Colo. 87. 44 C.J. p 1206 note 82.

Publication of returns

N.C.—Board of Com'rs of City of Hendersonville v. C. N. Malone & Co., 103 S.E. 134, 179 N.C. 604.

35. Ky.—Corpus Juris cited in Mollette v. Board of Education of Van Lear Graded Dist., 86 S.W.2d 990, 993, 260 Ky. 737.

La.—Corpus Juris cited in Woulfe v. Morrison, 34 So.2d 251, 259, 212 La. 1032—McCann v. Morgan City, 139 So. 481, 173 La. 1063.

N.Y.—Petition of Board of Fire Com'rs of Columbia-Litchfield Fire Dist., 28 N.Y.S.2d 605.

N.C.—Board of Com'rs of City of Hendersonville v. C. N. Malone & Co., 103 S.E. 134, 179 N.C. 604.

N.D.—Lang v. City of Cavalier, 228 N.W. 819, 59 N.D. 75.

S.C.—Banister v. Lollis, 190 S.E. 511, 183 S.C. 218.

Wyo.—Anselmi v. City of Rock Springs, 80 P.2d 419, 53 Wyo. 223, 116 A.L.R. 1250.

44 C.J. p 1206 note 82.

36. Ga.—Scott v. Town of McIntyre, 19 S.E.2d 49, 66 Ga.App. 640. Mo.—Arkansas - Missouri Power Corp v City of Potosi, 196 S.W.2d 152, 355 Mo. 356—State v. Hackman, 202 S.W. 7, 273 Mo. 670.

37. Ala.—Browder v. Gunter, 125 So. 646, 220 Ala. 407.

Home-rule doctrine unaffected

Mont.—Weber v. City of Helena, 297 P. 455, 89 Mont. 109.

38. La.—Woulfe v. Morrison, 34 So. 2d 251, 212 La. 1032.

39. La.—Woulfe v. Morrison, supra.

40. La.—Woulfe v. Morrison, supra.

Absence of resolution permitting machines immaterial

N.Y.—Spano v. City of Middletown, 7 N.Y.S.2d 14, 169 Misc. 338.

41. N.C.—Smith v. Bellhaven, 63 S.E. 610, 150 N.C. 156—Lumberton v. Nuveen, 56 S.E. 940, 144 N.C. 303.

42. Cal.—Mead v. Los Angeles, 197 P. 65, 185 Cal. 422.

43. Ky.—O'Bryan v. Owensboro, 68 S.W. 858, 69 S.W. 806, 113 Ky. 680, followed in Lancaster v. Owensboro, 73 S.W. 775, 24 Ky.L. 2249.

44. Ga.—State v. Carswell, 50 S.E. 2d 621, 78 Ga.App. 84.

Mo.—State ex rel. Miller v. O'Malley, 117 S.W.2d 319, 342 Mo. 641.

Opening of ballots for investigation of fraud

Mo.—State ex rel. Miller v. O'Malley, supra.

45. Ky.—Frost v. Central City, 120 S.W. 367, 134 Ky. 434.

46. Ky.—Frost v. Central City, supra.

47. Ky.—Frost v. Central City, supra.

44 C.J. p 1206 note 87.

48. Ark.—El Dorado v. Jacobs, 294 S.W. 411, 174 Ark. 98.

49. Ky.—Turpin v. Madison County Fiscal Ct., 48 S.W. 1085, 105 Ky. 226, 20 Ky.L. 1131.

Minn.—Wiley v. Minneapolis Bd. of Education, 11 Minn. 371.

50. Ariz.—McLoughlin v. City of Prescott, 6 P.2d 50, 39 Ariz. 286.

51. Mo.—State ex rel. Miller v. O'Malley, 117 S.W.2d 319, 342 Mo. 641.

44 C.J. p 1206 note 83 [a] (2).

52. Mo.—State ex rel. Miller v. O'Malley, supra.

b. Officers

The election should be held by the officers prescribed by statute, although it is not necessarily invalidated by irregularities in their appointment or oath.

The election should be held by the officers prescribed by statute,⁵³ although the election is not necessarily rendered void by the fact that the appointment of such officers was not made in strict conformity to statutory provisions,⁵⁴ that they were not sworn before entering on the discharge of their duties,⁵⁵ or even, it has been held, by the fact that the officers were not appointed by the proper authority.⁵⁶ The election is not invalidated by the fact that the election officers appointed by the resolution pursuant to which the election was held resigned and others were duly appointed in their place;⁵⁷ nor does the absence of the regular election officers or judges invalidate the election where it does not appear that the persons holding the election were not elected to fill the vacancies caused by such absence.⁵⁸

c. Time

The election should be held on the day and during the hours prescribed by law, although it is not invalidated by an irregularity in keeping the polls open longer than necessary. Under some provisions the election cannot be held within a specified time after a regular municipal election or a previous bond election for a similar purpose.

The election may and should be held at the time,⁵⁹ that is, on the day⁶⁰ and during the hours,⁶¹ pre-

scribed by law. Under some statutory provisions a special election on a bond issue may not be held within a specified time before or after a regular municipal election.⁶² However, the holding of the election at a time other than that prescribed by law does not necessarily invalidate the bonds where it does not appear that the result was affected thereby⁶³ or where the question is not raised until after the election.⁶⁴ Moreover, keeping the polls open for a longer time than is provided by law is a mere irregularity which does not invalidate the election;⁶⁵ and the opening of the polls earlier⁶⁶ or later⁶⁷ than provided by statute has been held not to invalidate the election in the absence of evidence of any injury resulting therefrom.

Second election. Under some statutory provisions an election on a bond issue cannot be held within a specified period of time after a previous election for a similar purpose;⁶⁸ but such provisions do not prevent a second election after the lapse of the statutory period,⁶⁹ and have been held not applicable where the first election was abortive in that a sufficient per cent of the qualified electors failed to participate therein.⁷⁰

d. Place

While a municipal bond election should be held at the proper place, it is not necessarily invalidated by the fact that it was held at a place which was near the usual voting place and which the voters experienced no difficulty in finding.

53. U.S.—*Town of Oregon v. Jennings*, Ill., 7 S.Ct. 124, 119 U.S. 74, 30 L.Ed. 323.

44 C.J. p 1206 note 94.

Officials improperly appointed

Where town was situated in two counties, and similar orders by courts of both counties provided that election on question of issuing bonds should be conducted by officials appointed by electoral boards of both counties, an election held by officials appointed by electoral board of only one county was void.—*Vaughan v. Town of Galax*, 4 S.E.2d 886, 178 Va. 335.—*Appalachian Electric Power Co. v. Town of Galax*, 4 S.E.2d 390, 173 Va. 329.

54. N.Y.—*Petition of Board of Fire Com'rs of Columbia-Litchfield Fire Dist.*, 29 N.Y.S.2d 605.

44 C.J. p 1207 note 95.

Nonresidence of officers

Election on bond issuance was not avoided by fact that election in one precinct was presided over by officers not residents of district.—*Loop v. McCracken*, 274 P. 793, 151 Wash. 19.

55. Mo.—*State v. Hackman*, 202 S.W. 7, 273 Mo. 670.

56. Ala.—*Ryan v. Tuscaloosa*, 46 So. 638, 155 Ala. 479.

Ky.—*Fidelity Trust, etc., Co. v. Morganfield*, 29 S.W. 442, 96 Ky. 563, 16 Ky.L. 647.

57. N.C.—*Board of Com'rs of City of Hendersonville v. C. N. Malone & Co.*, 103 S.E. 134, 179 N.C. 604.

58. Ark.—*City of El Dorado v. Jacobs*, 294 S.W. 411, 174 Ark. 98.

59. Okl.—*Hughes v. Sapulpa*, 182 P. 511, 75 Okl. 149.

44 C.J. p 1207 note 98.

Determination of time for election

Tex.—*Texas Power & Light Co. v. City of Sulphur Springs*, Civ.App., 103 S.W.2d 859, error dismissed.

60. U.S.—*Hill v. Memphis*, C.C.Mo., 23 F. 872, affirmed 10 S.Ct. 562, 134 U.S. 198, 33 L.Ed. 887.

At same time as election of judge

Ill.—*Bilek v. City of Chicago*, 71 N.E.2d 789, 396 Ill. 445.

La.—*Woulfe v. Morrison*, 34 So.2d 251, 212 La. 1032.

61. S.C.—*Herbert v. Griffith*, 82 S.E. 886, 99 S.C. 1.

44 C.J. p 1207 note 1.

62. N.C.—*Adcock v. Town of Fuquay Springs*, 140 S.E. 24, 194 N.C. 423.

63. Ky.—*Mollette v. Board of Education of Van Lear Graded Dist.*, 86 S.W.2d 990, 260 Ky. 787.

64. Mont.—*Hendrickson v. Powell County*, 112 P.2d 199, 112 Mont. 1.

65. Ariz.—*Corpus Juris cited in In re Verde River Irrigation & Power District Bonds*, 298 P. 804, 807, 37 Ariz. 580.

Kan.—*State v. Francisco*, 160 P. 217, 98 Kan. 808.

66. Cal.—*Palos Verdes Library Dist. of Los Angeles County v. McClellan*, 276 P. 600, 97 Cal.App. 769.

67. Ark.—*El Dorado v. Jacobs*, 294 S.W. 411, 174 Ark. 98.

Mo.—*State v. Hackman*, 202 S.W. 7, 273 Mo. 670.

68. Va.—*Wooding v. Leigh*, 177 S.E. 310, 163 Va. 785.

44 C.J. p 1207 note 98 [d] (2)–(4).

69. Va.—*Ennis v. Town of Herndon*, 191 S.E. 685, 168 Va. 539.

Successive submissions generally see *infra* § 1929 c.

70. Fla.—*Dixon v. City of Miami*, 170 So. 845, 126 Fla. 249.

It has been both affirmed⁷¹ and denied⁷² that the election is invalidated because held, in violation of a statute, at one voting place for the entire municipality instead of at separate polling places in the several election districts or precincts. In the absence of a contrary showing it will be presumed that the election was held at the usual voting places in the city,⁷³ and even though it appears that in one ward or precinct the election was held at a place other than the usual voting place, yet the election will not necessarily be held invalid on this account,⁷⁴ at least where the places are in close proximity,⁷⁵ and there is nothing to indicate that any voter experienced difficulty in finding the voting place⁷⁶ or was in anywise prevented from voting.⁷⁷

§ 1929. Operation and Effect

- a. In general
- b. Conformity with submission
- c. Successive submissions
- d. Time of issuance of bonds
- e. Actions attacking election

a. In General

A favorable vote on a bond issue permits, and some-

times requires, the issuance of the securities. However, a municipal debt is not created thereby and does not arise until the bonds are issued and become valid obligations in the hands of a purchaser or holder.

Where, in pursuance of constitutional, statutory, or charter requirement, a proposition to issue municipal bonds, stock, or other securities has been submitted to, and acted on favorably by, the voters of the municipality, the securities may,⁷⁸ and sometimes must,⁷⁹ be issued; but ordinarily there is no imperative duty on the part of the municipal officers to borrow money as authorized by a vote.⁸⁰ Where, although not required, a proposition to issue bonds has been submitted to the voters to obtain an indication of their opinion, this expression of opinion is not binding on the authorities,⁸¹ and does not add to,⁸² or detract from,⁸³ the authority to issue the bonds.

A vote of the electors in favor of bonds does not have the effect of dispensing with a statutory requirement,⁸⁴ and the issuance of the bonds must be in accordance with the statute in force at the time of the submission.⁸⁵ However, the courts will, as a rule, uphold the validity of a municipal bond election wherever possible,⁸⁶ and will not set it aside

71. Okl.—Hall v. Turner, 257 P. 328, 125 Okl. 248—Munger v. Watonga, 233 P. 211, 106 Okl. 78.

72. N.D.—Lang v. City of Cavalier, 228 N.W. 819, 59 N.D. 75—Kerlin v. Devils Lake, 141 N.W. 756, 25 N.D. 207, Ann.Cas.1915C 624.

73. Mo.—State v. Hackman, 202 S.W. 7, 273 Mo. 670.

74. Wash.—Loop v. McCracken, 274 P. 793, 151 Wash. 19.

75. Okl.—Gilliland v. City of Clinton, 268 P. 254, 131 Okl. 186. 44 C.J. p 1207 note 7.

76. Ark.—Ralley v. City of Magnolia, 126 S.W.2d 273, 197 Ark. 1047. 44 C.J. p 1207 note 8.

77. Mo.—State v. Hackman, 202 S.W. 7, 273 Mo. 670.

78. U.S.—Kansas Power Co. v. City of Holisington, C.C.A.Kan., 89 F.2d 358.

Ala.—Corpus Juris quoted in Fuller v. Knight, 2 So.2d 605, 608, 241 Ala. 257.

Cal.—Sacramento Municipal Utility Dist. v. All Parties and Persons, etc., 57 P.2d 506, 6 Cal.2d 197.

Fla.—State v. City of Clearwater, 184 So. 875, 185 Fla. 112—Davis v. City of Melbourne, 170 So. 836, 126 Fla. 282.

Ky.—McDonald v. City of Lexington, 69 S.W.2d 1065, 253 Ky. 585.

Mich.—Schumacher v. City of Flint, 222 N.W. 406, 252 Mich. 1.

Mo.—State ex rel. City of Fulton v.

Smith, 194 S.W.2d 302, 355 Mo. 27 —State ex rel. City of Republic v. Smith, 139 S.W.2d 929, 345 Mo. 1158.

W.Va.—Walker v. City of Charleston, 182 S.E. 766, 116 W.Va. 645. 44 C.J. p 1207 note 13.

General obligation bonds may be issued to refund revenue bonds if the operation is pursuant to an election.—Kendrick v. City of Birmingham, 5 So.2d 82, 242 Ala. 112.

Revenue or tax bonds

Under statutes authorizing a city or town to issue bonds to acquire waterworks or sewage facilities, either revenue or tax bonds or both may be utilized for such purpose as determined by vote of the people.—Texsan Service Co. v. City of Nixon, Tex.Civ.App., 158 S.W.2d 88, error refused.

Failure to provide for sinking fund

City could authorize issuance of bonds pursuant to authorization by electors except in so far as ordinance failed to provide for sinking fund for first five years from inception of bond issue period.—McDonald v. City of Lexington, 69 S.W.2d 1065, 253 Ky. 585.

79. Ala.—Corpus Juris quoted in Fuller v. Knight, 2 So.2d 605, 608, 241 Ala. 257.

44 C.J. p 1208 note 14.

80. S.D.—LeFevre v. Board of Com'rs of City of Brookings, 272 N.W. 795, 65 S.D. 190.

Available funds on hand

S.D.—LeFevre v. Board of Com'rs of City of Brookings, 272 N.W. 795, 65 S.D. 190.

Necessity of action by council

Municipality cannot issue bonds or erect plant without determination of council to borrow money and issue bonds, even though bond issue is authorized by electors.—Eastern Shore Public Service Co. v. Town of Seaford, 187 A. 115, 21 Del.Ch. 214.

81. Ky.—Sinking Fund Com'rs v. Kentucky Northern Bank, 1 Metc. 174.

82. Fla.—State v. City of West Palm Beach, 193 So. 839, 141 Fla. 775.

N.D.—Stark v. City of Jamestown, 37 N.W.2d 516.

83. N.D.—Stark v. City of Jamestown, supra.

84. N.Y.—Geneva v. Fenwick, 145 N.Y.S. 884, 159 App.Div. 621.

85. Ala.—Corpus Juris quoted in Fuller v. Knight, 2 So.2d 605, 608, 241 Ala. 257.

Ky.—City of Louisville v. Board of Education of Louisville, 17 S.W.2d 210, 229 Ky. 325.

Ohio.—Kurtz v. City of Columbus, 28 N.E.2d 587, 137 Ohio St. 184. 44 C.J. p 1208 note 16.

86. Md.—Douty v. City of Baltimore, 141 A. 499, 155 Md. 125.

Wyo.—Anselmi v. City of Rock Springs, 80 P.2d 419, 53 Wyo. 223, 116 A.L.R. 1250.

for a mere informality or irregularity which cannot be said in any manner to have affected the result of the election.⁸⁷ It has been held that a failure to comply with some statutory detail of procedure will not invalidate a bond issue when the question is raised after the election, even though, if attacked before the election, it might have proved fatal.⁸⁸ Further, clerical errors in the election proceedings may, before issuance of the bonds, be corrected by the council as the representative of the taxpayers.⁸⁹

A vote of the electors in favor of the issuance of municipal bonds does not ipso facto create a debt against the municipality;⁹⁰ the debt does not arise until the bonds are issued⁹¹ and become valid obligations in the hands of a holder,⁹² that is, when they are sold and delivered to the purchaser.⁹³ However, bond ordinances approved by a vote of the people may effect a setting aside of public revenues for specified purposes.⁹⁴ A vote of the electors in favor of the issuance of funding or refunding bonds is a ratification of the acts of the authorities in creating the original indebtedness where the voters could have authorized such acts in the first instance.⁹⁵ An unfavorable vote may terminate the

liability of the municipality under a contract which was contingent on the voters' approval of a proposed bond issue.⁹⁶

Concurrent submission of several propositions.

Where separate bond propositions were carried at the same election, a single issue for the aggregate amount of all the bonds authorized may be made.⁹⁷ The defeat of one proposition, submitted concurrently with others, does not affect the validity of those receiving the requisite majority.⁹⁸

b. Conformity with Submission

Issuance of municipal bonds pursuant to an election must be in conformity with the terms of the submission, as, for example, with respect to the amounts and maturities of the bonds, the interest rate thereon, and the disposition of the proceeds thereof.

The issuance of bonds pursuant to an election may and must be in conformity with the terms and conditions of the submission⁹⁹ without regard to extraneous representations or arguments to the voters.¹ The necessity of conformity extends to conditions or provisions inserted unnecessarily, but not unlawfully, in the proposition submitted,² although

87. S.C.—*Banister v. Lollis*, 190 S. E. 511, 183 S.C. 218.

Wyo.—*Anselmi v. City of Rock Springs*, 80 P.2d 419, 58 Wyo. 223, 116 A.L.R. 1250.

88. Mont.—*Hendrickson v. Powell County*, 112 P.2d 199, 112 Mont. 1. Mandatory or directory nature of statutes relating to notice see supra § 1926.

89. La.—*Gooch v. Patterson*, 52 So. 555, 126 La. 397.
44 C.J. p 1208 note 21.

90. Cal.—*Clark v. Los Angeles*, 116 P. 722, 160 Cal. 30.

Ill.—*Austin v. Healy*, 35 N.E.2d 78, 376 Ill. 633.

91. Cal.—*Clark v. Los Angeles*, 116 P. 722, 160 Cal. 30.

Ky.—*Barry v. New Haven*, 171 S.W. 1012, 162 Ky. 60.

92. Cal.—*Clark v. Los Angeles*, 116 P. 722, 160 Cal. 30.

93. Cal.—*Clark v. Los Angeles*, supra.

Ill.—*Austin v. Healy*, 35 N.E.2d 78, 376 Ill. 633.

94. Ill.—*Tribune Co. v. Thompson*, 174 N.E. 561, 342 Ill. 503.

95. Neb.—*State v. Marsh*, 189 N.W. 381, 108 Neb. 835.

N.C.—*Jones v. New Bern*, 113 S.E. 663, 184 N.C. 131.

96. U.S.—*Scofield Engineering Co. v. City of Danville*, C.C.A.Va., 126 F.2d 942.

97. Cal.—*Mill Valley v. House*, 76 P. 658, 142 Cal. 698.

98. Cal.—*Law v. San Francisco*, 77 P. 1014, 144 Cal. 384.

Vote required where several propositions submitted at same election see supra § 1927.

99. Ala.—*Corpus Juris* quoted in *Fuller v. Knight*, 2 So.2d 605, 608, 241 Ala. 257.

Fla.—*City of Ft. Lauderdale v. Kraft*, 21 So.2d 461, 155 Fla. 738.

Ky.—*City of Louisville v. Board of Education of Louisville*, 17 S.W.2d 210, 229 Ky. 325.

Okl.—*State ex rel. City of Cushing v. King*, 19 P.2d 138, 162 Okl. 69.

W.Va.—*Jarrell v. Board of Ed. of Raleigh County*, 50 S.E.2d 442.

44 C.J. p 1208 note 15.

Authority strictly construed

Ohio.—*Kurtz v. City of Columbus*, 28 N.E.2d 587, 137 Ohio St. 184.

Bridge tolls

An ordinance requiring payment of bridge tolls was valid notwithstanding original ordinances submitting propositions of bond issues to the people recited that bridge should forever remain a free bridge, since the municipality had no power to bind itself never to charge such tolls.—*City of St. Louis v. Cavanaugh*, 207 S.W.2d 449, 357 Mo. 204.

1. U.S.—*West Missouri Power Co. v. City of Washington, Kan.*, C.C.A. Kan., 80 F.2d 420, certiorari denied 56 S.Ct. 834, 298 U.S. 668, 80 L.Ed. 1392.

Del.—*Eastern Shore Public Service Co. v. Town of Seaford*, 187 A. 115, 21 Del.Ch. 214.

N.Y.—*Balducci v. Strough*, 239 N.Y.S. 611, 135 Misc. 346.

Okl.—*Johnson v. City of Muskogee*, 153 P.2d 118, 194 Okl. 513.—*Reid v. City of Muskogee*, 278 P. 339, 137 Okl. 44.

44 C.J. p 1208 note 17.

Motives of officials and electors are not proper subjects of judicial inquiry as long as the means adopted for submitting the proposal to the people conformed to the requirements of the law.—*Reid v. City of Muskogee*, 278 P. 339, 137 Okl. 44.

Cost of project

Fallacious estimates and misrepresentations of facts touching the probable cost of the project, although relied on by the governing body and by the electors of the city, do not vitiate the election.—*Kansas Power Co. v. City of Washington*, 47 P.2d 1095, 145 Kan. 962.

Intent to construct new plant

Where proposition submitted to vote left the question of construction or purchase of system to judgment of city commission, the existence of an undisclosed intention of the members of the commission to construct new plants rather than to negotiate for purchase of existing plants did not invalidate the election.—*Texasan Service Co. v. City of Nixon, Tex.* Civ.App., 158 S.W.2d 88, error refused.

2. Cal.—*City of North Sacramento v. Irwin*, 472 P. 767, 34 Cal.App. 652.

it does not extend to provisions which were unlawfully included in the submission³ or which conflict with a statute and cover matters not required to be submitted to the electors.⁴ In the absence of prejudice, a substantial compliance with the mandate of the voters may be sufficient,⁵ as, for example, where a literal compliance with all provisions is impossible because of inconsistent provisions in the proposition adopted⁶ or where an unimportant change has been made in the project because of engineering difficulties and for economic reasons.⁷ The bonds may contain terms not authorized by the electors where such terms were not required to be, and were not, submitted to the electors,⁸ and it has been held that a departure from the statements of the ordinance calling for the election, which is not in conflict with the statute, will not invalidate the bonds unless the defect complained of would result in an increased burden on the taxpayers.⁹

Proceeds of the bonds may be used for the purpose authorized by the vote,¹⁰ but not for a different purpose,¹¹ or for a more limited purpose involving a system radically different from that contemplated by the voters.¹² In a proper case the proceeds of a bond issue authorized by the electors need not be

sufficient of themselves to build the proposed plant, or be the sole funds to be used in the proposed project, but may be supplemented by federal grant or the issue of revenue bonds or otherwise.¹³ The issuance of bonds to acquire a site for a proposed project is not permissible where the language of the submission was not broad enough to include such matter.¹⁴ Where the proposition submitted authorized the acquisition of a site, but did not specify any particular site, the proper officials may exercise their discretion in selecting the site,¹⁵ notwithstanding some previous representations as to the location of the improvement.¹⁶

Amount and interest. It is not necessary to issue bonds or stock for the full amount,¹⁷ or, except in some jurisdictions,¹⁸ at the maximum rate of interest,¹⁹ authorized by the vote. Bonds should not be issued in an amount greater than that authorized;²⁰ furthermore, where the election authorizes a bond issue for a project to cost not in excess of a specified amount, bonds should not be issued for a project costing more than such amount,²¹ and in computing such cost proper items should be included.²² If the question whether interest should be paid annually or semiannually has not been, and

N.M.—Mann v. City of Artesia, 76 P. 2d 941, 42 N.M. 224.

44 C.J. p 1208 note 25.

3. Wash.—Yesler v. Seattle, 25 P. 1014, 1 Wash. 308.

4. Ariz.—*Corpus Juris* cited in In re Verde River Irrigation & Power District Bonds, 296 P. 804, 808, 87 Ariz. 580.

Cal.—Santa Barbara v. Davis, 92 P. 308, 6 Cal.App. 342.

44 C.J. p 1209 note 27.

5. N.D.—Logan v. Bismarck, 194 N. W. 908, 49 N.D. 1178.

44 C.J. p 1208 note 22.

Conformity held shown

(1) Generally.—Palmer v. City of Liberal, 64 S.W.2d 265, 334 Mo. 266 —Meyering v. Miller, 51 S.W.2d 65, 330 Mo. 885.

(2) Manner of payment.

Ky.—McDonald v. City of Lexington, 70 S.W.2d 534, 253 Ky. 770, followed in Combs v. City of Lexington, 70 S.W.2d 921, 253 Ky. 813

Tex.—Texsan Service Co. v. City of Nixon, Civ.App., 158 S.W.2d 88, error refused.

6. N.D.—Logan v. Bismarck, 194 N. W. 908, 49 N.D. 1178.

44 C.J. p 1208 note 22.

7. Va.—Ennis v. Town of Herndon, 191 S.E. 685, 168 Va. 539.

8. Minn.—White v. Chatfield, 133 N. W. 962, 116 Minn. 371.

44 C.J. p 1208 note 23.

9. Cal.—City of Redding v. Holland, 170 P.2d 132, 75 Cal App 2d 178.

10. Cal.—Sacramento-Yolo Port

Dist. v. Rodda, App., 204 P.2d 372

Tex.—Lewis v. City of Fort Worth,

89 S.W.2d 975, 126 Tex. 458—Gill-

ham v. City of Dallas, Civ.App.,

207 S.W.2d 978, error refused, no

reversible error.

W.Va.—Warden v. City of Grafton,

26 S.E.2d 1, 125 W.Va. 658.

44 C.J. p 1209 note 35.

Proceeds of sale of bonds generally

see infra § 1934.

11. Cal.—Sacramento-Yolo Port

Dist. v. Rodda, App., 204 P.2d 372

Iowa.—*Corpus Juris* cited in Harding

v. Board of Sup'rs of Osceola

County, 237 N.W. 625, 629, 213

Iowa 560.

Or.—*Corpus Juris* cited in Conley v.

Union County Peoples' Utility

Dist., 187 P.2d 150, 152, 182 Or 565

Tex.—Lewis v. City of Fort Worth,

89 S.W.2d 975, 126 Tex. 458—Gill-

ham v. City of Dallas, Civ.App.,

207 S.W.2d 978, error refused, no

reversible error.—Texsan Service

Co. v. City of Nixon, Civ.App., 158

S.W.2d 88, error refused.

44 C.J. p 1209 note 36.

12. S.D.—Beers v. Watertown, 177

N.W. 502, 43 S.D. 14.

44 C.J. p 1209 note 37.

13. Ark.—Arkansas-Missouri Power

Corp. v. City of Rector, 217 S.W.

2d 335.

Kan.—Robertson v. Kansas City, 56 P.2d 1032, 143 Kan 726.

Mich.—Lake Superior District Power

Co. v. City of Bessemer, 285 N.W.

20, 288 Mich. 455.

14. Mo.—Meyers v. Kansas City, 18

S.W.2d 900, 323 Mo. 200.

15. Ga.—Allen v. City of Atlanta,

142 S.E. 262, 166 Ga. 28.

Tex.—Ardrey v. Zang, 127 S.W. 1114,

60 Tex.Civ.App. 295, error refused.

16. Ga.—Allen v. City of Atlanta,

142 S.E. 262, 166 Ga. 28.

Kan.—Board of Com'rs of Johnson

County v. Robb, 171 P.2d 784, 161

Kan. 683.

Tex.—Ardrey v. Zang, 127 S.W. 1114,

60 Tex.Civ.App. 295, error refused.

17. Mich.—Lake Superior District

Power Co. v. City of Bessemer, 285

N.W. 20, 288 Mich. 455

44 C.J. p 1208 note 18.

18. Md.—Stanley v. Baltimore, 126

A. 151, 130 A. 181, 146 Md. 277.

19. Ark.—Railey v. City of Magnolia,

126 S.W.2d 273, 197 Ark. 1047.

Wyo.—*Corpus Juris* cited in Jewett

v. School Dist. No. 25 in Fremont

County, 54 P.2d 516, 550, 49 Wyo.

277.

44 C.J. p 1208 note 20.

20. S.C.—Hyams v. Carroll, 144 S.E.

153, 146 S.C. 470.

21. Kan.—City of Iola v. Hobart, 42

P.2d 977, 141 Kan. 709.

22. Kan.—City of Iola v. Hobart,

supra.

was not required to be, submitted to the voters, the municipal officials may determine such matter;²³ but where the question whether interest should be payable annually or semiannually has been submitted to the voters, although it was not required to be submitted, and the voters have voted to pay interest annually, the governing body of the municipality is without authority to issue bonds which provide for the payment of interest semiannually at the maximum rate.²⁴

Maturity. The maturity of the bonds may be fixed in accordance with that authorized by the voters.²⁵ Where the proposition submitted to the voters called for the issuance of bonds payable within a specified number of years, each issue of bonds may extend for the prescribed period after the date of their own issuance,²⁶ and thus where various bonds are issued at different times it is not necessary that the later issues mature within a specified number of years from the date of the issuance of the first bonds.²⁷

c. Successive Submissions

The defeat of a proposition to issue bonds does not preclude its subsequent submission to the voters. After approval of a bond issue, later ordinances incidental to, and in furtherance of, the approved plan need not be submitted to the voters, at least where their provisions are administrative rather than legislative in character.

The defeat of a proposition to issue bonds does not prevent a second submission of the proposition,²⁸ whereas a proposition to issue bonds which has been adopted by the voters ordinarily cannot be resubmitted in the absence of statutory authority.²⁹ However, a statute authorizing successive submis-

sions of the proposition is not invalid,³⁰ and under some statutory provisions a second election to incur an additional bond indebtedness may be permissible where insufficient proceeds have been realized from a previous issuance of bonds;³¹ further, a new election has been held proper where a bond issue, although approved by the electorate, has been adjudged invalid.³² After the approval of the issuance of bonds by the voters, the enactment of new statutory or charter provisions requiring the submission of the question of a bond issue to the voters does not necessitate another vote where the new provisions are prospective in operation.³³ The adoption by the voters, at an election held in pursuance of a statutory provision, of a proposition to issue bonds for the purchase of an existing plant has been held to terminate the authority granted by a prior vote in favor of the issuance of bonds for the construction of an independent plant.³⁴

Later ordinance in furtherance of plan; variance. After approval of an ordinance providing for the issuance of bonds for the purchase or construction of a utility, later ordinances incidental to, and in furtherance of, the plan are not necessarily subject to a referendum.³⁵ Where there is some difference in the two ordinances, the question whether the later ordinance must also be approved by the voters depends on whether the changes made are legislative or administrative,³⁶ that is, whether the later ordinance makes a new law or merely executes the one already in existence,³⁷ a new vote being required if the change is legislative³⁸ but not if it is administrative.³⁹ In general, a vote is not required

Paving of railroad crossing

Okl.—State ex rel. City of Shawnee v. Williamson, 97 P.2d 74, 186 Okl. 278, 125 A.L.R. 1389.

23. Minn.—White v. Chatfield, 133 N.W. 962, 116 Minn. 371.

24. Okl.—Oklahoma Utilities Co. v. City of Hominy, 31 P.2d 932, 168 Okl. 130.

25. S.C.—McDaniel v. Bristol, 158 S.E. 804, 160 S.C. 408.

26. Tex.—City of Houston v. McCraw, 113 S.W.2d 1215, 131 Tex. 127.

27. Tex.—Settegast v. City of Houston, 113 S.W.2d 1221, 131 Tex. 138—City of Houston v. McCraw, 113 S.W.2d 1215, 131 Tex. 127.

28. Ark.—Rhodes v. City of Stuttgart, 95 S.W.2d 101, 192 Ark. 822. Va.—Ennis v. Town of Herndon, 191 S.E. 685, 168 Va. 539.

44 C.J. p 1209 note 41.

Time of holding second election for same purpose see supra § 1928 c.

29. N.Y.—People v. Bellport, 196 N.Y.S. 459, 119 Misc. 357.

44 C.J. p 1209 note 42.

30. Tenn.—Well v. Newbern, 148 S.W. 680, 126 Tenn. 223, L.R.A.1915A 1009, Ann.Cas.1913E 25.

31. Mo.—Bull v. McQuile, 119 S.W.2d 204, 342 Mo. 851.

32. Ark.—Hargraves v. Solomon, 9 S.W.2d 797, 178 Ark. 11.

33. Mich.—Schumacher v. City of Flint, 232 N.W. 406, 252 Mich. 1. Tex.—Texas Power & Light Co. v. City of Sulphur Springs, Civ.App., 103 S.W.2d 859, error dismissed.

34. Minn.—Moore v. Duluth, 76 N.W. 1022, 74 Minn. 105.

44 C.J. p 1209 note 44.

35. Ohio.—State ex rel. Didellus v. City Commission of City of Sandusky, 2 N.E.2d 862, 131 Ohio St. 356.

36. Utah.—Keigley v. Bench, 89 P.2d 480, 97 Utah 89, 122 A.L.R. 756.

37. Utah.—Keigley v. Bench, supra.

38. Utah.—Keigley v. Bench, supra.

Change held legislative

After approval by voters of ordinance authorizing bond issue, provision in later ordinance changing financial plan which resulted in stretching it over twenty years and eighteen annual payments of principal instead of fifteen years with thirteen annual payments was legislative in character and was subject to referendum.—Keigley v. Bench, supra.

39. Kan.—Lewis v. City of South Hutchinson, 174 P.2d 51, 162 Kan. 104.

Changes held administrative

(1) Where the voters approved a bond issue in a designated amount, an ordinance which specified the denomination and form of the bonds, the rate of interest, the maturity dates, and other matters common to utility bonds was held to be administrative rather than legislative in character and hence not subject to a referendum.—Tillamook Peoples'

on the later ordinance if the changes may reasonably be viewed as clearly within the ambit of the voters' intention when the original ordinance was adopted by them,⁴⁰ whereas a new vote is required if the change relates to matters which probably influenced the vote of the electors;⁴¹ and in this connection it may be assumed that a variance more favorable to the city than the submitted ordinance is in conformity with the voters' intent and presents no valid grounds for a new referendum.⁴²

d. Time of Issuance of Bonds

Bonds authorized by an election should be issued within the time prescribed by statute, or, in the absence of statute, within a reasonable time after the election, the question of what constitutes a reasonable time in the particular case depending on the surrounding facts and circumstances.

While the bonds authorized by an election may be issued at once,⁴³ they need not be issued immediately,⁴⁴ but, in the absence of statute or ordinance prescribing a specified time, may⁴⁵ and must⁴⁶ be issued within a reasonable time after the election, the selection of the particular time of issuance resting in the discretion of the issuing authorities,⁴⁷ which will not be interfered with in the

absence of arbitrary or fraudulent action on their part;⁴⁸ and, if the bonds are issued with reasonable promptness after the election, their validity is not affected by the fact that the body of taxpayers may have changed since the election.⁴⁹ Where the time of the issuance of the bonds has been submitted to the voters, such time cannot be departed from without their consent ascertained in the manner provided by law.⁵⁰

Under some statutes the bonds must be issued within a prescribed time after the date of the election or after final favorable determination of any litigation affecting such bonds,⁵¹ the purpose of such a statute being to prevent an undue delay in the issuance of the bonds⁵² and to prevent their being issued after the reason which prompted the electorate to assent has disappeared.⁵³ Such a statute is complied with, it has been held, where within the specified period the municipal authorities have made a contract with a purchaser of the bonds and nothing remains to be done except to deliver the bonds;⁵⁴ and, in the absence of undue delay, the fact that the mere mechanical and ministerial work of printing, signing, and delivering the bonds takes place after the expiration of the statutory period is not fatal.⁵⁵

Utility Dist. v. Coates, 149 P.2d 558, 174 Or. 476.

(2) Provision in later ordinance changing the dates of the bonds and advancing the dates of interest and principal payments was administrative in character and not subject to a referendum.—Kelgley v. Bench, 89 P.2d 480, 97 Utah 69, 122 A.L.R. 756.

40. Utah.—Kelgley v. Bench, supra.

41. Utah.—Kelgley v. Bench, supra.
Manufacture or distribution of electricity

A favorable vote on the issuance of bonds for the construction of a municipal system to distribute purchased electricity does not authorize the construction of a generating plant and the manufacture of electricity a great many years later.—Jersey Central Power & Light Co. v. Borough of Seaside Heights in Ocean County, 187 A. 533, 117 N.J.Law 253.

42. Utah.—Kelgley v. Bench, 89 P. 2d 480, 97 Utah 69, 122 A.L.R. 756.

43. Wash.—Bremerton Municipal League v. City of Bremerton, 124 P.2d 798, 13 Wash.2d 238.

44. Ala.—Corpus Juris quoted in Fuller v. Knight, 2 So.2d 606, 609, 241 Ala. 257.

Mo.—Missouri Electric Power Co. v. Smith, 155 S.W.2d 113, 348 Mo. 738.
Or.—Ollilo v. Clatskanie Peoples' Utility Dist., 132 P.2d 416, 170 Or. 173.

44 C.J. p 1207 note 13 [b].

45. Ala.—Corpus Juris quoted in Fuller v. Knight, 2 So.2d 606, 609, 241 Ala. 257.

Ky.—Sparks v. Sparks, 189 S.W.2d 354, 300 Ky. 392.—Hager v. Board of Education of City of Ashland, 72 S.W.2d 475, 254 Ky. 791.

Mo.—Missouri Electric Power Co. v. Smith, 155 S.W.2d 113, 348 Mo. 738.
44 C.J. p 1207 note 13 [b] (3).

46. Wash.—Bremerton Municipal League v. City of Bremerton, 124 P.2d 798, 13 Wash.2d 238.

Changed circumstances

Where, some years elapsed before any steps were taken to carry out ordinance authorizing issuance of bonds to purchase electric light plant then serving the municipality or to construct a duplicate plant, and in the meantime city had so changed as to area, population, and demand for electrical energy that authorized bond issue would be insufficient to purchase then existing plant and probably insufficient to construct a duplicate system, ordinance had been rendered void through lapse of an unreasonable time and changed circumstances.—Bremerton Municipal League v. City of Bremerton, supra.

47. Ala.—Corpus Juris quoted in Fuller v. Knight, 2 So.2d 606, 609, 241 Ala. 257.

Ariz.—Corpus Juris cited in In re Verde River Irrigation & Power District Bonds, 296 P. 804, 808, 37 Ariz. 580.

Kan.—Corpus Juris quoted in State ex rel. Boynton v. City of Topeka, 41 P.2d 260, 262, 141 Kan. 309.

Or.—Corpus Juris cited in Ollilo v. Clatskanie Peoples' Utility Dist., 132 P.2d 416, 420, 170 Or. 173.

Tex.—City of Houston v. McCraw, 113 S.W.2d 1215, 131 Tex. 127.
44 C.J. p 1207 note 13 [b] (1).

48. Tex.—City of Houston v. McCraw, supra.

49. Mo.—Missouri Electric Power Co. v. Smith, 155 S.W.2d 113, 348 Mo. 738.

50. W.Va.—Jarrell v. Board of Ed. of Raleigh County, 60 S.E.2d 442.

51. Miss.—Love v. Mayor and Board of Aldermen of Yazoo City, 148 So. 382, 166 Miss. 322.

Commencement of period after litigation

Time within which municipal bonds might be issued after favorable determination of litigation did not begin to run until issuance of mandate fifteen days after supreme court's decision, which was time allowed for filing of suggestion of error.—Love v. Mayor and Board of Aldermen of Yazoo City, supra.

52. Miss.—Love v. Mayor and Board of Aldermen of Yazoo City, supra.

53. Miss.—Love v. Mayor and Board of Aldermen of Yazoo City, supra.

54. Miss.—Love v. Mayor and Board of Aldermen of Yazoo City, supra.

55. Miss.—Love v. Mayor and Board of Aldermen of Yazoo City, supra.

There is no hard-and-fast rule as to what constitutes a reasonable time within which the bonds must be issued,⁵⁶ the question depending on all the surrounding facts and circumstances⁵⁷ and not merely on the length of time alone.⁵⁸ Even a delay of several years after the election is not fatal where under the circumstances the delay was reasonable and unavoidable⁵⁹ or where there has been no fraud or any radical change in conditions.⁶⁰

Issuance of all or part at one time. Where bonds have been authorized at an election, the municipality may issue them at one time in one issue,⁶¹ but it is not required to issue all the bonds at one time, and may issue them at different times as needed.⁶²

e. Actions Attacking Election

Actions attacking a municipal bond election must be brought within the time prescribed by law, and ordinarily are governed by the general rules applicable in civil actions with respect to parties, pleadings, and evidence.

It has been held that, in the absence of constitutional or statutory provisions so prescribing, a court of equity is without jurisdiction to set aside the result of a bond election on the ground that the election was fraudulently conducted.⁶³ Under statutes providing therefor, however, an action may be maintained attacking an election on a bond issue,⁶⁴ even though the result of the election has not been entered of record.⁶⁵ Mere allegations of fraud, dishonesty, or error of the election officials in calling the election, tabulating the votes, and making returns are not sufficient to justify an invasion of the

secrecy of the ballot box in order to see whether, by such invasion, the allegations can, peradventure, be sustained.⁶⁶

Time. An action to contest the legality of the election or the bond issue authorized thereby must be brought within the time limited by constitutional or statutory provisions,⁶⁷ and should be tried as expeditiously as possible, without any unreasonable or unnecessary delays.⁶⁸ Under some provisions a bond issue cannot be contested after the lapse of a specified period from the date of the promulgation or publication of the result of the election authorizing the issue, in the absence of fraud or collusion.⁶⁹ Some limitations statutes have been held to apply where there has been a departure from the statutory method of holding an election only in minor details constituting irregularities or informalities,⁷⁰ and not where there was no attempt at all to comply with the statutes.⁷¹ A provision that the result of an election, as proclaimed by the mayor, shall be conclusive unless attacked in the courts within a specified time after such proclamation does not apply to an attack on a bond issue on grounds other than those relating to the result as proclaimed by the mayor.⁷²

Parties. Municipal taxpayers have been held to have legal capacity to maintain an action to test the validity of an election authorizing the issuance of municipal bonds,⁷³ and under some statutes an individual may contest a municipal bond election without being joined by anyone else;⁷⁴ but the action

56. Ky.—Sparks v. Sparks, 189 S.W. 2d 354, 300 Ky. 392.

57. Mo.—Missouri Electric Power Co. v. Smith, 155 S.W.2d 113, 348 Mo. 738.

Tex.—City of Houston v. McCraw, 113 S.W.2d 1215, 131 Tex. 127.

Factors to be considered

The facts that the municipality was negotiating with the federal government for a federal grant to aid in the construction and that there was a period of great financial stress were to be taken into consideration. —City of Houston v. McCraw, *supra*.

58. Mich.—Quaid v. City of Detroit, 29 N.W.2d 687, 319 Mich. 268.

Mo.—Missouri Electric Power Co. v. Smith, 155 S.W.2d 113, 348 Mo. 738.
Tex.—City of Houston v. McCraw, 113 S.W.2d 1215, 131 Tex. 127.

59. Colo.—McNichols v. City and County of Denver, 74 P.2d 99, 101 Colo. 316.

Mo.—Missouri Electric Power Co. v. Smith, 155 S.W.2d 113, 348 Mo. 738.

Or.—Gurdane v. Northern Wasco County Peoples' Utility Dist., 195 P.2d 171, 183 Or. 565.

60. Mo.—Arkansas-Missouri Power Corporation v. City of Kennett, 156 S.W.2d 913, 348 Mo. 1108.

Nineteen years

Mich.—Quaid v. City of Detroit, 29 N.W.2d 687, 319 Mich. 268.

61. Tex.—City of Houston v. McCraw, 113 S.W.2d 1215, 131 Tex. 127.

62. Ky.—Hager v. Board of Education of City of Ashland, 72 S.W.2d 475, 254 Ky. 791.

Tex.—City of Houston v. McCraw, 113 S.W.2d 1215, 131 Tex. 127.

44 C.J. p 1208 note 18 [a].

63. Mo.—State ex rel. City of Clarence v. Drain, 73 S.W.2d 804, 335 Mo. 741.

64. Ill.—MacGuidwin v. South Park Com'rs, 164 N.E. 208, 333 Ill. 68.

65. Ill.—MacGuidwin v. South Park Com'rs, *supra*.

66. Tex.—Markowsky v. Newman, Civ.App., 138 S.W.2d 896.

67. La.—Woulfe v. Morrison, 34 So. 2d 251, 212 La. 1032.

44 C.J. p 1213 notes 87, 88.

Limitations and laches in taxpayers' actions generally see *infra* § 2160.

68. La.—Woulfe v. Morrison, *supra*.

69. La.—Dresser v. Recreation and Park Commission of Parish of East Baton Rouge, 34 So.2d 384, 213 La. 85—Nanney v. Town of Leesville, 4 So.2d 825, 198 La. 773—Houssiere v. City of Jennings, 197 So. 750, 195 La. 1042—Henning v. Town of Sulphur, 186 So. 845, 191 La. 979—Roy v. City of Lafayette, 123 So. 720, 168 La. 1081.

Tenn.—Tennessee Electric Power Co. v. Mayor and Aldermen of Town of Fayetteville, 114 S.W.2d 811, 173 Tenn. 111.

44 C.J. p 1213 note 87.

70. Mont.—Weber v. City of Helena, 297 P. 455, 89 Mont. 109.

71. Mont.—Weber v. City of Helena, *supra*.

72. Ark.—Hargraves v. Solomon, 9 S.W.2d 797, 178 Ark. 11.

73. Kan.—Kansas Electric Power Co. v. City of Eureka, 45 P.2d 877, 142 Kan. 117.

74. Tex.—Horine v. Kellam, Civ. App., 123 S.W.2d 439.

can be maintained only by one who has complied with the statutory requirements as to the maintenance of an election contest.⁷⁵ The members of the canvassing board and the county clerk have been held not proper or indispensable parties defendant in an action to contest the election.⁷⁶

Pleadings. The pleadings in a bond election contest are governed by the general rules of pleading.⁷⁷ Allegations of fraud in the conduct of the election should be sufficient to show that the results of the election would be changed if proof of the facts charged should be admitted.⁷⁸ Likewise, in a contest predicated on the participation in the election of disqualified voters, an allegation should be included to the effect that if the votes of disqualified voters were deducted from the total number of votes the result of the election would have been different;⁷⁹ but the contestee may waive the absence of such an allegation by failure properly to except thereto.⁸⁰ The petition in a bond election contest may be amended in a proper case.⁸¹ In a

bond election contest it is proper to exclude evidence which is not properly admissible under the pleadings.⁸² The contestant need not prove matters definitely admitted by the answer of the contestee.⁸³

Evidence. In the absence of evidence to the contrary, a presumption may arise in favor of the regularity and validity of the election,⁸⁴ and also that the returns were made in accordance with legal requirements⁸⁵ and that a consolidation of returns is correct.⁸⁶ The votes of persons permitted to vote by the election judges are presumed to be legal,⁸⁷ and the burden is on the persons contesting an election on the ground of the disqualification of voters to show that their votes were illegal.⁸⁸ A charge of fraud committed in some of the voting precincts does not warrant the court in presuming that similar frauds were committed in the remaining precincts.⁸⁹ General rules apply as to the admissibility of evidence⁹⁰ and the weight and sufficiency thereof.⁹¹

3. SALE OR DISPOSITION BY MUNICIPALITY

§ 1930. In General

Municipal corporations may sell or otherwise dispose of their bonds and other securities in such manner and on such terms as are authorized by statutory and charter regulations.

Municipal corporations may be authorized by statute or charter provisions to sell or otherwise dispose of their bonds and other securities.⁹² Such authority may be implied from the authority of the

75. Tex.—*Horine v. Kellam*, *supra*.

76. Ill.—*MacGuidwin v. South Park Com'rs*, 164 N.E. 208, 333 Ill. 58.

77. Ill.—*MacGuidwin v. South Park Com'rs*, *supra*.

Tex.—*Roberts v. Hall*, Civ.App., 167 S.W.2d 621.

Allegations held sufficient

Ill.—*MacGuidwin v. South Park Com'rs*, 164 N.E. 208, 333 Ill. 58.

Tex.—*Wingo v. Seale*, Civ.App., 212 S.W.2d 968.

78. Ill.—*MacGuidwin v. South Park Com'rs*, 164 N.E. 208, 333 Ill. 58.

79. Tex.—*Wingo v. Seale*, Civ.App., 212 S.W.2d 968.

80. Tex.—*Wingo v. Seale*, *supra*.

81. Ill.—*MacGuidwin v. South Park Com'rs*, 164 N.E. 208, 333 Ill. 58.

82. Tex.—*Markowsky v. Newman*, Civ.App., 138 S.W.2d 896.

83. Tex.—*Sewell v. Chambers*, Civ. App., 209 S.W.2d 363.

84. Ark.—*McKenzie v. City of De Witt*, 121 S.W.2d 71, 196 Ark. 1115.
Ky.—*Mollette v. Board of Education of Van Lear Graded Dist.*, 86 S.W.2d 990, 260 Ky. 737.

La.—*Woulfe v. Morrison*, 34 So.2d 251, 212 La. 1032.

N.Y.—*Balducci v. Strough*, 239 N.Y. 611, 135 Misc. 346.

S.C.—*Banister v. Lolliis*, 190 S.E. 511, 183 S.C. 218.

Wyo.—*Anselmi v. City of Rock Springs*, 80 P.2d 419, 53 Wyo. 223, 116 A.L.R. 1250.

85. Ky.—*Corpus Juris* cited in *Mollette v. Board of Education of Van Lear Graded Dist.*, 86 S.W.2d 990, 993, 260 Ky. 737.

Mo.—*Bauch v. Cabool*, 148 S.W. 1003, 165 Mo.App. 486.

86. Ga.—*Brown v. Atlanta*, 109 S.E. 666, 152 Ga. 283.

87. Tex.—*Lucchese v. Mauermann*, Civ.App., 195 S.W.2d 422, certiorari denied 67 S.Ct. 633, 329 U.S. 812, 91 L.Ed. 693.

88. Tex.—*Lucchese v. Mauermann*, *supra*.

89. Ill.—*MacGuidwin v. South Park Com'rs*, 164 N.E. 208, 333 Ill. 58.

90. Tex.—*Markowsky v. Newman*, Civ.App., 138 S.W.2d 896.

91. Evidence held sufficient

Tex.—*Lucchese v. Mauermann*, Civ. App., 195 S.W.2d 422, certiorari denied 67 S.Ct. 633, 329 U.S. 812, 91 L.Ed. 693.

Evidence held insufficient

(1) To establish alleged irregularities or scheme to confuse or mislead the voters, or that any voter was deprived of right to vote by

withholding of assessment certificate. —*Woulfe v. Morrison*, 34 So.2d 251, 212 La. 1032.

(2) To show that registration of voters was invalid.—*Mississippi Power Co. v. City of Starkville*, D.C. Miss., 4 F.Supp. 333.

92. U.S.—*City of Sanford, Fla. v. Chase Nat. Bank of City of New York*, C.C.A.N.Y., 50 F.2d 400, certiorari denied *Chase Nat. Bank of City of New York v. City of Sanford, Fla.*, 52 S.Ct. 35, 284 U.S. 660, 76 L.Ed. 559.

Iowa—Iowa Service Co. v. City of Villisca, 213 N.W. 401, 203 Iowa 610.

Okl.—*Hughes v. City of Cushing*, 39 P.2d 13, 170 Okl. 118.

Or.—*Barde v. Funk*, 34 P.2d 334, 144 Or. 233.

Purchase of municipal bonds as investment of funds of national bank see *Banks and Banking* § 684.

Transfer by payee or purchaser see *infra* §§ 1950-1952.

Suits by taxpayers to restrain sale of bonds or other securities see *infra* § 2146.

Sale to agency of federal government
Municipality had the right to sell bonds to an agency of federal government which offered to buy major part of bonds and to make a grant.—

municipality to borrow money and to issue such securities.⁹³ The rules obtaining generally in determining the powers possessed by municipal corporations are applicable in determining the existence and extent of the power of a municipality, or its officers, to sell its securities.⁹⁴

Where the power to sell the bonds of a city is expressly conferred by statute on the common council, it cannot delegate the power to any third person;⁹⁵ but the council or other body or officer vested with authority in the premises may, in making the sale, act through the medium of a broker⁹⁶ or other agent.⁹⁷ The council may act by resolution.⁹⁸ The personnel of the council need not be the same at the time of sale of the bonds as at the time of the authorization of the issuance of the bonds;⁹⁹ and acts properly performed in the process of selling bonds by persons then in office are not invalidated by the expiration of their terms of office before the completion of the sale.¹

A municipality issuing bonds not callable for redemption before maturity will be presumed to have been benefited in the sale of the bonds by receiving a higher price than if the bonds had been callable for redemption.²

Time of sale or disposition. Bonds or other securities of a municipality are to be sold or disposed of at such time as is authorized or required by statutory or charter provisions.³ Authority to determine when bonds authorized by the legislature shall be sold is not legislative in its nature and it may be properly delegated to a board.⁴ Except to the extent that statutes or charter provisions may otherwise provide,⁵ it is beyond the power of a municipality to contract to sell or dispose of bonds before they come into existence,⁶ or, at least, before they are authorized;⁷ but, in the absence of a statutory provision to the contrary, a sale of bonds for the acquisition of property may precede the taking over of the property.⁸

In the absence of contrary statutory or charter regulations, the question of when it is advantageous to sell bonds is one for the determination of the municipal authorities rather than for the judgment of a court, and the only limitation which courts ordinarily place on the exercise of the discretion of the municipal authorities arises in circumstances where the purposes for which the bonds were originally voted have so changed that it would be inequitable to allow the bonds to be issued.⁹

Arkansas-Missouri Power Corporation v. City of Kennett, 156 S.W.2d 913, 348 Mo. 1108.

93. Colo.—Thomas v. Grand Junction, 56 P. 665, 13 Colo.App. 80.

44 C.J. p 1214 note 8 [a].
Power of municipality to:

Borrow money see supra § 1869.

Issue bonds and other securities see supra §§ 1902-1904.

94. Md.—Stanley v. Baltimore, 126 A. 151, 130 A. 181, 146 Md. 277.

Scope of powers of municipality generally see supra §§ 115-117.

95. Ind.—State v. Hauser, 63 Ind. 155.

96. N.Y.—Sage v. Broderick, 173 N. E. 908, 255 N.Y. 19—Brownell v. Greenwich, 22 N.E. 24, 114 N.Y. 518, 4 L.R.A. 685.

Commission for sale of municipal bonds see infra § 1932.

97. N.Y.—Armstrong v. Ft. Edward, 53 N.E. 1116, 159 N.Y. 315.

44 C.J. p 1214 note 13.

Power to appoint or employ agents generally see supra §§ 702-708.

Under statute giving power "to make contracts, employ engineers, attorneys and other technical or professional assistance . . . and to do all other things necessary to carry out the provisions of this act," public utility district was expressly authorized to employ assistance in the sale of bonds.—Bayha v. Public Utility Dist. No. 1 of Grays Harbor County, 97 P.2d 614, 2 Wash.2d 85.

Municipal officer as agent

(1) Where bond company had submitted bid to city council for municipal bonds which were then the subject of litigation, resolution directing mayor and city clerk to sell bonds to company submitting bid, report of sale made by mayor and city clerk, and resolution of council accepting report of sale, considered in light of surrounding circumstances amounted to acceptance of bid by city council and not unlawful "delegation of authority" to mayor and city clerk to sell the bonds.—Arkansas-Missouri Power Corporation v. City of Kennett, 159 S.W.2d 782, 349 Mo. 173.

(2) Other decisions with respect to municipal officers as agents see 44 C.J. p 1214 note 13 [b].

98. Kan.—Smalley v. Yates, 13 P. 845, 36 Kan. 519—Smalley v. Yates, 21 P. 622, 41 Kan. 550.

99. N.M.—Albuquerque v. Water Supply Co., 174 P. 217, 24 N.M. 368, 5 A.L.R. 519.

1. N.M.—Albuquerque v. Water Supply Co., supra.

2. La.—Martin v. Mayor & Board of Aldermen of Town of Westwego, 32 So.2d 711, 212 La. 439.
Option to redeem bonds before maturity see infra § 1954.

3. Before maturity date

N.Y.—People ex rel. Schieffelin v. Walker, 160 N.E. 384, 347 N.Y. 320,

reargument denied 161 N.E. 191, 347 N.Y. 584.

Immediately following approval by electorate

Tenn.—Tennessee Electric Power Co. v. Mayor and Aldermen of Town of Fayetteville, 114 S.W.2d 811, 173 Tenn. 111.

4. Hawaii.—McKenzie v. Wilson, 31 Hawaii 216.

Delegation of powers to local authorities generally see Constitutional Law § 140.

5. Wis.—Flottum v. City of Cumberland, 291 N.W. 777, 234 Wis. 654.

6. Ky.—Eagle v. City of Corbin, 122 S.W.2d 798, 275 Ky. 808.

Wash.—Hansard v. Green, 103 P. 40, 54 Wash. 161, 132 Am.S.R. 1107, 24 L.R.A., N.S., 1273.

7. Ky.—Corpus Juris cited in Funk v. Town of Strathmoor Village, 129 S.W.2d 151, 152, 278 Ky. 627—Corpus Juris cited in Eagle v. City of Corbin, 122 S.W.2d 798, 802, 275 Ky. 808.

44 C.J. p 1214 note 9.

8. Del.—Taylor v. Smith, 115 A. 405, 13 Del.Ch. 39, modified on other grounds 115 A. 418, 13 Del.Ch. 57.

9. Kan.—Lewis v. City of South Hutchinson, 174 P.2d 51, 162 Kan. 104.

Delay in issuing bonds see infra § 1948.

Delay of nine years

Court should not substitute its

Mode of disposition or sale; advertisement. Subject to constitutional restrictions, the legislature may prescribe the manner by which and the terms on which municipal bonds and other securities shall be disposed of or sold,¹⁰ and various provisions have been made by statutes or charters directing the manner by which and the terms on which such securities shall be sold or otherwise disposed of.¹¹ An ordinance is invalid where it conflicts with such provisions prescribing the mode of sale or disposition.¹² The municipality must observe the statutory and charter regulations,¹³ and a sale is void which is not made in accordance with such regula-

tions.¹⁴

It is sometimes provided by statute or charter that municipal bonds or other securities shall be sold only after advertisement,¹⁵ and to the highest and best bidder;¹⁶ and a sale made without complying with such a requirement is void,¹⁷ or at least an objection to the sufficiency of the advertisement may be raised while the matter is still in fieri;¹⁸ but, where the bonds remain unsold after due advertisement, they may, without further advertisement¹⁹ and without further authority from the council,²⁰ be sold at private sale,²¹ and it is sometimes expressly so provided by statute.²²

judgment for that of governing body of city as to advisability of proceeding in 1940 with registration and sale of bonds authorized by special election held in 1931.—Missouri Electric Power Co. v. Smith, 155 S.W.2d 113, 348 Mo. 738.

10. Ky.—Rohde v. City of Newport, 55 S.W.2d 368, 246 Ky. 476, 87 A.L.R. 701.

11. Hawaii.—McKenzie v. Wilson, 31 Hawaii 216.

Iowa.—Iowa Service Co. v. City of Villisca, 213 N.W. 401, 203 Iowa 610.

Ky.—Eagle v. City of Corbin, 122 S.W.2d 798, 275 Ky. 808.

N.C.—Webb v. Port Commission of Morehead City, 172 S.E. 377, 205 N.C. 683.

Okl.—Hughes v. City of Cushing, 39 P.2d 13, 170 Okl. 118—Joint School Dist. No. 132 in Major County and Alfalfa County v. Dabney, 260 P. 486, 127 Okl. 234.

Or.—Cascade Locks v. Carlson, 90 P.2d 787, 161 Or. 557—Barde v. Funk, 24 P.2d 334, 144 Or. 233.

Wis.—Flottum v. City of Cumberland, 291 N.W. 777, 234 Wis. 654.

12. Or.—Barde v. Funk, 24 P.2d 334, 144 Or. 233.

13. U.S.—City of Sanford, Fla. v. Chase Nat. Bank of City of New York, C.C.A.N.Y., 50 F.2d 400, certiorari denied Chase Nat. Bank of City of New York v. City of Sanford, Fla., 52 S.Ct. 35, 284 U.S. 660, 76 L.Ed. 559.

Ky.—Eagle v. City of Corbin, 122 S.W.2d 798, 275 Ky. 808.

Mich.—Hunt v. Fenlon, 21 N.W.2d 906, 313 Mich. 644.

Or.—City of Cascade Locks v. Carlson, 90 P.2d 787, 161 Or. 557—Young v. Gard, 277 P. 1005, 129 Or. 534.

S.D.—State ex rel. Saylor v. Wait, 278 N.W. 12, 66 S.D. 14.

Tex.—City of Lubbock v. Geo. L. Simpson & Co., Civ.App., 31 S.W.2d 665, error dismissed.

44 C.J. p 1215 note 17.

Proceedings held proper

Kan.—State ex rel. Beck v. Kansas City, 84 P.2d 409, 148 Kan. 623, opinion supplemented 86 P.2d 476, 149 Kan. 252.

Wis.—Milwaukee Co. v. City of Tomahawk, 300 N.W. 257, 238 Wis. 452, 139 A.L.R. 1044.

44 C.J. p 1215 note 17 [a]

14. Tex.—City of Lubbock v. Geo. L. Simpson & Co., Civ.App., 31 S.W.2d 665, error dismissed.

44 C.J. p 1215 note 20.

15. Fla.—State v. City of Fort Lauderdale, 5 So.2d 263, 149 Fla. 177. N.Y.—Sage v. Broderick, 173 N.E. 908, 255 N.Y. 19.

Or.—City of Cascade Locks v. Carlson, 90 P.2d 787, 161 Or. 557.

S.D.—State ex rel. Saylor v. Wait, 278 N.W. 12, 66 S.D. 14.

44 C.J. p 1215 note 18.

Negotiable certificates of indebtedness

U.S.—City of Sanford, Fla., v. Chase Nat. Bank of City of New York, C.C.A.N.Y., 50 F.2d 400, certiorari denied Chase Nat. Bank of City of New York v. City of Sanford, Fla., 52 S.Ct. 35, 284 U.S. 660, 76 L.Ed. 559.

Right to advertise belongs exclusively to city and cannot be exercised by holder other than city.

U.S.—City of Sanford, Fla., v. Chase Nat. Bank of City of New York, D.C.N.Y., 44 F.2d 206, reversed on other grounds, C.C.A., 50 F.2d 400, certiorari denied Chase Nat. Bank of City of New York v. City of Sanford, Fla., 52 S.Ct. 35, 284 U.S. 660, 76 L.Ed. 559.

Contents of call, notice, or advertisement

Kan.—Barker v. Kansas City, 70 P.2d 5, 146 Kan. 347.

Mo.—City of Lebanon v. Schneider, 163 S.W.2d 588, 349 Mo. 712.

44 C.J. p 1215 note 18 [a].

Time of publication

Tex.—City of Lubbock v. Geo. L. Simpson & Co., Civ.App., 31 S.W.2d 665, error dismissed.

44 C.J. p 1215 note 18 [b].

Statutes or charters held inapplicable

Fla.—State v. City of Fort Lauderdale, 5 So.2d 263, 149 Fla. 177.

N.D.—Thomas v. McHugh, 256 N.W. 763, 65 N.D. 149.

Ohio.—Vollmer v. Village of Amherst, 29 N.E.2d 379, 65 Ohio App. 26, appeal dismissed 38 N.E.2d 409, 139 Ohio St. 139, affirmed 43 N.E.2d 235, 140 Ohio St. 257.

Validity of statute

General statute requiring municipal bonds to be advertised for sale at least once each week for two successive weeks in newspaper of general circulation, is not invalid in its application to bonds, which were authorized by amendment to city charter to provide funds for establishing an electric light and power system, and which were to be paid entirely from revenues derived from operation of plant, as an infringement of constitutional provision prohibiting legislative repeal of municipal charters, since the refunding of the bonds under such circumstances is not purely a matter of local concern.—City of Cascade Locks v. Carlson, 90 P.2d 787, 161 Or. 557.

16. S.D.—State ex rel. Saylor v. Wait, 278 N.W. 12, 66 S.D. 14.

44 C.J. p 1215 note 19.

17. Tex.—City of Lubbock v. Geo. L. Simpson & Co., Civ.App., 31 S.W.2d 665, error dismissed.

44 C.J. p 1215 note 20.

18. N.C.—Hendersonville v. Prudden, 105 S.E. 7, 180 N.C. 496.

19. SC.—Lucas v. Barringer, 112 S.E. 746, 120 S.C. 68.

20. Ohio.—Vadakin v. Crilly, 7 Ohio Cir.Ct., N.S., 341, 28 Ohio Cir.Ct. 634, affirmed 78 N.E. 1140, 73 Ohio St. 380.

21. N.C.—Kornegay v. Goldsboro, 105 S.E. 187, 180 N.C. 441.

22. Ohio.—Vadakin v. Crilly, 7 Ohio Cir.Ct., N.S., 341, 28 Ohio Cir.Ct. 634, affirmed 78 N.E. 1140, 73 Ohio St. 380.

The legislature may vest the municipality with wide power relative to the sale of bonds.²³ Where the power to sell or dispose of bonds or other securities is granted without restriction, the municipal authorities are free to dispose of them on such terms as they can obtain.²⁴ In such case municipal bonds or other securities may be sold at a private sale without advertisements for bids;²⁵ and a municipality authorized to issue and sell bonds to pay a debt or subscription may, where the debtor or beneficiary consents, deliver the bonds at par in payment of the debt or subscription in lieu of raising money on them by loan and then paying that money in discharge of the debt or subscription,²⁶ although it may not deliver bonds issued for one purpose in payment of property purchased for an entirely different purpose.²⁷ It is not illegal for a contractor with a city, on a cost-plus-a-fee basis, to use part of his fee in the purchase of bonds sold to raise funds for the work.²⁸

Sale for best interests of municipality. Some statutes and charters provide that municipal bonds shall be sold in such manner and on such terms as the council or other body shall deem for the best interests of the municipality,²⁹ or in such manner as the council may deem advisable, at not less than par and accrued interest.³⁰ Such provisions grant discretionary powers to the council or other body in the sale of bonds.³¹ Under such provisions it has been held that municipal bonds may be sold at a private sale,³² but it has also been held that such provisions do not permit the city to avoid public and reasonable advertisement or a proposal to receive bids or offers for bonds proposed to be issued and sold.³³ At any rate, under such provisions the city council may direct the city clerk to advertise for sealed bids for the purchase of the bonds.³⁴

Exchange of securities. A municipality may not exchange its bonds or other securities for other

23. Wash.—Bayha v. Public Utility Dist. No. 1 of Grays Harbor County, 97 P.2d 614, 2 Wash.2d 85.

Supreme court cannot limit powers granted to commissioners of public utility district relative to sale of utility revenue bonds.—Bayha v. Public Utility Dist. No. 1 of Grays Harbor County, *supra*.

24. La.—State ex rel. Maestri v. Cave, 190 So. 631, 193 La. 419.

Mont.—O'Neill v. Yellowstone Irr. District, 121 P. 283, 44 Mont. 402.

S.C.—Williams v. City of Rock Hill, 180 S.E. 799, 177 S.C. 82.
44 C.J. p 1215 note 26.

25. Fla.—State v. City of Fort Lauderdale, 5 So.2d 263, 149 Fla. 177.
N.D.—Thomas v. McHugh, 256 N.W. 763, 65 N.D. 149.

Ohio.—Vollmer v. Village of Amherst, 29 N.E.2d 379, 65 Ohio App. 26, appeal dismissed 38 N.E.2d 409, 139 Ohio St 139, affirmed 43 N.E. 2d 235, 140 Ohio St. 257.

S.C.—Williams v. City of Rock Hill, 180 S.E. 799, 177 S.C. 82.

Private sale after delay caused by litigation

Where city had been authorized by voters to issue bonds to build a municipal electric light plant, lawsuits had held up the sale of the bonds and erection of the plant for over six years, and, at the time the bonds were sold, a suit seeking to require a new bond election was pending, the act of the city council in selling the bonds for par and accrued interest without permitting competitive bids could not be condemned as unwise or arbitrary, notwithstanding generally public welfare may best be served by permitting competitive bids on all contracts where taxpayer's

money is to be used.—Arkansas—Missouri Power Corporation v. City of Kennett, 159 S.W.2d 782, 349 Mo. 173.

26. Neb.—Ledwith v. Lincoln, 193 N.W. 763, 110 Neb. 425.
44 C.J. p 1215 note 27.

27. Tex.—Texas Electric, etc., Co. v. Vernon, Civ.App., 266 S.W. 600.

28. Cal.—Crowe v. Boyle, 193 P. 111, 184 Cal. 117.
44 C.J. p 1216 note 30.

29. Fla.—State v. City of Miami, 26 So.2d 672, 157 Fla. 616.
Ky.—Eagle v. City of Corbin, 122 S.W.2d 798, 275 Ky. 808.

Wash.—Hill v. Seattle, 185 P. 631, 108 Wash. 572—Washington-Oregon Corp. v. Chehalis, 136 P. 681, 76 Wash. 442.

Wis.—State ex rel. City of Madison v. Bareis, 21 N.W.2d 721, 248 Wis. 387—Flottum v. City of Cumberland, 291 N.W. 777, 234 Wis. 654.

Repeal of provisions

Purpose of act relating to sale of municipal bonds to the United States government was to broaden powers of municipal corporations to sell their bonds to the United States government, and act was not intended to repeal provision in public utility act authorizing sale of bonds of public utility district in such manner as commissioners of district should deem for best interest of district.—Bayha v. Public Utility Dist. No. 1 of Grays Harbor County, 97 P.2d 614, 2 Wash.2d 85.

30. S.C.—Williams v. City of Rock Hill, 180 S.E. 799, 177 S.C. 82.

31. Ky.—Eagle v. City of Corbin, 122 S.W.2d 798, 275 Ky. 808.

Wash.—Bayha v. Public Utility Dist. No. 1 of Grays Harbor County, 97 P.2d 614, 2 Wash.2d 85—Washington-Oregon Corp. v. Chehalis, 136 P. 681, 76 Wash. 442.

32. Wash.—Bayha v. Public Utility Dist. No. 1 of Grays Harbor County, 97 P.2d 614, 2 Wash.2d 85.

Refunding bonds

Fla.—State v. City of Miami, 26 So. 2d 672, 157 Fla. 616.

S.C.—Williams v. City of Rock Hill, 180 S.E. 799, 177 S.C. 82.

Contract stifling competition

Clause in contract between public utility district and its fiscal agent giving agent negotiating sale of district bonds the option to purchase bonds did not stifle competition by preventing competitive bidding for bonds, where commissioners of district exercised their statutory right to sell bonds at private sale.—Bayha v. Public Utility Dist. No. 1 of Grays Harbor County, 97 P.2d 614, 2 Wash. 2d 85.

33. Ky.—Eagle v. City of Corbin, 122 S.W.2d 798, 275 Ky. 808.

Refutation of private sale

Where city proposed bond issue, failure to afford an opportunity to others than one purchaser to bid on proposed bonds, and the making of a private sale before bond issue had been authorized, could not be ratified by city commissioners.—Eagle v. City of Corbin, *supra*.

34. Wis.—State ex rel. City of Madison v. Bareis, 21 N.W.2d 721, 248 Wis. 387.

Clerk's functions are ministerial

Wis.—State ex rel. City of Madison v. Bareis, *supra*.

property,³⁵ unless an exchange is authorized by statute or charter provision.³⁶ When an exchange is authorized, it must be in accordance with statutory directions.³⁷ Thus, where the statute permits such securities to be exchanged for an indebtedness of the city which was outstanding when the resolution authorizing the securities was passed, an exchange may not be made in payment of an indebtedness which is not liquidated and outstanding at the time of the passage of the resolution.³⁸

Pledge of securities. In the absence of authority conferred by statute or charter provision, a municipality is without power to pledge its bonds or other securities.³⁹ Authority to sell bonds or other securities does not confer power to pledge such securities.⁴⁰

35. Common stock of utility company

Mich.—Hunt v. Fenlon, 21 N.W.2d 906, 313 Mich. 644.

Sale or exchange

A park district could not refuse payment on tax anticipation warrants on theory that such warrants were not sold but were merely delivered to a corporation in exchange for other warrants previously delivered to corporation, where such other warrants had been delivered to corporation conditionally with understanding that they were to be exchanged for other warrants at later date, and the exchange in effect constituted a sale.—Edward J. Berwind, Inc. v. Chicago Park Dist., 65 N.E.2d 785, 393 Ill. 317.

36. Iowa—Iowa Service Co. v. City of Villisca, 213 N.W. 401, 203 Iowa 610.

Exchange is not sale

Iowa—Iowa Service Co. v. City of Villisca, *supra*.

Exchange of refunding bonds for original bonds

Ill.—Scribner v. Village of Downers Grove, 25 N.E.2d 54, 372 Ill. 614.

37. Iowa—Iowa Service Co. v. City of Villisca, 213 N.W. 401, 203 Iowa 610.

38. Iowa—Iowa Service Co. v. City of Villisca, 213 N.W. 401, 203 Iowa 610.

44 C.J. p 1216 note 29.

39. U.S.—City of Sanford, Fla., v. Chase Nat. Bank of City of New York, D.C.N.Y., 44 F.2d 206, reversed on other grounds, C.C.A., 50 F.2d 400, certiorari denied Chase Nat. Bank of City of New York v. City of Sanford, Fla., 52 S.Ct. 35, 284 U.S. 660, 76 L.Ed. 559.

Certificates of indebtedness

U.S.—City of Sanford, Fla., v. Chase Nat. Bank of City of New York, D.C.N.Y., 44 F.2d 206, reversed on other grounds, C.C.A., 50 F.2d 400, certiorari denied Chase Nat. Bank of City of New York v. City of Sanford, Fla., 52 S.Ct. 35, 284 U.S. 660, 76 L.Ed. 559.

For payment of unemployment relief scrip

City auditor was not warranted in depositing with treasurer, nor was latter in accepting and retaining, public work bonds as security for payment of unemployment relief scrip, whether issued by city, county, or both as official act or by public spirited citizens as private enterprise.—Barde v. Funk, 24 P.2d 334, 144 Or. 233.

Pledge for debt of another

U.S.—City of Sanford, Fla., v. Chase Nat. Bank of City of New York, D.C.N.Y., 44 F.2d 206, reversed on other grounds, C.C.A., 50 F.2d 400, certiorari denied Chase Nat. Bank of City of New York v. City of Sanford, Fla., 52 S.Ct. 35, 284 U.S. 660, 76 L.Ed. 559.

40. Or.—Barde v. Funk, 24 P.2d 334, 144 Or. 233.

41. Ill.—Sherlock v. Winnetka, 59 Ill. 389, 68 Ill. 530.

44 C.J. p 1216 note 32.

42. Interest of city attorney

Property owner could not avoid payment of municipal street improvement bonds issued against its property on ground that bonds were invalid under statutes because city attorney claimed interest in bonds delivered to him as trustee for property owners, where city attorney's interest arose out of his employment in his private capacity as attorney at law to represent property owners

§ 1931. Tender or Sale to Officer or Commission

A sale of municipal bonds to members of the city council is void; and under some statutes municipal bonds must first be offered to a specified commission having funds to invest.

A sale of municipal bonds to members of the city council is void;⁴¹ and some statutes prohibit any member of a municipal agency from being interested in any contract made for, or on behalf of, the agency.⁴² Under some statutes municipal bonds must be offered to, and declined by, a specified commission having funds to invest before they are sold or offered for sale to other persons;⁴³ but some of such statutes have been held invalid in so far as they require a municipality to offer bonds to a commission for sale at a price below their market value.⁴⁴ Under a charter provision that bonds may be awarded to the treasurer for

in controversy involving bonds.—Bradley Co. v. Ridgeway, 58 P.2d 194, 14 Cal.App.2d 326.

Sale to corporation

Sale of sewer district's refunding bonds to bank of which one of commissioners was officer was not illegal under statute.—Davidson v. Sewer Improvement Dist., 32 S.W.2d 1062, 182 Ark. 741.

43. Kan.—City of Hutchinson, Reno County v. Ryan, 121 P.2d 179, 154 Kan. 751.

Ohio.—Lake Shore Power Co. v. Village of Edgerton, 184 N.E. 37, 43 Ohio App. 545.

44 C.J. p 1216 note 33.

Time for action by commission

Provision for action by state school fund commission "within ten days", etc., in statute requiring officers having in charge the sale of municipal bonds to send to commission a transcript of the proceedings preliminary to their issue and providing that commission shall within ten days after receiving such transcript notify officers whether the commission desires to purchase the bonds, would be construed as directory and not "mandatory," in view of statutes relating to duties of commission, and, hence, prior right of commission to purchase any issue of municipal bonds was not extinguished by failure of commission to exercise its right within ten days after the bonds and transcript were received.—City of Hutchinson, Reno County, v. Ryan, 121 P.2d 179, 154 Kan. 751.

44. Ohio.—State v. Frazine, 144 N.E. 289, 110 Ohio St. 523.

44 C.J. p 1216 note 34.

the sinking fund, the council has a discretionary power in awarding the bonds, and may accept the bid of a private purchaser, instead of that of the treasurer, where the two bids are the same.⁴⁵

§ 1932. Discount, Commission, and Expenses

- a. In general
- b. Commission and expenses

a. In General

Unless prohibited by constitutional, statutory, or charter regulations, a municipal corporation may sell its bonds for less than their par value.

A sale by a municipal corporation of its bonds for less than their par value is permissible when expressly authorized,⁴⁶ or not prohibited,⁴⁷ by constitution, statute, or charter. On the other hand, municipal bonds may not be sold for less than par where such a sale is expressly prohibited by statutory or charter regulations or by ordinance;⁴⁸ and, under some provisions, municipal bonds may not be sold for less than a prescribed percentage of their par value.⁴⁹ Where the maximum rate of interest which municipal bonds may bear is fixed by statute, charter, or ordinance, the municipality may not sell the bonds below par so as to produce a greater rate of interest than is allowed by law;⁵⁰

but the bonds may be sold for less than par where as a result of such sale the actual interest rate does not exceed the rate fixed by law,⁵¹ at least in cases where there is no statutory or charter provision expressly prohibiting a sale below par.⁵² Where the rate of interest is not limited, bonds are not invalid because they have been sold below par, if the discount added to the interest expressed does not make the rate usurious.⁵³ Where the statute or charter authorizes the issuance and sale of municipal bonds bearing a certain rate of interest and directing their sale to the highest bidder, the provision with respect to interest has been held merely to refer to the form of the bonds and the method in which they shall be executed, and, in the absence of an express statutory or charter prohibition against the sale of the bonds below par, the bonds may be sold for less than par, even though such sale makes the rate of interest greater in effect than the rate provided for.⁵⁴

"Par" or "par value." "Par" means equal, and "par value" means a value equal to the face of the bonds, and a sale of bonds at par is a sale at the rate of a dollar in money for a dollar in bonds.⁵⁵ This is the accepted meaning of the term in the mercantile world, which the legislature is presumed to have adopted in enacting the statute.⁵⁶

45. Or.—Portland v. Albee, 185 P. 516, 897, 67 Or. 221.

46. Ark.—Ledbetter v. Hall, 87 S. W.2d 996, 191 Ark. 791.

Fla.—State v. City of Miami, 194 So. 792, 142 Fla. 284.

44 C.J. p 1216 note 38, p 1217 note 41 [a].

Delivery at par in payment of debt or subscription see supra § 1930. Sale to commission at less than market value see supra § 1931.

Validity of statutory or charter provisions

(1) Charter amendment authorizing sale of bonds previously voted at less than par was not invalid.—Warfield v. Anglo & London Paris Nat. Bank, 260 P. 881, 202 Cal. 345.

(2) Validity of other provisions see 44 C.J. p 1216 note 38 [a].

47. Cal.—Golden Gate Bridge and Highway Dist. v. Filmer, 21 P.2d 112, 217 Cal. 754, 91 A.L.R. 1.

Or.—Hattrem-Nelson & Co. v. Salmon River-Grande Ronde Highway Improvement Dist., 285 P. 231, 132 Or. 297.

44 C.J. p 1216 note 39.

Constitutional restriction applicable to private corporations only does not govern municipalities or their agencies in sale of bonds below par.—Klein v. City of Louisville, 6 S. W.2d 1104, 224 Ky. 624.

48. U.S.—Shipman v. District of

Columbia, Ct.Cl., 7 S.Ct. 124, 119 U. S. 148, 30 L.Ed. 337.

Ga.—Bower v. City of Bainbridge, 148 S.E. 517, 168 Ga. 616.

Kan.—State ex rel. Beck v. Kansas City, 84 P.2d 409, 148 Kan. 623. opinion supplemented 86 P.2d 476, 149 Kan. 252.

Ky.—Corpus Juris cited in Duff v. Knott County, 36 S.W.2d 870, 874, 238 Ky. 71.

Mo.—Sager v. City of Stanberry, 78 S.W.2d 431, 336 Mo. 213.

Okl.—Aaronson v. Smiley, 285 P. 59, 142 Okl. 29.

44 C.J. p 1216 note 40.

Municipal debt

Statutory provision that no municipal bonds shall be sold for less than face value is applicable to sale of all bonds issued pursuant to statutory and constitutional authority, and is inapplicable to bonds which do not constitute municipal debt.—Fjeldsted v. Ogden City, 28 P.2d 144, 83 Utah 278.

Contract to construct sidewalk at greater than cash price, if paid by bonds, and for discount of bonds below par value, violated statutes providing for issuance of bonds at par.—Bower v. City of Bainbridge, 148 S.E. 517, 168 Ga. 616.

Effect of sale on validity of instrument

Fact that city sold water fund

certificates at less than par in violation of statute would not render certificates void and uncollectable.—City of Jerseyville, Ill., v. Connett, C.C.A.Ill., 49 F.2d 246.

49. Or.—Oillio v. Clatskanie Peoples' Utility Dist., 132 P.2d 416, 170 Or. 173.

44 C.J. p 1217 note 41.

50. Wash.—Spear v. Bremerton, 155 P. 825, 90 Wash. 507.

44 C.J. p 1217 note 43. Interest on municipal bonds see infra § 1940.

51. Or.—Hattrem-Nelson & Co. v. Salmon River-Grande Ronde Highway Improvement Dist., 285 P. 231, 132 Or. 297.

44 C.J. p 1217 note 45.

52. Wash.—Hill v. Seattle, 185 P. 631, 108 Wash. 572.

53. Tex.—Austin v. Nalle, 22 S.W. 668, 960, 85 Tex. 520.

Purchase of municipal bonds at discount as usurious see the C.J.S. title Usury § 19, also 66 C.J. p 189 note 6 et seq.

54. Or.—Kiernan v. Portland, 122 P. 764, 61 Or. 398, Ann.Cas.1914B 255.

55. N.Y.—Ft. Edwards v. Fish, 50 N.E. 973, 156 N.Y. 363.

Okl.—Town of Buffalo v. Walker, 257 P. 766, 126 Okl. 6.

56. Okl.—Town of Buffalo v. Walker, supra.

Where nothing to the contrary appears the words "par" or "par value" include not only the principal but also interest accrued at the time of the sale;⁵⁷ and in some jurisdictions statutes expressly prohibit the sale of municipal bonds for an amount less than par with accrued interest.⁵⁸

b. Commission and Expenses

A commission may be paid by a municipal corporation for the sale of its bonds or other securities where such payment is authorized by statutory or charter provisions.

In some jurisdictions it has been held that there is no authority in law for paying a commission for the sale of municipal bonds;⁵⁹ and a commission may not be paid for the sale of bonds or other securities where such payment is expressly forbidden by statutory or charter provisions.⁶⁰ In other jurisdictions, however, it has been held that a municipality may pay an agent or broker a commission for his services in effecting a sale of bonds;⁶¹ and a commission may be paid where authority to do so is expressly conferred on the municipality by statutory or charter provisions.⁶² Where a commission is allowed, it is not to be considered in determining whether the bonds were sold below par in violation of statute or charter

regulations;⁶³ but the municipality may not allow a purchaser of the bonds at par a commission, as agent of the municipality for the sale of the bonds,⁶⁴ as in substance and effect this would be a sale of the bonds below par⁶⁵ and a violation of statutes requiring a sale at par.⁶⁶ A commission for the sale of municipal bonds may not be paid out of the sinking fund where such payment is prohibited by statute.⁶⁷

Expenses. There is considerable divergence of holding in respect of payment of expenses incident to a sale of municipal bonds, such as printing and attorney's fees, since it is variously held that such expenses may⁶⁸ or may not⁶⁹ be allowed the purchaser, or that they may⁷⁰ or may not⁷¹ be paid from the general funds of the city. The payment of such expenses out of the proceeds of the bonds has been held proper in some decisions,⁷² or, even if improper, not to be fatal to the validity of the bonds;⁷³ but in other decisions it has been held that such expenses may not be paid from the proceeds of the bonds unless the bonds sell at a premium sufficient to cover the expenses.⁷⁴

§ 1933. Contract of Sale

a. In general

57. Wyo.—Diefenderfer v. State, 80 P. 667, 13 Wyo. 387.

44 C.J. p 1216 note 40 [c] (2)-(5).

58. Okl.—Town of Okarche v. Connelly Bros., 51 P.2d 955, 175 Okl. 238.

Sale is void if made in violation of statute.—Town of Okarche v. Connelly Bros., 51 P.2d 955, 175 Okl. 238.—Town of Buffalo v. Walker, 257 P. 766, 126 Okl. 6.

59. Idaho.—Lucas v. Nampa, 228 P. 288, 41 Idaho 35.

60. Fla.—Bryan v. City of Miami, 190 So. 772, 139 Fla. 650.

Illegal preference

Agreement by city to compensate brokerage firm which was to conduct public sale of proposed refunding paving certificates was not an abuse of discretion and did not constitute an illegal preference to bidder at public sale where it was expressly provided that brokerage company could not be a bidder at the sale.—State ex rel. Maestri v. Cave, 190 So. 681, 193 La. 419.

61. N.Y.—Sage v. Broderick, 173 N. E. 908, 255 N.Y. 19.

Wash.—Bayha v. Public Utility Dist. No. 1 of Grays Harbor County, 97 P.2d 614, 2 Wash.2d 85.

44 C.J. p 1217 note 49.

Amount of commission

Contract by which public utility

district commissioners employed fiscal agent to negotiate sale of bonds of district was not an abuse of discretion, notwithstanding agent was to be paid commission of two and one half per cent of purchase price of utility property purchased by district, and was given option to purchase bonds, where agent was required under contract to conduct negotiations relative to purchase of property and to procure purchaser for bonds and to pay expense of forming syndicate to handle the purchase out of his commission, and option was not used for personal advantage of agent.—Bayha v. Public Utility Dist. No. 1 of Grays Harbor County, supra.

62. Fla.—State v. City of Fort Myers, 198 So. 814, 145 Fla. 135.—Pierce v. Isaac, 184 So. 509, 134 Fla. 666.

63. Minn.—State v. West Duluth Land Co., 78 N.W. 115, 75 Minn. 456.

Wash.—Bayha v. Public Utility Dist. No. 1 of Grays Harbor County, 97 P.2d 614, 2 Wash.2d 85. Sale below par see supra subdivision a of this section.

64. Mich.—Bay City v. Lumbermen's State Bank, 160 N.W. 425, 193 Mich. 533.

44 C.J. p 1217 note 51.

65. Pa.—Appeal of Whelan, 1 A. 88, 108 Pa. 162.

66. Mich.—Bay City v. Lumbermen's State Bank, 160 N.W. 425, 193 Mich. 533.

67. Ohio.—Hicksville v. Blakeslee, 134 N.E. 445, 103 Ohio St. 508. Application of sinking fund generally see infra § 1953.

68. Tenn.—Miller v. Park City, 150 SW 90, 126 Tenn. 427, Ann Cas. 1913E 83. 44 C.J. p 1217 note 55.

69. Wash.—Spear v. Bremerton, 156 P. 825, 90 Wash 507—Uhler v. Olympia, 151 P. 117, 152 P. 998, 87 Wash. 1.

70. Tex.—Davis v. San Antonio, Civ. App., 160 S.W. 1161. 44 C.J. p 1217 note 57.

71. Wash.—Uhler v. Olympia, 151 P. 117, 152 P. 998, 87 Wash. 1.

72. N.C.—LeRoy v. Elizabeth City, 81 SE 1072, 166 N.C. 93.

73. N.C.—LeRoy v. Elizabeth City, supra. Improper use of proceeds as affecting validity of bonds generally see infra § 1934.

74. Tex.—Davis v. San Antonio, Civ. App., 160 S.W. 1161.

- b. Conditional bid or contract
- c. Rescission

a. In General

The acceptance by the municipal corporation of an unconditional bid or offer to purchase municipal bonds constitutes a complete contract for the sale and purchase of the bonds.

An unconditional bid, offer, or proposition to purchase municipal bonds and an acceptance thereof by the municipal corporation constitute a complete contract,⁷⁵ obligating the municipality to abide by its acceptance⁷⁶ and to issue⁷⁷ and deliver⁷⁸ the bonds. The municipality is liable for a breach of its contract for the sale of bonds in the same manner and to the same extent as individual persons or private corporations would be liable for breach of contract.⁷⁹ The contract of purchase obligates the purchaser to accept⁸⁰ and pay for⁸¹ the bonds.

Conversely, the contract is incomplete until the proposal is accepted,⁸² and the municipality inviting the proposals is not liable for damages for refusing to accept an offer, even though it is the highest regular offer made.⁸³ A person who, pursuant to an advertisement of sale, makes a bid for municipal bonds of a certain kind cannot be required to take all or part of the amount in bonds of another kind,⁸⁴ even though the latter bonds are equally valuable.⁸⁵ If the municipality was without

power to issue the bonds, the bidder is not bound to take them.⁸⁶

A buyer of municipal bonds from a city is not liable in damages for refusing to accept them when their marketable value is destroyed or impaired by questions of legality arising from facts shown by, or omissions in, the records of the city;⁸⁷ and it is immaterial that after his refusal, and after the bonds have been sold by the city to other persons, the state supreme court adjudges the bonds to be valid, since the purchaser then has no opportunity to accept them with the benefit of such adjudication.⁸⁸

A contract for the sale of bonds, which is illegal and void in its origin, cannot be ratified by the city.⁸⁹

Deposit. The statutes and charter provisions sometimes require that the bidder submit with his bid a certain sum in cash or its equivalent.⁹⁰ The deposit is a pledge of good faith⁹¹ and protects the municipality against possible loss because of the failure of the bidder to comply with his bid, if it is accepted.⁹² The provision for such a deposit is one made wholly for the benefit of the municipality and is not for the benefit of other bidders or of individual taxpayers.⁹³ The requirement may be waived by the municipality,⁹⁴ and the failure of the bidder to make the deposit

75. Okl.—State v. Sapulpa, 160 P. 489, 58 Okl. 550.

76. Wyo.—Diefenderfer v. State, 80 P. 667, 13 Wyo. 387.
44 C.J. p 1217 note 63.

77. U.S.—Roberts v. Paducah, C.C. Ky., 95 F. 62.
44 C.J. p 1218 note 64.

78. Ohio.—Breed v. Lima, 12 Ohio App. 485.
44 C.J. p 1218 note 65.

Right of purchaser to accrued interest coupons see *infra* § 1940.

Authorizing state officer to deliver bonds

(1) Mayor's letter and telegram authorized state comptroller, as matter of law, to deliver city bonds to warrant holders, contrary to a contract of the city to sell them to another.—Geo. L. Simpson & Co. v. City of Lubbock, Tex.Civ.App., 17 S. W.2d 163, error dismissed.

(2) Evidence showed that mayor's letter and telegram, authorizing state comptroller to deliver city bonds to warrant holders, were acts of city.—Geo. L. Simpson & Co. v. City of Lubbock, *supra*.

79. Tex.—Geo. L. Simpson & Co. v. City of Lubbock, *supra*.

Contracts by municipality generally see *supra* §§ 973–1026.

80. N.Y.—Moses v. Key West, 36 N. Y.S. 979, 15 Misc. 15, affirmed 51 N.E. 1092, 157 N.Y. 689.

44 C.J. p 1218 note 66.

81. Ga.—National City Co. of New York v. City of Athens, 144 S.E. 336, 38 Ga.App. 491.

44 C.J. p 1218 note 67.

Prima facie liability

One bidding off municipal paving bonds on proceedings admittedly regular on face is *prima facie* liable.—Merchants' Securities Corporation v. City of Atmore, 126 So. 871, 220 Ala. 682.

Purpose of issuance not fully stated in ordinance

Successful bidders for bonds could not avoid payment because purposes of bond issuance were not fully stated in caption of ordinance calling election.—Kern v. City of Mt. Sterling, 25 S.W.2d 41, 233 Ky. 156.

82. Mo.—Coquard v. Joplin School Dist., 46 Mo.App. 6.

No contractual relation arises from bid unless by terms of statute and advertisement a bid pursuant thereto is as a matter of law an acceptance of offer wholly apart

from any action on part of municipality or any of its officers.—Milwaukee Co. v. City of Tomahawk, 300 N.W. 257, 238 Wis. 452, 139 A.L.R. 1044.

83. Mo.—Coquard v. Joplin School Dist., 46 Mo.App. 6.

84. Tex.—McNear v. Kaufman, Civ. App., 270 S.W. 211.
44 C.J. p 1218 note 71.

85. U.S.—Coffin v. Indianapolis, C. C.Ind., 59 F. 221.

86. U.S.—Coffin v. Indianapolis, *supra*.

87. U.S.—Great Falls v. Theis, C.C. Wash., 79 F. 943.

88. U.S.—Great Falls v. Theis, *supra*.

89. Tex.—City of Lubbock v. Geo. L. Simpson & Co. Civ.App., 31 S. W.2d 665, error dismissed.

90. Okl.—Hughes v. City of Cushing, 39 P.2d 13, 170 Okl. 118.

91. Kan.—Junction City v. Central Nat. Bank, 153 P. 28, 96 Kan. 407.

92. Okl.—Hughes v. City of Cushing, 39 P.2d 13, 170 Okl. 118.

93. Okl.—Hughes v. City of Cushing, *supra*.

94. Okl.—Hughes v. City of Cushing, *supra*.

does not render the bid void or preclude the municipal officials from accepting the bid.⁹⁵

Where the bidder is required to accompany his bid with a deposit to be forfeited on failure to complete the purchase if his bid is accepted, he is not entitled to a return of the deposit where there exists no justifiable cause for his refusal to take the bonds;⁹⁶ and the municipality may declare the deposit forfeited where the purchaser or his assignee without cause unconditionally declares his intention to abandon the agreement.⁹⁷ On the other hand, if for any reason the bidder is entitled to be released from his bid, he may recover his deposit;⁹⁸ but interest on the deposit is not recoverable,⁹⁹ at least where the deposit is held in the registry of the court.¹

b. Conditional Bid or Contract

A bid to purchase municipal bonds subject to the

approval of the legality of the issue by the attorney of the bidder is a valid and conditional bid.

A bid to purchase municipal bonds may be made subject to a valid condition,² but, if the condition is illegal, the bid may not be legally accepted by the municipal corporation.³ A bid or contract to purchase municipal bonds subject to the approval of the legality of the issue by the attorney of the bidder is a valid⁴ conditional⁵ bid or contract. Where an opinion favorable to the legality of the bonds is rendered by the bidder's attorney, the bidder is under obligation to accept and pay for the bonds.⁶ Where the bidder's attorney has honestly and in good faith, without fraud or collusion, rendered an opinion adverse to the legality of the bonds, the bidder is relieved of the obligation to take the bonds⁷ and is entitled to a return of the deposit accompanying his bid,⁸ regardless of whether the opinion is correct or erroneous⁹ and regardless

95. Okl.—Hughes v. City of Cushing, *supra*.

96. Tex.—City of El Campo v. South Tex. Nat. Bank of San Antonio, Civ.App., 200 S.W.2d 252, error refused.

97. Tex.—Ulen Securities Co. v. City of El Paso, Civ.App., 59 S.W.2d 198, error refused.

Effect of illegality of bonds

Where assignee of contract to buy municipal bonds declared intention to abandon contract, mere illegality of bonds could not prevent forfeiture of check deposited as liquidated damages, since contract made return of check dependent on attorneys disapproving bonds.—Ulen Securities Co. v. City of El Paso, *supra*.

98. U.S.—Coffin v. Indianapolis, C. C.Ind., 59 F. 221.

Wis.—Corpus Juris cited in Milwaukee Co. v. City of Tomahawk, 300 N.W. 257, 259, 238 Wis. 452, 139 A.L.R. 1044.

Recovery of deposit made with conditional bid see *infra* subdivision b of this section.

Invalidity of contract

A city cannot claim that it made a contract for sale of municipal bonds void on its face and still retain money it required purchaser in good faith and reliance thereon to deposit.—Milwaukee Co. v. City of Tomahawk, 300 N.W. 257, 238 Wis. 452, 139 A.L.R. 1044.

Failure of city to perform

A city cannot rely on validity of contract for sale of municipal bonds and profit under it by retaining deposit made by purchaser in good faith if it fails to carry out terms on its part to be performed.—Milwaukee Co. v. City of Tomahawk, 300

N.W. 257, 238 Wis. 452, 139 A.L.R. 1044.

99. Colo.—Denver v. Hayes, 63 P. 311, 28 Colo. 110.

1. Tex.—McNear v. Kaufman, Civ. App., 270 S.W. 211.

2. Wis.—Milwaukee Co. v. City of Tomahawk, 300 N.W. 257, 238 Wis. 452, 139 A.L.R. 1044.

3. Tenn.—Reed v. Athens, 240 S.W. 439, 146 Tenn. 168.

4. Idaho.—Municipal Securities Corp. v. Buhl Highway Dist., 208 P. 233, 35 Idaho 377.

Wis.—Milwaukee Co. v. City of Tomahawk, 300 N.W. 257, 259, 238 Wis. 452, 139 A.L.R. 1044.

5. Ga.—National City Co. of New York v. City of Athens, 144 S.E. 336, 38 Ga.App. 491.
44 C.J. p 1218 note 81.

Title to bonds and deposit pending investigation

Acceptance of bidder as conditional purchaser of bonds pending bidder's approval of legality did not pass title to bonds or to deposit pending investigation.—National City Co. of New York v. City of Athens, *supra*.

6. Ga.—National City Co. of New York v. City of Athens, *supra*.

Loss of initial deposit on bank failure

Request that deposit check be returned, if bidder for city bonds was not successful, did not require city to cash check pending bidder's investigation of legality of issue, and city, failing to cash check, was not negligent, and could recover amount of check on failure of drawee bank.—National City Co. of New York v. City of Athens, *supra*.

7. Ga.—National City Co. of New York v. City of Athens, *supra*.

8. Ga.—National City Co. of New York v. City of Athens, *supra*.
44 C.J. p 1218 note 82.

"Unqualified approving opinion"

Contract between company and city, that company would buy and city would sell all revenue bonds to be issued by city to finance construction of city waterworks system if company received an "unqualified approving opinion" from third persons, called for an approving opinion preceding the time when consideration was to be paid for the bonds and not a final market opinion, and, therefore, company was not authorized to refuse to purchase the bonds and could not recover deposit of liquidated damages merely because opinion stated that it was impossible to give a final opinion.—City of El Campo v. South Tex. Nat. Bank of San Antonio, Tex.Civ.App., 200 S.W. 2d 252, error refused.

Resale of bonds by city

Where city advertised sale of its bonds to highest bidder, and plaintiff whose bid was highest and who had made deposit to insure good faith attached condition to bid that plaintiff's attorneys must approve legality of bond issue which bid was accepted by city, but plaintiff's attorneys disapproved bond issue whereupon city sold bonds to another without notice or tender to plaintiff, city had failed to fulfill its contract and plaintiff was entitled to return of its deposit.—Milwaukee Co. v. City of Tomahawk, 300 N.W. 257, 238 Wis. 452, 139 A.L.R. 1044.

9. Tex.—McNear v. Kaufman, Civ. App., 270 S.W. 211.
44 C.J. p 1218 note 83.

of whether the bonds are valid or invalid as a matter of law.¹⁰ Like rules obtain where a contract to find a purchaser for municipal bonds contains the same condition and is accompanied by a deposit.¹¹

On the other hand, where a bid is made subject to the legality of the issue generally without provision for approval by an attorney, the bidder is or is not bound according as the issue is or is not valid as a matter of law;¹² and, where the issue is valid and the bidder refuses to accept the bonds, he is not only not entitled to recover the deposit accompanying the bid,¹³ but is liable for such damages as the municipality suffers by reason of his breach of contract, even though such damages exceed the amount of the deposit.¹⁴

c. Rescission

In a proper case a contract for the sale of municipal bonds may be rescinded or canceled.

A municipal corporation is entitled to a rescission of a sale of its bonds and to a return of the bonds where the buyer purchased when insolvent and without intention to pay for the bonds.¹⁵ A

purchaser is entitled to a rescission and cancellation of the contract created by the acceptance of his bid where he made the bid under a misapprehension of the valuation of the taxable property in the municipality, and a statement as to such valuation contained in a circular inviting bids was false,¹⁶ or the bidder was honestly mistaken as to the meaning thereof.¹⁷

§ 1934. Proceeds of Sale

The proceeds of a sale of municipal bonds issued for a particular purpose belong to the fund to which they were dedicated and must be used for the purpose for which the issuance of the bonds was authorized.

The proceeds derived from the sale of municipal bonds or other securities are to be used or disposed of in such manner as is directed by statutory or charter provisions.¹⁸ All the proceeds of a sale of bonds issued for a particular purpose belong to the fund to which they were dedicated,¹⁹ and cannot be legally transferred to another fund.²⁰

The funds or proceeds arising from a sale of municipal bonds or other securities must be used for the purpose for which the issuance of the bonds was authorized²¹ and may not be diverted

10. Ga.—*Rome v. Breed*, 95 S.E. 474, 21 Ga.App. 805.

44 C.J. p 1218 note 84.

11. Tex.—*Grant v. Mineral Wells*, Civ.App., 230 S.W. 854.

12. Kan.—*Junction City v. Central Nat. Bank*, 153 P. 28, 96 Kan. 407.

13. Kan.—*Junction City v. Central Nat. Bank*, supra.

14. Kan.—*Junction City v. Central Nat. Bank*, supra.

15. U.S.—*Southport v. Williams*, D. C.N.C., 290 F. 488, affirmed, C.C.A., 298 F. 1028.

44 C.J. p 1219 note 90.

Cancellation of instruments by suit generally see *Cancellation of Instruments* § 1 et seq.

Rescission of contracts by act of parties see *Contracts* §§ 413-448.

16. U.S.—*Omaha v. Venner*, Neb., 243 F. 107, 155 C.C.A. 637.

17. U.S.—*Omaha v. Venner*, supra.
44 C.J. p 1219 note 92.

18. Cal.—*City of Oakland v. Williams*, 290 P. 1044, 107 Cal.App. 340.

Pa.—*Sambor v. Hadley*, 140 A. 347, 291 Pa. 395, followed in *Turner Const. Co. v. Mackey*, 140 A. 353, 291 Pa. 412, and *Plumly v. Hadley*, 140 A. 353, 291 Pa. 411.

Payment of expenses of sale from proceeds see supra § 1932.

Proceeds of bonds authorized by voters see supra § 1929.

Rights and duties of bondholders as

to application of proceeds see *infra* § 1971.

Lawful or unlawful purpose

Under constitution forbidding legislation authorizing municipality to appropriate money or loan credit to corporation or individuals, bonds authorized under valid statute for lawful purpose cannot be used for forbidden purpose, but proceeds of bonds duly authorized may be used for lawful purposes under valid statutes.—*State ex rel. Davis v. Ryan*, 158 So. 62, 118 Fla. 42.—*State ex rel. Ake v. Broward County Port Authority*, 158 So. 62, 118 Fla. 42.

Proceeds from refunding bonds

Under local improvement act, an objecting bondholder may be paid his due bond out of the sale of bonds issued in refunding the installment on which his bond is issued.—*Scribner v. Village of Downers Grove*, 25 N.E.2d 54, 372 Ill. 614.

19. Ala.—*Camden v. Fairbanks*, 86 So. 8, 204 Ala. 112.
44 C.J. p 1219 note 94.

20. Mo.—*Stephens v. Bragg City*, 27 S.W.2d 1063, 224 Mo.App. 469.
44 C.J. p 1219 note 96.

Transfer from one fund to another generally see *infra* §§ 2117-2118.

Where general bonds had been allotted to water fund, city was charged by law to accede to the faithful application of the bonds.—*Getz v. City of Harvey*, C.C.A.Ill., 118 F.2d 817, certiorari denied *City of Harvey*

v. Getz, 62 S.Ct. 59, two cases, 314 U.S. 628, 86 L.Ed. 504.

21. Ky.—*Dally v. Smith's Adm'x*, 180 S.W.2d 861, 297 Ky. 689.
Or.—*Blaser v. Dalles City*, 137 P.2d 991, 171 Or. 441.

44 C.J. p 1219 note 98.
Disposition of municipal revenue collected generally see *infra* § 2117.

Express constitutional, statutory, or charter requirement

In some jurisdictions constitutional, statutory, or charter provisions expressly provide that the proceeds of a bond sale shall only be applied for the purposes for which they were issued.

Cal.—*City of Oakland v. Williams*, 290 P. 1044, 107 Cal.App. 340.

Conn.—*Rule v. City of Stamford*, 185 A. 178, 121 Conn. 447.

Ga.—*City of Fayetteville v. Huddleston*, 142 S.E. 280, 165 Ga. 899.

Okl.—*Protest of Reid*, 15 P.2d 995, 180 Okl. 3.—*In re Bliss*, 285 P. 78, 142 Okl. 1.—*Gulf, C. & S. F. Ry. Co. v. Excise Board of Love County*, 283 P. 1003, 141 Okl. 34.

Ordinance in conflict with charter provision directing the use of the proceeds of a bond sale is invalid.—*Barde v. Funk*, 24 P.2d 634, 144 Or. 233.

Bonds for extension of city water-works

Ohio.—*Ohio Power Co. v. Craig*, 197 N.E. 826, 50 Ohio App. 289.

to, or used for, other purposes,²² unless such use is merely incidental to, and reasonably implied as part of, the designated object for which the bonds were authorized²³ or unless the diversion is authorized by a valid statute.²⁴ Thus, in the absence of authority conferred by statute or charter, the proceeds arising from a sale of bonds for a particular purpose may not be used to pay the general indebtedness of the city.²⁵ A statute, making a certificate of the auditor that the requisite funds are in the treasury a condition precedent to an ordinance or contract involving the expenditure of money, does not apply to an ordinance appropriating the money obtained from the sale of bonds to the purpose for which the bonds were sold.²⁶

The obligations incurred by the municipality on receipt of the proceeds of the sale of the bonds are essentially those that rest on the custodian of a

trust fund.²⁷ The municipality is bound to see that the fund is applied to the purposes for which it was created;²⁸ but that in general is the extent of its obligation²⁹ and it is not bound to complete the entire improvement for which the bonds were authorized;³⁰ nor is it under any obligation to use immediately the full amount derived from the bond issue.³¹

It may be proper to deposit the proceeds of bonds in a bank³² or to purchase government bonds.³³ In the case of improvement bonds, the city may not permit the purchaser of the bonds to retain the proceeds, without security to the city, and pay them over to the city only as the work on the improvement progresses.³⁴

Bond issue for several purposes. Some statutes authorizing a municipal bond issue for several pur-

Bonds to construct new hospital
Okl.—City of Alva v. Mason, 300 P. 784, 150 Okl. 25.

Bond to refund shortages in special funds
Ky.—City of Hopkinsville v. Wheeler, 106 S.W.2d 1017, 269 Ky. 292.

Refunding bonds
N.C.—Bolich v. City of Winston-Salem, 164 S.E. 361, 202 N.C. 786.

Revenue bonds for electric light plant
Ky.—Daffy v. Smith's Adm'x, 180 S.W.2d 861, 297 Ky. 689.

22. Fla.—Uttley v. City of St. Petersburg, 144 So. 58, 107 Fla. 6.
Ga.—City of Fayetteville v. Huddleston, 142 S.E. 280, 165 Ga. 899—Allen v. City of Atlanta, 142 S.E. 262, 166 Ga. 28.

Ky.—Levinthal v. City of Covington, 49 S.W.2d 574, 243 Ky. 614.

Ohio.—Ohio Power Co. v. Craig, 197 N.E. 820, 50 Ohio App. 239—Kellogg v. Sherrill, 156 N.E. 418, 24 Ohio App. 169.

Okl.—City of Alva v. Mason, 300 P. 784, 150 Okl. 25.

Or.—Barde v. Funk, 24 P.2d 334, 144 Or. 233.

44 C.J. p 1219 note 98.

Injunction at suit of taxpayers to restrain diversion of municipal funds see infra § 2148.

Exigencies of situation and good faith of the municipal authorities cannot justify the diversion of the proceeds to a purpose which has not been authorized.—Daffy v. Smith's Adm'x, 180 S.W.2d 861, 297 Ky. 689.

What constitutes diversion

(1) Where city was authorized to operate and maintain playgrounds, athletic fields, and indoor recreation centers, proceeds of bonds issued to construct, equip, and improve pleasure grounds, parks, and playgrounds were available for construction of

auditorium and buildings for exhibition of livestock.—Lewis v. City of Fort Worth, 89 S.W.2d 975, 126 Tex. 458.

(2) Where bonds were issued "for the planning, construction and establishment of units for a sewerage disposal system," there was no diversion in use of unexpended proceeds of bonds to build extension of system.—Payne v. City of Racine, 259 N.W. 437, 217 Wis. 550.

23. Ky.—Levinthal v. City of Covington, 49 S.W.2d 574, 243 Ky. 614. 44 C.J. p 1219 note 98 [d].

Overpass as incidental to airport
Ark.—Turnah v. Moyer, 152 S.W.2d 1007, 202 Ark. 821.

Storm drain as part of sea wall
Tex.—First Nat. Bank v. City of Port Arthur, Civ.App., 35 S.W.2d 258.

24. N.C.—Cabe v. Franklin, 116 S.E. 419, 185 N.C. 158.

25. Ky.—Daffy v. Smith's Adm'x, 180 S.W.2d 861, 297 Ky. 689.

Mo.—Stephens v. Bragg City, 27 S.W.2d 1063, 224 Mo.App. 469.

26. Tenn.—Reed v. Athens, 240 S.W. 439, 146 Tenn. 168.

Certificate as to funds see supra § 1868.

27. Ga.—Allen v. City of Atlanta, 142 S.E. 262, 166 Ga. 28.

Mo.—City of St. Louis v. Senter Commission Co., 85 S.W.2d 21, 337 Mo. 238—Thompson v. St. Louis, 253 S.W. 969, dismissed 46 S.Ct. 12, 269 U.S. 589, 70 L.Ed. 427.

Refunding bonds

Statutory requirement for sale of refunding bonds imposes status of trustee on officer receiving price for benefit of creditors whose indebtedness was merged in funding bonds.—Maryland Casualty Co. v. Board of County Com'rs, 260 P. 1112, 128 Okl. 58.

Particular officers having custody

Statute authorizing mayor and council to purchase land for fire department and providing for commission to take charge of purchase gave mayor and council custody of proceeds of bonds.—Renshaw v. Grace, 142 A. 99, 155 Md. 294.

28. Mo.—Thompson v. St. Louis, 253 S.W. 969, dismissed 46 S.Ct. 12, 269 U.S. 589, 70 L.Ed. 427.

Breach of trust

Any diversion of funds from the purpose or purposes for which they were voted is a misapplication of such funds and a breach of the trust imposed.—Allen v. City of Atlanta, 142 S.E. 262, 166 Ga. 28.

Proper application of fund

Cal.—City of San Diego v. Millan, 16 P.2d 357, 127 Cal.App. 521.

La.—Anderson v. Thomas, 117 So. 573, 166 La. 512.

Mo.—Vrooman v. City of St. Louis, 88 S.W.2d 189, 337 Mo. 933.

Tex.—Giles v. City of Houston, Civ. App., 59 S.W.2d 208, error dismissed.

W.Va.—Bowling v. City of Bluefield, 140 S.E. 685, 104 W.Va. 589.

44 C.J. p 1219 note 4 [a].

29. Mo.—Thompson v. St. Louis, 253 S.W. 969, dismissed 46 S.Ct. 12, 269 U.S. 589, 70 L.Ed. 427.

30. Mo.—Thompson v. St. Louis, supra.

31. Conn.—Litchfield v. Bridgeport, 131 A. 560, 103 Conn. 565.

32. Tenn.—Reed v. Athens, 240 S.W. 439, 146 Tenn. 168.

33. Ala.—Fuller v. City of Cullman, 27 So.2d 203, 248 Ala. 236.

34. Tenn.—Reed v. Athens, 240 S.W. 439, 146 Tenn. 168.

poses do not declare what proportion of the proceeds of the sale of the bonds shall be applied to each specific purpose.³⁵ Under such statutes the matter is left to the sound discretion of the city authorities.³⁶

Disposition of premium. Any premium on the sale of municipal bonds is to be used or disposed of in such manner as the statutes or charter provisions direct.³⁷ Under some statutes any premium realized on the sale of municipal bonds issued for a particular purpose is to be placed in the fund created to fulfill such purpose and is not to be used for interest and redemption payments,³⁸ at least until the purposes and objects for which the bonds were issued have been fully accomplished.³⁹ Under other statutes the net premium is credited to, and held in the sinking fund for, the purpose of reducing the tax levy necessary to pay the interest thereon and to create a sinking fund for the retirement of the bonds.⁴⁰ Where a city, on the sale of water bonds, received a sum in excess of the face of the bonds for accrued interest coupons which were left attached to the bonds, such sum should be deducted from the water bond fund and set apart to be applied to the payment of the coupons.⁴¹

Where the city issues bonds for a particular purpose to the limit allowed by law, any premium realized on the sale of the bonds may not be used for such purpose, but becomes a part of the general funds of the city.⁴²

Disposition of excess funds. Funds received from the sale of municipal bonds over and above the amount needed for the particular purpose for which the money was borrowed are to be used or disposed of in such manner as may be directed by constitutional, statutory, or charter provisions or by ordinance.⁴³ Where the ordinance providing for the issuance of the bonds so requires, any excess funds obtained by the sale of the bonds should be placed in the general sinking fund of the city.⁴⁴ Where the constitution or statutes expressly provide that the proceeds of a bond sale shall be used only for the purpose specified and for no other purpose, a balance of funds received from a bond issue after the purpose for which the money was borrowed has been served may not be used for another purpose, but must be placed in the sinking fund for the purpose of retiring pro tanto the bonds issued in excess of the amount needed for the purpose for which they were issued.⁴⁵ However, excess funds may be diverted to other purposes to the extent authorized by statutory or charter provisions.⁴⁶

Disposition of funds realized on sale of improvement. Where a municipality sells bonds for the purpose of purchasing or constructing an improvement, such as a public utility, and after its acquisition or construction the municipality sells such improvement, the funds realized on the sale of the improvement are to be used or disposed of in accordance with statutory directions.⁴⁷ Under some

35. N.C.—*Gastonia v. Citizens' Nat. Bank*, 81 S.E. 755, 165 N.C. 507.

36. N.C.—*Gastonia v. Citizens' Nat. Bank*, *supra*.

44 C.J. p 1220 note 10.

37. Cal.—*City of Oakland v. Williams*, 290 P. 1044, 107 Cal.App. 340.

Okl.—*In re Bliss*, 285 P. 73, 142 Okl. 1.

44 C.J. p 1219 note 95 [a].

Right of purchaser to accrued interest see *infra* § 1940.

38. **Premium as "proceeds of bonds"**

(1) Under statute providing that the "proceeds of such bonds shall be placed in the municipal treasury to the credit of the proper improvement fund," the entire purchase price, including the premium, constitutes the proceeds of the bond.—*City of Oakland v. Williams*, 290 P. 1044, 107 Cal. App. 340.

(2) The premium paid for bonds has likewise been considered as part of the proceeds available for the improvement.—*Williams v. Stockton*, 235 P. 986, 195 Cal. 743.

39. Cal.—*City of Oakland v. Williams*, 290 P. 1044, 107 Cal.App. 340.

40. Okl.—*In re Bliss*, 285 P. 73, 142 Okl. 1.—*Aaronson v. Smiley*, 285 P. 59, 142 Okl. 29.

Sinking funds see *infra* § 1953.

41. Ky.—*Owensboro Waterworks Co. v. Owensboro*, 96 S.W. 867, 29 Ky L. 1118.

42. **Bonds issued for board of education**

The premium, in so far as it exceeded the amount which the city council was authorized to borrow for the board of education, belonged to the municipality and not to the board of education.—*People v. Dakin*, 43 Hun 382, 6 N.Y.St. 328.

43. Conn.—*Rule v. City of Stamford*, 185 A. 178, 121 Conn. 447. Mo.—*City of St. Louis v. Senter Commission Co.*, 85 S.W.2d 21, 337 Mo. 238.

44. Mo.—*City of St. Louis v. Senter Commission Co.*, *supra*.

45. Okl.—*In re Bliss*, 285 P. 73, 142 Okl. 1.

Interest on unexpended funds

Where interest on daily balances on unexpended bond funds of city has been credited by county treasurer to general fund instead of sink-

ing fund and where there was on hand in general fund on July 1 of that fiscal year much larger sum out of which the sum could have been properly transferred to sinking fund, but such funds were not on hand at time of hearing before court of tax review, that court, while having no authority to order funds transferred to general fund, could direct that record be corrected to show that such sums were sinking fund account asset.—*Sinclair Prairie Pipe Line Co. v. Excise Board of Tulsa County*, 49 P.2d 114, 173 Okl. 375.

46. **Charter provision held inapplicable**

Charter authorizing diversion of excess of proceeds of bond issue above amount required for purpose of such issue was inapplicable where bonds were issued for construction of administration building which city had not legally determined to build.—*Rule v. City of Stamford*, 185 A. 178, 121 Conn. 447.

47. Pa.—*Corporation for Relief of Widows and Children of Clergymen in Communion of Protestant Episcopal Church in Commonwealth of*

provisions an amount equal to the bonded indebtedness with interest must be paid into the sinking fund.⁴⁸

Effect of improper use of proceeds. An improper

use of the proceeds from the sale of municipal bonds does not invalidate the bonds⁴⁹ or, as considered infra § 1971, constitute a defense to the enforcement thereof by an innocent holder.

4. FORM, CONTENTS, VALIDITY, AND CONSTRUCTION GENERALLY

§ 1935. Form and Contents in General

Municipal bonds and other securities should be in such form and contain such recitals as are prescribed by constitutional, statutory, or charter provisions.

Constitutional, statutory, and charter regulations frequently prescribe the form and contents of municipal bonds and other securities,⁵⁰ and such securities should be in the form and contain the recitals required by such regulations.⁵¹ Nevertheless the failure to comply with mere directory provisions as to matters of form will not invalidate the bonds,⁵² nor will a mere misnomer of the mu-

nicipality issuing the bonds.⁵³ Surplusage in the bonds will not invalidate them where no substantial right is affected.⁵⁴

The conditions on which municipal bonds are authorized to be issued need not be expressed in such bonds.⁵⁵ Printed bonds duly executed and substituted for typewritten bonds are valid, if the typewritten bonds were valid.⁵⁶

Discretion of municipal authorities. The municipal authorities have a discretion in fixing the form and contents of municipal bonds or other securities

Pennsylvania v. City of Philadelphia, 176 A. 727, 317 Pa. 76.

48. Okl.—Protest of Reid, 15 P.2d 996, 160 Okl. 3.

Notes received on sale of water and light plant, and interest thereon, must be credited to sinking fund to pay plant bonds and interest—Gulf. C. & S. F. Ry. Co. v. Excise Board of Love County, 283 P. 1003, 141 Okl. 34.

Removal from sinking fund

(1) City council would not be permitted to divert money realized from sale of city's interest in bridge from sinking fund, in which council by ordinance had directed money be placed, to current general expense fund, where bonds issued by city to secure capital required for improvement had been excluded from computation of city's bonded indebtedness, since effect of diversion would be to make city's debt greater than was allowed by statute.—*Corporation for Relief of Widows and Children of Clergymen in Communion of Protestant Episcopal Church in Commonwealth of Pennsylvania v. City of Philadelphia*, 176 A. 727, 317 Pa. 76.

(2) Money received by city from sale of city's interest in bridge, money for erection of which had been obtained by city by bond issue, was properly placed in sinking fund by ordinance, and could not be removed therefrom by city council to current general expense fund, in view of statute requiring all money pledged for such debt to be paid into sinking fund and to be inviolably reserved for and applied exclusively to debt.—*Corporation for Relief of Widows and Children of Clergymen in Communion of Protestant Episcopal Church in Commonwealth of Penn-*

sylvania v. City of Philadelphia, supra.

49. Fla.—*State ex rel. Davis v. Ryan*, 158 So. 62, 118 Fla. 42.—*State ex rel. Ake v. Broward County Port Authority*, 158 So. 62, 118 Fla. 42. Ind.—*Hamer v. City of Huntington*, 21 N.E.2d 407, 215 Ind. 594. 44 C.J. p 1219 note 1.

Invalidity of contract under which proceeds of bonds were to be used will not affect validity of bonds authorized for valid purpose by separate proceeding and at separate election.—*Green v. City of Rock Hill*, 147 S.E. 346, 149 S.C. 234.

50. U.S.—*D'Esterre v. New York, N. Y.*, 104 F. 605, 44 C.C.A. 75, certiorari denied 20 S.Ct. 1030, 178 U.S. 613, 44 L.Ed. 1216.

La.—*Martin v. Mayor & Board of Aldermen of Town of Westwego*, 32 So.2d 711, 212 La. 439.

Proposition approved by electors see supra § 1929.

Instruments negotiable in form see infra § 1950.

Reformation of bonds see the C.J.S. title Reformation of Instruments § 1 et seq., also 53 C.J. p 906 note 1 et seq.

Effect, as to purchasers, of absence or presence of recitals see infra §§ 1967, 1968.

Law as part of contract generally see infra § 1947.

Validity of statute

Cal.—*Stege v. Richmond*, 228 P. 461, 194 Cal. 305.

44 C.J. p 1220 note 18 [b].

Special act supersedes general statute

U.S.—*D'Esterre v. New York, N. Y.*, 104 F. 605, 44 C.C.A. 75, certiorari denied 20 S.Ct. 1030, 178 U.S. 613, 20 S.Ct. 1030.

44 C.J. p 1220 note 18 [a].

Distribution among investors

A municipal bond issue is intended to be in such form that it may be distributed among a number of investors and running over a period of years, sometimes for sale on the open market.—*Alabama Power Co. v. City of Scottsboro*, 190 So. 412, 238 Ala. 230.

51. S.C.—*Bolton v. Wharton*, 161 S. E. 454, 163 S.C. 242, 86 A.L.R. 1101.

Funding or renewal bonds

Ohio.—*Keehn v. Wooster*, 13 Ohio Cir.Ct. 270, 7 Ohio Cir.Dec. 456.

Approval of form of bonds

Provision of resolution that, before issuance and sale of bonds with which to build sewage disposal plant, form of bonds should be approved by Reconstruction Finance Corporation, was directory only, and, where corporation was succeeded, as far as project was concerned, by Public Works Administration, failure to secure approval of corporation would not invalidate bonds.—*Shainwald v. City of Portland*, 55 P.2d 1151, 153 Or. 167.

52. U.S.—*D'Esterre v. New York, N. Y.*, 104 F. 605, 44 C.C.A. 75, certiorari denied 20 S.Ct. 1030, 178 U.S. 613, 44 L.Ed. 1216.

44 C.J. p 1220 note 20.

53. U.S.—*Cornell Univ. v. Maumee, C.C. Ohio*, 68 F. 418.

44 C.J. p 1220 note 21.

54. Cal.—*Raisch v. Myers*, 167 P.2d 198, 27 Cal.2d 773.

55. U.S.—*Mercy v. Ohio, C.C. Ill.*, 17 F.Cas.No.9,457, affirmed 18 Wall. 552, 21 L.Ed. 813.

S.C.—*State v. Columbia*, 12 S.C. 370.

56. N.Y.—*Oswego City Sav. Bank v. Union Free School Dist. No. 2 Board of Education*, 75 N.Y.S. 417,

to the extent that such discretion is conferred on them by constitutional, statutory or charter regulations,⁵⁷ or to the extent that the law fails to prescribe the form or contents of such securities.⁵⁸

§ 1936. Denomination

Municipal bonds may be issued in such denominations as are authorized by statute or charter provisions.

Municipal bonds may be issued in such denominations as are authorized by statute or charter provisions.⁵⁹ Where a municipal corporation is authorized to issue bonds of a certain denomination, bonds for a greater denomination cannot lawfully be issued.⁶⁰ The municipality or its council may fix the denominations of the bonds where such authority is conferred by statute.⁶¹ Where the statute fixes a minimum and maximum limit as to the denominations of the bonds, the municipality or its council has authority to exercise discretion within the limits prescribed.⁶²

§ 1937. Provisions or Recitals as to Particular Matters

Municipal bonds and other securities should contain provisions or recitals as to such matters as are required by constitutional, statutory, and charter regulations.

Municipal bonds and other securities should contain provisions or recitals as to such particular matters as are required by constitutional, statutory, and charter regulations.⁶³ Where a portion of the municipal area has been excluded since the time when municipal bonds were issued, refunding bonds

should contain some recognition of the territorial exclusion, particularly where the taxing covenant in the refunding bonds is confined to the property in the present limits of the city.⁶⁴ In the absence of a constitutional or statutory regulation or restriction, the municipal authorities may insert in the bonds as an inducement to prospective holders that any subsequent issue of like bonds will be subordinate and junior to the issue in question.⁶⁵

Recital as to payee. Bonds issued payable to a person named or bearer are valid, notwithstanding the ordinance authorizing the issue did not name a payee.⁶⁶

§ 1938. — Authority to Issue

Municipal officers in issuing bonds have the right and duty to refer to the authority under which they are acting.

It is the right and duty of municipal officers to refer in issuing bonds to the authority under which they are acting.⁶⁷ The bonds should refer to the statutes which constitute their true basis.⁶⁸ Trifling errors in recitals have no effect on the validity of the bonds, if lawful authority to issue the bonds had been conferred on the issuing authority, although it is incorrectly recited or described.⁶⁹ A recital on the face of the bonds of a statute which does not grant authority to issue them is not fatal to their validity, where power to issue the bonds has been vested in the municipality by appropriate legislation,⁷⁰ and it is not claimed that any condition precedent to the issuance required by the

70 App.Div. 538, affirmed 86 N.E. 1113, 174 N.Y. 515.

57. N.C.—*Bolich v. City of Winston-Salem*, 164 S.E. 361, 202 N.C. 786

58. Fla.—*State ex rel. Ben Hur Life Ass'n v. City of Hialeah*, 177 So. 712, 130 Fla. 375.

Ill.—*Chicago, etc., R. Co. v. Aurora*, 99 Ill. 205.

Mo.—*State ex rel. City of Fulton v. Smith*, 194 S.W.2d 802, 355 Mo. 27.

59. Cal.—*Santa Barbara v. Davis*, 92 P. 308, 6 Cal.App. 342.

Fla.—*State ex rel. Ben Hur Life Ass'n v. City of Hialeah*, 177 So. 712, 130 Fla. 375.

Exchange of outstanding bonds see *infra* § 1954.

60. Tenn.—*Milan v. Tennessee Cent. R. Co.*, 11 Lea 329.

61. Fla.—*State ex rel. Ben Hur Life Ass'n v. City of Hialeah*, 177 So. 712, 130 Fla. 375.

Resolution giving authority to fix denominations

Municipal refunding bonds and certificates of indebtedness issued pursuant to statute which carried

no requirement as to denominations in which bonds were to be issued were not invalid merely because those denominations were not named, where resolution providing for issuance thereof stated that they should be issued in denominations provided by board of city commissioners.—*State v. City of Tarpon Springs*, 190 So. 19, 138 Fla. 649.

62. Cal.—*Santa Barbara v. Davis*, 92 P. 308, 6 Cal.App. 342.

44 C.J. p 1220 note 31.

63. Ohio.—*State ex rel. Ohio Nat. Bank of Columbus v. Village of Hudson*, 16 N.E.2d 266, 134 Ohio St. 150.

Effect, as to purchasers, of absence or presence of recitals see *infra* §§ 1967, 1968.

64. Fla.—*Atlantic Coast Line R. Co. v. City of Lakeland*, 177 So. 266, 130 Fla. 72.

Resolution setting up reduced area

City refunding bonds are not invalid because part of city was excluded therefrom after issuance of original bonds and not taxed to pay refunding bonds, where resolution

for issuance of refunding bonds fully set up city's reduced area.—*State v. City of Delray Beach*, 191 So. 133, 140 Fla. 132, followed in 3 So.2d 510, 147 Fla. 741.

65. Mo.—*State ex rel. City of Fulton v. Smith*, 194 S.W.2d 802, 355 Mo. 27.

66. Ohio.—*Pleasantville Bank v. Cox*, 26 Ohio N.P., N.S., 460.

67. U.S.—*New Orleans v. Louisiana*, La., 21 S.Ct. 263, 179 U.S. 622, 45 L.Ed. 347.

44 C.J. p 1220 note 33.

Effect, as to purchaser, of absence or presence of recitals see *infra* §§ 1967, 1968.

68. N.J.—*Livermore v. Millville*, 90 A. 380, 85 N.J.Law 655.

69. Fla.—*State ex rel. Havana State Bank v. Rodes*, 151 So. 289, 115 Fla. 259.

70. Iowa.—*Allen v. Davenport*, 77 N.W. 532, 107 Iowa 90.
44 C.J. p 1220 note 35.

statute under which they were in fact issued was omitted.⁷¹ Bonds referring to the proper statute are not rendered invalid by a mistake of a single word in the recital of the title of the statute⁷² or by a failure to state that the statute has been amended.⁷³

The ordinance under which the bonds are issued may,⁷⁴ and, under some statutes, must,⁷⁵ be designated in the bonds.

§ 1939. — Name, Purpose, or Class

In issuing bonds, municipal corporations should comply with statutory provisions requiring recitals as to the purpose and name of the issue and the class of indebtedness.

In issuing bonds and other securities, municipal corporations should comply with statutory provisions requiring such bonds to express on their face the purpose for which they were issued,⁷⁶ bear an appropriate name indicating the purpose of their issuance,⁷⁷ state on their face the class of indebtedness to which they belong,⁷⁸ or, in the case of im-

provements, identify the improvement, as by stating the name of the street or the name and number of the district.⁷⁹ It has been held, however, that the improper naming of bonds issued by a city does not invalidate them;⁸⁰ and bonds representing a valid indebtedness are not rendered unenforceable by their failure to recite the class of indebtedness to which they belong, as required by statute.⁸¹

§ 1940. — Interest Generally

Municipal bonds or other securities may bear interest at such rate and from such time as is authorized by constitutional, statutory, or charter provisions.

Where authorized by constitutional, statutory, or charter provisions, as is usually the case, municipal bonds or other securities may bear interest.⁸² The provisions of at least one state constitution, however, prohibit, or have prohibited, municipalities from issuing any interest-bearing evidences of indebtedness, except such bonds as may be authorized by law to provide for and secure the payment of the indebtedness existing at the time of the adoption of the constitution.⁸³ Where the

71. U.S.—*D'Esterre v. New York*, N. Y., 104 F. 605, 44 C.C.A. 75, certiorari denied 20 S.Ct. 1030, 178 U.S. 613, 44 L.Ed. 1216.

72. U.S.—*Atchison Board of Education v. De Kay*, Kan., 13 S.Ct. 706, 148 U.S. 591, 37 L.Ed. 573.

73. Cal.—*Marr v. Southern California Gas Co.*, 245 P. 178, 198 Cal. 278.

74. Tex.—*Laredo v. Frishmuth*, Civ. App., 196 S.W. 190.

75. Ohio.—*State ex rel. Ohio Nat. Bank of Columbus v. Village of Hudson*, 16 N.E.2d 266, 134 Ohio St. 150.

44 C.J. p 1221 note 40.

76. Ohio.—*State ex rel. Ohio Nat. Bank of Columbus v. Village of Hudson*, 16 N.E.2d 266, 134 Ohio St. 150.

44 C.J. p 1221 note 41.

Effect, as to purchaser, of absence or presence of recital as to purpose see *infra* § 1968.

Notes given by municipality

(1) A statute requiring bonds to state the purpose does not apply to notes given by a municipal corporation for money borrowed.—*Ohio Farmers' Ins. Co. v. New Philadelphia*, 9 Ohio Dec., Reprint, 793, 17 Cinc.L.Bul. 250.

(2) Under some statutes, however, it is expressly required that notes issued, as well as bonds, shall specify on their face the purpose for which they are issued.—*State ex rel. Ohio Nat. Bank of Columbus v. Village of Hudson*, 16 N.E.2d 266, 134 Ohio St. 150.

Sufficiency of specification

(1) Where bonds showed on their face that they were issued for public improvements, there was sufficient compliance with statute providing that bonds should specify on their face the purpose for which they were issued.—*State ex rel. Ohio Nat. Bank of Columbus v. Village of Hudson*, *supra*.

(2) Other specifications see 44 C.J. p 1221 note 41 [a].

77. Wis.—*Maxcy v. Oshkosh*, 128 N. W. 899, 1136, 144 Wis. 238, 31 L. R.A., N.S., 787.

44 C.J. p 1221 note 42.

78. U.S.—*Gladstone v. Throop*, Mich., 71 F. 341, 18 C.C.A. 61.

44 C.J. p 1221 note 43.

79. Ohio.—*Heffner v. Toledo*, 80 N. E. 8, 75 Ohio St. 413.

44 C.J. p 1221 note 44.

80. Mich.—*Detroit v. Engel*, 173 N. W. 547, 207 Mich. 106.

81. U.S.—*Gladstone v. Throop*, Mich., 71 F. 341, 18 C.C.A. 61.

82. Ky.—*City of Raceland v. McCoy*, 77 S.W.2d 41, 256 Ky. 786.

La.—*Martin v. Mayor & Board of Aldermen of Town of Westwego*, 32 So.2d 711, 212 La. 439.

N.C.—*Bolich v. City of Winston-Salem*, 164 S.E. 361, 202 N.C. 786.

General statute providing for interest on notes, accounts, and contracts does not apply to municipal corporations or other political subdivisions of state.—*City of Indianola v. Gates*, 179 So. 284, 181 Miss. 145.

Nature of interest

The interest provided for in street

improvement bonds which runs from the date of the bonds, is not a penalty or a charge for delinquency, but is "interest" in the true sense of the term, that is, it is compensation for the use or forbearance of money.—*Powell v. Allan*, 234 P. 339, 70 Cal. App. 663.

Interest as vital part of contract

Agreement on the part of political subdivision issuing bonds to pay interest and the right of the holder to receive interest until maturity are vital parts of the contract.—*Kansas City Life Ins. Co. v. Evangeline Parish School Board*, D.C.La., 58 F.Supp. 39, affirmed, C.C.A., 153 F.2d 611.

Interest may be evidenced by coupons, although the statute or charter is silent as to the use of coupons.—*City of Hialeah v. U. S. ex rel. Harris*, C.C.A.Fla., 89 F.2d 953.

83. Ark.—*Snodgrass v. City of Pochontas*, 75 S.W.2d 223, 189 Ark. 819.—*Cummock v. Little Rock*, 271 S.W. 466, 168 Ark. 777.

44 C.J. p 1221 note 49 [a].

Amendment to constitution

Const. 1874 art 16 § 1 was amended by Amend. No. 13 which provides, among other things, that cities of first and second class may issue bonds at an interest rate not greater than six per cent per annum payable from a tax not to exceed five mills.—*Lewis v. Tate*, 195 S.W.2d 640, 210 Ark. 326.

Purpose of constitutional prohibition

(1) Purpose of restriction is to prohibit municipalities from issuing interest-bearing evidence of indebt-

bonds or other securities call for the payment of interest contrary to the constitutional prohibition, the provision for interest is treated as surplusage and does not render the instruments void.⁸⁴

Rate of interest. In various jurisdictions, the rate of interest which municipal bonds or other securities may bear is expressly limited by constitutional, statutory, or charter provisions.⁸⁵ Such securities may bear the rate of interest thus authorized.⁸⁶ Where the maximum rate is fixed by statute or charter, the municipal authorities have a discretion in fixing the rate within the statutory maximum.⁸⁷ Refunding bonds may be issued at a rate not exceeding the maximum rate, notwithstanding the bonds to be refunded by the new issue bore a lower rate of interest.⁸⁸ While it has been held that, where a city is authorized to issue bonds bearing a certain rate of interest, bonds cannot lawfully be issued at an increased rate of interest,⁸⁹

it has also been held that, when bonds bear a greater rate of interest than that authorized, they are valid obligations for the principal and the authorized rate of interest.⁹⁰ The validity of municipal bonds will not be affected by the fact that they provide for interest at a lesser rate than that which they are authorized to bear.⁹¹

In some jurisdictions no interest rate is prescribed by the constitution, statutes, or charter provisions or such provisions leave the determination of the rate of interest to the municipal authorities.⁹² Some authorities take the view that, under such statutes, where only part of the authorized issue has been actually issued, the remainder may be issued and negotiated at a different rate of interest,⁹³ but other authorities take the view that there should be only one rate of interest for the entire issue.⁹⁴

edness, to pay which the people would be taxed, or their property appropriated to pay the indebtedness, or any indebtedness that placed any burden on the taxpayers.—*Lewis v. Tate*, supra—*Snodgrass v. City of Pocahontas*, 75 S.W.2d 223, 189 Ark. 819.

(2) It is not the purpose of the constitution to prohibit municipalities from making improvements and pledging the revenue from the improvements so made to the payment of the indebtedness.—*Snodgrass v. City of Pocahontas*, 75 S.W.2d 223, 189 Ark. 819.

Indebtedness paid from improvement

The indebtedness is not within the constitutional prohibition where it is to be paid out of the receipts derived from the operation of the improvement or payable exclusively from the revenue of the agency issuing the securities and not out of funds belonging to the municipality.—*Lewis v. Tate*, 195 S.W.2d 640, 210 Ark. 326—*Hogue v. Housing Authority of North Little Rock*, 144 S.W.2d 49, 201 Ark. 263—*Snodgrass v. City of Pocahontas*, 75 S.W.2d 223, 189 Ark. 819—*Jernigan v. Harris*, 62 S.W.2d 5, 187 Ark. 705.

84. Notes

U.S.—*American La-France & Foamite Corporation v. City of El Dorado*, C.C.A.Ark., 81 F.2d 862.
Ark.—*Forrest City v. Forrest City Bank*, 172 S.W. 1148, 116 Ark. 377.

85. Ark.—*Lewis v. Tate*, 195 S.W.2d 640, 210 Ark. 326.

Fla.—*State ex rel. Ben Hur Life Ass'n v. City of Hialeah*, 177 So. 712, 130 Fla. 375.

Ga.—*Cochran v. City of Thomasville*, 146 S.E. 462, 167 Ga. 579.

Ky.—*Funk v. Town of Strathmoor*

Village, 129 S.W.2d 151, 278 Ky. 627.

Or.—*Ollilo v. Clatskanie Peoples' Utility Dist.*, 132 P.2d 416, 170 Or. 173.

44 C.J. p 1221 note 51.

Effect of restriction on other classes of securities

Fact that a charter provision limits the interest to be paid on certain bonds therein authorized to be issued to a certain rate does not by implication deny the right to pay a higher rate of interest on any other character of indebtedness.

Cal.—*Brookes v. Oakland*, 117 P. 433, 160 Cal. 423.

Nev.—*Douglass v. Virginia City*, 5 Nev. 147.

86. N.C.—*Bolich v. City of Winston-Salem*, 164 S.E. 361, 202 N.C. 786.

Change of rate as approved by voters

Mayor and council cannot change interest rate specified in ordinance submitting to voters proposed issue of stock.—*Thom v. City of Baltimore*, 141 A. 125, 154 Md. 273.

Matters held not to increase rate

Municipal utility district bonds bearing interest at four and one half per cent per annum, containing option to redeem before maturity and at end of eight years or more after issuance and providing for payment of additional interest up to three per cent of principal to holders of bonds redeemed at end of eight years and additional interest at a gradually reduced rate for bonds redeemed thereafter did not violate statute providing that the interest rate should not exceed six per cent per annum and that bonds should not be sold for less than ninety-eight per cent of face value and accrued interest, where the generally accepted

bond values table revealed that in no event would the six per cent limitation be exceeded.—*Ollilo v. Clatskanie Peoples' Utility Dist.*, 132 P.2d 416, 170 Or. 173—44 C.J. p 1221 note 51 [a].

87. N.C.—*Bolich v. City of Winston-Salem*, 164 S.E. 361, 202 N.C. 786.

Delegation of power to mayor

Fact that city council delegated to mayor power to fix rate of interest in school improvement bonds did not invalidate them.—*Bullitt v. City of Louisville*, 281 S.W. 1031, 213 Ky. 756.

88. N.C.—*Bolich v. City of Winston-Salem*, 164 S.E. 361, 202 N.C. 786.

89. Tenn.—*Milan v. Tennessee Cent. R. Co.*, 11 Lea 329.

90. U.S.—*Lewis v. Clarendon*, C.C. Ark., 15 F.Cas.No.8,320, 5 Dill. 329. 44 C.J. p 1221 note 54.

91. Wyo.—*Corpus Juris cited in Jewett v. School District No. 25*, 54 P.2d 546, 550, 49 Wyo. 277.

44 C.J. p 1221 note 55.

Interest at lower rate than authorized by popular vote see supra § 1929.

Interest determined by competitive bidding

Ky.—*Funk v. Town of Strathmoor Village*, 129 S.W.2d 151, 278 Ky. 627.

92. Md.—*Stanley v. Baltimore*, 126 A. 151, 130 A. 181, 146 Md. 277.

Va.—*Radford v. Heth*, 40 S.E. 99, 100 Va. 16.

93. Va.—*Radford v. Heth*, supra.

94. Md.—*Stanley v. Baltimore*, 126 A. 151, 130 A. 181, 146 Md. 277.

An objection to the rate of interest which bonds in aid of a railroad are to bear comes too late after mandamus has been granted requiring the issuance and delivery of such bonds.⁹⁵

Time from which interest runs; accrued interest. The interest allowed on municipal bonds and other securities runs from such time as is fixed by statutory or charter provisions.⁹⁶ A statute authorizing the issuance of bonds at a certain rate of interest means that interest should run from the date of their issuance.⁹⁷ Municipal bonds issued for the purpose of retiring existing bonds cannot be made to bear interest from a date prior to that at which the old bonds fell due, where the municipality is without power to contract a new debt.⁹⁸

It has been held that a person who has purchased, or has agreed to accept in payment of the contract price for work done, bonds or debentures which, according to the terms of a statute or by-law, bear interest from a certain date is entitled to the bonds or debentures with all interest coupons attached thereto, even though one or more of the coupons may have matured before the delivery of the bonds or debentures;⁹⁹ but there is also authority to the contrary.¹ Under some statutes the accrued interest is credited to, and held in the sinking fund for the purpose of, reducing the tax levy necessary to pay the interest on the bonds and to create a sinking fund for the retirement of the bonds.²

§ 1941. — Payment

- a. In general
- b. Time for payment
- c. Place of payment
- d. Medium of payment

- e. Fund or source from which securities payable

a. In General

Municipal bonds or other securities must contain such provisions relative to payment as are required by constitutional, statutory, or charter provisions.

Such provisions relative to payment must be inserted in municipal bonds or other securities as are required by constitutional, statutory, or charter provisions;³ but the municipal authorities may determine and fix the terms as to payment to the extent that constitutional, statutory, or charter regulations confer discretion on them⁴ or where the law fails to prescribe the terms.⁵ A municipality is liable on the coupons of municipal bonds, although such coupons themselves show no promise or undertaking on the part of the municipality, where by the express terms of the bonds the municipality is bound for their payment.⁶ Where an ordinance of a city authorizing a contract with a gas company and the issue to it of bonds of the municipality provides that such company shall "guarantee the said bonds and assume the payment of the principal thereof at maturity," the indorsement on the bonds by the president of such company guaranteeing "the payment of the principal and interest" is a compliance with the ordinance and contract as to the guaranty.⁷

b. Time for Payment

Municipal bonds and other securities are to be made payable at such time or times as may be prescribed by constitutional, statutory, or charter provisions.

Constitutional, statutory, or charter provisions usually designate the time within which municipal bonds or other securities shall be made payable.⁸

95. Ill.—People v. Barnett, 91 Ill. 422.

96. La.—State Nat. Bank v. New Orleans, 46 So. 307, 121 La. 269.

97. Miss.—City of Indianola v. Gates, 179 So. 284, 181 Miss. 145.

98. Ky.—Louisville Sinking Fund Comrs. v. Zimmerman, 41 S.W. 428, 101 Ky. 432, 19 Ky.L. 689.

99. La.—State Nat. Bank v. New Orleans, 46 So. 307, 121 La. 269.

1. Okl.—State v. Sapulpa, 160 P. 489, 58 Okl. 550.

Wash.—State v. Seattle, 133 P. 1005, 74 Wash. 488, rehearing denied 137 P. 819, 77 Wash. 699, and error dismissed 35 S.Ct. 208, 235 U. S. 695, 69 L.Ed. 430.

2. Okl.—In re Bliss, 285 P. 73, 142 Okl. 1—Aaronson v. Smiley, 285 P. 50, 142 Okl. 29.

Disposition of premium on sale of bonds see supra § 1934.

Sinking funds see infra § 1953.

3. Ark.—Hargraves v. Solomon, 9 S.W.2d 797, 178 Ark. 11.

Payment of municipal securities: Generally see infra § 1955.

Power of municipality to tax for see infra § 1997.

Preliminary provision for see supra § 1918.

4. Fla.—State v. City of Lakeland, 180 So. 754, 132 Fla. 489.

N.C.—Bolich v. City of Winston-Salem, 164 S.E. 361, 202 N.C. 786.

5. Cal.—City of San Diego v. Millan, 16 P.2d 357, 127 Cal.App. 521.

Okl.—Armstrong v. Sewer Imp. Dist. No. 1, Tulsa County, 199 P.2d 1012, reheard 207 P.2d 917.

Wyo.—City of Casper v. Joyce, 88 P.2d 467, 54 Wyo. 198.

Terms agreed on between city and purchaser

Where the statute authorizing the issuance of municipal bonds is silent as to the terms and conditions on which they shall be payable, such conditions as to payment as are mutually assented to by the city and the person to whom the bonds are issued may be inserted in the bonds. —Chicago, etc., R. Co. v. Aurora, 99 Ill. 205.

6. Tenn.—Nashville v. Potomac Ins. Co., 2 Baxt. 296.

7. U.S.—Jefferson City Gas Light Co. v. Clark, La., 95 U.S. 644, 24 L. Ed. 521.

8. Ark.—Hargraves v. Solomon, 9 S.W.2d 797, 178 Ark. 11.

N.M.—Mann v. City of Artesia, 76 P.2d 941, 42 N.M. 224.

N.C.—Bolich v. City of Winston-Salem, 164 S.E. 361, 202 N.C. 786.

Thus, under various provisions an issue of municipal bonds or other securities shall not extend beyond a certain number of years from the date of issuance,⁹ or from the date of the taking effect of the by-laws providing for their issuance.¹⁰ Such provisions have been held to be mandatory¹¹ and to constitute a limitation on the power of the municipality to issue the securities,¹² and bonds or debentures having a longer time to run than that prescribed are void.¹³ On the other hand, bonds running for a shorter period than the maximum prescribed by the constitution or statute may be lawfully issued;¹⁴ and it has been held that the period prescribed by charter or statute may properly be computed from a date subsequent to the execution of the bonds, such as the date when the bonds commence to bear interest, where the interval is only a reasonable time for issuing and delivering the bonds.¹⁵

Determination of maturity by municipal authorities. The municipal authorities may fix the maturity date of municipal bonds and other securities where such authority is conferred on them by constitutional, statutory, or charter provisions.¹⁶ Such provisions leave the fixing of the maturity date to the discretion of the municipal authorities.¹⁷ Furthermore, the municipal authorities are vested with discretionary power in fixing the maturity date where the law does not prescribe the time for which the securities may run.¹⁸

Acceleration of maturity. Some statutes and charters make provision for the reservation of a right or privilege in municipal bonds or other securities to pay or redeem before they would otherwise mature.¹⁹ When authority is thus conferred, the municipality may insert in the bonds or other securities an option to pay before maturity;²⁰

Ohio.—State ex rel. City of Columbus v. Ketterer, 189 N.E. 252, 127 Ohio St. 483—State v. Rees, 183 N.E. 432, 125 Ohio St. 578.

Okl.—Board of Com'rs of Harmon County v. R. J. Edwards, Inc., 282 P. 1090, 140 Okl. 247.

Beyond life of corporation

Some statutes have been construed to authorize a municipal corporation to issue bonds maturing beyond the life of the corporation as limited in its original charter.—Black v. Fishburne, 66 S.E. 681, 84 S.C. 451, 19 Ann.Cas. 1104.

Tax notes

In the absence of a statute to the contrary, tax notes were not invalid because they were without definite maturities.—State v. City of Clearwater, 169 So. 602, 125 Fla. 73.

9. Ariz.—Corpus Juris quoted in Maricopa County v. Osborn, 136 P. 2d 270, 273, 60 Ariz. 290.

Idaho.—Neighbors of Woodcraft v. City of Rupert, 4 P.2d 860, 51 Idaho 215.

N.M.—Mann v. City of Artesia, 76 P. 2d 941, 42 N.M. 224.

44 C.J. p 1222 note 75.

Repeal of ordinance

A city ordinance, changing maturity of sewer bonds issued under previous ordinance to twenty years, so as to comply with constitutional provision, impliedly repealed such prior ordinance, although there was no specific statement in body of later ordinance that it repealed previous ordinance.—State ex rel. City of Republic v. Smith, 139 S.W.2d 929, 345 Mo. 1158.

Refunding bonds

Maximum period fixed by statute for maturity of municipal bonds to be refunded is not determinative of period for maturity of refunding

bonds.—Bolich v. City of Winston-Salem, 164 S.E. 361, 202 N.C. 786.

10. Ariz.—Corpus Juris quoted in Maricopa County v. Osborn, 136 P.2d 270, 273, 60 Ariz. 290.

44 C.J. p 1222 note 76.

11. Ark.—Hargraves v. Solomon, 9 S.W.2d 797, 178 Ark. 11.

12. Ariz.—Corpus Juris quoted in Maricopa County v. Osborn, 136 P.2d 270, 273, 60 Ariz. 290.

44 C.J. p 1222 notes 75, 76.

13. Ariz.—Corpus Juris quoted in Maricopa County v. Osborn, 136 P.2d 270, 273, 60 Ariz. 290.

N.M.—Mann v. City of Artesia, 76 P. 2d 941, 42 N.M. 224.

Wyo.—Corpus Juris cited in Jewett v. School Dist. No. 25, 54 P.2d 546, 550, 49 Wyo. 277.

44 C.J. p 1222 note 77.

14. Ariz.—Corpus Juris quoted in Maricopa County v. Osborn, 136 P. 2d 270, 273, 60 Ariz. 290.

Idaho.—Neighbors of Woodcraft v. City of Rupert, 4 P.2d 860, 51 Idaho 215.

44 C.J. p 1222 note 78.

15. U.S.—Elmwood v. Dows, Ill., 10 S.Ct. 1074, 136 U.S. 651, 34 L.Ed. 555—South St. Paul v. Lamprecht Bros. Co., Minn., 88 F. 449, 31 C. C.A. 585.

16. N.C.—Bolich v. City of Winston-Salem, 164 S.E. 361, 202 N.C. 786. S.C.—City of Spartanburg v. Leonard, 186 S.E. 395, 180 S.C. 491.

44 C.J. p 1222 note 72.

Refunding bonds

N.C.—Bolich v. City of Winston-Salem, 164 S.E. 361, 202 N.C. 786.

17. Wash.—Shorts v. Seattle, 164 P. 241, 95 Wash. 538.

44 C.J. p 1222 note 73.

18. Ill.—Chicago, etc., R. Co. v. Aurora, 99 Ill. 205.

44 C.J. p 1222 note 74.

19. La.—Reuther v. City of New Orleans, 9 So.2d 523, 201 La. 209. Mont.—Carlson v. Helena, 102 P. 39, 39 Mont. 82, 17 Ann.Cas. 1233. S.C.—City of Spartanburg v. Leonard, 186 S.E. 395, 180 S.C. 491.

Callable or noncallable bonds in same issue

Statute providing that bonds issued by a municipal utility district should contain provisions for the call or redemption by the district of such bonds, or any part of such issue at the option of the district, three years or more after date of issuance, was not violated by a bond issue containing option to redeem bonds eight years after date of issuance or by including both callable and noncallable bonds in the same issue.—Oillio v. Clatskanie Peoples' Utility Dist., 132 P.2d 416, 170 Or. 173.

20. S.C.—City of Spartanburg v. Leonard, 186 S.E. 395, 180 S.C. 491.

Implied authority

Iowa.—Ballard-Hassett Co. v. City of Des Moines, 224 N.W. 793, 207 Iowa 1351.

Acceleration on default in payment of interest

Although municipal bonds have on their face many years to run, nevertheless an indorsement on each of them to the effect that, if default is made in paying any of the interest coupons at maturity, then as a part of the contract the bond itself shall become due and payable, will be given effect, whenever a default in paying interest according to any of the coupons occurs.—Griffin v. Macon City Bank, 58 Ga. 584.

and the municipality may insert in its bonds or other securities an option to redeem before maturity under a statute giving the municipality the authority to determine the length of time such securities shall run.²¹ A reservation for payment before maturity is in the public interest.²²

Some statutes providing for the reservation of a right or privilege to pay or redeem municipal bonds before they would otherwise mature are construed to be mandatory,²³ but others are construed to confer an option for the benefit of the city which may be waived by it,²⁴ and still others are construed to apply only to bonds bearing a higher rate of interest than that permitted by prior statutes.²⁵ Where a reservation of a right to redeem conflicts with a statute, the reservation is void, but the bonds are not invalidated thereby.²⁶

Payment at one time or in installments. When authorized by statutory or charter provisions the municipal authorities may make municipal bonds or other securities payable serially or in installments;²⁷ and the bonds must be made payable serially or in installments when constitutional, statutory, or charter provisions so direct.²⁸ The

first installment is to be made payable at such time as may be prescribed by constitutional or statutory provisions,²⁹ such as after the lapse of a certain number of years from the date of issue.³⁰ Some statutes requiring payment in installments provide that not less than a certain proportion of the whole amount shall be paid each year,³¹ while others provide that not more than a prescribed proportion shall fall due in any one year,³² but it has been held that a violation of the latter provision does not invalidate the bonds in the hands of a purchaser who was without means of ascertaining whether the municipal officers complied with the requirement.³³ Under such statutes, the bonds must be made so payable that they will mature in installments in each year following their issuance and during their term,³⁴ and under some charters or statutes the amounts to be paid each year must be equal or uniform in amount,³⁵ although it is immaterial whether the amount payable each year is to be paid in one installment or in semiannual installments,³⁶ but, under other statutes, leaving the determination of the part of the bonds which shall be payable each year to the legislative body of the municipality,³⁷

Necessity for inserting method of redemption

Where the municipality pursuant to the express terms of the statute inserts in the bonds a provision authorizing it to call them after a certain date in such manner and form as it deems best, the municipality is not required at the time of the issuance to provide also in the bonds the method by which the bonds are to be liquidated at the time the option to redeem is exercised.—*Reuther v. City of New Orleans*, 9 So. 2d 523, 201 La. 209.

21. S.C.—*City of Spartanburg v. Leonard*, 186 S.E. 395, 180 S.C. 491.

22. Pa.—*Philadelphia Sav. Fund Soc. v. City of Bethlehem*, 17 A.2d 750, 143 Pa.Super. 449.

23. Mont.—*Carlson v. Helena*, 102 P. 39, 29 Mont. 82, 17 Ann.Cas. 1233. 44 C.J. p 1223 note 81.

24. Mo.—*State v. Gordon*, 116 S.W. 1099, 217 Mo. 103.

25. Kan.—*State v. Kansas City*, 204 P. 690, 110 Kan. 603. 44 C.J. p 1223 note 84.

26. Miss.—*Pontetoc v. Fulton*, 31 So. 102, 79 Miss. 611.

27. Okl.—*Armstrong v. Sewer Imp. Dist. No. 1, Tulsa County*, 199 P. 2d 1012, reheard 207 P.2d 917. 44 C.J. p 1223 note 88.

Option of municipality

A statute providing that all bonds shall be payable at the option of

the city in annual installments authorizes the municipality, at its option, to make the bonds payable all at one time, or in installments from time to time.—*Borner v. Prescott*, 136 N.W. 552, 150 Wis. 197.

28. Ark.—*Hargraves v. Solomon*, 9 S.W.2d 797, 178 Ark. 11. 44 C.J. p 1223 note 89.

29. Ark.—*Hargraves v. Solomon*, 9 S.W.2d 797, 178 Ark. 11.

Exception to Uniform Bond Act

Statute permitting political subdivision to fix maturity of earliest installment of proposed bond issue five years after earliest possible maturity date created valid exception to Uniform Bond Act.—*State ex rel City of Columbus v. Ketterer*, 189 N.E. 252, 127 Ohio St. 483.

Statute and ordinance held valid

Ohio.—*State ex rel City of Columbus v. Ketterer*, supra.

30. Constitutional requirement held mandatory

Ark.—*Hargraves v. Solomon*, 9 S.W.2d 797, 178 Ark. 11.

"Dates of issue," when applied to notes, bonds, etc., of series, usually means an arbitrary date fixed as beginning of term for which they run, without reference to precise time when convenience or state of market may permit their sale or delivery, date which bonds and stocks bear, and not date when they were actually issued in sense of being signed and delivered and put into circula-

tion.—*Whetstone v. City of Stuttgart*, 97 S.W.2d 641, 193 Ark. 88.

Bonds held valid

Ark.—*Whetstone v. City of Stuttgart*, supra.

Effect of premature date on whole issue

Where the constitution directs that the bonds shall be serial, maturing annually after three years from date of issue, and some of the bonds are made payable before the expiration of the three years' period, the whole issue as a result is void.—*Hargraves v. Solomon*, 9 S.W.2d 797, 178 Ark. 11.

31. Cal.—*San Diego v. Potter*, 95 P. 146, 153 Cal. 288—*Calistoga v. Adams*, 172 P. 624, 36 Cal App 486.

32. N.Y.—*Syracuse Sav. Bank v. Seneca Falls*, 21 Hun 304, affirmed 86 N.Y. 371.

33. N.Y.—*Hoag v. Greenwich*, 30 N. E. 842, 133 N.Y. 152—*Brownell v. Greenwich*, 22 N.E. 24, 114 N.Y. 518, 4 L.R.A. 685.

34. N.Y.—*Geneva v. Fenwick*, 145 N. Y.S. 884, 159 App.Div. 621. 44 C.J. p 1223 note 94.

35. Nev.—*Ronnow v. City of Las Vegas*, 65 P.2d 133, 57 Nev. 332. 44 C.J. p 1223 note 95.

36. N.Y.—*Anderson v. Potsdam*, 203 N.Y.S. 20, 122 Misc. 437.

37. Cal.—*San Diego v. Potter*, 95 P. 146, 153 Cal. 288. 44 C.J. p 1223 note 97.

the annual payments need not be uniform in amount.³⁸

Time for payment of interest. In the absence of statutory or charter regulations, interest may be made payable at such time or times as the municipal authorities may determine;³⁹ but, where the time for payment of interest is fixed by constitutional, statutory, or charter provisions, the interest must be made payable at the time or times prescribed.⁴⁰ In the absence of statutory or charter regulations to the contrary, whether the interest on bonds shall be payable annually or semiannually is a matter to be determined by the officers authorized to issue them.⁴¹ A provision merely fixing the maximum rate of interest per annum generally permits the municipal authorities to exercise their discretion in making the interest payable annually or at shorter periods than a year, such as semiannually or quarterly.⁴² Payment at periods less than a year does not operate as such an increase of the rate of interest as will affect the validity of the bonds.⁴³ A statute providing that bonds shall bear interest not exceeding a certain rate of interest payable semiannually does not require that the interest

shall be payable semiannually but merely requires that the rate of interest shall not exceed semiannual interest at the rate prescribed.⁴⁴ If, however, the statute provides that the interest shall be payable annually, bonds with interest payable semiannually may not be issued.⁴⁵ Where the statute requires the interest to be made payable semiannually, the fact that the first installment of interest is, as a matter of convenience, made payable for a little less or a little more than six months will not invalidate the bonds.⁴⁶

c. Place of Payment

Municipal bonds are to be made payable at such place as statutory or charter provisions may designate, but, in the absence of statutory or charter directions, they ordinarily may be made payable at such place as may be determined by the municipal authorities.

Municipal bonds and other securities may,⁴⁷ and should,⁴⁸ be made payable at the place prescribed by law; but, where a statute authorizing the issuance of such bonds or other securities does not designate the place at which they shall be made payable, the municipal officers whose duty it is to issue them may in their discretion determine where they shall be made payable.⁴⁹

38. Cal.—*Calistoga v. Adams*, 172 P. 624, 36 Cal.App. 486.

39. Fla.—*State ex rel. Ben Hur Life Ass'n v. City of Hialeah*, 177 So. 712, 130 Fla. 375.
Provision in bonds for interest generally see *supra* § 1940.

40. Ind.—*English v. Smock*, 34 Ind. 115, 7 Am.R. 215.

When funds for payment are available

Refunding bonds are not within constitutional provision requiring interest maturities to be fixed at time when funds will be available for payment.—*Faught v. City of Sapulpa*, 292 P. 15, 145 Okl. 164.

Deferred interest

(1) Deferred interest coupons, attached to refunding bonds as evidence of deferred obligation to pay in lump sum at maturity of bonds difference between stated interest rate per annum and lesser rates specified in new bonds, were valid.—*State v. City of New Smyrna Beach*, 4 So.2d 660, 148 Fla. 482.

(2) Provision for paying half the difference between interest rate on original city bonds and refunding bonds represented by deferred interest coupons if called before maturity could not be severed from provision making bonds callable on any interest date.—*Meredith v. City of Winter Haven*, C.C.A.Fla., 141 F.2d 348, rehearing denied 141 F.2d 1019, certiorari denied 65 S.Ct. 42, 323 U.S. 733, 89 L.Ed. 592.

(3) If provision for payment of of one-half the difference between rate of interest on original city bonds and refunding bonds if called before maturity was void because not approved at popular election, but severable from provision making bonds callable before maturity, refunding bonds were unenforceable in part, so that, under resolution of city commission authorizing refunding bonds, holders could enforce payment as holders of like amount of refunded indebtedness, plus interest at rate provided in original bonds to date of call less interest payments made, but not to exceed amount due under provision for payment of deferred interest.—*Meredith v. City of Winter Haven*, *supra*.

(4) Where city refunding bonds bore same rates of interest as original bonds, provision that interest in excess of three per cent per annum maturing on and before Jan. 1, 1936, should be extended and certificates of indebtedness bearing two per cent interest issued therefor so as to relieve city of cash payments during such period was valid.—*State v. City of Miami*, 157 So. 13, 116 Fla. 517.

(5) A covenant made by city in issuing refunding bonds, to refund accrued unpaid interest by issuance of delinquent tax notes, did not render bonds invalid, though amount of unpaid interest and of delinquent tax notes was not known.—*State v. City of Lakeland*, 180 So. 754, 132 Fla. 489.

41. Wyo.—*Corpus Juris* cited in *Jewett v. School Dist. No. 25*, 54 P.2d 546, 550, 49 Wyo. 277.

44 C.J. p 1223 note 99.

42. U.S.—*Meyer v. Muscatine*, Iowa, 1 Wall. 384, 17 L.Ed. 664.—*City of Hialeah v. U. S. ex rel. Harris*, C. C.A.Fla., 87 F.2d 953.

Okl.—*Oklahoma Utilities Co. v. City of Hominy*, 31 P.2d 932, 168 Okl. 130.

43. Ala.—*Phillips v. Atkins*, 155 So. 537, 229 Ala. 16.

44. Wis.—*Borner v. Prescott*, 136 N. W. 552, 150 Wis. 197.

45. Ind.—*English v. Smock*, 34 Ind. 115, 7 Am.R. 215.

46. U.S.—*Lyons v. Lyons Nat. Bank*, C.C.N.Y., 8 F. 369, 19 Blatchf. 279.

47. U.S.—*Cairo v. Zane*, III., 13 S.Ct. 803, 149 U.S. 122, 37 L.Ed. 673.

Place of payment generally see *infra* § 1955.

48. Cal.—*Los Angeles v. Teed*, 44 P. 580, 112 Cal. 319.

Fla.—*Middleton v. St. Augustine*, 29 So. 421, 42 Fla. 287, 89 Am.S.R. 227.

49. Wyo.—*City of Casper v. Joyce*, 38 P.2d 467, 54 Wyo. 198.

44 C.J. p 1224 note 6.

The Depository Act was not intended to interfere with the power of municipal corporations to contract as to the place where their bonds and interest coupons were legally to be made payable, or with the manner in which they were to be handled in

Municipal bonds and other securities may be made payable at a place outside of the state where the municipality is expressly authorized to make such provision;⁵⁰ and it has generally been held that, in the absence of express authority or restriction, the municipality has implied power to make its bonds and other securities payable outside of the state.⁵¹ In some jurisdictions, however, it has been held that a municipality has no implied power to make its bonds payable at any place other than its treasury,⁵² and that a provision in bonds for their payment at another place is void,⁵³ although the invalidity of the provision does not render the bonds void.⁵⁴

d. Medium of Payment

In the absence of statutory or charter directions or restrictions a municipal corporation may fix the medium in which the principal and interest of its bonds may be paid.

Where the statute authorizing the issuance of municipal bonds contains no directions as to the medium in which the bonds shall be paid, the municipal corporation has a discretion in fixing any medium of exchange not otherwise prohibited.⁵⁵ General power to issue municipal bonds carries with it, in the absence of legislative restrictions, the implied or incidental power to make them payable generally, that is, in currency which is constitutionally a legal tender, or payable in a particular coin which constitutes the legal and commercial standard by which the value of other kinds of currency is measured.⁵⁶ Although there is authority to the contrary,⁵⁷ it has been held that, in the

absence of legislation to the contrary, municipal bonds may be made payable in gold coin of the United States, of the present standard weight and fineness.⁵⁸ Where the proceedings preliminary to the issuance of the bonds, including the proposition voted on by the electors, provided that the bonds should be payable in gold coin, in the absence of directions contained in the statute authorizing the issuance of bonds as to the medium of payment the city may nevertheless make them payable in lawful money of the United States.⁵⁹

e. Fund or Source from Which Securities Payable

Municipal bonds or other securities must contain such provisions, recitals or covenants with respect to the fund or source pledged to secure payment as are required by constitutional, statutory, or charter regulations.

When authorized by constitutional, statutory, or charter regulations, municipal authorities may insert in municipal bonds or other securities provisions, recitals, or covenants with respect to the fund or source pledged to secure payment or from which the securities are payable,⁶⁰ and they are under a duty to insert such provisions when constitutional, statutory, or charter regulations so direct.⁶¹ Thus, under such regulations the municipal authorities may, or when directed, must, insert in municipal bonds or other securities a provision, recital, or covenant that the securities shall be payable out of taxes or that the municipality shall levy or be obligated to levy taxes for their payment,⁶² or that the municipality will collect

that place.—*City of Casper v. Joyce*, supra.

50. Fla.—*Lasseter v. State*, 64 So. 847, 67 Fla. 240.

51. Mont.—*Kalman v. Treasure County*, 275 P. 743, 84 Mont. 285.

Wyo.—*Corpus Juris* cited in *City of Casper v. Joyce*, 88 P.2d 467, 472, 54 Wyo. 198.

44 C.J. p 1224 note 8.

52. Ill.—*Sherlock v. Winnetka*, 68 Ill. 530—*Pekin v. Reynolds*, 31 Ill. 629, 83 Am.D. 244.

53. Ill.—*Sherlock v. Winnetka*, 68 Ill. 530.

54. U.S.—*Enfield v. Jordan*, Ill., 7 S.Ct. 353, 119 U.S. 680, 30 L.Ed. 523.

44 C.J. p 1224 note 11.

55. Cal.—*City of San Diego v. Millan*, 16 P.2d 357, 127 Cal.App. 521.

56. Ala.—*Judson v. Bessemer*, 6 So. 267, 37 Ala. 240, 4 L.R.A. 742.

57. Ohio.—*Cincinnati v. Anderson*, 10 Ohio Cir.Ct. 245, 6 Ohio Cir.Dec. 594.

Tenn.—*Burnett v. Maloney*, 37 S.W. 689, 97 Tenn. 697, 34 L.R.A. 541.

58. Fla.—*Lassater v. State*, 64 So. 847, 67 Fla. 240.

44 C.J. p 1224 note 15.

59. Cal.—*City of San Diego v. Millan*, 16 P.2d 357, 127 Cal.App. 521.

60. Fla.—*State v. City of Auburndale*, 197 So. 739, 144 Fla. 210.

Right of security holders to be paid from general or special fund see infra § 1957.

Pledge in original and refunding bonds

Refunding bonds issued under charter provision authorizing city to pledge net revenues of its light and water department in addition to full faith and credit of city for payment of refunding bonds were not invalid as going beyond the pledge of original bonds issued under former charter provision pledging the full faith and credit of the city for the payment thereof.—*State v. City of Fort Pierce*, 19 So.2d 468, 155 Fla. 58.

Clerical error in stating source held not to invalidate municipal note.—*Brock v. Town of Kentwood*, 199 So. 133, 196 La. 318.

61. Fla.—*State v. City of Tampa*, 3 So.2d 484, 148 Fla. 6.

62. Fla.—*State v. City of Venice*, 2 So.2d 365, 147 Fla. 70.

Power to tax to pay bonds see infra § 1997.

Pledge of entire taxable property of city

Provision in proposed municipal refunding bonds for pledging entire taxable property in city to secure payment was limited to pledge of city's taxing power.—*Boatright v. City of Jacksonville*, 158 So. 42, 117 Fla. 477.

Tax on different areas in municipality

Fla.—*State v. City of St. Petersburg*, 173 So. 434, 127 Fla. 509.

Tax on homesteads

Refunding bonds and interest certificates proposed to be issued by city to be exchanged for principal and in-

taxes for payment of the securities in the same manner and at the same time that other taxes are collected, and that it will not accept payment of other taxes unless there is also paid at the same time the taxes for payment of the securities,⁶³ or that the securities shall be payable from the revenues derived from the operation of a public utility or facility.⁶⁴

Where, as a matter of law, the full faith and credit of a city are pledged for the payment of bonds, the fact that the bonds set forth a formal pledge to this effect does not affect their validity.⁶⁵

Tax anticipation notes. When required by statute, tax anticipation notes, warrants, or certificates

must show on their face that they are payable solely from taxes when collected;⁶⁶ and, when authorized by law, the municipal authorities may covenant that the delinquent taxes and tax certificates pledged to secure the payment of delinquent tax anticipation notes shall be paid and discharged solely by the payment and receipt of money.⁶⁷

§ 1942. Validity

Municipal bonds or other securities, valid when issued, ordinarily are not rendered invalid by subsequent events.

The validity of municipal bonds or other securities has been considered in connection with various objections.⁶⁸ Subsequent events ordinarily

terest claims of bonded debt were not invalid under homestead exemption provisions of constitution, enacted subsequent to issuance of original bonds, because of provisions obligating city to levy taxes on homesteads for payment, since instruments constituted extension of original contract, and bondholders were entitled to have tax levy made on property as authorized under original bonds.—*State v. City of West Palm Beach*, 174 So. 334, 127 Fla. 849.

Lands excluded from city

Provisions in refunding bonds for a tax on lands excluded from city since issuance of original bonds were held valid.—*State v. City of Fort Myers*, 198 So. 814, 145 Fla. 135.—*State v. City of Auburndale*, 197 So. 739, 144 Fla. 210.

Inaccuracies in stating area to be taxed were held not to invalidate bonds.—*Fahs v. Kilgore*, 187 So. 170, 136 Fla. 701.

63. Fla.—*State v. Town of Gulfport*, 189 So. 703, 138 Fla. 505.—*State v. City of Lakeland*, 180 So. 754, 132 Fla. 489.—*State v. City of Orlando*, 170 So. 887, 126 Fla. 251, 127 Fla. 280.

Acceptance of lawful money in payment of taxes

The covenant of a city issuing refunding bonds to accept nothing but lawful money in payment of taxes or special assessments imposed for payment of bonds and delinquent notes, except that delinquent tax notes would be accepted in payment of special assessments for particular years, did not render bonds invalid under statute permitting use of past-due obligations in paying taxes levied for payment of interest and for sinking fund.—*State v. City of Lakeland*, 180 So. 754, 132 Fla. 489.

64. Fla.—*State v. City of Tampa*, 3 So.2d 484, 148 Fla. 6.

Light and water supply system certificates

Fla.—*State v. City of Fort Pierce*, 170 So. 742, 126 Fla. 184.

Waterworks and sewer system bonds
Ky.—*Dunn v. City of Murray*, 208 S.W.2d 309, 306 Ky. 426.

65. Mont.—*Carlson v. Helena*, 102 P. 39, 39 Mont. 82, 17 Ann.Cas. 1233.

Such provision does not create lien on any municipal property or enlarge obligation of bond or means of payment beyond requirements of controlling statute.—*State ex rel. Babson v. City of Sebring*, 155 So. 669, 115 Fla. 176.

66. Ill.—*People ex rel. Toman v. M. Born & Co.*, 26 N.E.2d 848, 373 Ill. 490.

S.C.—*Bolton v. Wharton*, 161 S.E. 454, 163 S.C. 242, 86 A.L.R. 1101.

67. Fla.—*State v. City of Tampa*, 183 So. 491, 133 Fla. 840.

68. Fla.—*State v. City of Lakeland*, 180 So. 754, 132 Fla. 489.

Validity:

Determination of validity in statutory proceedings before issuance see *supra* § 1919.

Execution and delivery see *infra* § 1948.

Form and contents of securities see *supra* §§ 1935–1941.

In hands of bona fide purchasers see *infra* §§ 1967–1971.

Limitation of amount see *supra* §§ 1911–1914.

Power or authority to issue securities see *supra* §§ 1902–1904.

Preliminary steps or proceedings and conditions precedent see *supra* §§ 1915–1919.

Provision for payment of securities see *supra* § 1918.

Purpose of issue of securities see *supra* §§ 1905–1910.

Sale or disposition of securities see *supra* §§ 1930–1932.

Compromise of special assessments
Where refunded bonds were gen-

eral obligations of municipality but payment thereof had as additional security special assessments which municipality was obligated to collect for use in such bond payments, fact that city has compromised special assessments does not affect validity of refunding bonds which merely continued obligations of refunded bonds.—*Fahs v. Kilgore*, 187 So. 170, 136 Fla. 701.

Effect of power of sale in mortgage

Until a power of sale in a mortgage on a municipal water system is sought to be exercised, its mere grant in a mortgage securing bonds cannot affect otherwise valid bonds.—*City of Hamlin v. Brown-Crummer Inv. Co.*, C.C.A.Tex., 93 F.2d 680, certiorari denied *Brown-Crummer Inv. Co. v. City of Hamlin, Tex.*, 58 S.Ct. 831, 303 U.S. 664, 82 L.Ed. 1122.

Exemption of homesteads from taxation

Fact that bonds refunding public improvement bonds issued by town might be subject to discretionary power of general assembly to exempt from taxation homesteads not exceeding one thousand dollars in value would not affect validity of refunding bonds.—*Nash v. Board of Com'rs of St. Paul*, 190 S.E. 475, 211 N.C. 301.

Improvements costing more than amount of bonds

Bonds are not void because the improvements will cost more than the amount of bonds authorized.—*Wheeler v. Denver, Colo.*, 231 F. 8, 146 C.C.A. 196, appeal dismissed 38 S.Ct. 10, 245 U.S. 626, 62 L.Ed. 518.

Statutory provisions for election to approve tax levy by town board to aid town port commission in performing its duties do not affect validity of latter's bonds, since such election is not a condition precedent to issuance of such bonds.—*Webb v. Port Commission of Morehead City*, 172 S.E. 377, 205 N.C. 663.

do not invalidate a bond issue.⁶⁹ Municipal bonds which are valid when executed cannot be rendered void by a subsequent charter amendment.⁷⁰ Bonds which are valid when issued and sold cannot be defeated by the failure of municipal authorities to do their duty with respect to things to be done or records to be made after the bonds have been issued.⁷¹ Revenue bonds issued in connection with a municipal utility are not invalidated by the failure of the city to name a city utility commission to manage the plant, as required by statute, where the statute does not make the establishment of the commission a condition precedent to the issuance of the bonds.⁷²

The obligations of a municipality will be sustained if authorized by any statute, even where the municipality apparently is acting under an invalid law.⁷³ Bonds which are in fact issued under a valid charter provision are not rendered invalid by the fact that, in issuing the bonds, the municipal officers assume to act under invalid charter amendments.⁷⁴

The validity of revenue bonds, the proceeds of which are to be used for a particular purpose, is not impaired by the fact that funds derived from general taxation, or from other sources, also have been, and are to be, used for the same purpose.⁷⁵ Refunding bonds are not rendered invalid because a part of the proceeds of some of the original bonds was spent in installing improvements beyond the legal corporate limits of the city when

at the time such proceeds were used the area benefited was included as a part of the city by a statute which was subsequently declared invalid.⁷⁶

Collateral attack on validity. The validity of bonds cannot be tried in a collateral proceeding.⁷⁷

Effect of reincorporation of municipality. The dissolution of a municipal corporation and its reincorporation with less territory does not invalidate bonds issued before its dissolution.⁷⁸

§ 1943. — Who May Challenge

The validity of municipal bonds may not be challenged by a person who has not been injured by their issuance.

The validity of municipal bonds may not be challenged by a person who has not been injured by their issuance;⁷⁹ by one for whose benefit they were issued when the municipality has never repudiated them or denied its obligation to pay them, principal and interest, and does not propose to repudiate them;⁸⁰ by a ministerial officer of the municipality charged only with the duty of paying the bonds;⁸¹ or by the holders of bonds duly authorized, who have, without objection, allowed a large amount of bonds to be issued in violation of their rights and to pass into the hands of bona fide holders.⁸²

On the other hand, where corporate bonds recite their issue under a certain valid statute, and in

Determination of validity from charter section

Sometimes a section of a municipal charter is so worded that the validity of particular bonds is to be determined from an examination of that section alone.—*Wheeler v. Denver, Colo.*, 231 F. 8, 145 C.C.A. 196, appeal dismissed 38 S.Ct. 10, 245 U.S. 626, 62 L.Ed. 518.

69. Fla.—*State ex rel. Davis v. Ryan*, 158 So. 62, 118 Fla. 42. Wrongful diversion of proceeds of sale as affecting validity see *supra* § 1934.

Failure of private persons to contribute

If contemplated contribution to harbor project by private persons is not made or project fails of completion, such result would not show lack of authority to exercise powers conferred by charter acts on cities issuing bonds for project, since subsequent events do not invalidate bond issues.—*State ex rel. Davis v. Ryan*, 158 So. 62, 118 Fla. 42, *State ex rel. Ake v. Broward County Port Authority*, 158 So. 62, 118 Fla. 42.

Partial exchange of refunding bonds Fla.—*State v. Haines City*, 188 So. 831, 137 Fla. 616.

70. Or.—*Portland v. Albee*, 135 P. 516, 897, 67 Or. 221.

71. U.S.—*Board of Education of Village of Estancia, School Dist. No. 7 of Torrance County, N. M., v. Woodmen of the World, C.C.A. N.M.*, 77 F.2d 31.

72. Ky.—*Eagle v. City of Corbin*, 122 S.W.2d 798, 275 Ky. 808.

73. U.S.—*Township of South Hackensack v. Federal Deposit Ins. Corporation, C.C.A. N.J.*, 109 F.2d 327, certiorari denied 60 S.Ct. 896, 310 U.S. 624, 84 L.Ed. 1396.

74. Mo.—*State v. Smith*, 259 S.W. 1060, 302 Mo. 594.

75. W.Va.—*Warden v. City of Grafton*, 26 S.E.2d 1, 125 W.Va. 658.

76. Fla.—*State ex rel. Gillespie v. Walthall*, 169 So. 552, 124 Fla. 866.

77. Iowa—*Sioux City v. Weare*, 12 N.W. 786, 59 Iowa 95.

Wyo.—*Henning v. Consolidated Building & Loan Co.*, 62 P.2d 540, 50 Wyo. 315.

78. U.S.—*Uvalde v. Spier, Tex.*, 91 F. 594, 33 C.C.A. 501.

Effect of new charter on liabilities generally see *supra* § 97.

79. Mich.—*Boehme v. Monroe*, 64 N.W. 204, 106 Mich. 401.

Estoppel to question validity see *infra* § 1944.

Utility corporation

The franchise of a utility corporation has been held to constitute a property right entitling the corporation to sue to restrain an unauthorized issue of bonds for construction and operation of a competing utility plant.

U.S.—*Kansas Gas & Electric Co. v. City of Independence, C.C.A. Kan.*, 79 F.2d 32, 100 A.L.R. 1479, rehearing denied 79 F.2d 638.

Ala.—*Alabama Power Co. v. City of Scottsboro*, 190 So. 412, 238 Ala. 230.

Injunction to restrain issue of bonds generally see *Injunctions* § 121.

80. U.S.—*Sala v. New Orleans, C.C. La.*, 21 F.Cas.No.12,246, 2 Woods 188.

81. N.Y.—*Oxford First Nat. Bank v. Wheeler*, 72 N.Y. 201—*Ross v. Curtiss*, 31 N.Y. 606.

82. U.S.—*Ranger v. New Orleans, C.C. La.*, 20 F.Cas.No.11,564, 2 Woods 128, reversed on other grounds 98 U.S. 381, 25 L.Ed. 225.

pursuance of its provisions, and nothing on their face indicates their invalidity, a defendant to a bill, seeking their sale in part satisfaction of certain liens, may, by cross bill, show that they are in reality void, and thus prevent the court from decreeing a sale, whereby they may pass for value to innocent purchasers.⁸³

§ 1944. — Ratification or Estoppel

- a. In general
- b. By levy of taxes for payment
- c. By payment of principal or interest

a. In General

In the absence of legislative sanction, a municipal corporation may not ratify municipal bonds issued without authority and a municipality may not be estopped to deny the validity of bonds where it was without power to issue them.

An issue of municipal bonds without authority of law may not be ratified⁸⁴ without legislative sanction.⁸⁵ Where there is a total want of power to issue bonds, a municipality cannot be estopped to raise such a defense⁸⁶ by admissions,⁸⁷ recitals in the bonds, as considered *infra* § 1968, the issuance of securities negotiable in form,⁸⁸ any acts or conduct on the parts of the officers⁸⁹ or inhabitants⁹⁰ of the municipality, or even by the receipt and enjoyment of the proceeds of the bonds.⁹¹

On the other hand, irregularities in the execution and issuance of bonds, or in the proceedings preliminary thereto, may be cured by ratification;⁹² the acts of municipal officers constituting a distinct

recognition of the validity of the bonds estop the municipality to assert their invalidity on the ground of irregularity in their issuance;⁹³ and when a municipality has authority to issue bonds, it may be estopped by long acquiescence in their validity to assert that certain conditions attached to the exercise of the power were not complied with.⁹⁴ A municipality having received and retained stock which was issued in exchange for its bonds cannot raise the objection that the bonds and coupons were not made payable at the time directed by the statute;⁹⁵ but a claim that a town, by accepting and retaining stock of the railroad company for which the bonds were exchanged in violation of a statute, ratified the issue of bonds cannot be upheld where a judgment has previously been rendered, which was not appealed from, adjudging that such bonds were void, and that the certificates of stock should be delivered up and canceled.⁹⁶ Where a town was a *de facto* corporation at the time it issued certain bonds, and after reincorporation of the town the succeeding *de jure* corporation assumes the payment thereof as authorized by statute, the bonds become valid obligations of the succeeding corporation.⁹⁷

A person at whose instance municipal bonds have been issued is estopped to question their validity.⁹⁸ Abutting owners will not be heard to question the legality of municipal bonds issued to pay for street paving or other like improvements, where the bonds were issued before the assessment was made and the abutting owners allowed the work to proceed to completion without objection.⁹⁹

83. U.S.—Alessandro Irr. Dist. v. Savings & Trust Co. of Cleveland, Ohio, C.C.Cal., 88 F. 928.

84. U.S.—Katzengerger v. Aberdeen, Miss., 7 S.Ct. 947, 121 U.S. 172, 30 L.Ed. 911.

44 C.J. p 1227 note 5.

Estoppel against bona fide purchaser see *infra* § 1970.

Renewal of invalid bond or note does not invalidate it.—Bolton v. Wharton, 161 S.E. 454, 163 S.C. 242, 86 A.L.R. 1101.

85. U.S.—Campbell v. Kenosha, Wis., 5 Wall. 194, 18 L.Ed. 610.

44 C.J. p 1227 note 6.

86. U.S.—City of Corpus Christi v. Hayward, C.C.A.Tex., 111 F.2d 637, certiorari denied Hayward v. City of Corpus Christi, 61 S.Ct. 30, 311 U.S. 670, 85 L.Ed. 430.

44 C.J. p 1227 note 7.

Bonds issued without vote of people U.S.—City of Corpus Christi v. Hayward, C.C.A.Tex., 111 F.2d 637, certiorari denied Hayward v. City of

Corpus Christi, 61 S.Ct. 30, 311 U.S. 670, 85 L.Ed. 430.

Tex.—Radford v. City of Cross Plains, 86 S.W.2d 201, 126 Tex. 153.

87. U.S.—Graves v. Saline County, Ill., 16 S.Ct. 526, 161 U.S. 359, 40 L.Ed. 732.

88. U.S.—Graves v. Saline County, *supra*.

89. U.S.—Kelley v. Milan, Tenn., 8 S.Ct. 1101, 127 U.S. 139, 32 L.Ed. 77.

44 C.J. p 1227 note 11.

90. U.S.—Lewis v. Shreveport, C.C. La., 15 F.Cas.No.8,331, 3 Woods 205, affirmed 2 S.Ct. 634, 108 U.S. 282, 27 L.Ed. 728.

N.Y.—Weismser v. Douglass, 64 N.Y. 91, 21 Am.R. 586.

91. U.S.—Parkersburg v. Brown, W. Va., 1 S.Ct. 442, 106 U.S. 487, 27 L.Ed. 238.

44 C.J. p 1227 note 13.

92. Cal.—Cole v. Los Angeles, 182 P. 436, 180 Cal. 617.

44 C.J. p 1227 note 14.

93. Fla.—State v. Town of Belleair, 170 So. 434, 125 Fla. 669.

Ill.—Cook v. City of Staunton, 14 N.E.2d 696, 295 Ill.App. 111.

Kan.—Coolidge v. Connecticut Gen. Hospital Soc., 58 P. 562, 9 Kan. App. 891.

94. U.S.—Board of Education of City of Atchison, Kan., v. De Kay, Kan., 13 S.Ct. 706, 148 U.S. 591, 37 L.Ed. 573.

44 C.J. p 1227 note 16.

95. Bonds issued in aid of railroad construction

U.S.—Munson v. Lyons, C.C.N.Y., 17 F.Cas.No.9,935, 12 Blatchf. 539, affirmed 99 U.S. 684, 25 L.Ed. 451.

96. N.Y.—Horton v. Thompson, 71 N.Y. 513.

97. Tex.—Bradford v. Westbrook, 88 S.W. 382, 39 Tex.Civ.App. 638.

98. Mo.—State v. Mastin, 15 S.W. 529, 103 Mo. 508.

99. Mich.—Boehme v. Monroe, 64 N.W. 204, 106 Mich. 401.

b. By Levy of Taxes for Payment

The levy of a tax or assessment to pay municipal bonds irregularly issued estops the municipal corporation to deny their validity.

Where the power to issue municipal bonds existed but has been irregularly exercised, the levy of a tax or an assessment for their payment estops the municipal corporation to deny their validity.¹ On the other hand, the levy of a tax to pay municipal bonds does not estop the municipality to deny their validity where they were issued without authority,² or in excess of the constitutional limit,³ or to aid a purely private enterprise,⁴ or were fraudulently issued by officers in satisfaction of a judgment already paid;⁵ and sometimes ratification⁶ or estoppel⁷ is held not to result from the levy of a tax for the payment of interest where, at the first opportunity thereafter, liability is denied and payment refused.

c. By Payment of Principal or Interest

The payment of a part of the principal of municipal bonds void at their inception, or the payment of interest thereon, does not estop the municipal corporation to deny their validity.

Where municipal bonds are void in their inception for want of power to issue them,⁸ or because in excess of the debt limit,⁹ or because issued in aid of a private enterprise,¹⁰ and not merely because of irregularities in their issuance, the payment of a part of the principal or the payment of interest thereon by the municipal corporation, however long continued, does not amount to a ratification which

estops the municipality to plead their invalidity. On the other hand, where there is authority to issue bonds, a municipality may, by paying a part of the principal thereof or the interest thereon, become estopped to deny that they are binding obligations,¹¹ because of irregularities or defects in their issuance or in the proceedings preliminary thereto,¹² particularly where the bonds contain recitals that they were duly authorized and regularly issued,¹³ or where the municipality has received and retained the proceeds of the bonds¹⁴ or has renewed them at maturity.¹⁵

Where the legislature ratifies, or authorizes a city to ratify, an issue of bonds, and authorizes the city to levy taxes to pay the interest on such bonds, the levy of taxes for such purpose and the application of the proceeds to the payment of the interest for a number of years constitute a ratification of the bonds.¹⁶ Ratification of one series of bonds does not result from the payment of interest on another series of bonds issued for a different purpose and for which the municipality received full consideration.¹⁷

§ 1945. — Curative Constitutional or Statutory Provisions

The effect of curative statutes ratifying municipal bonds or other securities is to validate such securities from the beginning.

In various jurisdictions constitutional and statutory provisions have been enacted validating municipal bonds or other securities.¹⁸ The purpose

1. Ill.—*Prange v. City of Marion*, 48 N.E.2d 980, 319 Ill.App. 136—*Cook v. City of Staunton*, 14 N.E.2d 696, 295 Ill.App. 111.
- 44 C.J. p 1228 note 22.
2. Ill.—*Lippincott v. Pana*, 92 Ill. 24.
3. Iowa.—*McPherson v. Foster*, 43 Iowa 48, 22 Am.R. 215.
4. Kan.—*McConnell v. Hamm*, 16 Kan. 228.
5. Iowa.—*Decorah First Nat. Bank v. Doon*, 53 N.W. 301, 86 Iowa 330, 41 Am.S.R. 489.
6. Kan.—*Faulkenstein Tp. v. Fitch*, 43 P. 276, 2 Kan.App. 193.
7. Okl.—*State v. Sapulpa*, 160 P. 489, 58 Okl. 550.
8. S.C.—*Bolton v. Wharton*, 161 S. E. 454, 163 S.C. 242, 86 A.L.R. 1101.
- 44 C.J. p 1228 note 30.
9. U.S.—*Doon Dist. Tp. v. Cummins*, Iowa, 12 S.Ct. 220, 142 U.S. 366, 35 L.Ed. 1044—*Davless County v. Dickinson, Ky.*, 6 S.Ct. 897, 117 U. S. 657, 29 L.Ed. 1028.
10. Ala.—*Eufaula v. McNabb*, 67 Ala. 588, 42 Am.R. 118.
11. Ill.—*Prange v. City of Marion*, 48 N.E.2d 980, 319 Ill.App. 136.
- N.C.—*Bankers' Trust Co. v. City of Statesville*, 166 S.E. 169, 203 N.C. 399.
- 44 C.J. p 1228 note 33.
12. Ill.—*Cook v. City of Staunton*, 14 N.E.2d 696, 295 Ill.App. 111.
- 44 C.J. p 1229 note 34.
13. U.S.—*Rondot v. Rogers Tp., Mich.*, 99 F. 202, 39 C.C.A. 462.
- 44 C.J. p 1229 note 35.
- Effect of recitals in bonds generally see *infra* §§ 1967, 1968.
14. U.S.—*Rondot v. Rogers Tp., Mich.*, 99 F. 202, 39 C.C.A. 462.
- 44 C.J. p 1229 note 36.
15. Ky.—*Frankfort v. Frankfort Bd. of Education*, 284 S.W. 1085, 215 Ky. 286.
16. U.S.—*Denison v. Columbus, C.C. Miss.*, 62 F. 775, affirmed 69 F. 58, 16 C.C.A. 125, appeal dismissed 84 F. 1015, 28 C.C.A. 680, and certiorari denied 16 S.Ct. 1203, 163 U.S. 695, 41 L.Ed. 314.
- Kan.—*Atchison v. Butcher*, 3 Kan. 104.
17. Tenn.—*Weil v. Newbern*, 148 S. W. 680, 126 Tenn. 223, L.R.A. 1915A 1009, Ann.Cas.1913E 25.
18. Ala.—*Lockhart v. Troy*, 48 Ala. 579.
- Cal.—*City of Fairfield v. Hutcheon*, 202 P.2d 745—*City of Pacific Grove v. Irwin*, 172 P.2d 357, 76 Cal.App. 2d 46.
- Fla.—*State v. Haines City*, 188 So. 831, 137 Fla. 616.
- Ga.—*Town of McIntyre v. Scott*, 12 S.E.2d 883, 191 Ga. 473.
- Ind.—*W. H. Dreves, Inc. v. Osolo School Tp. of Elkhart County*, 28 N.E.2d 252, 217 Ind. 388, 128 A.L.R. 1405.
- La.—*Badger-Louisiana Land Co. v. Estopinal*, 79 So. 335, 143 La. 775.
- Minn.—*Vorbeck v. City of Glencoe*, 288 N.W. 4, 206 Minn. 180.
- N.C.—*Starmount Co. v. Town of Hamilton Lakes*, 171 S.E. 909, 205 N.C. 514.
- Pa.—*Sambor v. Hadley*, 140 A. 847, 291 Pa. 395, followed in *Turner Const. Co. v. Mackey*, 140 A. 353,

of such provisions is to protect individual investors and to maintain the salability of municipal securities.¹⁹ The intention of the legislature to cure or ratify municipal bonds or other securities must clearly appear,²⁰ especially where the bonds have been declared invalid by a court²¹ or the municipality has not received any consideration therefor.²²

Whether or not a curative act applies to particular municipal bonds or other securities depends on the terms of the act;²³ and in various cases a curative statute has been held to apply²⁴ or to be inapplicable²⁵ to particular municipal securities. An act expressly relating only to bonds previously issued does not validate bonds issued subsequent to its passage.²⁶ Where the curative statute applies to all proceedings which have been taken prior to the date the statute becomes effective, it is not lim-

ited to a situation where bonds have been already issued or to a situation where the validation proceedings had previously been completed, but covers a situation where the proceedings for the issuance of the bonds had been taken before the adoption of the statute.²⁷

Effect of curative acts. The rule that curative statutes make the acts to which they relate valid ab initio, considered in the C.J.S. title Statutes § 430, also 59 C.J. p 1179 note 51, applies to curative statutes relating to municipal bonds and other securities,²⁸ provided no vested rights have intervened.²⁹ Curative statutes cure all defects resulting from a failure to comply with provisions which are merely directory of the mode of the exercise of the power,³⁰ but they cannot cure defects and omissions which go to the jurisdiction of the mu-

291 Pa. 412, and *Plumly v. Hadley*, 140 A. 353, 291 Pa. 411—*Vansciver v. Sharon Hill Borough*, 33 Pa. Dist. & Co. 383, 28 Del. Co. 41, 30 Mun. L.R. 43.

S.C.—*Ashmore v. Greater Greenville Sewer Dist.*, 44 S.E.2d 88, 211 S.C. 77—*Green v. City of Rock Hill*, 147 S.E. 346, 149 S.C. 234.

Tenn.—*Stone v. Town of Crossville*, 212 S.W.2d 678—*Soukup v. Sell*, 104 S.W.2d 830, 171 Tenn. 437, modified on other grounds 105 S.W.2d 107, 171 Tenn. 491.

Curative statutes generally see the C.J.S. title Statutes § 430, also 59 C.J. p 1178 note 36 et seq.

Validation of acts of municipality: Generally see supra § 196.

Municipal contracts see supra § 1010.

Power of legislature and validity of curative statutes see Constitutional Law §§ 428-432.

Notes

Ala.—*Newman v. City of Opelika*, 139 So. 247, 224 Ala. 70.

Validating bond election and bonds

Kan.—*City of Wichita v. Robb*, 179 P.2d 937, 163 Kan. 121.

Mont.—*Commonwealth Public Service Co. of Montana v. City of Deer Lodge*, 29 P.2d 667, 96 Mont. 48.

Validating statute as constituting tax levy

Statute validating municipal bond election was held not "levy of tax" within constitutional prohibition, where no legislative compulsion rested on city to levy taxes to pay the bonds.—*Weber v. City of Helena*, 297 P. 455, 89 Mont. 109.

19. Ind.—*W. H. Dreves, Inc., v. Onolo School Tp. of Elkhart County*, 28 N.E.2d 252, 217 Ind. 388, 128 A.L.R. 1405.

20. U.S.—*Beyer v. Athens, C.C.A. Tenn.*, 249 F. 849, 162 C.C.A. 83, 44 C.J. p 1229 note 45.

21. U.S.—*Beyer v. Athens, supra*.

22. U.S.—*Beyer v. Athens, supra*.

23. Minn.—*Vorbeck v. City of Glencoe*, 288 N.W. 4, 206 Minn. 180. Mont.—*Montana-Dakota Utilities Co. v. City of Havre*, 94 P.2d 660, 109 Mont. 164.

44 C.J. p 1229 note 48.

Term "acts and proceedings," as used in statute validating all acts and proceedings taken by a public body for authorization, issuance, sale, or exchange of bonds of such body for any public purpose, includes the submission to voters of question whether an indebtedness should be incurred for purpose of repairing sewer and water systems, which is a public purpose.—*City of Fairfield v. Hutcheon, Cal.*, 202 P.2d 745.

24. Cal.—*City of Fairfield v. Hutcheon*, 202 P.2d 745.

Kan.—*City of Wichita v. Robb*, 179 P.2d 937, 163 Kan. 121.

Minn.—*Vorbeck v. City of Glencoe*, 288 N.W. 4, 206 Minn. 180.

Mont.—*Commonwealth Public Service Co. of Montana v. City of Deer Lodge*, 29 P.2d 667, 96 Mont. 48—*Weber v. City of Helena*, 297 P. 455, 89 Mont. 109.

S.C.—*Banister v. Lollis*, 190 S.E. 511, 183 S.C. 218.

25. N.J.—*Sherman v. City of Long Branch*, 153 A. 109, 9 N.J. Misc. 75, affirmed 158 A. 544, 108 N.J. Law 548 and followed in *Yankowski v. City of East Orange*, 153 A. 911, 9 N.J. Misc. 312.

Tex.—*Radford v. City of Cross Plains*, 86 S.W.2d 204, 126 Tex. 153—*American Nat. Ins. Co. v. Donald, Civ. App.*, 77 S.W.2d 1080, affirmed 83 S.W.2d 947, 125 Tex. 597, 44 C.J. p 1229 note 48 [a].

26. U.S.—*Concord v. Robinson, Ill.*, 7 S.Ct. 937, 121 U.S. 165, 30 L.Ed. 885.

27. Ga.—*Town of McIntyre v. Scott*, 12 S.E.2d 883, 191 Ga. 473.

Validation proceedings pending when statute adopted

The fact that proceedings respecting validation of municipal waterworks bonds were pending when statute was adopted did not take proceedings out of purview of statute providing for validating bonds and proceedings for their authorization and issuance by cities in financing projects aided by loans or grants from federal government.—*Town of McIntyre v. Scott, supra*.

28. U.S.—*Starmount Co. v. Ohio Sav. Bank & Trust Co., C.C.A.N.C.*, 55 F.2d 649.

N.C.—*Starmount Co. v. Town of Hamilton Lakes*, 171 S.E. 909, 205 N.C. 514.

44 C.J. p 1229 note 42.

Notes

Ala.—*Newman v. City of Opelika*, 139 So. 247, 224 Ala. 70.

Script

Minn.—*McCutchen v. Freedom*, 15 Minn. 217.

Making bonds general obligations

U.S.—*Bessemer Inv. Co. v. City of Chester, D.C.Pa.*, 22 F.Supp. 311, modified on other grounds, C.C.A., 113 F.2d 571.

Pa.—*Vansciver v. Sharon Hill Borough*, 33 Pa. Dist. & Co. 383, 28 Del. Co. 41, 30 Mun. L.R. 43—*Palmer v. City of Erie*, 20 Erie Co. 400, affirmed 9 A.2d 378, 337 Pa. 5.

29. Ind.—*Bollenbacher v. Harris*, 148 N.E. 417, 196 Ind. 657—*Schneck v. Jeffersonville*, 52 N.E. 212, 152 Ind. 204.

30. Cal.—*City of San Diego v. Mil-lan*, 16 P.2d 357, 127 Cal.App. 521.

municipality to act at all and which make its action absolutely void.³¹

A validating clause of a bond act making the issuance of bonds for an improvement conclusive of the regularity of the proceedings prior thereto is not material on the question of the power of the city council to levy an assessment for the improvement.³² Notwithstanding the validation of an election on the question of issuing bonds, the municipality cannot be compelled to issue the bonds against its will.³³

§ 1946. Construction in General

A municipal bond must be construed as a whole and in the light of existing statutory provisions.

General rules relating to the construction of bonds and contracts, as considered in Bonds §§ 38-61, and Contracts §§ 294-372, ordinarily are applicable in construing municipal bonds and other securities.³⁴ A municipal bond must be construed as

a whole and in the light of existing statutory provisions.³⁵ The import of municipal bonds will be controlled by their legal effect rather than by the name given them in the ordinance authorizing their issuance.³⁶

§ 1947. — Law as Part of Contract

The law in effect at the time of the execution of municipal bonds or other securities becomes a part of the contract.

The law in effect at the time of the execution of municipal bonds or other securities becomes a part of the contract³⁷ as effectively and completely as though expressly incorporated in the securities.³⁸ Incorporated as part of the contract are all the provisions of the state constitution³⁹ and statutes⁴⁰ and ordinances of the city⁴¹ in force at the time of execution, and the statutes⁴² and ordinances⁴³ pursuant to which the securities were issued and the constructions placed on such

31. Cal.—City of San Diego v. Millan, *supra*.

32. Cal.—Thompson v. Hance, 163 P. 1021, 174 Cal. 572.

33. Ill.—Cairo, etc., R. Co. v. Sparta, 77 Ill. 505.

44 C.J. p 1230 note 69.

34. Provision giving municipality option to pay bond before maturity is not negated by a proviso that bond is payable only out of special assessment fund.—Ballard-Hassett Co. v. City of Des Moines, 224 N.W. 793, 207 Iowa 1351.

Reservation in bond issue as to determination of construction work by city council referred only to preceding clause and could not be applied to succeeding clause.—Tribune Co. v. Thompson, 174 N.E. 561, 342 Ill. 503.

Tax anticipation warrants or promissory notes

Warrants issued by park district were not negotiable notes, but were tax anticipation warrants, where warrants recited that they were issued in anticipation of taxes levied to provide a fund to defray payment of principal and interest of maturing bonds theretofore issued, etc.—Edward J. Berwind, Inc., v. Chicago Park Dist., 65 N.E.2d 785, 393 Ill. 317.

35. Iowa.—Ballard-Hassett Co. v. City of Des Moines, 224 N.W. 793, 207 Iowa 1351.

Law as part of contract see *infra* § 1947.

36. Fla.—State v. City of Key West, 14 So.2d 707, 153 Fla. 226.

37. U.S.—City of Decatur v. Thames Bank & Trust Co., C.C.A. Ala., 84 F.2d 105.

Ala.—Johnson v. City of Sheffield, 183 So. 265, 236 Ala. 411.

Okl.—Davis v. McCasland, 75 P.2d 1118, 182 Okl. 49—Bonebrake Hardware Co. v. Miller, 72 P.2d 351, 181 Okl. 4—Straughn v. Berry, 65 P.2d 1203, 179 Okl. 364—McGrath v. Oklahoma City, 9 P.2d 711, 156 Okl. 34.

Pa.—Clark v. City of Philadelphia, 196 A. 384, 328 Pa. 521, 115 A.L.R. 212.

Purchasers taking securities subject to law in force see *infra* § 1956.

38. Mont.—City of Phillipsburg v. Porter, 190 P.2d 676.

39. Neb.—State ex rel. Consumers Public Power Dist. v. Boettcher, 291 N.W. 709, 138 Neb. 22.

Okl.—Perrine v. Bonaparte, 282 P. 332, 140 Okl. 165.

40. Fla.—State ex rel. Keefe v. City of St. Petersburg, 144 So. 313, 106 Fla. 742.

Neb.—State ex rel. Consumers Public Power Dist. v. Boettcher, 291 N.W. 709, 138 Neb. 22.

Okl.—Board of Com'rs of Harmon County v. R. J. Edwards, Inc., 282 P. 1090, 140 Okl. 247.

Where city expressly adopted statutes relating to street improvements, such statutes became the organic law of the city and a part of the contract with holders of paving bonds—Dickinson v. Tidd, C.C.A. Okl., 137 F.2d 610.

41. Fla.—State ex rel. Keefe v. City of St. Petersburg, 144 So. 313, 106 Fla. 742.

42. U.S.—O'Donnell v. Cullen, C.C. A.Wyo., 76 F.2d 955.

Ala.—City of Mobile v. Merchants Nat. Bank of Mobile, 33 So.2d 457, 250 Ala. 159—Moore v. Howard,

149 So. 249, 227 Ala. 219, followed in State ex rel. Lindsey v. Howard, 149 So. 252, 227 Ala. 208.

Ariz.—Wise v. First Nat. Bank, 65 P.2d 1154, 49 Ariz. 146.

Fla.—City of Sarasota v. Johnson, 167 So. 361, 123 Fla. 501—City of Fort Meade v. State ex rel. Rose, 162 So. 350, 120 Fla. 177, followed in City of Fort Meade v. State ex rel. Lyon, 162 So. 352, 120 Fla. 182.

Ill.—Friedman v. City of Chicago, 30 N.E.2d 36, 374 Ill. 545.

Ind.—Read v. Beczkiewicz, 18 N.E.2d 789, 215 Ind. 365, rehearing denied 19 N.E.2d 465, 215 Ind. 365.

N.C.—Board of Com'rs for Washington County v. Gaines, 20 S.E.2d 377, 221 N.C. 324—McGuinn v. City of High Point, 8 S.E.2d 462, 217 N.C. 449, 128 A.L.R. 608—Wilkinson v. Boomer, 7 S.E.2d 491, 217 N.C. 217.

N.D.—Stark v. City of Jamestown, 37 N.W.2d 516.

Okl.—City of Ardmore v. Hudson-Houston Lumber Co., 120 P.2d 988, 190 Okl. 58—Prince v. Ypsilanti Sav. Bank, 282 P. 282, 140 Okl. 131.

Wash.—City of Tacoma v. Perkins, 296 P. 829, 161 Wash. 209.

W.Va.—Brewer v. City of Point Pleasant, 172 S.E. 717, 114 W.Va. 572.

Conditions specified in act of congress authorizing city prior to statehood to issue bonds become material part of contractual obligations of bonds.—Acres v. Excise Board of Muskogee County, 299 P. 136, 149 Okl. 84—Pitts v. Allen, 281 P. 126, 138 Okl. 295.

43. N.C.—Nash v. Board of Com'rs of St. Pauls, 190 S.E. 475, 211 N.C. 301.

statutes,⁴⁴ even if in doing so the terms of the securities are restrained or modified.⁴⁵ Where the provisions of the statute are directly referred to in the ordinance and bonds, they are to be read into, and made part of, the bonds.⁴⁶

On the other hand, a constitutional or statutory provision adopted or enacted subsequent to the issuance of municipal securities cannot be read into the securities and be considered as a part of the contract.⁴⁷

5. EXECUTION, ISSUANCE, DELIVERY, AND REGISTRATION

§ 1948. Execution, Issuance, and Delivery

A municipal corporation may not issue bonds except on substantial compliance with charter and statutory provisions.

It is within the power of a state to prescribe the form of execution of municipal bonds,⁴⁸ and, if not executed in the manner prescribed, they impose no liability.⁴⁹ The execution of municipal bonds may precede their sale and delivery.⁵⁰ A municipal corporation may not issue bonds except on substantial compliance with charter and statutory provisions.⁵¹ Bonds are issued, not when they are

authorized or executed,⁵² but when they are delivered,⁵³ that is, when the possession and control thereof pass from the municipality to the donee or purchaser or some person in whose hands they become a claim or charge against the municipality;⁵⁴ even though executed, the bonds do not become operative and obligatory unless and until they are delivered.⁵⁵ In the absence of a statute requiring bonds to be issued at or within a specified time, a municipality may issue authorized bonds from time to time in its discretion,⁵⁶ and particular

Ordinance or charter in conflict with statute is ineffective—City of Ardmore v. Hudson-Houston Lumber Co., 120 P.2d 988, 190 Okl. 58.

44. Ala.—Moore v. Howard, 149 So. 249, 227 Ala. 219, followed in State ex rel. Lindsey v. Howard, 149 So. 252, 227 Ala. 208.

45. Fla.—State ex rel. Babson v. City of Sebring, 155 So. 669, 115 Fla. 176.

46. Ariz.—Wise v. First Nat. Bank, 65 P.2d 1154, 49 Ariz. 146.

Idaho.—Neighbors of Woodcraft v. City of Rupert, 4 P.2d 360, 51 Idaho 215.

Express mention of statute as excluding other statutes

Sewer bonds of city issued in 1912 to secure funds to extend sewerage system were governed by local acts passed in 1898, notwithstanding reference in bonds to statute of 1909, authorizing holding of election to obtain authority to issue bonds, where recital did not show that 1909 statute was only statute in pursuance of which bonds were issued.—City of Mobile v. Marx & Co., C.C.A.Ala., 75 F.2d 569.

47. N.Y.—Van Derzee v. City of Long Beach, 31 N.Y.S.2d 359, 177 Misc. 894.

Refunding bonds issued after passage of statute

Ark.—Arkansas Mortg. & Sec. Co. v. Street Improvement Dist. No. 419, 86 S.W.2d 917, 191 Ark. 487.

48. Okl.—Gardner v. Kay County School Dist. 87, 126 P. 1018, 34 Okl. 718.

49. Okl.—Gardner v. Kay County School Dist. 87, supra.
44 C.J. p 1224 note 18.

50. N.M.—Albuquerque v. Water

Supply Co., 174 P. 217, 24 N.M. 368, 5 A.L.R. 519.

Ohio—**Corpus Juris** quoted in Hilton v. Board of Education, 1 N.E.2d 166, 169, 51 Ohio App. 336.

Refunding bonds may be prepared in advance and signed on date fixed for hearing of refunding proceeding.—Faught v. City of Sapulpa, 292 P. 15, 145 Okl. 164.

51. Fla.—State v. Town of Belleair, 170 So 434, 125 Fla. 669—State ex rel. Davis v. Ryan, 158 So. 62, 118 Fla. 42—State ex rel. Ake v. Broward County Port Authority, 158 So. 62, 118 Fla. 42—Nuveen v. City of Quincy, 156 So. 153, 115 Fla. 510, 94 A.L.R. 600—City of Jacksonville v. Renfroe, 136 So. 254, 102 Fla. 512—City of Lake Alfred v. Lawless, 135 So. 895, 102 Fla. 84.

N.D.—Ward County v. Balerud, 5 N.W.2d 425, 72 N.D. 173, followed in Ward County v. Pringle, 5 N.W.2d 432, 72 N.D. 185.

Legislature may prescribe form and manner of issuance of municipal bonds, if not curtailing municipality's power to pay debts.—Rohde v. City of Newport, 55 S.W.2d 368, 246 Ky. 476, 87 A.L.R. 701.

Mere debt of municipality not evidenced by any contract in writing does not constitute "issuing of bonds."—U. S. Rubber Products v. Town of Batesburg, 190 S.E. 120, 183 S.C. 49, 110 A.L.R. 144.

52. Kan.—Jaeger v. City of Hillsboro, 190 P.2d 420, 164 Kan. 533.

Ohio—**Corpus Juris** quoted in Hilton v. Board of Education, 1 N.E.2d 166, 169, 51 Ohio App. 336.
44 C.J. p 1224 note 20.

"Dates of issue," when applied to notes, bonds, etc., of series, usually means an arbitrary date fixed as be-

ginning of term for which they run, without reference to precise time when convenience or state of market may permit their sale or delivery, date which bonds and stocks bear, and not date when they were actually issued in sense of being signed and delivered and put into circulation.—Whetstone v. City of Stuttgart, 97 S.W.2d 641, 193 Ark 88.

53. Fla.—State ex rel. Woman's Catholic Order of Foresters v. City of Fort Myers, 196 So 705, 143 Fla. 304—City of Jacksonville v. Renfroe, 136 So. 254, 102 Fla. 512.
Kan.—State ex rel. Arn v. Woodruff, 189 P.2d 899, 164 Kan. 339.

Ohio—**Corpus Juris** quoted in Hilton v. Board of Education, 1 N.E.2d 166, 169, 51 Ohio App. 336.

Okl.—City of Madill v. Dabney, 285 P. 832, 142 Okl. 92.
44 C.J. p 1224 note 21.

54. Ohio—**Corpus Juris** quoted in Hilton v. Board of Education, 1 N.E.2d 166, 169, 51 Ohio App. 336.
44 C.J. p 1224 note 22.

55. Ohio—**Corpus Juris** quoted in Hilton v. Board of Education, 1 N.E.2d 166, 169, 51 Ohio App. 336.
44 C.J. p 1224 note 23.

56. U.S.—Brady v. City of Atlanta, C.C.A.Ga., 17 F.2d 764.
Kan.—State ex rel. Boynton v. City of Topeka, 41 P.2d 260, 141 Kan. 309.

Mo.—State ex rel. School Dist. of Kansas City v. Thompson, 36 S.W.2d 109, 327 Mo. 144.

Tex.—City of Houston v. McCraw, 113 S.W.2d 1215, 131 Tex. 127.
Time for issuance after election see supra § 1929.

Forfeiture of authority

(1) A mere lapse of time between

bonds have been held not invalidated by delay in their issuance.⁶⁷

Municipal bonds may and should be executed,⁵⁸ issued,⁵⁹ and delivered⁶⁰ by, or with the authority of, the officers designated by statute or ordinance. However, some statutes designating the officers to sign the bonds have been held to be directory only,⁶¹ and, in the absence of a mandatory statutory direction, the bonds may be signed by any of the officers of the municipality who have been appointed or designated for that purpose by the governing board of the municipality⁶² or the body having power to issue the bonds.⁶³ The bonds may and should be signed by persons who are in office at the time of execution,⁶⁴ even though they are not in office at the time of the sale and delivery of the bonds,⁶⁵ and even though, according to some,⁶⁶ although not other,⁶⁷ authorities, they were not in office at the time stated in the bonds as

the date of issuance. In the issuance, signing, and delivery to a purchaser of municipal bonds, the acts of officers de facto are, as to third persons, equally as binding on a municipality as though they had been officers de jure.⁶⁸

The duty to sign or attest duly authorized bonds has been held to be a ministerial duty whose performance may be compelled⁶⁹ unless the bonds are unlawful or contravene some statutory, charter, or constitutional limitation,⁷⁰ but it has also been held that a mere ministerial officer has no right to question the validity or constitutionality of the bond issue.⁷¹

Coupons. The fact that the coupons are not properly signed, as where they are signed by only one officer, is not fatal where the bonds to which the coupons are annexed are properly signed and sealed by the municipal officers⁷² or contain a

authorization and issuance of bonds, such as sewer and drain bonds, by a city, does not in and of itself show a forfeiture or an abandonment of the right to issue bonds duly approved by the electors—*Quaid v. City of Detroit*, 29 N.W.2d 687, 319 Mich 268.

(2) A delay, even of several years, in exercising city's authority to issue bonds, will not necessarily cause forfeiture of such authority, if delay was reasonable, prudent, or necessary in light of all facts and circumstances.

Colo.—*McNichols v. City and County of Denver*, 74 P.2d 99, 101 Colo. 316.

Mo.—*Missouri Electric Power Co. v. Smith*, 155 S.W.2d 113, 348 Mo. 738.

Refunding bonds are issued concurrently with cancellation of evidence of prior valid existing indebtedness—*Faught v. City of Sapulpa*, 292 P. 15, 145 Okl. 164—*State ex rel Board of Education of Oklahoma City v. West*, 118 P. 146, 29 Okl. 503.

57. U.S.—*Scipio v. Wright*, N.Y., 101 U.S. 665, 25 L.Ed. 1037. 44 C.J. p 1224 note 24.

58. Pa.—*Miners Savings Bank of Pittston v. Duryea Borough, Com. Pl.*, 32 Luz.Leg.Reg. 9, 29 Mun L.R. 145, 9 Som.Leg.J. 25.

Wis.—*State ex rel. City of Madison v. Bareis*, 21 N.W.2d 721, 248 Wis. 387.

44 C.J. p 1224 note 25.

Facsimile signatures

(1) Where city charter required bonds to be signed by mayor and city treasurer and countersigned by comptroller and attested by city clerk, comptroller was not obliged to countersign bonds executed by other named officers by printed, lith-

ographed, or engraved facsimile signatures adopted as official signatures, since words "signed" and "attested" meant manual signatures.—*Smith v. Curran*, 255 N.W. 276, 267 Mich 413, 94 A.L.R. 766.

(2) The fact that railroad aid bonds have the signature of the clerk of the council lithographed thereon does not render them invalid—*Lexington v. Union Nat. Bank*, 22 So. 291, 75 Miss. 1.

(3) Revenue certificates and attached coupons, executed in accordance with city charter, are not invalid because ordinance providing for execution thereof authorizes officers to cause execution of coupons by their respective facsimile signatures—*State v. City of Fort Lauderdale*, 5 So 2d 263, 149 Fla. 177.

59. Wis.—*State ex rel. City of Madison v. Bareis*, 21 NW 2d 721, 248 Wis 387.

44 C.J. p 1224 note 26.

60. Mich.—*Portsmouth Sav. Bank v. Ashley*, 52 N.W. 74, 91 Mich 670, 30 Am S.R. 511.

44 C.J. p 1225 note 27.

61. N.C.—*Statesville Bank v. Statesville*, 84 N.C. 169.

62. U.S.—*German Ins. Co. v. Manning*, C.C.Iowa, 78 F. 906.

63. Tenn.—*Weil v. Newbern*, 148 S.W. 680, 126 Tenn. 223, L.R.A.1915A 1009, Ann Cas.1913E 25.

64. U.S.—*Coler v. Cleburne, Tex.*, 9 S.Ct. 720, 131 U.S. 162, 33 L.Ed. 146.

44 C.J. p 1225 note 31.

65. Ariz.—*Gage v. McCord*, 51 P. 977, 5 Ariz. 227.

N.M.—*Albuquerque v. Water Supply Co.*, 174 P. 217, 24 N.M. 368, 5 A.L.R. 519.

66. Wash.—*Yesler v. Seattle*, 25 P. 1014, 1 Wash. 308.

67. U.S.—*Lehman v. San Diego*, Cal., 83 F. 669, 27 C.C.A. 668.

68. N.C.—*Smith v. Town of Carolina Beach*, 175 SE 313, 206 N.C. 834.

44 C.J. p 1225 note 35.

Acting officers not qualified

Fact that mayor and board of aldermen were not qualified to hold their offices because they had not taken required oath of office and were delinquent in payment of taxes was not ground for equitable relief in suit to enjoin them from issuing municipal bonds, where they had assumed duties and performed functions of their offices—*State ex rel City of Clarence v. Drain*, 73 S.W.2d 804, 335 Mo. 741.

69. Ohio—*State ex rel. City of Portsmouth v. Kountz*, 194 N.E. 869, 129 Ohio St. 272, 97 A.L.R. 1099.

Wis.—*State ex rel City of Madison v. Bareis*, 21 NW 2d 721, 248 Wis 387.

Mandamus to compel execution and issuance of bonds see *Mandamus* § 155.

70. Ohio—*State ex rel. City of Portsmouth v. Kountz*, 194 N.E. 869, 129 Ohio St. 272, 97 A.L.R. 1099.

71. Wis.—*State ex rel. City of Madison v. Bareis*, 21 N.W.2d 721, 248 Wis. 387.

72. U.S.—*City of Hialeah v. Groves*, C.C.A.Fla., 101 F.2d 951—*Thayer v. Montgomery County*, C.C.Kan., 23 F.Cas No.13,870, 3 Dill 359, affirmed 94 U.S. 631, 24 L.Ed. 133.

statement that the officers have caused one of their number to sign the coupons.⁷³

Stock. Limited power to issue stock is sometimes conferred on the mayor and council of a city.⁷⁴

Notes. A municipal corporation may issue its notes only by the hand of one or more duly authorized agents.⁷⁵ The mayor empowered by the board of aldermen to execute a note exceeds his authority by executing a bond.⁷⁶ Some statutes designate the officers by whom the notes of a municipality shall be signed and countersigned.⁷⁷

Seal. It has been held by some,⁷⁸ although not all,⁷⁹ authorities that municipal bonds are not necessarily invalidated by the fact that they are not under seal. Municipal bonds are not invalidated because after their issuance a stranger affixes to them wafer seals opposite the names of the officers who signed them but neglected to affix their seals as required by law.⁸⁰

Date. Municipal bonds or debentures are properly dated as of the date of their actual issuance;⁸¹ but they are not necessarily rendered invalid by a mistake in their date⁸² or by the fact that they are antedated⁸³ or bear no date.⁸⁴

§ 1949. Registration

Registration of municipal bonds is essential under some statutes.

Under some statutes municipal bonds must be registered by a specified officer,⁸⁵ such as the state auditor.⁸⁶ Where a statute expressly provides that bonds must be registered and certified as such before they shall obtain validity or be negotiated, a compliance with the statute is essential to the validity of the bonds;⁸⁷ but if it merely provides that they shall be registered, and does not provide that they shall not be valid until registered, the statute will be construed as directory,⁸⁸ and a failure to register will not invalidate the bonds,⁸⁹ although all bonds issued as registered bonds, notwithstanding the registration is not a condition precedent to their validity, ought to be registered.⁹⁰ Where bonds have been duly certified as registered by the proper officer, the fact that he failed to make a record of such registration in his office will not destroy their validity.⁹¹

When bonds are presented to the proper officer for registration, he is authorized and required, before registering or refusing to register, to ascertain whether the bonds were issued in compliance with law⁹² and whether the signatures of the officers thereto are genuine;⁹³ but he does not exercise judicial functions.⁹⁴ It is his duty to register the bonds on a prima facie showing that they have been issued in compliance with the conditions prescribed by law;⁹⁵ and he is not relieved of the

73. U.S.—Phelps v. Lewiston, C.C.N.Y., 19 F.Cas.No.11,076, 15 Blatchf. 131.

74. Md.—Stanley v. Baltimore, 126 A. 151, 130 A. 181, 146 Md. 277.

75. Me.—Argyle v. Eastern Trust, etc., Co., 134 A. 164, 125 Me. 370.

76. Ark.—Little Rock v. State Bank, 8 Ark. 227.

77. U.S.—Capital Sav. Bank, etc., Co. v. Framingham, Mass., 246 F. 553, 158 C.C.A. 523, certiorari denied 38 S.Ct. 332, 246 U.S. 662, 62 L.Ed. 927.

44 C.J. p 1225 note 41.

78. S.C.—Bolton v. Wharton, 161 S. E. 454, 163 S.C. 242, 86 A.L.R. 1101.

44 C.J. p 1225 note 43.

79. U.S.—Avery v. Springport, 2 F. Cas.No.676, C.C.N.Y., 14 Blatchf. 272.

44 C.J. p 1225 note 44—15 C.J. p 677 note 55 [a].

80. N.Y.—Armfield v. Solon, 19 N.Y. S. 44, modified on other grounds 32 N.E. 1063, 136 N.Y. 663.

Effect generally of affixing seal to bond after its issue see Alteration of Instruments § 26.

81. Miss.—Lexington v. Union Nat. Bank, 22 So. 291, 75 Miss. 1.

82. Tenn.—Stone v. Town of Crossville, 212 S.W.2d 678.

Wis.—State v. Madison, 7 Wis. 688.

83. Tex.—Moller v. Galveston, 57 S. W. 1116, 23 Tex.Civ.App. 693.

44 C.J. p 1220 note 27.

84. Tenn.—Stone v. Town of Crossville, 212 S.W.2d 678.

85. U.S.—Coler v. Cleburne, Tex., 9 S.Ct. 720, 131 U.S. 162, 33 L.Ed. 146.

44 C.J. p 1225 note 47.

Revenue bonds were ineligible to registration by state auditor under statutes which govern registration of bonds payable through taxation.—State ex rel. City of Fulton v. Smith, 194 S.W.2d 302, 355 Mo. 27.

86. Mo.—State v. Hackman, 203 S. W. 960, 274 Mo. 551.

44 C.J. p 1225 note 48.

87. U.S.—Anthony v. Jasper County, Mo., 101 U.S. 693, 25 L.Ed. 1005.

Neb.—State ex rel. City of Columbus v. Price, 254 N.W. 889, 127 Neb. 132.

88. U.S.—North Bennington First Nat. Bank v. Arlington, C.C.Vt., 9 F.Cas.No.4,806, 16 Blatchf. 57.

89. U.S.—North Bennington First Nat. Bank v. Arlington, supra.

90. U.S.—D'Esterre v. Brooklyn, C. C.N.Y., 90 F. 586.

91. U.S.—Rock Creek Tp. v. Strong, Kan., 96 U.S. 271, 24 L.Ed. 815.

92. Neb.—State ex rel. City of Columbus v. Price, 254 N.W. 889, 127 Neb. 132.

44 C.J. p 1226 note 54.

93. Kan.—Garden City, etc., R. Co. v. Nation, 108 P. 102, 82 Kan. 345.

44 C.J. p 1226 note 55.

94. Mo.—State v. Gordon, 158 S.W. 683, 251 Mo. 303.

95. Mo.—State v. Hackman, 203 S. W. 960, 274 Mo. 551.

Mandamus to compel state auditor to register municipal bonds see Mandamus § 141.

Two sets of bonds

The state auditor, having registered bonds based on special election, was not precluded from registering additional bonds based on authority of same special election, where auditor was not requested to register second set until after proof had been made that first set was not sold, that they had never become obligations of city, that they had been destroyed, and that ordinance authorizing their issuance had been repealed.—Missouri Electric Power Co. v. Smith, 155 S.W.2d 113, 343 Mo. 738.

discharge of this duty by mere delay or nonaction of the municipality in issuing and negotiating bonds after authorization by an election,⁹⁶ or by a failure to show or prove matters antedating the judgments to refund which the bonds are issued,⁹⁷ or, in the case of railroad aid bonds, by a failure to prove that the purposes of the aid have been accomplished.⁹⁸

In some cases it is provided by statute that bonds shall not be entitled to registration unless the question of creating the indebtedness was submitted to the voters of the municipality at an election,⁹⁹ or that, when presented for registration, any interest coupons shall be detached which will mature before the first tax levied to pay them will become due and collectable,¹ or that after registration the auditor shall notify the authorities issuing the bonds of the fact of such registration.² The certificate of the municipal officer required by statute as to a compliance with the conditions entitling the bonds to registration need not be positive,³ but may be sworn to on the best of that offi-

cer's knowledge and belief.⁴ Payment or tender of the prescribed registration fee is necessary before registration will be compelled,⁵ and, where convertible coupon bonds contain a recital that they may be registered at the option of the holder, the proper remedy, in case of a refusal of the authorities to register them on demand, is a suit for specific performance of the contract, and not mandamus or an action for damages.⁶ Where bonds are presented for registration but the registration is delayed by injunction, they should, when actually registered, be registered as of the date when presented.⁷

Under some statutes bonds duly registered are prima facie valid⁸ although registration is not conclusive of validity and the bonds may nevertheless be shown to be invalid.⁹ It has been held that bonds registered while a suit attacking the validity of the bonds is pending are not within a statute providing that registered bonds are prima facie valid.¹⁰

6. NEGOTIABILITY AND TRANSFER

§ 1950. In General

Municipal bonds may be negotiable instruments with all the qualities, attributes, and incidents of commercial paper where they possess the essential requisites of negotiable paper, notwithstanding they are sealed instruments.

Municipal bonds may be negotiable or nonnegotiable.¹¹ While it has been said that municipal

bonds were originally held not to be negotiable because they were sealed instruments, they subsequently came to be acknowledged by the courts as negotiable instruments,¹² and it is now well established that bonds issued by a municipal corporation under statutory authority may be negotiable,¹³ with all the qualities, attributes, and incidents of commercial paper,¹⁴ notwithstanding they are sealed

96. Mo.—State v. Hackman, 202 S. W. 7, 273 Mo. 670.

Delay due to litigation

Mo.—Missouri Electric Power Co. v. Smith, 155 S.W.2d 113, 348 Mo. 738.

97. Mo.—State v. Hackmann, 229 S. W. 1082, 287 Mo. 166.

98. Kan.—Garden City, etc., R. Co. v. Nation, 108 P. 102, 82 Kan. 345. 44 C.J. p 1226 note 60.

99. Ill.—Flack v. Hughes, 67 Ill. 384.

44 C.J. p 1226 note 61.

Election on question of bond issue generally see supra §§ 1920-1929.

1. Neb.—Brinkworth v. Grable, 63 N.W. 952, 45 Neb. 647.

2. U.S.—Bissell v. Spring Valley Tp., Kan., 3 S.Ct. 555, 110 U.S. 162, 28 L.Ed. 105.

44 C.J. p 1226 note 63.

3. Ill.—Decker v. Hughes, 68 Ill. 38.

4. Ill.—Decker v. Hughes, supra.

5. N.Y.—People v. Parmerter, 53 N. E. 40, 158 N.Y. 385.

6. N.J.—Benwell v. Newark, 36 A. 668, 55 N.J.Eq. 260.

7. Neb.—Brinkworth v. Grable, 63 N.W. 952, 45 Neb. 647.

8. Tex.—Griffith v. Buchanan, Civ. App., 5 S.W.2d 211.

9. Tex.—Griffith v. Buchanan, supra.

10. Tex.—Griffith v. Buchanan, supra.

11. Or.—City of Cascade Locks v. Carlson, 90 P.2d 787, 161 Or. 557.

12. Iowa.—Griffith v. Burden, 35 Iowa 138.

Necessity of seal see supra § 1948.

13. U.S.—City of New Port Richey v. Fidelity & Deposit Co. of Maryland, C.C.A.Fla., 105 F.2d 348, 123 A.L.R. 1352.

Fla.—City of Jacksonville v. Renfro, 136 So. 254, 102 Fla. 512.

N.C.—Bankers' Trust Co. v. City of Statesville, 166 S.E. 169, 203 N.C. 399.

S.C.—Rutledge v. Greater Greenville Sewer Dist., 137 S.E. 597, 139 S.C. 188.

Tex.—Landrum v. Centennial Rural High School Dist., Civ.App., 146 S. W.2d 799, error dismissed, judgment correct.

Wash.—Royce v. Public Utility Dist. No. 1 of Clark County, 175 P.2d 624, 26 Wash.2d 733.

44 C.J. p 1230 note 73.

Quasi-negotiable instruments

Pa.—Mershon v. Borough of Millertown, 193 A. 328, 128 Pa.Super. 248

—Fulton Nat. Bank of Lancaster v. City of Lancaster, 172 A. 34, 112 Pa.Super. 565.

14. Okl.—State v. Incorporated Town of Hoffman, 260 P. 12, 127 Okl. 101.

Tex.—Landrum v. Centennial Rural High School Dist., Civ.App., 146 S.W.2d 799.

44 C.J. p 1231 note 74.

Protection of bona fide purchaser against equities and defenses see

infra §§ 1970, 1971.

Negotiable Instruments Law applied

(1) The Negotiable Instruments Act applies to municipal bonds and must be looked to in determining

instruments,¹⁵ where they possess the essential requisites of negotiable instruments,¹⁶ or, in other words, where they are negotiable in form¹⁷ and payable at a future date.¹⁸

It has been held that the negotiability of municipal bonds is not affected by the fact that by the statute under which they were issued the municipality has the right, at its option, to pay them before they are due.¹⁹ Also, the omission to insert the name of a payee is not a feature, or a defect, which affects the negotiability of the bonds;²⁰ bonds payable to bearer are negotiable paper,²¹ and are deemed payable to the holder, as discussed *infra* § 1955, who is not regarded as the assignee of the contract²² but as the holder through

transfer by delivery.²³ It has been held that in order that municipal bonds may constitute commercial paper they must contain recitals that prerequisites or conditions precedent imposed by statute have been complied with.²⁴

Municipal bonds are not negotiable when they are payable on a contingency,²⁵ or only out of a particular fund,²⁶ such as a fund derived from special assessments.²⁷ Sometimes municipal notes are so worded as to be nonnegotiable,²⁸ as where they provide for payment in municipal bonds.²⁹ The coupons usually attached to municipal bonds may be negotiated after they have been separated from the bond.³⁰

whether a bond is negotiable.—*Pulaski County v. Ben Hur Life Ass'n of Crawfordsville, Ind.*, 149 S.W.2d 738, 286 Ky. 119.

(2) The Negotiable Instruments Law applies to municipal bonds and coupons which are negotiable in form.—*National Surety Corporation v. List*, 33 N.E.2d 255, 308 Mass. 539.—*Fidelity & Deposit Co. of Maryland v. City of Taunton*, 21 N.E.2d 279, 303 Mass. 176.

15. N.Y.—*Manhattan Sav. Inst. v. New York Nat. Exch. Bank*, 62 N. E. 1079, 170 N.Y. 58, 88 Am.S.R. 640.

44 C.J. p 1231 note 75.

16. Ala.—*Alabama Power Co. v. City of Scottsboro*, 190 So. 412, 238 Ala. 230.

44 C.J. p 1231 note 76.

Provision for increase in interest rate

(1) Fact that bonds provided for an increase of interest on the happening of certain contingencies did not render such bonds nonnegotiable as not being a promise to pay a sum certain.—*State v. City of Inverness*, 188 So. 767, 137 Fla. 629.

(2) Refunding bonds are not nonnegotiable because of covenant that, on default by city, rate of interest of bonds would revert to the original rate borne by the bonds being refunded.—*State v. City of Fort Myers*, 198 So. 814, 145 Fla. 135.

17. Ill.—*People v. Chicago, etc., R. Co.*, 139 N.E. 2, 308 Ill. 54.
Tex.—*Stratton v. Kinney County Com'rs Ct., Civ.App.*, 137 S.W. 1170.

Forms held negotiable

Wash.—*Keck v. Yakima Sav. & Loan Ass'n*, 295 P. 483, 160 Wash. 430.
44 C.J. p 1231 note 77 [a].

Form held not negotiable

U.S.—*First Nat. Bank v. Mayor and City Council of Baltimore, C.C.A. Md.*, 108 F.2d 600.

18. Ill.—*People v. Chicago, etc., R. Co.*, 139 N.E. 2, 308 Ill. 54.

19. U.S.—*Ackley Independent School Dist. v. Hall, Iowa*, 5 S.Ct. 371, 113 U.S. 135, 38 L.Ed. 954.

20. N.Y.—*Manhattan Sav. Inst. v. New York Nat. Exch. Bank*, 62 N. E. 1079, 170 N.Y. 58, 88 Am.S.R. 640.

44 C.J. p 1231 note 81.

21. N.C.—*Bankers Trust Co. v. City of Statesville*, 166 S.E. 169, 203 N. C. 399.

44 C.J. p 1231 note 82.

Not conclusive

N.M.—*Munro v. City of Albuquerque*, 150 P.2d 733, 48 N.M. 306.

22. U.S.—*Farr v. Lyons, C.C.N.Y.*, 13 F. 377, 21 Blatchf. 116.—*Pettit v. Hope, C.C.N.Y.*, 2 F. 623, 18 Blatchf. 180.

23. U.S.—*Farr v. Lyons, C.C.N.Y.*, 13 F. 377, 21 Blatchf. 116.

24. U.S.—*Buchanan v. Litchfield, Ill.*, 102 U.S. 278, 26 L.Ed. 138.
Ohio.—*Sullivan v. Urbana*, 3 Ohio Dec. (Reprint) 554.

25. Ky.—*Pulaski County v. Ben Hur Life Ass'n of Crawfordsville, Ind.*, 149 S.W.2d 738, 286 Ky. 119.

44 C.J. p 1231 note 87.

26. Ky.—*Pulaski County v. Ben Hur Life Ass'n of Crawfordsville, Ind.*, *supra*.

44 C.J. p 1231 note 88.

Reference to source of funds collateral

Municipal bonds are negotiable, in so far as an unconditional promise to pay is concerned, where reference to the source of revenue is only collateral.—*Pulaski County v. Ben Hur Life Ass'n of Crawfordsville, Ind.*, *supra*.

Pledge of all revenues

If the source specified is the municipality's only source of revenue, a provision for payment from such source does not destroy negotiability.—*Royal Oak Drain Dist., Oakland County v. Keefe, C.C.A.Mich.*, 87 F.2d

786.—*Duval Cattle Co. v. Hemphill, C.C.A.5*, 41 F.2d 433.

Income from operation of utility

(1) Revenue bonds are not negotiable if supported only by pledge of plant and appurtenances, since such bonds are not direct obligation of city and are not evidences of unconditional obligation to pay money.—*Alabama Power Co. v. City of Scottsboro*, 190 So. 412, 238 Ala. 230.—*Oppenheim v. City of Florence*, 155 So. 859, 229 Ala. 50.

(2) A revenue bond is a negotiable obligation, payable entirely from the revenues of a public utility.—*State ex rel. Consumers Public Power Dist. v. Boettcher*, 291 N.W. 709, 138 Neb. 22.

27. U.S.—*City of Jacksonville v. Bankers Life Co., C.C.A.Ill.*, 90 F. 2d 141.

Ill.—*Galt v. City of Chicago*, 42 N. E.2d 115, 315 Ill.App. 91.—*Drouineau v. First Nat. Bank*, 244 Ill. App. 251.

Or.—*City of Cascade Locks v. Carlson*, 90 P.2d 787, 161 Or. 557.
44 C.J. p 1231 note 89.

28. Ala.—*Baisden v. Greenville*, 111 So. 2, 215 Ala. 512.

29. Ala.—*First Nat. Bank v. Town of Luverne*, 180 So. 283, 235 Ala. 606.

44 C.J. p 1231 note 90 [a].

30. Fla.—*City of Winter Park v. Dunblaine, Inc.*, 164 So. 366, 121 Fla. 600.

Pa.—*In re Franklin Borough Auditors' Report*, 18 Pa.Dist. & Co. 625, 25 Mun.L.R. 17.

Va.—*Arents v. Com.*, 18 Gratt. 750, 59 Va. 750.

An overdue coupon detached from a negotiable bond not yet due retains its negotiable character as to suit by assignee in the federal court.—*Thompson v. Perrine, N.Y.*, 1 S.Ct. 564, 106 U.S. 589, 27 L.Ed. 298.

Tax anticipation notes have been held to be negotiable instruments.³¹

Registered bonds. Bonds or stock registered in the holder's name under a system limiting their transfer are not negotiable instruments,³² although they are assignable.³³ Registration of the bonds before issuance to establish the regularity and authority of the issue, discussed supra § 1949, does not affect the character of the bonds as negotiable instruments where the bonds are not registered in the names of their owners or holders and no restrictions are imposed on their transfer.³⁴

§ 1951. Power to Issue Negotiable Paper

Unless such power is conferred on it by statute or charter, a municipal corporation has no power to issue negotiable bonds or other negotiable instruments.

Unless such power is conferred on it by charter or statute, a municipal corporation has no power to issue negotiable bonds or other negotiable instruments.³⁵ According to some authorities the power does not exist unless it has been expressly conferred on the municipality by the legislature,³⁶ but other authorities take the view that the power may be implied,³⁷ and it has frequently been held

that a mere grant of power to issue bonds implies that bonds having the commercial quality of negotiability may be issued,³⁸ in the absence of provisions showing a contrary intention.³⁹

The power to issue negotiable bonds may not be implied from the right to borrow money⁴⁰ or to contract an indebtedness,⁴¹ but there is also authority to the contrary.⁴² Where a municipality has power to issue negotiable paper, the power may be exercised only as specified in the grant of the power.⁴³ Where a municipal corporation has the power to bind itself by written obligation, without the power to make such instrument negotiable, and it executes its written obligation, making it negotiable in form, the instrument will not in fact be negotiable,⁴⁴ but it will not be void.⁴⁵

Obligations circulating as money. The issuance by municipalities of bills, scrip, or other corporate obligations to circulate as money has been frequently prohibited by express statutes;⁴⁶ and it seems that, even in the absence of such express prohibition, municipalities have no right to exercise this prerogative;⁴⁷ but there is no violation of law where scrip is issued by a municipality for a lawful purpose and not to circulate as money,⁴⁸ even

31. U.S.—Federal Reserve Bank of Philadelphia v. Ocean City, C.C.A. N.J., 84 F.2d 657, certiorari denied Ocean City, N. J. v. Federal Reserve Bank of Philadelphia, 57 S. Ct. 109, 299 U.S. 584, 81 L.Ed. 431.

32. U.S.—First Nat. Bank v. Mayor and City Council of Baltimore, C. C.A.Md., 108 F.2d 600.
Wash.—Sims v. U. S. Nat. Bank, 6 P. 2d 601, 166 Wash. 119.

Fact that interest coupons are attached to municipal bonds does not prevent registration of bonds under statute.—Sims v. U. S. Nat. Bank, supra.

Registration by treasurer

Municipal bonds, in order to be registered under statute, need not be presented by owner or any other particular person; owner could ratify town treasurer's act in registering municipal bonds under statute by treating them as registered after they bore treasurer's indorsement showing registration.—Sims v. U. S. Nat. Bank, supra.

Release from registration

Fact that owner's attorney unauthorizedly presented registered municipal bonds to town treasurer, who wrote thereon, "Released from registration," and subsequently pledged them with banks, did not entitle banks to prevail against owner, statute not being complied with.—Sims v. U. S. Nat. Bank, supra.

33. U.S.—First Nat. Bank v. Mayor

and City Council of Baltimore, D. C.Md., 108 F.2d 600.

34. N.Y.—Manhattan Sav. Inst. v. New York Nat. Exch. Bank, 62 N. E. 1079, 170 N.Y. 58, 88 Am.S.R. 640.

44 C.J. p 1231 note 79.

35. U.S.—Port of Palm Beach Dist. v. Goethals, C.C.A.Fla., 104 F.2d 706.

Ill.—Corpus Juris cited in Greenlee v. Beaver, 79 N.E.2d 822, 824, 334 Ill App. 572.

Tex.—Keel v. Pulte, Civ.App., 10 S. W.2d 694.

44 C.J. p 1231 note 92.

36. U.S.—Port of Palm Beach Dist. v. Goethals, C.C.A.Fla., 104 F.2d 706.

Iowa.—Muscatine Lighting Co. v. City of Muscatine, 217 N.W. 468, 205 Iowa 82.

Tex.—Keel v. Pulte, Com App., 10 S. W.2d 694.

44 C.J. p 1231 note 93.

37. Ky.—Corpus Juris cited in Pulaski County v. Ben Hur Life Ass'n of Crawfordsville, Ind., 149 S.W. 2d 738, 746, 286 Ky. 119.

44 C.J. p 1232 note 94.

38. Wash.—Keck v. Yakima Sav. & Loan Ass'n, 295 P. 483, 160 Wash. 430.

44 C.J. p 1232 note 95.

39. U.S.—D'Esterre v. Brooklyn, C. C.N.Y., 90 F. 586.

40. Iowa.—Muscatine Lighting Co.

v. City of Muscatine, 217 N.W. 478, 205 Iowa 82

44 C.J. p 1232 note 97.

41. Iowa.—Muscatine Lighting Co. v. City of Muscatine, supra

42. Ky.—Pulaski County v. Ben Hur Life Ass'n of Crawfordsville, Ind., 149 S.W.2d 738, 286 Ky. 119

43. Tex.—Keel v. Pulte, Com.App., 10 S.W.2d 694.

44. U.S.—Port of Palm Beach Dist. v. Goethals, C.C.A.Fla., 104 F.2d 706

44 C.J. p 1232 note 98.

45. U.S.—Port of Palm Beach Dist. v. Goethals, supra.

44 C.J. p 1232 note 99

Recovery on bond as nonnegotiable instrument see infra § 196.

46. U.S.—Thomas v. Richmond, Va., 12 Wall 349, 20 L.Ed. 453.

44 C.J. p 1232 note 1.

Municipality may be liable to the holder for the face value of the scrip.—Allegheny City v. McClurkan, 14 Pa. 81.

47. U.S.—Getz v. City of Harvey, C.C.A.Ill., 118 F.2d 817, certiorari denied City of Harvey v. Getz, 62 S.Ct. 59, two cases, 314 U.S. 628, 86 L.Ed. 504.

Or.—Barde v. Funk, 24 P.2d 334, 144 Or. 233.

44 C.J. p 1232 note 2.

48. Iowa.—Dively v. Cedar Falls, 27 Iowa 227.

44 C.J. p 1232 note 3.

though the members of the council may contemplate that the scrip may or will become a convenient circulating medium,⁴⁹ or even though it is in fact used by individuals or the community generally as a circulating medium.⁵⁰

Railroad aid bonds. Some statutes providing for the issuance of municipal bonds in aid of a railroad either expressly or impliedly authorize the issuance of bonds payable to bearer⁵¹ or to the company, its assigns, or bearer.⁵²

Refunding bonds. A statute authorizing cities to issue refunding bonds has been construed as giving authority to issue negotiable bonds in the usual form;⁵³ but power to issue new negotiable bonds having the attributes of commercial paper to take the place of a former issue may not be implied merely from ordinary municipal powers,⁵⁴ from the power conferred by statute to issue the original bonds,⁵⁵ or from a mere power to borrow money without authority to issue bonds.⁵⁶

§ 1952. Mode of Transfer

Unless otherwise provided by statute, municipal bonds

which are on their face made payable to bearer or to a named person or bearer are transferable by delivery.

Unless provided otherwise by statute,⁵⁷ municipal bonds which are on their face made payable to bearer or to a person therein named or bearer are transferable by delivery,⁵⁸ without indorsement⁵⁹ or assignment.⁶⁰

The transfer of nonnegotiable municipal bonds is governed by the law of the place where the transfer is made,⁶¹ although the bonds were executed in another state.⁶² Such bonds have been held not within the purview of the Uniform Stock Transfer Act.⁶³

Coupons. Where the statute authorizing the issuance of municipal bonds provides that they shall be transferable only on the books of the city, interest coupons, which have been attached to the bonds, are not transferable except in the same manner as the bonds themselves.⁶⁴

Notes. Where a note purports to have been made by a town to the order of its treasurer, the treasurer has no authority to impose a financial obligation or liability on the town by indorsing the note.⁶⁵

7. SINKING FUNDS, REDEMPTION OR CANCELLATION, AND PAYMENT

§ 1953. Sinking Funds

Provision is frequently made by charter, statute, or bonds for the creation of a sinking fund to be used in paying municipal bonds.

Provision is frequently made by statute, charter, or the bonds for the creation of a sinking fund to be used in paying or redeeming municipal bonds.⁶⁶ It has been held that a statutory grant of power

49. Iowa.—Dively v. Cedar Falls, *supra*.

50. Iowa.—Dively v. Cedar Falls, *supra*.

51. Miss.—Lexington v. Union Nat. Bank, 22 So. 291, 75 Miss. 1.

Va.—Arents v. Commonwealth, 18 Gratt. 750, 59 Va. 750.

52. Ky.—Maddox v. Graham, 2 Metc. 56.

53. U.S.—Santa Cruz v. Waite, Cal., 98 F. 387, 39 C.C.A. 106, reversed on other grounds 22 S.Ct. 327, 184 U.S. 302, 46 L.Ed. 552.

54. Ill.—Coquard v. Oquawka, 61 N. E. 660, 192 Ill. 355.

55. Ill.—Coquard v. Oquawka, *supra*.

44 C.J. p 1232 note 10.

56. U.S.—Merrill v. Monticello, Ind., 11 S.Ct. 441, 138 U.S. 673, 34 L.Ed. 1069.

Iowa.—Heins v. Lincoln, 71 N.W. 189, 102 Iowa 69.

57. Ala.—Blackman v. Lehman, 63 Ala. 547, 35 Am.R. 57.

44 C.J. p 1232 note 14.

58. Ohio.—Pleasantville Bank v. Cox, 26 Ohio N.P.N.S., 460.

Okl.—Weems v. Town of Covington, 30 P.2d 462, 167 Okl. 443.

Pa.—Mershon v. Borough of Millers-town, 193 A. 328, 128 Pa Super. 248.

44 C.J. p 1232 note 15.

59. U.S.—Ottawa v. Portsmouth First Nat. Bank, Ill., 105 U.S. 342, 26 L.Ed. 1127.

60. U.S.—Evans v. Cleveland, etc., R. Co., C.C.Pa., 8 F.Cas.No.4,557, 5 Phila. 512.

61. Wash.—Jones v. American Sav. Bank, etc., Co., 247 P. 1017, 139 Wash. 598.

62. Wash.—Jones v. American Sav. Bank, etc., Co., *supra*.

63. U.S.—First Nat. Bank v. Mayor and City Council of Baltimore, D. C.Md., 27 F.Supp. 444, affirmed, C. C.A., 108 F.2d 600.

64. U.S.—Oelrich v. Pittsburgh, C.C. Pa., 18 F.Cas.No.10,442, 1 Pittsb. 522.

65. Mass.—Franklin Sav. Bank v. Framingham, 98 N.E. 925, 212 Mass. 92.

44 C.J. p 1233 note 20.

66. Fla.—State ex rel. Garland v. City of West Palm Beach, 193 So. 297, 141 Fla. 244, followed in State

ex rel. Garland v. City of Sarasota, 193 So. 299, 141 Fla. 256, appeal dismissed State of Florida ex rel. Garland v. City of Sarasota, 60 S. Ct. 894, 309 U.S. 640, 84 L.Ed. 995, rehearing denied 60 S.Ct. 1075, 310 U.S. 657, 84 L.Ed. 1420, appeal dismissed State of Florida ex rel. Garland v. City of West Palm Beach, 60 S.Ct. 893, 309 U.S. 639, 84 L.Ed. 994, rehearing denied 60 S.Ct. 1074, 310 U.S. 657, 84 L.Ed. 1420.

Idaho.—Marsing v. Gem Irr. Dist., 48 P.2d 1099, 56 Idaho 29.

Minn.—Weiss v. City of St. Paul, 300 N.W. 795, 211 Minn. 170.

Miss.—Street v. Town of Ripley, 161 So. 855, 173 Miss. 225.

44 C.J. p 1233 note 23.

Impairment or diversion of sinking fund as impairment of contract see Constitutional Law § 312 c.

"Sinking fund" defined

A sinking fund, within constitutional and statutory provisions requiring city to maintain such fund for retirement of obligations, is a fund instituted and invested in such manner that its gradual accumulations will enable it to meet and wipe out a debt at maturity; a fund spe-

to a municipality to establish a sinking fund is exhausted by its exercise,⁶⁷ and the municipality is without power to rescind its exercise of the power and disestablish the fund.⁶⁸ Where a sinking fund is created by statute for existing bonds, holders of interest coupons which mature while the statute remains in force have a vested interest in the fund;⁶⁹ but holders of coupons which mature after the repeal of such a statute acquire no rights therein.⁷⁰

A sinking fund may not be diverted from the purpose for which it is created;⁷¹ but where it is not pledged to the redemption of any specific bonds it may be applied to the redemption of bonds held as a part of the fund under a statute authorizing the sinking fund commissioners to cancel all bonds that may have been purchased by them for the

redemption of the debt of the city.⁷² It has been held that the measure of damages arising from the failure of a city to provide a sinking fund as it has agreed in the contract with its bondholders is not capable of legal computation.⁷³

Revenues constituting fund. A sinking fund is properly composed only of taxes and other revenues⁷⁴ and not of borrowed money.⁷⁵ Where it is provided that a certain portion of the revenue of a city, derived from a particular source, shall be set aside as a sinking fund, it has been held that it is intended that such proportion of the gross revenue shall be so set aside.⁷⁶ A tax collected for a sinking fund may not be used or applied for any other purpose.⁷⁷

Custody and control. The right to the custody

cially earmarked for the extinction of a debt.—*Clark v. City of Philadelphia*, 196 A. 384, 328 Pa. 521, 115 A.L.R. 212.

Separate sinking funds for each bond issue

Pa.—*Clark v. City of Philadelphia*, supra.—*Commissioners of Sinking Fund of City of Philadelphia v. City of Philadelphia*, 182 A. 645, 320 Pa. 394, adhered to 188 A. 314, 324 Pa. 129.

Sinking fund required only where specified deficits occur

Ind.—*La Plante v. City of Vincennes*, 194 N.E. 191, 100 Ind.App. 264, rehearing denied 195 N.E. 297.

Statute as to refunding of bonds is not inconsistent with statute providing for maintenance and integrity of sinking fund; they establish two different methods of liquidating the maturing bonds of municipalities.—*Schuchman v. City of Pittsburgh*, 41 A.2d 642, 351 Pa. 527, 157 A.L.R. 785.

67. N.J.—*Loudenslager v. Atlantic City*, 83 A. 898, 83 N.J.Law 30.

68. N.J.—*Loudenslager v. Atlantic City*, supra.

69. U.S.—*Hall v. New Orleans, C.C. La.*, 19 F. 870.

70. U.S.—*Hall v. New Orleans*, supra.

71. U.S.—*Rittenoure v. City of Edinburg, C.C.A.Tex.*, 159 F.2d 989 —*Federal Deposit Ins. Corporation v. Casady, C.C.A.Okla.*, 108 F.2d 784.

Ky.—*City of Newport v. McLane*, 77 S.W.2d 27, 256 Ky. 803, 96 A.L.R. 655.

Pa.—*Schuchman v. City of Pittsburgh*, 41 A.2d 642, 351 Pa. 527, 157 A.L.R. 785.

44 C.J. p 1233 note 30.

Consolidation of sinking funds invalid

Pa.—*Clark v. City of Philadelphia*,

196 A. 384, 328 Pa. 521, 115 A.L.R. 212.

Funded debt

Under constitutional provision that every city should create sinking fund, which should be inviolably pledged for payment of city's funded debt, term "funded debt" included all municipal indebtedness embraced within or evidenced by bond, principal of which was payable at time beyond current fiscal year of its issue, with periodical terms for payment of interest.—*Corporation for Relief of Widows and Children of Clergymen in Communion of Protestant Episcopal Church in Commonwealth of Pennsylvania v. City of Philadelphia*, 176 A. 727, 317 Pa. 76.

Lease of municipal gas plant

A bondholder cannot object to a lease of a municipal gas plant on the ground that the ordinance authorizing the issue of bonds for an extension of the plant provided for a retention of a certain amount of the annual receipts of the plant for the purpose of creating a sinking fund, where there is no pledge of the receipts of the plant for the security of the loan and there is no showing that the sinking fund has not been kept up by appropriation from the city treasury from time to time as required by law.—*Baily v. Philadelphia*, 39 A. 494, 184 Pa. 594, 63 Am. S.R. 812, 39 L.R.A. 837—44 C.J. p 1233 note 32.

Sinking fund for payment of refunding bonds

Where city issued refunding bonds for purpose of exchange and to take place of outstanding bonds, and refunding bonds were supported by a sinking fund, a holder of outstanding bonds who refused to exchange them for refunding bonds could not enforce payment of principal and interest of outstanding bonds from money held in the sinking fund cre-

ated for the refunding bonds.—*State ex rel. Garland v. City of West Palm Beach*, 193 So. 297, 141 Fla. 244, followed in *State ex rel. Garland v. City of Sarasota*, 193 So. 299, 141 Fla. 256, appeal dismissed *State of Florida ex rel. Garland v. City of Sarasota*, 60 S.Ct. 894, 309 U.S. 640, 84 L.Ed. 995, rehearing denied 60 S.Ct. 1075, 310 U.S. 657, 84 L.Ed. 1420, appeal dismissed *State of Florida ex rel. Garland v. City of West Palm Beach*, 60 S.Ct. 893, 309 U.S. 639, 84 L.Ed. 994, rehearing denied 60 S.Ct. 1074, 310 U.S. 657, 84 L.Ed. 1420.

72. N.J.—*McDermott v. Jersey City Sinking Fund Com'rs*, 55 A. 37, 69 N.J.Law 575.

73. U.S.—*Memphis v. Brown, Tenn.*, 20 Wall. 289, 22 L.Ed. 264.

74. Wash.—*Murphy v. Spokane*, 117 P. 476, 64 Wash. 681.

Proceeds of bonds not used for purpose of bond issue as part of sinking fund see supra § 1934.

Proceeds of property owned and to be owned by city, if available, may be transferred to interest and redemption funds created by statute for payment of principal and interest on outstanding bonds.—*Allison v. City of Phoenix*, 33 P.2d 927, 44 Ariz. 66, 93 A.L.R. 354, followed in 33 P.2d 932, 44 Ariz. 81, and 33 P.2d 933, first case, 33 P.2d 933, 44 Ariz. 82, second case, 44 Ariz. 83.

75. Wash.—*Murphy v. Spokane*, 117 P. 476, 64 Wash. 681.

Issuance of bonds to create sinking fund for other bonds see supra § 1910.

76. Cal.—*Bates v. Porter*, 15 P. 732, 74 Cal. 224, followed in *Haumeister v. Porter, Cal.*, 16 P. 187, 74 Cal. xix.

77. U.S.—*Rittenoure v. City of Edinburg, C.C.A.Tex.*, 159 F.2d 989.

Ky.—*City of Newport v. McLane*, 77 S.W.2d 27, 256 Ky. 803.

and control or supervision of sinking funds may be and is generally fixed by statute;⁷⁸ but sometimes the right to possession of instruments or documents involved in the administration of the fund is fixed by ordinance.⁷⁹ While the city has the legal title to money raised for a sinking fund,⁸⁰ together with the right to collect, manage, and protect it,⁸¹ such legal title is held in trust for the bondholders.⁸² The actions of officers vested with supervision over a sinking fund may not be controlled by injunction unless the fund is in danger of being wasted or impaired,⁸³ or unless a liability will be incurred or an injury done by threatened or probable misfeasance for which the officers' bonds or personal responsibility will afford no probable or adequate redress.⁸⁴

Investment. Some statutes expressly or impliedly authorize or require the investment of municipal sinking funds.⁸⁵ The investment may be made only in the securities,⁸⁶ and according to the requirements,⁸⁷ prescribed by statute, and any other investment or disposition of the funds is illegal and

void.⁸⁸ Under some statutes the investment may be in bonds of the municipality,⁸⁹ although they are of another series⁹⁰ and mature at a later date⁹¹ than the bonds secured by the sinking fund. Under some statutes any surplus in the sinking fund must first be used to redeem or purchase bonds secured by the sinking fund, and only if such bonds are not available on fair terms may the surplus be invested in other bonds.⁹² It has been held that authority to purchase municipal bonds for the sinking fund does not extend to the purchase of bonds at the time they are offered for sale by the city;⁹³ but, as discussed supra § 1931, the statutes may expressly require that the bonds shall be offered to, and declined by, the sinking fund commission before they are sold or offered for sale to other persons. Where the statute provides for the investment of the prepaid assessments in bonds at par, the city may not purchase at less or more than par;⁹⁴ the determination of what bonds are worth par is within the sound discretion of the city officers,⁹⁵ and, if a municipal officer determines

N.Y.—Clark v. Sheldon, 12 N.E. 341, 106 N.Y. 104.

Tax for sinking fund generally see infra § 1998.

Deficit

If needs of city sinking fund for fiscal year are not satisfied by collections during that fiscal year, and deficit in sinking fund results, deficit may be made up when revenue for that fiscal year is subsequently collected.—Protest of Chicago, R. I. & P. Ry. Co., 23 P.2d 158, 164 Okl. 114.

78. Ga.—Wiley v. Sparta, 114 S.E. 45, 154 Ga. 1, 25 A.L.R. 1342. 44 C.J. p 1233 note 38.

Contract in bonds

Pa.—Clark v. City of Philadelphia, 196 A. 384, 328 Pa. 521, 115 A.L.R. 212.

Change to commission form of government

After commission form of government was adopted by city of second class, duty theretofore imposed on mayor, president of board of aldermen and president of board of councilmen, as commissioners of sinking fund, devolved on board of commissioners.—City of Newport v. McLane, 77 S.W.2d 27, 256 Ky. 803, 96 A.L.R. 655.

79. N.Y.—Craig v. Matthews, 143 N.E. 800, 238 N.Y. 88.

80. U.S.—Rittenoure v. City of Edinburg, C.C.A.Tex., 159 F.2d 989—**Corpus Juris cited in Federal Deposit Ins. Corporation v. Casady, C. C.A.Okl., 106 F.2d 784, 787.**

Mass.—City of Boston v. Dolan, 10 N.E.2d 275, 298 Mass. 346.

Tex.—Austin v. Cahill, 88 S.W. 542, 89 S.W. 552, 99 Tex. 172.

81. Tex.—Austin v. Cahill, supra.

82. U.S.—Rittenoure v. City of Edinburg, C.C.A.Tex., 159 F.2d 989—**Corpus Juris cited in Federal Deposit Ins. Corporation v. Casady, C.C.A.Okl., 106 F.2d 784, 787.**

Ga.—Town of Douglasville v. Mobley, 149 S.E. 575, 169 Ga. 53.

Ky.—City of Newport v. McLane, 77 S.W.2d 27, 256 Ky. 803, 96 A.L.R. 655.

44 C.J. p 1234 note 42.

83. Cal.—San Francisco v. San Francisco Funded Debt, 10 Cal 585.

84. Cal.—San Francisco v. San Francisco Funded Debt, supra.

85. Ga.—Mathews v. Darby, 141 S.E. 304, 165 Ga. 509.

Okl.—State ex rel. Town of El Dorado v. Williamson, 60 P.2d 1032, 177 Okl. 526—State ex rel. Town of Nichols Hills v. Williamson, 60 P.2d 1036, 177 Okl. 529.

44 C.J. p 1234 note 45.

Double agent; laches

Right of city to have purchase of bonds for sinking fund by trustees acting through secretary from bank in which secretary was officer set aside held barred by city's laches in delaying more than two years in attacking transaction.—City of Leesburg v. Ware, 153 So. 87, 113 Fla. 760.

86. Ga.—Mathews v. Darby, 141 S.E. 304, 165 Ga. 509.

44 C.J. p 1234 note 46.

87. U.S.—Ft. Scott v. W. G. Eads Brokerage Co., Kan., 117 F. 51, 54 C.C.A. 437, certiorari denied 23 S.Ct. 846, 187 U.S. 647, 47 L.Ed. 348. 44 C.J. p 1234 note 47.

88. Ga.—Town of Douglasville v. Mobley, 149 S.E. 575, 169 Ga. 53—Mathews v. Darby, 141 S.E. 304, 165 Ga. 509.

Deposit of sinking fund in bank

(1) A loan to a bank of sinking funds on a time certificate of deposit is illegal and void.—Town of Douglasville v. Mobley, 149 S.E. 575, 169 Ga. 53—Hogansville Banking Co. v. Hogansville, 120 S.E. 604, 156 Ga. 855.

(2) Municipality did not have option to affirm or reject unauthorized investment of municipal funds illegally deposited in bank.—Town of Douglasville v. Mobley, supra.

89. Ohio—Cleveland v. Baker, 4 Ohio App. 68, 25 Ohio Cir.Ct., N.S., 369.

44 C.J. p 1234 note 48.

90. Tex.—Elser v. Ft. Worth, Civ. App., 27 S.W. 739.

91. Tex.—Elser v. Ft. Worth, supra.

92. Ky.—Moss v. City of Paducah, 147 S.W.2d 59, 285 Ky. 100.

93. Minn.—Kelly v. Minneapolis, 65 N.W. 115, 63 Minn. 125, 30 L.R.A. 281.

94. Ind.—Read v. Beczkiewicz, 18 N.E.2d 789, 215 Ind. 365, reheard 19 N.E.2d 465, 215 Ind. 365.

95. Ind.—Read v. Beczkiewicz, supra.

that there are no bonds to be had at par which are a safe investment, he may not buy bonds.⁹⁶

§ 1954. Redemption, Cancellation, Extension, or Exchange

The right of a municipal corporation to redeem bonds is governed by the terms of the bonds and the provisions of the statutes and ordinances under which the bonds were issued and sold.

The right of a municipal corporation to redeem bonds is governed by the terms of the bonds and the provisions of the statutes and ordinances under which the bonds were issued and sold.⁹⁷ Where so provided in the statute or ordinance or in the bonds, the municipality may redeem bonds before their maturity,⁹⁸ but, in the absence of a provision therefor either in the bonds or a statute, bonds

issued for a certain number of years are not redeemable before maturity without the consent of the persons holding them,⁹⁹ and the right to redeem bonds may not be conferred by a statute enacted after their issuance.¹ The existence of a constitutional or statutory right to refund bonds does not necessarily imply the right to call bonds for payment if they are not due.²

Redemption must be in the manner and on the terms provided by statute or the bonds,³ and, where there is no provision as to the nature of the notice required of the municipality as to its exercise of the option to redeem, reasonable notice is sufficient.⁴ Redemption may be made from any funds which the municipality may properly allocate to such purpose,⁵ but it has been held that a municipi-

96. Ind.—Read v. Beczkiewicz, *supra*.

97. Ala.—Wheellis v. Phenix City, 2 So.2d 776, 241 Ala. 310.

Fla.—City of Miami v. State, 190 So. 774, 139 Fla. 598.

Okl.—State ex rel. R. J. Edwards, Inc., v. Keith, 66 P.2d 1059, 179 Okl. 563.

Enforcement in equity of agreement to cancel municipal bonds see Cancellation of Instruments § 36.

Redemption plan held not ultra vires
Proposed plan of city to call and pay bonds by lot was not subject to objection as ultra vires—Reuther v. City of New Orleans, 9 So.2d 523, 201 La. 209.

Annual redemption plan not a refunding operation

La.—Reuther v. City of New Orleans, *supra*.

Void bonds

S.C.—City of Spartanburg v. Leonard, 186 S.E. 395, 180 S.C. 491.

Statute requiring redemption

Statute, purpose of which was to compel municipal corporations issuing bonds to extinguish all of issue before final maturity, was held contrary to constitutional provision providing for sinking fund to extinguish indebtedness within a specified number of years.—Fox v. Boyle County, 53 S.W.2d 192, 245 Ky. 27.

98. Ala.—Moore v. Howard, 149 So. 249, 227 Ala. 219, followed in State ex rel. Lindsey v. Howard, 149 So. 252, 227 Ala. 208.

Fla.—City of Miami v. State, 190 So. 774, 139 Fla. 598.

Idaho.—Neighbors of Woodcraft v. City of Rupert, 4 P.2d 360, 51 Idaho 215.

Neb.—State ex rel. City of Columbus v. Price, 254 N.W. 889, 127 Neb. 132.

44 C.J. p 1235 note 59.

Provision or recital in bonds as to

redemption generally see *supra* § 1941.

Interest in default

The statute authorizing city or town treasurer to call improvement bonds for payment "whenever considered prudent" does not derogate the mandate of the statute and ordinance requiring payment of semiannual interest and authorizes calling of bonds only where no interest, matured and due, is in default.—Ewing v. Elliott, 84 P.2d 823, 103 Colo. 216.

99. Kan.—Corpus Juris cited in State ex rel. Parker v. State School Fund Commission, 103 P.2d 801, 803, 152 Kan. 427.

Okl.—State ex rel. R. J. Edwards, Inc., v. Keith, 66 P.2d 1059, 179 Okl. 563.

Tex.—Gavin v. Potter County, Civ App., 187 S.W.2d 705, error granted 44 C.J. p 1235 note 61.

Statute authorizing redemption held inapplicable

Okl.—State ex rel. R. J. Edwards, Inc., v. Keith, 66 P.2d 1059, 179 Okl. 563.

1. Mont.—City of Philipsburg v. Porter, 190 P.2d 676.

Impairment of obligation of contracts of municipalities generally see Constitutional Law § 308 et seq.

2. U.S.—Evangeline Parish School Bd. v. Kansas City Life Ins. Co., C. C.A. La., 153 F.2d 611.

La.—Martin v. Mayor & Bd. of Aldermen of Town of Westwego, 32 So.2d 711, 212 La. 439.

3. Ala.—Wheellis v. Phenix City, 2 So.2d 776, 241 Ala. 310.

Fla.—City of Miami v. State, 190 So. 774, 139 Fla. 598.

Ill.—Rothschild v. Village of Calumet Park, 183 N.E. 337, 350 Ill. 330.

Ky.—Cook v. City of Louisville, 86 S.W.2d 157, 260 Ky. 474.

La.—Reuther v. City of New Orleans, 9 So.2d 523, 201 La. 209.

N.M.—Town of Alamogordo v. Beall, 64 P.2d 384, 41 N.M. 93.

Pa.—Philadelphia Sav. Fund Soc. v. City of Bethlehem, 17 A.2d 750, 143 Pa.Super. 449.

Tender by bondholder

Provision of refunding bond extending privilege to bondholders to tender bonds for payment at prices below par and accrued interest on ninety days' notice prior to date of interest payment was held inapplicable, where bonds were peremptorily called for payment—State v. City of Orlando, 170 So. 887, 126 Fla. 251, 127 Fla. 250.

Refutation of call

Pa.—Fulton Nat. Bank of Lancaster v. City of Lancaster, 172 A. 34, 112 Pa.Super. 565.

Minimum annual redemption

With respect to mandatory requirement of statute that city redeem in each year at least one-fifteenth of total refunding paying certificates issued, city could apply excess redeemed on original refunding certificates to minimum requirement on new refunding certificates so as to bring the amount redeemed each year within the statutory requirement—State ex rel. Maestri v. Cave, 190 So. 631, 193 La. 419.

4. Fla.—State v. City of Tallahassee, 170 So. 897, 126 Fla. 275.

Pa.—Philadelphia Sav. Fund Soc. v. City of Bethlehem, 17 A.2d 750, 143 Pa.Super. 449.

S.C.—City of Spartanburg v. Leonard, 186 S.E. 395, 180 S.C. 491.

5. Ala.—Wheellis v. Phenix City, 2 So.2d 776, 241 Ala. 310.

Bond payable from special fund

Holder of street improvement bond, providing for payment from special assessment fund only, held not entitled to refuse payment from other sources before maturity.—Bal-

pality may not redeem part of a bond issue out of the funds pledged for the payment of all of the bonds where the funds are insufficient.⁶ The mere assertion by the bondholders of a claim for additional interest will not deprive the municipality of the right to proceed to redeem the bonds, nor does it require the municipality to postpone redemption until the determination of the claim.⁷

Interest. Where bonds are redeemed, interest is payable only to the date of delivery⁸ and current and future interest coupons are canceled,⁹ but a call for redemption does not stop the running of interest where proper notice is not given bondholders and funds for redemption are not on hand.¹⁰

Purchase of own bonds. It has been held that a purchase by the city of its own bonds to be placed in a sinking fund does not operate as a cancellation or retirement of such bonds.¹¹ Bonds so purchased constitute assets¹² and may be sold,¹³ subject to applicable limitations;¹⁴ but it has also been held that the purchase by a municipality of its own bonds before maturity amounts to their payment¹⁵ precluding their reissuance.¹⁶

Refund; exchange. Although bonds may be paid by their exchange for refunding bonds, where the bondholders consent,¹⁷ bonds may not be refunded in a manner which deprives the bondholders of their vested rights¹⁸ and a bondholder may not be com-

pelled to accept refunding bonds in exchange for his bonds.¹⁹ Where the statute authorizing an issue of new bonds in exchange for outstanding bonds provides that the holders of outstanding bonds shall have the right to surrender them and receive the new bonds in lieu thereof, such holders of outstanding bonds may not be required to receive the new bonds at a premium.²⁰

It is no valid objection to municipal bonds that a single bond was at first issued in payment of the whole of a subscription in aid of a railroad, and afterward bonds of smaller denomination were given in exchange for the single bond.²¹

Extension. Where a statute confers on bondholders the right to an extension, its terms must be complied with by the bondholders in order to entitle them to demand such an extension.²²

§ 1955. Payment

- a. In general
- b. Priorities
- c. Interest after maturity

a. In General

A municipal corporation is under a duty to make provision for the payment of its bonds.

A municipal corporation is under a duty to make provision for the payment of its bonds,²³ and where

lard-Hassett Co. v. City of Des Moines, 224 N.W. 793, 207 Iowa 1351.

6. Ala.—Moore v. Howard, 149 So. 249, 227 Ala. 219, followed in State ex rel. Lindsey v. Howard, 149 So. 252, 227 Ala. 208.

7. Fla.—State v. City of Fort Myers, 19 So.2d 613, 155 Fla. 165.

8. Fla.—City of Miami v. State, 190 So. 774, 139 Fla. 598.

9. Fla.—City of Miami v. State, supra.

10. U.S.—Mott v. City of Flora, Ill., D.C.Ill., 51 F.Supp. 963.

11. Ohio.—Cleveland v. Baker, 4 Ohio App. 68, 76, 25 Ohio Cir.Ct., N.S., 369.

44 C.J. p 1234 note 53.

12. Ohio.—Cleveland v. Baker, supra.

13. Ohio.—Cleveland v. Baker, supra.

Tex.—Elser v. Ft. Worth, Civ.App., 27 S.W. 739.

14. Ohio.—Cleveland v. Baker, 4 Ohio App. 68, 25 Ohio Cir.Ct., N.S., 369.

44 C.J. p 1234 note 56.

15. Ga.—City of Dawson v. Wilkinson, 163 S.E. 485, 174 Ga. 539.

16. Ga.—City of Dawson v. Wilkinson, supra.

17. Ill.—Scribner v. Village of Downers Grove, 25 N.E.2d 54, 372 Ill. 614.

Remuneration of bondholders' committee

Ala.—City of Decatur v. Mohns, 180 So. 297, 235 Ala. 640.

Exchange agent

Bank accepting an appointment under ordinance to act as exchange agent for city in refinancing bonded indebtedness of city became agent of city burdened with ministerial duty involving no discretionary powers of exchanging the bonds according to terms provided for in ordinance.—City of Decatur v. Mohns, supra.

18. Ill.—Scribner v. Village of Downers Grove, 25 N.E.2d 54, 372 Ill. 614.

19. Ill.—Scribner v. Village of Downers Grove, supra.

20. Pa.—Lloyd v. Altoona City, 19 A. 675, 134 Pa. 545.

21. U.S.—Rockmulh v. Pittsburgh, C.C.Pa., 20 F.Cas.No.11,982.

22. La.—State v. New Orleans, 8 So. 883, 43 La. Ann. 130.

44 C.J. p 1235 note 67.

23. Fla.—Rountree v. State, 135 So. 888, 102 Fla. 246.

Provisions:

For payment as condition to issuance of bonds see supra § 1918. In bond as to payment see supra § 1941.

Funds must be on hand

Funds to pay municipal bonds as they fall due must be on hand and not in process of collection—Jones v. Blaine, 300 P. 369, 149 Okl. 153.

Duty not dependent on presentation of bonds

Fla.—Rountree v. State, 135 So. 888, 102 Fla. 246.

Legislative transfer of liability

Legislative acts purporting to release city from liability on its validly issued bonds did not constitutionally release city where creditor did not accept arrangement, although acts imposed payment of bonds on special taxing district, and acts were not void but required district to pay bonds and to indemnify city for actions brought against it by bondholders.—City of Fort Lauderdale v. State ex rel. Elston Bank & Trust Co., 169 So. 584, 125 Fla. 89.

Contract to pay bonds

A person who enters into a contract with a municipal corporation to redeem bonds issued by the corporation cannot avoid liability on the contract on the ground that the cor-

the legislature fixes a method by which bonds are to be paid that method must be followed.²⁴ Payment of the bonds may be made from such funds as may be properly allocated to such purpose,²⁵ and it has been held to be the duty of the treasurer to pay matured bonds out of funds created for that purpose without any further order or allowance by the mayor or city council.²⁶ A municipal corporation does not free itself from liability on its bonds by merely placing funds for their payment in the hands of the proper officers²⁷ or with the bank at which the bonds are payable.²⁸ In the absence of provision to the contrary, bonds are payable at the treasury of the municipality.²⁹

Presentation of the bonds ordinarily is not necessary to entitle a bondholder to payment.³⁰ However, while municipal bonds need not be presented for audit,³¹ if they are transferable by delivery they should be presented by the holder³² or notice given to the corporate body in order that the owner may be known.³³ Where an interest coupon passes by delivery like a bank note, the holder is not bound to show his chain of title at the time he demands payment,³⁴ but it has been held that the city pays overdue coupons at its peril.³⁵

To whom payable. Bonds in which the name of the payee is not inserted are payable to bearer,³⁶ and bonds payable to bearer are deemed payable to the holder.³⁷ Where the bonds are negotiable in form³⁸ or are indorsed in blank by the payee³⁹ the municipality is justified in making payment to the holder, in the absence of any notice on its part of his want of title;⁴⁰ but where a city has had notice of the theft or loss of bonds it is, in order to justify a payment, bound to show that the holders to whom payment was made were purchasers in good faith before maturity and for value;⁴¹ and, where nonnegotiable municipal bonds have been stolen, the person from whom they were stolen,⁴² rather than the person who came into possession of them through a chain of transfers from the thief,⁴³ is entitled to payment from the municipality.

Medium of payment. If the bonds do not specify the medium of payment, they may be paid in any medium which is a legal tender at the time of their maturity;⁴⁴ but holders of municipal bonds may not be compelled to accept in payment anything but legal tender.⁴⁵

poration has exceeded its authority in making interest payable semiannually instead of annually.—*Newark v. Elliott*, 5 Ohio St. 113—14a C.J. p 642 note 47.

24. Colo.—*Gordon v. Wheatridge Water Dist.*, 109 P.2d 899, 107 Colo. 128.

25. Fla.—*Rountree v. State*, 135 So. 888, 102 Fla. 246.

26. Wyo.—*City of Casper v. Joyce*, 88 P.2d 467, 54 Wyo. 198.

Interest coupons

Wyo.—*City of Casper v. Joyce*, supra.

27. N.Y.—*Federgreen v. Fallsburgh*, 25 Hun 152.

28. Pa.—*Mershon v. Borough of Millerstown*, 193 A. 328, 128 Pa.Super. 248.

Failure of bank

(1) With respect to liability of borough to holder of borough bonds and interest coupons, where he had not presented instruments for payment until after failure of bank in which borough treasurer had deposited sufficient funds to cover payment, fact that bonds and coupons were payable at bank did not of itself make it agent of holder.—*Mershon v. Borough of Millerstown*, supra.

(2) Where interest coupons attached to municipal bonds were payable on October 1 to bearer at office of town treasurer or at financial institution at holder's option, and municipal

pality deposited with such institution sum to meet coupons, but institution failed on October 13 before holder had presented coupons for payment, holder subsequently presenting coupons to town treasurer could recover amount thereof, and was not estopped to do so because it had on prior occasions always collected interest by sending coupons to financial institution.—*Lusk State Bank v. Council of Town of Lusk*, 52 P.2d 413, 48 Wyo. 547, 103 A.L.R. 1256.

29. Ill.—*Williamson v. Farson*, 101 Ill.App. 328, affirmed 64 N.E. 1086, 199 Ill. 71.

Pa.—*Friend v. Pittsburgh*, 18 A. 1060, 131 Pa. 305, 17 Am.S.R. 811, 6 L.R.A. 636.

Provision in bond as to place of payment see supra § 1941.

30. Pa.—*Mershon v. Borough of Millerstown*, 193 A. 328, 128 Pa. Super. 248.—*Lebenthal v. Borough of Hughestown*, Com Pl., 39 Luz Leg.Reg. 73.

Demand for levy of tax held unnecessary to entitle holder of municipal bond to payment, where duty to levy is plain.—*Little River Bank & Trust Co. v. Johnson*, 141 So. 141, 105 Fla. 212.

31. Cal.—*Commercial, etc., Bank v. Ewing*, 225 P. 476, 66 Cal.App. 231. 44 C.J. p 1235 note 71.

Interest coupons on bonds which are not demands are not required to

be presented for allowance.—*Freehill v. Chamberlain*, 4 P. 646, 65 Cal. 608.

32. N.C.—*Leach v. Fayetteville*, 84 N.C. 829.

33. N.C.—*Leach v. Fayetteville*, supra.

34. Pa.—*Williamsport v. Commonwealth*, 90 Pa. 498.

35. Ky.—*Bainbridge v. Louisville*, 83 Ky. 285, 4 Am.S.R. 153.

44 C.J. p 1236 note 92.

36. U.S.—*Lyon County v. Keene, etc.*, Bank, Iowa, 100 F. 337, 40 C. C.A. 391.

37. U.S.—*Farr v. Lyons*, C.C.Ky., 13 F. 377, 21 Blatchf. 116.

38. D.C.—*Strong v. District of Columbia*, 15 D.C. 242.

39. D.C.—*Strong v. District of Columbia*, supra.

40. D.C.—*Strong v. District of Columbia*, supra.

41. Ky.—*Bainbridge v. Louisville*, 83 Ky. 285, 4 Am.S.R. 153.

Purchaser of stolen bonds as bona fide purchaser see infra § 1962.

42. Wash.—*Manker v. American Sav. Bank, etc., Co.*, 230 P. 406, 131 Wash. 430, 42 A.L.R. 1021.

43. Wash.—*Manker v. American Sav. Bank, etc.*, supra.

44. Cal.—*People v. Cook*, 39 Cal. 658, 44 Cal. 638.

45. U.S.—*Crummer v. City of Fort Pierce*, D.C.Fla., 2 F.Supp. 737.

Ark.—*English v. Oliver*, 28 Ark. 317.

Plans for reorganization of debt. A statute providing a plan for the readjustment of the debts of a municipality may not affect the rights of nonconsenting bondholders⁴⁶ and will be construed so as to preserve their vested rights.⁴⁷ A liquidation plan for the payment of a bond issue is not subject to attack by a taxpayer where the plan will result in a tax saving,⁴⁸ nor is it subject to attack by a nonconsenting bondholder where the plan provides for the payment of the bonds of nonconsenting bondholders at par with accrued interest.⁴⁹ Where, on the insolvency of a municipal corporation, bondholders accept refunding bonds under a provision subrogating them to all the rights, remedies, and privileges of the holders of the original securities, they are entitled to as much of the funds available for the payment of interest and principal as they would have been entitled to on the unrefunded claim, provided it does not exceed

the amount to which they are entitled under the refunding bonds.⁵⁰

b. Priorities

Valid provisions as to priority in the payment of municipal bonds may be enforced.

Valid provisions as to priority and preference in the payment of municipal bonds may be enforced.⁵¹ A mere provision that a certain sum annually shall be paid on certain bonds does not give the holders priority over other bonds;⁵² nor does the fact that one issue is older than another give it priority.⁵³ Priority of demand of payment ordinarily will not create priority between bondholders.⁵⁴ As a general rule, where bonds are payable from a special or limited fund, there is no priority or preference among the bonds, but they are entitled to share in the fund pro rata,⁵⁵ at least where the fund is insufficient to pay all of the bonds in full.⁵⁶

46. Ohio.—State ex rel. Bruml v. Village of Brooklyn, 49 N.E.2d 684, 141 Ohio St. 593.

47. Ohio.—State ex rel. Bruml v. Village of Brooklyn, supra.

48. La.—Reuther v. City of New Orleans, 9 So.2d 523, 201 La. 209.

49. La.—Reuther v. City of New Orleans, supra.

50. U.S.—Rittenoure v. City of Edinburg, C.C.A.Tex., 159 F.2d 989.

51. Mo.—State ex rel. City of Excelsior Springs v. Smith, 82 S.W.2d 37, 336 Mo. 1101.

Mortgage securing two bond issues

Where mortgage on mineral water system and revenues therefrom secured two series of bonds issued by city pursuant to statute, giving one of series of bonds priority over the other was held not violative of statute providing that mortgage should constitute a first lien on such property and revenues.—State ex rel. City of Excelsior Springs v. Smith, supra.

52. U.S.—Maenhaut v. New Orleans, C.C.La., 16 F.Cas.No.8,940, 3 Woods 1.

53. U.S.—Pape v. St. Lucie Inlet Dist. and Port Authority, C.C.A. Fla., 75 F.2d 865, certiorari denied 55 S.Ct. 915, 295 U.S. 758, 79 L.Ed. 1700—Maenhaut v. New Orleans, C.C.La., 16 F.Cas.No.8,940, 3 Woods 1.

Fla.—State v. City of Jacksonville, 179 So. 172, 131 Fla. 163—Sovereign Camp, W. O. W., v. Lake Worth Inlet Dist. of Palm Beach County, 161 So. 717, 119 Fla. 782, 99 A.L.R. 1482.

In absence of unambiguous statute

The general rule that one issue of municipal bonds has no priority

over a later issue should be enforced by courts in absence of an unambiguous statute granting priority.—Bankers Life Co. v. City of Littlefield, C.C.A.Tex., 93 F.2d 152, certiorari denied 58 S.Ct. 759, 303 U.S. 654, 82 L.Ed. 1114.

Provision for levy and collection of annual tax

Where a city's taxable values decreased to such an extent that maximum annual tax required under statutes and constitutional provisions was insufficient to pay interest and provide sinking fund to pay principal of city's bonds on maturity, the provision for levy and collection of such annual tax did not constitute such an appropriation of the maximum taxing power of the city as to give priority to the first and earlier issues of bonds over bonds of a second or subsequent series.—Bankers Life Co. v. City of Littlefield, supra.

54. Cal.—Meyer v. Didber, 58 P. 532, 126 Cal. 252

55. U.S.—Village of Brookfield v. Pentis, C.C.A.Ill., 101 F.2d 516.

Ill.—Prange v. City of Marion, 48 N.E.2d 980, 319 Ill.App. 136—People ex rel. First Nat. Bank of Stevens Point, Wis., v. Village of Stickney, 37 N.E.2d 883, 312 Ill.App. 179—How & Co. v. City of Chicago, 29 N.E.2d 388, 306 Ill.App. 571—Viehweg v. City of Mount Olive, 19 N.E.2d 211, 298 Ill.App. 412—Cook v. City of Staunton, 14 N.E.2d 696, 295 Ill.App. 111—Bankers Life Co. v. Village of Elmwood Park, 280 Ill.App. 524.

N.M.—City of Santa Fé v. First Nat. Bank, 65 P.2d 857, 41 N.M. 130.

Okl.—City of Okmulgee v. Young, 113 P.2d 373, 189 Okl. 25—Lucas v. First Nat. Bank, 43 P.2d 752, 171 Okl. 606.

44 C.J. p 1237 note 19 [b].

56. Colo.—Rising v. Hoffman, 179 P.2d 430, 116 Colo. 63

Ill.—Rothschild v. Village of Calumet Park, 183 NE 337, 350 Ill. 330—Lubezny v. Ball, 53 NE.2d 988, 322 Ill.App. 78, reversed on other grounds 59 N.E.2d 645, 389 Ill. 263—People ex rel. Decker v. City of Park Ridge, 275 Ill.App. 97.

Ky.—City of Corbin v. Becker, 180 S.W.2d 419, 297 Ky. 485.

Payment of previously matured bonds

Where redemption fund, not replenishable by general levy, is insufficient to meet all outstanding district street improvement bonds, in absence of express statutory power bondholder may not compel full payment of his bonds, regardless of whether district is insolvent or whether previously matured bonds have been satisfied in full.—Kerr Glass Mfg. Corporation v. City of San Buenaventura, 62 P.2d 583, 7 Cal.2d 701.

Declaration of insolvency

Municipal bond redemption fund could be declared insolvent without finding of city's insolvency in suit by bondholder for equitable relief, where bonds were in default and maximum special tax levy would not produce more than enough to pay interest.—Brown-Crummer Inv. Co. v. City of Burbank, D.C.Cal., 17 F.Supp. 469, appeal dismissed, C.C.A., 97 F.2d 993.

Fund replenishable

Bondholder may compel full payment of his bonds, even though redemption fund is insufficient to meet all outstanding bonds, if fund is replenishable by general levy.—Kerr Glass Mfg. Corporation v. City of San Buenaventura, 62 P.2d 583, 7 Cal.2d 701.

Under statutes or bonds so providing, bonds have been held payable in the order of their maturity⁵⁷ or in numerical order,⁵⁸ and not pro rata even though the fund for payment is insufficient;⁵⁹ but it has also been held that, unless the statute or bonds clearly indicate the creation of a preference,⁶⁰ provisions for payment in numerical order,⁶¹ or at different maturity dates,⁶² or on presentment⁶³ will not be construed to create a preference but as merely fixing the order of payment where the fund is sufficient and the fund is to be distributed pro rata where it is insufficient.⁶⁴ Where the fund is to be pro rated, it has been held that it is to be pro rated in accordance with the amount of the

bonds remaining due and unpaid and not in accordance with the amount of the bonds issued.⁶⁵

The holders of tax revenue and anticipation notes have been held entitled to payment ahead of, and in priority to, the general obligations of the municipality.⁶⁶

c. Interest after Maturity

Municipal interest-bearing bonds usually continue to bear interest when they are not paid at maturity.

Unless a contrary intent is indicated by statute,⁶⁷ interest-bearing or coupon bonds of a municipal corporation, which are not paid on demand at maturity, usually continue to bear interest,⁶⁸ especially

57. Ind.—Read v. Beczkiewicz, 18 N.E.2d 789, 215 Ind. 365, reheard 19 N.E.2d 465, 215 Ind. 365.
Iowa—Shaw, McDermott & Sparks v. Town of Danbury, 288 N.W. 435, 227 Iowa 415.

Owner of all bonds

Under statute giving owner of all outstanding bonds on any public improvement a right to immediate payment from proper disbursing officer of all payments made by property holders whether or not due, owner of special assessment bonds was held entitled to compel payment in accordance with statute as against contention that law under which bonds were issued provided that the bonds should be paid in order of their maturity.—Conter v. Lincoln Nat. Life Ins. Co., 8 N.E.2d 232, 212 Ind. 125.

58. Ind.—Read v. Beczkiewicz, 18 N.E.2d 789, 215 Ind. 365, reheard 19 N.E.2d 465, 215 Ind. 365.
Mont.—State ex rel. Mueller v. Todd, 132 P.2d 154, 114 Mont. 35.
N.M.—Munro v. City of Albuquerque, 93 P.2d 993, 43 N.M. 334—State ex rel. Ackerman v. City of Carlsbad, 47 P.2d 865, 39 N.M. 352.
Wash.—State v. Walters, 287 P. 874, 156 Wash. 664.
44 C.J. p 1235 note 88.

59. Ind.—Read v. Beczkiewicz, 18 N.E.2d 789, 215 Ind. 365, reheard 19 N.E.2d 465, 215 Ind. 365.
Iowa—Shaw, McDermott & Sparks v. Town of Danbury, 288 N.W. 435, 227 Iowa 415.
N.M.—State ex rel. Ackerman v. City of Carlsbad, 47 P.2d 865, 39 N.M. 352.
Okl.—McCann v. City of Enid ex rel. Illinois Pure Aluminum Co., 137 P.2d 586, 192 Okl. 495.
Wash.—State v. Walters, 287 P. 874, 156 Wash. 664.
44 C.J. p 1235 note 89.

Court could not alter numerical order or priority of payment of bonds issued by municipality as contained in bondholders' contract.—City of Hollis, Okl., ex rel. Kearn v. Carrell, D.C.Okl., 42 F.Supp. 893.

Statute not express as to order of payment

Where the statute authorizing the issuance of street improvement bonds by a municipality fails to provide in express language that the bonds shall be paid in numerical order, and the fund available is insufficient to pay them in full, the fund should be applied pro rata to their payment.—Brown-Crummer Inv. Co. v. City of Purcell, Okl., C.C. A Okl., 128 F.2d 400.

Proceedings instituted before effective date of statute

Where proceedings for street improvements were commenced prior to effective date of act providing that bonds are payable in their numerical order, the bonds were payable pro rata, notwithstanding they were not issued or the contractor's actual construction work begun until after the effective date of the act providing that bonds are payable in their numerical order.—Overstreet v. Keith, 90 P.2d 921, 185 Okl. 198.

60. Idaho.—Meyers v. City of Idaho Falls, 11 P.2d 626, 521 Idaho 81.
Ky.—The Maccabees v. City of Ashland, 109 S.W.2d 29, 270 Ky. 86.

61. Idaho.—Meyers v. City of Idaho Falls, 11 P.2d 626, 521 Idaho 81.

Estoppel

Holders of bonds could not complain of payment by city, under directory statute, of certain bonds in their numerical order before maturity years after payment had been made and the fund was insufficient to pay all bonds in full, where they did not object when the payments were made.—Smith v. Boise City, C.C. A Idaho, 104 F.2d 933.

62. Ky.—Enslin v. Knepple Bros., 194 S.W.2d 497, 302 Ky. 327—The Maccabees v. City of Ashland, 109 S.W.2d 29, 270 Ky. 86.

63. Cal.—Kerr Glass Mfg. Corporation v. City of San Buenaventura, 62 P.2d 583, 7 Cal.2d 701.

64. Cal.—Kerr Glass Mfg. Corpora-

tion v. City of San Buenaventura, supra.

Idaho.—Meyers v. City of Idaho Falls, 11 P.2d 626, 521 Idaho 81.
Ky.—Enslin v. Knepple Bros., 194 S.W.2d 497, 302 Ky. 327—The Maccabees v. City of Ashland, 109 S.W.2d 29, 270 Ky. 86.

Statute as to payment of unmatured bonds

Statute requiring payment in numerical order of unmatured special improvement bonds does not apply after maturity date of the bonds—Rising v. Hoffman, 179 P.2d 430, 116 Colo. 63.

Interest on excessive payments to others

A judgment, equalizing all purchasers of serially maturing city street improvement bonds as of agreed date, should have allowed purchasers of later maturing bonds interest on their proportionate shares of city's payments of principal to holders of previously maturing bonds from dates of such payments until date of equalization—Enslin v. Knepple Bros., 194 S.W.2d 497, 302 Ky. 327.

65. Ill.—How & Co v. City of Chicago, 51 N.E.2d 120, 384 Ill. 232.

66. N.J.—State ex rel. Phelps v. Borough of Fort Lee, 188 A. 689, 14 N.J. Misc. 895, affirmed 191 A. 836, 118 N.J. Law 181.

67. Idaho—Corpus Juris quoted in Breckenridge v. Johnston, 108 P.2d 833, 810, 62 Idaho 121.
44 C.J. p 1236 note 94
Interest before maturity see supra § 1940

68. Cal.—Corpus Juris cited in Irvine v. Reclamation Dist. No. 108, 150 P.2d 428, 431, 24 Cal.2d 468.

Fla.—Corpus Juris cited in State v. Lee, 156 So. 744, 745, 116 Fla. 726.
Idaho.—Corpus Juris quoted in Breckenridge v. Johnston, 108 P.2d 833, 840, 62 Idaho 121.
Iowa.—Hauge v. City of Des Moines, 224 N.W. 520, 207 Iowa 1209.

where it is so provided,⁶⁹ and this is also true of interest or interest coupons which are not paid;⁷⁰ but according to some authorities interest coupons do not bear interest after maturity unless such interest is provided for by contract or legislative act.⁷¹

Interest on interest or interest coupons has been held payable only from the time payment is demanded and refused and not from the date when payment is due,⁷² and it has been held that the city is not liable for interest accruing after maturity where it has funds on hand to pay the bond at maturity and the bond is not then presented at the municipal treasury or other designated place of payment,⁷³ but it has also been held that, where there are no funds to pay bonds if presented, they will continue to draw interest, although not presented,⁷⁴ and that, where no actual notice is given to the holder of an interest-bearing municipal bond which is overdue to present it for payment and surrender, and there is no statutory method provided for the calling in of such a bond and fixing a day beyond which interest will not run, interest will

continue to accrue on such an obligation in the same manner as on an ordinary note of a private person.⁷⁵

The holder of a bond payable from assessments has been held not entitled to interest for the period after maturity, but before presentment, if the municipality has not collected interest on assessments for such period,⁷⁶ but if the municipality has collected principal and interest and fails to pay the bonds when presented it is liable for interest from the date of presentment until the bonds are paid.⁷⁷ Under a constitutional provision prohibiting a municipal corporation from issuing interest bearing evidences of indebtedness, a note does not bear interest after maturity.⁷⁸ Under a contract provision that temporary notes shall bear interest at a specified rate until bonds are issued, the holder of the notes is entitled to, and only to, interest at the specified rate from the respective dates of the notes until the bonds are issued.⁷⁹

The rate of interest after maturity is generally the same as that before maturity,⁸⁰ but there is

Miss.—City of Indianola v. Gates, 179 So. 284, 181 Miss. 145.

Mont.—Corpus Juris cited in State ex rel. Mueller v. Todd, 158 P.2d 299, 300, 117 Mont. 80.

Ohio.—State ex rel. Bruml v. Village of Brooklyn, 49 N.E.2d 684, 141 Ohio St. 593.

44 C.J. p 1236 note 95.

Local law determinative

Whether city bonds and interest coupons bear interest after maturity when none is expressly promised in them or in the statute authorizing them depends on the local law.—City of Hialeah v. U. S. ex rel. Harris, C.C.A.Fla., 87 F.2d 953.

Interest on past-due assessments

Where bonds are issued to be paid from assessments which bear interest after maturity, the bonds likewise bear interest after maturity.—Bankers Life Co. v. Village of Elmwood Park, 280 Ill.App. 524.

69. U.S.—Carnegie Nat. Bank v. City of Wolf Point, D.C.Mont., 4 F.Supp. 385.

Provision for interest until payment N.M.—Munro v. City of Albuquerque, 93 P.2d 993, 43 N.M. 334.

70. Fla.—City of Winter Park v. Dunblaine, Inc., 164 So. 366, 121 Fla. 600.

Idaho.—Corpus Juris quoted in Breckenridge v. Johnston, 108 P.2d 833, 840, 62 Idaho 121.

Mont.—Corpus Juris cited in State ex rel. Mueller v. Todd, 158 P.2d 299, 301, 117 Mont. 80.

Ohio.—State ex rel. Bruml v. Vil-

lage of Brooklyn, 49 N.E.2d 684, 141 Ohio St. 593.

44 C.J. p 1236 note 96.
Interest on overdue coupons and interest generally see Interest § 15.

71. Ariz.—Miners & Merchants Bank v. Herron, 47 P.2d 430, 46 Ariz. 71.

Cal.—Bates v. Gerber, 22 P. 1115, 82 Cal. 550—Davis v. Porter, 6 P. 746, 66 Cal. 658—Hewel v. Hugin, 84 P. 1002, 3 Cal.App. 248.

Ill.—Hawthorne Park Dist. v. Seipp, Princell & Co., 4 N.E.2d 117, 286 Ill.App. 599.

N.M.—Munro v. City of Albuquerque, 93 P.2d 993, 43 N.M. 334.

Interest on bonds and on coupons distinguished

"There is a difference between interest on interest coupons and on the principal of matured bonds. In the latter case the bonds call for interest and even though the statute is silent on the question of interest after maturity that result should follow by necessary implication. There is ordinarily no provision for interest on the interest coupons at any time and hence we must apply the general rule . . . that interest will not run against a government obligation unless it is imposed by statute or authorized contract."—Irvine v. Reclamation Dist. No. 108, 150 P. 2d 428, 432, 24 Cal. 468.

72. Wyo.—Lusk State Bank v. Council of Town of Lusk, 52 P.2d 413, 48 Wyo. 547, 103 A.L.R. 1256.

73. Ky.—Tandy's Ex'rs v. Carlisle

County, 178 S.W.2d 591, 296 Ky. 743.

Pa.—Friend v. Pittsburgh, 18 A. 1060, 131 Pa. 305, 17 Am.S.R. 811, 6 L.R.A. 636.

74. U.S.—Wilson v. Neal, C.C.Ohio, 23 F. 129.

75. Ill.—Williamson v. Farson, 101 Ill.App. 328, affirmed 64 N.E. 1086, 199 Ill. 71.

76. Ind.—Read v. Beczkiewicz, 18 N.E.2d 789, 215 Ind. 365, reheard 19 N.E.2d 465, 215 Ind. 365.

77. Ind.—Read v. Beczkiewicz, supra.

78. U.S.—American La-France & Foamite Corporation v. City of El Dorado, C.C.A.Ark., 81 F.2d 862.

Interest as damages

Presentation of notes executed by city at bank where they were made payable, without presentation or demand on mayor or other city officials, was held insufficient demand to charge city with damages for breach of contracts to pay notes.—American La-France & Foamite Corporation v. City of El Dorado, supra.

79. Kan.—Grecian v. Hill City, 256 P. 163, 123 Kan. 542.

80. Fla.—Corpus Juris cited in State v. Lee, 156 So. 744, 745, 116 Fla. 726.

44 C.J. p 1236 note 97.

Legislature has right to fix interest rate on deferred installments and bonds under local improvement assessment on basis of use of money for benefit of property owner.—Hoe-hamer v. Village of Elmwood Park,

authority that the legal rate of interest applies after maturity.⁸¹

Where the bonds are payable only from a special fund, it has been held that principal and interest to

maturity on all the bonds are to be paid in priority to interest after maturity;⁸² but the contrary has also been held,⁸³ and it has been held that a provision for the payment of bonds in numerical order includes post-maturity interest on such bonds.⁸⁴

8. RIGHTS, REMEDIES, AND LIABILITIES

a. In General

§ 1956. In General

A holder of municipal bonds takes them subject to the law in force at the time of their issuance, and ordinarily has a right of action against the municipal corporation to require it to live up to the terms of the bonds.

An original or subsequent holder of municipal bonds or securities takes them subject to, and has the right to rely on, the terms of the constitutional and statutory provisions or law under which they were issued, and which were in force and

effect at the time of the issuance of the bonds.⁸⁵ The rights and remedies of such a holder are fixed and determined by the terms of the bond,⁸⁶ and by the legislative acts or law relative thereto, at the time the bonds are issued,⁸⁷ and generally such rights and remedies of a bondholder cannot be restricted by the municipal corporation;⁸⁸ nor can they be adversely affected by subsequent legislation;⁸⁹ nor are such rights and remedies affected

198 N.E. 345, 361 Ill. 422, 102 A.L.R. 196.

81. Ohio.—State ex rel. Bruml v. Village of Brooklyn, 49 N.E.2d 684, 141 Ohio St. 593.

82. Mont.—State ex rel. Griffith v. City of Shelby, 87 P.2d 183, 107 Mont. 571.

Wash.—State v. Walters, 287 P. 874, 156 Wash. 664.

Statute giving interest priority over principal

Statutory provision making interest on bonds issued by special improvement district payable out of the fund in preference to principal did not include interest after maturity of the bonds.—State ex rel. Griffith v. City of Shelby, 87 P.2d 183, 107 Mont. 571.

83. N.M.—Munro v. City of Albuquerque, 93 P.2d 993, 43 N.M. 334.—State ex rel. Ackerman v. City of Carlsbad, 47 P.2d 865, 39 N.M. 352. Okl.—Foshee v. Martin, 88 P.2d 900, 184 Okl. 554.

84. Okl.—Foshee v. Martin, *supra*.

85. Ind.—Read v. Beczkiewicz, 18 N.E.2d 789, 215 Ind. 365, reheard 19 N.E.2d 465, 215 Ind. 365.

La.—Martin v. Mayor & Board of Aldermen of Town of Westwego, 32 So.2d 711, 212 La. 439.

Okl.—Sutton v. Kaika, 285 P. 1, 141 Okl. 233.

S.D.—Sutton v. Town of Wetonka, 253 N.W. 64, 62 S.D. 339.

Wash.—State ex rel. Washington Mut. Sav. Bank v. City of Bellingham, 48 P.2d 609, 183 Wash. 415. 44 C.J. p 1236 note 4.

Status of city and scope of governing statute as of time of issuance of city's public improvement bonds has been held controlling in suit against city by holders of delinquent bonds.

—Brown-Crummer Inv. Co. v. City of Burbank, D.C. Cal., 17 F.Supp. 469, appeal dismissed, C.C.A., 97 F.2d 993.

Liability for illegal assessment

State of law when street improvement bonds were issued, not when they are due, determines whether city is liable to purchaser for amount of illegal assessment.—Powell v. City of Ada, C.C.A.Okl., 61 F.2d 283.

Ordinance effective after statute

Person owning interest coupons for improvements ordered by ordinance enacted prior to effective date of statute providing for local improvement guaranty fund, but effective after statute, has been held entitled to rely on ordinance and guaranty fund.—State ex rel. French v. City of Seattle, 59 P.2d 914, 187 Wash. 58.

86. Cal.—Balaam v. Pacific States Savings & Loan Co., 28 P.2d 1053, 219 Cal. 619.

Colo.—City of Aurora v. Krauss, 59 P.2d 79, 99 Colo. 12.

Pa.—Philadelphia Sav. Fund Soc. v. City of Bethlehem, 17 A.2d 750, 143 Pa.Super. 449.

S.D.—Sutton v. Town of Wetonka, 253 N.W. 64, 62 S.D. 339.

Effect of recitals in bonds in general see *infra* §§ 1967, 1968.

Bond supersedes assessment

When cost of street improvement is to be paid by issuance of a serial bond, issuance and delivery of legal bond supersede assessment, and rights of parties are fixed and determined by terms of bond.—Balaam v. Pacific States Savings & Loan Co., 28 P.2d 1053, 219 Cal. 612.

87. U.S.—City of Louisiana v. Taylor, Mo., 105 U.S. 454, 26 L.Ed. 1133.

Fla.—City of Fort Lauderdale v.

State ex rel. Elston Bank & Trust Co., 169 So. 584, 125 Fla. 89.

Ky.—City of Catlettsburg v. Trapp, 87 S.W.2d 621, 261 Ky. 347.

Okl.—City of Ardmore v. Hudson-Houston Lumber Co., 120 P.2d 988, 190 Okl. 58.

44 C.J. p 1236 note 5.

The obligation of city bond contract is not necessarily fixed by law as of date of bonds, but is fixed by law as of date of issuance of bonds.

—State ex rel. Woman's Catholic Order of Foresters v. City of Fort Myers, 196 So. 705, 143 Fla. 304.

Where statutes provide two methods by which payment of special assessments for payment of street improvement bonds could be enforced, both remedies are available to holder of bonds issued after effective date of the statutes, and a contrary provision of city ordinance or charter would be ineffective to cut off either of such remedies or relegate the bondholder to the sole remedy provided by prior statute.—City of Ardmore v. Hudson-Houston Lumber Co., 120 P.2d 988, 190 Okl. 58.

Sewer certificates

The rights, powers, and duties incident to sewer certificates are governed by statutes under which improvement district was created, assessments made, and certificates issued.—Purcell v. City of Carlsbad, C.C.A.N.M., 126 F.2d 748.

88. Okl.—City of Ardmore v. Hudson-Houston Lumber Co., 120 P.2d 988, 190 Okl. 58.

89. Fla.—City of Fort Lauderdale v. State ex rel. Elston Bank & Trust Co., 169 So. 584, 125 Fla. 89.

Ind.—Read v. Beczkiewicz, 18 N.E.2d 789, 215 Ind. 365, reheard 19 N.E.2d 465, 215 Ind. 365.

by the repeal of the statute under which the bonds were issued,⁹⁰ particularly where it is so provided by statute.⁹¹ The enabling statutes and ordinances enacted in pursuance thereof limit the property owner's burden with respect to special improvements,⁹² and charge the bondholder with notice of the measure of his rights and the limitations thereon,⁹³ and, in the absence of any specific guaranty, the risk of determining the validity of the securities rests on the purchaser.⁹⁴

Except where he has taken the bond subject to a statutory provision that no action shall be brought against the city by its creditors,⁹⁵ any holder of a

valid municipal bond, who has title thereto as against other persons,⁹⁶ has the right to maintain an action to require the municipality to live up to the terms of the bond,⁹⁷ and his right to sue the city cannot be impaired by subsequent legislation.⁹⁸ The ownership of municipal bonds necessarily includes the ownership of the right to interest secured by them and of the coupons attached.⁹⁹

Refunding bonds. Any original or subsequent holder of municipal bonds takes them subject to the authority of the municipal authorities to refund the bonds,¹ and, where a municipal corporation, already having the power to contract debts

Ky.—City of Catlettsburg v. Trapp, 87 S.W.2d 621, 261 Ky. 347.

N.C.—Nash v. Board of Com'rs of St. Pauls, 190 S.E. 475, 211 N.C. 301.

Ohio.—State ex rel. Bruml v. Village of Brooklyn, 49 N.E.2d 684, 141 Ohio St. 593.

Elimination of valueless right

Where bondholders' right to security of delinquent taxes is without value, its elimination as a feature of consideration in a settlement plan authorized by subsequent legislation to relieve pressing financial conditions existing in certain districts does not constitute an "impairment" of the bondholders' contract so as to defeat such legislation.—San Bernardino County v. Way, 117 P.2d 354, 18 Cal.2d 647.

Remedial legislation

Statute providing that, if municipality fails to enforce lien on special assessments, holders of bonds secured thereby may do so in manner provided for foreclosure of mortgages on realty has been held remedial in nature and not to impair obligation of contract, and, hence, applicable to bonds issued prior to enactment thereof.—Gray v. City of Santa Fe, D.C.N.M., 15 F.Supp. 1074, modified on other grounds, C.C.A., 89 F.2d 406.

Creating new town

As respects rights of holder of town bonds, a subsequent statute creating new town out of portion of old town and providing that new town should pay one half of old town's indebtedness has been held invalid.—Humphreys v. State, 145 So. 858, 108 Fla. 92.

90. Cal.—American Securities Co. v. Forward, 32 P.2d 343, 220 Cal. 566, 96 A.L.R. 1268.

Repeal as to penalty as remission thereof

Repeal of provision of statute providing for payment of penalties to city for default in principal or interest due on city improvement bond representing amount of assessment

levied against real property described therein has been held a remission of such penalties accruing prior to repeal of provision, and, hence, holder of bond was entitled to cancellation thereof after foreclosure without payment of statutory penalties to city for default which had occurred before amendment of statute.—Merchants Finance Corporation v. Waring, 51 P.2d 160, 10 Cal. App.2d 80.

91. Minn.—Batchelder v. City of Faribault, 3 N.W.2d 778, 212 Minn. 251.

The purpose of a statute providing that, notwithstanding repeal of statutes relating to bonds previously issued by municipalities, obligations of municipalities thereunder and duties of all public officers relating thereto should continue in respect of such bonds until they were fully paid, is to leave outstanding municipal bonds wholly unaffected as to validity and enforcement notwithstanding repeal of statutes under which they were issued.—Batchelder v. City of Faribault, supra.

92. U.S.—Purcell v. City of Carlsbad, C.C.A.N.M., 126 F.2d 748.

93. U.S.—Purcell v. City of Carlsbad, C.C.A.N.M., 126 F.2d 748—City of McLaughlin, S. D. v. Turgeon, C.C.A.S.D., 75 F.2d 402—Board of Com'rs of Rogers County v. Bristow Battery Co., D.C.Okl., 28 F.2d 195, reversed on other grounds, C.C.A., Bristow Battery Co. v. Board of Com'rs of Rogers County, Okl., 37 F.2d 504, certiorari denied Board of County Com'rs of Rogers County, Okl. v. Bristow Battery Co., 51 S.Ct. 23, 282 U.S. 543, 75 L.Ed. 748, and rehearing denied Bristow Battery Co. v. Board of Com'rs of Rogers County, Okl., 38 F.2d 562, certiorari denied Board of County Com'rs of Rogers County, Okl. v. Bristow Battery Co., 51 S.Ct. 23, 282 U.S. 843, 75 L.Ed. 748.

Mont.—State ex rel. Mueller v. Todd, 132 P.2d 154, 114 Mont. 35.

N.M.—Munro v. City of Albuquerque, 150 P.2d 733, 48 N.M. 306.

Notice to bona fide purchasers generally see infra § 1966.

94. U.S.—Lumbermen's Trust Co. v. Town of Ryegate, D.C.Mont., 50 F.2d 219, reversed on other grounds, C.C.A., 61 F.2d 14.

N.Y.—Bond & Goodwin v. Du Pont, 5 N.Y.S.2d 423, 254 App Div. 543, appeal denied Bond & Goodwin v. Dupont, 7 N.Y.S.2d 99, 255 App. Div. 761, affirmed Bond & Goodwin v. Du Pont, 21 N.E.2d 211, 280 N. Y. 715.

95. U.S.—Kennedy v. Sacramento, C.C.Cal., 19 F. 580.

96. Mich.—Schmid v. Frankfort, 104 N.W. 668, 141 Mich. 291.

Rights and remedies of holders of invalid securities see infra § 1960.

Full legal title

Deposit of bearer bond or coupon under agreement assigning and transferring bond or coupon to holder with agreement that holders should be vested as trustees of express trust with legal title to all bonds and coupons deposited and all rights and powers of owners thereof has been held to vest holder with full legal title and right to sue.—Bullard v. City of Cisco, Tex., 54 S.Ct. 177, 290 U.S. 179, 78 L.Ed. 254, 93 A.L.R. 141—City of Hialeah v. Harris, C.C.A.Fla., 83 F.2d 999.

97. Wash.—Hayes v. Seattle, 207 P. 607, 120 Wash. 372.

Form of action see infra § 1972.

98. Cal.—Bates v. Gregory, 22 P. 683, 3 Cal Unrep.Cas. 170.

Ill.—Weinhagen v. City of Herrin, 26 N.E.2d 525, 305 Ill.App. 158.

99. Pa.—Commonwealth v. Pittsburgh, 34 Pa. 496.

Right of purchaser from municipality to accrued interest coupons see supra § 1940.

1. La.—Martin v. Mayor & Board of Aldermen of Town of Westwego, 32 So.2d 711, 212 La. 439.

and levy and collect taxes for their payment, is authorized to fund such indebtedness and issue new bonds therefor, and the maturity of the bond issues is extended beyond the original dates, the contract rights of the original bond issues will be carried forward in the refunding issues,² and, where so provided, the refunding bonds should be paid by the same processes and from the same duly authorized sources of revenue as the refunded bonds were to be paid.³ The rights and remedies for the enforcement of the original bonds are carried into the refunding bonds,⁴ if no provision is made in the law under which the funding is made as to the means by which collection may be had.⁵ However, a statutory provision that the city may issue bonds to redeem local improvement bonds does not mean that the city must issue such redemption bonds.⁶

What law governs. Rights and liabilities arising out of transfers of municipal bonds or securities are governed by the law of the place where the transfers were made.⁷

§ 1957. Securities Payable Generally or from Special Tax or Fund

a. In general

2. Ark.—Hopkins v. Fields, 154 S. W.2d 22, 202 Ark. 890—Arkansas Mortgage & Securities Co. v. Street Imp. Dist., No. 419, 86 S.W. 2d 917, 191 Ark. 487.

3. Fla.—Fahs v. Kilgore, 187 So. 170, 136 Fla. 701.

4. Fla.—State v. City of Delray Beach, 191 So. 188, 140 Fla. 132, followed in 3 So.2d 510, 147 Fla. 741—State v. City of Pensacola, 166 So. 851, 123 Fla. 331.
44 C.J. p 1236 note 12.

5. Ala.—Graham v. Tuscumbia, 42 So. 400, 146 Ala. 449.
Ill.—People v. Lippincott, 81 Ill. 193.

6. Wash.—Buell v. City of Toppenish, 24 P.2d 431, 174 Wash. 79.

7. U.S.—First Nat. Bank v. Mayor and City Council of Baltimore, C. C.A.Md., 108 F.2d 600.

New York law applied

Where stock certificates issued by city of Baltimore were transferred in New York, New York law applied under Maryland decisions as regards whether owner of certificates was estopped from denying title of purchaser.—First Nat. Bank v. Mayor and City Council of Baltimore, *supra*.

8. U.S.—Judith Basin Irr. Dist. v. Malott, C.C.A.Mont., 73 F.2d 142, 97 A.L.R. 504.

Fla.—City of Deland v. State ex rel. Bond Realization Corporation, 162

So. 892, 120 La. 402—Little River Bank & Trust Co. v. Johnson, 141 So. 141, 143, 105 Fla. 212—State v. Baskin ex rel. Gillespie, 136 So. 262, 102 Fla. 329.

Mich.—Callahan v. City of Berkley, 12 N.W.2d 431, 307 Mich. 701, rehearing denied 14 N.W.2d 87, 307 Mich. 701.

Minn.—Wilke v. City of Duluth, 215 N.W. 511, 172 Minn. 374.

Or.—State ex rel. First Nat. Bank v. Melville, 41 P.2d 1071, 149 Or. 532.
Pa.—Palmer v. City of Erie, Com.Pl., 20 Erie Co. 400, affirmed 9 A.2d 378, 337 Pa. 5.

44 C.J. p 1237 note 15.

Absolute debt on maturity

Ohio—State ex rel. Bruml v. Village of Brooklyn, 49 N.E.2d 684, 141 Ohio St. 593.

Bonds pledging full faith, credit, and resources of city for retirement of principal and interest thereof, irrevocably obligate city, in good faith, to use such of its resources and taxing power as might be authorized or required by law for full and prompt payment of principal and interest on maturity.—State v. City of Lakeland, 16 So.2d 924, 154 Fla. 137.

9. Mich.—Callahan v. City of Berkley, 12 N.W.2d 431, 307 Mich. 701, rehearing denied 14 N.W.2d 87, 307 Mich. 701.

- b. Payable from special tax or fund
- c. Taxation
- d. Revenue from utility
- e. Anticipation warrants or notes

a. In General

Under some provisions, municipal bonds are regarded as general obligations of the municipal corporations, and the municipal corporation as being directly liable on the bonds.

Under the provisions of various municipal bonds, or of the constitution, statute, charter, or ordinance under which they were issued, the bonds are regarded as the direct, general, or absolute obligations of the municipal corporation,⁸ to the extent that the debt limitation is not exceeded,⁹ and the municipality is regarded as being directly liable on the bonds.¹⁰ The bonds, however, do not constitute a lien on any property owned by the municipality,¹¹ even though municipal property is to be acquired or improved by the proceeds of the bond,¹² unless such lien is expressly provided for.¹³ There is such direct or general liability on the municipality, even though there are also specific provisions relative to security or payment, as from a special fund,¹⁴ or where the securities, although payable out of a special fund or tax, are phrased

10. U.S.—Mather v. San Francisco, Cal., 115 F. 37, 52 C.C.A. 631.

Fla.—Klemm v. Davenport, 129 So. 904, 100 Fla. 627, 70 A.L.R. 156.
44 C.J. p 1237 note 17

Actions on bonds generally see *infra* § 1972.

11. Fla.—Durham v. Pentucket Groves, 189 So. 428, 138 Fla. 386, followed in Town of Polk City v. Block Twenty, 189 So. 927, 138 Fla. 609—State ex rel. Babson v. City of Sebring, 155 So. 669, 115 Fla. 176.

12. Fla.—State ex rel. Babson v. City of Sebring, *supra*.

Light and water bond

Fla.—State ex rel. Babson v. City of Sebring, *supra*.

13. Fla.—State ex rel. Babson v. City of Sebring, *supra*.

Improvement certificates guaranteed

Municipality issuing transferable improvement certificates is liable for payment of transferred certificates on their nonpayment by property owners on whose lands they constitute a lien under statute by which city guarantees payment of such certificates, since such statute must be read into certificates.—City of Saratoga v. Johnson, 167 So. 361, 123 Fla. 501.

14. Fla.—City of Deland v. State ex rel. Bond Realization Corporation, 162 So. 892, 120 Fla. 402—Little

as general obligations of the municipality;¹⁵ and such specific provisions are deemed to afford merely additional or collateral security for payment.¹⁶

Under such statutes, a municipality may appropriate money to pay its debts out of other and different sources of revenue than those particularly pledged in its bonds,¹⁷ and, accordingly, in case of a deficit in the special fund, the municipality may, in its discretion, provide for payment out of its general funds;¹⁸ but, where the bondholder's remedy, in case of nonpayment, is confined to the enforcement of the special assessments, the municipality may not enact an ordinance establishing a revolving fund for the payment of defaulted local improvement bonds.¹⁹ Since special assessment bonds are not negotiable, as discussed supra § 1950, holders or purchasers thereof have the same, and no greater, rights than the person to whom they were issued.²⁰ Where a bond contains a general obligation to pay, it cannot be converted into a

promise to pay from a particular fund, except on the plainest grounds of construction.²¹

b. Payable from Special Tax or Fund

- (1) In general
- (2) Liability for negligence or delinquency
- (3) Municipal corporation as agent or trustee

(1) In General

A bond which is made payable only out of a special tax or fund is not a general obligation of the municipal corporation, but is payable only out of funds derived from special assessments or other specified resources.

Where, under the provisions of the bonds or statutes relating thereto, the bonds or other securities are to be paid exclusively out of a special fund derived from special assessments or other specified sources, there is no general or primary obligation or liability on the part of the municipal corporation in respect thereof,²² and the rights and liabilities

River Bank & Trust Co. v. Johnson, 141 So. 141, 143, 105 Fla. 212—State v. Baskin ex rel. Gillespie, 136 So. 262, 102 Fla. 329—Klemm v. Davenport, 129 So. 904, 100 Fla. 627, 70 A.L.R. 156.

44 C.J. p 1237 note 17.

15. Fla.—City of Deland v. State ex rel. Bond Realization Corporation, 162 So. 892, 120 Fla. 402—Little River Bank & Trust Co. v. Johnson, 141 So. 141, 143, 105 Fla. 212.

16. U.S.—U. S. v. New Orleans, La., 98 U.S. 381, 25 L.Ed. 225.

44 C.J. p 1237 note 18.

17. Fla.—State ex rel. Harrington v. City of Daytona Beach, 160 So. 501, 118 Fla. 773—Klemm v. Davenport, 129 So. 904, 100 Fla. 627, 70 A.L.R. 156.

Pa.—Schuchman v. City of Pittsburgh, 41 A.2d 642, 351 Pa. 527, 157 A.L.R. 785.

18. Ky.—Hart v. Central City, 159 S.W.2d 18, 289 Ky. 431.

Mich.—Callahan v. City of Berkley, 12 N.W.2d 431, 307 Mich. 701, rehearing denied 14 N.W.2d 87, 307 Mich. 701.

Payment out of general funds not harmful

Where city apparently recognizing indebtedness from paving improvements as a general liability, when pressed by certain bondholders, paid out sufficient funds out of its general funds to leave a balance of assessments and the remaining and uncollected assessments were adequate to discharge the balance of the unpaid bonds, city was not harmed by being required to pay the holder of unpaid bonds out of its general

funds.—Palmer v. City of Erie, 9 A.2d 378, 337 Pa. 5.

19. Wash.—State ex rel. Booth v. Tatro, 92 P.2d 206, 199 Wash. 421—State ex rel. National Bank of Tacoma v. Tacoma, 166 P. 66, 97 Wash. 190.

20. Colo.—City of Sterling v. Commercial Sav. Bank of Sterling, 181 P.2d 361, 116 Colo. 369.

Ill.—Northern Trust Co. v. Village of Wilmette, 77 N.E. 169, 220 Ill. 417, 5 Ann.Cas. 193—Galt v. City of Chicago, 42 N.E.2d 115, 315 Ill.App. 91.

Wash.—State v. City of Vancouver, 295 P. 947, 160 Wash. 655.

Wyo.—Henning v. City of Casper, 57 P.2d 1264, 50 Wyo. 1, rehearing denied 62 P.2d 304, 50 Wyo. 1.

New refunding certificates

The provisions of city charter pledging paving assessments and other funds to payment of original refunding paving certificates, and the authority to deposit certificates with state treasurer, apply to proposed new refunding certificates, since the issuance of the new refunding certificates does not involve the creation of a new indebtedness and the holders of the new certificates are therefore vested with all the security of the holders of the old certificates.—State ex rel. Maestri v. Cave, 190 So. 631, 193 La. 419.

21. N.J.—Mutual Ben. Life Ins. Co. v. Elizabeth, 42 N.J.Law 235.

22. U.S.—Gray v. City of Santa Fe, C.C.A.N.M., 135 F.2d 374—Village of Brookfield v. Pentis, C.C.A.Ill., 101 F.2d 516—City of Jacksonville v. Bankers Life Co., C.C.A.Ill., 90 F.2d 141—Blanchard v. City of Cas-

per, C.C.A.Wyo., 81 F.2d 452—City of McLaughlin, S. D., v. Turgeon, C.C.A.S.D., 75 F.2d 402—City of Winner, S. D., v. Kelley, C.C.A.S. D., 65 F.2d 955—Life & Casualty Ins. Co. v. City of Florala, C.C.A. Ala., 63 F.2d 195, certiorari denied 54 S.Ct. 49, 290 U.S. 630, 78 L.Ed. 549—Lumbermen's Trust Co. v. Town of Ryegate, C.C.A.Mont., 61 F.2d 14—Brown-Crummer Inv. Co. v. City of Burbank, D.C.Cal., 17 F. Supp. 469, appeal dismissed, C.C. A., 97 F.2d 993—Real Estate Land, Title & Trust Co. v. Town of Fairfax, D.C.Okla., 11 F.Supp. 459, affirmed, C.C.A., 84 F.2d 675.

Ala.—Young v. City of Tusculumbia, 117 So. 306, 217 Ala. 683.

Cal.—Hammond v. City of Burbank, 59 P.2d 495, 6 Cal.2d 646, appeal dismissed 57 S.Ct. 316, 299 U.S. 519, 81 L.Ed. 387.

Idaho.—Oregon Short Line R. Co. v. Berg, 16 P.2d 373, 52 Idaho 499.

Ill.—Simpson v. City of Highwood, 23 N.E.2d 62, 372 Ill. 212, 124 A.L.R. 1459.

Ind.—Bloomington v. Citizens' Nat. Bank, 105 N.E. 575, 56 Ind.App. 446.

Iowa.—Bankers Life Co. v. City of Emmetsburg, 278 N.W. 311, 224 Iowa 1287.

Mich.—Callahan v. City of Berkley, 12 N.W.2d 431, 307 Mich. 701, rehearing denied 14 N.W.2d 87, 307 Mich. 701.

Mont.—State ex rel. Truax v. Town of Lima, 193 P.2d 1008—Griffin v. Opinion Pub. Co., 138 P.2d 580, 114 Mont. 502—State ex rel. Griffith v. City of Shelby, 87 P.2d 183, 107 Mont. 571.

Okla.—City of Okmulgee v. Young, 113 P.2d 373, 189 Okla. 25—First

of the municipality and of the bondholders depend on the provisions of the statute under which the bonds are issued.²³ Such a bond is no part of the municipality's indebtedness,²⁴ and there is no obligation to pay the bonds from the general funds of the municipality,²⁵ unless the special funds, applicable to the bonds, have been wrongfully di-

verted to the general funds.²⁶

Under such statutes, the bonds are generally payable only out of the special funds derived from special assessments or other specified sources²⁷ which never become a part of the city's general corporate funds;²⁸ and the assessments made inure to the benefit of the bondholders, whether or not the mu-

Nat. Bank v. Board of Education of City of Enid, 49 P.2d 1077, 174 Okl. 164—Moroney v. State ex rel. Southern Surety Co., 31 P.2d 926, 168 Okl. 69—State v. Armstrong, 13 P.2d 198, 158 Okl. 290.

Or.—City of Cascade Locks v. Carlson, 90 P.2d 787, 161 Or. 557.

Pa.—Reading Trust Co. v. Reading, Com.Pl., 41 Berks Co. 101—Palmer v. City of Erie, Com.Pl., 20 Erie Co. 400, affirmed 9 A.2d 378, 337 Pa. 5.

S.D.—Sutton v. Town of Wetonka, 253 N.W. 64, 62 S.D. 339.

Wash.—State ex rel. National Bank of Commerce of Seattle v. Stacy, 90 P.2d 264, 198 Wash. 708, 44 C.J. p 1237 note 20.

Unauthorized issuance of bonds

Bonds, payable from a special fund, are not rendered a primary obligation of the city, because of a statute authorizing the city to issue the bonds, where no election is held to authorize their issuance as required by statute.—Gray v. City of Santa Fe, C.C.A.N.M., 89 F.2d 406—City of McLaughlin, S. D., v. Turgeon, C.C.A.S.D., 75 F.2d 402.

Effect of validating statute

A statute validating as debts of municipality municipal public improvement bonds payable only out of benefit assessments is unconstitutional, and does not obligate city to pay street improvement bonds redeemable only out of special assessments, particularly where city was under no moral obligation to contractor or to bondholders.—Harbold v. City of Reading, 49 A.2d 817, 355 Pa. 253.

23. U.S.—Purcell v. City of Carlisbad, C.C.A.N.M., 126 F.2d 748.

Wash.—State ex rel. Booth v. Tatros, 92 P.2d 206, 199 Wash. 421—State ex rel. Kuehl v. City of Seattle, 79 P.2d 974, 195 Wash. 110—State ex rel. Washington Mut. Sav. Bank v. City of Bellingham, 48 P.2d 609, 183 Wash. 415.

Statute held valid

Mont.—Stanley v. Jeffries, 284 P. 184, 86 Mont. 114, 70 A.L.R. 166.

Rights and obligations

The only rights and only obligations conferred or imposed by such provisions are the rights of bondholders to proceed against city, and obligation of city to maintain fund out of which city undertook to satisfy obligation.—Commissioner of

Internal Revenue v. Pontarelli, C.C. A.7, 97 F.2d 793.

The words "local improvement bonds," as used in statute authorizing establishment by municipalities of a fund to guarantee payment of their local improvement bonds, refers not only to bonds issued to pay for physical improvements, but also includes bonds issued to pay for local improvements made through eminent domain proceedings; and the fact that the cost of eminent domain proceeding and boundaries of district may not be known when proceeding is ordered does not establish that statute providing for local improvement guaranty funds applies only to bonds issued to pay for physical improvements, and not to bonds issued in eminent domain proceeding.—State ex rel. Kuehl v. City of Seattle, 79 P.2d 974, 195 Wash. 110.

Taking over and operating property Pa.—Gemmell v. Calder, 3 A.2d 7, 332 Pa. 281.

24. Mont.—State ex rel. Truax v. Town of Lima, 193 P.2d 1008.

25. U.S.—Bryant v. Commissioners of Internal Revenue, C.C.A.9, 111 F.2d 9—Village of Brookfield v. Pentis, C.C.A.Ill., 101 F.2d 516.

Ill.—People ex rel. Anderson v. Village of Bradley, Kankakee County, 6 N.E.2d 240, 288 Ill.App. 162, reversed on other grounds People ex rel. Bradley v. Village of Bradley, 11 N.E.2d 415, 367 Ill. 301.

La.—State ex rel. McGregor v. Diamond, App., 167 So. 760.

44 C.J. p 1237 note 20 [a].

Effect of provision for tax levy

There is no general liability on the city notwithstanding provision for tax levy and for transferring "available funds" into bond redemption fund to discharge delinquencies on foreclosure sale.—Brown-Crummer Inv. Co. v. City of Burbank, D.C. Cal., 17 F.Supp. 469, appeal dismissed, C.C.A., 97 F.2d 993.

26. Ill.—People ex rel. Anderson v. Village of Bradley, Kankakee County, 6 N.E.2d 240, 288 Ill.App. 162, reversed on other grounds People ex rel. Anderson v. Village of Bradley, 11 N.E.2d 415, 367 Ill. 301.

27. U.S.—Village of Brookfield v. Pentis, C.C.A.Ill., 101 F.2d 516—City of McLaughlin, S. D. v. Turgeon, C.C.A.S.D., 75 F.2d 402—City of Winner, S. D. v. Kelley, C.C.A.S.

D., 65 F.2d 955—Lumbermen's Trust Co. v. Town of Ryegate, C.C. A.Mont., 61 F.2d 14—Harris v. City of Miami, D.C.Fla., 6 F.Supp. 305.

Ala.—Oppenheim v. City of Florence, 155 So. 859, 229 Ala. 50.

Colo.—Gordon v. Wheatridge Water Dist., 109 P.2d 899, 107 Colo. 128.

Fla.—State ex rel. Babson v. City of Sebring, 155 So. 669, 115 Fla. 176.

Ill.—People v. Anderson, 43 N.E.2d 997, 380 Ill. 158—Simpson v. City of Highwood, 23 N.E.2d 62, 372 Ill. 212, 124 A.L.R. 1459—Reconstruction Finance Corporation v. Calumet City, 57 N.E.2d 290, 324 Ill. App. 73.

Ky.—Knepple v. City of Morehead, 192 S.W.2d 189, 301 Ky. 417—Hart v. Central City, 159 S.W.2d 18, 280 Ky. 431—City of Irvine v. Wallace, 71 S.W.2d 974, 254 Ky. 564.

Mich.—Callahan v. City of Berkley, 12 N.W.2d 431, 307 Mich. 701, rehearing denied 14 N.W.2d 87, 307 Mich. 701.

Mont.—Griffin v. Opinion Pub. Co., 138 P.2d 580, 114 Mont. 502—State ex rel. Griffith v. City of Shelby, 87 P.2d 183, 107 Mont. 571.

N.M.—Munro v. City of Albuquerque, 93 P.2d 993, 43 N.M. 334.

Or.—City of Cascade Locks v. Carlson, 90 P.2d 787, 161 Or. 557.

Pa.—Nagle Engine & Boiler Works v. City of Erie, 38 A.2d 225, 350 Pa. 158.

Wash.—Buell v. City of Toppenish, 24 P.2d 431, 174 Wash. 79.

Wyo.—Henning v. City of Casper, 57 P.2d 1264, 50 Wyo. 1, rehearing denied 62 P.2d 304, 50 Wyo. 1.

44 C.J. p 1237 note 19.

As contract

A bond provision that bond and interest were payable solely out of specified installment of designated improvement assessment has been held contract binding on village and bondholder.—Rothschild v. Village of Calumet Park, 183 N.E. 337, 350 Ill. 330.

Effect of ultra vires guaranty

This rule applies notwithstanding the bonds provide that the city guarantees that the special assessments will provide sufficient revenue to retire the bonds, where the guaranty is ultra vires and void, and even as against an alleged bona fide purchaser for value.—City of McLaughlin, S. D. v. Turgeon, C.C.A.S.D., 75 F.2d 402.

28. Ill.—Simpson v. City of High-

municipality had power to issue the bonds under the statute.²⁹ Under such statutes, also, a municipality is liable for the payment of improvement bonds only to the extent of moneys actually collected and accumulated by it from assessments made against property benefited by the improvement;³⁰ and, under the express provisions of some bonds, the city is liable only for the amount collected on the assessments and as fast as collected,³¹ in the absence of a request by the bondholder that the city enforce assessments, and the giving of security for costs.³² Each annual installment of improvement assessments belongs to the series of bonds next falling due, and should be paid out only to the holders of bonds of such next succeeding period.³³ This does not mean that each installment of an assessment must be applied, when collected, to the payment of the corresponding bond;³⁴ but an assessment paid by one property owner cannot be diverted to the payment of principal or interest due from other property owners who are delinquent.³⁵ Under a statute requiring the bonds to show from which installment of the assessment they are payable, and authorizing payments against one installment from the surplus on other installments, bondholders have the right to insist that no other bonds be issued against installments from which their bonds are payable.³⁶

Application to principal and interest. The term "bonds," as used in a provision for the application of money collected from assessments to the payment of bonds, includes the obligation to pay interest as embodied in the bonds, and, therefore, all money collected from improvement assessments should be paid into one fund, out of which interest coupons should be paid first,³⁷ and any excess applied to the redemption of outstanding bonds.³⁸

Liability in rem. The liability on bonds payable out of special assessments or funds is a liability in rem against the property, and not a liability in personam.³⁹

(2) Liability for Negligence or Delinquency

By the weight of authority, the municipal corporation may be liable to bondholders for losses arising from negligence or delinquency, on the part of the municipal officers or agents, in failing to levy, collect, and apply adequate assessments, or to preserve and enforce the lien thereof.

Under some statutes providing for municipal bonds payable out of a special tax or fund, there is no liability,⁴⁰ direct or indirect,⁴¹ ex contractu or ex delicto,⁴² on the part of the municipal corporation for nonpayment of the bonds or interest thereon, even where there is negligence on the part of municipal officers in failing to levy and collect valid and adequate assessments,⁴³ or where there

wood, 23 N.E.2d 62, 372 Ill. 212, 124 A.L.R. 1459.

A city cannot increase its general fund by street improvement assessments or taxes collected for the benefit of bondholders—Hart v. Central City, 159 S.W.2d 18, 289 Ky. 431.

29. Wyo.—Henning v. Consolidated Building & Loan Co., 62 P.2d 540, 50 Wyo. 315.

30. Ind.—Read v. Abe Rosenblum & Sons, 58 N.E.2d 376, 115 Ind.App. 200—Rottger v. Union City, 196 N.E. 355, 101 Ind.App. 438.

Iowa—Bankers Life Co. v. City of Emmetsburg, 278 N.W. 311, 224 Iowa 1287.

More levying of tax does not discharge annual installment of interest and principal on municipality's bonds, even though substantial amount of tax is never paid.—Morris, Mather & Co. v. Port of Astoria, 15 P.2d 385, 141 Or. 251.

31. Pa.—First Catholic Slovak Union of U. S. v. City of Scranton, 167 A. 34, 311 Pa. 500.

32. Pa.—First Catholic Slovak Union of U. S. v. City of Scranton, supra.

33. Ind.—City of Hammond v. Welsh, 67 N.E.2d 390, 224 Ind. 349.

34. Ind.—Pittsburgh, etc., R. Co. v.

Schmuck, 103 N.E. 325, 181 Ind. 323.

35. Idaho.—New First Nat. Bank v. Weiser, 166 P. 213, 30 Idaho 15.

36. Ill.—People ex rel. Wilmette State Bank v. Village of Wilmette, 13 N.E.2d 990, 294 Ill.App. 362

37. Colo.—Elsiminger v. Elliott, 84 P.2d 823, 103 Colo. 216.

Separate funds not necessary

It is not necessary to create separate funds from principal payments on assessments and interest payments respectively and pay interest only out of the fund derived from interest payments.—Elsiminger v. Elliott, supra.

38. Colo.—Elsiminger v. Elliott, supra.

39. Idaho.—Oregon Short Line R. Co. v. Berg, 16 P.2d 373, 52 Idaho 499.

N.M.—Munro v. City of Albuquerque, 150 P.2d 733, 48 N.M. 306.

Okl.—City of Okmulgee v. Young, 113 P.2d 373, 189 Okl. 25—Moroney v. State ex rel. Southern Surety Co., 31 P.2d 926, 168 Okl. 69—State v. Armstrong, 13 P.2d 198, 158 Okl. 290.

Wash.—Buell v. City of Toppenish, 24 P.2d 431, 174 Wash. 79.

40. Ala.—Life & Casualty Ins. Co. v. City of Florala, Ala., C.C.A.Ala.,

63 F.2d 195, certiorari denied 54 S.Ct. 49, 290 U.S. 630, 78 L.Ed. 549. 44 C.J. p 1237 note 21.

41. Ala.—Steiner v. Capitol Heights, 105 So. 682, 213 Ala. 539—Capitol Heights v. Steiner, 101 So. 451, 211 Ala. 640.

42. Ala.—Steiner v. Capitol Heights, 105 So. 682, 213 Ala. 539—Capitol Heights v. Steiner, 101 So. 451, 211 Ala. 640.

Subsequent agreement

A city has been held not liable to bondholder under subsequent agreement in city's name by its governing body purporting to obligate city to pay percentage of specified assessments applicable on bonds—Life & Casualty Ins. Co. v. City of Florala, C.C.A.Ala., 63 F.2d 195, certiorari denied 54 S.Ct. 49, 290 U.S. 630, 78 L.Ed. 549.

43. U.S.—Smith v. Boise City, C.C.A. Idaho, 104 F.2d 923—Moore v. City of Nampa, C.C.A.Idaho, 18 F.2d 860, affirmed 48 S.Ct. 340, 276 U.S. 536, 72 L.Ed. 688

Okl.—Foote Co. v. City of McAlester, 172 P.2d 617, 197 Okl. 440, 172 A.L.R. 1027—Moroney v. State ex rel. Southern Surety Co., 31 P.2d 926, 168 Okl. 69—State v. Armstrong, 13 P.2d 198, 158 Okl. 290.

44 C.J. p 1238 note 24.

is a diversion of the funds collected.⁴⁴

By the great weight of authority, however, while the special fund raised by assessment,⁴⁵ rather than the general funds of the municipality, is primarily liable for the payment of the bonds, if the municipality, through its officers and agents, is guilty of negligence or delinquency in failing or refusing to levy, collect, and apply valid and ade-

quate assessments, or to preserve and enforce the lien thereof, in breach of its duty or contract, it is directly liable to the bondholders for the losses or damages thereby sustained,⁴⁶ even though it has received no benefit from the improvement for which the bonds were issued,⁴⁷ and it is also liable for losses arising from a diversion, misappropriation, improper application of, or failure to pay over, the fund collected,⁴⁸ and for interest on the amount

Reason for rule

The municipal officers are deemed to act in the premises, not as representatives of the municipality, but as special agents or instrumentalities to accomplish a public end.—*Moore v. City of Nampa*, C.C.A.Idaho, 18 F.2d 860, affirmed 48 S.Ct. 340, 276 U.S. 536, 72 L.Ed. 688.

Construction of statute

A statutory provision that the municipality shall not be liable to bondholders in case of failure to collect assessments must be strictly construed.—*Mott v. Helmes*, 20 So 2d 461, 246 Ala. 331.

The general taxpayers of the city cannot be held responsible "for the payment of local improvement bonds and defeat the protective purpose of the statute, whereby by express terms the general taxpayer is relieved of all cost of the local improvement."—*Moore v. City of Nampa*, C.C.A.Idaho, 18 F.2d 860, 862, certiorari denied 48 S.Ct. 38, 275 U.S. 515, 72 L.Ed. 401, affirmed 48 S.Ct. 340, 276 U.S. 536, 72 L.Ed. 688.

44. U.S.—*Life & Casualty Ins. Co. v. City of Florala*, C.C.A.Ala., 63 F.2d 195, certiorari denied 51 S.Ct. 49, 290 U.S. 630, 78 L.Ed. 549.

Ala.—In re Opinions of the Justices, 152 So. 901, 228 Ala. 140.

Okl.—*City of Okmulgee v. Young*, 113 P.2d 373, 189 Okl. 25.

44 C.J. p 1238 note 25.

Statute held not invalid

U.S.—*Life & Casualty Ins. Co. v. City of Florala*, C.C.A.Ala., 63 F.2d 195, certiorari denied 51 S.Ct. 49, 290 U.S. 630, 78 L.Ed. 549.

45. Pa.—*Scranton Dime Deposit, etc., Bank v. Scranton*, 57 A. 770, 208 Pa. 383.

46. U.S.—*Gray v. City of Santa Fe*, C.C.A.N.M., 135 F.2d 374—*City of Huron v. Evensen*, C.C.A.S.D., 113 F.2d 598, certiorari denied *City of Huron v. Evenson*, 61 S.Ct. 75, 311 U.S. 692, 85 L.Ed. 448—*City of Canton v. Tinan*, C.C.A.S.D., 104 F.2d 961, followed in *City of Canton v. Retirement Board*, 104 F.2d 963—*City of Jacksonville v. Bankers Life Co.*, C.C.A.Ill., 90 F.2d 141—*Gray v. City of Santa Fe*, C.C.A.N.M., 89 F.2d 406—*City of McLaughlin, S. D. v. Turgeon*, C.C.A.S.D., 75

F.2d 403—*Powell v. City of Ada*, C.C.A.Okl., 61 F.2d 283.

Colo.—*City of Sterling v. Commercial Sav. Bank of Sterling*, 181 P.2d 361, 116 Colo. 369

Idaho—*Maguire v. Whillock*, 124 P.2d 248, 63 Idaho 630

Ill.—*Prange v. City of Marion*, 48 N.E.2d 980, 319 Ill.App. 136

Iowa—*Bankers Life Co. v. Town of Spirit Lake*, 278 N.W. 320, 224 Iowa 1304—*First Nat. Bank v. Town of Elliott*, 233 N.W. 712, 211 Iowa 341, followed in *Crowdson v. Town of Elliott*, 233 N.W. 713—*Hauge v. City of Des Moines*, 224 N.W. 520, 207 Iowa 1209.

Ky.—*Knepple v. City of Morehead*, 192 S.W.2d 189, 301 Ky. 417—*City of Catlettsburg v. Trapp*, 87 S.W.2d 621, 261 Ky. 317—*City of Prestonsburg v. People's State Bank of Frankfort*, 72 S.W.2d 1043, 255 Ky. 252.

Pa.—*Vansciver v. Sharon Hill Borough*, 33 Pa.Dist. & Co 383, 28 Del Co 41, 30 Mun.L.R. 43—*Reading Trust Co. v. Reading, Com.Pl.*, 41 Berks Co. 51—*Palmer v. City of Erie, Com.Pl.*, 20 Erie Co. 400, affirmed 9 A.2d 378, 337 Pa. 5—*Swan v. Borough of Fountain Hill, Com.Pl.*, 18 Leh.L.J. 30

Wyo.—*Corpus Juris cited in Henning v. City of Casper*, 57 P.2d 1264, 1269, 50 Wyo. 1, rehearing denied 62 P.2d 304, 50 Wyo. 1. 44 C.J. p 1238 note 28.

Municipality held liable for damage or loss

(1) For failure to comply with statute and ordinance requiring assessments to be placed on tax roll and collected currently as taxes.—*Knepple v. City of Morehead*, 192 S.W.2d 189, 301 Ky. 417.

(2) For levying inadequate assessments for paving improvements.—*Palmer v. City of Erie*, 9 A.2d 378, 337 Pa. 5.

Municipality held not liable for damage or loss

(1) For failure of municipality issuing paving bonds to require county treasurer to advertise and offer for sale lots on which installments of special assessment were delinquent and failure of municipality or county treasurer to bid in lots for municipality.—*City of Winner, S. D. v. Kelley*, C.C.A.S.D., 65 F.2d 955.

(2) For insufficiency of assessment contrary to recital in bond, where delinquent installments of assessment, interest, and penalties exceeded aggregate of outstanding municipal paving bonds and interest thereon—*City of Winner, S. D. v. Kelley*, supra.

(3) For lack of diligence in collection of assessments, where city had acquired property which had been sold for delinquent special assessments, in the interest of the holders of bonds.—*Bankers Life Co. v. City of Emmetsburg*, 278 N.W. 311, 224 Iowa 1287.

(4) For failure to limit refunding issue to amount of unpaid special assessments as required by statute, notwithstanding an alleged loss in lien in amount of delinquent assessments resulting from county treasurer's failure to bring forward the amount of delinquent assessments on the tax lists, in absence of showing that injury resulted to the bondholders therefrom.—*Bankers Life Co. v. Town of Spirit Lake*, 278 N.W. 320, 224 Iowa 1304.

(5) For uncollectable assessments against a few small lots which had been sold for general taxes and for which certificate of purchase had been issued to purchaser.—*City of Sterling v. Commercial Sav. Bank of Sterling*, 181 P.2d 361, 116 Colo. 369.

47. Wyo.—*Henning v. City of Casper*, 57 P.2d 1264, 50 Wyo. 1, rehearing denied 62 P.2d 304, 50 Wyo. 1.

48. U.S.—*City of Jacksonville v. Bankers Life Co.*, C.C.A.Ill., 90 F.2d 141—*Miller v. Hamilton, Ark.*, 233 F. 402, 147 C.C.A. 338—*Whitaker & Co. v. City of Carbondale, D.C.* Ill., 55 F.Supp. 72—*Gray v. Town of Thermopolis, D.C.Wyo.*, 33 F. Supp. 77—*Smith v. Boise City, D.C.* Idaho, 18 F.Supp. 385.

Colo.—*Rising v. Hoffman*, 179 P.2d 430, 116 Colo. 63.

Idaho.—*Bosworth v. Anderson*, 280 P. 227, 47 Idaho 697, 65 A.L.R. 1372.

Ill.—*Village of Lansing v. Sundstrom*, 39 N.E.2d 987, 379 Ill. 121—*Reconstruction Finance Corporation v. Calumet City*, 57 N.E.2d 290, 324 Ill.App. 73—*Allbee v. City of Aurora*, 28 N.E.2d 742, 306 Ill.

thereby lost or diverted,⁴⁹ at the statutory rate from the date of the maturity of the bonds to the date of the accounting by which they are sought to be collected.⁵⁰ This, however, does not prevent the temporary use of idle bond funds, to pay principal and interest on other bonds, where such funds are to be seasonably repaid on the collection of taxes;⁵¹ and, under some statutes, if a loan is made by the city to a special improvement district fund from a revolving fund, the latter fund has a lien therefor on all unpaid assessments and moneys thereafter coming into the district fund,⁵² and accordingly the security of the revolving fund bondholders is not in any way impaired.⁵³

Such liability on the part of the municipality

for negligence or delinquency does not arise for a mere inconsequential irregularity,⁵⁴ or where the acts complained of do not constitute a breach of duty owed by the municipality to the bondholder.⁵⁵ A municipality may be held liable to bondholders for the loss or damage sustained by reason of its negligence or breach of duty, in failing to segregate moneys collected from special assessments to corresponding bond issues,⁵⁶ in failing to redeem bonds when there were sufficient available funds to do so,⁵⁷ in not making the security for the satisfaction of the bonds available for their payment,⁵⁸ or in failing to pay the bonds in their numerical order, causing a depletion in the fund out of which bonds are payable,⁵⁹ even though the bonds were

App. 457—Cook v. City of Staunton, 14 N.E.2d 696, 295 Ill.App. 111—Bankers Life Co. v. Village of Elmwood Park, 280 Ill.App. 524.
Iowa.—Hauge v. City of Des Moines, 224 N.W. 520, 207 Iowa 1209.
Wash.—City of Longview v. Longview Co., 150 P.2d 395, 21 Wash.2d 248—City of Tacoma v. Perkins, 296 P. 829, 161 Wash. 209.
44 C.J. p 1238 note 29.

Restoration of funds transferred from general fund

Where a city transfers funds from a general fund to an improvement fund to prevent default in the payment of installments on improvement bonds, special assessment for which had not been collected, and the money is not restored to the general fund until a day before the maturity of the remaining unpaid bonds, the amount of which exceeds the amount remaining in the improvement fund, unpaid bondholders are entitled to recover from the city the amount due on the bonds after exhausting the improvement fund, since the city's failure to restore the loan promptly led the bondholders to believe that additional assessments were not necessary to pay the bonds, and that they need not take other steps to protect their interests.—Wheeler v. City of Blackfoot, 45 P.2d 298, 55 Idaho 599.

Acting through agent

The fact that the municipality acted through agent, in collecting special assessment for municipal improvement bonds and in placing amount collected in special fund for payment of bonds, did not relieve municipality from liability for failure to pay bonds out of special fund.—Smith v. Boise City, D.C.Idaho, 18 F.Supp. 385.

Liability of treasurer

U.S.—Federal Deposit Ins. Corporation v. Casady, C.C.A.Okl., 106 F.2d 784.

49. U.S.—City of Canton v. Tinan, C.C.A.S.D., 104 F.2d 961.

Colo.—Rising v. Hoffman, 179 P.2d 430, 116 Colo. 63.

Ill.—Reconstruction Finance Corporation v. Calumet City, 57 N.E.2d 290, 324 Ill.App. 73—Prange v. City of Marion, 48 N.E.2d 980, 319 Ill. App. 136—Grand Carniolian Slovenian Catholic Union v. Village of Rockdale, 41 N.E.2d 218, 314 Ill. App. 308—Bankers Life Co. v. Village of Elmwood Park, 280 Ill.App. 524.

Iowa.—Bankers Life Co. v. Town of Spirit Lake, 278 N.W. 320, 224 Iowa 1304.

Pa.—Reading Trust Co. v. Reading, Com.Pl., 41 Berks 51.

Wash.—City of Longview v. Longview Co., 150 P.2d 395, 21 Wash. 2d 248.

50. Ill.—Prange v. City of Marion, 48 N.E.2d 980, 319 Ill.App. 136—Grand Carniolian Slovenian Catholic Union v. Village of Rockdale, 41 N.E.2d 218, 314 Ill.App. 308.

51. Ill.—Gates v. Switzer, 179 N.E. 837, 347 Ill. 353, 79 A.L.R. 1151.

52. Mont.—Hansen v. City of Havre, 114 P.2d 1053, 112 Mont. 207, 135 A.L.R. 1278.

53. Mont.—Hansen v. City of Havre, supra.

54. U.S.—City of Huron v. Evenson, C.C.A.S.D., 113 F.2d 598, certiorari denied City of Huron v. Evenson, 61 S.Ct. 75, 311 U.S. 692, 85 L.Ed. 448.

Iowa.—Bankers Life Co. v. City of Emmetsburg, 278 N.W. 311, 224 Iowa 1287.

Bondholder cannot complain of alleged irregularities in proceedings relating to paving district which could have been remedied if called to attention of city council at time of, or prior to, passage of assessing ordinance or of acts of city authorities in which contractor or engineer participated or acquiesced.—City of Sterling v. Commercial Sav. Bank of Sterling, 181 P.2d 361, 116 Colo. 369.

Excessive assessment

A city is not liable to holders of refunding street improvement bonds and of refunding sewer bonds because of alleged assessment of properties in excess of actual value, notwithstanding representation in bonds that all things had been done as required by law, since representation was merely a representation that the assessments had been fixed by the city council exercising its own judgment as to values, as authorized by statute, and equity had no authority to review the exercise of that discretion in absence of fraud.—Bankers Life Co. v. City of Emmetsburg, 278 N.W. 311, 224 Iowa 1287.

55. U.S.—Moore v. City of Nampa, Idaho, 48 S.Ct. 340, 276 U.S. 536, 72 L.Ed. 688.

Iowa.—Bankers Life Co. v. City of Emmetsburg, 278 N.W. 311, 224 Iowa 1287.

S.D.—Grand Lodge of Order of Sons of Herman of Minnesota v. City of Winner, 259 N.W. 278, 63 S.D. 390.

56. U.S.—Bessemer Inv. Co. v. City of Chester, C.C.A.Pa., 113 F.2d 571.

57. U.S.—Bessemer Inv. Co. v. City of Chester, supra.
Redemption of bonds generally see supra § 1954.

Surplus belonging to municipality at end of fiscal year over that required for lawful municipal obligations constituted "available funds" which city was required to apply to bond redemption fund to meet defaulted obligations under street improvement bonds.—Brown-Crummer Inv. Co. v. City of Burbank, D.C.Cal., 17 F. Supp. 469, appeal dismissed, C.C.A., 97 F.2d 993.

58. Pa.—Palmer v. City of Erie, 9 A. 2d 378, 337 Pa. 5.

59. Colo.—Town of Haxtun v. Wagnild, 127 P.2d 328, 109 Colo. 518—Wagnild v. Town of Haxtun, 108 P.2d 474, 106 Colo. 180.

issued without being submitted to the vote of the electors of the municipality.⁶⁰ It has been held, however, that the municipality is not liable for a failure to levy an amount sufficient to take care of interest,⁶¹ or for applying to the payment of interest funds which had been collected for the payment of principal.⁶²

Nature and extent of liability. The nature and extent of the municipality's liability to the bondholders for loss or damage sustained by reason of its negligence or delinquency with respect to the special assessment funds depend on the provisions of the particular statute.⁶³ Under a statute which gives a bondholder the right to enforce the special assessment, if the municipality should fail or refuse to do so, the liability of the municipality is contingent on, and subject to, the corresponding duty of the bondholder to exhaust all remedies available to him,⁶⁴ such as to compel the municipality by mandamus to perform its express or statutory duty, and enforce collection,⁶⁵ or to enforce collection of assessments by a suit to foreclose liens in his own behalf,⁶⁶ and, accordingly, although there may be circumstances under which the municipality may be held liable as for a breach of duty or contract,⁶⁷ the municipality's mere failure or refusal

to enforce the collection of the assessments, from which the bonds are to be paid, generally does not render it liable to the owners of the bonds,⁶⁸ even though the right of enforcement may thereby become barred by limitation,⁶⁹ and notwithstanding the city has continued to pay interest on the bonds after many assessments have become delinquent.⁷⁰

Under other statutes, the municipality is liable for its neglect or refusal to collect assessments only when the bondholder is unable to make the collection, as he is authorized by statute to do;⁷¹ and moreover it has been held that the municipality should not be held guilty of neglect or refusal to do its duty, in this connection, until it has been given an opportunity to make a reassessment, if a valid one can be made.⁷² Under still other statutes, if the municipality neglects or refuses to do all things necessary to levy the special assessments or enforce the payment thereof, it becomes primarily liable to pay the bonds.⁷³ Under some statutes, the municipality is under an implied contractual obligation to exercise diligence in levying and collecting the special assessments, and is liable to the bondholders for a breach of such obligation,⁷⁴ as where it fails to avail itself of all reasonable

N.M.—Crist v. Town of Gallup, 183 P.2d 156, 51 N.M. 286.

60. N.M.—Crist v. Town of Gallup, supra.

61. U.S.—Smith v. Boise City, C.C. A. Idaho, 104 F.2d 933.

62. Idaho.—Bosworth v. Anderson, 280 P. 227, 47 Idaho 697, 65 A.L.R. 1372.

Wyo.—Richardson v. City of Casper, 45 P.2d 1, 48 Wyo. 219.

63. U.S.—Purcell v. City of Carlsbad, C.C.A.N.M., 126 F.2d 748—Lumbermen's Trust Co. v. Town of Ryegate, D.C.Mont., 50 F.2d 219, reversed on other grounds, C. C.A., 61 F.2d 14.

Pa.—Lehigh Valley Trust Co. v. Reading, Com.Pl., 41 Berks Co. 57.

Reassessment of cost of improvement against property

U.S.—Powell v. City of Ada, C.C.A. Okl., 61 F.2d 283.

Statutory liability

A city's liability, if any, on refunding street improvement bonds and on refunding sewer bonds allegedly arising from mere fact that amount realized from the special taxes was insufficient to pay all the bonds was purely statutory.—Bankers Life Co. v. City of Emmetsburg, 278 N.W. 311, 224 Iowa 1287.

64. U.S.—Purcell v. City of Carlsbad, C.C.A.N.M., 126 F.2d 748.

65. U.S.—Purcell v. City of Carlsbad, supra.

Mandamus to compel municipality to perform duties see Mandamus § 144 b.

66. U.S.—Gray v. City of Santa Fe, N. M., C.C.A.N.M., 135 F.2d 374.

Necessity of notice of city's breach of obligation

U.S.—Gray v. City of Santa Fe, supra.

67. U.S.—Gray v. City of Santa Fe, C.C.A.N.M., 89 F.2d 406.

68. U.S.—Freeman v. Town of Gallup, C.C.A.N.M., 152 F.2d 273.

Wyo.—Richardson v. City of Casper, 45 P.2d 1, 48 Wyo. 219.

In Kentucky

(1) Under statutes, giving the bondholders the right to proceed to enforce delinquent assessments, the failure on the part of the city to collect any tax or installment thereon creates no liability against the city.—City of Corbin v. Becker, 180 S.W.2d 419, 297 Ky. 485.

(2) A contrary rule obtained under an earlier statute which gave the bondholders no right to enforce collection of delinquent assessments.—City of Catlettsburg v. Trapp, 87 S.W.2d 621, 261 Ky. 347.

69. U.S.—Freeman v. Town of Gallup, C.C.A.N.M., 152 F.2d 273.

Ind.—Read v. Abe Rosenblum &

Sons, 58 N.E.2d 376, 115 Ind.App. 200.

Notice to bondholders

Where collection of assessments for sewer improvement was barred by statute of limitations, city could not be held liable to bondholders for failure, to enforce collection of assessments, since bondholders were required to know that which was being done or left undone by city treasurer and were afforded ample remedies under the law, but within statute of limitations, to compel him to follow mandate of law in enforcement of assessments levied.—Read v. Abe Rosenblum & Sons, supra.

70. N.M.—Munro v. City of Albuquerque, 150 P.2d 733, 48 N.M. 306.

71. Wyo.—Henning v. City of Casper, 57 P.2d 1264, 50 Wyo. 1, rehearing denied 62 P.2d 304, 50 Wyo. 1.—Richardson v. City of Casper, 45 P.2d 1, 48 Wyo. 219.

72. Wyo.—Henning v. City of Casper, 57 P.2d 1264, 50 Wyo. 1, rehearing denied 62 P.2d 304, 50 Wyo. 1.

73. U.S.—City of Enid ex rel. Versluis v. Robinson, D.C.Okl., 39 F. Supp. 923—Oklahoma City v. Orthwein, C.C.A.Okl., 258 F. 190.

74. U.S.—Bessemer Inv. Co. v. City of Chester, C.C.A.Pa., 113 F.2d 571.

Pa.—Nagle Engine & Boiler Works

measures to collect the assessments or enforce the assessment lien,⁷⁵ unless such measures would probably have been futile because of the financial condition of the nonpaying abutting property owners.⁷⁶

Duty of municipality to create, collect, and apply special funds. Under some statutes, a municipality which has issued, or may thereafter issue, any special improvement bonds, is mandatorily required to create a fund for the purpose of guaranteeing the payment of the bonds and interest thereon;⁷⁷ and to keep taxes collected from property owners in a separate fund for the payment of the bonds.⁷⁸ Obligations or duties imposed on the municipality by the bonds, or by the statute or ordinance under which they were issued, to levy and collect special assessments, or to set apart money from other specified sources, and to make application thereof to the payment of the bonds or interest thereon, should be performed,⁷⁹ for the benefit of all holders of bonds and interest coupons as a class,⁸⁰ and, where the city officials fulfill their duties in connection with the special assessments, the city is relieved from liability to the holder of bonds payable from such assessments,⁸¹ even though there is a deficien-

cy in the amount collectable.⁸²

The duty of paying the bonds by special assessments is discharged only where the assessments are collected in season,⁸³ or, as has been held, where the special assessments are not collected in season, the city's statutory duty of paying the bonds is not fulfilled until a special additional tax is levied to make up the deficiency.⁸⁴ A provision pledging the city's full faith and credit to full performance of all its duties including the collection of special assessments for the payment of principal and interest places on the city the burden of exercising due care and diligence to collect assessments levied,⁸⁵ notwithstanding the city is not an insurer or guarantor of payment.⁸⁶ A bondholder may assume that the municipality will comply with such duty,⁸⁷ and the municipality may be held liable on the bonds although, under the ordinance, the city auditor is required to collect assessments, since the municipality must usually act through some agency.⁸⁸

Proration. The loss or damage for which the municipality is held liable should be prorated among all the bondholders as their interests may appear.⁸⁹

v. City of Erie, 38 A.2d 225, 350 Pa. 158, followed in Pennsylvania Boiler Works v. City of Erie, 38 A.2d 229, 350 Pa. 167—Palmer v. City of Erie, 9 A.2d 378, 337 Pa. 5—Price v. City of Scranton, 184 A. 253, 321 Pa. 504—Reading Trust Co. v. Reading, Com.Pl., 41 Berks Co. 101.

75. Pa.—Harbold v. City of Reading, 49 A.2d 817, 355 Pa. 253—Price v. City of Scranton, 184 A. 253, 321 Pa. 504—Lehigh Valley Trust Co. v. Reading, Com.Pl., 41 Berks Co. 57.

76. Pa.—Harbold v. City of Reading, 49 A.2d 817, 355 Pa. 253.

77. Cal.—American Securities Co. v. Forward, 32 P.2d 343, 220 Cal. 566, 96 A.L.R. 1268.

Fla.—State ex rel. Dos Amigos v. Lehman, 131 So. 533, 100 Fla. 1313. Utah.—Desert Sav. Bank v. Francis, 217 P. 1114, 62 Utah 85.

Legal promise secured by statutory obligation

Fla.—State ex rel. Gulf Life Ins. Co. v. City of Live Oak, 170 So. 608, 126 Fla. 132.

78. Okl.—State ex rel. Barnett v. Exchange Nat. Bank of Tulsa, 45 P.2d 759, 172 Okl. 361.

79. U.S.—Commissioner of Internal Revenue v. Pontarelli, C.C.A.7, 97 F.2d 793—Puget Sound Power, etc., Co. v. Seattle, D.C.Wash., 271 F. 955.

Fla.—State ex rel. Gillespie v. Baskin, 136 So. 262, 102 Fla. 329.

Ill.—Village of Lansing v. Sundstrom, 39 N.E.2d 987, 379 Ill. 121. Iowa.—Hauge v. City of Des Moines, 224 N.W. 520, 207 Iowa 1209.

Ky.—Knepfle v. City of Morehead, 192 S.W.2d 189, 301 Ky. 417.

Mont.—State ex rel. Clark v. Bailey, 44 P.2d 740, 99 Mont. 484.

Pa.—Harbold v. City of Reading, 49 A.2d 817, 355 Pa. 253—Reading Trust Co. v. Reading, Com.Pl., 41 Berks Co. 51—Palmer v. City of Erie, Com.Pl., 20 Erie Co. 400, affirmed 9 A.2d 378, 337 Pa. 5. 44 C.J. p 1238 note 34.

Implied obligation

Wyo.—Henning v. City of Casper, 57 P.2d 1264, 50 Wyo. 1, rehearing denied 62 P.2d 304, 50 Wyo. 1.

Duties and liabilities determined by statute

Where paving ordinances contained promise of city to enforce collection of assessment but the promise was one to perform the services which statute pursuant to which ordinances were passed or justified, required city to perform, the duties and responsibilities, if any, of the city were required to be determined by the statute.—Munro v. City of Albuquerque, 150 P.2d 733, 48 N.M. 306.

Under a statute making the municipality liable only for the collection of the special assessments, a city is responsible for the bona fide collection of the assessments.—Cruzen v. Boise City, 74 P.2d 1037, 58 Idaho 406.

80. Fla.—State ex rel. Gillespie v. Baskin, 136 So. 262, 102 Fla. 329.

81. Ky.—City of Irvine v. Wallace, 71 S.W.2d 974, 254 Ky. 564.

S.D.—Grand Lodge of Order of Sons of Herman of Minnesota v. City of Winner, 259 N.W. 278, 63 S.D. 390.

Wyo.—Henning v. City of Casper, 57 P.2d 1264, 50 Wyo. 1, rehearing denied 62 P.2d 304, 50 Wyo. 1.

82. Wyo.—Henning v. City of Casper, supra—Richardson v. City of Casper, 45 P.2d 1, 48 Wyo. 219.

83. Fla.—Rountree v. State, 135 So. 888, 102 Fla. 246.

84. Fla.—Rountree v. State, supra.

85. U.S.—City of McLaughlin, S. D. v. Turgeon, C.C.A.S.D., 75 F.2d 402.

N.Y.—Snell v. City of Long Beach, 27 N.Y.S.2d 164, affirmed 33 N.Y.S.2d 923, 263 App.Div. 1021, appeal denied 35 N.Y.S.2d 727, 264 App. Div. 782, affirmed 49 N.E.2d 616, 290 N.Y. 649.

86. U.S.—City of McLaughlin, S. D., v. Turgeon, C.C.A.S.D., 75 F.2d 402.

87. U.S.—City of McLaughlin, S. D., v. Turgeon, supra.

88. U.S.—City of McLaughlin, S. D., v. Turgeon, supra.

89. Colo.—City of Sterling v. Commercial Sav. Bank of Sterling, 181 P.2d 361, 116 Colo. 369.

Trust funds

U.S.—City of Jacksonville v. Bank-

(3) Municipal Corporation as Agent or Trustee

The municipal corporation is generally regarded as an agent or trustee in charge of the special funds, as trust funds, for the benefit of the bondholders, and is charged with all the duties of such a fiduciary.

According to some authorities, where a city has issued improvement bonds and pledged special assessments or funds therefor, the city is not a guarantor of the bonds,⁹⁰ but, although there is authority to the contrary,⁹¹ a municipal corporation, through its officers, has been held merely an agent⁹² or trustee of the special funds for the benefit of the bondholders,⁹³ since the funds collected belong to the bondholders, and not to the municipality;⁹⁴ and the municipality is charged with all the duties of such a fiduciary, including, under some statutes,

the obligations to spread the assessment, collect it, and make disbursements thereof, in conformity with the statute,⁹⁵ as well as never to use its position, as agent or trustee, to profit directly or indirectly by the execution of its powers, actual or assumed, without the consent of its principal, the bondholders.⁹⁶ The trust has also been held to be for the benefit of the municipality and taxpayers having a beneficial interest in the funds collected.⁹⁷

Any funds collected by the municipality applicable to the payment of the bonds and vouchers, together with interest earned on such funds,⁹⁸ even though the rate of interest, under the statute, exceeds the rate of interest which the bonds bear,⁹⁹ are trust funds, for which the municipality must account, for the benefit of the holders of bonds

ers Life Co., C.C.A.Ill., 90 F.2d 141.

90. U.S.—City of McLaughlin, S. D. v. Turgeon, C.C.A.S.D., 75 F.2d 402—Jewell v. Superior, Wis., 135 F. 19, 67 C.C.A. 623, certiorari denied 25 S.Ct. 801, 198 U.S. 583, 49 L.Ed. 1173.

91. Wyo.—Henning v. City of Casper, 57 P.2d 1264, 50 Wyo. 1, rehearing denied 62 P.2d 301, 50 Wyo. 1.

City authorities are not agents of local improvement contractor or bondholder in levy and collection of improvement assessments.—Henning v. City of Casper, supra.

92. U.S.—Purcell v. City of Carlsbad, C.C.A.N.M., 126 F.2d 748.

Ga.—Bainbridge v. Jester, 121 S.E. 798, 157 Ga. 505, 33 A.L.R. 1406. Ky.—Knepple v. City of Morehead, 192 S.W.2d 189, 301 Ky. 417—Hart v. Central City, 159 S.W.2d 18, 289 Ky. 431.

Okl.—Town of Shattuck v. Barcafer, 137 P.2d 238, 192 Okl. 336—Beggs v. Kelly, 238 P. 466, 110 Okl. 271. Pa.—Reading Trust Co. v. Reading, Com.Pl., 41 Berks Co. 101.

Municipal officers, in certifying delinquent assessments for street improvements to county treasurer, merely act as agents for bondholders—Moroney v. State ex rel. Southern Surety Co., 31 P.2d 926, 168 Okl. 69—State v. Armstrong, 13 P.2d 198, 158 Okl. 290.

93. U.S.—Purcell v. City of Carlsbad, C.C.A.N.M., 126 F.2d 748—Smith v. Boise City, C.C.A.Idaho, 104 F.2d 933—Village of Brookfield v. Pentis, C.C.A.Ill., 101 F.2d 516—City of Jacksonville v. Bankers Life Co., C.C.A.Ill., 90 F.2d 141—Whitaker & Co. v. City of Carbondale, D.C.Ill., 55 F.Supp. 72—Smith v. Boise City, D.C.Idaho, 18 F.Supp. 385—Gray v. City of Santa Fe, D.C.N.M., 15 F.Supp. 1074, modified

on other grounds, C.C.A., 89 F.2d 406.

Ala.—City of Carbon Hill v. Merchants Bank & Trust Co., 185 So. 387, 237 Ala. 55.

Colo.—Town of Haxtun v. Wangnild, 127 P.2d 328, 109 Colo. 518—Wangnild v. Town of Haxtun, 103 P.2d 474, 106 Colo. 180.

Fla.—City of Winter Haven v. Summerlin, 154 So. 863, 114 Fla. 727.

Ill.—Schreiber v. Cook Co., 58 N.E.2d 40, 388 Ill. 297, 155 A.L.R. 1162—Village of Lansing v. Sundstrom, 39 N.E.2d 987, 379 Ill. 121—Hochamer v. Village of Elmwood Park, 198 N.E. 345, 361 Ill. 422, 102 A.L.R. 196—People ex rel. First Nat. Bank of Stevens Point, Wis. v. Village of Stickney, 37 N.E.2d 883, 312 Ill.App. 179—How & Co. v. City of Chicago, 29 N.E.2d 388, 306 Ill.App. 571.

Ky.—Hart v. Central City, 159 S.W.2d 18, 289 Ky. 431.

Wash.—City of Longview v. Longview Co., 150 P.2d 395, 21 Wash. 2d 248.

Statutory trustee

U.S.—Jewell v. Superior, Wis., 135 F. 19, 67 C.C.A. 623, certiorari denied 25 S.Ct. 801, 198 U.S. 583, 49 L.Ed. 1173.

Ala.—City of Mobile v. Smith, 136 So. 851, 223 Ala. 480.

Position similar to trustee

Ill.—People v. Anderson, 43 N.E.2d 997, 380 Ill. 158.

94. U.S.—Bank of Burlington v. City of Murphysboro, C.C.A.Ill., 96 F.2d 899.

Okl.—Town of Shattuck v. Barcafer, 138 P.2d 238, 162 Okl. 336.

As private property

Any funds collected by the municipality applicable to the payment of the bonds and vouchers are private property and belong to the bondholders.—Smith v. Boise City, D.C.Idaho, 18 F.Supp. 385.

95. U.S.—Village of Brookfield v. Pentis, C.C.A.Ill., 101 F.2d 516—City of Jacksonville v. Bankers Life Co., C.C.A.Ill., 90 F.2d 141.

Colo.—City of Sterling v. Commercial Sav. Bank of Sterling, 181 P.2d 361, 116 Colo. 369.

Ill.—People ex rel. First Nat. Bank of Stevens Point, Wis. v. Village of Stickney, 37 N.E.2d 883, 312 Ill. App. 179—How & Co. v. City of Chicago, 29 N.E.2d 388, 306 Ill. App. 571.

Ky.—Hart v. Central City, 159 S.W.2d 18, 289 Ky. 431.

The municipal officers are presumed to do their legal duty as such trustees—Schreiber v. Cook County, 58 N.E.2d 40, 388 Ill. 297, 155 A.L.R. 1162.

Duty of city attorney to enforce collection

U.S.—Gray v. City of Santa Fe, C.C.A.N.M., 135 F.2d 374.

96. Ky.—Hart v. Central City, 159 S.W.2d 18, 289 Ky. 431.

Profits from resale of property purchased

Ky.—Hart v. Central City, supra.

97. Ala.—City of Carbon Hill v. Merchants Bank & Trust Co., 185 So. 387, 237 Ala. 55.

Fla.—City of Winter Haven v. Summerlin, 154 So. 863, 114 Fla. 727.

98. Ill.—Cook v. City of Staunton, 14 N.E.2d 696, 295 Ill.App. 111.

Ind.—Read v. Beczkiewicz, 18 N.E.2d 789, 215 Ind. 365, reheard 19 N.E.2d 465, 215 Ind. 365—Conter v. Lincoln Nat. Life Ins. Co., 8 N.E.2d 232, 212 Ind. 125.

Okl.—Oklahoma City v. Duhme, 145 P. 408, 45 Okl. 75.

Wash.—Lynn v. City of Longview, 131 P.2d 164, 15 Wash.2d 528, 143 A.L.R. 1336.

99. Colo.—Rising v. Hoffman, 179 P.2d 430, 116 Colo. 63.

Okl.—Oklahoma City v. Duhme, 145 P. 408, 45 Okl. 75.

issued against such funds,¹ including the payment of interest on the bonds.² This trust fund doctrine, however, has been held not to apply to any funds which have not been collected,³ except to the extent that unpaid assessments are made trust funds by statute.⁴ It has also been held that the municipality is not liable for collected assessments with which the treasurer has absconded, on the theory that he is an agent for whose default the municipality is liable;⁵ and that, where the officers of the city, in levying and collecting the assessments, are not acting as agents of the city, but as special agents to accomplish a public end, the city is not chargeable with their negligence.⁶ Under some statutes, the municipality assumes no obligation, except that it stands as a trustee obligated to collect the installments and interest from the property owners,⁷ and no liability attaches to it if such owner fails to pay interest,⁸ and, if for any reason a full collection of an installment or interest is not made, the deficiency must fall on the bondholders and not on the municipality.⁹

Relation as contractual. Under some statutes, the relation between the municipality and the bondholders with respect to a sinking fund and special

assessment deficiency fund is contractual, and is not a relation of trust, but that of debtor only,¹⁰ and the holders of past-due bonds are not entitled to an accounting by the city for amounts payable into such funds.¹¹ Where, as authorized by the statute, a property owner signs a waiver and secures the right to pay the assessments in deferred payments, and then elects to pay the entire assessment, the lien on the property is to that extent discharged, as discussed supra § 1569, and the city becomes the principal obligor on the bond to the extent of payments of assessments received by it,¹² notwithstanding a misappropriation or misapplication of the amounts collected by its officers,¹³ as where by error the funds are misapplied to the payment of bonds other than the correct ones;¹⁴ and, if prepaid assessments are lost or frozen in closed banks, the city must bear the loss rather than the bondholders.¹⁵

C. Taxation

The right of a bondholder to have taxes levied, as directed by law, for the payment of the bonds is a contractual right which cannot be affected by subsequent legislation.

Under some statutes, in levying an assessment

1. U.S.—Fidelity Trust Co. v. Village of Stickney, C.C.A.Ill., 129 F.2d 506—Smith v. Boise City, C. C.A. Idaho, 104 F.2d 933—Village of Brookfield v. Pentis, C.C.A.Ill., 101 F.2d 516—Bank of Burlington v. City of Murphysboro, C.C.A.Ill., 96 F.2d 899—City of Jacksonville v. Bankers Life Co., C.C.A.Ill., 90 F.2d 141—Whitaker & Co. v. City of Carbondale, D.C.Ill., 55 F.Supp. 72—City of Clinton, Okl., ex rel. Schuetter, v. First Nat. Bank in Clinton, D.C.Okl., 39 F.Supp. 909—Gray v. Town of Thermopolis, D. C.Wyo., 33 F.Supp. 77—Smith v. Boise City, D.C. Idaho, 18 F.Supp. 385—Brown-Crummer Inv. Co. v. City of Burbank, D.C.Cal., 17 F. Supp. 469, appeal dismissed, C.C. A., 97 F.2d 993—Carnegie Nat. Bank v. City of Wolf Point, D.C. Mont., 4 F.Supp. 385.
2. Colo.—Rising v. Hoffman, 179 P.2d 430, 116 Colo. 63.
- Fla.—City of Winter Haven v. Summerlin, 154 So. 863, 114 Fla. 727.
- Idaho—Cruzen v. Boise City, 74 P.2d 1037, 58 Idaho 406—Wheeler v. City of Blackfoot, 45 P.2d 298, 55 Idaho 599—Meyers v. City of Idaho Falls, 11 P.2d 626, 52 Idaho 81.
- Ill.—Friedman v. City of Chicago, 30 N.E.2d 36, 374 Ill. 545—Lubezny v. Ball, 53 N.E.2d 988, 323 Ill. App. 78, reversed on other grounds 59 N.E.2d 645, 389 Ill. 263—Prange v. City of Marion, 48 N.E.2d 980, 319 Ill. App. 136—People ex rel. First Nat. Bank of Stevens Point, Wis., v. Village of Stickney, 37 N.E.2d 883, 312 Ill. App. 179—Viehweg v. City of Mount Olive, 19 N.E.2d 211, 298 Ill. App. 412—Siefker v. City of Chicago Heights, 17 N.E.2d 368, 297 Ill. App. 113—Cook v. City of Staunton, 14 N.E.2d 696, 295 Ill. App. 111—Bankers Life Co. v. Village of Elmwood Park, 280 Ill. App. 524.
- Okl.—State ex rel. Barnett v. Exchange Nat. Bank of Tulsa, 45 P.2d 759, 172 Okl. 361.
- Wash.—Keyes v. City of Tacoma, 120 P.2d 533, 12 Wash.2d 54—Lynn v. City of Longview, 131 P.2d 164, 15 Wash.2d 528, 143 A.L.R. 1336—City of Tacoma v. Perkins, 296 P. 829, 161 Wash. 209.
2. U.S.—Gray v. City of Santa Fe, C.C.A.N.M., 135 F.2d 374—City of Clinton, Okl., ex rel. Schuetter v. First Nat. Bank in Clinton, D.C. Okl., 39 F.Supp. 909.
- Wash.—Lynn v. City of Longview, 131 P.2d 164, 15 Wash.2d 528, 143 A.L.R. 1336.
3. U.S.—Fidelity Trust Co. v. Village of Stickney, C.C.A.Ill., 129 F.2d 506—Smith v. Boise City, C.C. A. Idaho, 104 F.2d 923.
4. Cal.—Thompson v. Clark, 57 P.3d 490, 6 Cal.2d 285.
5. U.S.—Real Estate Land, Title & Trust Co. v. Town of Fairfax, D. C.Okl., 11 F.Supp. 459, affirmed, C. C.A., 84 F.2d 675.
6. U.S.—Smith v. Boise City, C.C.A. Idaho, 104 F.2d 933.
7. Ill.—Hoehamer v. Village of Elmwood Park, 198 N.E. 345, 361 Ill. 422, 102 A.L.R. 196.
8. Ill.—Hoehamer v. Village of Elmwood Park, supra.
9. Ill.—Hoehamer v. Village of Elmwood Park, supra—Rothschild v. Village of Calumet Park, 183 N.E. 337, 350 Ill. 330.
10. Ill.—Bryant v. Commissioner of Internal Revenue, C.C.A.9, 111 F. 2d 9.
- Ind.—Kimes v. City of Gary, 66 N.E. 2d 888, 117 Ind. 294.
11. Ind.—Kimes v. City of Gary, supra.
12. Ind.—City of Hammond v. Welsh, 67 N.E.2d 390, 224 Ind. 349—Read v. Beczkiewicz, 18 N.E.2d 789, 215 Ind. 365, reheard 19 N.E. 2d 465, 215 Ind. 365—City of Hammond v. Melville, 52 N.E.2d 845, 114 Ind. App. 602.
13. Ind.—City of Hammond v. Welsh, 67 N.E.2d 390, 224 Ind. 349—Read v. Beczkiewicz, 18 N.E.2d 789, 215 Ind. 365, reheard 19 N.E. 2d 465, 215 Ind. 365—City of Hammond v. Melville, 52 N.E.2d 845, 114 Ind. App. 602.
14. Ind.—Read v. Beczkiewicz, 18 N.E.2d 789, 215 Ind. 365, reheard 19 N.E.2d 465, 215 Ind. 365.
15. Ind.—Read v. Beczkiewicz, supra.

and issuing bonds to be paid by the municipality from its tax collected fund, a direct contractual relationship arises between the municipal corporation and a bondholder,¹⁶ and, where there is a valid law, at the time of their issuance, directing a tax to be levied for their payment, the law for the tax becomes a part of the contract,¹⁷ and a failure to levy sufficient special taxes to cover principal and accrued interest constitutes a breach of such obligation.¹⁸ The right conferred on the bondholders thereby cannot be impaired by subsequent legislation¹⁹ or even by a subsequent constitutional provision.²⁰ The fact that the bonds have been reduced to judgment does not affect the bondholders' right to have the municipal officials levy a tax on lands for the purpose of paying the judgment.²¹ While a limitation on the taxing power of the municipality is binding both on the municipality²² and a purchaser or holder of its bonds,²³ the bondholder is entitled to insist on the full and proper exercise of the taxing power within the limitation.²⁴

A promise to pay contained in municipal bonds "without relief from the valuation or appraisal laws of the state" is a mere waiver by the debtor of the benefit of valuation or appraisal in case the obligation shall be enforced by execution at law,²⁵ and cannot be construed to require levies for payment of the bonds to be made on the same valuation that existed in the municipality when the bonds were issued.²⁶ A tax levied and collected as required by law to pay the interest²⁷ or the prin-

cipal²⁸ of specific bonds cannot be diverted to other purposes. If the municipality fails to collect a tax for a special fund from which local improvements are payable, the municipality is not liable to pay the bonds from its general fund;²⁹ nor is it liable because the special taxes are insufficient to pay the bonds, as a result of the shrinkage in the market value of real estate.³⁰

d. Revenue from Utility

Under some statutes, the special net revenue derived from the operation of a revenue-producing utility must be applied to the payment of principal and interest on bonds issued in aid of such utility.

In the absence of a constitutional or statutory provision to the contrary, a municipal corporation may voluntarily use unencumbered funds derived from any source to pay revenue bonds issued for special purposes;³¹ and a statute authorizing a sale of bonds by a utility district and a tax levy for the payment thereof does not authorize an issuance of bonds to be paid out of income derived from property purchased with the proceeds of the bond issue.³² However, under statutes authorizing a municipality to issue bonds or other securities in aid of the construction and operation of various public utilities or enterprises, as discussed supra §§ 1907, 1908, and authorizing the municipality to pledge future net income or revenue from the operation of such utility or enterprise to the payment of the bonded indebtedness,³³ the special net revenue or income derived from the operation

16. U.S.—*Bryant v. Commissioner of Internal Revenue*, C.C.A.9, 111 F.2d 9.

17. U.S.—*Bryant v. Commissioner of Internal Revenue*, supra.

Okl.—*Perrine v. Bonaparte*, 282 P. 332, 140 Okl. 165—*Pitts v. Allen*, 281 P. 126, 138 Okl. 295.

Pa.—*Clark v. City of Philadelphia*, 196 A. 384, 328 Pa. 521, 115 A.L.R. 212.

44 C.J. p 1238 note 46.

Power to tax for payment of bonds see infra § 1997.

As between bondholders and municipality, bondholder may enforce payment of bonds as general obligations of city by ad valorem tax on all property.—*Klemm v. Davenport*, 129 So. 904, 100 Fla. 627, 70 A.L.R. 156.

Rate of taxation which municipality is authorized to levy at time of issuance of bonds by it becomes part of obligation of contract for payment of such bonds.—*City of Decatur v. Thames Bank & Trust Co.*, C.C.A.1a., 84 F.2d 105.

18. Iowa.—*Hauge v. City of Des Moines*, 224 N.W. 520, 207 Iowa 1209.

19. Cal.—*Meyer v. Brown*, 26 P. 281, 65 Cal. 583.

44 C.J. p 1238 note 47.

20. U.S.—*Sibley v. Mobile*, C.C.A.1a., 22 F.Cas.No.12,829, 3 Woods 535.

21. U.S.—*Brown-Crummer Inv. Co. v. Town of North Miami*, D.C.Fla., 11 F.Supp. 73, 77.

Reason for rule

"The judgment carries with it all rights which attached to the original bonds and coupons."—*Brown-Crummer Inv. Co. v. Town of North Miami*, supra.

22. N.C.—*Gaston v. Citizens' Nat. Bank*, 81 S.E. 755, 165 N.C. 507.

23. U.S.—*Beaulieu v. Pleasant Hill*, C.C.Mo., 14 F. 222, 4 McCrary 554. Tex.—*Austin v. Cahill*, 88 S.W. 542, 89 S.W. 552, 99 Tex. 172.

24. U.S.—*Beaulieu v. Pleasant Hill*, C.C.Mo., 14 F. 222, 4 McCrary 554.

25. U.S.—*U. S. v. Cicero*, C.C.Ind., 41 F. 83, affirmed 50 F. 147, 1 C. C.A. 147.

26. U.S.—*U. S. v. Cicero*, supra.

27. U.S.—*Ranger v. New Orleans*, C. C.La., 20 F.Cas.No.11,564, 2 Woods

128, reversed on other grounds 98 U.S. 381, 25 L.Ed. 225.

28. Ill.—*Aurora v. Chicago, etc.*, R. Co., 10 N.E. 27, 119 Ill. 246.

44 C.J. p 1239 note 55.

29. U.S.—*Bryant v. Commissioner of Internal Revenue*, C.C.A.9, 111 F.2d 9.

30. Iowa.—*Bankers Life Co. v. City of Emmetsburg*, 278 N.W. 311, 224 Iowa 1287.

31. Ala.—*Kendrick v. City of Alabama*, 5 So.2d 82, 242 Ala. 112—*Wheells v. Phenix City*, 2 So.2d 776, 241 Ala. 310.

32. Cal.—*Lassen Municipal Utility Dist. v. Hopper*, 53 P.2d 347, 5 Cal. 2d 18.

33. Ariz.—*Guthrie v. City of Mesa*, 56 P.2d 655, 47 Ariz. 336.

Ark.—*Kitchens v. City of Paragould*, 90 S.W.2d 761, 192 Ark. 271.

Mich.—*Gentsler v. Smith*, 31 N.W. 2d 668, 320 Mich. 394.

Tenn.—*Tennessee Electric Power Co. v. City of Chattanooga*, 114 S.W. 2d 441, 172 Tenn. 505.

Tex.—*City of El Campo v. South Texas Nat. Bank of San Antonio*,

of such a revenue-producing utility or enterprise must be applied to the payment of principal and interest on the bonds or securities so issued,³⁴ and may not be diverted to other utilities or purposes,³⁵ except to another utility or purpose with which the revenue-producing utility is intimately connected and operated.³⁶ The object of a statute authorizing such revenue bonds or securities for a particular utility is that a portion of the income be set aside for the bonds and interest only after the expenses of the operation and maintenance of the utility are taken care of;³⁷ and the obligations of such bonds or securities may be paid only from the revenues of such public utilities,³⁸ and do not constitute debts against, or general obligations

of, the municipality to be enforced by, or paid from, taxes assessed against general property,³⁹ or from other general funds or revenues of the city.⁴⁰ An essential prerequisite to the practical validity or enforcement of such bonds secured by an encumbrance of the revenue of a system is the ownership of the system by the municipality issuing the bonds.⁴¹

A proposed issuance of bonds payable solely from the revenues of the utility is not subject to the objection that the city might in the future feed the special fund from the general revenues of the city,⁴² or to the objection that the city would be estopped from denying general liability to pay the bonds by its receipt of the property,⁴³ or to the

Civ.App., 200 S.W.2d 252—Fisher v. City of Bartlett, Civ.App., 76 S.W.2d 535, error dismissed.

W.Va.—State ex rel. Klostermeyer v. City of Charleston, 45 S.E.2d 7.

Notice of necessity of further financing

The agreement by a city to maintain existing municipal electric plant in good condition, contained in ordinance under which first revenue certificates were issued, gave notice to purchasers of first issue that further financing might become necessary to keep up efficiency of plant.—State v. City of Jacksonville, 179 So. 172, 131 Fla. 163.

Sewage disposal plant near boundary

A city located on or near state boundary and confronted with necessity of purchasing property and erecting sewage disposal plant in adjoining state has been held authorized under statute to issue revenue bonds payable solely from revenues of such plant.—Bernard v. City of Bluefield, 186 S.E. 298, 117 W.Va. 556.

34. U.S.—George v. City of Asheville, C.C.A.N.C., 80 F.2d 50, 103 A.L.R. 568—City of Mobile v. Marx & Co., C.C.A.Ala., 75 F.2d 569.

Ariz.—Crawford v. City of Prescott, 83 P.2d 789, 52 Ariz. 471.

Ark.—Mathers v. Moss, 151 S.W.2d 660, 202 Ark. 554.

Tex.—City of Del Rio v. Lowe, Civ. App., 111 S.W.2d 1208, reversed on other grounds Lowe v. City of Del Rio, 122 S.W.2d 191, 132 Tex. 111.

In determining proper net revenue of a municipal enterprise, a municipality in its governmental capacity may pay to itself in its proprietary capacity the reasonable cost of services rendered by the enterprise to the municipality in the discharge of its governmental functions.—Street v. Town of Ripley, 161 So. 855, 173 Miss. 225.

Liability on bonds issued by municipal housing authority is strictly limited, and principal and interest of such bonds are payable exclusively from income and revenue of housing project financed with proceeds thereof, or exclusively from such income and revenue together with grants and contributions from federal government or other source in aid of such project, and neither city, county, state, nor any political subdivision thereof is liable because of such bonds.—Lloyd v. Twin Falls Housing Authority, 113 P.2d 1102, 62 Idaho 592.

35. U.S.—George v. City of Asheville, C.C.A.N.C., 80 F.2d 50, 103 A.L.R. 568—Fazende v. City of Houston, C.C.Tex., 34 F. 95.

Ark.—Mathers v. Moss, 151 S.W.2d 660, 202 Ark. 554.

Cal.—Uhl v. Badaracco, 248 P. 917, 199 Cal. 270.

Mo.—Woodmansee v. Kansas City, 144 S.W.2d 137, 346 Mo. 919.

N.C.—Webb v. Port Commission of Morehead City, 172 S.E. 377, 205 N.C. 633.

36. Ala.—Chamberlain v. Board of Com'rs of City of Mobile, 11 So.2d 724, 243 Ala. 662.

Ferry and tunnel

Ala.—Chamberlain v. Board of Com'rs of City of Mobile, supra.

37. Ariz.—Crawford v. City of Prescott, 83 P.2d 789, 52 Ariz. 471—Guthrie v. City of Mesa, 56 P.2d 655, 47 Ariz. 336.

Mo.—Dodds v. Kansas City, 152 S.W.2d 128, 347 Mo. 1193.

38. Ala.—Kendrick v. City of Birmingham, 5 So.2d 82, 242 Ala. 112—Oppenheim v. City of Florence, 155 So. 859, 229 Ala. 50.

Ill.—Hairgrove v. City of Jacksonville, 8 N.E.2d 187, 366 Ill. 163.

Tex.—City of Del Rio v. Lowe, Civ. App., 111 S.W.2d 1208, reversed on other grounds Lowe v. City of Del Rio, 122 S.W.2d 191, 132 Tex. 111.

Foreclosure

A statute and contract providing for foreclosure in event of default in payment of installments of municipal revenue warrants evidencing purchase price of electric light plant and containing provision that they were payable from revenue only and not from funds raised by taxation, contemplated foreclosure only on default, where revenues were sufficient to pay installments.—City of Seymour v. Municipal Acceptance Corporation, Tex.Civ.App., 96 S.W.2d 814, error dismissed.

39. Fla.—Schmeller v. City of Fort Lauderdale, 38 So.2d 36—Phillips v. City of Bradenton, 187 So. 258, 136 Fla. 602.

Kan.—State ex rel. Beck v. Kansas City, 86 P.2d 476, 149 Kan. 252.

Tex.—City of Del Rio v. Lowe, Civ. App., 111 S.W.2d 1208, reversed on other grounds Lowe v. City of Del Rio, 122 S.W.2d 191, 132 Tex. 111.

Utah.—Utah Power & Light Co. v. Ogden City, 79 P.2d 61, 95 Utah 161.

40. Kan.—State ex rel. Beck v. Kansas City, 84 P.2d 409, 148 Kan. 623, reheard 86 P.2d 476, 149 Kan. 252.

Utah.—Utah Power & Light Co. v. Ogden City, 79 P.2d 61, 95 Utah 161.

Contract not objectionable

A contract for construction of an electric light and power plant and distribution system payable solely from revenues of the system is not objectionable as creating a liability against general funds of the city because of provision therein that city should operate the plant in efficient manner.—Utah Power & Light Co. v. Ogden City, supra.

41. Tex.—City of El Campo v. South Texas Nat. Bank of San Antonio, Civ.App., 200 S.W.2d 252.

42. Utah.—Utah Power & Light Co. v. Ogden City, 79 P.2d 61, 95 Utah 161.

43. U.S.—Utah Power & Light Co. v. Ogden City, supra.

objection that the city did not, before entering into the contract, advertise for bids or budget the outlay in the annual budget.⁴⁴ A trust deed covering a municipal utility and its revenues and securing bonds will not be construed to present irreconcilable and mutually destructive provisions, unless no other interpretation is possible;⁴⁵ but, if such a trust deed attempts to impose liability on the city beyond that expressed in the ordinance providing for the utility, it is void.⁴⁶ A pledge of utility revenues to secure certificates issued to defray the cost of a utility improvement is superior to pledges and liens on the net revenues of the utility system contained in refunding and original general obligation bonds theretofore issued by the city.⁴⁷

e. Anticipation Warrants or Notes

An "anticipation warrant," which is an assignment of tax money if and when collected, creates no debt or obligation on the municipal corporation, except to apply the taxes, when collected, to the payment of the warrant.

An "anticipation warrant," or as it is sometimes called a "tax anticipation warrant," is an assign-

ment of tax money if and when collected;⁴⁸ an assignment of tax money, which directs the treasurer to pay the holder of the warrant out of funds collected from the anticipated tax levy, when collected,⁴⁹ and which, in the alternative, may be presented to the tax collector in full discharge of taxes.⁵⁰ It creates no general debt or obligation on the part of the municipal corporation to pay the warrant to the holder thereof,⁵¹ and discharges the municipality from all liability on account of the services or obligation for which the warrant was drawn and accepted.⁵² However, such a warrant constitutes a charge or lien against the particular fund or taxes out of which it is payable,⁵³ and there is an obligation or duty on the municipality to apply the taxes, when collected, to the payment of the warrant;⁵⁴ and, accordingly, if the municipality disregards its duty to apply collected taxes to the payment of the warrant and uses the money for other purposes, it creates an obligation on itself to make the warrant holders whole, and, therefore, is liable to such holders for the funds diverted.⁵⁵

44. Utah.—Utah Power & Light Co. v. Ogden City, *supra*.

45. Tex.—Fisher v. City of Bartlett, Civ.App., 76 S.W.2d 535, error dismissed.

46. Tex.—Fisher v. City of Bartlett, *supra*.

47. Fla.—State v. City of Jacksonville, 31 So.2d 385, 159 Fla. 328—Brooks v. City of Jacksonville, 173 So. 365, 127 Fla. 564.

Contract as to priority

A county port authority may, under some statutes, enter into a contract with corporation and bank by which the lien of the claims of the corporation and bank become subordinate and inferior to lien created by harbor revenue certificates issued by the authority.—Dickey v. Broward County Port Authority, 185 So. 349, 135 Fla. 622.

48. Ill.—People ex rel. Toman v. Chicago & N. W. Ry. Co., 37 N.E.2d 169, 377 Ill. 547.

49. Ill.—Edward J. Berwin, Inc. v. Chicago Park Dist., 65 N.E.2d 785, 794, 393 Ill. 317—Leviton v. Board of Education of City of Chicago, 30 N.E.2d 497, 374 Ill. 594—Pratt v. Board of Education of Dist. No. 61, Kankakee County, 63 N.E.2d 275, 326 Ill.App. 610—Ziebell v. Town of Bremen, 39 N.E.2d 725, 313 Ill.App. 266.

50. Ill.—Leviton v. Board of Education of City of Chicago, 30 N.E.2d 497, 374 Ill. 594—Ziebell v. Town of Bremen, 39 N.E.2d 725, 313 Ill. App. 266.

51. Ill.—People ex rel. Reconstruc-

tion Finance Corporation v. Board of Education of City of Chicago, 54 N.E.2d 508, 386 Ill. 522, certiorari denied 65 S.Ct. 70, 323 U.S. 733, 89 L.Ed. 588, rehearing denied 65 S.Ct. 115, 323 U.S. 814, 89 L.Ed. 648—People ex rel. Toman v. Chicago & N. W. Ry. Co., 37 N.E.2d 169, 377 Ill. 547—Leviton v. Board of Education of City of Chicago, 30 N.E.2d 497, 374 Ill. 594—People ex rel. Toman v. M. Born & Co., 26 N.E.2d 848, 373 Ill. 490—People ex rel. Lindheimer v. Axelrod, 26 N.E.2d 512, 373 Ill. 446—People ex rel. Gill v. Schiek, 14 N.E.2d 223, 368 Ill. 353—People ex rel. Gill v. Hamilton, 9 N.E.2d 243, 366 Ill. 455—Dimond v. Commissioner of Highways of Town of Ottawa, 9 N.E.2d 197, 366 Ill. 503—Berman v. Board of Education of City of Chicago, 196 N.E. 464, 360 Ill. 535, 99 A.L.R. 1029—City of Springfield v. Edwards, 84 Ill. 626—Pratt v. Board of Education of Dist. No. 61, Kankakee County, 63 N.E.2d 275, 326 Ill.App. 610—Ziebell v. Town of Bremen, 39 N.E.2d 725, 313 Ill.App. 266.

52. Ill.—People ex rel. Lindheimer v. Axelrod, 26 N.E.2d 512, 373 Ill. 446—People ex rel. Toman v. Crane, 23 N.E.2d 337, 372 Ill. 228—Dimond v. Commissioner of Highways of Town of Ottawa, 9 N.E.2d 197, 366 Ill. 503—Berman v. Board of Education of City of Chicago, 196 N.E. 464, 360 Ill. 535, 99 A.L.R. 1029.

Closed transaction

When tax anticipation warrant is issued and accepted or sold, transac-

tion is closed on part of municipality, leaving no further obligation on it, either absolute or contingent, whereby its debt may be increased.—Berman v. Board of Education of City of Chicago, *supra*.

53. Ill.—People ex rel. Toman v. M. Born & Co., 26 N.E.2d 848, 373 Ill. 490—People ex rel. Gill v. Hamilton, 9 N.E.2d 243, 366 Ill. 455.

Minn.—Judd v. City of St. Cloud, 272 N.W. 577, 198 Minn. 590.

54. Ill.—People ex rel. Toman v. Chicago & N. W. Ry. Co., 37 N.E.2d 169, 377 Ill. 547—Leviton v. Board of Education of City of Chicago, 30 N.E.2d 497, 374 Ill. 594.

Continuing nature of liability

A supposed liability originating in tax anticipation warrant continues to be based on such warrant in whatever form the claim may thereafter assume, and invalidity of original claim cannot be avoided merely by changing form in which it is presented in an effort to conceal its identity.—Pratt v. Board of Education of Dist. No. 61, Kankakee County, 63 N.E.2d 275, 326 Ill.App. 610.

Taxes for the year

Tax anticipation warrants issued by city and interest thereon are to be paid only when taxes for the year in which the warrants are drawn are collected.—People ex rel. Gill v. Schiek, 14 N.E.2d 223, 368 Ill. 353.

55. Ill.—Edward J. Berwind, Inc., v. Chicago Park Dist., 65 N.E.2d 785, 393 Ill. 317.

The purchaser or holder of such a warrant must look solely to the specific tax assigned for the payment of his warrant⁵⁶ and interest thereon;⁵⁷ and, accordingly, he must depend solely on the collection of taxes from the previous levy as anticipated,⁵⁸ and must rely solely on the ability and fidelity of the revenue officials in collecting the taxes and paying the money mentioned in the warrant.⁵⁹

Anticipation notes. An "anticipation note" is an obligation payable out of a particular fund.⁶⁰ Under some statutes, the funds to pay an anticipatory note are appropriated as a matter of law at the next succeeding semiannual settlement,⁶¹ and the notes must be retired in strict conformity with the statute and charter provisions under which they were issued;⁶² and, if the notes are permitted to run past two semiannual settlements without collection and appropriated funds have been expended, no power exists to make another appropriation or to provide for the collection of such a note.⁶³

§ 1958. Where Holder Is Municipal Officer

Under some statutes a municipal officer may not purchase a bond of the municipal corporation at less than its face value.

Under some statutes, if a bond of a municipal corporation is purchased by an officer thereof at less than its face value, it shall be forfeited to the municipal corporation;⁶⁴ but such a statute does not apply where, under an agreement between a

city and the holder of its bonds, they are assigned for less than their face value to trustees appointed by, and in behalf of, the city,⁶⁵ even though some of such trustees are members of the common council,⁶⁶ and have contributed to a fund for the payment of the bonds a sum equal to their proportion of taxes necessary to pay them.⁶⁷

§ 1959. Holders of Stolen Securities

The rights and liabilities of the holders of stolen securities are treated *infra* §§ 1962-1972.

Examine Pocket Parts for later cases.

§ 1960. Holders of Invalid Securities

- a. In general
- b. Rescission
- c. Recovery of money paid or received

a. In General

A municipal corporation ordinarily is not liable, on a void negotiable bond issued by it, for the consideration paid for the bond by a purchaser, although under some circumstances it may be held liable on a quantum meruit.

A municipal corporation is not liable on the instruments themselves for the consideration received for its negotiable bonds, which are void for all purposes,⁶⁸ and such bonds can never become valid and collectable in the hands of a purchaser.⁶⁹ Moreover, where such bonds are issued by a municipal corporation without authority of law and are void as negotiable instruments, an action cannot be

56. Ill.—*Leviton v. Board of Education of City of Chicago*, 30 N.E.2d 497, 374 Ill. 594—People ex rel. Toman v. M. Born & Co., 26 N.E.2d 848, 373 Ill. 490—People ex rel. Gill v. Schiek, 14 N.E.2d 223, 368 Ill. 353—People ex rel. Gill v. Hamilton, 9 N.E.2d 243, 366 Ill. 455—*Berman v. Board of Education of City of Chicago*, 196 N.E. 464, 360 Ill. 535, 99 A.L.R. 1029.

Statute validating warrants

A statute providing for validation of anticipation warrants theretofore issued, which show on their face that they are payable solely out of taxes previously levied when collected and not otherwise, merely validates warrants payable solely out of taxes against which they are drawn, and does not authorize payment of warrants from other revenues or sources, and has no application where general recovery on warrants is sought.—*Dimond v. Commissioner of Highways of Town of Ottawa*, 9 N.E.2d 197, 366 Ill. 503.

Statute held invalid

A statute providing for payment of warrants out of any available

revenue, derived from taxes or otherwise than from fund anticipated, is unconstitutional.—*Dimond v. Commissioner of Highways of Town of Ottawa*, supra.

57. Ill.—People ex rel. Gill v. Schiek, 14 N.E.2d 223, 368 Ill. 353.

58. Ill.—People ex rel. Lindheimer v. Axelrod, 26 N.E.2d 512, 373 Ill. 446—People ex rel. Toman v. Crane, 23 N.E.2d 337, 372 Ill. 228.

59. Ill.—People ex rel. Toman v. Chicago & N. W. Ry. Co., 37 N.E.2d 169, 377 Ill. 547—People ex rel. Lindheimer v. Axelrod, 26 N.E.2d 512, 373 Ill. 446—*Berman v. Board of Education of City of Chicago*, 196 N.E. 464, 360 Ill. 535, 99 A.L.R. 1029.

The remedy is against such officers, for a failure to collect and pay over the taxes.—*City of Springfield v. Edwards*, 84 Ill. 626.

60. S.C.—*Bolton v. Wharton*, 161 S. E. 454, 163 S.C. 242, 86 A.L.R. 1141.

61. Ohio.—*Davis v. State ex rel. Pecsok*, 200 N.E. 181, 130 Ohio St. 411.

62. Ohio.—*Davis v. State ex rel. Pecsok*, supra.

63. Ohio.—*Davis v. State ex rel. Pecsok*, supra.

64. Ind.—*City of Aurora v. Lamar*, 59 Ind. 400.

Tender or sale to officer generally see supra § 1931.

65. Ind.—*City of Aurora v. Lamar*, supra.

66. Ind.—*City of Aurora v. Lamar*, supra.

67. Ind.—*City of Aurora v. Lamar*, supra.

68. U.S.—*German Ins. Co. v. Manning*, C.C.Iowa, 95 F. 597. 44 C.J. p 1239 note 68.

69. Idaho.—*Village of Heyburn v. Security Savings & Trust Co.*, 49 P.2d 258, 55 Idaho 732.

Bonds issued contrary to constitutional provisions

Fla.—*Nuveen v. City of Quincy*, 156 So. 153, 115 Fla. 510, 94 A.L.R. 600.

Idaho.—*Village of Heyburn v. Security Savings & Trust Co.*, 49 P. 2d 258, 55 Idaho 732.

maintained on them as nonnegotiable instruments;⁷⁰ but it has been held that an action may be maintained on them as evidences of debt.⁷¹ A purchaser with notice of the invalidity of bonds cannot maintain their validity under an act to which they do not refer, as valid on their face under such act, if such act was not complied with and the bonds were actually invalid under it.⁷² The fact that money has been collected for the purpose of paying illegal bonds will not afford the holder of the bonds the right to have such funds paid over to him where he has no valid claim against the city.⁷³

Exchanging valid for invalid securities. Where the holder of valid bonds surrenders them to the municipality and receives in exchange therefor other bonds which the municipality had not the lawful right to issue, he is not divested of his title to the bonds surrendered⁷⁴ and may maintain an action on them after they mature.⁷⁵

Value received. The purchaser of an invalid bond may recover on the theory of an implied contract or quantum meruit, where the municipality has received some benefit from the transaction,⁷⁶ unless, under the circumstances, there is no privity between the purchaser and the municipality.⁷⁷

b. Rescission

A purchaser of municipal bonds which prove to be invalid may rescind the contract of purchase.

A person who purchases from a city bonds which prove to be invalid has the right to rescind the

contract of purchase.⁷⁸ As respects the holder's right to rescind the contract on the ground of fraud, the controlling factor is not what the technical meaning of the term used in making representations might be, but what effect the use thereof had on the buyer's mind,⁷⁹ and, where the action to rescind covers several transactions extending over a number of years and many misrepresentations are charged, all the surrounding facts and circumstances should be considered in determining whether the misrepresentations are actionable.⁸⁰

c. Recovery of Money Paid or Received

- (1) In general
- (2) Following specific funds

(1) In General

Money paid or received for invalid municipal bonds or securities may be recovered back from the municipal corporation by the purchaser or holder of such bonds or securities.

The debt which invalid municipal bonds are given to pay,⁸¹ or the money received by a municipal corporation for its invalid bonds or other securities⁸² may be recovered from it by the purchaser of the securities,⁸³ on a promise implied by law,⁸⁴ where the money remains in the treasury or under the control of the municipality,⁸⁵ and the purpose of the loan was lawful and the creation of the debt was not prohibited by law.⁸⁶ Such money, however, cannot be recovered where the loan itself was in excess of the authority of the municipality

70. U.S.—German Ins. Co. v. Manning, C.C.Jowa, 95 F. 597.
44 C.J. p 1239 note 69.

71. U.S.—Clarendon County, S. C., v. Curtis, C.C.A.S.C., 46 F.2d 888—Pacific Imp. Co. v. City of Clarksdale, C.C.A.Miss., 74 F. 528.

72. U.S.—Crow v. Oxford Tp., Kan., 7 S.Ct. 180, 119 U.S. 215, 30 L.Ed. 388.

73. U.S.—Burlingham v. New Bern, D.C.N.C., 218 F. 1014.

Tex.—Gould v. Paris, 4 S.W. 650, 68 Tex. 511.

74. U.S.—Deyo v. Otoe County, C. C.Neb., 87 F. 246.

75. U.S.—Deyo v. Otoe County, supra—Gause v. Clarksville, C.C.Mo., 1 F. 853, 1 McCrary 78.

U.S.—Guckenberger v. Dexter, 8 Ohio S. & C.P. 530, 5 Ohio N.P. 429.

76. Tex.—Peoples Nat. Bank of Tyler v. City of Tyler, Civ.App., 141 S.W.2d 1021, error dismissed, judgment correct.

77. U.S.—Lumbermen's Trust Co. v. Town of Ryegate, C.C.A.Mont., 61 F.2d 14.

78. N.Y.—Ironwood v. Wickes, 87 N. Y.S. 554, 93 App.Div. 164.

Right of municipality to sue for cancellation of municipal bonds see Cancellation of Instruments § 45.

79. Kan.—Sluss v. Brown-Crummer Inv. Co., 53 P.2d 900, 143 Kan. 14, opinion adhered to, 64 P.2d 23, 145 Kan. 12.

80. Kan.—Sluss v. Brown-Crummer Inv. Co., supra.

81. La.—Board of Com'rs of Bayou Terre aux Boeufs Drainage Dist. v. McClellan, 114 So. 694, 164 La. 808.

82. U.S.—Olds v. Town of Belleair, D.C.Fla., 41 F.Supp. 453, reversed on other grounds, C.C.A., Town of Belleair v. Olds, 127 F.2d 838, certiorari denied 63 S.Ct. 36, 317 U.S. 644, 87 L.Ed. 519.

La.—Board of Com'rs of Bayou Terre aux Boeufs Drainage Dist. v. McClellan, 114 So. 694, 164 La. 808.

Wis.—Oconto Co. v. Town of Townsend, 246 N.W. 410, 210 Wis. 85.
44 C.J. p 1240 note 88.

Legal or equitable action see infra § 1972.

A purchaser of municipal revenue bonds issued for construction and operation of electric utility, pending suit to restrain city from issuing bonds, is subject to power of court to make restitution should it be held that issuance of bonds was contrary to law.—Alabama Power Co. v. City of Scottsboro, 190 So. 412, 238 Ala. 230.

83. La.—Board of Com'rs of Bayou Terre aux Boeufs Drainage Dist. v. McClellan, 114 So. 694, 164 La. 808.
44 C.J. p 1240 note 84.

84. U.S.—Travelers' Ins. Co. v. Johnson City, Tenn., 99 F. 663, 40 C.C.A. 58, 49 L.R.A. 123.

N.Y.—Hoag v. Greenwich, 80 N.E. 842, 133 N.Y. 152.

85. N.Y.—Newburgh Sav. Bank v. Woodbury, 65 N.E. 858, 173 N.Y. 55.

86. U.S.—Chelsea Sav. Bank v. Ironwood, Mich., 130 F. 410, 66 C. C.A. 230.

44 C.J. p 1240 note 87.

to create a debt,⁸⁷ or where the municipal corporation has never received the benefit of the money,⁸⁸ or where the purchaser from the municipality had knowledge of its want of authority to issue the bonds for a prohibited purpose,⁸⁹ since it is essential that the municipality shall have received a benefit in the shape of money paid to it or property delivered into its actual possession under such circumstances that had no express contract been attempted a contract might have been implied.⁹⁰ According to some authorities the transfer of invalid municipal bonds or other securities carries with it the right to recover from the municipal corporation the money paid to it for them,⁹¹ but there is authority to the contrary where there is no privity between the purchaser and the municipality.⁹² It has also been held that a purchaser of invalid municipal bonds must return or offer to return the bonds before he may recover back the purchase money paid by him,⁹³ but as to this there is authority to the contrary.⁹⁴

Statutory power to repay. Under some statutes, a municipality is expressly empowered to repay the amount received from a purchaser of invalid bonds,⁹⁵ and may make such a repayment, notwithstanding a judgment is given for the municipality in the bondholder's action for money received, because of the action being barred by the statute of limitations.⁹⁶

(2) Following Specific Funds

Money paid for invalid bonds may be followed in rem into the thing bought with it, if it can be clearly identified and traced into the fund or other property which represents the money.

The money paid for invalid bonds may be followed in rem into the thing bought with it;⁹⁷ but, where it is sought in equity to pursue the money, complainants must clearly identify the money or the fund, or other property which represents the money, in such a manner that it can be reclaimed and delivered without taking other property with it⁹⁸ or injuring other persons⁹⁹ or interfering with others' rights.¹ It has been held that money paid for bonds which are not issued in accordance with paramount law, and, therefore, are illegal and void, does not raise a trust in favor of the purchaser,² even though the money is used for an authorized municipal purpose.³

§ 1961. Particular Circumstances and Relationships Affecting Rights and Liabilities

The rights and liabilities between the parties with respect to municipal bonds or securities are often controlled by the particular circumstances and the peculiar relationship between the parties to the particular transaction.

The rights and liabilities of the parties with respect to municipal bonds or securities are often controlled by the particular circumstances and the peculiar relationship between the parties to the

87. U.S.—Litchfield v. Ballou, Ill., 5 S.Ct. 820, 114 U.S. 190, 29 L.Ed. 132.

44 C.J. p 1240 note 88.

88. S.C.—Bolton v. Wharton, 161 S. E. 454, 163 S.C. 242, 86 A.L.R. 1101. 44 C.J. p 1240 note 89.

89. Ill.—Ohio Nat. Life Ins. Co. v. Board of Education of Grant Community High School Dist. No. 124, 55 N.E.2d 163, 387 Ill. 159, certiorari denied 65 S.Ct. 439, 323 U.S. 796, 89 L.Ed. 635.

90. U.S.—Read v. Plattsmouth, Neb., 2 S.Ct. 208, 107 U.S. 568, 27 L.Ed. 414. 44 C.J. p 1240 note 90.

91. U.S.—Chelsea Sav. Bank v. Ironwood, Mich., 130 F. 410, 66 C.C. A. 230. 44 C.J. p 1240 note 91.

92. U.S.—Lumbermen's Trust Co. v. Town of Ryegate, C.C.A.Mont., 61 F.2d 14.

Ky.—Henderson v. Winstead, 215 S. W. 527, 185 Ky. 693.

93. N.Y.—Ironwood v. Wickes, 87 N. Y.S. 554, 93 App.Div. 164. 44 C.J. p 1240 note 93.

94. Wis.—Paul v. Kenosha, 22 Wis. 266, 94 Am.D. 598.

95. Fla.—Nuveen v. City of Quincy, 156 So. 153, 115 Fla. 510, 94 A.L.R. 600.

Permissive statute

Fla.—Nuveen v. City of Quincy, supra.

96. Fla.—Nuveen v. City of Quincy, supra.

97. U.S.—Parkersburg v. Brown, W. Va., 1 S.Ct. 442, 106 U.S. 487, 27 L.Ed. 238.

Refunding bonds

Where municipal refunding bonds were erroneously validated because proceeds of original bonds had been appropriated to benefit private corporations, holders of original bonds, who were not parties to litigation attacking validation, were not deprived of right to proceed against properties specially benefited to recover claims.—State v. Town of Belleair, 170 So. 434, 125 Fla. 669.

98. U.S.—Litchfield v. Ballou, Ill., 5 S.Ct. 820, 114 U.S. 190, 29 L.Ed. 132.

44 C.J. p 1241 note 99.

99. U.S.—Litchfield v. Ballou, supra.

1. U.S.—Litchfield v. Ballou, supra. Not entitled to prior lien

Where city without authority sold bonds and used proceeds, together with money received from county board of public instruction, in erecting school building on site owned by it, owner of bonds was not entitled to have his contribution to the cost of the building charged against it as a lien and the building sold to satisfy it, since this would give him priority over the city and the board of public instruction, and would give him a secured claim where the law prohibited a debt.—Nuveen v. Board of Public Instruction of Gadsden County, C.C.A.Fla., 88 F.2d 175, certiorari denied Board of Public Instruction of Gadsden County, Fla. v. Nuveen, 57 S.Ct. 794, 301 U.S. 691, 81 L.Ed. 1347.

2. Fla.—Nuveen v. City of Quincy, 156 So. 153, 115 Fla. 510, 94 A.L.R. 600.

3. Fla.—Nuveen v. City of Quincy, supra.

particular transaction,⁴ such as between a municipal corporation which has issued new bonds for bonds which had been lost, and a bank which has loaned money on the original bonds,⁵ or with respect to the territorial limits of the municipality as affecting a landowner's liability on municipal bonds.⁶ Under some statutes, if a municipality avails itself of the privilege of incurring a bonded indebtedness for the purpose of investing the proceeds in its own bonds or in those of an improvement district within the municipality, it is required to collect the principal and interest on improvement bonds so acquired and not sold by it, as provided by the statute under which the improvement bonds were issued,⁷ and this includes the enforcement of assessments against the property and the levy and collection of a tax on assessable property for each delinquent district.⁸

The state is not obligated on a municipal bond,⁹ even though the municipality is directed by statute to incur debts pursuant to the exercise of essential governmental powers of the state.¹⁰

As between guarantor and holders of securities. Where a coupon promising to pay a certain sum as interest on a municipal bond designated by a specified number, and stating that it is due on a certain day, is stolen after such day, a subsequent innocent holder of the coupon is not the lawful owner,¹¹ and cannot maintain an action thereon against the state as a guarantor.¹²

As between municipality and former holders of securities. Where a railroad company has wrongfully and without authority of law procured the

issuance of municipal aid bonds and has negotiated them, and the holders have by judicial proceedings fixed the liability of the municipality on such bonds, the municipality has a right of action against the railroad company for the amount of the bonds with interest;¹³ and an officer of a railroad company who sells to bona fide purchasers municipal bonds issued in aid of the company, which he knows to be invalid in the hands of the company, is liable to the municipality for the value of such bonds.¹⁴

As between prior and present holders. The former holder of nonnegotiable municipal bonds from whom they were stolen is entitled to the bonds as against a subsequent holder in due course.¹⁵ When, however, a negotiable municipal bond, after issuance, is stolen from the owner, and sold or pledged before maturity to a person who acts in good faith, such person has a good title as against the former owner,¹⁶ notwithstanding the number of the bond has been altered by the thief.¹⁷ There is no implied warranty or guaranty on the sale of municipal bonds by a holder thereof,¹⁸ and where, on a sale of such bonds, their invalidity not having been determined, the seller stated that he believed the bonds were valid, and the buyer, after notice that the town claimed that the bonds were invalid, sued the town for the value thereof, and their invalidity was determined, the buyer cannot recover the price on the ground of false representations by the seller as to their validity.¹⁹

As between prospective holders of securities. Time is held not to be of the essence of a contract by a person to sell municipal bonds to be received

4. Ky.—City of Corbin v. Peace, 93 S.W.2d 827, 263 Ky. 723.

Liability as indorser

Where insurance company had printed statements on municipal bonds deposited with insurance commissioner, so that bonds could not be transferred without signature of company's officers, fact that such signatures were affixed to bonds to restore negotiability when company withdrew and sold bonds has been held not to render it liable as indorser to subsequent purchaser.—Prudential Inv. Co. v. National Reserve Life Ins. Co., 21 P.2d 373, 137 Kan. 659.

5. U.S.—First Nat. Bank v. Mayor and City Council of Baltimore, D. C.Md., 27 F.Supp. 444, affirmed, C. C.A., 108 F.2d 600.

City has superior equity

U.S.—First Nat. Bank v. Mayor and City Council of Baltimore, supra.

6. U.S.—U. S. ex rel. Brown-Crum-

mer Inv. Co. v. Town of North Miami, D.C.Fla., 11 F.Supp. 69.

7. Cal.—Redwood City v. Meyers, 60 P.2d 291, 7 Cal.2d 283, 108 A. L.R. 727.

8. Cal.—Redwood City v. Meyers, supra.

9. R.I.—Opinion to the Governor, 193 A. 503, 58 R.I. 486.

10. R.I.—Opinion to the Governor, 193 A. 503, 58 R.I. 486.

11. Va.—Arents v. Commonwealth, 18 Gratt. 750, 59 Va. 750.

12. Va.—Arents v. Commonwealth, supra.

13. Minn.—Plainview v. Winona, etc., R. Co., 32 N.W. 745, 36 Minn. 505, appeal dismissed 12 S.Ct. 530, 143 U.S. 371, 36 L.Ed. 191.

14. N.Y.—Farnham v. Benedict, 13 N.E. 784, 107 N.Y. 159, 44 C.J. p 1255 note 52.

15. Wash.—Jones v. American Sav. Bank, etc., Co., 247 P. 1017, 139 Wash. 598—Manker v. American Sav. Bank, etc., Co., 230 P. 406, 131 Wash. 430, 42 A.L.R. 1021.

Payment to prior or present holders of stolen bonds see supra § 1955.

Pledge as collateral

Ill.—Drouineau v. First Nat. Bank, 244 Ill.App. 251.

16. N.J.—Force v. Elizabeth, 28 N. J.Eq. 403, reversed on other grounds 29 N.J.Eq. 587.

N.Y.—Manhattan Sav. Inst. v. New York Nat. Exch. Bank, 62 N.E. 1079, 170 N.Y. 58, 88 Am.S.R. 640.

17. N.J.—Elizabeth v. Force, 29 N. J.Eq. 587.

18. Tenn.—Ruohs v. Chattanooga Third Nat. Bank, 28 S.W. 303, 94 Tenn. 57.

19. Tenn.—Ruohs v. Chattanooga Third Nat. Bank, supra.

by him in the future in payment of work done for the municipality.²⁰

As between municipality and property owners. Under some statutes or ordinances, the entire obligation of an improvement bond is the obligation of the municipality, and a property owner cannot be held liable for the payment of the bond.²¹ On the other hand, as between the municipality and a taxpayer, the municipality may place the ultimate burden of paying for a bond issue on those specially benefited.²² Where a city which has issued street improvement bonds equaling the amount of street assessments, but constituting obligations only on the part of the city, subsequently refunds the bonds at a rate of interest lower than that paid by the property owners on the unpaid installments of their assessments, it is not bound to account to them for the difference in interest.²³ Where landowners, liable for a street assessment, contract with the city commissioner, acting for the landowner's ac-

commodation, to purchase the street assessment bond for a price not to exceed a specified maximum, and pays such maximum without knowledge that the city had purchased the bond for a smaller price, or that there was accrued interest thereon, the landowners are entitled to the proceeds of the bond,²⁴ and, therefore, as against the city, are entitled to the excess paid plus accrued interest, retained by the city in the street fund.²⁵

Trustee. An original trustee named in a pledge or mortgage of a municipal district securing bonds is no longer capable of acting if he becomes insolvent;²⁶ and, where the provisions of the pledge or mortgage provide that the bondholders shall have the right to appoint a successor on the insolvency of the original trustee, such right of appointment is absolute,²⁷ and it is the duty of the court to give full effect to such contract rights of the bondholders.²⁸

b. Bona Fide Purchasers and Purchasers Therefrom

§ 1962. Who Are Bona Fide Purchasers in General

One who purchases negotiable municipal bonds or other securities for value, before maturity, and without notice of any illegality or defense which would defeat recovery thereon, is a bona fide holder.

One who is a purchaser for value, before maturity, and without notice, actual or constructive, of any illegality or defense which would defeat a recovery on a negotiable municipal bond is a bona fide holder,²⁹ even though he took a guaranty from the seller;³⁰ and his status as a bona fide purchaser is unaffected by the fact that he acquired the bonds from one who had unlawfully obtained

them,³¹ or that they were not sold or disposed of by the municipal corporation but were transferred by a municipal officer for his own purposes,³² or by a bondbroker to whom the bonds were intrusted for the purpose of registration.³³ Where stock certificates are not negotiable, an assignee may not recover thereon on the theory that he is a bona fide holder for value without notice of any infirmity of title in the person from whom he received them.³⁴

Bonds stolen before issuance. A municipality is not liable to a bona fide purchaser for the value of bonds stolen and put on the market before they

20. Mo.—Metropolitan Pav. Co. v. Brown-Crummer Inv. Co., 274 S.W. 815, 309 Mo. 638.

44 C.J. p 1255 note 60.

21. Colo.—Montgomery v. City and County of Denver, 80 P.2d 434, 102 Colo. 427.

22. Fla.—Klemm v. Davenport, 129 So. 904, 100 Fla. 627, 70 A.L.R. 156.

23. Ohio.—Borger v. Columbus, 15 Ohio S. & C.P. 476, 3 Ohio N.P., N.S., 261, affirmed 6 Ohio Cir.Ct., N.S., 401, 27 Ohio Cir.Ct. 812.

44 C.J. p 1255 note 61.

24. Ky.—City of Corbin v. Peace, 93 S.W.2d 827, 263 Ky. 723.

25. Ky.—City of Corbin v. Peace, *supra*.

26. U.S.—Curb and Gutter Dist. No. 37 of City of Fayetteville v. Parrish, C.C.A.Ark., 110 F.2d 902.

27. U.S.—Curb and Gutter Dist. No. 37 of City of Fayetteville v. Parrish, *supra*.

28. U.S.—Curb and Gutter Dist. No. 37 of City of Fayetteville v. Parrish, *supra*.

29. Tex.—Rhodes v. Twing, Com. App., 41 S.W.2d 13, appeal dismissed Rhodes v. Twing, 53 S.Ct. 5, 287 U.S. 561, 77 L.Ed. 495—H. C. Speer & Sons Co. v. Williams, Com. App., 41 S.W.2d 14, appeal dismissed Williams v. H. C. Speer & Sons Co., 53 S.Ct. 5, 287 U.S. 562, 77 L.Ed. 496.

44 C.J. p 1241 note 9.

30. Mich.—Schmid v. Frankfort, 96 N.W. 1056, 134 Mich. 619.

31. Mass.—Cohn v. City of Taunton, 21 N.E.2d 281, 303 Mass. 182—Fidelity & Deposit Co. of Maryland v. City of Taunton, 21 N.E.2d 279, 303 Mass. 176.

N.J.—Montvale v. People's Bank, 67 A. 67, 74 N.J.Law 464.

N.C.—Stricker v. Buncombe County, 172 S.E. 188, 205 N.C. 536.

Ohio.—Pleasantville Bank v. Cox, 26 Ohio N.P., N.S., 460.

Okl.—Weems v. Town of Covington, 30 P.2d 462, 167 Okl. 443.

Wash.—Keck v. Yakima Sav. & Loan Ass'n, 295 P. 483, 160 Wash. 430.

32. U.S.—First Nat. Bank at East St. Louis v. Street Imp. Dist. No. 326 of City of Little Rock, Ark., D. C.Ark., 48 F.Supp. 225.

N.J.—Montvale v. People's Bank, 67 A. 67, 74 N.J.Law 464.

33. Kan.—City of Kanopolis v. Mountain, 76 P.2d 803, 147 Kan. 322.

34. U.S.—First Nat. Bank v. Mayor and City Council of Baltimore, 108 F.2d 600.

were issued by the municipal officers.³⁵

Purchase directly from municipality. Where a municipality sells its bonds in the open market, the right and title of the first purchaser directly from the municipality is as perfectly and fully enforced and protected as though he were a third person buying the bonds in a subsequent market sale.³⁶

§ 1963. Purchasers from Bona Fide Holders

One who purchases or acquires negotiable municipal bonds or securities from a holder in due course succeeds to all the rights of his transferor.

One who is a holder in due course may transfer his title, standing, and right to protection to another.³⁷ The rights of a transferee of a bona fide purchaser for value are the same whether the assignment or transfer is made before or after maturity,³⁸ whether or not the transferee has knowledge or notice of equities or defenses,³⁹ and whether or not a consideration is paid therefor;⁴⁰ but a person who purchases bonds payable to bearer and undorsed, having notice of defenses to the bonds, cannot claim the right of a bona fide holder on the ground that his vendor was a bona fide holder, in the absence of proof that his vendor was not the original payee.⁴¹ In order to be entitled to the protection of an innocent purchaser for value, one who purchases bonds after maturity must have purchased them from one who took them before maturity for value and without notice of any illegality or defense.⁴²

Where bonds are repurchased by a former holder

in due course after sale to an innocent purchaser, he acquires the rights of his vendee as innocent purchaser even though he has learned that the bonds originally were stolen, where he has not been party to any fraud or illegality.⁴³

§ 1964. Consideration for Transfer

While a bona fide purchaser must have purchased for value, he need not have paid the par or face value for the security.

While, in order to constitute one a bona fide purchaser of a municipal bond he must have paid value therefor,⁴⁴ it is not essential that he shall have paid the par or face value thereof;⁴⁵ and, although he has paid less than par value, he is not restricted in his claim on the bond to the amount paid,⁴⁶ but may enforce the bond for its par value.⁴⁷ One who purchases on credit, and who has not paid the purchase price, cannot be considered a purchaser for value so as to entitle him to protection as a bona fide holder.⁴⁸ If, however, at the time of purchase he gives his negotiable promissory notes payable at different times for the purchase price, this entitles him to claim as a purchaser for value,⁴⁹ although the notes have not matured or been paid.⁵⁰ A person who receives a municipal bond in payment of a preexisting debt,⁵¹ or in payment for services rendered and to be rendered, and which are in fact rendered,⁵² is a holder for value. Also, the holder of municipal bonds as collateral security may be entitled to protection as a bona fide holder,⁵³ as where he has surrendered other collateral therefor,⁵⁴ but where a railroad company pledges mu-

35. N.Y.—*Germania Sav. Bank v. Suspension Bridge*, 26 N.Y.S. 98, 73 Hun 590, appeal dismissed 54 N.E. 33, 159 N.Y. 362.

36. Iowa.—*Griffith v. Burden*, 35 Iowa 138.

37. U.S.—*Gamble v. Allison Rural Independent School Dist.*, Iowa, 146 F. 113, 76 C.C.A. 589.

38. U.S.—*Fletcher v. Hickman*, Colo., 165 F. 403, 91 C.C.A. 353—*Rondot v. Rogers Tp.*, Mich., 90 F. 202, 39 C.C.A. 462—*Lake County v. Sutliff*, Colo., 97 F. 270, 38 C.C.A. 167.

Transfer of pledged securities

Where negotiable tax anticipation notes issued by city were acquired by bank and pledged by bank before maturity with state treasurer to secure a deposit of state funds, and there was no suggestion that treasurer did not acquire notes in good faith and for value, or that plaintiffs, who acquired notes when they were sold on bank's failure, were parties to any fraud or illegality, plaintiffs had rights of a holder in due course, even though they ac-

quired notes after maturity, since treasurer was a holder in due course—*City of Florence v. Anderson*, C.C. A.S.C., 95 F.2d 777.

39. U.S.—*Corpus Juris cited in Board of Education of Town of Carmen, Okl.*, v. *James*, C.C.A. Okl., 49 F.2d 91, 102.

Pa.—*Fulton Nat. Bank of Lancaster v. City of Lancaster*, 172 A. 34, 112 Pa.Super. 565.

44 C.J. p 1241 note 12.

40. U.S.—*Rondot v. Rogers Tp.*, Mich., 99 F. 202, 39 C.C.A. 462—*Lake County v. Sutliff*, Colo., 97 F. 270, 38 C.C.A. 167.

41. Wis.—*Montpelier Sav. Bank, etc., Co. v. Ludington School Dist.* No. 5, 92 N.W. 439, 115 Wis. 622.

42. U.S.—*Edwards v. Bates County*, C.C.Mo., 117 F. 526.

43. Mass.—*Fidelity & Deposit Co. of Maryland v. City of Taunton*, 21 N.E.2d 279, 303 Mass. 176.

44. U.S.—*Norris v. Camp*, C.C.A. Okl., 144 F.2d 1.

44 C.J. p 1241 note 17.

45. U.S.—*Board of Education of*

Town of Carmen, Okl., v. *James*, C. C.A. Okl., 49 F.2d 91—*Butterfield v. Ontario*, C.C.N.Y., 32 F. 891.

46. Va.—*Cumberland County v. Randall*, 16 S.E. 722, 89 Va. 614.

47. U.S.—*Butterfield v. Ontario*, C. C.N.Y., 32 F. 891.

48. U.S.—*Lytle v. Lansing*, N.Y., 13 S Ct. 254, 147 U.S. 59, 37 L Ed 78.

49. U.S.—*Orleans v. Platt*, N.Y., 99 U.S. 676, 25 L Ed 404.

50. U.S.—*Orleans v. Platt*, *supra*.

51. U.S.—*D'Esterre v. Brooklyn*, C. C.N.Y., 90 F. 586.

44 C.J. p 1241 note 24.

52. U.S.—*Gamble v. Allison Rural Independent School Dist.*, C.C. Iowa, 132 F. 514, reversed on other grounds 146 F. 113, 76 C.C.A. 589.

44 C.J. p 1242 note 25.

53. Okl.—*Weems v. Town of Covington*, 30 P.2d 462, 167 Okl. 443.

44 C.J. p 1242 note 26.

54. U.S.—*D'Esterre v. Brooklyn*, C. C.N.Y., 90 F. 586.

municipal aid bonds issued to it, giving the pledgee authority to sell them, such pledgee, although he would be protected to the amount of his advances to secure which the bonds were pledged,⁵⁵ is not such a bona fide holder as to entitle his transferee to recover on the bonds, where they are invalid.⁵⁶

§ 1965. Time of Purchase

A transferee after maturity takes municipal securities subject to all defenses against his transferor to which they were subject at the time of the transfer.

A transferee after maturity takes municipal securities subject to all defenses against his transferor to which they were subject at the time of the transfer.⁵⁷ Where a bond is purchased before maturity, the fact that unpaid and overdue coupons are attached does not render the whole bond dishonored, so as to deprive the purchaser of the character of a holder in due course,⁵⁸ but as to the past-due coupons the transferee takes them subject to existing defenses.⁵⁹ The rights of a purchaser or transferee after maturity from a holder in due course are discussed *supra* § 1963.

Purchasers of nonnegotiable special assessment bonds at a discount after the bonds were overdue, without making inquiry as to collections made and disbursement thereof and without ascertaining whether all payments had been made on the bonds to be purchased, have been held not to be innocent purchasers for value.⁶⁰

§ 1966. Notice or Absence Thereof

a. In general

55. U.S.—*Lytle v. Lansing, N.Y.*, 13 S.Ct. 254, 147 U.S. 59, 37 L.Ed. 78.

56. U.S.—*Lytle v. Lansing, supra*.

57. N.C.—*Belo v. Forsythe County*, 76 N.C. 489.

Bonds of same series

Where refunding bonds were exchanged for outstanding original bonds, and the exchange agent betrayed his trust and pledged the original bonds as collateral to his own obligations, but all bonds showed on their face that they were each one of a series issued at the same time for same consideration and purpose and secured by same instrument, the fact that some of the bonds were past maturity and unpaid was sufficient to put the transferees on notice of defenses to the bonds and the transferees were not holders in due course, and were not in a position to raise question of validity of the refunding bonds.—*First Nat. Bank at East St. Louis v. Street Imp. Dist. No. 326 of City of Little Rock, Ark., D.C.Ark.*, 48 F.Supp. 225.

58. U.S.—*City of New Port Richey v. Fidelity & Deposit Co. of Maryland, C.C.A.Fla.*, 105 F.2d 348, 123 A.L.R. 1352.

Okl.—*State v. Incorporated Town of Hoffman*, 260 P. 12, 127 Okl. 101, 44 C.J. p 1242 note 33.

59. U.S.—*City of New Port Richey v. Fidelity & Deposit Co. of Maryland, C.C.A.Fla.*, 105 F.2d 348, 123 A.L.R. 1352—*German - American Bank v. Brenham, C.C.Tex.*, 35 F. 185, reversed on other grounds 12 S.Ct. 559, 144 U.S. 173, 36 L.Ed. 390.

Okl.—*State v. Sapulpa*, 160 P. 489, 58 Okl. 550—*State v. Incorporated Town of Hoffman*, 260 P. 12, 127 Okl. 101.

Stolen coupons

Where negotiable coupons of municipal bonds are stolen after maturity, a subsequent holder, although ignorant of the theft, takes no title as against the real owner.—*Arentz v. Commonwealth*, 18 Gratt. 750, 59 Va. 750.

b. Matters apparent on face of instrument

c. Matters of record

d. Lack of, or limitations on, power to issue or execute

e. Matters relating to conditions precedent or preliminary proceedings

a. In General

In order to be a bona fide purchaser or holder, one must not have had notice, before or at the time of purchase, of any matters rendering the municipal bond or other security invalid.

In order to entitle a holder of municipal bonds to protection as a bona fide holder, it is essential that he should not have had notice,⁶¹ either at the time of the contract⁶² or at the time of the payment of the price,⁶³ of matters rendering the bonds invalid. While a purchaser who willfully closes his ears to information⁶⁴ or refuses to make inquiry when circumstances of grave suspicion imperatively demand it⁶⁵ is not entitled to protection, the test as to whether a person, at the time of purchasing municipal bonds, had notice of facts and circumstances requiring inquiry, is not whether the facts were such as would excite the suspicion of an ordinarily careful and prudent man⁶⁶ or would naturally and reasonably lead him to make inquiry,⁶⁷ but whether the facts were such as to make it bad faith not to make inquiry.⁶⁸ A holder or purchaser of municipal bonds or notes is chargeable with knowledge of matters of law,⁶⁹ but he is not required to examine further than the act of

60. Ill.—*Galt v. City of Chicago*, 42 N.E.2d 115, 315 Ill.App. 91.

61. U.S.—*Ottawa v. Carey, Ill.*, 2 S.Ct. 361, 108 U.S. 110, 27 L.Ed. 669, 44 C.J. p 1242 note 34.

62. U.S.—*Lytle v. Lansing, N.Y.*, 13 S.Ct. 254, 147 U.S. 59, 37 L.Ed. 78.

63. U.S.—*Lytle v. Lansing, supra*.

64. U.S.—*Lytle v. Lansing, supra*.

65. U.S.—*Lytle v. Lansing, supra*.

66. U.S.—*Foot v. Hancock, C.C.N.Y.*, 9 F.Cas.No.4,911, 15 Blatchf. 343—*Ronede v. Jersey City, C.C.N.J.*, 20 F.Cas.No.12,031a.

67. Mich.—*Thompson v. Mecosta*, 104 N.W. 694, 141 Mich. 175.

68. Mich.—*Thompson v. Mecosta, supra*.

69. U.S.—*Chase Nat. Bank of City of New York v. Fidelity & Deposit Co. of Maryland, C.C.A.N.Y.*, 79 F.2d 84—*City of Winner, S. D., v. Kelley, C.C.A.S.D.*, 65 F.2d 955—*Life & Casualty Ins. Co. v. City of Florida, Ala., C.C.A.Ala.*, 68 F.2d

the legislature authorizing the issue and the recitals of the bond, when no such duty is imposed by constitution or statute.⁷⁰ While a holder in due course of bonds issued under proper authority is not charged with knowledge of any collateral facts tending to invalidate the bonds in the hands of a purchaser with notice,⁷¹ where the bonds are payable out of a special tax or assessment, he is charged with knowledge of matters relating to payment.⁷² One who has exercised more than reasonable diligence in inquiring relative to future payments is a bona fide purchaser where, through inaccurate city records, he could not discover the facts as to payment.⁷³ A purchaser of negotiable municipal bonds is not affected with constructive notice of the pendency of a suit involving the validity of such bonds,⁷⁴ nor is the pendency of such a suit constructive notice of any invalidity of the bonds.⁷⁵ A purchaser from the first purchaser is not chargeable with notice of the invalidity of the bonds by reason of an erroneous supposition on his part that he is buying from the body issuing the bonds.⁷⁶

b. Matters Apparent on Face of Instrument

A purchaser of municipal bonds or other securities is bound to take notice of all matters disclosed on the face thereof.

A purchaser of municipal bonds is bound to take notice of all matters disclosed on the face of the

bonds,⁷⁷ such as recitals contained in the bonds,⁷⁸ or the terms of the bonds in respect of the source or method of payment;⁷⁹ and no person can claim protection as a bona fide purchaser where the bonds show on their face that they were not issued in compliance with the law⁸⁰ or the consent of the taxpayers required by statute.⁸¹ So also, if municipal bonds are not executed by the officers,⁸² or in the manner⁸³ required by statute, a purchaser is chargeable with notice. Where coupons refer to the bonds to which they are attached and purport to be for the periodic interest accruing thereon, the purchaser of such coupons is charged with notice of all which the bonds contain.⁸⁴ Notwithstanding the foregoing rules, the matters disclosed on the face of particular bonds may not be sufficient to affect a purchaser with notice of defenses.⁸⁵

c. Matters of Record

One who purchases municipal bonds or securities is charged with notice of the contents of any public record which under the law of the state furnishes the test of compliance with the conditions and the validity of the issue.

Where the constitution or the statute under which municipal bonds are issued prescribes a public record which furnishes the test of compliance with the conditions and the validity of the issue, a purchaser is charged with notice of the contents of such record;⁸⁶ and the record, rather than the

195, certiorari denied 54 S.Ct. 49, 290 U.S. 630, 78 L.Ed. 549.

Fla.—State ex rel. Grubstein v. Campbell, 1 So.2d 483, 146 Fla. 532. 44 C.J. p 1242 note 42.

70. U.S.—Lyons v. Munson, N.Y., 99 U.S. 684, 25 L.Ed. 451. 44 C.J. p 1242 note 45.

71. U.S.—Uvalde v. Spier, Tex., 91 F. 594, 33 C.C.A. 501—Portland Sav. Bank v. Evansville, C.C.Ind., 25 F. 389.

72. Mont.—Gagnon v. Butte, 243 P. 1085, 75 Mont. 279, 51 A.L.R. 966. 44 C.J. p 1242 note 47.

73. Ill.—Frangé v. City of Marion, 48 N.E.2d 980, 319 Ill.App. 136.

74. U.S.—Pickens Tp. v. Post, S.C., 99 F. 659, 41 C.C.A. 1. 44 C.J. p 1242 note 48.

75. U.S.—Enfield v. Jordan, Ill., 7 S.Ct. 358, 119 U.S. 680, 30 L.Ed. 523. 44 C.J. p 1242 note 49.

76. U.S.—Montpelier Nat. Life Ins. Co. v. Huron Bd. of Education, S. D., 62 F. 778, 10 C.C.A. 637, certiorari denied 15 S.Ct. 1041, 159 U.S. 262, 40 L.Ed. 147.

77. Pa.—Philadelphia Sav. Fund

Soc. v. City of Bethlehem, 17 A.2d 750, 143 Pa.Super. 449.

44 C.J. p 1242 note 52.

78. U.S.—City of McLaughlin, S. D. v. Turgeon, C.C.A.S.D., 75 F.2d 402 —Brown-Crummer Inv. Co. of Wichita, Kan., v. City of Florala, Ala., D.C.Ala., 55 F.2d 238. 44 C.J. p 1243 note 53.

Recitals apparently false

Where it appears on the face of a bond that the recitals in it, with respect to statutory or constitutional limitations, are false, a municipality would not be bound by the recitals and would not be estopped to plead invalidity of the bonds in that particular, and the holder would not be a bona fide purchaser for value without notice.—Knott County v. Aid Ass'n for Lutherans, C.C.A.Ky., 140 F.2d 630.

79. Mont.—Gagnon v. Butte, 243 P. 1085, 75 Mont. 279, 51 A.L.R. 966.

80. S.C.—Corpus Juris quoted in Bolton v. Wharton, 161 S.E. 454, 163 S.C. 242, 86 A.L.R. 1101. 44 C.J. p 1243 note 55.

81. U.S.—Harshman v. Bates County, Mo., 92 U.S. 569, 23 L.Ed. 747.

82. Okl.—Gardner v. Kay County

School Dist. No. 87, 126 P. 1018, 34 Okl. 716.

Tenn.—Weil v. Newbern, 148 S.W. 680, 126 Tenn. 223, L.R.A.1915A 1009, Ann.Cas.1913E 25.

83. U.S.—Anthony v. Jasper County, Mo., 101 U.S. 693, 25 L.Ed. 1005.

S.C.—Corpus Juris quoted in Bolton v. Wharton, 161 S.E. 454, 163 S.C. 242, 86 A.L.R. 1101.

84. U.S.—McClure v. Oxford Tp., Kan., 94 U.S. 429, 24 L.Ed. 129.

Pa.—Corpus Juris cited in Fulton Nat. Bank of Lancaster v. City of Lancaster, 172 A. 34, 36, 112 Pa. Super. 565.

85. Recitals not affecting purchaser (1) Recitals as to purpose of issue.—Pierre Bd. of Education v. McLean, S.D., 106 F. 817, 45 C.C.A. 658.

(2) Other recitals see 44 C.J. p 1243 note 60 [a].

86. Fla.—Corpus Juris cited in Olds v. Alvord, 191 So. 434, 448, 139 Fla. 745, certiorari denied Alvord v. Town of Belleair, 60 S.Ct. 141, 308 U.S. 603, 84 L.Ed. 505.

Or.—State ex rel. Fred J. Kiesel Estate v. Bishop, 129 P.2d 276, 169 Or. 448.

44 C.J. p 1243 note 62.

recitals in the bonds,⁸⁷ must be looked to by all persons proposing to deal in the bonds; but a purchaser is not charged with notice of parts of the record not connected with such bonds,⁸⁸ nor is he required to look beyond the record;⁸⁹ and if the record fails to show the illegality of the bonds the purchaser may rely on the presumption that the officers faithfully discharged their duty in issuing such bonds⁹⁰ and, as discussed *infra* § 1967, on the recitals which the bonds contain. In some jurisdictions, however, where the recitals in bonds are sufficient to work an estoppel against the municipality, purchasers in the open market are not required to examine the record of the city.⁹¹

d. Lack of, or Limitations on, Power to Issue or Execute

The purchaser of municipal bonds or other securities is bound to inform himself of the power of the municipal corporation to issue them and is chargeable with notice of any lack of power to do so.

A purchaser of municipal bonds is bound at his peril to inform himself as to the power of the municipal corporation to issue such bonds,⁹² and is chargeable with notice of any want of power on the part of the municipality,⁹³ as well as of all pro-

visions and requirements of the statute under which the bonds were issued,⁹⁴ especially where the bonds on their face refer to such statute.⁹⁵ Also, where a statute requires the passage of an ordinance or by-law for the issuance of bonds or notes,⁹⁶ or requires the bonds to refer to the ordinance under which they were issued,⁹⁷ a purchaser is bound to ascertain whether a valid and sufficient ordinance or by-law has been enacted; and where municipal bonds state on their face that they are issued under a certain ordinance, a purchaser is put on inquiry as to the validity⁹⁸ and provisions⁹⁹ of the ordinance. Purchasers of municipal bonds must at their peril ascertain that the authority assumed by the officers or agents executing or issuing them has been conferred¹ and that the power granted has not been exceeded.² The purchasers of municipal bonds or coupons must always take the risk of the genuineness of the official signatures of those who executed the paper they buy,³ and this includes not only the genuineness of the signature itself⁴ but also the official character of him who makes it.⁵ Likewise, where notes purport to be executed by municipal officers, the payee takes them at the risk of the authority of such officers.⁶

87. U.S.—Lake County v. Graham, Colo., 9 S.Ct. 654, 130 U.S. 674, 32 L.Ed. 1065.

44 C.J. p 1243 note 64.

88. Or.—Corpus Juris quoted in State ex rel. Fred J. Kiesel Estate v. Bishop, 129 P.2d 276, 284, 169 Or. 448.

Tex.—Tyler v. Tyler Bldg., etc., Assoc., 86 S.W. 750, 99 Tex. 6.

89. Or.—Corpus Juris quoted in State ex rel. Fred J. Kiesel Estate v. Bishop, 129 P.2d 276, 284, 169 Or. 448.

44 C.J. p 1243 note 66.

90. U.S.—Lake County v. Sutliff, Colo., 97 F. 270, 38 C.C.A. 167, appeal dismissed 22 S.Ct. 936, 46 L. Ed. 1264.

91. Wash.—Cuddy v. Sturtevant, 190 P. 909, 111 Wash. 304.

92. Ind.—Read v. Abe Rosenblum & Sons, 58 N.E.2d 376, 115 Ind.App. 200.

44 C.J. p 1243 note 71.

93. U.S.—Anthony v. County of Jasper, Mo., 101 U.S. 693, 25 L.Ed. 1005—City of Sanford, Fla., v. Chase Nat. Bank of City of New York, D.C.N.Y., 44 F.2d 206, reversed on other grounds, C.C.A., 50 F.2d 400, certiorari denied Chase Nat. Bank of City of New York v. City of Sanford, Fla., 52 S.Ct. 35, 284 U.S. 660, 76 L.Ed. 559.

Fla.—State v. Town of Belleair, 170 So. 434, 125 Fla. 669.

Ill.—Corpus Juris cited in Greenlee v. Beaver, 79 N.E.2d 822, 824, 334 Ill.App. 572.

Mich.—Chemical Bank & Trust Co. v. Oakland County, 251 N.W. 395, 264 Mich. 673.

N.Y.—Bond & Goodwin v. Du Pont, 5 N.Y.S.2d 423, 254 App.Div. 543, appeal denied Bond & Goodwin v. Dupont, 7 N.Y.S.2d 99, 255 App. Div. 761, affirmed Bond & Goodwin v. Du Pont, 21 N.E.2d 211, 280 N.Y. 715—Rondout Sav. Bank v. City of Kingston, 259 N.Y.S. 30, 144 Misc. 880.

Okl.—City of Chickasha v. Foster, 48 P.2d 289, 173 Okl. 217, certiorari denied Foster v. City of Chickasha, Okl., 56 S.Ct. 179, 296 U.S. 643, 80 L. Ed. 457—Eaton v. St. Louis-San Francisco Ry. Co., 251 P. 1032, 122 Okl. 143.

S.C.—Bolton v. Wharton, 161 S.E. 454, 163 S.C. 242, 86 A.L.R. 1101. 44 C.J. p 1244 note 72.

94. U.S.—City of Sanford, Fla., v. Chase Nat. Bank of City of New York, C.C.A.N.Y., 50 F.2d 400, certiorari denied Chase Nat. Bank of City of New York v. City of Sanford, Fla., 52 S.Ct. 35, 284 U.S. 660, 76 L.Ed. 559.

Idaho.—Reynard v. City of Caldwell, 42 P.2d 292, 55 Idaho 342.

N.M.—State ex rel. Ackerman v. City of Carlsbad, 47 P.2d 865, 39 N.M. 352.

44 C.J. p 1244 note 78.

95. U.S.—McClure v. Oxford Tp., Kan., 94 U.S. 429, 24 L.Ed. 129. 44 C.J. p 1244 note 74.

96. Tex.—Tyler v. Tyler Bldg., etc., Assoc., 86 S.W. 750, 99 Tex. 6. 44 C.J. p 1244 note 75.

97. U.S.—U. S. Trust Co. v. Mineral Ridge, Ohio, 104 F. 851, 44 C.C.A. 218.

98. S.C.—Corpus Juris quoted in Bolton v. Wharton, 161 S.E. 454, 460, 163 S.C. 242, 86 A.L.R. 1101.

44 C.J. p 1244 note 77.

99. S.C.—Corpus Juris quoted in Bolton v. Wharton, 161 S.E. 454, 460, 163 S.C. 242, 86 A.L.R. 1101. 44 C.J. p 1244 note 78.

1. S.C.—Bolton v. Wharton, 161 S.E. 454, 163 S.C. 242, 86 A.L.R. 1101. 44 C.J. p 1244 note 79.

2. U.S.—Merchants' Exch. Nat. Bank v. Bergen County, N.Y., 6 S. Ct. 88, 115 U.S. 384, 29 L.Ed. 430 —In re Manistee Watch Co., D.C. Mich., 197 F. 455.

3. U.S.—Anthony v. Jasper County, Mo., 101 U.S. 693, 25 L.Ed. 1005.

4. U.S.—Anthony v. Jasper County, supra.

44 C.J. p 1244 note 82.

5. U.S.—Anthony v. Jasper County, supra.

44 C.J. p 1244 note 83.

6. U.S.—Bloomfield v. Charter Oak Bank, Conn., 7 S.Ct. 865, 121 U.S. 121, 30 L.Ed. 923.

44 C.J. p 1244 note 84.

However, it has been held that, where a city is authorized to borrow money for some purposes, notes issued by it for money borrowed for an unauthorized purpose are enforceable in the hands of the lender where he did not have actual knowledge of the purpose for which the money was to be used,⁷ since it is not incumbent on him to inform himself, before lending the money, of the purpose for which it was needed.⁸

Excess of debt limit. A purchaser of municipal securities must at his peril ascertain whether the constitutional debt limit of the city is thereby exceeded.⁹

e. Matters Relating to Conditions Precedent or Preliminary Proceedings

A bona fide purchaser may presume that everything preliminary to issuance of securities which the municipal corporation has the power to issue has been done.

Where power to issue municipal bonds or other securities exists, a bona fide purchaser thereof has a right to presume that everything preliminary to their lawful issuance has been done,¹⁰ and is not bound to go back and examine all the intermediate steps which should have been taken before the bonds were issued,¹¹ or to ascertain whether all the details provided by the law authorizing the issue have been duly complied with by the corporate authorities,¹² especially where the bonds bear on their face the statement that they have been issued in pursuance of law and under the contingencies required by law.¹³ A purchaser of municipal aid bonds is not required to ascertain what conditions as to time

of completing the enterprise were imposed by the proposition voted on¹⁴ or as to whether the corporation pursued the regular steps necessary to entitle it to receive the bonds.¹⁵ A purchaser before maturity of bonds payable to bearer is not ipso facto chargeable with constructive notice of their alleged invalidity because he investigated as to the fulfillment of the conditions necessary to their issuance;¹⁶ where there is no want of power in the municipality and there are no marks of infirmity on the face of the bonds, he will be deemed to have knowledge of their invalidity when and only when, as a matter of fact, he had actual notice.¹⁷

§ 1967. Effect of Recitals in Bonds or Absence Thereof

Where authority to issue bonds or other securities exists, purchasers are, in general, entitled to rely on recitals therein as to matters of fact.

Where innocent persons invest money in the bonds of a municipal corporation because of authorized recitals of its officers, the bonds should be sustained unless an insuperable legal obstacle prevents.¹⁸ Consequently it is well settled that, where the authority to issue municipal bonds exists, purchasers are entitled to rely on recitals therein that such authority has been regularly exercised,¹⁹ and the municipality is estopped to deny such recitals.²⁰ Recitals in municipal bonds are, however, binding only in respect of matters of fact,²¹ which it may be fairly presumed that the officers of the municipality were left to determine,²² and not in respect of matters of law or

7. Ohio.—Ohio Farmers' Ins. Co. v. New Philadelphia, 9 Ohio Dec. (Reprint) 793, 17 Cinc.L.Bul. 250.

8. Ohio.—Ohio Farmers' Ins. Co. v. New Philadelphia, *supra*.

9. U.S.—St. Lawrence Tp. v. Furman, S.D., 171 F. 400, 96 C.C.A. 356, 17 Ann Cas. 1244.
44 C.J. p 1244 note 87.

10. U.S.—Myer v. Muscatine, Iowa, 1 Wall. 384, 17 L.Ed. 564.
44 C.J. p 1245 note 89.

11. U.S.—South St. Paul v. Lamprecht Bros. Co., Minn., 88 F. 449, 31 C.C.A. 585—Davis v. Kendallville, C.C.Ind., 7 F.Cas No.3,638, 5 Biss. 280.

12. Ga.—Danielly v. Cabaniss, 52 Ga. 211.

13. U.S.—Davis v. Kendallville, C.C. Ind., 7 F.Cas.No.3,638, 5 Biss. 280.

14. U.S.—Chilton v. Gratton, C.C. Neb., 82 F. 873, affirmed 97 F. 145, 38 C.C.A. 34.
44 C.J. p 1245 note 93.

15. U.S.—Henry County v. Nicolay, Mo., 95 U.S. 619, 24 L.Ed. 394.

16. U.S.—Carrier v. Shawangunk, C.C.N.Y., 10 F. 220, 20 Blatchf. 307.

17. U.S.—Carrier v. Shawangunk, *supra*.

18. U.S.—Platt v. Hitchcock County, Neb., 139 F. 929, 17 C.C.A. 649, certiorari denied 26 S.Ct. 761, 201 U.S. 646, 50 L.Ed. 903.

Mont.—Corpus Juris quoted in Edmunds v. City of Glasgow, 300 P. 203, 205, 89 Mont. 596.

19. N.D.—Stutsman v. Arthur, 16 N. W.2d 449, 73 N.D. 504, 158 A.L.R. 924.
44 C.J. p 1248 note 47.

Administrative or ministerial irregularities

Where there is legal authority for issue and sale of municipal bonds and bonds are issued for authorized municipal purpose, mere administrative or ministerial irregularities will not render bonds invalid in hands of bona fide holders, particularly where bonds state laws have been fully complied with.—State ex rel. Davis v. Ryan, 158 So. 62, 118 Fla. 42—

State ex rel. Ake v. Broward County Port Authority, 158 So. 62, 118 Fla. 42.

Presumption of proper exercise

Municipal officers issuing bonds to fund deficiencies in special assessment funds are presumed to have exercised authority and performed duties constitutionally and in accordance with law, and recitals by them in bonds may be relied on by bona fide purchasers—Stutsman v. Arthur, 16 N.W.2d 449, 73 N.D. 504, 158 A.L.R. 924.

20. U.S.—City of West University Place v. Pleasant, C.C.A.Tex., 90 F. 2d 844.
44 C.J. p 1248 note 48.

21. Ill.—Corpus Juris quoted in Newberry Library v. Board of Ed. of City of Chicago, 60 N.E.2d 552, 558, 390 Ill. 48.

S.C.—Bolton v. Wharton, 161 S.E. 454, 163 S.C. 242, 86 A.L.R. 1101.
44 C.J. p 1248 note 49.

22. Ill.—Corpus Juris quoted in Newberry Library v. Board of Ed.

which all are bound to take cognizance,²³ and even as to matters of fact the municipality is not estopped if the facts recited are matters of public record open to the inspection of every inquirer,²⁴ or the constitution or the law under which the bonds are issued prescribes some public record as the test of the existence of the facts or circumstances recited,²⁵ and such record is in fact made as required by law.²⁶ While recitals in municipal bonds to the effect that they are issued in pursuance of, and in conformity with, statutes²⁷ and ordinances²⁸ authorizing their issuance, estop the municipality to deny that they were so issued, such a recital does not necessarily import a compliance with the state constitution,²⁹ nor does a recital in bonds that they were issued by virtue of a certain statute and in accordance with the vote of the electors of the town preclude inquiry into the performance of a condition to be performed after issuance of the bonds.³⁰ A city is not bound by recitals contained in bonds issued by the board of public works where such board is a distinct corporation, acting independently of the city, under the provisions of a special statute.³¹ Where recitals are true when made, the municipality cannot be held

liable for deficiencies resulting from subsequently arising causes.³²

§ 1968. — Recitals or Estoppel as to Particular Matters

- a. Power to issue or execute
- b. Performance of conditions precedent
- c. Debt limit
- d. Purpose
- e. Time of issuance
- f. Seal

a. Power to Issue or Execute

Lack of power to issue bonds or other securities cannot be cured by recitals in the instrument, nor can such recitals estop the municipal corporation to deny its power.

A lack of power on the part of a municipal corporation to issue bonds cannot be cured or supplied by any recital in the bonds,³³ and hence no recitals can estop the municipality to deny its power to issue the bonds,³⁴ where the laws are such that there can be no state of facts or of conditions under which the municipality would have the authority to issue the bonds.³⁵ It has been laid down that, if the laws are such as that there might under

of City of Chicago, 60 N.E.2d 552, 558, 390 Ill. 48.

44 C.J. p 1248 note 50.

23. U.S.—U. S. v. Cicero, C.C.Ind., 41 F. 83, affirmed 50 F. 147, 1 C.C.A. 499.

Ill.—Corpus Juris quoted in Newberry Library v. Board of Ed. of City of Chicago, 60 N.E.2d 552, 558, 390 Ill. 48.

S.C.—Bolton v. Wharton, 161 S.E. 454, 163 S.C. 242, 86 A.L.R. 1101.

Recitals in refunding bonds

Recitals on faces of bonds, issued by city board of education to refund bonds previously issued thereby for payment of tax anticipation warrants, that refunding bonds were issued to pay outstanding bonds which were valid and subsisting obligations of board, were ineffective and did not estop board to assert that refunding bonds, which were declared invalid by supreme court, were not binding and existing legal obligations of board—Newberry Library v. Board of Ed. of City of Chicago, 60 N.E.2d 552, 390 Ill. 48.

24. Ill.—Corpus Juris quoted in Newberry Library v. Board of Ed. of City of Chicago, 60 N.E.2d 552, 558, 390 Ill. 48.

N.M.—Southwest Securities Co. v. Board of Education of Village of Lovington, 54 P.2d 412, 40 N.M. 59. 44 C.J. p 1248 note 52.

25. Ill.—Corpus Juris quoted in Newberry Library v. Board of Ed.

of City of Chicago, 60 N.E.2d 552, 558, 390 Ill. 48.

44 C.J. p 1248 note 53.

26. Ill.—Corpus Juris quoted in Newberry Library v. Board of Ed. of City of Chicago, 60 N.E.2d 552, 558, 390 Ill. 48.

44 C.J. p 1248 note 54.

27. U.S.—Santa Cruz v. Wykes, Cal., 202 F. 357, 120 C.C.A. 485.

44 C.J. p 1248 note 55.

28. U.S.—Van Hostrup v. Madison City, Ind., 1 Wall. 291, 17 L.Ed. 538.

44 C.J. p 1248 note 56.

29. U.S.—Buchanan v. Litchfield, Ill., 102 U.S. 278, 26 L.Ed. 138.

30. Ill.—Parker v. Smith, 3 Ill.App. 356.

31. U.S.—Liebman v. San Francisco, C.C.Cal., 24 F. 705.

32. Wyo.—Richardson v. City of Casper, 45 P.2d 1, 48 Wyo. 219.

Recital as to sufficiency of assessment

Recital in municipal paving bonds that assessment was sufficient to pay them is an expression of municipality's judgment and not representation which would render city liable thereon where law was complied with and there was no proof of bad faith; and a recital in municipal paving bonds that amount of assessment was sufficient to pay principal and interest is not false so as to render municipality liable there-

on where assessment equaled amount of bonds as permitted by statute—City of Winner, S. D., v. Kelley, C.C.A.S.D., 65 F.2d 955.

33. U.S.—Moore v. City of Nampa, Idaho, 48 S.Ct. 340, 276 U.S. 536, 72 L.Ed. 688—Harris v. City of Hialeah, D.C.Fla., 10 F.Supp. 546.

Fla.—Corpus Juris cited in Olds v. Alvord, 191 So. 434, 449, 139 Fla. 745, certiorari denied Alvord v. Town of Belleair, 60 S.Ct. 141, 308 U.S. 603, 84 L.Ed. 505—State ex rel. Harrington v. City of Pompano, 188 So. 610, 136 Fla. 730—State v. Town of Belleair, 170 So. 434, 125 Fla. 669—Corpus Juris cited in State ex rel. Davis v. Ryan, 158 So. 62, 68, 118 Fla. 42—Nuveen v. City of Quincy, 156 So. 153, 115 Fla. 510, 94 A.L.R. 600.

S.C.—Bolton v. Wharton, 161 S.E. 454, 163 S.C. 242, 86 A.L.R. 1101. 44 C.J. p 1248 note 61.

34. U.S.—Harris v. City of Hialeah, D.C.Fla., 10 F.Supp. 546—First Trust Co. of St. Paul v. Board of Education of Whitley County, Ky., D.C.Ky., 5 F.Supp. 49, reversed on other grounds, C.C.A., 78 F.2d 114.

Fla.—State ex rel. Harrington v. City of Pompano, 188 So. 610, 136 Fla. 730.

44 C.J. p 1249 note 62.

35. U.S.—Aurora v. Gates, Colo., 208 F. 101, 125 C.C.A. 329, L.R.A. 1915A 910.

44 C.J. p 1249 note 63.

any state of facts or circumstances be lawful power in a municipality or quasi municipality to issue its bonds, it may by recitals therein estop itself to deny that those facts or circumstances existed, and that it had lawful power to send the bonds forth,³⁶ unless the constitution or the law under which the bonds were issued prescribed some public record as the test of the existence of some of those facts or circumstances;³⁷ but this statement should be modified so as to limit the application of the rule to cases in which the fact represented by the recital is one which the law empowers or makes it the duty of the local board to ascertain and determine as a condition to its further proceeding.³⁸ It has been both affirmed³⁹ and denied⁴⁰ that, where the city is authorized to issue bonds only in aid of a domestic corporation, the fact that the bonds recite on their face that they were issued to a railroad company incorporated under the general laws of the state estops the city to show that such corporation was in fact a foreign corporation. A recital in municipal bonds that they were issued under a particular statute which is invalid has been held not to preclude inquiry as to whether there is other and valid legislative authority under which the power to issue the bonds can be upheld,⁴¹ but it has also been held that in such case the bondholders are estopped to set up some other statutory or constitutional authority.⁴²

Exceeding power. Where the statutory power to issue bonds has been exceeded, a purchaser is not protected by recitals in the bonds that they are issued in conformity with the statute,⁴³ and, a for-

tiori, where the bonds do not contain any recital that they were issued in conformity with law, a purchaser for value cannot recover where their issuance exceeded the authority conferred.⁴⁴

Authority of officers to execute. Where municipal bonds contain no recital that the corporation is actually authorized to issue them, the corporation is not estopped to deny the authority of its officers to execute them.⁴⁵ However, where bonds recite that the city has caused the bonds to be signed by certain officers, who have in fact signed them, the city cannot urge that they were signed by such officers without its authority.⁴⁶ As against bona fide purchasers, the authority of officers having authority to issue bonds will be implied to extend to the making of recitals of facts essential to their validity.⁴⁷

b. Performance of Conditions Precedent

Recitals as to compliance with all preliminary steps before issuance of the instrument are generally binding on the municipal corporation as against a bona fide holder.

Where the power to issue municipal bonds exists, a bona fide purchaser of such bonds in the open market is entitled to rely on recitals in the bonds that all antecedent steps necessary to validate the securities have been taken.⁴⁸ Accordingly it is well established that the recitals of the officers of a municipal corporation who are invested with power to perform a condition precedent to the issue of negotiable bonds or with authority to determine when that condition has been per-

36. U.S.—Caldwell v. Guardian Trust Co., C.C.A. Ark., 26 F.2d 218. Mont.—Corpus Juris quoted in Edmunds v. City of Glasgow, 300 P. 203, 205, 89 Mont. 596. 44 C.J. p 1249 note 64.

For recitals to be effective as estoppel, recitals must be broad enough to state that required statutory conditions exist, and municipality must have authority to make them—First Trust Co. of St. Paul v. Board of Education of Whitley County, Ky., D.C.Ky., 5 F.Supp. 49, reversed on other grounds, C.C.A., 78 F.2d 114.

37. U.S.—Aurora v. Gates, Colo., 208 F. 101, 125 C.C.A. 329, L.R.A.1915A 910—Hughes County v. Livingston, S.D., 104 F. 306, 43 C.C.A. 541, certiorari denied 21 S.Ct. 926, 181 U.S. 623, 45 L.Ed. 1033.

38. U.S.—Municipal Trust Co. v. Johnson City, Tenn., 116 F. 458, 53 C.C.A. 178.

39. U.S.—Municipal Trust Co. v. Johnson City, supra.

40. Tenn.—Johnson City v. Charleston, etc., R. Co., 44 S.W. 670, 100 Tenn. 138.

41. U.S.—Defiance v. Schmidt, Ohio, 123 F. 1, 59 C.C.A. 159. 44 C.J. p 1249 note 69.

42. N.C.—Wilkes County v. Call, 31 S.E. 481, 123 N.C. 308.

43. Miss.—Woodruff v. Okolona, 57 Miss. 806.

44. U.S.—Santa Cruz v. Wykes, Cal., 202 F. 357, 120 C.C.A. 485—Bergen County v. Merchants' Exch. Nat. Bank, C.C.N.Y., 12 F. 743, 21 Blatchf. 13, affirmed 6 S.Ct. 88, 115 U.S. 384, 29 L.Ed. 430.

45. U.S.—Concord v. Robinson, Ill., 7 S.Ct. 937, 121 U.S. 165, 30 L.Ed. 885.

46. U.S.—German Ins. Co. v. Manning, C.C.Iowa, 78 F. 900. Mont.—Corpus Juris cited in Edmunds v. City of Glasgow, 300 P. 203, 205, 89 Mont. 596.

47. Mont.—Edmunds v. City of Glasgow, 300 P. 203, 89 Mont. 596.

48. Fla.—State ex rel. Harrington

v. City of Pompano, 188 So. 610, 136 Fla. 730—State ex rel. Havana State Bank v. Rodes, 151 So. 289, 115 Fla. 259—Crawford v. State ex rel. A. M. Klemm & Son, 149 So. 340, 111 Fla. 301.

Iowa.—Hauge v. City of Des Moines, 224 N.W. 520, 207 Iowa 1209.

Mont.—Edmunds v. City of Glasgow, 300 P. 203, 89 Mont. 596.

N.M.—Southwest Securities Co. v. Board of Education of Village of Lovington, 54 P.2d 412, 40 N.M. 59. Ohio.—Vollmer v. Village of Amherst, 43 N.E.2d 235, 140 Ohio St. 257.

44 C.J. p 1249 note 76.

Recitals equivalent to representation, warranty, or certificate

Adequate recitals in negotiable municipal bonds are equivalent to a representation or warranty, or certificate on the part of the officers that everything necessary by law to be done has been done, and that every fact necessary to have existed did exist, to make bonds binding. —State ex rel. Fred J. Kiesel Estate v. Bishop, 129 P.2d 276, 169 Or. 448.

formed, that they have found that all the requirements of law necessary to authorize the issuance of the bonds have been fully complied with, preclude inquiry as against an innocent purchaser for value as to whether a condition precedent had actually been performed before the bonds were issued,⁴⁹ for such recital is of itself a decision by the appointed tribunal that the requisite facts exist.⁵⁰ Such an estoppel may arise in a proper case on a recital that an act or condition required by the constitution has been performed or fulfilled as well as on a recital of compliance with the statutory requirements.⁵¹ While the estoppel does not arise except as to matters of fact which the corporate officers making the recitals have authority by law to determine and certify,⁵² in order that recitals in municipal bonds shall constitute an estoppel as against the municipality, it is not necessary that the officers by whom the bonds are issued should

be given express authority to decide as to compliance with preliminary conditions.⁵³ It seems that a municipal corporation may be estopped, by recitals in its bonds that all conditions necessary to their issue have been complied with, to dispute the performance of such conditions, although the bonds were not issued by the regular municipal officers, but by commissioners named by a court.⁵⁴ No recitals as to compliance with the law will effect an estoppel where the bonds were not authorized by statute,⁵⁵ nor may a purchaser rely on recitals known to be false.⁵⁶

It has been held or stated that if the bonds contain no recitals importing a performance of conditions precedent to their issuance, there is no estoppel to show nonperformance.⁵⁷

Form and construction of recitals. Fulfillment of all conditions, and compliance with all require-

49. U.S.—*City of Florence v. Anderson*, C.C.A.S.C., 95 F.2d 777—*City of McLaughlin, S. D. v. Turgeon*, C.C.A.S.D., 75 F.2d 402—*City of Shidler v. H. C. Speer & Sons Co.*, C.C.A.Okl., 62 F.2d 544—*Starmount Co. v. Ohio Sav. Bank & Trust Co.*, C.C.A.N.C., 55 F.2d 649—*Caldwell v. Guardian Trust Co.*, C.C.A.Ark., 26 F.2d 218—*South Sioux City v. Hanchett Bond Co.*, C.C.A.Neb., 19 F.2d 476—*Shaffer v. Wolfe County, Ky.*, D.C.Ky., 49 F.Supp. 149—*City of Enid ex rel. Versluis v. Robinson*, D.C.Okl., 39 F.Supp. 923—*Christmas v. City of Asbury Park*, D.C.N.J., 10 F.Supp. 22.

Fla.—*State ex rel. Harrington v. City of Pompano*, 188 So. 610, 136 Fla. 730—*Board of Public Instruction for Dade County v. State ex rel. Tanger Inv. Co.*, 164 So. 697, 121 Fla. 703—*City of Auburndale v. State ex rel. Summerlin*, 155 So. 97, 114 Fla. 829—*State ex rel. Havana State Bank v. Rodes*, 151 So. 289, 115 Fla. 259—*Crawford v. State ex rel. A. M. Klemm & Son*, 149 So. 340, 111 Fla. 301.

Ill.—*Prange v. City of Marion*, 48 N.E.2d 980, 319 Ill.App. 136.

Mich.—*Chemical Bank & Trust Co. v. Oakland County*, 251 N.W. 395, 264 Mich. 673.

N.D.—*Flagg v. Barnes County School Dist.* No. 70, 58 N.W. 499, 4 N.D. 30, 25 L.R.A. 363.

Or.—*State ex rel. Fred J. Kiesel Estate v. Bishop*, 129 P.2d 276, 169 Or. 448.

Tenn.—*Armstrong v. City of South Fulton*, 82 S.W.2d 862, 169 Tenn. 54.

Tex.—*Landrum v. Centennial Rural High School Dist.*, Civ.App., 146 S.W.2d 799, error dismissed, judgment correct.

44 C.J. p 1250 note 77.

Negotiable Instruments Act did not impair earlier decisions of the supreme court and of the United States supreme court relating to an innocent holder's right to rely on recitals of a municipal bond, so that, where municipal refunding bond intrusted by city to bond broker for registration was registered by broker and then delivered to defendant, who accepted it as security without notice of broker's want of title or authority to negotiate bond, defendant was entitled to rely on recitals in bond indicating proper execution and registration, as against contention that defendant was not entitled to privileges of an innocent holder because bond was not complete when intrusted to bond broker.—*City of Kanopolis v. Mountain*, 76 P.2d 803, 147 Kan. 322.

50. Fla.—*State ex rel. Havana State Bank v. Rodes*, 151 So. 289, 115 Fla. 259.

Mich.—*Chemical Bank & Trust Co. v. Oakland County*, 251 N.W. 395, 264 Mich. 673.

44 C.J. p 1251 note 78.

51. U.S.—*King v. Superior*, Wis., 117 F. 113, 54 C.C.A. 499.
44 C.J. p 1251 note 79.

52. U.S.—*City of Sanford, Fla., v. Chase Nat. Bank of City of New York*, C.C.A.N.Y., 50 F.2d 400, certiorari denied *Chase Nat. Bank of City of New York v. City of Sanford, Fla.*, 52 S.Ct. 35, 284 U.S. 660, 76 L.Ed. 559.

44 C.J. p 1251 note 80.

Existence of authority

Purchasers in accepting bonds executed by mayor and clerk of city having commission government ran risk of existence of mayor's authority.—*City of Sanford, Fla., v. Chase*

Nat. Bank of City of New York, C.C.A.N.Y., 50 F.2d 400, certiorari denied *Chase Nat. Bank of City of New York v. City of Sanford, Fla.*, 52 S.Ct. 35, 284 U.S. 660, 76 L.Ed. 559.

53. U.S.—*Bernards Tp. v. Morrison*, N. J., 10 S.Ct. 333, 133 U.S. 523, 33 L.Ed. 766.

44 C.J. p 1251 note 81.

54. U.S.—*Anders v. Ely*, N.Y., 15 S.Ct. 954, 158 U.S. 312, 39 L.Ed. 996.

55. Fla.—*State ex rel. Harrington v. City of Pompano*, 188 So. 610, 136 Fla. 730—*State v. Town of Belleair*, 170 So. 434, 125 Fla. 669.

Where statute limited exercise of municipal authority to issue improvement bonds to those instances where property owners had elected to pay costs of improvement in installments and had executed waivers, and public records and statutes provided means of ascertainment so that all persons dealing with bonds had equal knowledge, recitals in improvement bonds could not render city liable on bonds issued in an amount equal to unwaivered assessments, on theory of fraud or estoppel.—*Read v. Abe Rosenblum & Sons*, 58 N.E.2d 376, 116 Ind.App. 200.

56. U.S.—*City of Sanford, Fla., v. Chase Nat. Bank of City of New York*, C.C.A.N.Y., 50 F.2d 400, certiorari denied *Chase Nat. Bank of City of New York v. City of Sanford, Fla.*, 52 S.Ct. 35, 284 U.S. 660, 76 L.Ed. 559.

57. U.S.—*Evansville v. Dennett*, Ind., 16 S.Ct. 613, 161 U.S. 434, 40 L.Ed. 760.

Ky.—*Green County v. Shortell*, 75 S.W. 251, 116 Ky. 108, 25 Ky.L. 357.

ments, precedent to the issuance of bonds by a municipal corporation is imported by a recital that the bonds are issued "in pursuance of,"⁵⁸ "pursuant to,"⁵⁹ "in conformity with,"⁶⁰ "in accordance with,"⁶¹ "by virtue of,"⁶² or "by authority of"⁶³ a particular statute or that they are "authorized by" a statute to which reference is made,⁶⁴ or by a recital that all acts, conditions, and things required to be done precedent to, and in the issuing of, the bonds have happened, and have been properly done and performed in regular and due form as required by law.⁶⁵ A recital in bonds issued on account of a municipal subscription to the stock of a railroad company, that the subscription was "made in pursuance of an act of the legislature and ordinances of the city council passed in pursuance thereof," imports not only compliance with the act of the legislature,⁶⁶ but that the ordinances of the city council conform to the statute.⁶⁷

Popular assent. The rule that recitals in municipal bonds that the conditions precedent to their issuance have been fulfilled are conclusive in favor of bona fide purchasers, and estop the municipality to deny their truth, applies in full force when the statute requires a petition or the consent of the voters or taxpayers as a condition precedent to the issuance of bonds;⁶⁸ but a recital in municipal bonds that they were for a subscription to the capital stock of a railroad company, authorized by acts of the state legislature referred to by title and date, does not estop the municipality to set up, in an action on the bonds, that their issue was not authorized by the vote of two thirds of the voters

of the municipality, as required by the constitution of the state.⁶⁹

Recitals in note. While a recital on the face of a note, made by the officers of a municipality charged with the duty of ascertaining the existence of necessary facts precedent to its valid issuance, will estop the municipality to show the nonexistence of those facts as against a bona fide holder of the note,⁷⁰ the rule does not apply to a recital made by only one of two or more officers charged with the duty of ascertaining the existence or nonexistence of the necessary facts.⁷¹

Recital of performance at improper time. When municipal bonds recite on their face that they are issued in accordance with the provisions of a particular act of the legislature, and that certain steps required by such act to be taken as a condition of their issue were taken at a time when the act itself shows they could not legally be taken, such bonds are invalid, even in the hands of a bona fide purchaser for value.⁷²

c. Debt Limit

Recitals that indebtedness evidenced by municipal bonds do not exceed the constitutional or statutory limit have been held conclusive in favor of a bona fide holder.

There is authority for the proposition that a recital on the face of municipal bonds that the indebtedness thereby created does not exceed the constitutional or statutory limit is conclusive in favor of a bona fide holder,⁷³ he not being obliged to go behind it,⁷⁴ and the municipality being estopped to deny it,⁷⁵ at least where there is nothing on

58. U.S.—Hughes County v. Livingston, S.D., 104 F. 306, 43 C.C.A. 541.

44 C.J. p 1252 note 92.

59. U.S.—Clay County v. Savings Soc., Ill., 104 U.S. 579, 26 L.Ed. 856—Stanly County v. Coler, N.C., 113 F. 705, 51 C.C.A. 379, affirmed 23 S.Ct. 811, 190 U.S. 437, 47 L.Ed. 1126.

60. U.S.—Rondot v. Rogers Tp., Mich., 99 F. 202, 39 C.C.A. 462. 44 C.J. p 1252 note 94.

61. U.S.—Haskell County v. National L. Ins. Co., Kan., 90 F. 228, 32 C.C.A. 591.

62. U.S.—Evansville v. Dennett, Ind., 16 S.Ct. 613, 161 U.S. 434, 40 L.Ed. 760—Grattan Tp. v. Chilton, Neb., 97 F. 145, 38 C.C.A. 84.

63. U.S.—Jordan v. Cass County, C. Mo., 13 F.Cas.No.7518, 3 Dill. 245, affirmed 95 U.S. 373, 24 L.Ed. 419.

64. U.S.—South St. Paul v. Lamprecht, Minn., 88 F. 449, 31 C.C.A. 585.

65. U.S.—Kearny County v. Vandriess, Kan., 115 F. 866, 53 C.C.A. 192.

44 C.J. p 1252 note 99.

66. U.S.—Evansville v. Dennett, Ind., 16 S.Ct. 613, 161 U.S. 434, 40 L.Ed. 760.

67. U.S.—Evansville v. Dennett, supra.

68. Fla.—Board of Public Instruction for Dade County v. State ex rel. Tanger Inv. Co., 164 So. 697, 121 Fla. 703.

Mont.—Corpus Juris quoted in Edmunds v. City of Glasgow, 300 P. 203, 89 Mont. 596.

44 C.J. p 1251 note 90.

69. U.S.—Carroll County v. Smith, Miss., 4 S.Ct. 539, 111 U.S. 556, 28 L.Ed. 517.

70. U.S.—Capital Sav. Bank, etc., Co. v. Framingham, Mass., 246 F. 553, 158 C.C.A. 523, certiorari denied 38 S.Ct. 332, 246 U.S. 662, 62 L.Ed. 927.

71. U.S.—Capital Sav. Bank, etc., Co. v. Framingham, supra.

72. U.S.—Manhattan Co. v. Ironwood, Mich., 74 F. 535, 20 C.C.A. 642.

73. U.S.—City of Florence v. Anderson, C.C.A.S.C., 95 F.2d 777—Christmas v. City of Asbury Park, D.C.N.J., 10 F.Supp. 22.

Mont.—Corpus Juris cited in Edmunds v. City of Glasgow, 300 P. 203, 205, 89 Mont. 596.

44 C.J. p 1252 note 4.

74. U.S.—City of Florence v. Anderson, C.C.A.S.C., 95 F.2d 777.

44 C.J. p 1252 note 5.

75. U.S.—Board of Com'rs of Rogers County v. Bristow Battery Co., D.C.Okl., 28 F.2d 195, reversed on other grounds, C.C.A., Bristow Battery Co. v. Board of Com'rs of Rogers County, Okl., 37 F.2d 504, certiorari denied Board of County Com'rs of Rogers County, Okl. v. Bristow Battery Co., 51 S.Ct. 23, 282 U.S. 543, 75 L.Ed. 748 and rehearing denied Bristow Battery Co. v. Board of Com'rs of Rogers County, Okl., 38 F.2d 562, certio-

the face of the bonds to indicate that the recital is untrue and the limit has in fact been exceeded,⁷⁶ and neither the constitution nor the statutes prescribe any rule or test by which to ascertain the extent of the existing indebtedness;⁷⁷ but there is also authority for the propositions that a bona fide purchaser of municipal bonds is not entitled to rely solely on the recital therein that the debt thereby created does not exceed the constitutional limit,⁷⁸ and that the city is not estopped by recitals in the bonds from asserting that the debt created by their issuance exceeds the constitutional⁷⁹ or statutory⁸⁰ limit, or at least that there is no estoppel where the officers making the recital are not authorized by constitution or statute to do so,⁸¹ the constitution or the statute prescribes some public record as a test of whether the limit has been exceeded,⁸² or it appears from the face of the bonds that the limit has in fact been exceeded,⁸³ as where the total amount of the issue is stated, so that an examination of the assessment rolls and a simple arithmetical calculation would show the excess.⁸⁴

Purchasers may not rely on recitals inconsistent with what they are chargeable with knowing.⁸⁵ Such recitals are of no avail where there is a complete absence of authority to issue bonds.⁸⁶ Where an entire issue of bonds exceeding the constitutional limit is purchased from the holder thereof by one person, as a single transaction, such person is not entitled to protection as a bona fide holder, no matter what recitals appear on the face of the

bonds.⁸⁷ Where purchasers of bonds take them with notice that they are not direct obligations of the municipality, the doctrine of estoppel because of recitals in the bonds as to debt limitations is inapplicable.⁸⁸

General or insufficient recitals. Where there is no recital in the bonds that they do not exceed the limit prescribed by law, and each bond on its face, when taken in connection with the assessment roll, shows the limit to have been exceeded, a general recital that all the requirements of the law have been complied with will not estop the municipality issuing them to show that the bonds issued exceed the legal limit.⁸⁹ Also, a recital that the bonds are issued under the provisions of a given statute does not estop the municipality to show that the bonds are void because they created an indebtedness in excess of a constitutional limitation.⁹⁰

Recitals in new bonds issued in exchange for bonds which were void because in excess of a limitation of indebtedness do not create any estoppel as against a holder who is not a bona fide holder.⁹¹

d. Purpose

Recitals as to the purpose for which bonds were issued have been held binding on the municipal corporation.

Where a municipal corporation has power to issue bonds for a particular purpose, and bonds issued by it recite that they were issued for such purpose, the municipality cannot set up as against a

rari denied Board of County Com'rs of Rogers County, Okl. v. Bristow Battery Co., 51 S.Ct. 23, 282 U.S. 843, 75 L.Ed. 748—Shaffer v. Wolfe County, Ky., D.C.Ky., 69 F.Supp. 149—Christmas v. City of Asbury Park, D.C.N.J., 10 F.Supp. 22.

Mont.—Clerihew v. City of Baker, 96 P.2d 269, 109 Mont. 317.

Ohio.—State ex rel. Ohio Nat. Bank of Columbus v. Village of Hudson, 16 N.E.2d 266, 134 Ohio St. 150—State ex rel. Alden Corporation v. Village of Solon, 7 N.E.2d 550, 132 Ohio St. 362.

44 C.J. p 1252 note 6.

76. U.S.—Christmas v. City of Asbury Park, D.C.N.J., 10 F.Supp. 22.

44 C.J. p 1252 note 7.

77. U.S.—Buchanan v. Litchfield, Ill., 102 U.S. 278, 26 L.Ed. 138.

44 C.J. p 1252 note 8.

78. U.S.—Fairfield v. Rural Independent School Dist., C.C.Iowa, 111 F. 453, reversed on other grounds 116 F. 838, 54 C.C.A. 342.

79. U.S.—St. Lawrence Tp. v. Fur-

man, S.D., 171 F. 400, 96 C.C.A. 356, 17 Ann.Cas. 1244.

44 C.J. p 1252 note 10.

80. U.S.—Springfield Safe Deposit, etc., Co. v. Attica, Kan., 85 F. 387, 29 C.C.A. 214.

S.D.—Montpelier Nat. L. Ins. Co. v. Mead, 82 N.W. 78, 83 N.W. 335, 13 S.D. 37, 342, 79 Am.S.R. 876, 48 L.R. A. 785.

81. U.S.—Sidey v. Marceline, Mo., 237 F. 168, 150 C.C.A. 314.

82. S.C.—Bolton v. Wharton, 161 S. E. 454, 163 S.C. 242, 86 A.L.R. 1101, 44 C.J. p 1253 note 13.

83. U.S.—Chaffee County v. Potter, Colo., 12 S.Ct. 216, 142 U.S. 355, 35 L.Ed. 1040.

44 C.J. p 1253 note 14.

84. U.S.—Chaffee County v. Potter, supra—Shelby County, Tex. v. Provident Sav. Bank & Trust Co., C.C.A.Tex., 54 F.2d 602, certiorari denied Provident Savings Bank & Trust Co. v. Shelby County, Texas, 53 S.Ct. 9, 287 U.S. 604, 77 L.Ed. 526.

85. U.S.—Shelby County, Tex., v.

Provident Sav. Bank & Trust Co., C.C.A.Tex., 54 F.2d 602, certiorari denied Provident Savings Bank & Trust Co. v. Shelby County, Texas, 53 S.Ct. 9, 287 U.S. 604, 77 L.Ed. 526.

86. Fla.—State v. Town of Belleair, 170 So. 434, 125 Fla. 669.

87. U.S.—Nesbit v. Riverside Independent Dist., Iowa, 12 S.Ct. 746, 144 U.S. 610, 36 L.Ed. 562.

88. Ky.—Kentucky Utilities Co. v. City of Paris, 58 S.W.2d 361, 248 Ky. 252.

89. U.S.—Geer v. Ouray County School Dist. No. 11, Colo., 97 F. 732, 38 C.C.A. 392.

90. U.S.—Buchanan v. Litchfield, Ill., 102 U.S. 278, 26 L.Ed. 138—Bates v. Independent School Dist., C.C.N.D., 25 F. 192.

91. U.S.—Salmon v. Rural Independent School Dist., C.C.Iowa, 125 F. 235—Shaw v. Riverside School Dist., C.C.Iowa, 62 F. 911.

bona fide holder that the bonds were in fact issued for another and unauthorized purpose,⁹² even though a diversion from the lawful purpose recited may be shown by the municipal records.⁹³ Accordingly, where municipal bonds recite that they were issued for the purpose of funding the existing debt of the city, and the city is authorized to issue such bonds, it is estopped as against a bona fide holder to set up that the antecedent indebtedness was fraudulent or invalid,⁹⁴ or that the refunding bonds either created or increased any indebtedness of the municipality;⁹⁵ and an innocent purchaser of such bonds is not required to consider or inquire into the question of excessive indebtedness.⁹⁶ On the other hand, where the bonds do not sufficiently comply with a charter or statutory requirement that they shall state the purpose for which they are issued, the municipality is not estopped or precluded from showing that they were issued for an illegal or unauthorized purpose;⁹⁷ and no estoppel can arise from a recital which discloses that the issuance was for a prohibited purpose.⁹⁸ Recitals in the bonds that they are issued for municipal purposes are of no avail to one who purchases after maturity with knowledge of the real and unlawful purpose of the issue.⁹⁹

e. Time of Issuance

Recitals in municipal bonds showing premature issuance have been held not to be conclusive.

A recital showing that the bonds were prematurely issued or ordered to be issued is not conclusive that they were so issued,¹ and it may be shown that the bonds were not ordered to be issued or that they were not issued until the time prescribed by statute.² The fact that municipal bonds bear a date prior to the time when the or-

dinance under which they were issued went into effect under the statute is not sufficient to defeat a recovery on such bonds in the hands of a bona fide holder, where there is no proof of the date of their actual issue,³ and their premature issuance would be contrary to a recital in the bonds that all conditions precedent have been properly performed in due and regular form as required by law.⁴

f. Seal

Recitals in municipal bonds as to a corporate seal have been held conclusive.

Recitals in municipal bonds to the effect that the seal attached is the corporate seal estops the municipal corporation, as against an innocent purchaser, to deny the validity of the seal.⁵ Also, a recital in bonds that they were issued under seal prevents the municipality from showing, as against a bona fide purchaser, that the bonds were delivered before any seal was affixed.⁶

§ 1969. Effect of Records, Decisions, Affidavits, or Certificates

As against bona fide holders of its bonds, a municipal corporation has been held concluded by recitals in municipal records and by official and judicial decisions, affidavits, and certificates.

A bona fide purchaser of municipal bonds has a right to rely on recitals in the municipal records as to matters affecting the validity of the bonds, and as against him the municipal corporation is estopped to contradict such records.⁷ Since the assessment roll of a municipality is a public record, bondholders are charged with notice of its contents.⁸

Official and judicial decisions. Where matters

92. U.S.—Knott County v. Ald Ass'n for Lutherans, C.C.A.Ky., 140 F.2d 630—City of Florence v. Anderson, C.C.A.S.C., 95 F.2d 777.

N.D.—Stutsman v. Arthur, 16 N.W. 2d 449, 73 N.D. 504, 158 A.L.R. 924. 44 C.J. p 1253 note 21.

93. U.S.—Portland Sav. Bank v. Evansville, C.C.Ind., 25 F. 389.

94. Mont.—Corpus Juris cited in Clerihew v. City of Baker, 96 P.2d 269, 270, 109 Mont. 317. 44 C.J. p 1253 note 23.

95. U.S.—Fairfield v. Rural Independent School Dist., Iowa, 116 F. 838, 54 C.C.A. 342. 44 C.J. p 1253 note 24.

96. U.S.—Pierre v. Dunscomb, S.D., 106 F. 611, 45 C.C.A. 499—Huron v. Second Ward Sav. Bank, S.D., 86 F. 272, 30 C.C.A. 38, 49 L.R.A. 534.

97. U.S.—Barnett v. Denison, Tex.,

12 S.Ct. 819, 145 U.S. 135, 36 L.Ed. 652.

44 C.J. p 1253 note 27.

98. U.S.—City of Hamlin v. Brown-Crummer Inv. Co., C.C.A.Tex., 93 F.2d 680, certiorari denied Brown-Crummer Inv. Co. v. City of Hamlin, Tex., 58 S.Ct. 831, 303 U.S. 664, 82 L.Ed. 1122.

99. U.S.—Ottawa v. Carey, Ill., 2 S.Ct. 361, 108 U.S. 110, 27 L.Ed. 669.

1. Neb.—Chicago, etc., R. Co. v. Dundy County, 91 N.W. 554, 3 Neb (Unoff.) 391.

2. Neb.—Chicago, etc., R. Co. v. Dundy County, supra.

3. U.S.—Kent v. Dana, Ohio, 100 F. 56, 40 C.C.A. 281.

4. U.S.—Kent v. Dana, supra.

5. U.S.—Schmidt v. Deffance, C.C.

Ohio, 117 F. 702, affirmed 123 F. 1, 59 C.C.A. 159.

44 C.J. p 1253 note 34.

6. U.S.—Phelps v. Yates, C.C.N.Y., 19 F.Cas No.11,082, 16 Blatchf. 192.

7. U.S.—U. S. ex rel. Brown-Crummer Inv Co v. Town of North Miami, D.C.Fla., 11 F.Supp. 69. 44 C.J. p 1254 note 38.

8. Ill.—Prange v. City of Marion, 48 NE2d 980, 319 Ill.App. 136.

Omissions from assessment roll

Since an assessment roll of a city collector, is a public record, it charges a holder of a special improvement bond with notice of an omission from the roll of assessments, a part of which were charged with payment of his bond, and the city is not liable to the holder of bonds in a suit for an accounting for special assessments levied against pri-

respecting an issue of bonds, such as the existence of certain facts or the fulfillment of conditions precedent, are left to the decision of certain officers, their decision is conclusive in favor of a bona fide purchaser,⁹ and, a fortiori, where a court, before the issuance of bonds by a municipality, decides in a proper action or proceeding that it may lawfully issue such bonds, persons purchasing them have a right to rely on the law as declared by the court,¹⁰ and the validity of the bonds cannot be questioned as against them,¹¹ even though the decision is subsequently reversed¹² or subsequent decisions establish a different rule.¹³

Affidavits. Official affidavits required by statute as evidence of certain authorizing conditions for the issuance of municipal bonds have been held to be conclusive in favor of bona fide purchasers,¹⁴ but it has also been held that such affidavits do not preclude proof that the bonds were illegally issued.¹⁵

Certificates. Where a municipality has power to issue bonds, stock, notes, or debentures on certain conditions, the determination as to the existence or performance of which is devolved on a designated board or officer, the certificate of such

board or officer as to the existence or performance of such conditions precedent estops or precludes the municipality to deny the truth of the matters recited therein, as against a bona fide purchaser;¹⁶ but the rule is otherwise where the certification is not within the official authority or duty of the officer making it.¹⁷

§ 1970. Defenses against Bona Fide Purchasers

Only such defenses as are available against bona fide purchasers generally can be urged against a bona fide holder of negotiable municipal bonds or other securities.

A bona fide purchaser of negotiable municipal bonds before maturity for value and without notice is entitled to all the protection which the law throws around the holder of a negotiable instrument;¹⁸ and his right cannot be taken away or affected by the subsequent repeal of the statute under which the bonds were issued.¹⁹ It follows that many defenses, discussed infra § 1972, which might be available against the original payees, purchasers with notice, or the holders of nonnegotiable bonds, cannot be set up against holders in due course of negotiable municipal bonds.²⁰ Generally speaking,

vate property but omitted from the roll of the city collector and hence never collected by the city, in the absence of a showing that the city did not act in good faith in making such abatements.—*Prange v. City of Marion*, supra.

9. U.S.—*New Providence v. Halsey*, N.J., 6 S.Ct. 764, 117 U.S. 336, 29 L.Ed. 904.

44 C.J. p 1254 note 39.

10. U.S.—*North Miami, Fla., v. Meredith*, C.C.A.Fla., 121 F.2d 279, certiorari denied 62 S.Ct. 138, 314 U.S. 674, 86 L.Ed. 539—Board of Education of Town of Carmen, Okl., v. James, C.C.A.Okl., 49 F.2d 91—Board of Com'rs of Rogers County v. Bristow Battery Co., D. C.Okl., 28 F.2d 195, reversed on other grounds, C.C.A., Bristow Battery Co. v. Board of Com'rs of Rogers County, Okl., 37 F.2d 504, certiorari denied Board of County Com'rs of Rogers County, Okl. v. Bristow Battery Co., 51 S.Ct. 23, 282 U.S. 543, 75 L.Ed. 748, and rehearing denied Bristow Battery Co. v. Board of Com'rs of Rogers County, Okl., 38 F.2d 562, certiorari denied Board of County Com'rs of Rogers County, Okl. v. Bristow Battery Co., 51 S.Ct. 23, 282 U.S. 843, 75 L.Ed. 748.

Fla.—*Rountree v. State*, 135 So. 888, 102 Fla. 246.

Wash.—*Stallcup v. Tacoma*, 42 P. 541, 13 Wash. 141, 52 Am.S.R. 25.

11. Wash.—*Stallcup v. Tacoma*, 42

P. 541, 13 Wash. 141, 52 Am.S.R. 25, error dismissed 17 S.Ct. 998, 165 U.S. 719, 41 L.Ed. 1185.

12. U.S.—*Orleans v. Platt*, N.Y., 99 U.S. 676, 25 L.Ed. 404.

44 C.J. p 1254 note 42.

13. Suit in federal courts

Where bonds are, at the time of their issuance, according to the course of judicial decisions of the state, valid and binding, the fact that subsequent decisions establish a different rule will not prevent bona fide holders, when suing in the federal courts, from claiming the benefit of the former rule.—*Cairo v. Zane*, Ill., 13 S.Ct. 803, 149 U.S. 122, 37 L.Ed. 673—44 C.J. p 1254 note 43 [a].

14. U.S.—*Bernards Tp. v. Morrison*, N.J., 10 S.Ct. 333, 133 U.S. 523, 33 L.Ed. 766.

44 C.J. p 1254 note 44.

15. N.Y.—*Cagwin v. Hancock*, 84 N. Y. 532.

44 C.J. p 1254 note 45.

16. U.S.—*Pulaski County v. Eichstaedt*, C.C.A.Ky., 110 F.2d 79—Board of Com'rs of Oklahoma County v. Board of Finance of M. E. Church, South, C.C.A.Okl., 100 F.2d 766—Board of Education of Village of Estancia, School Dist. No. 7 of Torrance County, N. M., v. Woodmen of the World, C.C.A.N. M., 77 F.2d 31—*City of Shidler v. H. C. Speer & Sons Co.*, C.C.A.Okl., 62 F.2d 544—Board of Education

of Town of Carmen, Okl., v. James, C.C.A.Okl., 49 F.2d 91.

Pa.—*Miners Sav. Bank of Pittston v. Duryea Borough*, 200 A. 846, 331 Pa. 458.

Vt.—*St. Johnsbury First Nat. Bank v. Concord*, 50 Vt. 257.

44 C.J. p 1254 note 46.

17. U.S.—Board of Education of Village of Estancia, School Dist. No. 7 of Torrance County, N. M., v. Woodmen of the World, C.C.A.N. M., 77 F.2d 31.

44 C.J. p 1254 note 47.

Where public record required

Rule estopping municipality to prove falsity of officers' certificate reciting facts authorizing municipality to issue bonds is inapplicable where statute requires public record to be made of condition precedent necessary to validity of bonds as the statute belies the authority to certify.—Board of Education of Village of Estancia, School Dist. No. 7 of Torrance County, N. M., v. Woodmen of the World, supra.

18. Ky.—*City of Irvine v. Wallace*, 71 S.W.2d 974, 254 Ky. 564—*Citizens Trust, etc., Co. v. Hays*, 180 S.W. 811, 167 Ky. 560.

19. N.Y.—*Marsh v. Little Valley*, 1 Hun 554, affirmed 64 N.Y. 112.

20. N.C.—*Bankers' Trust Co. v. City of Statesville*, 166 S.E. 169, 203 N. C. 399.

S.C.—*Coryus Juris* quoted in Bolton

where the power to issue negotiable municipal bonds exists, a person who purchases such bonds from the holder thereof in good faith, for value, and before maturity, acquires title free of any equities²¹ and the bonds in his hands are not assailable on any ground that does not relate to the authority for their issue.²² Defenses originally available against a purchaser for value may not be set up where the municipality and the property owners thereof have retained without complaint the benefits of the improvements for which the bonds were issued.²³

Set-off and counterclaim. Debts or claims arising out of transactions on the same bond or series of bonds cannot be set off as against innocent purchasers not connected with such transactions,²⁴ and, where bonds were purchased before maturity and without notice of previous cash payments on them, such payments are not available as a counterclaim on the bonds.²⁵

Coupons are entitled to the same immunity in the hands of a holder in due course as are the bonds of which they were originally a part.²⁶

v. Wharton, 161 S.E. 454, 457, 163 S.C. 242, 86 A.L.R. 1101.

44 C.J. p 1245 note 3.

Laches and estoppel as barring defenses

(1) One who acquired special improvement bonds after repeated inquiry by himself and former owners relative to future payment was an innocent purchaser for value, and city was barred by laches and estoppel from asserting as special defense to his suit on bonds that principal thereof was partially paid by overpayment of interest in excess of pro rata share of interest collected from property owners, where such payment was not included among numerous payments indorsed on bonds and city records were so inaccurate that alleged overpayment was discovered only as result of examination by public accountant.—Prange v. City of Marion, 48 N.E.2d 990, 319 Ill.App. 136.

(2) Innocent holders of municipal bonds had right to rely on conditions represented as existing at time bonds were issued, when it was claimed that town limits included lands on other side of bay, which lands were sought to be excluded in suit to compel officials to levy tax for payment of judgment on bonds, and owners of lands were estopped to urge dismissal of case on ground that state supreme court had declared that lands were not part of town because not contiguous thereto, where owners acquiesced in bond is-

sue for more than three years, permitting bonds to be sold to public upon representation that lands stood as security for bonds, and some of proceeds of sale were spent for improvements on lands.—Brown-Crummer Inv. Co. v. Town of North Miami, D.C. Fla., 11 F.Supp. 73.

21. Tenn.—Tennessee Electric Power Co. v. Mayor and Aldermen of Town of Fayetteville, 114 S.W.2d 811, 173 Tenn. 111.

Wash.—Royce v. Public Utility Dist. No. 1 of Clark County, 175 P.2d 624, 26 Wash.2d 733.

44 C.J. p 1245 note 4.

22. N.Y.—Citizens' Sav. Bank v. Greenburgh, 65 N.E. 978, 173 N.Y. 215.

N.C.—Bankers' Trust Co. v. City of Statesville, 166 S.E. 169, 203 N.C. 399.

23. U.S.—Brown-Crummer Inv. Co. of Wichita, Kan., v. City of Florida, Ala., D.C. Ala., 55 F.2d 238.

24. U.S.—Grannis v. Cherokee Tp. of York County, C.C.S.C., 47 F.2d 427.

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25. Ky.—City of Irvine v. Wallace, 71 S.W.2d 974, 254 Ky. 564.

26. U.S.—Lexington v. Butler, Ky., 14 Wall. 282, 28 L.Ed. 809.

N.J.—Linbarger v. West New York Bd. of Education, 85 A. 235, 83 N.J.Law 446.

27. Fla.—State v. Town of Belleair,

170 So. 434, 125 Fla. 669—State ex rel. Davis v. Ryan, 158 So. 62, 118 Fla. 42—State ex rel. Ake v. Broward County Port Authority, 158 So. 62, 118 Fla. 42.

Ill.—Greenlee v. Beaver, 79 N.E.2d 822, 334 Ill.App. 572.

Mich.—Chemical Bank & Trust Co. v. Oakland County, 251 N.W. 395, 264 Mich. 673.

44 C.J. p 1245 note 9—8 C.J. p 779 note 27.

Lawful holder

Where there is no authority for issuance of bonds, no person can become a lawful holder since holder of municipal bonds, to be lawful holder, must have derived his rights under title which issuing authority could transmit to purchaser by sale in first instance.—State v. Town of Belleair, 170 So. 434, 125 Fla. 669.

28. U.S.—Brenham v. German-American Bank, Tex., 12 S.Ct. 559, 114 U.S. 173, 36 L.Ed. 390.

44 C.J. p 1246 note 10.

29. Fla.—State v. Greer, 102 So. 739, 88 Fla. 249, 37 A.L.R. 1298.

44 C.J. p 1246 note 11.

30. Fla.—State v. Greer, *supra*.

31. N.C.—Duke v. Brown, 1 S.E. 873, 96 N.C. 127.

44 C.J. p 1246 note 13.

32. U.S.—Green v. Dyersburg, C.C. Tenn., 10 F.Cas.No.5,756, 2 Flipp. 477.

N.D.—People's Bank v. School Dist. No. 52, 57 N.W. 787, 3 N.D. 496, 28 L.R.A. 642.

§ 1971. — Particular Defenses

- a. Lack or transgression of power to issue
- b. Lack of, or irregularity in obtaining, popular assent
- c. Nonperformance of conditions precedent
- d. Other matters

a. Lack or Transgression of Power to Issue

Want of authority to issue municipal bonds or other securities is a good defense even as against a bona fide holder.

Municipal bonds issued without authority are void, even in the hands of a bona fide holder,²⁷ and the municipal corporation may assert its want of authority as a defense against him.²⁸ Thus bonds issued under an invalid statute are void in the hands of a bona fide purchaser for value,²⁹ who acquired the bonds before the statute was adjudged invalid,³⁰ and the invalidity of the statute is available as a defense against him.³¹ Also, where a municipality has exceeded its power in issuing bonds, such bonds are void even in the hands of an innocent purchaser for value,³² and the

respecting an issue of bonds, such as the existence of certain facts or the fulfillment of conditions precedent, are left to the decision of certain officers, their decision is conclusive in favor of a bona fide purchaser,⁹ and, a fortiori, where a court, before the issuance of bonds by a municipality, decides in a proper action or proceeding that it may lawfully issue such bonds, persons purchasing them have a right to rely on the law as declared by the court,¹⁰ and the validity of the bonds cannot be questioned as against them,¹¹ even though the decision is subsequently reversed¹² or subsequent decisions establish a different rule.¹³

Affidavits. Official affidavits required by statute as evidence of certain authorizing conditions for the issuance of municipal bonds have been held to be conclusive in favor of bona fide purchasers,¹⁴ but it has also been held that such affidavits do not preclude proof that the bonds were illegally issued.¹⁵

Certificates. Where a municipality has power to issue bonds, stock, notes, or debentures on certain conditions, the determination as to the existence or performance of which is devolved on a designated board or officer, the certificate of such

board or officer as to the existence or performance of such conditions precedent estops or precludes the municipality to deny the truth of the matters recited therein, as against a bona fide purchaser;¹⁶ but the rule is otherwise where the certification is not within the official authority or duty of the officer making it.¹⁷

§ 1970. Defenses against Bona Fide Purchasers

Only such defenses as are available against bona fide purchasers generally can be urged against a bona fide holder of negotiable municipal bonds or other securities.

A bona fide purchaser of negotiable municipal bonds before maturity for value and without notice is entitled to all the protection which the law throws around the holder of a negotiable instrument;¹⁸ and his right cannot be taken away or affected by the subsequent repeal of the statute under which the bonds were issued.¹⁹ It follows that many defenses, discussed infra § 1972, which might be available against the original payees, purchasers with notice, or the holders of nonnegotiable bonds, cannot be set up against holders in due course of negotiable municipal bonds.²⁰ Generally speaking,

vate property but omitted from the roll of the city collector and hence never collected by the city, in the absence of a showing that the city did not act in good faith in making such abatements.—*Prange v. City of Marion*, supra.

9. U.S.—*New Providence v. Halsey*, N.J., 6 S.Ct. 764, 117 U.S. 336, 29 L.Ed. 904.

44 C.J. p 1254 note 39.

10. U.S.—*North Miami, Fla., v. Meredith*, C.C.A.Fla., 121 F.2d 279, certiorari denied 62 S.Ct. 138, 314 U.S. 674, 86 L.Ed. 539—Board of Education of Town of Carmen, Okl., v. James, C.C.A.Okl., 49 F.2d 91—Board of Com'rs of Rogers County v. Bristow Battery Co., D. C.Okl., 28 F.2d 195, reversed on other grounds, C.C.A., Bristow Battery Co. v. Board of Com'rs of Rogers County, Okl., 37 F.2d 504, certiorari denied Board of County Com'rs of Rogers County, Okl., v. Bristow Battery Co., 51 S.Ct. 23, 282 U.S. 543, 75 L.Ed. 748, and rehearing denied Bristow Battery Co. v. Board of Com'rs of Rogers County, Okl., 38 F.2d 562, certiorari denied Board of County Com'rs of Rogers County, Okl., v. Bristow Battery Co., 51 S.Ct. 28, 282 U.S. 843, 75 L.Ed. 748.

Fla.—*Rountree v. State*, 135 So. 888, 102 Fla. 246.

Wash.—*Stallcup v. Tacoma*, 42 P. 541, 13 Wash. 141, 52 Am.S.R. 25.

11. Wash.—*Stallcup v. Tacoma*, 42

P. 541, 13 Wash. 141, 52 Am.S.R. 25, error dismissed 17 S.Ct. 998, 165 U.S. 719, 41 L.Ed. 1185.

12. U.S.—*Orleans v. Platt*, N.Y., 99 U.S. 676, 25 L.Ed. 404.

44 C.J. p 1254 note 42.

13. Suit in federal courts

Where bonds are, at the time of their issuance, according to the course of judicial decisions of the state, valid and binding, the fact that subsequent decisions establish a different rule will not prevent bona fide holders, when suing in the federal courts, from claiming the benefit of the former rule.—*Cairo v. Zane*, Ill., 13 S.Ct. 803, 149 U.S. 122, 37 L.Ed. 673—44 C.J. p 1254 note 43 [a].

14. U.S.—*Bernards Tp. v. Morrison*, N.J., 10 S.Ct. 333, 133 U.S. 523, 33 L.Ed. 766.

44 C.J. p 1254 note 44.

15. N.Y.—*Cagwin v. Hancock*, 84 N. Y. 532.

44 C.J. p 1254 note 45.

16. U.S.—*Pulaski County v. Eichstaedt*, C.C.A.Ky., 110 F.2d 79—Board of Com'rs of Oklahoma County v. Board of Finance of M. E. Church, South, C.C.A.Okl., 100 F.2d 766—Board of Education of Village of Estancia, School Dist. No. 7 of Torrance County, N. M., v. Woodmen of the World, C.C.A.N.M., 77 F.2d 31—*City of Shidler v. H. C. Speer & Sons Co.*, C.C.A.Okl., 62 F.2d 544—Board of Education

of Town of Carmen, Okl., v. James, C.C.A.Okl., 49 F.2d 91.

Pa.—*Miners Sav. Bank of Pittston v. Duryea Borough*, 200 A. 846, 331 Pa. 458.

Vt.—*St. Johnsbury First Nat. Bank v. Concord*, 50 Vt. 257.

44 C.J. p 1254 note 46.

17. U.S.—Board of Education of Village of Estancia, School Dist. No. 7 of Torrance County, N. M., v. Woodmen of the World, C.C.A.N.M., 77 F.2d 31.

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Set-off and counterclaim. Debts or claims arising out of transactions on the same bond or series of bonds cannot be set off as against innocent purchasers not connected with such transactions,²⁴ and, where bonds were purchased before maturity and without notice of previous cash payments on them, such payments are not available as a counterclaim on the bonds.²⁵

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v. Wharton, 161 S.E. 454, 457, 163 S.C. 242, 86 A.L.R. 1101.
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(2) Innocent holders of municipal bonds had right to rely on conditions represented as existing at time bonds were issued, when it was claimed that town limits included lands on other side of bay, which lands were sought to be excluded in suit to compel officials to levy tax for payment of judgment on bonds, and owners of lands were estopped to urge dismissal of case on ground that state supreme court had declared that lands were not part of town because not contiguous thereto, where owners acquiesced in bond is-

sue for more than three years, permitting bonds to be sold to public upon representation that lands stood as security for bonds, and some of proceeds of sale were spent for improvements on lands.—Brown-Crummer Inv. Co. v. Town of North Miami, D.C. Fla., 11 F.Supp. 73.

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24. U.S.—Grannis v. Cherokee Tp. of York County, C.C.S.C., 47 F.2d 427.

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170 So. 434, 125 Fla. 669—State ex rel. Davis v. Ryan, 158 So. 62, 118 Fla. 42—State ex rel. Ake v. Broward County Port Authority, 158 So. 62, 118 Fla. 42.

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28. U.S.—Brenham v. German-American Bank, Tex., 12 S.Ct. 559, 144 U.S. 173, 36 L.Ed. 390.

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31. N.C.—Duke v. Brown, 1 S.E. 873, 96 N.C. 127.

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§ 1971. — Particular Defenses

- a. Lack or transgression of power to issue
- b. Lack of, or irregularity in obtaining, popular assent
- c. Nonperformance of conditions precedent
- d. Other matters

a. Lack or Transgression of Power to Issue

Want of authority to issue municipal bonds or other securities is a good defense even as against a bona fide holder.

Municipal bonds issued without authority are void, even in the hands of a bona fide holder,²⁷ and the municipal corporation may assert its want of authority as a defense against him.²⁸ Thus bonds issued under an invalid statute are void in the hands of a bona fide purchaser for value,²⁹ who acquired the bonds before the statute was adjudged invalid,³⁰ and the invalidity of the statute is available as a defense against him.³¹ Also, where a municipality has exceeded its power in issuing bonds, such bonds are void even in the hands of an innocent purchaser for value,³² and the

fact that the municipality exceeded its power is available as a defense against him.³³ Thus the fact that constitutional limitations of municipal indebtedness or bond issues are exceeded in the issue of bonds is a good and sufficient defense against an innocent holder.³⁴ However, bonds which are issued to fund a valid indebtedness neither create any debt nor increase the debt of a municipality, but merely change the form of indebtedness; and, as against an innocent purchaser in the open market without notice, the fact that, at the time the bonds were issued, the indebtedness of the city already exceeded the prescribed limitations is no defense to an action on such bonds.³⁵

b. Lack of, or Irregularity in Obtaining, Popular Assent

It has been both affirmed and denied that lack of popular assent is a good defense to municipal bonds in the hands of a bona fide purchaser.

It has been held that, where the statute authorizing the issuance of municipal bonds makes the exercise of the power dependent on the consent of the taxpayers, a lack of such consent is available as a defense, even as against a bona fide holder,³⁶ but there is also authority for the contrary view.³⁷ At any rate, a municipal corporation may not repudiate its bonds which are in the hands of a bona fide purchaser on the ground of mere irregularities in the election authorizing their issue.³⁸

c. Nonperformance of Conditions Precedent

Nonperformance of conditions precedent has been held no defense unless the validity of the bond or security is thereby impaired.

Where a municipal corporation is authorized to issue bonds they are binding in the hands of bona fide purchasers, although conditions precedent to their issuance were not observed.³⁹ On the other hand, where it is expressly provided by statute that the bonds shall not be valid and binding until there has been a compliance with conditions precedent,⁴⁰ or where the municipality has power to issue bonds only on a compliance with conditions precedent,⁴¹ the municipality may set up nonperformance of the conditions, as against a bona fide purchaser for value, unless, as discussed supra § 1968, it is estopped to do so.⁴²

d. Other Matters

Various defects, irregularities, and other matters have been held not good defenses as against a bona fide purchaser of a municipal bond.

Matters which a municipal corporation is precluded from setting up as defenses against a bona fide purchaser of negotiable bonds which the municipality has power to issue include irregularities in the exercise of the power;⁴³ the fraud⁴⁴ or misconduct⁴⁵ of the officers or agents of the municipality in issuing the bonds or of the person to whom the bonds were sold;⁴⁶ the use of unfair and corrupt means in obtaining the recommendation of the grand jury for the subscription,

33. Ill.—Eagle v. Kohn, 84 Ill. 292—Middleport v. Aetna L. Ins. Co., 82 Ill. 562.

34. Pa.—Millerstown v. Frederick, 7 A. 156, 114 Pa. 435.
44 C.J. p 1246 note 16.

35. U.S.—Huron v. Second Ward Sav. Bank, S.D., 86 F. 272, 30 C.C. A. 38, 49 L.R.A. 534.

36. N.C.—Claybrook v. Rockingham County, 19 S.E. 593, 114 N.C. 453.
44 C.J. p 1246 note 19.

37. Tex.—San Antonio v. Lane, 32 Tex. 405.

Estoppel to claim noncompliance with referendum law

Where no objection was raised to issuance of local improvement bonds by municipality to anticipate collection of second and succeeding installments of assessment both against private property and against city, and taxes had been levied and collected without objection of taxpayers, the municipality, which as trustee had received the taxes as trust fund to be held and paid over to bondholders, was estopped to set

up its own wrongdoing in issuing bonds to anticipate installments of its own assessment, without submitting question to voters, as ground for refusal to pay over trust funds to bondholder even if a referendum statute applied to such bond issue.—Bank of Burlington v. City of Murphysboro, C.C.A.Ill., 96 F.2d 899.
38. U.S.—Roberts v. Bolles, Ill., 101 U.S. 119, 24 L.Ed. 880.
44 C.J. p 1246 note 21.

39. U.S.—Sala v. New Orleans, C.C. La., 21 F.Cas.No.12,246, 2 Woods 188.

40. Ill.—Eagle v. Kohn, 84 Ill. 292—Parker v. Smith, 3 Ill.App. 356.

41. N.C.—Belo v. Forsythe County, 76 N.C. 489.

42. N.C.—Belo v. Forsythe County, supra.

43. U.S.—Curb and Gutter Dist. No. 37 of City of Fayetteville v. Parish, C.C.A.Ark., 110 F.2d 902—City of Florence v. Anderson, C.C.A.S. C., 95 F.2d 777.
N.C.—Bankers' Trust Co. v. City of Statesville, 166 S.E. 169, 208 N.C. 399.

Ohio.—State v. Board of Com'rs of Allen County, 177 N.E. 271, 124 Ohio St. 174, appeal dismissed Board of Com'rs of Allen County, Ohio v. State of Ohio ex rel. Bowman, 52 S.Ct. 494, 286 U.S. 526, 76 L.Ed. 1269.

Tenn.—Tennessee Electric Power Co. v. Mayor and Aldermen of Town of Fayetteville, 114 S.W.2d 811, 173 Tenn. 111.

44 C.J. p 1247 note 31.

Irregularities in election or in execution and sale

Tenn.—Tennessee Electric Power Co. v. Mayor and Aldermen of Town of Fayetteville, supra.

44. U.S.—East Lincoln v. Davenport, Ill., 94 U.S. 801, 24 L.Ed. 322.
44 C.J. p 1247 note 32.

45. U.S.—Rouede v. Jersey City, C. C.N.J., 18 F. 719.

Violation of injunctive order

U.S.—City of Shidler v. H. C. Spear & Sons Co., C.C.A.Okl., 62 F.2d 544.

46. U.S.—Pulaski County v. Eichstaedt, C.C.A.Ky., 110 F.2d 79.

in payment of which the bonds are issued;⁴⁷ a delay which is not unreasonable in issuing the bonds after the election authorizing them;⁴⁸ the use of an improper seal on the bonds;⁴⁹ the fact that the bonds are made payable at an earlier date than directed in the ordinance of the municipality relating to the mode of executing them;⁵⁰ failure or want of consideration for the bonds;⁵¹ the existence or breach of collateral conditions or agreements, not appearing in the statute or ordinance author-

izing the bonds or on the face of the bonds;⁵² and an irregular or illegal sale or disposition of the bonds;⁵³ or contract relating thereto,⁵⁴ made or entered into by the municipality or its officers. Also, there is no duty on the part of a holder of a bond or note issued by a municipality to direct or look after the application of the proceeds thereof,⁵⁵ and the diversion or misapplication of the proceeds constitutes no defense to the enforcement of the bond or note by an innocent holder.⁵⁶

c. Actions

§ 1972. Rights of Action and Defenses

- a. In general
- b. Defenses

a. In General

The rights of holders of municipal bonds or other securities may be enforced by appropriate actions at law or in equity, or in such manner as the statutes may provide, the selection of the remedy being largely dependent on the facts of the particular case and the nature of the relief sought.

Whatever rights, contractual in nature, are possessed by holders of bonds of municipal corpora-

tions may at their suit be enforced in the courts⁵⁷ by appropriate procedure.⁵⁸ Where a housing authority, although not a municipal corporation, is a corporation with full power to issue bonds and other obligations and to secure them by pledge of its revenue or mortgage of its realty, it may confer on its creditors reasonable remedies for enforcing such obligations.⁵⁹

In a proper case, a holder of valid bonds or other securities on which the municipality is liable to suit may enforce his rights in an action at law,⁶⁰ such

47. Pa.—Commonwealth v. Allegheny County, 37 Pa. 237.

48. U.S.—Mercy v. Ohio, C.C.Ill., 17 F.Cas.No.9,457, affirmed 18 Wall. 552, 21 L.Ed. 813.

49. U.S.—Defiance v. Schmidt, Ohio, 123 F. 1, 59 C.C.A. 159.

44 C.J. p 1247 note 37.

50. U.S.—Gilchrist v. Little Rock, C.C.Ark., 10 F.Cas.No.5,421, 1 Dill. 261.

44 C.J. p 1247 note 38.

51. U.S.—Bernards Tp. v. Morrison, N.J., 10 S.Ct. 333, 133 U.S. 523, 33 L.Ed. 766.

44 C.J. p 1247 note 39.

52. U.S.—Graves v. Saline County, Ill., 16 S.Ct. 526, 161 U.S. 359, 40 L.Ed. 732.

44 C.J. p 1247 note 40.

53. N.Y.—Citizens' Sav. Bank v. Greenburgh, 65 N.E. 978, 173 N.Y. 215.

44 C.J. p 1247 note 41.

54. U.S.—Gladstone v. Throop, Mich., 71 F. 341, 18 C.C.A. 61.

44 C.J. p 1247 note 42.

55. U.S.—Citizens' Sav. Bank v. Newburyport, Mass., 169 F. 766, 95 C.C.A. 232, certiorari denied 30 S.Ct. 399, 215 U.S. 598, 54 L.Ed. 342.

44 C.J. p 1247 note 43.

56. Fla.—Corpus Juris cited in Olds v. Alvord, 191 So. 434, 449, 139 Fla. 745, certiorari denied Alvord v. Town of Belleair, 60 S.Ct. 141, 308 U.S. 603, 84 L.Ed. 505—Corpus

Juris cited in State ex rel. Davis v. Ryan, 158 So. 62, 68, 118 Fla. 42. 44 C.J. p 1247 note 44.

57. Mass.—In re Opinions of the Justices, 199 N.E. 538, 293 Mass. 589.

58. Fla.—State ex rel. Montgomery v. City of Ft. Pierce, 143 So. 733, 106 Fla. 845—Little River Bank & Trust Co. v. Johnson, 141 So. 141, 105 Fla. 212.

Effect of demand

Demand of holder of city bond coupon for payment from available funds gives merely right to enforce demand by legal proceedings.—State ex rel. Du Pont Ball v. Livingston, 139 So. 360, 104 Fla. 33.

59. La.—State ex rel. Porterle v. Housing Authority of New Orleans, 182 So. 725, 190 La. 710.

Reasonable and usual remedies

The remedies, which housing authorities are empowered to confer, are not only reasonable, but are the same as individuals and corporations usually confer on their creditors.—State ex rel. Porterle v. Housing Authority of New Orleans, supra.

60. U.S.—City of McLaughlin, S. D., v. Turgeon, C.C.A.S.D., 75 F.2d 402 —Lumbermen's Trust Co. v. Town of Ryegate, C.C.A.Mont., 61 F.2d 14—Gray v. Town of Thermopolis, D.C.Wyo., 33 F.Supp. 73.

Colo.—Wangnild v. Town of Haxtun, 103 P.2d 474, 106 Colo. 180.

Ill.—Cook v. City of Staunton, 14 N.E.2d 696, 295 Ill.App. 111.

N.Y.—Snell v. City of Long Beach, 27 N.Y.S.2d 164, affirmed 33 N.Y.S.2d 923, 263 App.Div. 1021, appeal denied 35 N.Y.S.2d 727, 264 App.Div. 782, affirmed 49 N.E.2d 616, 290 N.Y. 649.

Pa.—Vansclver v. Sharon Hill Borough, 33 Pa.Dist. & Co. 383, 28 Del.Co. 41, 30 Mun.L.R. 43.

Wyo.—Henning v. City of Casper, 57 P.2d 1264, 50 Wyo. 1, rehearing denied 62 P.2d 304, 50 Wyo. 1.

44 C.J. p 1256 note 72.

Nature of recovery

A recovery from city in amount of improvement bonds for payment of which the special assessments levied had been collected but the proceeds diverted rested on ownership of the bonds but was not a suit on the bonds in the sense that recovery had to be according to the tenor and effect of the bonds, and was essentially a recovery for money had and received arising from city's obligation to carry out trust reposed in it for the benefit of the bondholders.—Cook v. City of Staunton, 14 N.E.2d 696, 295 Ill.App. 111.

Controlling statutes

Where there is no agreement whereby landowners accept the ten-year payment plan with respect to street improvement bonds, the rights of the city or a contractor to proceed against a landowner are controlled by statutes relating to public ways.—City of Hazard v. Duff, 175 S.W.2d 146, 295 Ky. 628.

as *assumpsit*⁶¹ or an action of covenant;⁶² but an action against the municipality for money had and received will not lie where the money was not used for any appropriate municipal purpose,⁶³ or where there was no privity between the holder and the municipality.⁶⁴ Under some statutes bonds cannot be enforced against the municipality as a debt, or as a measure of damages either in an action *ex contractu* or *ex delicto* for neglect, delay, or refusal to assess or reassess property;⁶⁵ and where, by statute, it is provided that no action should be brought against a municipality by its creditors, no action will lie on bonds issued by it to fund its indebtedness and given to creditors surrendering their claims against the municipality.⁶⁶ In accordance with the general principles, as discussed *supra* § 1957, where a special fund has been created, bond-

holders may not maintain an action for a money judgment against the municipality on the ground that the bonds are unpaid;⁶⁷ and, while it has been held that in such case an action may be maintained against the city on the bonds to establish and perpetuate them as a claim on the funds and to prevent the bar of the statute of limitations,⁶⁸ where the proper remedy of the bondholder is *mandamus*, a judgment against the special fund cannot be had merely to preserve the claim of the bondholder against the bar of a statute of limitations.⁶⁹

A bondholder is not entitled to proceed in equity to enforce his bonds where he has an adequate remedy at law,⁷⁰ but he may in some cases proceed in equity to compel the municipality to perform its obligations to provide particular funds for, and apply them to, payment;⁷¹ or to prevent the en-

In New Mexico

(1) An action for damages may be maintained by a bondholder against a municipality for failure of the treasurer thereof to pay bonds in their proper order.—*Crist v. Town of Gallup*, 183 P.2d 156, 51 N.M. 286.

(2) Prior decisions, however, held that the bondholder's statutory remedy of foreclosure, if the municipality failed to collect assessments, was the exclusive remedy available to the bondholder.

U.S.—*Freeman v. Town of Gallup*, C. C.A.N.M., 152 F.2d 273

N.M.—*Munro v. City of Albuquerque*, 150 P.2d 733, 48 N.M. 306—*State ex rel. Lynch v. District Court of McKinley County*, 73 P.2d 333, 41 N.M. 658, 113 A.L.R. 746.

(3) Any liability of municipality in connection with breach of its express duty to collect special assessments is subject to corresponding duty of bondholder or certificate holder to exhaust all remedies available to him and to compel the municipality by *mandamus* to perform its duty and enforce collection, and the holder of sewer certificates could not recover balance due thereon from city which created sewer district, on theory of implied obligation to pay from general revenue where express promise to pay from general revenue was unenforceable because it was *ultra vires*, when remedy in nature of *mandamus* or suit to foreclose was open to him.—*Purcell v. City of Carlsbad*, C.C.A.N.M., 126 F.2d 748.

(4) It was held that, under the statute imposing duty on city issuing paving bonds payable from assessments to enforce collection of assessments but authorizing bondholder to enforce assessment liens on city's failure or refusal to enforce collection, bondholder is bound to take notice of city and other records pertinent to circumstances of

whether assessments were delinquent and whether city had failed or refused to take steps to enforce collection, and the fact that city continued to pay interest on bonds until after statute of limitations had run against collection of assessments was not controlling factor as showing lack of notice to bondholder of delinquency as to assessments.—*Munro v. City of Albuquerque*, 150 P.2d 733, 48 N.M. 306.

(5) Where a valid and enforceable lien exists, holders of municipal paving bonds payable exclusively out of funds derived from special assessments against abutting property are entitled to foreclose liens of special assessments on failure of city to enforce collection of assessment.—*Gray v. City of Santa Fe*, D.C.N.M., 15 F.Supp. 1074, modified on other grounds, C.C.A., 89 F.2d 406.

61. Ill.—*Cook v. City of Staunton*, 14 N.E.2d 696, 295 Ill.App. 111.

Fictitious contract

Bondholders' right to recover from city by reason of city's diversion of special assessments collected for payment of particular improvement bonds to other corporate purposes did not rest in privity of contract, although action was at law in form *ex contractu*, but right to recover was governed by principles of equity.—*Cook v. City of Staunton*, *supra*.

Money had and received

Where municipality received municipal improvement bond special assessments which by statute belonged to bondholders, bondholders could recover for money had and received.—*Smith v. Boise City*, D.C.Idaho, 18 F.Supp. 385.

Money paid for invalid municipal bonds may be recovered back in an action at law on appropriate common counts.—*State v. Greer*, 102 So. 739, 88 Fla. 249, 37 A.L.R. 1298.

62. U.S.—*Rondot v. Rogers Tp.*, Mich., 99 F. 202, 39 C.C.A. 462.

63. Ill.—*Board of Education of Grant Community High School Dist. No. 124*, 55 N.E.2d 163, 387 Ill. 159, certiorari denied 65 S.Ct. 439, 323 U.S. 796, 89 L.Ed. 635.

S.C.—*Bolton v. Wharton*, 161 S.E. 454, 163 S.C. 242, 86 A.L.R. 1101.

64. U.S.—*Lumbermen's Trust Co. v. Town of Ryegate*, C.C.A.Mont., 61 F.2d 14.

65. Okl.—*Euler v. Oklahoma City*, 143 P.2d 814, 193 Okl. 393—*Severns Paving Co. v. Oklahoma City*, 13 P.2d 94, 158 Okl. 182.

66. U.S.—*Kennedy v. Sacramento*, C.C.Cal., 19 F. 580.

67. U.S.—*Shapter v. San Francisco*, C.C.Cal., 110 F. 615.

Colo.—*City of Sterling v. Commercial Savings Bank of Sterling*, 181 P.2d 361, 116 Colo. 369.

In rem proceeding or mandatory writ proper remedy

Ala.—*Oppenheim v. City of Florence*, 155 So. 859, 229 Ala. 50.

68. Cal.—*Meyer v. San Francisco*, 88 P. 722, 150 Cal. 131, 10 L.R.A., N.S., 110.

69. Wash.—*Zinser v. City of Vancouver*, 74 P.2d 486, 192 Wash. 622.

70. U.S.—*Heine v. Madison Parish Levee Com'rs*, La., 19 Wall. 655, 22 L.Ed. 223.

44 C.J. p 1256 note 74.

71. U.S.—*Smith v. Boise City*, D.C. Idaho, 18 F.Supp. 385.

Ala.—*City of Carbon Hill v. Merchants Bank & Trust Co.*, 185 So. 387, 237 Ala. 55—*Moore v. Howard*, 149 So. 249, 227 Ala. 219, followed in *State ex rel. Lindsey v. Howard*, 149 So. 252, 227 Ala. 208.

Fla.—*City of St. Petersburg v. United Mut. Life Ins. Co.*, 162 So. 871, 120 Fla. 307—*City of Winter Haven v. Summerlin*, 154 So. 863, 114 Fla. 727.

forcement of a subsequent statute impairing the obligation of the contract;⁷² and a return of the consideration may be compelled by an action in equity when the issues involved otherwise present grounds for equitable jurisdiction.⁷³ Where a municipal corporation has refused to pay bonds on the ground that the bonds issued increased its debt beyond the constitutional limit, the facts may be inquired into in a court of equity at the suit of the bondholders to ascertain what part, if any, of the debt created may be enforced without violating the constitutional limitation.⁷⁴

A suit cannot be maintained by a person holding the public stock of a municipal corporation to avoid an alienation of its property on which he has no specific or general lien,⁷⁵ and which is not shown to be essential to his security.⁷⁶

Ill.—Friedman v. City of Chicago, 30 N.E.2d 36, 374 Ill. 545—Rothschild v. Village of Calumet Park, 183 N.E. 337, 350 Ill. 330—Prange v. City of Marlon, 48 N.E.2d 980, 319 Ill.App. 136—Grand Carniolian Slovenian Catholic Union v. Village of Rockdale, 41 N.E.2d 218, 314 Ill.App. 308.

44 C.J. p 1238 note 35.

Accounting and injunction

Remedy of bondholders who sought accounting of special assessments collected by township issuing bonds for sewer and water improvements and injunction preventing surety on bonds from presenting bonds for payment prior to payment of plaintiffs' bonds was properly in equity rather than by mandamus—Whitman v. Royal Oak Tp, 258 N.W. 835, 269 Mich. 146.

Correction of mistake of law

In an action at law by the bondholder wherein the municipality filed a cross complaint in equity, where village and owner of all of village's outstanding local improvement bonds acted under mutual mistake of law in entering into and acting upon arrangement whereby bonds and interest coupons were used in lieu of cash in paying installments of special assessments and interest thereon, and neither village nor any third persons suffered loss, village would not be permitted to unjustly enrich itself, but remained obligated to pay balance owing on bonds after deducting from face value thereof, the payments indorsed on bonds when bonds were used in lieu of cash in paying installments of special assessments.—First Nat. Bank of Stevens Point, Wis., v. Village of Stickney, 82 N.E.2d 673, 335 Ill.App. 596.

72. U.S.—Moore v. Otis, C.C.A.Okla., 275 F. 747.

73. U.S.—Chelsea Sav. Bank v.

Ironwood, Mich., 130 F. 410, 66 C.C.A. 230.

44 C.J. p 1256 note 80.

74. U.S.—Everett v. Rock Rapids Independent School Dist., C.C. Iowa, 109 F. 697.

75. N.Y.—Roosevelt v. Draper, 23 N.Y. 318.

76. N.Y.—Roosevelt v. Draper, supra.

77. N.C.—Nevins v. City of Lexington, 194 S.E. 293, 212 N.C. 616.

Breach of trust

A statute requiring all claims for damages against any city or town to be filed within a designated number of days after time when such claim accrues begins to run against a city as trustee of funds of a local improvement district from time the cestui que trust acquires knowledge of city's repudiation of the trust.—City of Longview v. Longview Co., 150 P.2d 395, 21 Wash.2d 248.

To whom claim presented

Under statute, the city manager of a city which has adopted plan D for its government is not the "proper or lawful municipal authority" to whom a claim against the city may be presented for audit and allowance before an action on the claim can be maintained against the city.—Nevins v. City of Lexington, 194 S.E. 293, 212 N.C. 616.

Charter provision for claim

City charter requirement for filing claims against city is inapplicable in suit in equity against city for enforcement of street improvement bonds issued before charter provision became effective.—Brown-Crummer Inv. Co. v. City of Burbank, D.C.Cal., 17 F.Supp. 469, appeal dismissed, C.C.A., 97 F.2d 993.

78. Fla.—City of New Port Richey v. Oliver, 184 So. 499, 134 Fla. 699. N.Y.—Snell v. City of Long Beach, 27 N.Y.S.2d 164, affirmed 33 N.Y.S.

Conditions precedent. Some statutes requiring the filing of a claim before commencement of action have been held applicable to actions by bondholders,⁷⁷ but such statutes have also been held to be inapplicable.⁷⁸ Restitution of part payments is not a condition precedent to a suit to collect the balance due on municipal bonds.⁷⁹

b. Defenses

In addition to matters which may or may not be urged as defenses against bona fide holders, various matters have been considered and ruled on as defenses in actions or suits on, or arising out of, municipal bonds or other securities.

Unless waived by it,⁸⁰ such defenses as the municipal corporation has against the original payee of its bonds may be asserted against such payee,⁸¹

2d 923, 263 App.Div. 1021, appeal denied 35 N.Y.S.2d 727, 264 App. Div. 782, affirmed 49 N.E.2d 616, 290 N.Y. 649.

Special statute

A special statute of nonclaim requiring suits against a city to be brought within six months from time of accrual of cause of action, at least thirty days after filing of written notice of intention to sue, is inapplicable to suits on bonds duly issued under the municipal corporate seal, which have become due by maturity and are in default because of nonpayment.—City of New Port Richey v. Oliver, 184 So. 499, 134 Fla. 699.

Statute held not applicable to actions ex contractu

N.Y.—Snell v. City of Long Beach, 27 N.Y.S.2d 164, affirmed 33 N.Y.S.2d 923, 263 App.Div. 1021, appeal denied 35 N.Y.S.2d 727, 264 App. Div. 782, affirmed 49 N.E.2d 616, 290 N.Y. 649.

79. U.S.—Brown-Crummer Inv. Co. v. Paulter, C.C.A.Okla., 70 F.2d 184.

80. Miss.—Lexington v. Union Nat. Bank, 22 So. 291, 75 Miss. 1.

81. Mich.—Barber Asphalt Pav. Co. v. Highland Park, 120 N.W. 621, 156 Mich. 178.

44 C.J. p 1257 note 89.

Financial difficulty

An answer merely reflecting a condition of insolvency, or financial difficulty, did not set up a valid defense to a right to interest asserted by a bondholder.—City of Breckenridge v. Avenius, Tex.Civ.App., 75 S.W.2d 916.

Interest paid by another entity

It is no defense to a proceeding to collect bonds that the bondholder accepted interest payments from a special taxing district which the legislature attempted to substitute for the municipality.—City of Fort Lauderdale v. State ex rel. Elston Bank

his assignee or transferee with notice,⁸² or any holder, where the bond is nonnegotiable;⁸³ but, as has been discussed supra §§ 1970, 1971, many defenses are not available to the municipality as against a bona fide purchaser of a negotiable bond. Where the power to issue bonds is dependent on the performance of certain conditions precedent, a failure to comply with such conditions is available as a defense to the bonds.⁸⁴ On the other hand, the failure of the clerk of a municipal corporation to make a record of proceedings relating to the issuance of bonds cannot avail the corporation to defeat the enforcement of such bonds.⁸⁵ A municipality cannot question its own corporate existence in a suit brought on evidences of debt issued by it,⁸⁶ nor can it deny the official character of its own officers, who acted as such in performing duties necessary to execute conditions precedent to the issuance of negotiable bonds.⁸⁷ A city, having delivered railroad bonds, payable to bearer, to a railroad company, cannot defeat a recovery thereon by a purchaser, on the ground that it gave the railroad company no directions as to how the bonds should be transferred.⁸⁸ The fact that a judgment may not be enforceable constitutes no defense to an action on municipal bonds,⁸⁹ nor is the fact that an injunction restraining the corporation from paying the bonds involved has been granted in a taxpayer's suit a defense to an action by a bondholder who was not a party to such suit.⁹⁰

Where the right to sue for the principal of bonds has accrued by reason of failure to pay interest, it has been held that the acceptance of a tender of the interest and costs does not, in the absence of agree-

ment to that effect, waive the right to prosecute a suit already begun to recover the principal and interest.⁹¹ In an action for the value of bonds made worthless by the act of the municipality in paying bonds out of their proper order, it is no defense that the municipality accepted some bonds from property owners as payment of assessments and liens on their property.⁹² In a suit on a promissory note given by a municipality to a contractor for work and labor,⁹³ it has been held no defense that the municipality failed to comply with a statute requiring appointment of an engineer to superintend the work. In an action by bondholders on delinquent improvement bonds, where the statute requires purchase by the city or state at delinquent sales and application of all available funds in the city treasury to the payment of interest and principal of delinquencies on the bonds, the city may be precluded from claiming that the tax sale was invalid.⁹⁴ Delay by a municipality in instituting foreclosure actions on delinquent assessments has been held excusable, in a suit by a bondholder for equitable relief, where the bondholder has not previously demanded foreclosure,⁹⁵ and where current economic conditions would have prevented sales except at a greatly depressed level.⁹⁶

§ 1973. Time to Sue

A suit on municipal bonds may not be brought before they mature, and an action on suit must be brought within the time limited by statute. Such a suit may be barred by laches.

A suit on municipal bonds may not be brought before they mature according to their terms,⁹⁷ even

& Trust Co., 169 So. 584, 125 Fla. 89.

Legality of collections

In an action against the municipality to recover the face value of, and remaining unpaid interest on, bonds on the theory that it was responsible for dissipation of funds after payment, the municipality having permitted the clerk to make collections may not question the legality of the collection by the clerk, especially after adopting and ratifying the acts of the clerk.—*Cruzen v. Boise City*, 74 P.2d 1037, 58 Idaho 406.

Status as holder in due course

Where bonds are negotiable, payable to bearer, lack or want of status as a holder in due course is no defense.—*City of Hialeah v. Groves*, C.C.A.Fla., 101 F.2d 951.

Statutory defenses

The municipality may avail itself of statutory defenses.—*City of Jacksonville v. Bankers Life Co.*, C.C.A. Ill., 90 F.2d 141.

82. Ill.—*Galt v. City of Chicago*, 42 N.E.2d 115, 315 Ill.App. 91.

44 C.J. p 1257 note 90.

83. Ill.—*Northern Trust Co. v. Wilmette*, 77 N.E. 169, 220 Ill. 417, 5 Ann Cas. 193.

44 C.J. p 1257 note 91.

84. Ky.—*Green County v. Shortell*, 75 S.W. 251, 116 Ky. 108, 25 Ky.L. 357.

44 C.J. p 1257 note 93.

85. U.S.—*Rondot v. Rogers Tp.*, Mich., 99 F. 202, 39 C.C.A. 462.

86. U.S.—*Allen v. Cameron*, C.C.Mo., 1 F.Cas No.243, 3 Dill. 198.

44 C.J. p 1257 note 95.

87. Ky.—*Eminence v. Grasser*, 81 Ky. 52.

88. Pa.—*Commonwealth v. Pittsburgh, etc.*, R. Co., 34 Pa. 496.

89. U.S.—*Shepard v. Tulare Irr. Dist.*, C.C.Cal., 94 F. 1, affirmed 22 S.Ct. 531, 185 U.S. 1, 46 L.Ed. 531.

90. U.S.—*Clagett v. Duluth Tp.*, Minn., 143 F. 824, 74 C.C.A. 620.

91. Mo.—*Moore v. Jefferson*, 45 Mo. 202.

92. N.M.—*Crist v. Town of Gallup*, 183 P.2d 156, 51 N.M. 286.

93. Ala.—*First Nat. Bank v. Town of Luverne*, 180 So. 283, 235 Ala. 606.

94. U.S.—*Brown-Crummer Inv. Co. v. City of Burbank*, D.C.Cal., 17 F. Supp. 469, appeal dismissed, C.C.A., 97 F.2d 993.

95. U.S.—*Brown-Crummer Inv. Co. v. City of Burbank*, supra.

96. U.S.—*Brown-Crummer Inv. Co. v. City of Burbank*, supra.

97. U.S.—*Bessemer Inv. Co. v. City of Chester*, D.C.Pa., 22 F.Supp. 311, modified on other grounds, C.C.A., 113 F.2d 571.

La.—*Brand v. Donaldsonville*, 28 La. Ann. 558.

though the municipal corporation repudiates its obligation on the bonds.⁹⁸ An action or suit between a municipality and a holder of its bonds should be brought within the period of time limited by statute for the maintenance of such action or suit,⁹⁹ computed from the time the cause of action accrued,¹ unless there is something to prevent or interrupt the running of the statute or avoid its operation.²

Laches on the part of a bondholder after repudiation of the trust precludes him from maintaining a suit in equity to charge the municipality as a trustee for the collection of taxes and payment thereof to the bondholder.³ An unnecessarily long delay by bondholders will, in a proper case, constitute laches so as to bar recovery,⁴ but mere lapse of time, without prejudice to the other party, does not constitute laches.⁵ Where a charter provision declares that an assessment lien shall continue in full force and effect until assessments and all interest thereon are paid, a general law of the state, extinguishing liens by lapse of time for bringing an action on the principal obligation does not apply, so that delay beyond such time is not laches.⁶

§ 1974. Who May Sue or Be Sued; Parties

Suit may be brought by the holder of a bond payable to bearer; and in any action or suit on, or arising out

of, bonds or other securities all necessary parties must be joined.

Where bonds are payable to bearer, suit thereon may be maintained by the legal holder thereof,⁷ in his own name,⁸ although they are held only for the purpose of collection and the equitable title is in another.⁹ A bondholder may sue to enforce the payment of his bonds without holding or representing the entire issue;¹⁰ and a holder of a coupon need not have any interest in the bond to which it was formerly attached, in order to recover on the coupon.¹¹ It has been held that, where a municipal board is charged with an official duty to see that bonds issued by it are paid when due, it has such interest as will entitle it to maintain mandamus to compel payment.¹² While, in the absence of statute one bondholder may, for the benefit of himself and other bondholders in like situation, maintain a suit to enforce assessments by foreclosure or to recover against a property owner who has waived his right to contest assessments and agreed to become personally liable,¹³ and under a statute so providing may maintain an action to enforce the contractual rights and contractual and statutory remedies in favor of himself and other bondholders similarly situated,¹⁴ he may not forego remedies or accept less than the amount due for the other bondholders except with their express consent and on their express authorization;¹⁵ and

98. La.—Brand v. Donaldsonville, supra.

99. Ill.—Coquard v. Oquawka, 61 N. E. 660, 192 Ill. 355.

44 C.J. p 1256 note 83.

Recovery held not barred by limitations

Okl.—Town of Shattuck v. Barcafer, 137 P.2d 238, 192 Okl. 336.

Tex.—Hayward v. City of Corpus Christi, Civ.App., 195 S.W.2d 995, error refused, no reversible error.

Moratorium statute held inapplicable where interest on bond was delinquent.—Trompeter & Co. v. Monaco, 125 P.2d 581, 51 Cal.App.2d 668.

Construction of statutes

The statute imposing a ten-year limitation period on obligations of public and quasi-public corporations, is remedial legislation and, as such, is entitled to a liberal construction. —Gerweck v. Munch, 26 N.W.2d 864, 317 Mich. 53.

1. Cal.—Freehill v. Chamberlain, 4 P. 466, 65 Cal. 603.

44 C.J. p 1256 note 84.

2. U.S.—Hall v. New Orleans, C.C. La., 19 F. 870.

3. U.S.—Eddy v. San Francisco, Cal., 162 F. 441, 89 C.C.A. 327, cer-

tiorari denied 30 S.Ct. 405, 215 U.S. 604, 54 L.Ed. 345.

4. U.S.—Whitaker & Co. v. City of Carbondale, D.C.Ill., 55 F.Supp. 72 —Brown-Crummer Inv. Co. v. City of Burbank, D.C.Cal., 17 F.Supp. 469, appeal dismissed, C.C.A., 97 F. 2d 993.

Cal.—Hammond v. City of Burbank, 59 P.2d 495, 6 Cal.2d 646, appeal dismissed 57 S.Ct. 316, 299 U.S. 519, 81 L.Ed. 383.

5. Wash.—Keyes v. City of Tacoma, 120 P.2d 533, 12 Wash.2d 54.

6. U.S.—Brown-Crummer Inv. Co. v. City of Purcell, C.C.A.Okl., 128 F. 2d 400.

7. U.S.—Salmon v. Rural Independent School Dist. of Allison, C.C. Iowa, 125 F. 235.

Tex.—Jennings Banking, etc., Co. v. Jefferson, 70 S.W. 1005, 30 Tex. Civ.App. 534.

8. U.S.—Salmon v. Rural Independent School Dist. of Allison, C.C. Iowa, 125 F. 235.

Pa.—Mershon v. Borough of Millers-town, 193 A. 328, 128 Pa.Super. 248 —Fulton Nat. Bank of Lancaster v. City of Lancaster, 172 A. 34, 112 Pa.Super. 565.

44 C.J. p 1257 note 3.

A suit by a nonresident holder of special improvement bonds to determine amount due by municipality on account of paving improvements abutting municipally-owned property in paving improvement district was not required to be instituted in the name of the municipality, where action did not seek to foreclose special improvement liens.—Hovenden v. City of Bristow, D.C.Okl., 34 F. Supp. 674.

9. U.S.—Salmon v. Rural Independent School Dist. of Allison, C.C. Iowa, 125 F. 235.

Tex.—Jennings Banking, etc., Co. v. Jefferson, 70 S.W. 1005, 30 Tex. Civ. App. 534.

10. U.S.—Perris Irr. Dist. v. Thompson, Cal., 116 F. 832, 54 C.C. A. 336.

11. Va.—Arents v. Commonwealth, 18 Gratt. 750, 59 Va. 750.

12. Mich.—People v. East Saginaw, 33 Mich. 164.

13. Ind.—Read v. Beczkiewicz, 18 N. E.2d 789, 215 Ind. 365, reheard 19 N.E.2d 465, 215 Ind. 365.

14. Ind.—Read v. Beczkiewicz, supra.

15. Ind.—Read v. Beczkiewicz, supra.

the court cannot vest a receiver or other officer of the court with power to compromise for bondholders who are not before the court, and accept for them anything less than the full rights and remedies called for under their contract.¹⁶

Plaintiff's right of action against the municipality for his pro rata share of installments collected is not affected by his suit as class plaintiff to foreclose assessment liens against lands of persons failing to pay their assessments.¹⁷

Defendant. All necessary parties must be joined as defendants.¹⁸ The fact that bonds are to be paid from the proceeds of assessments against specific property does not render the owners of such property necessary parties to an action thereon.¹⁹ When the money for payment of bonds has been placed in the hands of officers charged with the duty of paying them, an action will lie on behalf of a bondholder against such officers;²⁰ and, where delinquent special assessments, pledged for the payment of improvement bonds, are returned to the county treasurer for collection as delinquent taxes, the county may be joined with the municipality as a party defendant in a suit by a bondholder for an accounting and other equitable relief;²¹ but a committee of the city government whose consent is not essential to the raising of funds for the pay-

ment of bonds is not a necessary party to a suit thereon.²² In a suit for accounting, the municipal officers, as well as the municipality, are proper parties to the bill,²³ and all parties who have dealt with trust funds may be joined as defendants.²⁴

Those whose rights and liabilities will not be affected by the determination of the cause are not necessary parties defendant,²⁵ although they may be proper parties;²⁶ but, where the rights of all bondholders will be affected, they must be joined.²⁷

Intervention. Under some statutes the holder of a certificate issued after issuance of bonds may intervene in a bondholder's action to enforce payment of the bonds.²⁸

§ 1975. Pleading

- a. Declaration, complaint, or bill
- b. Plea or answer
- c. Issues, proof, and variance

a. Declaration, Complaint, or Bill

In actions or suits on, or arising out of, municipal bonds or other securities the plaintiff must set forth in his pleading all matters essential to his cause of action.

In actions or suits on, or arising out of, municipal bonds or other securities plaintiff must set forth in his complaint, declaration, petition, or bill all matters essential to his cause of action.²⁹ The

16. Ind.—Read v. Beczkiewicz, *supra*.

17. Ind.—City of Hammond v. Melville, 52 N.E.2d 845, 114 Ind.App. 602.

18. Tex.—Mercantile Nat. Bank at Dallas v. Hickman, Civ.App., 80 S.W.2d 488, error dismissed.

19. U.S.—Mather v. San Francisco, Cal., 115 F. 37, 52 C.C.A. 631. 44 C.J. p 1257 note 8.

20. N.Y.—Murdoch v. Aikin, 29 Barb. 59.

21. U.S.—Hayden v. Douglas County, Wis., 170 F. 24, 95 C.C.A. 298.

22. N.C.—Leach v. Fayetteville Com'rs, 84 N.C. 829—Hawley v. Fayetteville, 82 N.C. 22.

23. Ala.—City of Carbon Hill v. Merchants Bank & Trust Co., 185 So. 387, 237 Ala. 55.

Accounting and mandatory injunction

In suit by holder of local improvement bonds issued by municipality for an accounting of trust funds and for mandatory relief, city treasurer and other municipal officers were properly joined as parties defendant with the municipality where the scope of the mandatory relief would have called for action by such officials, but a decree for bondholder was not vitiated by fact that city

treasurer and other officials who were made codefendants had been dismissed from the suit.—Bank of Burlington v. City of Murphysboro, C.C.A.Ill., 96 F.2d 899.

24. Ala.—City of Carbon Hill v. Merchants Bank & Trust Co., 185 So. 387, 237 Ala. 55.

Fla.—City of Winter Haven v. Summerlin, 154 So. 863, 114 Fla. 727.

Individual or official capacity

In suit by bondholder against city to compel accounting for proceeds of certificates of indebtedness deposited with city treasurer to be applied to payment of bonds, officers of city who dealt with proceeds are properly joined as defendants in individual capacity.—City of Winter Haven v. Summerlin, *supra*.

25. U.S.—Hovenden v. City of Bristow, D.C.Okl., 34 F.Supp. 674.

Ill.—Grand Carniolian Slovenian Catholic Union v. Village of Rockdale, 41 N.E.2d 218, 314 Ill.App. 308.

26. Ill.—Grand Carniolian Slovenian Catholic Union v. Village of Rockdale, *supra*.

27. U.S.—City of Alvarado v. Christian, C.C.A.Tex., 100 F.2d 156.

28. U.S.—Whitaker & Co. v. Grable, C.C.A.Ark., 109 F.2d 710.

29. Compliance with statutory con-

ditions precedent to bringing action must be alleged.—Nevins v. City of Lexington, 194 S.E. 293, 212 N.C. 616.

Requisites prescribed by statute

Ky.—City of Prestonsburg v. People's State Bank of Frankfort, 72 S.W.2d 1043, 255 Ky. 252. 44 C.J. p 1258 note 21 [a].

Pleadings held sufficient

U.S.—Hovenden v. City of Bristow, D.C.Okl., 34 F.Supp. 674.

Fla.—Farmers & Bankers Life Ins. Co. v. Lake Hancock Imp. Dist., 25 So.2d 666, 157 Fla. 266—City of Lakeland v. Select Tenures, 176 So. 274, 129 Fla. 338.

Iowa.—Hauge v. City of Des Moines, 224 N.W. 520, 207 Iowa 1209.

Tex.—Chattanooga Boiler & Tank Co. v. City of Collinsville, Civ. App., 111 S.W.2d 1170.

Wash.—Keyes v. City of Tacoma, 120 P.2d 533, 12 Wash.2d 54.

44 C.J. p 1258 note 21 [c].

Pleadings held insufficient

U.S.—Seeley v. Town of Belleair, C.C.A.Fla., 127 F.2d 840—Olmstead v. Superior, C.C.Wis., 155 F. 172.

Tex.—Mercantile Nat. Bank at Dallas v. Hickman, Civ.App., 80 S.W.2d 488, error dismissed.

Wash.—Zinser v. City of Vancouver, 74 P.2d 486, 192 Wash. 622.

Theory of case

Payee could not recover interest

petition should show the authority to issue the bond or note,³⁰ either by averment of the special act conferring such authority or by stating the recital of the bond in that respect;³¹ and, where the bonds contain no recital which will preclude the municipality from impeaching them in the hands of a bona fide holder, plaintiff must show in his complaint that they were issued in substantial compliance with the legislative enactments³² and for a proper purpose;³³ but, when it is alleged that plaintiff is a bona fide holder and the bonds recite their issuance in conformity with law, it is not necessary that the facts showing the regularity and legality of issuance should be set out.³⁴ Where bonds are payable to bearer, the complaint need not allege how and when plaintiff became owner of the bonds.³⁵ It has been held that a compliance with a constitutional provision requiring provision to be made for the payment of the indebtedness must be alleged.³⁶

Subject to the foregoing rules the complaint need not negative matters of defense;³⁷ nor need it set out the ordinance under which the bonds were issued,³⁸ show the authority of general agents of the municipality,³⁹ or aver matters not essential to the validity of the bonds, such as the statement of the proper name of the bonds on their face⁴⁰ or the performance of certain duties by officers after the issuance of the bonds.⁴¹ Averments concerning the activities of the mayor in matters in which the city can act only by ordinance will not be given weight in determining a motion to dismiss a bill

in equity.⁴² A general judgment for misappropriation of moneys belonging to a special fund cannot be had in the absence of any allegation of misappropriation.⁴³

As in civil actions generally, plaintiff may be permitted to amend his pleadings so as to cure defects therein.⁴⁴

Statement of facts on submission of controversy. A statutory provision that in pleading the judgment of a court of special jurisdiction the facts conferring jurisdiction need not be set out is applicable to the statement of a case filed for the submission of controversy with regard to the validity of a bond.⁴⁵

b. Plea or Answer

The plea or answer in an action or suit on, or arising out of, a municipal bond or other security must allege all matters of defense to be relied on in accordance with the rules of pleading generally. Set-off or counterclaim may be urged in a proper case.

Defendant may plead generally non est factum or a plea in the nature thereof,⁴⁶ or may plead specially setting up special matter avoiding liability on the bond after its issuance.⁴⁷ Where it is alleged that plaintiff obtained possession of the bond in suit by fraud, the facts constituting the fraud should be specifically pleaded.⁴⁸ A municipality seeking to defend on the theory that the indebtedness evidenced by the notes sued on exceeded its debt limitation must allege with particularity and certainty the facts of such indebtedness, the character thereof, and when contracted.⁴⁹ A plea which

by way of damages for breach of contracts to pay notes by city, which was prohibited by constitution from issuing interest-bearing evidences of indebtedness, where complaint asked judgment for both interest and principal on notes, asserting right to recover interest under contract and not as award by way of damages for breach of contract—*American La-France & Foamite Corporation v. City of El Dorado*, C.C.A.Ark., 81 F. 2d 862.

30. Ind.—*Citizens Bank of Anderson v. Town of Burnettsville*, 179 N.E. 724, 98 Ind.App. 92.
44 C.J. p 1258 note 22.

31. U.S.—*Hopper v. Covington, Ind.*, 6 S.Ct. 1025, 118 U.S. 148, 30 L.Ed. 190.

44 C.J. p 1258 note 23.

32. U.S.—*Hopper v. Covington, supra*.

33. U.S.—*Hopper v. Covington, supra*.

34. U.S.—*Lincoln Tp. v. Cambria Iron Co., Mich.*, 103 U.S. 412, 26 L. Ed. 518—*Shepard v. Tulare Irr.*

Dist., C.C.Cal., 94 F. 1, affirmed 22 S.Ct. 531, 185 U.S. 1, 46 L.Ed. 773.

35. Ill.—*Reconstruction Finance Corporation v. Calumet City*, 57 N.E.2d 290, 324 Ill.App. 73.

36. Tex.—*Biddle v. Terrell*, 18 S.W. 691, 82 Tex. 335.

44 C.J. p 1258 note 28.

37. U.S.—*Lincoln Tp. v. Cambria Iron Co., Mich.*, 103 U.S. 412, 26 L.Ed. 518.

44 C.J. p 1258 note 29.

38. Cal.—*Underhill v. Sonora*, 17 Cal. 172.

39. N.J.—*Ridgefield Tp. Board of Education v. Cliffside Park Board of Education*, 43 A. 722, 63 N.J. Law 371, affirmed 53 A. 1124, 68 N.J. Law 415.

44 C.J. p 1258 note 31.

40. N.J.—*Rahway Sav. Inst. v. Rahway*, 20 A. 756, 53 N.J. Law 48.

41. N.J.—*Rahway Sav. Inst. v. Rahway*, *supra*.

42. U.S.—*Puget Sound Power, etc.*, Co. v. Seattle, D.C.Wash., 271 F. 958.

43. Wash.—*Zinser v. City of Vancouver*, 74 P.2d 486, 192 Wash. 622.

44. Tex.—*Citizens' Bank v. Terrell*, 14 S.W. 1003, 78 Tex. 450.
44 C.J. p 1258 note 21 [b].

45. N.Y.—*Brownell v. Greenwich*, 22 N.E. 24, 114 N.Y. 518, 4 L.R.A. 685.

46. U.S.—*Coler v. Cleburne, Tex.*, 9 S.Ct. 720, 131 U.S. 162, 33 L.Ed. 146.

44 C.J. p 1258 note 38.

47. Tenn.—*Richardson v. Marshall County*, 45 S.W. 440, 100 Tenn. 346.
44 C.J. p 1258 note 39.

48. Iowa—*Clapp v. Cedar County*, 5 Iowa 15, 68 Am.D. 678.

49. Ala.—*First Nat. Bank v. Town of Luverne*, 180 So. 283, 235 Ala. 606.

Allegations held insufficient

Ala.—*First Nat. Bank v. Town of Luverne*, *supra*—*Town of Linden v. American-La France & Foamite*

omits essential allegations is demurrable,⁵⁰ and a plea or answer alleging merely that plaintiff was not the owner or holder of the securities sued on raises no defense.⁵¹ An admission in the answer that plaintiff is the owner and holder of bonds payable to bearer precludes any defense questioning plaintiff's title.⁵²

Set-off and counterclaim. A claim of set-off for overpayment of interest is properly raised by an answer setting up payment as a defense.⁵³ Where bondholders are seeking merely an adjudication of their claims and not satisfaction of a judgment, a counterclaim of the municipality alleging insolvency and praying for intervention of equity to prevent a multiplicity of suits is dismissible as insufficient in law,⁵⁴ and as premature since a mere entry of judgment would not entitle the bondholder to payment in full or prevent intervention of other bondholders for the purpose of sharing in funds that might thereafter be collected.⁵⁵

c. Issues, Proof, and Variance

In actions or suits on, or arising out of, municipal bonds or other securities only such matters as are properly pleaded and controverted are in issue. Evidence bearing on such matters is admissible.

In actions or suits on or arising out of municipal bonds or other securities only such matters as are properly pleaded and controverted are in issue.⁵⁶

Recovery may be had on negotiable detached coupons without production of the bond to which they were formerly attached.⁵⁷ However, where the bonds are transferable only on the books of the city, a person suing on coupons cannot recover without showing a legal assignment of the bonds to him.⁵⁸ It is incumbent on defendant to sustain affirmative defenses pleaded by it by proper and sufficient evidence.⁵⁹ Evidence bearing on the matters put in issue by the pleadings is admissible.⁶⁰

§ 1976. Evidence

- a. Presumptions and burden of proof
- b. Admissibility, weight, and sufficiency

a. Presumptions and Burden of Proof

The rules of evidence in civil actions apply as to presumptions and the burden of proof in actions on, or arising out of, municipal bonds or other securities.

Subject to the rules of evidence in civil actions, it will be presumed as a general rule that the bonds or other securities of a municipal corporation issued in apparent compliance with a law authorizing their issue have been actually so issued,⁶¹ and that there has been a compliance with all conditions precedent,⁶² especially where the bonds are in the hands of bona fide holders.⁶³

The burden of proof rests, as it does in civil ac-

Industries, 167 So. 548, 232 Ala. 167.

Ky.—City of Winchester v. Winchester Bank, 205 S.W.2d 997, 306 Ky. 45—James C. Willson & Co. v. City of Ravenna, 104 S.W.2d 965, 268 Ky. 232.

50. Ala.—First Nat. Bank v. Town of Luverne, 180 So. 283, 235 Ala. 606.

51. Fla.—City of Lakeland v. Select Tenures, 176 So. 274, 129 Fla. 338. Miss.—Town of Mize v. McIntosh, 191 So. 489, 186 Miss. 467.

52. Colo.—Town of Haxtun v. Wangnild, 127 P.2d 328, 109 Colo. 518.

53. Ill.—Prange v. City of Marion, 48 N.E.2d 980, 319 Ill.App. 136.

54. U.S.—City of Hendersonville v. Katz, C.C.A.N.C., 85 F.2d 907.

55. U.S.—Town of Columbus v. Barringer, C.C.A.N.C., 85 F.2d 908.

56. Ky.—City of Hazard v. Duff, 175 S.W.2d 146, 295 Ky. 628.

A plea of want of consideration will not raise the issue of partial failure of consideration.—First Nat. Bank of Town of Luverne, 180 So. 283, 235 Ala. 606.

Status of plaintiff

Where no defenses against the first holder, obligee, or promisee are

asserted in a subsequent holder's action on a negotiable instrument payable to bearer, no issue as to plaintiff's status as a holder in due course is raised, and proof that he is such a holder is unnecessary.—City of Hialeah v. Groves, C.C.A. Fla., 101 F.2d 951.

57. U.S.—Walnut v. Wade, Ill., 103 U.S. 683, 26 L.Ed. 526. 44 C.J. p 1258 note 43.

58. U.S.—Oelrich v. Pittsburgh, C. C.Pa., 18 F.Cas.No.10,442.

59. W.Va.—Brown v. Point Pleasant, 15 S.E. 209, 36 W.Va. 290.

60. U.S.—Dinet v. Rapid City, S.D., 222 F. 497, 138 C.C.A. 93.

Evidence held admissible under pleadings

Ala.—First Nat. Bank v. Town of Luverne, 180 So. 283, 235 Ala. 606. Pa.—Palmer v. City of Erie, Com. Pl., 20 Erie 400, affirmed 9 A.2d 378, 337 Pa. 5.

Evidence held not admissible under pleadings

Ala.—First Nat. Bank v. Town of Luverne, 180 So. 283, 235 Ala. 606.

61. Okl.—Greer County v. Gregory, 81 P. 422, 15 Okl. 208.

44 C.J. p 1259 note 51.

Certification for collection

In action against city to recover

balance due on sewer certificates, where complaint affirmatively showed that certificates were in prescribed form and all things had been done necessary to their validity, it must be presumed that city certified the assessments to county assessor as required by statute.—Purcell v. City of Carlsbad, C.C.A.N.M., 126 F.2d 748.

62. Ill.—Quincy v. Warfield, 25 Ill. 317, 79 Am.D. 330.

N.C.—Belo v. Forsythe County, 76 N.C. 489.

63. N.J.—Montvale v. Hackensack Trust Co., 67 A. 69. 44 C.J. p 1259 note 53.

Delivery

(1) Where city had authority to issue negotiable bonds, delivery thereof by city is conclusively presumed in favor of bona fide holder who purchased bonds before maturity.—Bankers' Trust Co. v. City of Statesville, 166 S.E. 169, 203 N.C. 399—44 C.J. p 1259 note 53 [a].

(2) Delivery of negotiable city bonds payable to bearer is presumed until contrary is proved in action for amount due thereon.—City of Hialeah v. Groves, C.C.A.Fla., 101 F.2d 951.

tions generally, on the party having the affirmative of the issue;⁶⁴ and, as against a bona fide purchaser, the burden of proving want of performance of any of the prerequisites is on the municipality or other party attacking the validity of the bonds.⁶⁵ However, where bonds for a particular purpose are valid only if they fall within an exception of a statute forbidding the issuance of bonds for such purpose generally, the burden is on plaintiff to establish that they are within such exception;⁶⁶ and, where a bond on its face shows the conditions on which it is payable, the holder of the bond or coupons has the burden of showing that there has been a compliance with such conditions.⁶⁷ The burden is not on plaintiff to prove improper application of money collected for payment of bonds in a suit for accounting of proceeds of assessments,⁶⁸ but the holder of improvement bonds seeking a general judgment because of misappropriation of moneys belonging to a special fund has the burden of proving misappropriation by the municipality.⁶⁹ Where the municipality seeks to compel plaintiff to prorate with other creditors, it has the burden of showing that others have like claims against it amounting to more than the funds available.⁷⁰

If a municipality has the right to execute a promissory note, the execution thereof creates a prima facie liability on the municipality,⁷¹ and the burden is on it to show want of consideration or that it did not receive the proceeds of the note,⁷² rather than on plaintiff to prove that it did receive the proceeds.⁷³ In an action on such a note, in the absence of anything to the contrary, it must be assumed that current revenues of the municipality are sufficient to discharge the note.⁷⁴

Excessive issue or indebtedness. In the absence of evidence as to the indebtedness of a municipal corporation and the assessed value of its taxable property, it will be presumed, in support of the validity of bonds, that the authorized limit of indebtedness was not exceeded;⁷⁵ and, where a corporation has power to issue bonds to a limited amount only, the burden is on it to show that a particular bond in suit was issued after this limit was exceeded.⁷⁶

Status, title, and rights of holder. Possession of negotiable bonds raises a presumption of ownership;⁷⁷ but it has been held that the mere possession of coupons creates no presumption that the holder is entitled to the interest represented there-⁷⁸ A holder of municipal bonds is presumed,

64. U.S.—Town of Belleair v. Olds, C.C.A.Fla., 127 F.2d 838, certiorari denied 63 S.Ct. 36, 317 U.S. 644, 87 L.Ed. 519—Brown-Crummer Inv. Co. v. City of Burbank, D.C.Cal., 17 F.Supp. 469, appeal dismissed C.C.A., 97 F.2d 993.

Ind.—Citizens' Bank of Anderson v. Town of Burnettsville, 179 N.E. 724, 98 Ind.App. 92.

Burden of proving defenses

U.S.—Bessemer Inv. Co. v. City of Chester, C.C.A.Pa., 113 F.2d 571—Curb and Gutter Dist., No. 37 of City of Fayetteville v. Parrish, C.C.A.Ark., 110 F.2d 902—Gray v. Town of Thermopolis, D.C.Wyo., 83 F.Supp. 78.

Ga.—City of Alma v. Indiana Air Pump Co., 157 S.E. 376, 42 Ga.App. 743.

Ill.—Prange v. City of Marion, 48 N.E.2d 980, 319 Ill.App. 136.

65. N.M.—Cook v. Socorro, 165 P. 341, 22 N.M. 507.
44 C.J. p 1259 note 54.

66. Ill.—Sampson v. People, 30 N.E. 781, 141 Ill. 17.
44 C.J. p 1259 note 55.

67. U.S.—Green v. Dyersburg, C.C. Tenn., 10 F.Cas.No.5,756, 2 Flipp 477.
44 C.J. p 1259 note 56.

68. Ill.—Rothschild v. Village of Calumet Park, 183 N.E. 337, 350 Ill. 330.

69. Wash.—Zinser v. City of Vancouver, 74 P.2d 486, 192 Wash. 622.

70. Ill.—Burke v. Chicago, 185 Ill. App. 228.

71. Ky.—City of Jackson v. First Nat. Bank of Jackson, 157 S.W.2d 321, 289 Ky. 1.

72. Ala.—First Nat. Bank v. Town of Luverne, 180 So. 283, 235 Ala. 606.

Ky.—City of Jackson v. First Nat. Bank of Jackson, 157 S.W.2d 321, 289 Ky. 1.

73. Ky.—City of Jackson v. First Nat. Bank of Jackson, supra.

74. Ky.—City of Jackson v. First Nat. Bank of Jackson, supra.

Specific pledge immaterial

In bank's action on note executed by city of fourth class, it was required to be assumed, in absence of pleading and proof to the contrary, that the current revenues of the city were sufficient to discharge the note, and the fact that the current revenues were not specifically pledged by ordinance directing execution of note or by note itself was immaterial.—City of Jackson v. First Nat. Bank of Jackson, supra.

75. U.S.—German Ins. Co. v. Manning, C.C.Iowa, 95 F. 597.
44 C.J. p 1259 note 58.

76. S.C.—Neely v. Yorkville, 10 S. C. 141.

77. U.S.—City of Hialeah v. Harris, C.C.A.Fla., 83 F.2d 999—City of Coral Gables v. Hayes, C.C.A.Fla., 74 F.2d 989.

Minn.—Batchelder v. City of Faribault, 3 N.W.2d 778, 212 Minn. 251
44 C.J. p 1259 note 60.

Prima facie ownership

Where bonds payable to bearer on July 1, 1904 were discovered in 1929 in deceased lawyer's safe, plaintiffs, who were the only surviving heirs of the attorney, were prima facie the owners.—Batchelder v. City of Faribault, 3 N.W.2d 778, 212 Minn. 251.

78. U.S.—Oelrich v. Pittsburgh, C. C.Pa., 18 F.Cas.No.10,442.

Genuineness of coupons

(1) In action for principal and interest due on city bonds and coupons, not attached to bonds when produced in court, burden was on plaintiff to prove that coupons were attached to bonds when issued, where genuineness of coupons was put in issue.—City of Hialeah v. Groves, C.C.A.Fla., 101 F.2d 951.

(2) Proof that coupons, not attached to city bonds, corresponded to bonds and satisfied requirements of city charter and ordinances, did not sustain plaintiff's burden of proving that such coupons were city's valid obligations in action for principal and interest due on bonds and coupons; and, while proof of genuine-

in the absence of proof to the contrary, to have taken them before maturity for a valuable consideration and without notice of any objections to their validity;⁷⁹ and a mere irregularity not amounting to illegality does not place on plaintiff the burden of showing that he is a holder for value;⁸⁰ but, where the municipality proves that there was fraud or illegality in the inception of the bonds, the burden is thrown on the holder to show that he or, some one under whom he claims, is a bona fide holder for value.⁸¹ It has been held that want of notice of defects cannot be presumed from mere evidence of a purchase for value.⁸²

Nonnegotiable instrument. There is no presumption that a nonnegotiable instrument was rightfully issued by the municipality;⁸³ and, where nil debet has been pleaded, it places on plaintiff the burden of showing that the execution of a nonnegotiable note was within the power of the corporation.⁸⁴ The transferee of a nonnegotiable security has the burden of establishing his superior equity as against the true owner.⁸⁵

b. Admissibility, Weight, and Sufficiency

The general rules as to the admissibility, weight, and sufficiency of evidence apply in actions or suits on, or arising out of, municipal bonds or other securities.

The rules governing the admissibility, weight, and sufficiency of evidence in civil actions are applicable in determining the admissibility,⁸⁶ and the weight and sufficiency,⁸⁷ of evidence in actions or suits on, or arising out of, municipal bonds, coupons, notes, or other securities.

§ 1977. Trial and Judgment

a. Trial

b. Judgment; amount of recovery

a. Trial

In actions or suits on, or arising out of, municipal bonds or other securities, the general rules of trial in civil actions apply.

Where the trial is before a jury, questions of fact are to be submitted to, and determined by, it,⁸⁸ under proper instructions,⁸⁹ provided the evidence

ness of city bonds and attached coupons may be made by proving negotiating officers' acts pursuant to their authority in action for principal and interest due thereon, validity of coupons not signed by such officers depends entirely on whether they were attached to bonds when issued.—City of Hialeah v. Groves, supra.

79. U.S.—Corpus Juris cited in Board of Education of Town of Carmen, Okl. v. James, C.C.A.Okla., 49 F.2d 91, 102.

Fla.—State ex rel. Havana State Bank v. Rodas, 151 So. 289, 115 Fla. 259.

Or.—State ex rel. Fred J. Kiesel Estate v. Bishop, 129 P.2d 276, 169 Or. 448.

44 C.J. p 1269 note 62.

80. U.S.—Pana v. Bowler, Ill., 2 S. Ct. 704, 107 U.S. 529, 27 L.Ed. 424.

81. U.S.—Lytle v. Lansing, N.Y., 13 S.Ct. 254, 147 U.S. 59, 37 L.Ed. 78.

44 C.J. p 1269 note 64.

82. Mich.—Thompson v. Mecosta, 86 N.W. 1044, 127 Mich. 522.

83. Ill.—Chicago First Nat. Bank v. Elgin, 136 Ill.App. 453.

84. Va.—Richmond, etc., Land, etc., Co. v. West Point, 27 S.E. 460, 94 Va. 668.

85. U.S.—First Nat. Bank v. Mayor and City Council of Baltimore, C. C.A.Md., 108 F.2d 600.

86. Evidence held admissible

Ala.—First Nat. Bank v. Town of Luverne, 180 So. 283, 235 Ala. 606. 44 C.J. p 1260 note 70 [a].

Evidence held inadmissible

U.S.—Curb and Gutter Dist. No. 37

of City of Fayetteville v. Parrish, C.C.A.Ark., 110 F.2d 902.

Ala.—Town of Valley Head v. Mishler, 183 So. 664, 236 Ala. 520.

44 C.J. p 1260 note 70 [b].

87. Evidence held sufficient

U.S.—Fidelity Trust Co. v. Village of Stickney, C.C.A.Ill., 129 F.2d 506

—Bessemer Inv. Co. v. City of Chester, C.C.A.Pa., 113 F.2d 571—

Curb and Gutter Dist. No. 37 of City of Fayetteville v. Parrish, C. C.A.Ark., 110 F.2d 902—City of Hialeah v. Groves, C.C.A.Fla., 101 F.

2d 951—City of Hialeah v. Harris, C.C.A.Fla., 83 F.2d 999—Gray v. Town of Thermopolis, D.C.Wyo., 33 F.Supp. 78.

Colo.—Rising v. Hoffman, 179 P.2d 430, 116 Colo. 63.

Ga.—City of Alma v. Indiana Air Pump Co., 157 S.E. 376, 42 Ga.App. 743.

Ill.—Viehweg v. City of Mount Olive, 19 N.E.2d 211, 298 Ill.App. 412—Rothschild v. Village of Calumet Park, 262 Ill.App. 96, modified on other grounds 183 N.E. 337, 350 Ill. 330.

Ind.—La Plante v. City of Vincennes, 194 N.E. 191, 100 Ind.App. 264, rehearing denied 195 N.E. 297, 100 Ind.App. 264.

Mass.—National Surety Corporation v. List, 33 N.E.2d 255, 308 Mass. 539.

N.Y.—Snell v. City of Long Beach, 33 N.Y.S.2d 923, 263 App.Div. 1021, appeal denied 35 N.Y.S.2d 727, 264 App.Div. 782, affirmed 49 N.E.2d 616, 290 N.Y. 649.

Okla.—Alexander v. Board of Education of Town of Carmen, 18 P.2d 863, 161 Okl. 287.

Pa.—Philadelphia Sav. Fund Soc. v. City of Bethlehem, 17 A.2d 750, 143 Pa.Super. 449.

Tex.—Miller v. State ex rel. Abney, Civ.App., 155 S.W.2d 1012, error refused.

44 C.J. p 1260 note 71 [a].

Evidence held insufficient

U.S.—Town of Belleair v. Olds, C.C. A.Fla., 127 F.2d 838, certiorari denied 63 S.Ct. 36, 317 U.S. 644, 87 L.Ed. 519—Mott v. City of Flora, D.C.Ill., 51 F.Supp. 963—Gray v. Town of Thermopolis, D.C.Wyo., 33 F.Supp. 78.

Ill.—Prange v. City of Marion, 48 N.E.2d 980, 319 Ill.App. 136.

Iowa.—Bankers Life Co. v. City of Emmetsburg, 278 N.W. 811, 224 Iowa 1287.

Ky.—W. T. Congleton Co. v. Craft, 103 S.W.2d 287, 267 Ky. 750.

Pa.—First Catholic Slovak Union of U. S. v. City of Scranton, 167 A. 34, 311 Pa. 500.

44 C.J. p 1260 note 71 [b].

Pa.—Philadelphia Sav. Fund Soc. v. City of Bethlehem, 17 A.2d 750, 143 Pa.Super. 449.

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Pa.—First Catholic Slovak Union of U. S. v. City of Scranton, 167 A. 34, 311 Pa. 500.

44 C.J. p 1260 note 71 [b].

Degree of proof

Before public securities are invalidated by a court, it should be plain that their issuance was in violation of law.—City of Kingsville v. Meredith, C.C.A.Tex., 103 F.2d 279.

88. Pa.—Harbold v. City of Reading, 49 A.2d 817, 355 Pa. 253—Palmer v. City of Erie, 9 A.2d 378, 337 Pa. 5.

44 C.J. p 1260 note 75.

89. Pa.—Palmer v. City of Erie, 9 A.2d 378, 337 Pa. 5—Philadelphia Sav. Fund Soc. v. City of Bethlehem, 17 A.2d 750, 143 Pa.Super. 449.

is sufficient to require the submission of such questions to the jury.⁹⁰ Where the trial is had without a jury, the rules governing the requisites and sufficiency of findings of fact in civil actions generally are applicable in determining the sufficiency of the findings made by the court.⁹¹ In an action brought solely for recovery on bonds and coupons, questions arising out of the liability of the municipal corporation on a stock subscription, in payment of which the bonds were issued, cannot be determined.⁹²

b. Judgment; Amount of Recovery

The judgment or decree to be rendered in any action or suit on, or arising out of, municipal bonds or other securities depends on the nature of the action or suit and the facts and circumstances of the case.

In an action or suit on, or arising out of, municipi-

pal bonds or other securities, the court will render such judgment or decree as will afford proper and adequate relief under the circumstances.⁹³ In a proper case the court may decree restoration of assessments wrongfully abated by the municipal corporation;⁹⁴ and a decree may order the municipality to levy a general tax on all property therein to pay a money judgment, provided for in the decree, for the amount of money wrongfully diverted.⁹⁵ Where the judgment can direct payment only as and when money therefor accumulates in the special fund out of which bonds are payable, a judgment against the fund is of no avail where the fund is exhausted.⁹⁶ If only the surplus remaining after the payment of current expenses may be applied to the payment of bonds, a court has no right to anticipate the existence of such a

90. Mich.—Schmid v. Frankfort, 104 N.W. 668, 141 Mich. 291.
Tex.—San Antonio v. Rollins, Civ. App., 127 S.W. 1166.

91. Mich.—Thompson v. Mecosta, 86 N.W. 1044, 127 Mich. 522.
44 C.J. p 1260 note 78.

Bona fides of holder

Unsevered overdue interest coupons do not as a matter of law defeat claim of holder in due course of an unmatured bond, but the bona fides in taking it is open to question as a matter of fact and all the circumstances of the purchase, including the number of past-due interest coupons, the price paid for bond, and the reliability of the seller, are to be considered in determining the question.—City of New Port Richey v. Fidelity & Deposit Co. of Maryland, C.C.A.Fla., 105 F.2d 348, 123 A.L.R. 1352.

Questions not raised by pleadings, testimony, or by requests for findings of fact cannot be considered by the court on a trial in assumpsit without a jury.—Reading Trust Co. v. Reading, Pa.Com.Pl., 41 Berks Co. 101.

92. U.S.—Norton v. Dyersburg, Tenn., 7 S.Ct. 1111, 127 U.S. 160, 32 L.Ed. 85.

93. N.Y.—Hand v. Boland, 38 N.Y.S. 2d 233, 265 App.Div. 916, affirmed 51 N.E.2d 932, 291 N.Y. 651.

Judgments or decrees held proper or not erroneous

Fla.—City of St. Petersburg v. United Mut. Life Ins. Co., 162 So. 871, 120 Fla. 307.

Ill.—O'Laughlin Co. v. Village of Stickney, 9 N.E.2d 589, 291 Ill.App. 606.

Ky.—City of Hazard v. Duff, 175 S.W.2d 146, 295 Ky. 628.

Pa.—Realty Co. v. Borough of Port Vue, 178 A. 466, 318 Pa. 374.

Compelling action

In bondholders' suit for injunction restraining diversion of net revenues of municipal revenue-producing enterprise required to be applied to payment of principal and interest due on bonds issued for such enterprise for other purposes, court could not order city officers to levy, assess, or collect taxes or fix rates for water system since that would be equivalent to awarding writ of mandamus, an extraordinary legal remedy, which equity court never awards.—George v. City of Asheville, C.C.A.N.C., 80 F.2d 50, 103 A.L.R. 568.

Issuance of execution

Judgment against city for amount due holders of improvement bonds, authorizing issuance of execution on judgment, is improper.

Idaho.—Wheeler v. City of Blackfoot, 45 P.2d 298, 55 Idaho 599.

Tex.—City of Laredo v. Frishmuth, Civ.App., 196 S.W. 190, error dismissed by agreement.

Amendment of decree, where warranted by the facts, is proper.—First Nat. Bank of Stevens Point, Wis., v. Village of Stickney, 82 N.E.2d 673, 335 Ill.App. 596.

Personal judgment

(1) A judgment imposing liability on the municipality to the extent of funds actually paid to it is not a personal judgment against the municipality.—City of Corbin v. Becker, 180 S.W.2d 419, 297 Ky. 85.

(2) Where city assessed cost of street improvements against abutting property and issued bonds therefor, and was endeavoring to make collections, a bondholder was not entitled to personal judgment against city at time of suit, but was entitled to judgment requiring city to collect assessments and pay collections to bondholder, and thereaft-

er a personal judgment against city for any unpaid balance was proper.—City of Prestonsburg v. People's State Bank of Frankfort, 72 S.W.2d 1043, 255 Ky. 252.

(3) Holders of unmatured local improvement bonds issued by city under statute were not entitled to personal judgment against city which had wrongfully diverted money from special assessment fund securing bonds, where it could not be determined that bonds of such holders would have been selected in a drawing by lot, under statute authorizing selection of bonds by lot to be paid with proceeds of assessments prior to maturity of bonds.—City of Jacksonville v. Bankers Life Co., C.C.A.Ill., 90 F.2d 141.

Effect of consent decree for issuance of refunding bonds

Holders of defaulted city bonds, who had consented to decree providing for issue of refunding bonds and for compromise payment of accrued interest on old bonds out of such funds as would become available, were precluded thereby from compelling city to make back assessments on property of corporation which city had agreed not to assess, despite provision in decree construed as reserving to bondholders their rights to previously assessed but uncollected taxes, and future taxes, only.—McClung v. City of Elizabethton, 105 S.W.2d 95, 171 Tenn. 455.

94. U.S.—City of Jacksonville v. Bankers Life Co., C.C.A.Ill., 90 F.2d 141.

95. Ill.—Reconstruction Finance Corporation v. Calumet City, 57 N.E.2d 290, 324 Ill.App. 73.

96. Wash.—Zinser v. City of Vancouver, 74 P.2d 486, 192 Wash. 622.

surplus⁹⁷ and direct the payment of a fixed sum on such bonds annually.⁹⁸ A decree declaring the amount of money advanced for invalid bonds a lien on certain property purchased therewith is inconsistent with a bill which seeks to follow the money into such property, and seeks such property not as that of the city but as that of complainant.⁹⁹ In a suit for accounting of special assessments allegedly collected and misapplied, it has been held improper to direct the conduct of municipal officials as to future assessments.¹

A judgment must be enforced in accordance with specific statutory provisions if such provisions exist.² A statute prohibiting issuance of a fieri facias or any writ in the nature of a fieri facias on a money judgment against a municipality is ineffectual to limit the force and effect of a judg-

ment against the municipality on bonds issued prior to its enactment.³

Where, as discussed supra § 1957, the circumstances are such that the municipality becomes liable to the holder of its bonds or other securities, although these are payable from a special tax or fund, the holder of the securities is entitled to recover the amount of principal and interest due thereon as damages.⁴ Where the bond issue has not matured, the damages are to be measured by the amount of the default in that issue occasioned by the breach of contract,⁵ but the amount of inevitable future defaults in interest or principal or both should be appropriately discounted.⁶

Interest may be recovered by a bondholder in a suit for accounting where the municipality, having collected funds applicable to the bonds, fails to apply them thereto.⁷ In an action at law to

97. U.S.—East St. Louis v. U. S., Ill., 4 S.Ct. 21, 110 U.S. 321, 28 L. Ed. 162.

98. U.S.—East St. Louis v. U. S., supra.

99. U.S.—Litchfield v. Ballou, Ill., 5 S.Ct. 820, 114 U.S. 190, 29 L.Ed. 132.

1. U.S.—Fidelity Trust Co. v. Village of Stickney, C.C.A.Ill., 129 F. 2d 506.

Ill.—Rothschild v. Village of Calumet Park, 183 N.E. 337, 350 Ill. 330—Grand Carniolian Slovenian Catholic Union v. Village of Rockdale, 41 N.E.2d 218, 314 Ill.App. 308—Knell v. Village of Rockdale, 41 N.E.2d 216, 314 Ill.App. 304—How & Co. v. City of Chicago, 29 N.E.2d 388, 306 Ill.App. 571.

2. U.S.—Borough of Fort Lee v. U. S. ex rel. Barker, C.C.A.N.J., 104 F.2d 275, certiorari dismissed Borough of Fort Lee v. U. S. ex rel. Barker, 60 S.Ct. 136, 308 U.S. 629, 84 L.Ed. 525.

La.—Browne v. New Orleans, 35 La. Ann. 51.

Execution against funds

The holder of defaulted municipal bonds, recovering judgment therefor, could not have execution levied on sinking fund for retirement of bonds, or on money in account used to meet bond interest payments.—Vanderpoel v. Borough of Mt. Ephraim, 168 A. 575, 111 N.J.Law 423, 89 A.L.R. 862.

3. Fla.—City of Bradenton v. Fusillo, 184 So. 234, 134 Fla. 759—State ex rel. Select Tenures v. Raulerson, 176 So. 270, 129 Fla. 346.

4. U.S.—Bessemer Inv. Co. v. City of Chester, C.C.A.Pa., 113 F.2d 571—City of McLaughlin, S. D. v. Turgeon, C.C.A.S.D., 75 F.2d 402.

N.D.—Grand Lodge A. O. U. W. v.

City of Bottineau, 227 N.W. 363, 58 N.D. 740.

Pa.—Palmer v. City of Erie, 9 A.2d 378, 337 Pa. 5—Price v. City of Scranton, 184 A. 253, 321 Pa. 504—Nolan v. City of Reading, 84 A. 390, 235 Pa. 367—Dime Deposit & Discount Bank of Scranton v. City of Scranton, 57 A. 770, 208 Pa. 383—Gable v. City of Altoona, 49 A. 367, 200 Pa. 15.

Recovery on matured bonds

Where city issuing improvement bonds had breached its implied contractual obligation to exercise diligence, holders of matured bonds could recover face amount of bonds plus interest due and unpaid, the recovery being from collections on special assessments which had become absolutely payable and amounts raised by general taxes since the latter are in effect consequential damages imposed on the general taxpayers.—Bessemer Inv. Co. v. City of Chester, C.C.A.Pa., 113 F.2d 571.

Damages for breach of implied covenant

Where city broke implied covenant in improvement bonds providing they were dependent for their security only on assessments against property owners by negligence in enforcing collection of liens, resulting damage to bondholders was not unliquidated and limited to what might have been collected if city had been diligent, but bondholders were entitled to face amount of bonds and interest as therein provided.—Nagle Engine & Boiler Works v. City of Erie, 38 A.2d 225, 350 Pa. 158, followed in Pennsylvania Boiler Works v. City of Erie, 38 A.2d 229, 350 Pa. 167.

Reduction of excessive interest held proper

N.Y.—Snell v. City of Long Beach,

33 N.Y.S.2d 923, 263 App.Div. 1021, appeal denied 35 N.Y.S.2d 727, 264 App.Div. 782, affirmed 49 N.E.2d 616, 290 N.Y. 649.

Judgment held erroneous

General judgments against city for damages in amount of principal and interest due on certificates, issued against street paving assessments, for negligence in allowing latter to become barred by limitations, were erroneous, since damage to certificate holders could not exceed real value of assessments pro rated to outstanding certificates.—City of El Paso v. West, C.C.A.Tex., 102 F.2d 927, rehearing denied 104 F. 2d 96, certiorari denied 60 S.Ct. 111, 308 U.S. 587, 84 L.Ed. 492, and West v. City of El Paso, 60 S.Ct. 111, 308 U.S. 587, 84 L.Ed. 492.

5. U.S.—Bessemer Inv. Co. v. City of Chester, C.C.A.Pa., 113 F.2d 571.

Bonds maturing after action commenced

Where action was brought by bondholders against city for breach of implied contractual obligation to exercise diligence regarding improvement bonds, as to bond issues which had matured since action was instituted, in determining damages check could be made against what had actually occurred.—Bessemer Inv. Co. v. City of Chester, supra.

6. U.S.—Bessemer Inv. Co. v. City of Chester, supra.

7. Ill.—Rothschild v. Village of Calumet Park, 183 N.E. 337, 350 Ill. 330—Cook v. City of Staunton, 14 N.E.2d 696, 295 Ill.App. 111—O'Laughlin Co. v. Village of Stickney, 9 N.E.2d 589, 291 Ill.App. 606.

Allowance of interest improper

A decree, allowing holder of city special assessment bonds interest on amount of assessment funds wrong-

recover interest past due on municipal bonds, the bondholder has been held not to be entitled to a judgment directing how and when the municipality shall pay.⁸ A statute allowing creditors interest on money withheld by unreasonable and vexatious delay of payment authorizes allowance of interest on special assessments collected and wrongfully withheld, even though the bonds are interest-bearing.⁹

In a proceeding to recover back the money paid for invalid municipal securities, interest may be awarded¹⁰ at the legal rate¹¹ from the time the city denied its obligation to pay.¹²

Where a municipality, having issued improvement bonds and levied assessments against property in the improvement district, acquires certain lots therein subject to delinquent assessments, a bondholder has been held to be entitled to a money judgment against the city for the amount of unpaid installments of principal¹³ and for accrued interest and penalties to the date on which the property was acquired.¹⁴

Effect of debt limitation. Where part of an issue of bonds is in excess of a limitation of indebtedness, judgment may be awarded for,¹⁵ and only for,¹⁶ the amount of indebtedness which the mu-

nicipality could lawfully contract.

Lien of judgment. Under some statutes a judgment against an improvement district on certificates issued by it creates a general lien against the property of the district analogous to judgment liens against the property of other judgment debtors.¹⁷

Conclusiveness of judgment. In the absence of fraud in obtaining the judgment,¹⁸ a judgment in favor of the holder of bonds issued by a city, in an action thereon, is conclusive on the parties as to the validity of the bonds;¹⁹ but a judgment at law on a bond is not conclusive on the question whether it is entitled to share in the benefit of a trust imposed by statute, by which the property and revenues of the corporation were pledged to the payment of bonds issued under the authority of the statute.²⁰

Nonnegotiable securities. Purchasers of non-negotiable special assessment bonds, who were not innocent purchasers for value, could not recover the amount of funds not distributed pro rata on the bonds where excess payments made to previous owners of the bonds exceeded the amounts which would have been paid to the purchasers if proper pro rata distribution had been made.²¹

fully diverted by city from payment of bonds, was erroneous, in absence of evidence as to when assessments were collected and funds diverted.—*Reconstruction Finance Corporation v. Calumet City*, 57 N.E.2d 290, 324 Ill.App. 73.

Time from which allowable

A city which had collected the improvement assessments levied to pay particular bonds but had diverted the proceeds to pay other bonds became liable for payment of interest on amount misappropriated from date on which bondholders became entitled to demand and receive the funds under the bonds, but, in absence of evidence as to exact date when funds were collected, bondholders were allowed interest from dates of institution of suits against city to recover for money had and received.—*Cook v. City of Staunton*, 14 N.E.2d 696, 295 Ill.App. 111.

8. N.Y.—*Van Derzee v. City of Long Beach*, 31 N.Y.S.2d 359, 177 Misc. 894.

Remedy for collection of judgment

(1) In an action at law to recover interest past-due on city bonds, plaintiff was not entitled to a judgment directing city's fiscal officer to set apart and apply to payment of interest the first revenues received by him after receipt of a certified copy of a judgment to that effect in accordance with constitutional pro-

vision, but a proceeding in mandamus was the proper remedy for plaintiff to follow to collect the judgment recovered.—*Van Derzee v. City of Long Beach*, supra.

(2) The constitutional provision declaring that, if a city fails to make appropriations to pay interest on indebtedness, the fiscal officer of the city may be required to set apart and apply the first revenues received at the suit of any holder of obligations issued for indebtedness, was not intended to give to a bondholder-judgment creditor the absolute power to paralyze a city by enforcing his judgment, but the words "may be required" indicate the intention to permit the exercise of discretion in enforcing the provision.—*Van Derzee v. City of Long Beach*, supra.

9. Ill.—*First Nat. Bank of Stevens Point, Wis., v. Village of Stickney*, 82 N.E.2d 673, 335 Ill.App. 596.

10. U.S.—*Louisiana v. Wood, Mo.*, 102 U.S. 294, 26 L.Ed. 153.

Fla.—*State v. Greer*, 102 So. 739, 88 Fla. 249, 37 A.L.R. 1298.

11. U.S.—*Louisiana v. Wood, Mo.*, 102 U.S. 294, 26 L.Ed. 153.

12. U.S.—*Louisiana v. Wood*, supra.

13. U.S.—*City of Eufaula, Okl., v. Meyer*, C.A.Okla., 169 F.2d 463.

Effect of improvements after acquisition

Where city issued street improvement bonds and levied assessments

to pay principal and interest, and thereafter city took lots by purchase from owner subject to delinquent assessments and statutory lien, and there was neither pleading nor proof that bondholder had actual knowledge of conveyance or erection of improvements thereafter, taking as between city and bondholder could not be treated as equivalent to title by condemnation in absence of elements of estoppel, and amount of bondholder's recovery could not be limited to value of lots as of date of conveyance to city exclusive of value of later improvements.—*City of Eufaula, Okla., v. Meyer*, supra.

14. U.S.—*City of Eufaula, Okla. v. Meyer*, supra.

15. U.S.—*Everett v. Rock Rapids Independent School Dist., C.C. Iowa*, 109 F. 697.

44 C.J. p 1260 note 80.

16. U.S.—*Burlington Sav. Bank v. Clinton, C.C. Iowa*, 111 F. 439.

44 C.J. p 1260 note 81.

17. U.S.—*Whitaker & Co. v. Grable*, C.C.A.Ark., 109 F.2d 710.

18. Ala.—*Graham v. Tusculumbia*, 42 So. 400, 146 Ala. 449.

19. Ala.—*Graham v. Tusculumbia*, supra.

20. Ala.—*Wetumpka v. Wetumpka Wharf Co.*, 63 Ala. 611.

21. Ill.—*Galt v. City of Chicago*, 42 N.E.2d 115, 315 Ill.App. 91.

D. TAXES AND OTHER REVENUE AND APPLICATION THEREOF

1. POWER TO TAX

a. In General

§ 1978. In General

To the extent that it is exercised by a municipal corporation, the power to tax is merely a delegated power, and is not possessed by a municipal corporation unless it has been plainly and unmistakably granted either in express terms or by necessary implication. Where the power has been granted, it is subject to such limitations and restrictions as may be placed on it, and it is not to be arbitrarily exercised, although the exercise of the power is within the discretion of the municipal governing authority.

The power to tax, inherent only in sovereignty, and belonging exclusively to the legislative department of the government, is, to the extent that it is exercised by a municipal corporation, merely a delegated power,²² and is not possessed by a municipal corporation unless it has been plainly and unmistakably granted to it either in express terms or by necessary implication.²³ It cannot be vested in a

22. U.S.—Citizens' and Southern Nat. Bank v. City of Atlanta, Ga., D.C.Ga., 46 F.2d 88, affirmed, C.C.A., 53 F.2d 557.

Ariz.—Home Owners' Loan Corporation v. City of Phoenix, 77 P.2d 818, 51 Ariz. 455.

Cal.—West Coast Advertising Co. v. City and County of San Francisco, 95 P.2d 138, 14 Cal.2d 516.

Fla.—State ex rel. Hurner v. Culbreath, 192 So. 814, 140 Fla. 634—St. Lucie Estates v. Ashley, 141 So. 738, 105 Fla. 534.

Ill.—City of Bloomington v. Wirrick, 45 N.E.2d 852, 381 Ill. 347, certiorari denied 63 S.Ct. 1175, 319 U.S. 756, 87 L.Ed. 1709.

Ind.—Zoercher v. Agler, 172 N.E. 186, 202 Ind. 214, 70 A.L.R. 1232, rehearing denied 172 N.E. 907, 202 Ind. 214, 70 A.L.R. 1232.

Me.—Portland Terminal Co. v. Hinds, 39 A.2d 5, 141 Me. 68, 154 A.L.R. 1302.

Mass.—Board of Assessors of City of Quincy v. Cunningham Foundation, 26 N.E.2d 335, 305 Mass. 411—Duffy v. Burrill, 125 N.E. 135, 234 Mass. 42.

Mich.—City of Berkley v. Royal Oak Tp., 31 N.W.2d 825, 320 Mich. 597.

Mo.—Moots v. City of Trenton, 214 S.W.2d 31—Corpus Juris cited in Carter Carburetor Corp. v. City of St. Louis, 203 S.W.2d 438, 441, 356 Mo. 646—Kansas City v. Frogge, 176 S.W.2d 498, 352 Mo. 233—Corpus Juris cited in State ex rel. Emerson v. Mound City, 73 S.W.2d 1017, 1025, 335 Mo. 702, 94 A.L.R. 923.

N.Y.—Corpus Juris cited in Troy Union R. Co. v. City of Troy, 238 N.Y.S. 577, 581, 227 App.Div. 351, affirmed 171 N.E. 798, 253 N.Y. 597.

Pa.—McClelland v. City of Pittsburgh, 57 A.2d 846, 358 Pa. 448.

Tex.—Texas & P. Ry. Co. v. City of El Paso, 85 S.W.2d 245, 126 Tex. 86.

Wash.—Pacific First Federal Sav. & Loan Ass'n v. Pierce County, 178 P.2d 351, 27 Wash.2d 347—State ex rel. Pacific Telephone & Tele-

graph Co. v. Department of Public Service, 142 P.2d 498, 19 Wash.2d 200—Love v. King County, 44 P.2d 175, 181 Wash. 462.

44 C.J. p 1261 note 91.

Assessments and:

Special taxes for public improvements see supra §§ 1290-1652.

Taxes by irrigation districts see the C.J.S. title Waters §§ 332-337, also 67 C.J. p 1337 note 10 et seq.

County taxes see Counties §§ 279-285.

Legislative control over municipal revenue see supra § 194.

Licenses and occupation taxes see Licenses § 4 et seq.

Mandamus to compel levy of tax see Mandamus §§ 181-192.

Power to:

Grant exemption from, or commutation of, tax see infra § 2007.

Tax as:

Belonging exclusively to legislative department of government see the C.J.S. title Taxation § 7, also 61 C.J. p 81 note 21 et seq.

Inherent in sovereignty see the C.J.S. title Taxation § 4, also 61 C.J. p 76 note 73.

Right to taxes collected as between city and county see the C.J.S. title Taxation § 1061, also 61 C.J. p 1525 note 64 et seq.

School district taxes see the C.J.S. title Schools and School Districts §§ 376-413, also 56 C.J. p 634 note 98 et seq.

Taxation:

Generally see the C.J.S. title Taxation §§ 1-1280, also 61 C.J. p 65 note 2 et seq.

After consolidation, annexation, or diminution of territory see supra §§ 79-80.

In District of Columbia see District of Columbia § 18.

Township taxes see the C.J.S. title Towns §§ 155-172, also 63 C.J. p 197 note 95 et seq.

23. Ala.—Corpus Juris cited in

Decatur Transit v. City of Gadsden, 31 So.2d 339, 341, 249 Ala. 314—Beeland Wholesale Co. v. Kaufman, 174 So. 516, 234 Ala. 249.

Cal.—Rancho Santa Anita v. City of Arcadia, 125 P.2d 475, 20 Cal.2d 319—West Coast Advertising Co. v. City and County of San Francisco, 95 P.2d 138, 14 Cal.2d 516.

Del.—Consolidated Fisheries Co. v. Marshall, 32 A.2d 426, 3 Terry 283, affirmed 39 A.2d 413, 3 Terry 532.

Fla.—Certain Lots Upon Which Taxes Are Delinquent v. Town of Monticello, 31 So.2d 905—City of Miami v. Kayfetz, 30 So.2d 521, 158 Fla. 758—State ex rel. Hurner v. Culbreath, 192 So. 814, 140 Fla. 634—St. Lucie Estates v. Ashley, 141 So. 738, 105 Fla. 534.

Ga.—Nelms v. Stephens County School Dist., 39 S.E.2d 651, 201 Ga. 274—Lewis & Holmes Motor Freight Corporation v. City of Atlanta, 25 S.E.2d 699, 195 Ga. 810.

Ill.—Central Ill. Public Service Co. v. Lawless, 79 N.E.2d 67, 400 Ill. 161—Arnold v. City of Chicago, 56 N.E.2d 795, 387 Ill. 532—People ex rel. Toman v. Edward Hines Lumber Co., 52 N.E.2d 720, 385 Ill. 366—City of Bloomington v. Wirrick, 45 N.E.2d 852, 381 Ill. 347, certiorari denied 63 S.Ct. 1175, 319 U.S. 756, 87 L.Ed. 1709—People v. Wabash Ry. Co., 181 N.E. 610, 249 Ill. 93—People v. Central Illinois Public Service Co., 159 N.E. 797, 328 Ill. 440.

Ind.—Zoercher v. Agler, 172 N.E. 186, 202 Ind. 214, 70 A.L.R. 1232, rehearing denied 172 N.E. 907, 202 Ind. 214, 70 A.L.R. 1232.

Iowa.—Clark v. City of Des Moines, 267 N.W. 97, 222 Iowa 317.

Mass.—Board of Assessors of City of Quincy v. Cunningham Foundation, 26 N.E.2d 335, 305 Mass. 411—Middlesex County v. City of Waltham, 180 N.E. 318, 278 Mass. 514—Duffy v. Burrill, 125 N.E. 135, 234 Mass. 42.

Mich.—City of Berkley v. Royal Oak Tp., 31 N.W.2d 825, 320 Mich. 597

municipal corporation by judicial construction²⁴ or acquired by prescription,²⁵ nor can a restricted power be expanded by construction;²⁶ and the burden is on a municipality which demands taxes from the people to show the authority to exercise the taxing power in the manner in which it has attempted to do so.²⁷ These rules apply to all municipal corporations whether under special charter or general statute.²⁸

The power to tax, as discussed *infra* §§ 1979-1983, is very generally granted to municipal corporations, and is one of the most important powers conferred on a municipality,²⁹ and in some decisions the courts have regarded this power as essential to the very existence of the municipal corporation.³⁰ The power is subject to such limitations and restrictions as may be placed on it,³¹ and, as con-

—Barnhart v. City of Grand Rapids, 211 N.W. 96, 237 Mich. 90.

Mo.—Moots v. City of Trenton, 214 S.W.2d 31—First Nat. Bank of St. Joseph v. Buchanan County, 205 S.W.2d 726, 356 Mo. 1204—**Corpus Juris cited in** Carter Carburetor Corp. v. City of St. Louis, 203 S.W.2d 438, 441, 356 Mo. 646—City of St. Charles v. St. Charles Gas Co., 185 S.W.2d 797, 353 Mo. 996—Kansas City v. Frogge, 176 S.W.2d 498, 352 Mo. 233—**Corpus Juris cited in** Kansas City v. J. I. Case Threshing Mach. Co., 87 S.W.2d 195, 199, 337 Mo. 918—City of Bolivar v. Ozark Utilities Co., 191 S.W.2d 368, 238 Mo. App. 860—Wilhoit v. City of Springfield, 171 S.W.2d 95, 237 Mo. App. 775—City of West Plains v. Noland, App., 112 S.W.2d 79.

N.Y.—People ex rel. New York Cent. R. Co. v. Limburg, 28 N.E.2d 865, 283 N.Y. 344—City of Johnstown v. Wells, 273 N.Y.S. 631, 242 App. Div. 103, affirmed 11 N.E.2d 787, 275 N.Y. 623—**Corpus Juris cited in** Troy Union R. Co. v. City of Troy, 238 N.Y.S. 577, 581, 227 App. Div. 351, affirmed 171 N.E. 798, 253 N.Y. 597—In re Schenectady Sewer Assessment, 236 N.Y.S. 455, 134 Misc. 810.

Or.—Hickey v. Riley, 162 P.2d 371, 177 Or. 321.

Pa.—McClelland v. City of Pittsburgh, 57 A.2d 846, 358 Pa. 448—Hillman Coal & Coke Co. v. Jenner Tp., Somerset County, 150 A. 293, 300 Pa. 108—Appeal of Rieck-McJunkin Dairy Co., 39 A.2d 259, 156 Pa. Super. 9—City of Allentown v. Personal Finance Co., 42 Pa. Dist. & Co. 680, 19 Lehigh L.J. 247—Arronson v. City of Philadelphia, 16 Pa. Dist. & Co. 427—White v. Peoples, Com.Pl., 32 Del. Co. 368, 35 Mun. L. R. 241.

R.I.—Bijou Amusement Co. v. Toupin, 9 A.2d 852, 63 R.I. 503.

Tenn.—Memphis Union Station Co. v. City of Memphis, 30 S.W.2d 240, 161 Tenn. 203.

Tex.—Tri-City Fresh Water Supply Dist. No. 2 of Harris County v. Mann, 142 S.W.2d 945, 135 Tex. 280—State v. Etheridge, Com.App., 32 S.W.2d 828, rehearing denied 36 S.W.2d 983, 122 Tex. 18—Houston Lighting & Power Co. v. Fleming, Civ.App., 128 S.W.2d 487, reversed on other grounds Fleming v. Hous-

ton Lighting & Power Co., 138 S.W.2d 520, 135 Tex. 463, rehearing denied 143 S.W.2d 923, 135 Tex. 463, certiorari denied Houston Lighting & Power Co. v. City of West University Place, 61 S.Ct. 836, 313 U.S. 560, 85 L.Ed. 1520—Texas Bitulithic Co. v. Dallas Consol. Electric St. Ry. Co., Civ.App., 248 S.W. 746, reversed on other grounds Dallas Consol. Electric St. R. Co. v. City of Dallas, Com.App., 260 S.W. 1034.

Va.—Brooks Transp. Co. v. City of Lynchburg, 37 S.E.2d 857, 185 Va. 135—Danville Traction & Power Co. v. City of Danville, 191 S.E. 592, 168 Va. 430—Whiting v. Council of Town of West Point, 17 S.E. 1, 89 Va. 741.

Wash.—Pacific First Federal Sav. & Loan Ass'n v. Pierce County, 178 P.2d 351, 27 Wash. 2d 347—Weyerhaeuser Timber Co. v. Roessler, 97 P.2d 1070, 2 Wash. 2d 304, 126 A.L.R. 882—Great Northern Ry. Co. v. Glover, 77 P.2d 598, 194 Wash. 146—Love v. King County, 44 P.2d 175, 181 Wash. 462—State ex rel. Tacoma School Dist. No. 10 v. Kelly, 30 P.2d 638, 176 Wash. 689—State ex rel. King County v. Tax Commission of Washington, 26 P. 2d 80, 174 Wash. 668.

W.Va.—Anderson-Newcomb Co. v. City of Huntington, 188 S.E. 118, 117 W.Va. 716—S. S. Kresge Co. v. City of Bluefield, 183 S.E. 601, 117 W.Va. 17.

Wyo.—**Corpus Juris quoted in** Western Auto Transports v. City of Cheyenne, 120 P.2d 590, 596, 57 Wyo. 351.

44 C.J. p 1262 note 97—59 C.J. p 522 note 40 [a].

Express or implied power generally see *infra* § 1979.

Illegal bookmaking

It has been held that the sovereign right of the state to share in proceeds of illegal bookmaking by taxation thereof has not been delegated to include municipal corporations.—Application of Bromberger, 62 N.Y.S. 2d 47, 187 Misc. 593.

24. Del.—Consolidated Fisheries Co. v. Marshall, 32 A.2d 426, 3 Terry 283, affirmed 39 A.2d 413, 3 Terry 532.

Mo.—Kansas City v. Frogge, 176 S.W.2d 498, 352 Mo. 233.

44 C.J. p 1262 note 98.

25. Me.—Ham v. Sawyer, 38 Me. 37.

Lands outside municipal limits see *infra* § 2003.

26. Del.—Consolidated Fisheries Co. v. Marshall, 32 A.2d 426, 3 Terry 283, affirmed 39 A.2d 413, 3 Terry 532.

Miss.—Adams v. Ducate, 38 So. 497, 86 Miss. 276.

27. Ga.—Lewis & Holmes Motor Freight Corporation v. City of Atlanta, 25 S.E.2d 699, 195 Ga. 810.

Ill.—People v. Wabash Ry. Co., 181 N.E. 610, 349 Ill. 93—People v. Central Illinois Public Service Co., 159 N.E. 797, 328 Ill. 440.

Mo.—Carter Carburetor Corp. v. City of St. Louis, 203 S.W.2d 438, 356 Mo. 646.

28. Mo.—City of Bolivar v. Ozark Utilities Co., 191 S.W.2d 368, 238 Mo. App. 860.

29. Fla.—State v. City of Miami, 137 So. 261, 103 Fla. 54.

30. Ariz.—Trigg v. City of Yuma, 130 P.2d 59, 59 Ariz. 480—Home Owners' Loan Corporation v. City of Phoenix, 77 P.2d 818, 51 Ariz. 455.

Fla.—State v. City of Miami, 137 So. 261, 103 Fla. 54.

44 C.J. p 1262 note 9.

31. Cal.—West Coast Advertising Co. v. City and County of San Francisco, 95 P.2d 138, 14 Cal.2d 516.

Fla.—State ex rel. Hurner v. Culbreath, 192 So. 814, 140 Fla. 634.

Ky.—City of Louisville v. Sebree, 214 S.W.2d 248, 308 Ky. 420—City of Pineville v. Meeks, 71 S.W.2d 33, 254 Ky. 167—Life & Casualty Ins. Co. of Tennessee v. Coleman, 25 S.W.2d 748, 233 Ky. 350.

Mass.—Board of Assessors of City of Quincy v. Cunningham Foundation, 26 N.E.2d 335, 305 Mass. 411—Duffy v. Burrill, 125 N.E. 135, 234 Mass. 42.

Mich.—Thiesen v. Parker, 31 N.W.2d 806, 320 Mich. 446.

Mo.—**Corpus Juris cited in** State ex rel. Emerson v. Mound City, 73 S.W.2d 1017, 1025, 335 Mo. 702, 94 A.L.R. 923—City of West Plains v. Noland, App., 112 S.W.2d 79.

Tex.—Tri-City Fresh Water Supply Dist. No. 2 of Harris County v. Mann, 142 S.W.2d 945, 135 Tex.

sidered *infra* § 1984, it is subject to enlargement, abridgement, or withdrawal.

Exercise of power. In exercising the taxing power a municipal corporation is a mere agency for, and political subdivision of, the state,³² and the levy and collection of taxes constitute one of the purely governmental functions of a municipal corporation.³³ While the power granted is not to be arbitrarily exercised,³⁴ the exercise of the tax-

ing power granted to a municipal corporation is within the discretion of the municipal governing authority,³⁵ which has the power to supply in appropriate manner details necessary for the full exercise of the power.³⁶ The courts are not concerned with the wisdom of municipal action,³⁷ and will not interfere with the exercise of such discretion unless it is clearly apparent that the tax fixed by the municipal lawmaking body is arbitrary, un-

280—*Texas & P. Ry. Co. v. City of El Paso*, 85 S.W.2d 245, 126 Tex. 86.

44 C.J. p 1262 note 93.

Limitations on power:

In general see *infra* §§ 1985–1991.

Constitutional restrictions in general see *infra* § 1985.

Legislative restrictions in general see *infra* § 1986.

Direction of trade barriers between cities and towns by power of taxation may not be extended beyond constitutional and statutory limits.—*C. D. Kenny Co. v. Town of Brevard*, 7 S.E.2d 542, 217 N.C. 269.

Transfer of taxing functions to county

(1) A transfer to, and assumption by, county of city taxing functions, pursuant to city ordinance and charter provisions authorized by constitution, imports full consolidation of such functions with, and city's acceptance of, statutory scheme setting up and regulating county tax system.—*Los Angeles County v. Superior Court in and for Los Angeles County*, 112 P.2d 10, 17 Cal.2d 707.

(2) A city transferring its taxing functions to county by ordinance and charter provisions, as authorized by constitution, should not be permitted to limit county's powers and duties with respect to taxpayers by other such provisions.—*Los Angeles County v. Superior Court in and for Los Angeles County*, *supra*.

32. *Va.*—*Brooks Transp. Co. v. City of Lynchburg*, 37 S.E.2d 857, 185 Va. 135.

Wash.—*State ex rel. Pacific Telephone & Telegraph Co. v. Department of Public Service*, 142 P.2d 498, 19 Wash.2d 200.

Arm of state

A municipality may impose and collect taxes only when acting as an arm of the state.—*City of Niles v. Union Ice Corporation*, 12 N.E.2d 483, 183 Ohio St. 169.

Municipal utility district, comprising many square miles including city and unincorporated territory in two counties, formed under statute authorizing district, is an agency of government to extent that it may exercise power of general taxation of all property in area to support the furnishing of such authorized utili-

ties to serve public at large with light, water power, heat, transportation, telephone service, and other means of communication, and means of disposition of sewage.—*Pacific Gas & Electric Co. v. Sacramento Municipal Utility Dist.*, C.C.A.Cal., 92 F.2d 365, certiorari denied 58 S.Ct. 610, 303 U.S. 640, 82 L.Ed. 1100.

33. *Ala.*—*Chambers v. City of Montgomery*, 177 So. 155, 235 Ala. 59.

Ga.—*Plunkett's School for Boys v. City of Thomasville*, 173 S.E. 656, 178 Ga. 625.

Mich.—*Lovett v. City Treasurer of Detroit*, 281 N.W. 576, 286 Mich. 159.

Or.—*Johnson v. City of Pendleton*, 280 P. 873, 131 Or. 46.

Pa.—*Gravino v. Gordon*, Com.Pl., 29 Erie Co. 271, 38 Mun.L.R. 140, 60 York Leg Rec. 161.

Tex.—*Black v. Baker*, 111 S.W.2d 706, 130 Tex. 454.—*City of San Angelo v. Deutsch*, 91 S.W.2d 308, 126 Tex. 532.—*Houston Lighting & Power Co. v. Fleming*, Civ.App., 128 S.W.2d 487, reversed on other grounds *Fleming v. Houston Lighting & Power Co.*, 138 S.W.2d 520, 135 Tex. 463, rehearing denied 143 S.W.2d 923, 135 Tex. 463, certiorari denied *Houston Lighting & Power Co. v. City of West University Place*, 61 S.Ct. 836, 313 U.S. 560, 85 L.Ed. 1520.—*Deutsch v. City of San Angelo*, Civ.App., 73 S.W.2d 125, reversed on other grounds *City of San Angelo v. Deutsch*, 91 S.W.2d 308, 126 Tex. 532.

43 C.J. p 973 note 32.

Tort liability arising out of levy and collection of taxes see *supra* § 779.

A distinction is often made in public law between strictly governmental and proprietary functions of municipal corporations, especially in dealing with power to tax.—*In re Lindsay-Strathmore Irr. Dist.*, D.C. Cal., 21 F.Supp. 129, motion denied U.S. v. Bekins, 58 S.Ct. 647 and *Lindsay-Strathmore Irr. Dist. v. Bekins*, 58 S.Ct. 649, reversed on other grounds U.S. v. Bekins, 58 S.Ct. 811, 304 U.S. 27, 82 L.Ed. 1137, rehearing denied 58 S.Ct. 1043, 304 U.S. 589, 82 L.Ed. 1549 and *Lindsay-Strathmore Irr. Dist. v. Bekins*, 58

S.Ct. 1044, 304 U.S. 589, 82 L.Ed. 1549.

34. *N.J.*—*Ring v. Mayor and Council of Borough of North Arlington*, 58 A.2d 744, 136 N.J.Law 494, affirmed 61 A.2d 508, appeal dismissed 69 S.Ct. 250, 335 U.S. 889, 93 L.Ed. —.

Classification

The latitude allowed a municipal legislative body in making classifications in a pure revenue measure is more restricted than in a police regulation, since element of regulating particular businesses because of their nature is missing.—*Edmonds v. City of St. Louis*, 156 S.W.2d 619, 348 Mo. 1063.

35. *Ky.*—*City of Newport v. Pennsylvania R. Co.*, 154 S.W.2d 719, 287 Ky. 613.

Mich.—*Hoffman v. Otto*, 269 N.W. 225, 277 Mich. 437.

Powers of legislative and executive departments compared

Power to tax rests entirely with city's legislative department, which must determine how much money is to be spent and for what purposes, and which must raise appropriations, and power to expend rests with the executive departments, and legislative department is not required to uphold estimates of each executive department no matter what effect such estimates would have on public needs and the constitutional tax limitation.—*Hutton v. Goodsell*, 84 N.Y. S.2d 734, 274 App.Div. 373.

Matter of local concern

Tax levy by municipality, which is germane to purposes for which municipality was incorporated and is not in excess of limitation fixed by constitution or general law, is matter of local concern governed by charter.—*City of Portland v. Welch*, 59 P.2d 228, 154 Or. 286, 106 A.L.R. 1188.

36. *Neb.*—*Chicago & N. W. Ry. Co. v. Bauman*, 271 N.W. 256, 132 Neb. 67.

37. *Tex.*—*Bland v. City of Taylor*, Civ.App., 37 S.W.2d 291, affirmed *Davis v. City of Taylor*, 67 S.W.2d 1032, 123 Tex. 39.

reasonable, oppressive, or prohibitive.³⁸ A municipal property tax is neither a debt nor a contractual obligation, but an exaction or impost, levied by authority of the municipality, on property within its borders, for its support, and a charge on the land taxed.³⁹ The exercise of the power is a sovereign act,⁴⁰ and cannot be made to depend on contract.⁴¹ Power to levy taxes for municipal purposes is in no way, and to no extent, impaired by the exercise by a county of its powers to levy taxes for county purposes.⁴²

§ 1979. Express or Implied Power

Generally the power of a municipal corporation to tax need not be expressly conferred, but may be implied from the grant of other powers; but the power cannot be extended by implication.

While it has been said that the power of a municipal corporation to levy a tax is never implied,⁴³ but must directly and specifically be granted,⁴⁴ as a general rule the power to tax need not be expressly conferred, but may be implied from the grant of other powers,⁴⁵ even in jurisdictions where a constitutional provision authorizes the legislature to grant to municipalities power to impose taxes "in

such manner as shall be prescribed by law,"⁴⁶ or requires the legislature to restrict the taxing power of municipalities to prevent its abuse.⁴⁷ In some decisions, as discussed supra § 1878, the courts have regarded the power of taxation as essential to the life of a municipal corporation and have accorded weight to this consideration in arriving at the conclusion that the power is implied.⁴⁸ In other decisions it has been said that the power cannot be deduced from any consideration of convenience⁴⁹ or necessity,⁵⁰ and that no doubtful inference from other powers granted,⁵¹ or from obscure provisions of the law,⁵² will be sufficient to establish an implied power of taxation; and hence it has been held that the power is not to be implied from authority to enact by-laws for the good government of the municipality,⁵³ or from a mere grant of police power to regulate certain callings,⁵⁴ since the rule is that a municipality cannot, in the exercise of its police power, levy taxes,⁵⁵ although it is but reasonable and fair to require the thing that necessitates policing to pay the expense thereof.⁵⁶

The power granted to levy taxes cannot be extended by implication.⁵⁷ An implication against

38. Mo.—City of Washington v. Reed, 70 S.W.2d 121, 229 Mo.App. 1195.

39. N.J.—Brunner v. Morrison, 196 A. 716, 123 N.J.Eq. 224.

Exaction for revenue purposes

Where imposition is laid on persons or property under a general taxing ordinance, and proceeds are paid into the general treasury, and no part thereof is devoted to the expense incident to carrying out provisions of ordinance, conclusion is that exaction is laid for revenue purposes alone, unless the contrary is made clearly to appear.—City of Charlottesville v. Marks' Shows, 18 S.E.2d 890, 179 Va. 321.

40. N.Y.—Village of Babylon v. South Shore Thrift Corporation, 22 N.Y.S.2d 668, 174 Misc. 738.

41. Va.—Danville Traction & Power Co. v. City of Danville, 191 S.E. 592, 168 Va. 430.

42. Wis.—City of Appleton v. Bachman, 220 N.W. 393, 197 Wis. 4.

43. Ariz.—Maricopa County v. Southern Pac. Co., 162 P.2d 619, 63 Ariz. 342.

44. Ariz.—Maricopa County v. Southern Pac. Co., supra.

"The power of taxation, being a State function, the delegation of any part of that power to a subdivision of the State must be made in express terms. It cannot be inferred."—County Securities v. Seacord, 15 N.E.2d 179, 180, 278 N.Y. 84.

45. Ohio—Haefner v. City of Youngstown, 68 N.E.2d 64, 147 Ohio St. 58.

Tex.—Moreland v. City of San Antonio, Civ App., 116 S.W.2d 823, error refused.

W.Va.—Newcomb Co. v. City of Huntington, 188 S.E. 118, 117 W.Va. 716.

44 C.J. p 1262 note 6.

Construction of statutes see infra § 1983.

Implied constitutional authority to tax see infra § 1980.

Merger of districts

The statutory power of park districts merged into single district by consolidation act to levy taxes was impliedly transmitted to consolidated district.—People ex rel. Gill v. Hamilton, 9 N.E.2d 243, 366 Ill. 455.

46. Tenn.—State v. Bristol, 70 S.W. 1031, 109 Tenn. 315.

47. Wis.—Oconto City Water Supply Co. v. Oconto, 80 N.W. 1113, 105 Wis. 76.

48. U.S.—U. S. v. New Orleans, La., 98 U.S. 381, 393, 25 L.Ed. 225.

Cal.—Security Sav. Bank, etc., Co. v. Hinton, 32 P. 3, 97 Cal. 214.

44 C.J. p 1262 note 10.

"The power of taxation is regarded as a most important and essential attribute of a public corporation or utility in order that there may be the ability to function generally and freely under exigencies and situations that may present themselves, and unless the exercise of such power

is in the clearest of terms prohibited, it is never denied."—General Engineering & Dry Dock Co. v. East Bay Municipal Utility Dist., 14 P.2d 828, 835, 126 Cal App. 349.

49. Or.—Corbett v. Portland, 48 P. 428, 31 Or. 407.

50. Or.—Corbett v. Portland, supra.

51. Ga.—Lewis & Holmes Motor Freight Corporation v. City of Atlanta, 25 S.E.2d 699, 195 Ga. 810.

Or.—Corbett v. Portland, 48 P. 428, 31 Or. 407.

52. Or.—Corbett v. Portland, supra.

53. N.C.—Asheville v. Means, 29 N.C. 406.

54. U.S.—St. Louis v. Western Union Tel. Co., C.C.Mo., 39 F. 59, reversed on other grounds 13 S.Ct. 485, 148 U.S. 92, 37 L.Ed. 380.

44 C.J. p 1263 note 16.

55. Idaho.—Foster's, Inc., v. Boise City, 118 P.2d 721, 63 Idaho 201—State v. Nelson, 213 P. 358, 36 Idaho 713.

56. Idaho.—Foster's, Inc., v. Boise City, 118 P.2d 721, 63 Idaho 201.

57. Fla.—City of Miami v. Kayfetz, 30 So.2d 521, 158 Fla. 758.

Ill.—People ex rel. Anderson v. Baltimore & O. S. W. R. Co., 18 N.E. 2d 201, 370 Ill. 128.

Pa.—Hillman Coal & Coke Co. v. Jenner Tp., Somerset County, 150 A. 293, 300 Pa. 108—White v. Peoples, Com.Pl., 32 Del.Co. 368, 35 Mun.L.R. 241.

the grant of further power to tax arises from an express power to levy and collect particular taxes,⁵⁸ and so, as considered infra § 2000, where only the power to tax real property has been delegated, the municipality cannot tax personal property. Likewise, a municipal corporation cannot tax property outside the municipal limits under a power to tax property within such limits.⁵⁹ As discussed infra § 1992, a power to tax for general purposes does not include a power to tax for special or unusual purposes.

§ 1980. Constitutional Grant

Municipal power to tax may be granted by express constitutional provisions or implied from constitutional provisions conferring other powers; but, where it is contended that the state has yielded a part of its sovereign power, the rule of liberal construction does not apply.

Municipal power to tax may be granted by express constitutional provisions,⁶⁰ or it may be implied from constitutional provisions conferring on municipal corporations, or certain classes thereof, power to enact and amend their own charters;⁶¹ but where the contention is made that the state has yielded to a community a part of the sovereign power, the rule of liberal construction does not apply, but it must clearly and unambiguously appear that the state has done so in apt words contained in its constitution.⁶² Thus the power to tax will not be implied from constitutional provisions limiting the power where such provisions are consistent with the assumption that the source of the

taxing power is in the legislature,⁶³ and, where a home-rule amendment explicitly excepts from its operation the power to levy particular taxes, it has been held that to the extent of the exception the legislature is the source of municipal taxing power.⁶⁴ A constitutional provision that municipal corporate authorities "shall be vested" with power to tax is a direction to the legislature, and not an immediate conferring of the power.⁶⁵ Taxes levied under an assumed charter authority may be validated by a direct constitutional provision.⁶⁶

§ 1981. Statutory Grant

Municipal power to tax may be granted by express statutory provisions.

The power of a municipal corporation to tax may be granted by express statutory provisions.⁶⁷

§ 1982. — Power and Duty of Legislature to Delegate Authority

- a. In general
- b. Constitutional restrictions or requirements
- c. Taxation within district
- d. Delegation to officers, boards, or individuals

a. In General

Subject to constitutional limitations and exceptions, the legislature has power to delegate to a municipal corporation authority to levy taxes for local purposes within its corporate limits.

Wash.—State ex rel. Tacoma School Dist. No 10 v. Kelly, 30 P.2d 638, 176 Wash. 689.

58. Ala.—Decatur Transit v. City of Gadsden, 31 So.2d 339, 249 Ala. 314.

44 C.J. p 1263 note 17.

59. La.—Blanc v. New Orleans, 1 Mart. 119.

Taxation of property outside city limits generally see infra § 2003.

60. Ariz.—City of Phoenix v. Wayland, 167 P.2d 938, 64 Ariz. 222.

Ark.—Vaughan v. City of Searcy, 135 S.W.2d 319, 199 Ark. 585.

Mo.—City of Bolivar v. Ozark Utilities Co., 191 S.W.2d 368, 238 Mo. App. 860—Wilhoit v. City of Springfield, 171 S.W.2d 95, 237 Mo. App. 775.

Okl.—City of Ardmore v. Excise Board of Carter County, 8 P.2d 2, 155 Okl. 126.

Wash.—State v. Redd, 8 P.2d 619, 166 Wash. 132.

44 C.J. p 1263 note 21.

Whether provisions self-executing see Constitutional Law § 55.

Cities operating under freeholders' charters

Cal.—West Coast Advertising Co. v. City and County of San Francisco, 95 P.2d 138, 14 Cal.2d 516.

Consistency of charter with general statutes

Constitution was held to require that charters framed by cities be consistent with general statutes as to taxing powers.—Siemens v. Shreeve, 296 S.W. 415, 317 Mo. 736.

61. Mo.—Kansas City v. Frogge, 176 S.W.2d 498, 352 Mo. 233.

44 C.J. p 1263 note 22.

62. Ohio.—State ex rel. City of Toledo v. Cooper, 119 N.E. 253, 97 Ohio St. 86.

63. Mo.—State v. Van Every, 75 Mo. 530.

44 C.J. p 1263 note 23.

64. Tex.—Zane-Cetti v. Ft. Worth, Civ.App., 269 S.W. 130.

44 C.J. p 1263 note 25.

65. S.C.—Gaud v. Walker, 53 S.E.2d 316—Charleston Heights Co. v. City Council of Charleston, 136 S. E. 393, 138 S.C. 187.

66. Colo.—Perkins v. People, 147 P. 356, 59 Colo. 107.

44 C.J. p 1263 note 26.

67. Ill.—People ex rel. Anderson v. Baltimore & O. S. W. R. Co., 18 N.E.2d 201, 370 Ill. 128.

Tex.—McCollum v. City of Richardson, Civ.App., 121 S.W.2d 423, error dismissed.

Wash.—Pacific First Federal Sav. & Loan Ass'n v. Pierce County, 178 P.2d 351, 27 Wash.2d 347.

44 C.J. p 1263 note 28.

Construction and operation of statutes see infra § 1983.

Power and duty of legislature to delegate authority see infra § 1982.

Purpose of statute

Statute authorizing cities to tax persons, transactions, occupations, privileges, subjects and personality, not subject to a state tax or license fee was designed for the financial relief of local municipalities.—Pittsburgh Milk Co. v. City of Pittsburgh, 62 A.2d 49, 360 Pa. 360.

Park district

Ill.—People ex rel. Gill v. Hamilton, 9 N.E.2d 243, 366 Ill. 455.

Subject to constitutional limitations and exceptions, the legislature has power to delegate to a municipal corporation authority to levy taxes for local purposes within its corporate limits.⁶⁸ It may confer such measure of power with respect thereto as it deems expedient where it is not different from, or greater than, the power possessed by the state itself,⁶⁹ even though constitutional provisions relating to this power make no reference in terms to a delegation of the power to the municipality;⁷⁰ but the legislature cannot empower a municipal corporation to impose a tax for a purpose for which the state itself cannot tax,⁷¹ and, in order to sustain the authorization of the power

to tax, the purpose of the municipality must be governmental.⁷² If there is any fair and reasonable doubt as to the extent of power delegated, in accordance with the rules stated *infra* § 1983 a, the doubt must be resolved against the municipality claiming the right to exercise it.

b. Constitutional Restrictions or Requirements

A legislature granting to a municipal corporation authority to exercise the taxing power must observe constitutional provisions, requirements, limitations, or restrictions.

In granting to a municipal corporation authority to exercise the taxing power, the legislature

68. Ala.—Phenix City v. Alabama Power Co., 195 So. 894, 239 Ala. 547.

Ariz.—Maricopa County v. Southern Pac. Co., 162 P.2d 619, 63 Ariz. 342.

Fla.—St. Lucie Estates v. Ashley, 141 So. 738, 105 Fla. 534.

Ill.—People ex rel. Sanitary Dist. of Chicago v. Schlaeger, 63 N.E.2d 382, 391 Ill. 314—People ex rel. Curren v. Wood, 62 N.E.2d 809, 391 Ill. 237, 161 A.L.R. 718—Littell v. City of Peoria, 29 N.E.2d 533, 374 Ill. 344—People ex rel. Moshier v. City of Springfield, 19 N.E.2d 598, 370 Ill. 541—People ex rel. Lindhelmer v. Gaylord Bldg Corp., 16 N.E.2d 901, 369 Ill. 371—Kocsis v. Chicago Park Dist., 198 N.E. 847, 362 Ill. 24—People ex rel. McDonough v. Mills Novelty Co., 192 N.E. 236, 357 Ill. 285—City of Metropolis v. Gibbons, 166 N.E. 115, 334 Ill. 431—People v. Chicago, M. & St. P. Ry. Co., 150 N.E. 247, 319 Ill. 415.

Ind.—Edwards v. Housing Authority of City of Muncie, 19 N.E.2d 741, 215 Ind. 330—Zoercher v. Agler, 172 N.E. 186, 202 Ind. 214, 70 A.L.R. 1232, rehearing denied 172 N.E. 907, 202 Ind. 214, 70 A.L.R. 1232.

Ky.—District Board of Tuberculosis Sanatorium Trustees for Fayette County v. City of Lexington, 12 S.W.2d 348, 227 Ky. 7—Barrow v. Bradley, 227 S.W. 1016, 190 Ky. 480.

La.—Mouledoux v. Maestri, 2 So.2d 11, 197 La. 525—State ex rel. McGregor v. Diamond, App., 167 So. 760.

Mich.—Hoffman v. Otto, 269 N.W. 225, 277 Mich. 437.

Mo.—Coleman v. Kansas City, 182 S.W.2d 74, 363 Mo. 150—*Corpus Juris* cited in State ex rel. Emerson v. Mound City, 73 S.W.2d 1017, 1026, 335 Mo. 702, 94 A.L.R. 923—State ex rel. Carpenter v. City of St. Louis, 2 S.W.2d 713, 318 Mo. 870—City of Bolivar v. Ozark Utilities Co., 191 S.W.2d 368, 238 Mo. App. 860—Wilhoit v. City of

Springfield, 171 S.W.2d 95, 237 Mo. App. 775.

N.Y.—County Securities v. Seacord, 15 N.E.2d 179, 278 N.Y. 34—People ex rel. Buffalo & Fort Erie Public Bridge Authority v. Davis, 296 N.Y.S. 787, 163 Misc. 192, motion denied 12 N.E.2d 564, 276 N.Y. 534, affirmed 14 N.E.2d 74, 277 N.Y. 292—In re Schenectady Sewer Assessment, 236 N.Y.S. 455, 134 Misc. 810—Rochester Savings Bank v. Monroe County, 8 N.Y.S. 2d 107, 169 Misc. 526.

N.D.—Marks v. City of Mandan, 296 N.W. 39, 70 N.D. 474.

Okl.—Excise Board of Stephens County v. Chicago, R. I. & P. Ry. Co., 34 P.2d 268, 168 Okl. 523—Simmons v. Stuckey, 241 P. 124, 113 Okl. 200.

Pa.—English v. School Dist. of Robinson Tp., 55 A.2d 803, 358 Pa. 45—Pittsburg Junction R. Co. v. City of Pittsburgh, 42 A.2d 829, 352 Pa. 317—City and County of Philadelphia v. Samuels, 12 A.2d 79, 338 Pa. 321—Commonwealth v. Dauphin County, 6 A.2d 870, 335 Pa. 177—Blauner's v. City of Philadelphia, 198 A. 889, 330 Pa. 342—Wilson v. School Dist. of Philadelphia, 195 A. 90, 328 Pa. 225, 113 A.L.R. 1401—In re Baltimore & Philadelphia Steamboat Co., 153 A. 559, 302 Pa. 364—Clouser v. City of Reading, 113 A. 188, 270 Pa. 92—Appeal of Rieck-McJunkin Dairy Co., 39 A.2d 259, 156 Pa.Super. 9.

Tenn.—Knox Tenn Theatres v. Dance, 208 S.W.2d 536, 186 Tenn. 114—Hill v. Roberts, 217 S.W. 826, 142 Tenn. 215.

Tex.—Texas & P. Ry. Co. v. City of El Paso, 85 S.W.2d 245, 126 Tex. 86—Stratton v. Commissioners' Court of Kinney County, Civ.App., 137 S.W. 1170, error refused.

Wash.—Weyerhaeuser Timber Co. v. Roessler, 97 P.2d 1070, 2 Wash.2d 304, 126 A.L.R. 883—State v. Redd, 6 P.2d 619, 166 Wash. 132.

44 C.J. p 1263 note 28.

Power to tax implied from grant of other powers see *supra* § 1979.

Taxation by city for employees of board of education

Board of education of city of Chicago is part of municipal government of city to such extent that municipal employees' annuity and benefit fund act, in requiring city to raise funds by taxation for purpose of paying annuities and benefits to employees of board of education, does not require tax to be levied by one municipality for use and benefit of another separate and distinct municipality.—People ex rel. Schlaeger v. Jarmuth, 75 N.E.2d 367, 398 Ill. 66.

Tax year

Legislature may confer power on municipality to fix its tax year at dates different from those fixed by general law.—Reynolds v. City of Asheville, 154 S.E. 85, 199 N.C. 212, followed in *Gilkey v. City of Asheville*, 154 S.E. 93, 199 N.C. 218.

Double taxation

It has been said that it may not be successfully contended that the legislature lacks the power to delegate to a municipality power to impose what is called double taxation.—Socony-Vacuum Oil Co. v. City of New York, 287 N.Y.S. 288, 247 App. Div. 163, reargument denied 290 N.Y.S. 141, 246 App.Div. 723, affirmed 5 N.E.2d 385, 272 N.Y. 668.

69. Ky.—Walker v. City of Richmond, 189 S.W. 1122, 173 Ky. 26, Ann Cas 1918E 1084.

N.D.—Marks v. City of Mandan, 296 N.W. 39, 70 N.D. 474.

44 C.J. p 1264 note 29.

70. Ill.—Huck v. Chicago, etc., R. Co., 86 Ill. 352.
44 C.J. p 1264 note 30.

71. Mich.—People v. State Treasurer, 23 Mich. 490.

Authority limited to taxes for public purpose see *infra* § 1987.

72. Ill.—People ex rel. Curren v. Wood, 62 N.E.2d 809, 391 Ill. 237, 161 A.L.R. 718.

must observe and keep within constitutional provisions, requirements, limitations, or restrictions,⁷³ as, for example, provisions that the legislature shall restrict the municipal power of taxation⁷⁴ and that taxes shall be assessed on the basis of the value of the property⁷⁵ to be ascertained in proceedings which shall protect the taxpayer's constitutional rights;⁷⁶ and statutes are not unconstitutional as long as they accord with the fundamental constitutional concepts.⁷⁷ A statute granting the power of taxation to a municipality may not be invalid because it does not in terms contain the constitutional restrictions or limitations,⁷⁸ as where it does not attempt to dispense with them,⁷⁹ or the power is conferred by charter, and regulations conforming to the constitution are made by general laws.⁸⁰ A constitutional requirement that a statute which imposes, continues, or revives a tax shall distinctly state the tax and the object to which it is to be applied, does not apply to a statute which does not itself impose a tax but mere-

ly authorizes certain cities to do so,⁸¹ or which extends the lien of a tax,⁸² and, even if it is regarded as applicable, it is complied with where the tax and the object to which it is to be applied are stated with precision.⁸³ The welfare clause in general statutes conferring powers on municipalities and usually found in their charters cannot be cited or expanded to defeat constitutional limitations on the power of municipalities to tax.⁸⁴

Provisions requiring delegation. While constitutional provisions which require the legislature to authorize municipal corporations to assess and impose taxes for municipal purposes,⁸⁵ or which declare that the legislature itself shall not impose taxes on municipal corporations, or the inhabitants or property thereof, for municipal purposes,⁸⁶ may be mandatory, nevertheless the legislature may, without violating such a constitutional provision, enact a law providing for the appointment of state officers to supervise the action of municipal taxing

73. Ill.—People ex rel. Gallenbach v. Franklin, 58 N.E.2d 555, 388 Ill. 560—People ex rel. Greening v. Bartholf, 58 N.E.2d 172, 388 Ill. 445.

Ky.—City of Louisville v. Sebree, 214 S.W.2d 248, 308 Ky. 420—District Board of Tuberculosis Sanatorium Trustees for Fayette County v. City of Lexington, 12 S.W.2d 348, 227 Ky. 7—Walker v. City of Richmond, 189 S.W. 1122, 173 Ky. 26, Ann.Cas.1918E 1084.

Wash.—State v. Redd, 6 P.2d 619, 166 Wash. 132.

44 C.J. p 1264 notes 35–41.

Constitutional requirements and restrictions:

As to taxation generally see the C.J.S. title Taxation § 6, also 61 C.J. p 79 note 4 et seq.

That taxes shall be:

Collected by corporate officers see infra § 2071.

Imposed for public purposes see infra § 1987.

Limited to a certain rate or amount see infra §§ 1989–1991.

Exemption from taxation generally see infra §§ 2006–2014.

General laws and special charters or statutes see infra § 1983 b.

Purpose of constitutional requirements was to prohibit creation of indebtedness by taxing districts without making provision for payment and to provide for payment of every valid debt of the districts.—Griffin v. Clay County, 201 S.W.2d 733, 304 Ky. 592.

74. S.C.—State v. Beaufort, 17 S.E. 355, 39 S.C. 5.

44 C.J. p 1264 note 36.

75. Ga.—Livingston v. Albany, 41 Ga. 21.

Tenn.—Knoxville v. Ft. Sanders Hospital, 257 S.W. 408, 148 Tenn. 699.

44 C.J. p 1264 note 40.

76. Tex.—Vance v. Pleasanton, Civ. App., 261 S.W. 457, 459.

44 C.J. p 1264 note 41.

77. Fla.—Sovereign Finance Co. v. Beach, 38 So.2d 831.

Reasonable opportunity to adjust or discharge obligations

Town special charter act, requiring town clerk to mail notices of tax assessments to taxpayers at their last-known addresses, providing taxpayers opportunity to appear before equalizing board to contest amount or validity of taxes assessed, giving them ample opportunity to redeem lands from unpaid taxes, and requiring notice of applications for tax deeds, is constitutional as giving taxpayers reasonable opportunity, at each stage of proceedings, to adjust or discharge their tax obligations.—Sovereign Finance Co. v. Beach, supra.

Taxation of property within village, by preexisting park district within whose territory village was incorporated, could not be enjoined as depriving village of right of local self-government.—Village of Kensington v. Town of North Hempstead, 258 N.Y.S. 355, 236 App.Div. 340, affirmed 185 N.E. 94, 261 N.Y. 260.

78. Ill.—Braun v. Chicago, 110 Ill. 186.

79. Ill.—Braun v. Chicago, supra.

Double taxation

(1) Statute authorizing city to issue bonds for purpose of purchasing

at discount bonds and coupons of financially distressed improvement district within city does not constitute a burden of double taxation—Crescent City v. Moran, 77 P.2d 281, 25 Cal.App.2d 133.

(2) Statute authorizing issuance by city of general improvement bonds in refunding of certain district improvement bonds was held not invalid on ground that it subjected property owners within district to double taxation, where issuance of general improvement bonds was for a public purpose.—City of Dunsmuir v. Porter, 60 P.2d 836, 7 Cal.2d 269.

80. Fla.—Graham v. West Tampa, 71 So. 926, 71 Fla. 605.

81. Iowa—Youngerman v. Murphy, 76 N.W. 648, 107 Iowa 686.

Constitutional requirement of statement of object of tax generally see the C.J.S. title Taxation § 18, also 61 C.J. p 98 note 38 et seq.

82. Va.—Powers v. Richmond, 94 S. E. 803, 122 Va. 328.

83. Mich.—People v. Mahaney, 13 Mich. 481.

84. N.C.—Purser v. Ledbetter, 40 S. E.2d 702, 227 N.C. 1.

85. Fla.—Graham v. West Tampa, 71 So. 926, 71 Fla. 605.

86. Ky.—District Board of Tuberculosis Sanatorium Trustees for Fayette County v. City of Lexington, 12 S.W.2d 348, 227 Ky. 7.

44 C.J. p 1265 note 52.

Special improvement bond refunding statute held constitutional

Cal.—Culver City v. Reese, 80 P.2d 992, 11 Cal.2d 441.

officers,⁸⁷ or for the setting apart annually for a certain purpose a certain proportion of the taxes imposed and collected by a municipality,⁸⁸ or legislate with reference to matters in which the state has a sovereign interest, even though a municipal tax may be involved.⁸⁹

c. Taxation within District

The legislature may provide for the creation of a new taxing district in a municipal corporation or for the combination of two or more municipal corporations into one taxing district, and delegate to the governing board thereof power to tax for proper purposes.

The legislature may provide for the creation of a new taxing district in a municipal corporation theretofore divided into districts,⁹⁰ or may provide for the combination of two or more municipal corporations into one taxing district,⁹¹ and delegate to the governing board of the district power to tax for a particular purpose,⁹² where such board is elected by the inhabitants of the political divisions of the district;⁹³ but it has no power to provide for the taxation of a district less in area than a municipality for benefits accruing generally to the municipality.⁹⁴ Consolidation acts and amendments

providing for the consolidation of a city and the outlying territory, in so far as they provide for separate taxing districts to equalize the burdens of the old and new parts of the city, have been held to be a valid exercise of the legislative power.⁹⁵

d. Delegation to Officers, Boards, or Individuals

The legislature ordinarily has no power to authorize persons not corporate officers functioning as the legislative branch of the government to levy a tax without the consent of those to be affected thereby or the municipal authorities; but boards or individuals occupying no legislative position may be delegated duties with respect to taxation which are advisory or ministerial in their nature.

The legislature ordinarily has no power to authorize persons not corporate officers to levy a tax, either directly or indirectly, without the consent of those to be affected thereby, or the municipal authorities,⁹⁶ and the term "corporate officers," within the meaning of a constitutional provision so restricting the power, refers exclusively to the legislative branch of the city government,⁹⁷ and to the members thereof when they are functioning as the legislative branch of the government;⁹⁸ but in some instances, where the consent of the taxpay-

87. Fla.—*Corpus Juris* cited in *Coen v. Lee*, 156 So. 747, 750, 116 Fla. 215.

Miss.—*Adams v. Kuykendall*, 35 So. 830, 83 Miss. 571.

88. La.—*Benedict v. New Orleans*, 39 So. 792, 115 La. 645.

89. Okl.—*City of Ardmore v. Excise Board of Carter County*, 8 P.2d 2, 155 Okl. 126.

44 C.J. p 1265 note 55.

Officers and boards exercising power see *infra* subdivision d of this section.

90. Conn.—*State ex rel. Brush v. Sixth Taxing Dist.*, 132 A. 561, 104 Conn. 192.

Abolition of taxing districts see *infra* § 1984.

Highway districts see *Highways* § 283 et seq.

Improvement districts see *supra* § 1360.

Taxing districts generally see the C.J.S. title *Taxation* §§ 306-307, also 61 C.J. p 509 note 46 et seq.

91. Ind.—*Brown v. Baltimore, etc.*, R. Co., 115 S.E. 86, 186 Ind. 81.

92. Ind.—*Brown v. Baltimore, etc.*, R. Co., *supra*.

93. Ind.—*Brown v. Baltimore, etc.*, R. Co., *supra*.

94. N.J.—*Morgan v. Elizabeth*, 44 N.J.Law 571.

44 C.J. p 1265 note 60.

95. Conn.—*Chamberlain v. Bridgeport*, 91 A. 380, 88 Conn. 480, 486. 44 C.J. p 1265 note 62.

Taxation in consolidated territory generally see *supra* § 79.

96. Cal.—*Culver City v. Reese*, 80 P.2d 992, 11 Cal 2d 441.

Ill.—*People ex rel. Bergan v. New York Cent. R. Co.*, 60 N.E.2d 228, 390 Ill. 30—*People ex rel. Gallenbach v. Franklin*, 58 N.E.2d 555, 388 Ill. 560.

Or.—*City of Portland v. Welch*, 59 P.2d 228, 154 Or. 286, 106 A.L.R. 1188.

Pa.—*Lighton v. Township of Abington*, 9 A.2d 609, 336 Pa. 345—*Wilson v. School Dist of Philadelphia*, 195 A. 90, 328 Pa. 225, 113 A.L.R. 1401.

Wyo.—*Stewart v. City of Cheyenne*, 154 P.2d 355, 60 Wyo. 497.

44 C.J. p 1265 note 64.

Delegation of power of taxation to officers and boards generally see the C.J.S. title *Taxation* § 8, also 61 C.J. p 84 notes 34-36.

Charge not constituting tax

Constitutional provision that taxes for the several corporate bodies may be levied only by their corporate authorities did not apply to provision in housing co-operation act that city may serve as agent to contract for all taxing bodies within city with reference to service charges assessed against housing authorities' property, since charge was not a tax.—*Krause v. Peoria Housing Authority*, 19 N.E.2d 193, 370 Ill. 356.

Statutes held not unconstitutional

(1) Act pursuant to which water and sewer subdistrict was created for fire protection and garbage disposal is not an unconstitutional del-

egation of the taxing power in view of provision stating that until the principal and interest of all bonds issued under the act shall be fully paid, there shall be levied annually on all taxable property in the subdistrict a tax sufficient to pay interest and to provide a sinking fund, since the legislature itself has levied the tax, and the subdistrict has no discretion in the matter.—*Floyd v. Parker Water & Sewer Sub-District*, 17 S.E.2d 223, 203 S.C. 276.

(2) Fact that statute authorized city mayor to appoint directors by reason of whose acts property was taxed to care for dependent and neglected children was held not objectionable as authorizing taxation without representation.—*Fox v. Board for Louisville & Jefferson County Children's Home*, 50 S.W.2d 67, 244 Ky. 1.

97. Ill.—*Harward v. St. Clair, etc., Levee, etc. Co.*, 51 Ill. 130. 44 C.J. p 1265 note 65.

Administrative officer or board

A municipality cannot delegate to an administrative officer or board the authority to determine when, to what extent, or for what purposes taxes shall be laid.

Mo.—*St. Louis v. Clemens*, 52 Mo. 133.

N.Y.—*Davis v. Read*, 65 N.Y. 566—*Thompson v. Schermerhorn*, 6 N.Y. 92, 55 Am.D. 385.

98. Tenn.—*Waterhouse v. Cleveland Public Schools*, 8 Heisk. 857.

44 C.J. p 1266 note 66.

ers may be implied from a long-continued custom,⁹⁹ constitutional provisions for the encouragement of intellectual improvement "by all suitable means" have been construed to permit a delegation of the taxing power to municipal boards or departments with jurisdiction over such matters.¹ Furthermore, boards or individuals occupying no legislative position may be delegated duties with respect to taxation which are advisory or ministerial in their nature.²

"Corporate authorities," within the meaning of a constitutional provision limiting the power of the legislature to delegate the right of taxation to any other than corporate or local authorities, are those municipal officers who are either directly elected by the people to be taxed or appointed in some mode to which the people have given their consent.³ In the absence of constitutional restrictions to the contrary, the taxing power may be delegated to corporate authorities who are appointed rather than elected,⁴ such as a board or department appointed by the state independently of consent of the taxpayers,⁵ or, in accordance with the principles stat-

ed supra subdivision b of this section, where the state has a sovereign interest in matters within the jurisdiction of the board.

Private individual or private corporation. The power to tax cannot be delegated to a private individual or private corporation.⁶

§ 1983. — Construction and Operation of Statutes

- a. In general
- b. General laws and special charters or statutes

a. In General

Statutes conferring on municipal corporations authority to impose taxes must be strictly construed, and doubts or ambiguities arising from the terms used by the legislature must be resolved against the municipality and in favor of the taxpayers; but the courts must not defeat the legislative intent by turning the language used from its natural and obvious meaning.

Statutes conferring on municipal corporations authority to impose taxes must be strictly construed,⁷ and there must be strict compliance with

99. Ind.—Marion v. Forrest, 78 N. E. 187, 168 Ind. 94.
44 C.J. p 1266 note 67.

1. Ind.—Marion v. Forrest, supra.
44 C.J. p 1266 note 68.

2. Ind.—Dunn v. City of Indianapolis, 196 N.E. 528, 698, 208 Ind. 630, 5 N.E.2d 629—Zoercher v. Agler, 172 N.E. 186, 202 Ind. 214, 70 A. L. R. 1232, rehearing denied 172 N. E. 907, 202 Ind. 214, 70 A.L.R. 1232.
La.—National Bank of Commerce in New Orleans v. Board of Supervisors of La. State University and Agricultural and Mechanical College, 20 So.2d 264, 206 La. 913.

Certification of amount of tax

A statute authorizing others than corporate authorities to act in an advisory capacity in certifying the amount of the tax is not unconstitutional where the final determination rests with the city council.—People ex rel. Schlaeger v. Jarmuth, 75 N. E.2d 367, 398 Ill. 66.

Appraisal of property

The statute providing for sale of realty where market value is less than total amount of municipal tax claims, and providing that there should be no sale under fixed upset price to be fixed by board of revision of taxes, is not invalid as unlawfully authorizing the board to place valuation on property against which there exists a tax claim which is in excess of the market value of the property, since board has been merely designated for the purpose of making an appraisal and can do so only under the conditions prescribed

by the act.—Burkley v. City of Philadelphia, 15 A.2d 201, 339 Pa. 426

3. Ill.—McFarlane v. Hotz, 82 N.E. 2d 650, 401 Ill. 506—People ex rel. Curren v. Wood, 62 N.E.2d 809, 391 Ill. 237, 161 A.L.R. 718—People ex rel. Gallenbach v. Franklin, 58 N. E.2d 555, 388 Ill. 560.
Mont.—Weber v. City of Helena, 297 P. 455, 89 Mont. 109.

Supervisory board

Provision of firemen's annuity and benefit fund act making member cities liable for one half total sum estimated by local retirement board to be necessary for expenses including proportionate share of expenses of supervisory board and giving supervisory board unlimited powers relative to incurring of expenses is unconstitutional as an unlawful attempt to invest power of taxation in persons who do not constitute the corporate authorities of cities on whom liabilities are imposed.—People ex rel. Gallenbach v. Franklin, 58 N.E.2d 555, 388 Ill. 560.

Officials of participating governmental units

Statute authorizing officials of participating governmental units, not board of trustees elected from such units' officers and employees, to levy special taxes in limited amounts to pay units contributions for administration and operation of retirement system, if fund is insufficient therefor, is not unconstitutional as vesting power of taxation in others than corporate authorities.—McFarlane v. Hotz, 82 N.E.2d 650, 401 Ill. 506.

4. Colo.—Milheim v. Moffat Tunnel

Improvement Dist., 211 P. 649, 72 Colo. 268, affirmed 43 S.Ct. 694, 262 U.S. 710, 67 L.Ed. 1194.

5. Kan.—Wulf v. Kansas City, 94 P. 207, 77 Kan. 358.
44 C.J. p 1266 note 69.

6. N.J.—Taylor v. Smith, 11 A. 321, 50 N.J.Law 101.

Special improvement bond refunding statute held constitutional

Cal.—Culver City v. Reese, 80 P.2d 992, 11 Cal.2d 441.

7. Cal.—Whitmore v. Brown, 279 P. 447, 207 Cal. 473.

Del.—Consolidated Fisheries Co. v. Marshall, 32 A.2d 426, 3 Terry 283, affirmed 39 A.2d 413, 3 Terry 532.

Fla.—City of Miami v. Kayfetz, 30 So.2d 521, 158 Fla. 758.

Ga.—Lewis & Holmes Motor Freight Corporation v. City of Atlanta, 25 S.E.2d 699, 195 Ga. 810.

Ill.—People v. Wabash Ry. Co., 181 N.E. 610, 349 Ill. 93—People v. Cleveland, C. & St. L. Ry. Co., 174 N.E. 832, 343 Ill. 30—People ex rel. Hewitt v. Kankakee & S. R. Co., 107 N.E. 218, 265 Ill. 497—People ex rel. Hewitt v. Kankakee & S. W. R. Co., 93 N.E. 775, 243 Ill. 113—People ex rel. Hewitt v. Kankakee & S. R. Co., 93 N.E. 773, 243 Ill. 114.

Mo.—Siemens v. Shreeve, 296 S.W. 415, 317 Mo. 736—Wilhoit v. City of Springfield, 171 S.W.2d 95, 237 Mo.App. 775.

N.Y.—City of Johnstown v. Wells, 273 N.Y.S. 631, 242 App.Div. 103, affirmed 11 N.E.2d 787, 275 N.Y. 623.

their requirements or the power will not be conferred.⁸ The statutes are to be construed as of the time of their enactment.⁹ It is presumed that the legislature in granting the power has clearly indicated its intention,¹⁰ and doubts or ambiguities arising from the terms used by the legislature must be resolved against the municipality and in favor of the taxpayers.¹¹ An intent on the part of the legislature to impose so-called double taxa-

tion must be clearly and distinctly expressed;¹² it may not be inferred,¹³ and every presumption is against it.¹⁴

On the other hand, the courts must not defeat the legislative intent by turning the language used from its natural and obvious meaning,¹⁵ nor are powers expressly granted or necessarily implied to be defeated or impaired by a strict construction,¹⁶

N.C.—*C. D. Kenny Co. v. Town of Brevard*, 7 S.E.2d 542, 217 N.C. 269.

Pa.—*Hillman Coal & Coke Co. v. Jenner Tp.*, Somerset County, 150 A. 293, 300 Pa. 108—*White v. Peoples, Com.Pl.*, 32 Del.Co. 368, 35 Mun.L.R. 241.

Tex.—*Tri-City Fresh Water Supply Dist. No. 2 of Harris County v. Mann*, 142 S.W.2d 945, 135 Tex. 280—*State v. Etheridge, Com.App.*, 32 S.W.2d 828, rehearing denied 36 S.W.2d 983, 122 Tex. 18—*Joy v. City of Terrell, Civ.App.*, 143 S.W.2d 704, error dismissed, judgment correct—*Graham v. City of Fort Worth, Civ.App.*, 75 S.W.2d 930, error refused.

Wash.—*State ex rel. Tacoma School Dist. No. 10 v. Kelly*, 30 P.2d 638, 176 Wash. 689.

44 C.J. p 1266 note 73.

Municipal charter authorizing the imposition of a tax is to be strictly construed against the taxing power and in favor of the taxpayer.—*Hill v. City of Eureka*, 94 P.2d 1025, 35 Cal.App.2d 154.

8. Ill.—*People v. Cleveland, C. C. & St. L. Ry. Co.*, 174 N.E. 832, 343 Ill. 30—*People ex rel. Hewitt v. Kankakee & S. R. Co.*, 107 N.E. 218, 265 Ill. 497—*People ex rel. Hewitt v. Kankakee & S. W. R. Co.*, 93 N.E. 775, 248 Ill. 113—*People ex rel. Hewitt v. Kankakee & S. R. Co.*, 93 N.E. 773, 248 Ill. 114.

9. Ill.—*Arnold v. City of Chicago*, 56 N.E.2d 795, 387 Ill. 532.

10. Del.—*Consolidated Fisheries Co. v. Marshall*, 32 A.2d 426, 3 Terry 283, affirmed 39 A.2d 413, 3 Terry 532.

Ill.—*People v. Wabash Ry. Co.*, 181 N.E. 610, 349 Ill. 93—*People v. Central Illinois Public Service Co.*, 159 N.E. 797, 328 Ill. 440.

44 C.J. p 1266 note 74.

11. Del.—*Consolidated Fisheries Co. v. Marshall*, 32 A.2d 426, 3 Terry 283, affirmed 39 A.2d 413, 3 Terry 532.

Fla.—*City of Miami v. Kayfets*, 30 So.2d 521, 158 Fla. 758.

Ga.—*Lewis & Holmes Motor Freight Corporation v. City of Atlanta*, 25 S.E.2d 699, 195 Ga. 810.

Mo.—*Moots v. City of Trenton*, 214 S.W.2d 31—*City of St. Charles v. St. Charles Gas Co.*, 185 S.W.2d

797, 353 Mo. 996—*Kansas City v. Frogge*, 176 S.W.2d 498, 352 Mo. 233—*City of Bolivar v. Ozark Utilities Co.*, 191 S.W.2d 368, 238 Mo. App. 860—*Wilhoit v. City of Springfield*, 171 S.W.2d 95, 237 Mo. App. 775.

44 C.J. p 1266 note 75.

Saving clause

Provision of currency exchange act that nothing therein shall be construed to limit power of municipalities to tax community currency exchanges in a manner not inconsistent with the act is a saving clause and cannot be construed as recognition by legislature of an existing power to tax currency exchanges.—*Arnold v. City of Chicago*, 56 N.E.2d 795, 387 Ill. 532.

12. N.Y.—*Socony-Vacuum Oil Co. v. City of New York*, 287 N.Y.S. 288, 247 App.Div. 163, reargument denied 290 N.Y.S. 141, 248 App.Div. 723, affirmed 5 N.E.2d 385, 272 N.Y. 668.

13. N.Y.—*Socony-Vacuum Oil Co. v. City of New York*, supra.

14. N.Y.—*Socony-Vacuum Oil Co. v. City of New York*, supra.

15. Md.—*Hyattsville v. Chesapeake, etc., Tel. Co.*, 103 A. 133, 131 Md. 589.

44 C.J. p 1266 note 76.

"Statutes imposing taxes and providing means for the collection of the same should be construed strictly in so far as they may operate to deprive the citizen of his property by summary proceedings or to impose penalties or forfeitures upon him; but otherwise tax laws ought to be given a reasonable construction, without bias or prejudice against either the taxpayer or the state, in order to carry out the intention of the legislature and further the important public interests which such statutes subserve."—*Governmental Research Bureau v. Borgen*, 28 N.W.2d 760, 764, 224 Minn. 313.

Particular words and phrases construed

(1) "Library boards."—*Board of Directors of Fort Scott Public Library v. Drake*, 75 P.2d 275, 147 Kan. 157.

(2) "Money changers."—*Arnold v.*

City of Chicago, 56 N.E.2d 795, 387 Ill. 532.

(3) "Such taxes."—*City of Portland v. Pratt*, 55 P.2d 799, 153 Or. 57.

(4) "Surplus balance of levy."—*C. D. Coggeshall & Co. v. Smiley*, 285 P. 48, 142 Okl. 8.

(5) "Surplus balance of revenue."—*C. D. Coggeshall & Co. v. Smiley*, supra.

(6) "Surplus balance of revenue or levy."—*C. D. Coggeshall & Co. v. Smiley*, supra.

(7) "Taxing subdivisions."—*Board of Directors of Fort Scott Public Library v. Drake*, supra.

16. N.J.—*Penrose v. Ventnor City*, 77 A. 1061, 80 N.J.Law 547.

44 C.J. p 1267 note 77.

Purpose of statute

Statute requiring city council to determine amount of appropriation for corporate purposes and levy taxes for amount so ascertained by ordinance specifying in detail purposes for which appropriations are made, and amount appropriated for each purpose respectively, is for taxpayer's protection and designed to give him information in detail of each specific corporate purpose for which municipal taxes are levied.—*People ex rel. Hoennicke v. New York Cent. R. Co.*, 196 N.E. 815, 360 Ill. 569.

Combination of taxing and licensing powers

General assembly by revised cities and village act granting to cities and villages power to license, tax, regulate or prohibit certain businesses has combined the power to tax with power to license.—*City of Bloomington v. Ramey*, 66 N.E.2d 385, 393 Ill. 467.

Enumeration of particular powers

Under provision of city home-rule law authorizing cities to adopt and amend local laws relating to preparation, making, confirmation, and correction of local assessments for taxation purposes, and the levy, collection, and administration of city taxes on realty, the enumeration of the powers was not intended to imply that any of such powers was not included within the power of city to adopt and amend local laws in relation to its property, affairs, and government.—*Griffin v. City of Syracuse*, 38 N.Y.S.2d 476, 179 Misc. 250.

and, if a statute is capable of a reasonable construction upholding its constitutionality, such a construction will be favored over one having a different result.¹⁷

Taxation statutes relating to the same subject matter should be construed together and harmonized if possible;¹⁸ and, in order to ascertain the intention of the legislature in the amendment of a statute, the course of legislation on the subject and conditions created under the former statutory provisions may be considered.¹⁹

General or limited grant. The enumeration of particular objects and purposes of taxation is deemed to be an exclusion of all others not enumerated,²⁰ but an authority to vote taxes for certain specified purposes and other necessary charges is not an enumeration within the meaning of this rule.²¹ If a general power of taxation is granted, the municipal corporation has all the power that the legislature itself possesses in respect of the imposition of a municipal tax;²² but, as discussed *infra* § 1992, where general taxation alone is authorized, the sum required may not be raised by special taxation. Likewise, a grant of power to impose a special tax will not confer authority to accomplish the same purpose by a general tax.²³ A rule of construction embodied in a city charter that enumeration of any particular power granted in the charter shall not limit or impair any general grant of power contained therein does not delegate

to the city the power to assess, levy, and collect taxes which have not been authorized by charter or statute.²⁴

Mandatory provisions. Provisions in a statute designed for the protection of the taxpayer are mandatory.²⁵

Retroactive operation. Statutes authorizing municipal corporations to impose taxes do not have a retroactive operation²⁶ except where it is so provided in express terms.²⁷

b. General Laws and Special Charters or Statutes

While ordinarily the charter or act of incorporation is the source and measure of the taxing power of a municipal corporation, the taxing power may under some circumstances be exercised under general statutes independently of the charter.

The charter or act of incorporation ordinarily is the source and measure of the taxing power of a municipal corporation;²⁸ but the taxing power may be exercised under general statutes independently of the charter, in the absence of controlling provisions therein to the contrary,²⁹ especially where the general law is by its terms applicable to municipalities operating under special charters³⁰ or where the charter provisions are not self-executing and the municipal authorities have not acted thereon.³¹ Under a grant of powers incident to corporations of like character under the general laws of the state, a municipality has all the powers

affirmed 45 N.Y.S.2d 724, 266 App. Div. 1055, appeal denied 47 N.Y.S.2d 292, 267 App.Div. 854.

17. Or.—Portland v. Portland R., etc., Co., 156 P. 1058, 80 Or. 271.

18. Ariz.—Southern Pac. Co. v. Gila County, 109 P.2d 610, 56 Ariz. 499. Cal.—Holman v. Santa Cruz County, App., 205 P.2d 767.

La.—Town of Abbeville v. Police Jury of Vermillion Parish, 22 So.2d 62, 207 La. 779.

N.Y.—Brooklyn Union Gas Co. v. McGoldrick, 59 N.Y.S.2d 243, 270 App. Div. 186, appeal granted, 72 N.Y.S.2d 259, 272 App.Div. 873, appeal dismissed 74 N.E.2d 177, 297 N.Y. 469, appeal dismissed 80 N.E.2d 342, 297 N.Y. 936, affirmed 80 N.E.2d 669, 298 N.Y. 536—People ex rel. Powott Corporation v. Woodworth, 21 N.Y.S.2d 785, 260 App.Div. 168.

Ohio.—Kinsey v. Bower, 68 N.E.2d 317, 147 Ohio St. 66.

Okl.—Oklahoma County Excise Board v. Kurn, 115 P.2d 113, 189 Okl. 203.

44 C.J. p 1267 note 79.

19. Neb.—Union Pac. R. Co. v. Heuer, 150 N.W. 259, 97 Neb. 436.

Utah.—Pleasant Grove City v. Holman, 202 P. 1096, 59 Utah 242.

20. Fla.—City of Miami v. Kayfetz, 30 So.2d 521, 158 Fla. 758.

W.Va.—Shulick-Taylor Co. v. City of Wheeling, 43 S.E.2d 54.

44 C.J. p 1267 note 82.

Subjects plainly within statute
Power to impose tax embraces subjects only plainly within statute.—Cupp Grocery Co. v. City of Johnstown, 135 A. 610, 288 Pa. 43.

21. Mass.—Willard v. Newburyport, 12 Pick. 227.

Vt.—Van Sicklen v. Burlington, 27 Vt. 70.

Tax for special purposes see *infra* §§ 1992-1999.

22. Va.—Woodall v. Lynchburg, 40 S.E. 915, 100 Va. 318—Newport News, etc., R., etc., Co. v. Newport News, 40 S.E. 645, 100 Va. 157.

23. Ill.—Webster v. People, 98 Ill. 343.

Local assessments see *supra* §§ 1290-1652.

24. Mo.—Kansas City v. Frogge, 176 S.W.2d 498, 352 Mo. 233.

25. La.—Louisiana Western R. Co. v. Duson, 83 So. 455, 146 La. 190.

26. N.D.—Stutsman v. Arthur, 16 N. W. 2d 449, 73 N.D. 504, 158 A.L.R. 924—Marks v. City of Mandan, 296 N.W. 34, 70 N.D. 434.

44 C.J. p 1267 note 88.

27. Ill.—Fairfield v. People, 94 Ill. 244—Cowgill v. Long, 15 Ill. 202. Retroactive assessment of omitted property see *infra* § 2050.

28. Tex.—State v. Hoff, Civ.App., 29 S.W. 672, affirmed 31 S.W. 290, 88 Tex. 297.

44 C.J. p 1267 note 91.

Implied amendment or repeal of special law by general law see *infra* § 1984.

Laws applicable to improvement assessment see *supra* §§ 1297-1298.

29. Minn.—State v. Brown, 248 N. W. 822, 189 Minn. 257, affirmed 249 N.W. 569, 189 Minn. 257.

N.C.—Rodman-Heath Cotton Mills v. Wawhaw, 41 S.E. 483, 130 N.C. 293.

30. Ill.—Thatcher v. Chicago, etc., R. Co., 11 N.E. 853, 120 Ill. 560—Spring v. Olney Collector, 78 Ill. 101.

31. Cal.—Keyes v. San Francisco, 173 P. 475, 177 Cal. 313.

of taxation granted to municipalities generally under the general laws.³² In the case of a conflict between statutes covering the same subject matter, a special statute will prevail over a general law otherwise applicable.³³

General tax laws applicable to state and county taxation apply to municipalities only as far as, by the provisions of the laws imposing and regulating municipal taxation, they are either expressly or impliedly adopted.³⁴ In the absence of such adoption, a general law intended for other governmental units is not applicable to municipal taxation.³⁵

§ 1984. Change, Repeal, or Forfeiture of Power

- a. In general
- b. Presumption or implication

a. In General

Except where vested rights are concerned, the power of municipal corporations to tax may be enlarged, abridged, or entirely withdrawn, or taxing districts may be abolished, at the pleasure of the legislature; and on the dissolution of a municipal corporation the taxing power

reverts to the state, but mere long continued nonuser will not be construed as a forfeiture of the power to tax.

At the pleasure of the legislature the power of municipal corporations to levy taxes, except where vested rights are concerned, may be enlarged, abridged, or entirely withdrawn,³⁶ or taxing districts may be abolished.³⁷ The law, however, remains unchanged to the extent that a repealing statute reenacts the provisions of the earlier law,³⁸ and in the change from one scheme of taxation to another the two laws must be read together, and omissions in the later law supplied by provisions in the earlier law whenever necessary for the support of a complete taxation system.³⁹ The legislature can take away the taxing power even after the tax has been legally assessed⁴⁰ or a vote authorizing a levy has been taken;⁴¹ it may authorize a city to alter its method of raising funds for an improvement from a special tax on the property benefited to a general tax on all the taxable property of the city,⁴² even though the change is not made until after completion of the improvement;⁴³ or it may authorize a municipality to divert funds raised for a specified purpose to other purposes;⁴⁴ but it can-

32. NC—Lenoir Drug Co. v. Lenoir, 76 S.E. 840, 160 N.C. 571.

33. Okl.—Bodine v. Oklahoma City, 187 P. 209, 79 Okl. 106.

44 C.J. p 1267 note 96

34. N.Y.—American Transp. Co. v. Buffalo, 20 N.Y. 388—Troy v. Mutual Bank, 20 N.Y. 387.

Application of state and county tax laws to levy and assessment see infra § 2031.

Power of municipality to tax property within its borders subject to state and county taxes see infra § 2001.

Determination of legislative intent

Legislative intent of act declaring machinery for assessment and collection of state and county taxes applicable to assessment and collection of municipal taxes must be determined from language and evident purpose of act, considered with existing laws on subject matter.—City of Opp v. Brogden, 181 So. 752, 236 Ala. 180.

35. La.—Paepcke Leicht Lumber Co. v. Vantrompt, 69 So. 159, 137 La. 743.

N.Y.—People v. Willis, 31 N.E. 225, 183 N.Y. 383.

Taxes levied under authority of charter

Property taxes of city levied under authority of the city charter are not levied under authority of the code provision relating to taxation.—City of Phoenix v. Wayland, 187 P.2d 933, 64 Ariz. 222.

36. Ind.—Zoercher v. Agler, 173 N.

E. 186, 202 Ind. 214, 70 A.L.R. 1232, rehearing denied 172 N.E. 907, 202 Ind. 214, 70 A.L.R. 1232.

Minn.—State v. Brown, 248 N.W. 822, 189 Minn. 257, affirmed 249 N.W. 569, 189 Minn. 257.

N.Y.—Nassau County v. City of Long Beach, 289 N.Y.S. 191, 248 App.Div. 771, modified on other grounds 5 N.E.2d 811, 272 N.Y. 260, reargument granted 7 N.E.2d 712, 273 N.Y. 598, reargument affirmed 9 N.E.2d 50, 274 N.Y. 458.

N.C.—Bryson City Bank v. Town of Bryson City, 195 S.E. 398, 213 N.C. 165.

Tenn.—Memphis Union Station Co. v. City of Memphis, 30 S.W.2d 240, 161 Tenn. 203.

Utah—Plutus Mining Co. v. Orme, 289 P. 132, 76 Utah 286.

Va.—Danville Traction & Power Co. v. City of Danville, 191 S.E. 592, 168 Va. 430.

44 C.J. p 1268 note 1.

Contract between individuals as ineffectual to deprive municipality of power to tax see Constitutional Law § 283 a.

Rights of municipal creditors to levy and collection of taxes see Constitutional Law § 312 b.

Statutes held not to abridge or withdraw power

(1) Statute by its terms applicable only when not inconsistent with provisions of special laws.—Wingate v. Slunder, 51 N.C. 552.

(2) Workmen's compensation act.—Brown v. Town of Patrick, 24 S.E. 2d 365, 202 S.C. 236.

Tax law held not to create contract between state and taxpayers

La.—Realty Owners' Protective Alliance v. City of New Orleans, 115 So. 444, 165 La. 159.

37. Mass.—Weymouth, etc., Fire Dist. v. Norfolk County, 108 Mass. 142.

44 C.J. p 1268 note 2.

Taxing districts generally see supra § 1982 c.

38. Pa.—Haspel v. O'Brien, 67 A. 123, 218 Pa. 146, 11 Ann.Cas. 470.

39. N.Y.—Bareham v. City of Rochester, 220 N.Y.S. 66, 128 Misc. 642, modified on other grounds 222 N.Y.S. 141, 221 App.Div. 36 and 158 N.E. 51, 246 N.Y. 140.

44 C.J. p 1268 note 5

Taxation statutes relating to same subject matter construed together generally see supra § 1983 a.

40. Mo.—State v. St. Louis, etc., R. Co., 9 Mo. App. 532.

N.D.—Pickton v. Fargo, 88 N.W. 90, 10 N.D. 469.

41. Ky.—Covington, etc., R. Co. v. Kenton County Ct., 12 B.Mon. 144.

42. Ohio.—Alexander v. Spencer, 13 Ohio Cir.Ct., N.S., 475, 32 Ohio Cir. Ct. 306, affirmed 94 N.E. 1115, 83 Ohio St. 492.

43. Ohio.—Alexander v. Spencer, supra.

44. N.C.—Cabe v. Franklin, 116 S.E. 419, 185 N.C. 158.

44 C.J. p 1268 note 10.

not release the payment of taxes already levied.⁴⁵ Since municipal taxing power, as discussed supra § 1978, is only a delegation of part of the taxing power of the state, if the state does anything that alters or destroys its power to tax, the defect reaches to the municipal power.⁴⁶ A statute which authorizes a municipal corporation to increase its taxing power by a two-thirds vote of the council requires that two thirds of the aldermen constituting the council vote in favor of the proposition.⁴⁷

Forfeiture of power. Where power has been delegated, mere nonuser by the municipality of its power to tax certain property, no matter for how long continued, cannot be construed as a forfeiture of the power.⁴⁸ Where powers to tax are conferred by several distinct statutes, the exhaustion of the power under one statute will not affect powers existing under other statutes.⁴⁹ On the dissolution of a municipal corporation the taxing power reverts to the state,⁵⁰ and is to be exercised thereafter by the state.⁵¹

b. Presumption or Implication

Withdrawal or alteration of the power of taxation

will not be presumed in the absence of a clear expression of the legislative intent.

Withdrawal or alteration of the power of taxation will not be presumed in the absence of a clear expression of the legislative intent.⁵² In the case of a conflict between general statutes covering the same subject matter and to the extent of the conflict, the later statute has been held to supersede an earlier statute in the absence of any provision therein to the contrary.⁵³ While the passing of a general law will not modify or impair former special laws authorizing the collection of taxes in the absence of a clear legislative intent that it shall so operate,⁵⁴ a change in the law takes place, to the extent intended by the legislature, where such intent clearly appears.⁵⁵ Where the clear general intent of the legislature is to establish a uniform system by providing for a new scheme of taxation, the presumption is that the scheme of taxation provided by the local acts is intended to be repealed.⁵⁶ A statute authorizing a municipal corporation to impose a tax and giving taxpayers a right to vote is not affected, as far as the tax is concerned, by a subsequent constitutional limitation or annulment of the right to vote.⁵⁷

b. Limitations on Power

§ 1985. Constitutional Restrictions in General

Limitations on municipal power to tax may be imposed by constitutional provisions expressly referring to municipal corporations or by provisions limiting the taxing power of the state, but provisions evidently intended to apply to state taxation only will not operate as a

restriction on municipal corporations. Constitutional limitations should be strictly interpreted, and the courts may pass on the reasonableness and legality of ordinances imposing taxes, but not on their wisdom or folly.

Limitations on municipal power to tax may be imposed by constitutional provisions expressly referring to municipal corporations;⁵⁸ and, in view

Appropriation of revenue to use of state

If legislature may withdraw from municipality taxing power previously conferred and appropriate revenue to use of state.—*Memphis Union Station Co. v. City of Memphis*, 30 S.W.2d 240, 161 Tenn. 203.

45. Iowa.—*Dubuque v. Illinois Cent. R. Co.*, 39 Iowa 56.

46. U.S.—*Citizens' and Southern Nat. Bank v. City of Atlanta, Ga.*, D.C.Ga., 46 F.2d 88, affirmed, C.C.A., 53 F.2d 557.

National bank shares

If state destroys its power to tax national bank shares by taxing income of bank, city loses delegated power to tax shares for city purposes.—*Citizens' & Southern Nat. Bank v. City of Atlanta, Ga.*, supra.

47. Tex.—*State v. Etheridge*, Com. App., 32 S.W.2d 828, rehearing denied 36 S.W.2d 983, 122 Tex. 18.

Vote held insufficient to authorize increase where the council was composed of five aldermen, of whom

three voted in favor of the proposition, one against, and one refrained from voting.—*State v. Etheridge*, supra.

48. Ky.—*Covington v. Covington Gas-Light Co.*, 2 S.W. 326, 8 Ky.L. 515.

Va.—*Norfolk v. J. W. Perry Co.*, 61 S.E. 867, 108 Va. 28, 128 Am.S.R. 940, affirmed 31 S.Ct. 465, 220 U.S. 472, 55 L.Ed. 548.

44 C.J. p 1268 note 12.

49. Miss.—*Coulson v. Harris*, 43 Miss. 728.

50. U.S.—*Meriwether v. Garrett*, Tenn., 102 U.S. 472, 26 L.Ed. 197.

51. Ala.—*Hare v. Kennerly*, 3 So. 683, 83 Ala. 608.

52. Ariz.—*Southern Pac. Co. v. Gila County*, 109 P.2d 610, 56 Ariz. 499.—*Barrett v. State*, 36 P.2d 260, 44 Ariz. 270, followed in *Mahe v. State*, 36 P.2d 1118, 44 Ariz. 351.

44 C.J. p 1268 note 17.

Lien of taxes see *infra* § 2058.

53. Mont.—*Wibaux Impr. Co. v.*

Breitenfeldt, 215 P. 222, 67 Mont 206

44 C.J. p 1268 note 18.

54. Ala.—*Birmingham v. Southern Express Co.*, 51 So. 159, 164 Ala 529.

44 C.J. p 1269 note 19.

Special and general laws construed see *supra* § 1983 b.

55. Tenn.—*Memphis Union Station Co. v. City of Memphis*, 30 S.W.2d 240, 161 Tenn. 203.

44 C.J. p 1269 note 20.

56. Pa.—*Davison v. Erie*, 118 A. 429, 274 Pa. 523.

44 C.J. p 1269 note 21.

57. N.C.—*Moore v. Fayetteville*, 80 N.C. 154, 30 Am.R. 75.

44 C.J. p 1269 note 22.

58. Ohio.—*State ex rel. Markel v. City of Columbus*, 40 N.E.2d 144, 139 Ohio St. 351.—*Kurtz v. City of Columbus*, 22 N.E.2d 747, 61 Ohio App. 423, affirmed 28 N.E.2d 587, 187 Ohio St. 184.

of the rule, stated *supra* § 1978, that the power of taxation possessed and exercised by municipal corporations is merely a delegated power, limitations set on the taxing power of the state by either the federal or the state constitution will usually apply also to municipal taxation.⁵⁹ Accordingly municipal taxes have been held subject to constitutional provisions that property shall be taxed in proportion to its value,⁶⁰ that it shall not be twice taxed for the same purpose,⁶¹ that no tax shall be levied

except in pursuance of law,⁶² that the taxes shall be levied and collected by ordinance,⁶³ that all property, except such as is exempt, shall be taxed for payment of debts,⁶⁴ and that no tax levied and collected for one purpose shall ever be devoted to another purpose.⁶⁵ Where, however, the constitutional provision is evidently intended to apply to state taxation only, it will not operate as a restriction on municipal corporations.⁶⁶ A constitutional provision that the legislature shall not dele-

Constitutional limitations on:

Delegation of power by legislature see *supra* § 1982 b.

Taxing power generally see the C.J.S. title Taxation § 6 et seq. also 61 C.J. p 79 note 4 et seq.

Constitutional prohibitions against taking of private property for public use except on just compensation as not restricting power of taxation see Eminent Domain § 17 a.

Limitation on power to:

Incur indebtedness as constituting limitation on power to tax see *supra* § 1846.

Tax as constituting limitation on power to incur indebtedness see *supra* § 1846.

Operation of debt limitations see *supra* § 1846.

Protection of property owners

Municipal tax limitations are primarily designed for protection of property owners, and such protection will not be extended to municipality after sale and delivery of bonds to holder in due course, where proceeds of bonds had been duly expended for public improvements and no action had been filed by taxpayer or other qualified person to enjoin proceeding for issuance of bonds before their delivery.—*State ex rel. Aiden Corporation v. Village of Solon*, 7 N.E.2d 550, 132 Ohio St. 362.

59. Ark.—*Corpus Juris* quoted in *Adamson v. City of Little Rock*, 134 S.W.2d 558, 561, 199 Ark. 435.

Fla.—*City of Fort Myers v. Heitman*, 4 So.2d 871, 148 Fla. 432, rehearing denied 5 So.2d 410, 149 Fla. 203.—*Rio Vista Hotel & Improvement Co. v. Belle Mead Development Corporation*, 182 So. 417, 132 Fla. 88, certiorari denied 59 S.Ct. 251, 305 U.S. 655, 83 L.Ed. 424, rehearing denied 59 S.Ct. 364, 305 U.S. 676, 83 L.Ed. 438.—*Ranger Realty Co. v. Miller*, 136 So. 546, 102 Fla. 378.

Pa.—*Appeal of Stevens*, 18 Pa.Dist. & Co. 698.

Tex.—*Goodnight v. City of Wellington*, 13 S.W.2d 353, 118 Tex. 207, answers conformed to, Civ.App., 15 S.W.2d 1071.

44 C.J. p 1269 note 28.

60. Tex.—*Texas & P. Ry. Co. v.*

City of El Paso, 85 S.W.2d 245, 126 Tex. 88.

44 C.J. p 1269 note 30.

Taxation according to value generally see the C.J.S. title Taxation §§ 52–55, also 61 C.J. p 147 note 25 et seq.

Privilege or occupational tax is not within limitations of state constitution requiring all property to be taxed in proportion of its value.—*McAdams Oil Co. v. City of Los Angeles*, 89 P.2d 729, 32 Cal.App.2d 359.

Constitutional requirement that tax on property be proportional to property owned extends to such property taxes as legislature authorizes to be assessed and collected through municipalities, but difference in rate among different local assessing units does not violate the proportional principle.—*In re Opinion of the Justices, Mass.*, 85 N.E.2d 222.

61. Ill.—*People v. Clark*, 129 N.E. 583, 296 Ill. 46.

Mo.—*State v. Young*, 187 S.W. 995, 259 Mo. 52.

44 C.J. p 1269 note 31.

Double taxation generally see the C.J.S. title Taxation §§ 39–51, also 61 C.J. p 137 note 10 et seq.

Held not to constitute double taxation

(1) The fact that a business may be required to pay regulatory taxes under police power of a city, under one ordinance, and to also pay additional property taxes for purpose of revenue under another ordinance does not render the ordinances illegal or void on ground of double taxation.—*Redwood Theatres v. City of Modesto*, 196 P.2d 119, 86 Cal.App.2d 907.

(2) A home-rule city's annexation of territory embraced in water control and improvement district and water conservation districts was not void as subjecting private property within the annexed districts to taxation both by the city and the districts for purposes and services which could be rendered by only one of them, since the city and the districts were separate entities to each of which had been delegated the power to tax.—*City of Pelly v. Harris County Water Control & Imp.*

Dist. No. 7, 198 S.W.2d 450, 145 Tex. 443.

Double taxation not prohibited

(1) The rule against double taxation has been held not to prohibit such taxation, but merely to require that statutes and ordinances be construed to avoid double taxation, if possible.—*Pennsylvania Co. for Insurances on Lives & Granting Annuities v. City of Philadelphia*, 31 A.2d 137, 346 Pa. 408.

(2) A city tax receiver's regulation, classifying business properties for purpose of determining whether net profits from operation thereof are taxable under ordinance imposing taxes on earned net profits of businesses conducted by city residents, was held not to violate rule against double taxation as obliging corporate trustee to pay taxes on net profits, derived as mortgagee in possession of business properties operated by it while also subject to personal property taxes on mortgages or corporate loan taxes on certain corporate bonds.—*Pennsylvania Co. for Insurances on Lives & Granting Annuities v. City of Philadelphia*, *supra*.

62. Fla.—*Certain Lots Upon Which Taxes Are Delinquent v. Town of Monticello*, 31 So.2d 905.

63. Tex.—*Masterson v. Hedley*, Civ. App., 265 S.W. 406. Necessity of ordinance see *infra* § 2037.

64. Ill.—*Heffner v. Cass, etc., Counties*, 62 N.E. 201, 193 Ill. 439, 58 L.R.A. 353.

S.C.—*Stehmeyer v. Charleston*, 31 S.E. 322, 53 S.C. 259.

Property taxable or exempt generally see *infra* §§ 2000–2029.

65. Ky.—*Covington Bd. of Education v. Covington Public Library*, 68 S.W. 10, 24 Ky.L. 98.

Purpose of tax and obligations of city connected therewith see *infra* § 2119.

Statement of purpose see *infra* § 2039.

66. Ark.—*Shepherd v. City of Little Rock*, 35 S.W.2d 361, 183 Ark. 244. La.—*State ex rel. City of New Orleans v. Louisiana Tax Commission*, 130 So. 48, 171 La. 211.

gate to any special commission, private corporation, company, association, or individual the power to levy taxes or assessment is inapplicable to a municipal corporation.⁶⁷ A statute permitting political subdivisions to transfer any public funds to another municipal fund does not release municipalities from constitutional limitations on their taxing power, and is not repugnant to the constitution.⁶⁸

Control of courts. The courts may act on the reasonableness and legality of an ordinance imposing a tax,⁶⁹ but not on its wisdom or folly.⁷⁰ Constitutional limitations should be strictly interpreted.⁷¹ Where the constitution expressly limits public officials in the exercise of the taxing power, any scheme of financing involving even a doubtful transgression of such limitation should be resolved against the public officials and in favor of the people.⁷²

Neb.—*York v. Chicago, etc., R. Co.*, 76 N.W. 1065, 56 Neb 572.

Provision held not to effect repeal

Constitutional provision that limitation of parish tax rate for payment of parochial government expenses shall not apply to other tax levies elsewhere provided in constitution did not repeal section of constitution stipulating that no provision thereof shall be construed to effect or repeal city's or town's withdrawal from parochial authority's taxing jurisdiction by legislative charter.—*Town of Abbeville v. Police Jury of Vermillion Parish*, 22 So.2d 62, 207 La. 779.

67. Cal.—*American Co. v. City of Lakeport*, 32 P.2d 622, 220 Cal. 548.—*City of Oakland v. Garrison*, 228 P. 433, 184 Cal. 298.

68. Ohio.—*City of Niles v. Union Ice Corporation*, 12 N.E.2d 483, 133 Ohio St. 169.

69. Fla.—*State ex rel. Cole v. Keller*, 176 So. 176, 129 Fla. 276.—*City of De Land v. Florida Public Service Co.*, 161 So. 735, 119 Fla. 804.—*Heriot v. City of Pensacola*, 146 So. 654, 108 Fla. 480.

70. Cal.—*Auston v. Wilson*, 80 P.2d 503, 27 Cal.App.2d 724.

Fla.—*Heriot v. City of Pensacola*, 146 So. 654, 108 Fla. 480.

71. Ky.—*Miles v. Lee*, 143 S.W.2d 843, 284 Ky. 39.

Exhortatory duty

Constitutional duty to restrict power of taxation by villages to prevent abuses in contracting debts is exhortatory only.—*Kelly v. Merry*, 186 N.E. 425, 262 N.Y. 151.

72. Fla.—*Kathleen Citrus Land Co. v. City of Lakeland*, 169 So. 356, 124 Fla. 659.

73. Ohio.—*Haefner v. City of Youngstown*, 68 N.E.2d 64, 147 Ohio St. 58.—*City of Middletown v. City Commission of Middletown*, 37 N.E.2d 609, 138 Ohio St. 596.—*City of Cincinnati v. Gamble*, 34 N.E.2d 226, 138 Ohio St. 220.

Or.—*City of Portland v. Welch*, 59 P.2d 228, 154 Or. 286, 106 A.L.R. 1188.

Utah.—*Plutus Mining Co. v. Orme*, 289 P. 132, 76 Utah 286.

43 C.J. p 288 note 44—44 C.J. p 1270 note 44.

Amount or rate of tax see *infra* §§ 1989–1991.

Constitutional requirement that legislature restrict municipal power of taxation see *supra* § 1982 b.

Constitutional authority

The section of the constitution providing that laws may be passed to limit the power of municipalities to levy taxes for local purposes has no application to liability arising by virtue of proceedings under that section of the constitution dealing with mortgage bonds for public utilities.—*Vollmer v. Village of Amherst*, 29 N.E.2d 379, 65 Ohio App. 26, appeal dismissed 38 N.E.2d 409, 139 Ohio St. 139, affirmed 43 N.E.2d 235, 140 Ohio St. 257.

74. Fla.—*State ex rel. Keefe v. City of St. Petersburg*, 144 So. 313, 106 Fla. 742.

Ill.—*People ex rel. Gill v. Schiek*, 14 N.E.2d 223, 368 Ill. 353.

Neb.—*Darnell v. City of Broken Bow*, 299 N.W. 274, 136 Neb. 844, 136 A.L.R. 101.

N.Y.—*Getman v. Niferopoulos*, 289 N.Y.S. 374, 248 App.Div. 5, reversed on other grounds 11 N.E.2d 713, 276 N.Y. 161.

Pa.—*Appeal of Rieck-McJunkin*

§ 1986. Legislative Restrictions in General

The legislature may place limitations on the exercise of the taxing power of municipal corporations, and restrictions thus imposed must be observed.

Since, as discussed *supra* § 1982 a, the legislature has authority to delegate the taxing power to municipalities, it may also place limitations on the exercise of such power,⁷³ and restrictions thus imposed by the legislature must be observed.⁷⁴ Under a constitutional provision authorizing the enactment of laws to limit the power of municipalities to levy taxes, the legislature may impose the limitation impliedly,⁷⁵ as by levying the same or a similar tax, and thus preempting the field.⁷⁶ Charter tax limitations are applicable only to the ordinary course of municipal operations, and have no application to additional undertakings inaugurated pursuant to additional legislative action.⁷⁷

Dairy Co., 39 A.2d 259, 156 Pa.Super. 9.

44 C.J. p 1270 note 45.

Inconvenience to municipality by limitation of taxing power in charter does not justify exercise of power not within terms of grant.—*Connelly v. City and County of San Francisco*, 127 P. 834, 164 Cal. 101.

Restrictions on general grants

(1) General grants of power to city by general enabling statutes are restricted by particular limitations placed thereon, including those read in by reference.—*Brooklyn Union Gas Co. v. McGoldrick*, 59 N.Y.S. 2d 243, 270 App.Div. 186, appeal granted 72 N.Y.S.2d 259, 272 App.Div. 873, appeal dismissed 74 N.E.2d 177, 297 N.Y. 469, appeal dismissed 80 N.E.2d 342, 297 N.Y. 936, affirmed 80 N.E.2d 669, 298 N.Y. 536.

(2) The fact that statutory amendments, specifically limiting city's power to tax in other respects than under tax law, were placed in enabling acts, rather than such law, cannot be held, on theory of practical construction, to overcome plain force of language incorporated in original and amended statutes limiting local taxing power.—*Brooklyn Union Gas Co. v. McGoldrick*, *supra*.

75. Ohio.—*Haefner v. City of Youngstown*, 68 N.E.2d 64, 147 Ohio St. 58.

76. Ohio.—*Haefner v. City of Youngstown*, *supra*.

Tax on sales and gross receipts
Ohio.—*Haefner v. City of Youngstown*, *supra*.

77. Or.—*State ex rel. First Nat. Bank v. Melville*, 41 P.2d 1071, 149 Or. 532.

§ 1987. Public Purpose

- a. In general
- b. Particular municipal purposes

a. In General

A municipal power to levy a tax is subject to the restriction that it must be for a municipal or public purpose; and the action of a state or municipal legislative body in determining a tax to be for a public purpose is subject to review by the courts, which will not, however, interfere except for clear abuse of power or unless the absence of public interest is clear and palpable.

A municipal power to levy a tax is subject to the restriction that it must be for a municipal or public purpose as distinguished from a private purpose,⁷⁸ and the legislature has no power to au-

thorize the imposition of a tax for which the municipal corporation receives no benefit;⁷⁹ but the validity of a tax may be upheld on the presumption that it is levied for a public purpose in the absence of evidence to the contrary.⁸⁰ If the main object of the tax is to accomplish a proper municipal purpose it cannot be defeated on the ground that it may be used incidentally for a private purpose;⁸¹ but the incidental benefits which accrue to the inhabitants of the municipality from the development of its commercial interests will not sustain a tax in aid of such interests as being made for a public purpose.⁸² A tax is not necessarily void in toto where it is levied partly for a public

78. U.S.—*Hoskins v. City of Orlando, Fla.*, C.C.A.Fla., 51 F.2d 901.

Del.—*Town of Seaford v. Eastern Shore Public Service Co.*, 24 A.2d 436, 2 Terry 438.

Mo.—*State ex rel. City of Jefferson v. Smith*, 154 S.W.2d 101, 348 Mo. 554.

N.C.—*Nash v. Town of Tarboro*, 42 S.E.2d 209, 227 N.C. 283.

Tex.—*Davis v. City of Taylor*, 67 S.W.2d 1033, 123 Tex. 39—*Goodnight v. City of Wellington*, 13 S.W.2d 353, 118 Tex. 207, answers conforming to, Civ.App., 15 S.W.2d 1071.

Wis.—*Attorney General v. City of Eau Claire*, 37 Wis. 400.

44 C.J. p 1270 note 48.

Limitation of taxation to public purposes generally see the C.J.S. title Taxation § 14, also 61 C.J. p 89 note 98 et seq.

Power and duty to tax for special purposes see *infra* §§ 1992–1999.

Corporate purpose

(1) Municipal taxes may not be levied for other than corporate purposes—*People ex rel. Thompson v. Chicago & N. W. Ry. Co.*, 74 N.E.2d 510, 397 Ill. 319—*Indiana Harbor Belt R. Co. v. Calumet City*, 63 N.E.2d 369, 391 Ill. 280—*People ex rel. Bergan v. New York Cent. R. Co.*, 60 N.E.2d 228, 390 Ill. 30—*People ex rel. Illinois Armory Board v. Kelly*, 16 N.E.2d 693, 369 Ill. 280—*Dimond v. Commissioner of Highways of Town of Ottawa*, 9 N.E.2d 197, 366 Ill. 503—*Kocsis v. Chicago Park Dist.*, 198 N.E. 847, 362 Ill. 24—*Berman v. Board of Education of City of Chicago*, 196 N.E. 464, 360 Ill. 535, 99 A.L.R. 1029.

(2) The words "corporate purpose" as used in constitutional provision that municipalities may be vested with authority to assess and collect taxes for "all other corporate purposes," should not receive a narrow or rigid construction.—*People ex rel. Illinois Armory Board v. Kelly*, *supra*.

(3) A corporate purpose is such

as is germane to the objects of the creation of the municipal corporation, or has a legitimate connection with those objects, and a manifest relation thereto—*People ex rel. Toman v. Otis' Estate*, 33 N.E.2d 202, 376 Ill. 112—*People ex rel. Illinois Armory Board v. Kelly*, *supra*—*Kocsis v. Chicago Park Dist.*, *supra*—*Robbins v. Kadyk*, 143 N.E. 863, 312 Ill. 290—*Wetherell v. Devine*, 6 N.E. 24, 116 Ill. 631.

Purpose both public and municipal

Taxes levied by municipality must be for both public and municipal purpose.—*Vrooman v. City of St. Louis*, 88 S.W.2d 189, 337 Mo. 933.

Public interest, necessity, or convenience

Municipalities may use power of taxation only in public interest; they may not commercialize power of taxation, and the power of a municipality to tax must be exercised only for public necessity or convenience.—*Atlantic Coast Line R. Co. v. City of Lakeland*, 115 So. 669, 94 Fla. 347.

Benefit to municipality as whole

(1) Municipal taxation refers to municipal purposes that are beneficial to municipality as a whole.—*Klemm v. Davenport*, 129 So. 904, 100 Fla. 627, 70 A.L.R. 156.

(2) Objects to be attained must affect people as community and not merely as individuals.—*Briggs v. City of Raleigh*, 141 S.E. 597, 195 N.C. 223.

(3) Cities may impose a tax if funds collected from particular levy are to be used for benefit of all persons residing within the area.—*Shilito v. City of Spartanburg*, 51 S.E.2d 95, 214 S.C. 11.

(4) Where ad valorem tax is levied against all taxable property within village on ad valorem basis, validity does not depend on the receipt of some special benefit as distinguished from general benefit to the community.—*O'Flynn v. Village of East Rochester*, 54 N.E.2d 343, 292

N.Y. 156, certiorari denied 65 S.Ct. 39, 323 U.S. 713, 89 L.Ed. 574.

Commensurate benefit

A municipal power to tax for benefits is bounded by its present or reasonably present capacity to replace taxes exacted with a commensurate benefit.—*Smith v. City of Winter Haven*, 18 So.2d 4, 154 Fla. 439.

Definite expression of corporate power required

The constitutional limitation on power of legislature to vest municipal subdivisions with taxing power, that taxes must be for corporate purposes necessarily implies that corporate purposes for which levy is made must be in some manner definitely expressed.—*Weyerhaeuser Timber Co. v. Roessler*, 97 P.2d 1070, 2 Wash.2d 304, 126 A.L.R. 882.

Purpose limited by rule of strict construction

Fla.—*City of Miami v. Kayetz*, 30 So.2d 521, 158 Fla. 758.

79. Cal.—*Redwood City v. Meyers*, 69 P.2d 291, 7 Cal.2d 283, 108 A.L.R. 727.

Constitutional provision authorizing the legislature to vest municipal corporations with power to assess and collect taxes for corporate purposes is a limitation on the vesting of the power to tax, and the legislature cannot vest such power in any municipal corporation other than the one for whose corporate purpose the tax is to be levied.—*People ex rel. Hagler v. Chicago, B. & Q. R. Co.*, 43 N.E.2d 989, 380 Ill. 120.

80. Ill.—*Law v. People*, 87 Ill. 385.

Mass.—*Duffy v. Treasurer & Receiver Gen.*, 125 N.E. 135, 234 Mass. 42, 44 C.J. p 1270 note 49.

81. Ill.—*Baltimore, etc., R. Co. v. People*, 66 N.E. 148, 200 Ill. 541.

Mo.—*State ex rel. City of Jefferson v. Smith*, 154 S.W.2d 101, 348 Mo. 554.

82. Mo.—*State ex rel. City of Jefferson v. Smith*, *supra*.

44 C.J. p 1270 note 51.

purpose and partly for a private one.⁸³ Public purposes may include both proprietary and governmental purposes.⁸⁴ The application of these rules varies with the different and changing requirements of different states and localities;⁸⁵ and the question of what constitutes a municipal purpose should be determined as of the time the constitution is construed, rather than as of the time of its adoption,⁸⁶ and is dependent on the facts involved.⁸⁷

While the action of a state or municipal legislative body in determining a tax to be for a public purpose may be reviewed by the courts,⁸⁸ ordinarily the legislature may declare what is a municipal purpose of taxation, and a duly enacted statute designating a municipal purpose is subject only to the provisions of the constitution,⁸⁹ and the courts will not interfere with the action of a state or municipal legislative body except for clear abuse of power,⁹⁰ or unless the absence of public interest is clear and palpable,⁹¹ especially where the municipality acted under a home-rule statute.⁹² In determining the question of public purpose within the power to tax, the municipal council engages

in the exercise of its legislative, as distinguished from either its administrative or judicial, powers.⁹³ Authority to vote a tax "for any purpose for which the council may call an election" is construed to mean any lawful purpose.⁹⁴

Whether a tax is necessary for purposes embraced within a charter is to be determined by the taxing power.⁹⁵

b. Particular Municipal Purposes

Municipal activities which the courts have sustained as public uses for which a tax may be levied include the reasonable use of public money for objects to promote the general welfare and the health, amusement, and recreation of the people, and to advertise the attractions and assets of the municipality.

Constitutional provisions authorizing municipal taxes for corporate purposes permit reasonable use of public money for objects to promote the general welfare;⁹⁶ and municipal activities which the courts have sustained as public uses for which a tax may be levied embrace health,⁹⁷ amusement,⁹⁸ recreation,⁹⁹ and advertising by a municipality of its attractions and assets.¹ Thus taxes upheld as

83. Tex.—Nalle v. Austin, 44 S.W. 66, 91 Tex. 424.

84. Tex.—Goodnight v. City of Wellington, 13 S.W.2d 353, 118 Tex. 207, answers conformed to, Civ. App., 15 S.W.2d 1071.

85. Fla.—City of Fernandina v. State, 197 So. 454, 143 Fla. 802, 44 C.J. p 1270 note 54.

86. Fla.—City of Fernandina v. State, supra.

87. Ill.—People ex rel. Illinois Armory Board v. Kelly, 16 N.E.2d 693, 369 Ill. 280.

Tenn.—Oehmig v. City of Chattanooga, 80 S.W.2d 83, 168 Tenn. 618.

88. Fla.—Bradentown v. State, 102 So. 556, 88 Fla. 381, 36 A.L.R. 1297, 44 C.J. p 1271 note 55.

Weight accorded state decisions on taxation by federal courts generally see Federal Courts § 189.

89. Fla.—Tampa v. Prince, 58 So. 542, 63 Fla. 387—Brown v. Lakeland, 54 So. 716, 61 Fla. 508, 43 C.J. p 289 note 52.

Statutes held constitutional

Ill.—People ex rel. Toman v. Advance Heating Co., 33 N.E.2d 206, 376 Ill. 158.

Tenn.—Oehmig v. City of Chattanooga, 80 S.W.2d 83, 168 Tenn. 618.

90. Fla.—City of Fernandina v. State, 197 So. 454, 143 Fla. 802, 44 C.J. p 1271 note 56.

91. Ill.—People ex rel. Thompson v. Chicago & N. W. Ry. Co., 74 N.E. 2d 510, 397 Ill. 319.

The word "public" in constitutional provision that no city shall have

power to assess, levy, or collect taxes for other than public purposes should not be construed or applied in narrow or illiberal sense, or in any sense precluding legislature from taking broad views of state interest, necessity or policy or giving effect to such views by means of public revenues.—Hays v. City of Kalamazoo, 25 N.W.2d 787, 316 Mich. 443.

92. N.Y.—Matter of Christey, 155 N.Y.S. 39, 92 Misc. 1.

93. S.C.—Green v. City of Rock Hill, 147 S.E. 346, 149 S.C. 234.

94. Tex.—Tone v. Denison, Civ.App., 140 S.W. 1189.

95. Ky.—Mayfield Woolen Mills v. Mayfield, 61 S.W. 43, 111 Ky. 172, 22 Ky.L. 1676.

44 C.J. p 1271 note 61.

96. S.C.—Marshall v. Rose, 49 S.E.2d 720, 213 S.C. 428.

Taxation, other than municipal, for particular purposes see the C.J.S. title Taxation §§ 13-17, also 61 C.J. p 89 note 98 et seq.

Tax for:

Aid to corporations see *infra* § 1996.

Educational purposes see *infra* § 1995.

Waterworks and water supply see *infra* § 1994.

Welfare and protection of people

"Public purpose" within meaning of constitutional provision that taxes shall be levied only for public purposes, when used in connection with expenditure of municipal funds, refers to public purpose within the frame of governmental and proprie-

tary power given to the particular municipality, to be exercised for the welfare and protection of its inhabitants and others coming within the municipal care.—Nash v. Town of Tarboro, 42 S.E.2d 209, 227 N.C. 283.

97. Tex.—Bland v. City of Taylor, Civ.App., 37 S.W.2d 291, affirmed Davis v. City of Taylor, 67 S.W.2d 1033, 123 Tex. 39.

98. Tex.—Bland v. City of Taylor, Civ.App., 37 S.W.2d 291, affirmed Davis v. City of Taylor, 67 S.W.2d 1033, 123 Tex. 39.

99. Tex.—Bland v. City of Taylor, Civ.App., 37 S.W.2d 291, affirmed Davis v. City of Taylor, 67 S.W.2d 1033, 123 Tex. 39.

Contribution for acquisition of national park

Contribution of city's funds to United States for acquisition and construction of national public park located within city was held contribution for public and corporate purpose within constitutional provision requiring city to exercise taxing power for such purpose, notwithstanding nonresidents of city might receive occasional benefit from use of park, and congress has power to control property.—Vrooman v. City of St. Louis, 88 S.W.2d 189, 337 Mo. 933.

1. Fla.—City of Jacksonville v. Oldham, 150 So. 619, 112 Fla. 502.

Tex.—Bland v. City of Taylor, Civ. App., 37 S.W.2d 291, affirmed Davis v. City of Taylor, 67 S.W.2d 1033, 123 Tex. 39.

being for a public purpose include taxes levied for the acquisition or maintenance of a gas or electric light plant for furnishing lights to all persons within the limits of the municipality;² the construction of public sewers;³ the maintenance of a municipal fuel yard for the purpose of selling fuel to the inhabitants of the municipality;⁴ the acquisition or donation of land for the construction of an armory for the state militia;⁵ the erection and maintenance of community buildings for town meetings, lectures, and concerts;⁶ the maintenance of a municipal band;⁷ the maintenance of a board of city development,⁸ regardless of the manner of the selection of the membership of the board;⁹ preserving property owned by the city;¹⁰ the paving,¹¹ construction,¹² repair,¹³ and sprinkling¹⁴ of city streets; the erection and maintenance of bridges;¹⁵ the creation of a special improvement district re-

volving fund,¹⁶ or the payment of deficiencies in the city's special improvement funds;¹⁷ the payment of expenses of election¹⁸ or registration,¹⁹ or other debts incurred for city purposes;²⁰ the payment of a money judgment against the municipality for an amount wrongfully diverted from funds collected for the payment of special assessment bonds;²¹ payment for services in bringing about the location in the municipality of large mills contributing to the economic welfare thereof;²² the reimbursement of an officer for counsel fees and expenses incurred by him in litigation involving questions of public interest and importance;²³ a contribution to a charitable association;²⁴ the maintenance of a pension fund for municipal employees;²⁵ or the payment of bounties to volunteers credited to the quota of the municipality where soldiers are being drafted during a war.²⁶ A stat-

2. Mich.—*Mitchell v. Negaunee*, 71 N.W. 646, 113 Mich. 359, 67 Am.S. R. 468, 38 L.R.A. 157.

44 C.J. p 1271 note 63.

Tax for public improvements generally see *infra* § 1993.

3. Mo.—*State v. Wilder*, 116 S.W. 1087, 217 Mo. 261.

Payment of defaulted revenue sewer bonds

Levy of tax by village to pay defaulted revenue sewer bonds which were payable only from revenue from sewerage system, was valid as for a corporate purpose, where people of village voted to assume the payment of the bonds.—*People ex rel. Thompson v. Chicago & N. W. Ry. Co.*, 74 N.E.2d 510, 397 Ill. 319.

4. Tex.—*Corpus Juris* cited in *Bland v. City of Taylor*, Civ.App. 37 S.W.2d 291, 293, affirmed *Davis v. City of Taylor*, 67 S.W.2d 1033, 123 Tex. 39.

44 C.J. p 1271 note 65.

5. Ill.—*People ex rel. Illinois Armory Board v. Kelly*, 16 N.E.2d 693, 369 Ill. 280.

Reason for rule

One of the purposes for which local governments are organized is to preserve the peace and order of the community, and to prevent and suppress riots, affrays, and disorder therein. Donating funds or property for an armory in a city is in furtherance of that corporate function, and thus is for a corporate purpose, particularly in view of the statute providing that cities are liable to the owner of property injured or destroyed in a riot of twelve or more persons, since the location of an armory and a military force in a city naturally tends to prevent such a liability.—*People ex rel. Illinois Armory Board v. Kelly*, *supra*.

6. Ill.—*Robbins v. Kadyk*, 143 N.E. 863, 312 Ill. 290.

7. Tex.—*Goodnight v. City of Wellington*, 13 S.W.2d 353, 118 Tex. 207, answers conformed to, Civ. App., 15 S.W.2d 1071.

Proprietary function

Although maintenance of municipal band is not governmental function for benefit of public generally, but proprietary function for benefit of municipality, a tax therefor is a tax for a public purpose.—*Goodnight v. City of Wellington*, *supra*.

8. Tex.—*Bland v. City of Taylor*, Civ.App. 37 S.W.2d 291, affirmed *Davis v. City of Taylor*, 67 S.W.2d 1033, 123 Tex. 39.

9. Tex.—*Bland v. City of Taylor*, Civ.App. 37 S.W.2d 291, affirmed *Davis v. City of Taylor*, 67 S.W.2d 1033, 123 Tex. 39.

10. Vt.—*Van Sicklen v. Burlington*, 27 Vt. 70.

11. Fla.—*State v. City of Pensacola*, 40 So 2d 569.

Miss.—*Maybin v. Biloxi*, 28 So. 566, 77 Miss. 673.

44 C.J. p 1271 note 68.

12. Fla.—*State v. City of Pensacola*, 40 So 2d 569.

13. Fla.—*State v. City of Pensacola*, *supra*.

14. Ky.—*Maydwell v. Louisville*, 76 S.W. 1091, 116 Ky. 885, 25 Ky.L. 1062, 105 Am.S.R. 245, 63 L.R.A. 655.

15. Ill.—*People v. Illinois Cent. R. Co.*, 107 N.E. 253, 286 Ill. 240.

N.Y.—*People v. Kelly*, 76 N.Y. 475, 5 Abb.N.Cas. 383.

44 C.J. p 1271 note 70.

16. Mont.—*Stanley v. Jeffries*, 284 P. 134, 86 Mont. 114, 70 A.L.R. 166.

Districts previously created

It has been held, however, that a

provision making special improvement district revolving fund applicable to districts previously created, subject to vote of taxpayers, was void as levying tax for private purposes.—*Stanley v. Jeffries*, *supra*.

Project partly outside city

Statute providing for creation by cities of a special improvement district revolving fund for purpose of making loans to improvement district does not levy tax for private purposes within constitutional prohibition, even though part of project in furtherance of improvement within city is located outside the city.—*Hansen v. City of Havre*, 114 P.2d 1053, 112 Mont. 207, 135 A.L.R. 1278.

17. N.D.—*Marks v. City of Mandan*, 296 N.W. 39, 70 N.D. 474.

18. Ill.—*Wetherell v. Devine*, 6 N.E. 24, 116 Ill. 631.

19. Mo.—*State v. Owsley*, 26 S.W. 659, 122 Mo. 68.

20. Utah.—*Shepard v. Kayville*, 52 P. 592, 16 Utah 340.

Payment of public debt as public purpose generally see the C.J.S. title *Taxation* § 16, also 61 C.J. p 95 note 94 et seq.

Tax for payment of debts and bonds generally see *infra* § 1997.

21. Ill.—*Reconstruction Finance Corporation v. Calumet City*, 57 N.E.2d 290, 324 Ill.App. 73.

22. Fla.—*City of Fernandina v. State*, 197 So. 454, 143 Fla. 802.

23. N.Y.—*Matter of Christey*, 155 N.Y.S. 39, 92 Misc. 1.

24. N.Y.—*Shepherd's Fold of Protestant Church v. New York*, 96 N.Y. 137.

25. Tex.—*Byrd v. City of Dallas*, 6 S.W.2d 738, 118 Tex. 28.

44 C.J. p 1271 note 76.

26. Wis.—*Dinehart v. La Fayette*,

ute empowering cities to acquire and operate mineral water vending houses, springs, and wells and to issue bonds therefor which shall be payable solely from the income of the properties is not violative of a constitutional provision that taxes can be levied and collected for public purposes only.²⁷

Tax not for public or municipal purpose. Taxes held to be invalid as not being for a public, municipal, or corporate purpose include a tax for the entertainment of official visitors;²⁸ the building or maintenance of a house of entertainment²⁹ or a hotel and business house;³⁰ the purchase and maintenance of a municipal golf course in the absence of express legislative authority;³¹ the erection of a municipal ice plant;³² the management and use by the city of land along the sides of its streets to promote the interests of merchants or traders who might occupy it;³³ the improvement of property not owned by the city;³⁴ aiding a county in repairing its buildings³⁵ or in maintaining the county court;³⁶ the erection of statues or monuments;³⁷ the construction of a water-power dam;³⁸ the construction of a bridge outside the corporate limits;³⁹ the payment of a debt not incurred by the authority imposing the tax;⁴⁰ the payment of defaulted tax anticipation warrants;⁴¹ the reimbursement of a tax collector who has taken a note for certain taxes and accounted therefor to the town as money, and is thereafter unable to collect the note;⁴² the reimbursement of

a municipal officer for expenses incurred by him in successfully resisting removal on a criminal charge;⁴³ the payment of expenses incurred in opposing before the legislature the passage of an act annexing the whole or a part of the territory to another municipality;⁴⁴ or the payment of the expenses of a committee appointed by the municipality to effect the passage of an act which was declared unconstitutional when enacted.⁴⁵

§ 1988. Submission to Popular Vote

- a. Necessity
- b. Sufficiency in general
- c. Notice
- d. Contest
- e. Authority conferred by vote

a. Necessity

Generally, in the absence of any constitutional or statutory provision to the contrary, a submission to the voters is not essential to the validity of a tax levy.

Although, when a proposition is presented to impose additional burdens on the people by taxation, it has been said to be the public policy to submit the proposition to a vote of the qualified electors to be affected by such proposed increase of taxation,⁴⁶ as a general rule, in the absence of any constitutional or statutory provisions to the contrary, a submission to the voters is not essential to the validity of a tax levy;⁴⁷ nor is a popular

19 Wis. 677—*Brodhead v. Milwaukee*, 19 Wis. 624, 88 Am.D. 711.

44 C.J. p 1271 note 77.

27. Mo.—*State ex rel. City of Excelsior Springs v. Smith*, 82 S.W.2d 37, 336 Mo. 1104.

28. Ill.—*Law v. People*, 87 Ill. 385. N.C.—*Corpus Juris* quoted in *Nash v. Town of Tarboro*, 42 S.E.2d 209, 213, 227 N.C. 283.

29. N.C.—*Corpus Juris* quoted in *Nash v. Town of Tarboro*, 42 S.E.2d 209, 213, 227 N.C. 283.

44 C.J. p 1271 note 79.

30. Ill.—*Mather v. Ottawa*, 3 N.E. 216, 114 Ill. 659.

N.C.—*Corpus Juris* quoted in *Nash v. Town of Tarboro*, 42 S.E.2d 209, 213, 227 N.C. 283.

31. Fla.—*Bradentown v. State*, 102 So. 556, 88 Fla. 381, 36 A.L.R. 1297.

32. La.—*Union Ice, etc., Co. v. Ruston*, 66 So. 262, 135 La. 898, L.R.A. 1915B 859, Ann.Cas.1916C 1274.

33. Mass.—*In re Opinion of Justices*, 91 N.E. 405, 204 Mass. 607, 27 L.R.A., N.S., 483.

34. N.Y.—*People v. Works*, 7 Wend. 486.

35. N.Y.—*Deady v. Lyons*, 57 N.Y.S. 448, 39 App.Div. 139.

36. Tenn.—*Newton v. Hamilton County*, 33 S.W.2d 419, 161 Tenn. 634.

37. Mass.—*Stetson v. Kempton*, 13 Mass. 272, 7 Am.D. 145.

38. Tex.—*Nalle v. Austin*, Civ App., 21 S.W. 375.

39. N.D.—*Manning v. Devils Lake*, 99 N.W. 51, 13 N.D. 47, 112 Am S.R. 652, 65 L.R.A. 187.

40. Ill.—*Sleight v. People*, 74 Ill. 47.

41. Ill.—*People ex rel. Thompson v. Chicago & N. W. Ry. Co.*, 74 N.E.2d 510, 397 Ill. 319.

Reason for rule

Tax anticipation warrants are not obligations of the taxing municipality but represent taxes that have already been levied and presumably will be paid by the taxpayer, so that a tax for payment of defaulted tax anticipation warrants is a tax to pay that which is not a debt of the taxing district, but would amount to double taxation and is not for a corporate purpose.—*People ex rel. Thompson v. Chicago & N. W. Ry. Co.*, *supra*.

42. Me.—*Thorndike v. Camden*, 19 A. 95, 82 Me. 39, 7 L.R.A. 463.

43. N.Y.—*Matter of Jensen*, 60 N.Y. S. 933, 44 App.Div. 509.

44. Mass.—*Coolidge v. Brookline*, 114 Mass. 592.

45. Mass.—*Mead v. Acton*, 1 N.E. 413, 139 Mass. 341.

46. Tex.—*State v. Etheridge*, Com. App., 32 S.W.2d 828, rehearing denied 36 S.W.2d 983, 122 Tex. 18. Increase of rate by popular vote see *infra* § 1989 b.

47. Ill.—*People ex rel. Toman v. B. Mercil & Sons Plating Co.*, 37 N.E.2d 839, 378 Ill. 142—*People ex rel. Toman v. Advance Heating Co.*, 33 N.E.2d 206, 376 Ill. 158.

Mo.—*State ex rel. St. Louis County v. St. Johns-Overland Sanitary Sewer Dist.*, 185 S.W.2d 780, 353 Mo. 974, followed in *State ex rel. St. Louis County v. South Lackland Sanitary Sewer Dist.*, 185 S.W.2d 784.

N.C.—*Gill v. City of Charlotte*, 195 S.E. 368, 213 N.C. 160.

Tex.—*City of Del Rio v. Lowe*, Civ. App., 111 S.W.2d 1208, reversed on other grounds *Lowe v. City of Del Rio*, 122 S.W.2d 191, 132 Tex. 111. 44 C.J. p 1272 note 95.

vote made necessary by a statute purporting to require it where the city's power to tax exists under a constitutional grant with reservations to the legislature of a right merely to provide a method for the exercise of the power granted.⁴⁸ Where, however, submission to the voters is required by the constitution or by a statute, no valid tax can be levied without a submission of the proposition to the voters in conformity with such requirement,⁴⁹ as where constitutional or statutory provisions require such submission where the proposed tax is for public school or educational purposes,⁵⁰ or is in excess of the amount collected and expended the preceding year.⁵¹ A failure to submit is not cured by a subsequent vote of the electors accepting the improvement for which the tax was raised and au-

thorizing payment of the cost thereof.⁵²

Under a constitutional provision that no tax shall be levied or collected by any officers of any municipal corporation except for the necessary expenses thereof unless by a vote of the majority of the qualified voters therein, the municipal authorities may levy a tax for necessary expenses up to the constitutional limitation without a vote of the people and without special legislative authority,⁵³ and in excess of the constitutional limitation by legislative authority without a vote of the people,⁵⁴ but may not levy a tax within or in excess of the constitutional limitation for purposes other than necessary expenses except by a vote of the people under special legislative authority,⁵⁵ and approval of taxation by popular vote is the rule, and direct

Ordinances under initiative and referendum laws generally see *supra* §§ 449-461.

Confirmation of implied power

Where amendment of city charter authorized city to advertise city, provision in amendment for tax was surplusage and except for limitation thereon amounted to no more than a confirmation of the authority necessarily incident to, and implied from, the general grant of power to advertise, and its only effect was restrictive so that tax could not exceed the amount authorized, and was not required to be submitted to voters, whether or not taxpayers.—*Moreland v. City of San Antonio*, Tex. Civ. App., 116 S.W.2d 823, error refused.

Ordinance held not subject to referendum

An ordinance levying an ad valorem tax, the enactment of which was declared an emergency measure, and which consisted of many integral paragraphs, was not subject to referendum under city charter which contained provisions for reference of ordinances.—*Denman v. Quin*, Tex. Civ. App., 116 S.W.2d 783, error refused.

48. Mo.—*Calland v. Springfield*, 174 S.W. 396, 264 Mo. 296.

49. Cal.—*Holman v. Santa Cruz County*, App., 205 P.2d 767.

Ill.—*People ex rel. Bergan v. New York Cent. R. Co.*, 60 N.E.2d 228, 390 Ill. 80.

Mo.—*Kansas City Power & Light Co. v. Town of Carrollton*, 142 S.W.2d 849, 346 Mo. 802.

44 C.J. p 1272 note 1.

Constitutionality of charter provision

(1) Constitutional provision directing that laws providing for tax levies, appropriations for current expenses of state government and state institutions and emergency laws necessary for immediate preservation of public peace, health, and

safety shall not be subject to referendum applies only to acts of general assembly, and places no limitation on referendum powers reserved to people of a municipality—*State ex rel. Snyder v. Board of Elections of Lucas County*, 69 N.E.2d 634, 78 Ohio App. 194, appeal dismissed 67 N.E.2d 322, 146 Ohio St. 556.

(2) Provisions of city charter for a referendum on all ordinances, including one levying a tax passed as an emergency measure, do not violate such constitutional provision—*State ex rel. Snyder v. Board of Elections of Lucas County*, *supra*.

50. Ky.—*Ramsey v. Shelbyville*, 83 S.W. 116, 119 Ky. 180, 26 Ky.L. 1102, 83 S.W. 1136, 27 Ky.L. 141, 68 L.R.A. 300.

44 C.J. p 1272 note 4.

Submission to voters of tax by school district see the C.J.S. title *Schools and School Districts* § 379, also 56 C.J. p 644 note 79 et seq.

51. Miss.—*State v. Glennen*, 47 So. 550, 93 Miss. 836.

44 C.J. p 1273 note 6.

52. Ill.—*District No. 3 School Directors v. Fogelman*, 76 Ill. 189.

53. N.C.—*Sing v. City of Charlotte*, 195 S.E. 271, 213 N.C. 60—*Henderson v. City of Wilmington*, 132 S.E. 25, 191 N.C. 269.

Construction and effect of constitutional provisions prohibiting municipality from contracting debt except for necessary expenses unless authorized to do so by popular vote see *supra* § 1860.

What constitutes necessary expenses

(1) The term "necessary expenses," as used in constitutional limitation, although not implying expenses without which government cannot exist, implies a certain degree of exigency, the essentials of frugality and economy, and a definite quality, governmental in character, which does not yield to arguments of con-

venience, and which cannot be dismissed from the provision without depriving it of all significance—*Purser v. Ledbetter*, 40 S.E.2d 702, 227 N.C. 1.

(2) Courts determine what class of expenditures by municipal corporations come under definition of "necessary expenses," but governing authorities of municipality determine when such expenditures are needed, and, except in cases of fraud, courts cannot control discretion of commissioners—*Starmount Co. v. Town of Hamilton Lakes*, 171 S.E. 909, 205 N.C. 514.

(3) Expense of acquiring and constructing electric plant for municipal use and for the comfort and convenience of the inhabitants of the municipality is a necessary expense.—*Williamson v. City of High Point*, 195 S.E. 90, 213 N.C. 96.

(4) Issuance of bonds for water and sewer and street improvement was for necessary expense.—*Starmount Co. v. Town of Hamilton Lakes*, *supra*.

(5) City expenditures for park and recreational purposes were not "necessary expenses" within constitutional provision—*Purser v. Ledbetter*, *supra*.

(6) Public hospital is not "necessary expense" of town—*Burleson v. Board of Aldermen of Town of Spruce Pines*, 156 S.E. 241, 200 N.C. 30.

54. N.C.—*Williamson v. City of High Point*, 195 S.E. 90, 213 N.C. 96—*Henderson v. City of Wilmington*, 132 S.E. 25, 191 N.C. 269.

55. N.C.—*Purser v. Ledbetter*, 40 S.E.2d 702, 227 N.C. 1—*Sing v. City of Charlotte*, 195 S.E. 271, 213 N.C. 60—*Henderson v. City of Wilmington*, 132 S.E. 25, 191 N.C. 269.

44 C.J. p 1273 note 7.

imposition for necessary expenses is the exception.⁵⁶ A tax for a public purpose levied by legislative authority and approved by popular vote is valid under such constitutional provision without regard to whether the tax is for a necessary purpose within the meaning of the constitutional provision.⁵⁷

Resubmission. The requirement of a general law that proposed taxes once rejected by vote of the people shall not be resubmitted within a stated term thereafter does not apply to municipalities organized under special charters permitting submission at any time within the discretion of the governing board.⁵⁸

b. Sufficiency in General

Constitutional or statutory provisions specifically relating to elections on taxing propositions control with respect to the sufficiency of the submission; but, in the absence of such provisions, the rules relating to general elections control as far as applicable. Mere informalties or irregularities which cannot prejudice any substantial rights will not affect the validity of the tax.

Where the statute provides no method for the conduct of the election, it must be conducted in the manner provided for general elections in the municipality where it is held.⁵⁹ Where the statute prescribes a method, substantial compliance with its terms is necessary to validate the levy,⁶⁰ and the municipal corporation cannot avail itself of proceedings in an earlier election, in which the proposal for a tax had been defeated.⁶¹ The election must be authorized by ordinance, not by reso-

lution, when the statute so requires,⁶² but an amendment to the ordinance after notice of the election has been given will not vitiate it, if the amendment does not materially affect its essential parts.⁶³ The submission of a tax proposition at a primary election is not sufficient under a charter or statute requiring its submission at a general or special election.⁶⁴ A November general election is a regular election within the meaning of a statute requiring the question to be submitted at a regular election.⁶⁵

Generally, a majority in number and amount of those participating in the election is sufficient to authorize the tax,⁶⁶ unless constitutional or statutory provisions require a larger vote in favor of the tax.⁶⁷

Taxpayers' petition for election. The taxpayers' petition for an election to authorize a special tax must conform to statutory requirements,⁶⁸ but it will be presumed that municipal officers have performed their duty in approving the petition as signed by the requisite number of qualified voters.⁶⁹ Such a petition has been held to be valid where it sets forth the tax rate and total amount of the tax to be levied and the purpose for which it is to be used.⁷⁰ An immaterial variance between the petition and notice is not fatal.⁷¹

Qualification and registration of voters. The qualifications of those entitled to vote on taxing propositions may be prescribed by constitutional or statutory provisions,⁷² and it has been said that

56. NC.—Purser v. Ledbetter, 40 S. E.2d 702, 227 N.C. 1.

57. NC.—Webb v. Port Commission of Morehead City, 172 S.E. 377, 205 N.C. 663.—Burlison v. Board of Aldermen of Town of Spruce Pines, 156 S.E. 241, 200 N.C. 30.

58. N.Y.—O'Connor v. Waterford, 156 N.Y.S. 933, 171 App.Div. 425.

59. Ill.—Prairie v. Lloyd, 97 Ill. 179, 44 C.J. p 1273 note 8.

60. Iowa.—Bartemeyer v. Rohlf, 32 N.W. 673, 71 Iowa 582.

Wash.—Union High School Dist. No. 1, Skagit County v. Taxpayers of Union High School Dist. No. 1 of Skagit County, 172 P.2d 591, 26 Wash.2d 1.

61. Cal.—Josselyn v. San Francisco, 143 P. 705, 168 Cal. 436.

62. Tex.—Miller v. State, 69 S.W. 522, 44 Tex.Cr. 99, 44 C.J. p 1273 note 11.

63. La.—MacKenzie v. Wooley, 3 So. 128, 39 La. Ann. 944.

64. Cal.—San Jose v. Goodwin, 237 P. 548, 196 Cal. 274.

65. Neb.—State v. Nebraska City, 243 N.W. 858, 123 Neb. 614.

66. La.—Dresser v. Recreation and Park Commission of Parish of East Baton Rouge, 34 So.2d 384, 213 La. 85.

Constitutional and statutory provisions construed

The constitutional amendment authorizing recreation and park commission to impose taxes if authorized by majority in number and amount of public taxpayers in parish, without specifying kind of majority required, and enabling act, prohibiting levy of taxes until authorized by majority in number and amount of property taxpayers qualified to vote who vote at election held thereunder, are not in conflict as to majority required, but, when construed together, require majority, not of all eligible taxpayers but only of those actually participating in election.—Dresser v. Recreation and Park Commission of Parish of East Baton Rouge, *supra*.

67. Wash.—Union High School Dist. No. 1, Skagit County v. Taxpayers of Union High School Dist. No. 1 of Skagit County, 172 P.2d 591, 26 Wash.2d 1.—American Smelting & Refining Co. v. Tacoma

School Dist. No. 10, 129 P.2d 531, 15 Wash.2d 1.

68. La.—Smith v. Claiborne Parish Police Jury, 51 So. 701, 125 La. 724.

69. Mo.—State ex rel. Rose v. Webb City, App. 74 S.W.2d 45.

70. La.—Smith v. Claiborne Parish Police Jury, 51 So. 701, 125 La. 724.

71. Iowa.—Bartemeyer v. Rohlf, 32 N.W. 673, 71 Iowa 582.

72. La.—Dresser v. Recreation and Park Commission of Parish of East Baton Rouge, 34 So.2d 384, 213 La. 85.

Qualification and registration of voters in elections generally see Elections §§ 14-35.

"Public taxpayers"

The words "public taxpayers of the parish," in constitutional amendment, authorizing recreation and park commission for parish to impose taxes, if authorized by majority in number and amount of public taxpayers of parish, mean "property taxpayers," in view of other provisions of amendment and enabling act.—Dresser v. Recreation and Park

the general policy of the state with respect to tax matters is to authorize the tax by a vote of the majority of the property owners affected who are qualified electors.⁷³ The legislature has no power to change the qualifications of electors when such qualifications are prescribed in the constitution itself.⁷⁴ In the absence of any provisions to the contrary, those qualified to vote at general elections are entitled to vote on taxing propositions.⁷⁵ Women, properly qualified, may vote.⁷⁶ Where the statute requires registration, it is a prerequisite to the right to vote.⁷⁷ Opportunity to register must be given to all persons qualified to vote, and failure to give it will vitiate the election where the denial materially affects the result.⁷⁸ It is not necessary that a taxpayer's property should be so described on the assessment rolls as affirmatively to show its situs in the district where the owner voted.⁷⁹ A canvassing of the voting list before the election is not required in the absence of a statute so providing.⁸⁰ Where tax elections are governed by special provisions of the constitution and special statutes, it has been held that laws dealing with the purging of the registration rolls are not applicable.⁸¹

Form of ballot. The ballot must comply with

constitutional requirements as to form,⁸² and show that the specific question contemplated by the act, which authorizes a tax for a specific purpose, was passed on.⁸³

Certification, canvass, and declaration of vote.

In order to constitute the basis of a legal tax, the vote must be certified by the proper officers to the board or persons authorized to act on it,⁸⁴ and the certificate must conform to the law, or else it will confer no authority to levy the tax;⁸⁵ but a failure to return the certificate of the vote within the time required will not invalidate the tax voted.⁸⁶ The board canvassing the returns must proceed in compliance with the statute,⁸⁷ and, where the statute so authorizes it, may base its report on its own inspection of the ballots,⁸⁸ and the certificates of the inspectors is not conclusive on them.⁸⁹ The declaration of the mayor and common council as to the result of the election is conclusive until reversed by a direct proceeding,⁹⁰ brought within the time limited by constitutional or statutory provisions.⁹¹

Irregularities. Mere informalities or irregularities in the election proceedings which cannot prejudice any substantial right will not affect the validity of the tax.⁹²

Commission of Parish of East Baton Rouge, *supra*.

73. La.—Dresser v. Recreation and Park Commission of Parish of East Baton Rouge, *supra*.

74. Mich.—Rentschler v. Board of Education of City of Detroit, 37 N.W.2d 645, 324 Mich. 603.

75. La.—MacKenzie v. Wooley, 3 So. 128, 39 La. Ann. 944.

Particular constitutional and charter provisions construed

In view of constitutional provisions defining the qualifications of electors generally and providing further that legal voters of every city or town are granted power to enact and amend their municipal charter, and further providing that the initiative and referendum powers reserved to the people are reserved to the legal voters of every municipality as to all local, special, and municipal legislation of every character, an ordinance referred to the people proposing an amendment to the city charter and authorizing and directing the council to comply with the terms of a gift of a building which required the council to levy an annual tax for the maintenance, operation, and upkeep of the building was properly submitted to all of the legal voters of the city, and not only to the taxpayers, notwithstanding the city charter prescribing the qualifications of persons entitled to vote

on matters relating to taxation within the city expressly limited such voters to taxpayers only, since the effect of the constitutional provisions is to render nugatory the restrictions and limitations contained in the charter.—Johnson v. City of Pendleton, 280 P. 873, 131 Or. 46.

76. N.Y.—Gould v. Seneca Falls, 121 N.Y.S. 723, 137 App. Div. 417, certified questions answered, and affirmed 93 N.E. 1121, 200 N.Y. 523.

77. Miss.—Hawkins v. Carroll County, 50 Miss. 735.
N.C.—McDowell v. Massachusetts, etc., Constr. Co., 2 S.E. 351, 96 N.C. 514.

78. La.—Endom v. Monroe, 36 So. 681, 112 La. 779.
N.C.—McDowell v. Massachusetts, etc., Constr. Co., 2 S.E. 351, 96 N.C. 514.

79. La.—Smith v. Claiborne Parish Police Jury, 51 So. 701, 125 La. 724.

80. R.I.—Carr v. Kettelle, 75 A. 488, 30 R.I. 339.

81. La.—McFatter v. Beauregard Parish School Board, 30 So.2d 197, 211 La. 443.

82. Ala.—Florence v. State, 101 So. 462, 211 Ala. 617.
44 C.J. p 1273 note 25.

83. Mich.—People v. Woodhull Tp., 14 Mich. 28.

84. Iowa.—Shontz v. Evans, 40 Iowa 139.

44 C.J. p 1273 note 28.
Certification, canvass, and declaration of vote in elections generally see Elections §§ 221-240.

85. Iowa.—Shontz v. Evans, *supra*.
44 C.J. p 1273 note 29.

86. Ill.—Moore v. Fessenbeck, 88 Ill. 422.

Mich.—Smith v. Crittenden, 16 Mich. 152.

87. Ala.—Florence v. State, 101 So. 462, 211 Ala. 617.

88. Ala.—Florence v. State, *supra*.

89. Ala.—Florence v. State, *supra*.

90. N.C.—Smallwood v. Newbern, 90 N.C. 36.

91. La.—Dresser v. Recreation and Park Commission of Parish of East Baton Rouge, 34 So.2d 384, 213 La. 85.

Suit held barred by constitutional and statutory prescription

La.—Dresser v. Recreation and Park Commission of Parish of East Baton Rouge, *supra*.

92. Iowa.—Ryan v. Varga, 37 Iowa 78.

44 C.J. p 1274 note 36.
Irregularities in elections generally see Elections § 214.

c. Notice

Where a vote for a tax is to be taken, due and sufficient notice of the time, place, and purpose thereof must be given in the manner prescribed.

When a vote for a tax for any purpose is to be taken, due notice of the time, place, and purpose thereof must be given in the manner prescribed,⁹³ and notice of some kind is necessary, even though the statute which authorizes the election contains no express provision for notice.⁹⁴ Where notice is in fact actually brought home to the great body of the voters, an election will not be held invalid for lack of notice where it does not appear that enough voters to change the result failed to vote because of lack of notice.⁹⁵

The notice of the election may be sufficient if it enables those interested to understand its purpose.⁹⁶ Even if the notice is ambiguously worded, it has been held to be valid if it can be construed to authorize the tax voted.⁹⁷ It is not necessary that the names of all the signers of a petition for a special tax election should be published in the absence of a statutory requirement.⁹⁸

d. Contest

The contest of a tax election is governed by the terms of the constitution or statute applicable thereto.

The contest of a municipal election on a tax proposal is governed by the terms of the constitution or statute applicable thereto;⁹⁹ and, where such terms refer to another statute on election contests as governing, the statute referred to as it existed at the time, unaffected by any subsequent amendment, will control.¹

e. Authority Conferred by Vote

Where an election is necessary, a tax can be levied

only in conformity with the terms of the power conferred by the election.

Where an election is necessary, a tax can be levied only in conformity with the terms of the power conferred by the election,² but the authorities may exercise such discretion as is conferred on them by the vote.³ The consent of the people applies only to legal conditions existing at the date of the election.⁴

Where the constitution authorizes the levy of a special tax by a vote of the taxpaying voters of a municipality, such tax is not levied by the municipality, but by the voters to whom has been delegated the taxing power.⁵

§ 1989. Amount or Rate

- a. In general
- b. Authorization of increase by voters or state tax commission
- c. Municipalities having special charters
- d. Municipalities of stated class or population
- e. After reorganization of municipality
- f. Effect of failure to exhaust limit in previous years

a. In General

In the absence of a constitutional, statutory, or charter limitation, a municipal corporation having power to tax may generally levy such rate or amount as it deems best.

In the absence of a constitutional, statutory, or charter limitation,⁶ a municipality having power to tax may levy such rate or amount as it deems best,⁷ and the discretion of the legislative authorities

93. Vt.—Allen v. Burlington, 45 Vt. 202.

44 C.J. p 1274 note 38.

Notice of elections generally see Elections §§ 66-82.

94. Mo.—State v. St. Louis, etc., R. Co., 75 Mo. 526—McPike v. Pen, 51 Mo. 63.

95. Neb.—State v. Nebraska City, 243 N.W. 858, 123 Neb. 614.

96. Conn.—Bartlett v. Kinsley, 15 Conn. 327—South School Dist. v. Blakeslee, 13 Conn. 227.

Mo.—State v. Allen, 77 S.W. 868, 178 Mo. 555.

97. Iowa.—Bartemeyer v. Rohlf, 32 N.W. 673, 71 Iowa 582.

98. La.—Smith v. Claiborne Parish Police Jury, 51 So. 701, 125 La. 724.

99. Ala.—Florence v. State, 101 So. 462, 211 Ala. 617.

1. Ala.—Florence v. State, supra.

44 C.J. p 1274 note 45.

Contest of elections generally see Elections §§ 245-322.

2. Iowa.—State v. Des Moines, 72 N.W. 639, 103 Iowa 76, 64 Am.S.R. 157, 39 L.R.A. 285.

44 C.J. p 1274 note 46.

Levy pursuant to favorable vote held constitutional

Ill.—People ex rel Thompson v. Chicago & N. W. Ry. Co., 74 N.E.2d 510, 397 Ill. 319.

3. La.—Henderson v. Shreveport, 107 So. 139, 160 La. 360—Gray v. Bourgeois, 32 So. 42, 107 La. 671. 44 C.J. p 1274 note 47.

4. Iowa.—State v. Des Moines, 72 N.W. 639, 103 Iowa 76, 64 Am.S.R. 157, 39 L.R.A. 285.

5. Tex.—San Saba County v. McCraw, 108 S.W.2d 200, 130 Tex. 54.

6. S.C.—Home Building & Loan Ass'n v. City of Spartanburg, 194 S.E. 143, 185 S.C. 353.

44 C.J. p 1274 note 51.

7. Cal.—Rancho Santa Anita v. City of Arcadia, 125 P.2d 475, 20 Cal.2d 319.

Ill.—People ex rel. Oller v. New York Cent. R. Co., 58 N.E.2d 51, 388 Ill. 382—People ex rel. Toman v. Signode Steel Strapping Co., 44 N.E.2d 555, 380 Ill. 633—People ex rel. Toman v. Chicago & N. W. Ry. Co., 37 N.E.2d 169, 377 Ill. 547.

Mich.—Council of City of Saginaw v. Board of Trustees of Policemen and Firemen Retirement System of City of Saginaw, 32 N.W.2d 899, 321 Mich. 641.

44 C.J. p 1274 note 54.

Amount of special assessment for public improvements see supra §§ 1406-1416.

in this respect is not subject to judicial interference⁸ unless the discretion is clearly abused⁹ or the tax is so excessive as to be confiscatory or prohibitory.¹⁰ Spoliation under the guise of taxation will, however, be declared unconstitutional, whatever its name or form.¹¹

By constitutional, statutory, or charter provision the power may be restricted to a certain rate or amount which may be levied for any one year,¹² or, in the case of a statutory change of the fiscal year, for the interval elapsing between the close of the old, and the beginning of the new, fiscal year,¹³ and a taxpayer may invoke the protection of such provision regardless of its effect on the finances of the municipality.¹⁴ Constitutional limitations are not directed solely against the municipal council but are directed also against any agency

acting for the municipality, whether such agency is its council or its electors.¹⁵

While the legislature has the power to fix a maximum rate of taxation for municipal purposes,¹⁶ such power must be exercised subject to the provisions of the constitution.¹⁷ The legislature cannot authorize a tax in excess of a constitutional limit,¹⁸ except in the particular cases and on the particular conditions permitted by the constitution.¹⁹ Statutes limiting the rate or amount of the tax at any point within the constitutional limit have been held to be constitutional;²⁰ and the legislature, fixing a limit at a point under the constitutional limit, may give power to the city to increase the rate up to the constitutional limit on certain conditions,²¹ and the city in such case has no power to tax up to the constitutional limit if it has not conformed to the statutory conditions.²² Where, however, the

Apportionment of limitation by county board among county, cities, towns, and school districts therein see Counties § 282 b (2).

Limitation of rate or amount of taxes generally see the C.J.S. title Taxation § 56, also 61 C.J. p 152 note 69 et seq.

Power of municipal corporation to tax generally see supra §§ 1978-1984.

8. Cal.—Rancho Santa Anita v. City of Arcadia, 125 P.2d 475, 20 Cal.2d 319.

Discretion of municipality in fixing rate see infra § 2035 c.

9. Ill.—People ex rel. Toman v. Signode Steel Strapping Co., 44 N.E.2d 555, 380 Ill. 633.

10. Ky.—Beavers v. City of Williamsburg, 206 S.W.2d 938, 306 Ky. 201.

11. Fla.—City of De Land v. Florida Public Service Co., 161 So. 735, 119 Fla. 804.

12. Ala.—Jefferson County v. City of Birmingham, 38 So.2d 844, 251 Ala. 634.

Ark.—Vaughan v. City of Searcy, 135 S.W.2d 319, 199 Ark. 585—Railey v. City of Magnolia, 126 S.W.2d 273, 197 Ark. 1047.

Cal.—Union Safe Deposit Bank v. City of Menlo Park, 45 P.2d 347.

Del.—Marshall v. Consolidated Fisheries Co., 28 A.2d 247, 3 Terry 106.

Ill.—Anderson v. City of Park Ridge, 72 N.E.2d 210, 896 Ill. 235—People ex rel. Toman v. Park-Davis Co., 24 N.E.2d 166, 372 Ill. 354—People ex rel. Toman v. Crane, 23 N.E.2d 337, 372 Ill. 228—People ex rel. Oiler v. Cairo & Thebes R. Co., 4 N.E.2d 482, 364 Ill. 329.

La.—Town of Abbeville v. Police Ju-

ry of Vermillion Parish, 22 So.2d 62, 207 La. 779

Minn.—Tetzlaff v. Village of Chisholm, 227 N.W. 202, 178 Minn. 342.

Mo.—Kansas City Power & Light Co. v. Town of Carrollton, 142 S.W.2d 849, 346 Mo. 802.

N.Y.—Brooklyn Union Gas Co. v. McGoldrick, 59 N.Y.S.2d 243, 270 App. Div. 186, appeal dismissed 74 N.E.2d 177, 297 N.Y. 469, appeal dismissed 80 N.E.2d 342, 297 N.Y. 936, affirmed 80 N.E.2d 669, 298 N.Y. 536—Martin v. City of Kingston, 61 N.Y.S.2d 552, 186 Misc. 124.

Ohio—State ex rel. City of Akron v. Slusser, 56 N.E.2d 239, 144 Ohio St. 123—State ex rel. Markel v. City of Columbus, 40 N.E.2d 144, 139 Ohio St. 351—City of Mansfield v. Endly, 176 N.E. 462, 38 Ohio App 528, affirmed 181 N.E. 886, 124 Ohio St. 652.

Okl.—Stone v. Bonaparte, 297 P. 228, 148 Okl. 70—Grubb v. Smiley, 285 P. 38, 142 Okl. 19—Missouri-Kansas-Texas R. Co. v. Bennett, 250 P. 1021, 122 Okl. 102.

Pa.—Eureka Fire Hose Mfg. Co. v. Borough of Shenandoah, Quar. Sess., 35 Mun.L.R. 238, 10 Sch.Reg. 28.

44 C.J. p 1275 note 56.

Purpose of statute

Ind.—Wallace v. Simpson, 27 N.E.2d 130, 108 Ind.App. 54.

Kan.—State ex rel. Ward v. Board of Com'rs of Republic County, 82 P.2d 84, 148 Kan. 376.

Minn.—Governmental Research Bureau v. Borgen, 28 N.W.2d 760, 224 Minn. 313.

Strict interpretation required

Constitutional provision limiting tax rate of cities, towns, taxing districts, and other municipalities, should be strictly interpreted.—Miles v. Lee, 143 S.W.2d 843, 284 Ky. 39.

Particular provisions construed

U.S.—City of Kingsville v. Meredith, C.C.A.Tex., 103 F.2d 279.

Ga.—Georgia Southern & F. Ry. Co. v. Town of Lenox, 162 S.E. 650, 44 Ga App 660.

Ill.—People ex rel. Nash v. S. A. Maxwell & Co., 195 N.E. 26, 359 Ill. 570, 98 A.L.R. 494.

Ind.—Douglas v. Tash, 200 N.E. 608, 209 Ind. 675

Mo.—State ex rel. Zoological Board of Control v. City of St. Louis, 1 S.W.2d 1021, 318 Mo. 910.

Tex.—Wheeler v. City of Brownsville, 220 S.W.2d 457.

13. N.J.—Garrison v. Jersey City, 105 A. 460, 893, 92 N.J.Law 624.

14. Ariz.—Southern Pac. Co. v. Gila County, 109 P.2d 610, 56 Ariz. 499.

15. Ark.—Adamson v. City of Little Rock, 134 S.W.2d 558, 199 Ark. 435.

16. Ky.—McDonald v. Louisville, 68 S.W. 413, 113 Ky. 425, 24 Ky.L. 271.

Mich.—Harsha v. City of Detroit, 246 N.W. 849, 261 Mich. 586, 90 A.L.R. 853—Michigan United Light, etc., Co. v. Hart, 209 N.W. 937, 235 Mich. 682.

Wash.—Love v. King County, 44 P.2d 175, 181 Wash. 462.

17. Mich.—Michigan United Light, etc., Co. v. Hart, 209 N.W. 937, 235 Mich. 682.

18. Ala.—State v. Southern R. Co., 22 So. 589, 115 Ala. 250.

44 C.J. p 1275 note 61.

19. N.C.—Rodman v. Washington, 30 S.E. 118, 122 N.C. 39.

20. Mo.—Heather v. Palmyra, 276 S.W. 872, 311 Mo. 32.

44 C.J. p 1275 note 63.

21. Mo.—State v. Weinrich, 236 S.W. 872, 291 Mo. 461.

22. Cal.—San Christina Inv. Co. v.

legislature first fully empowers the city to levy to the constitutional limit, it cannot then affix to a part of such levy an unconstitutional condition.²³ Where a municipal tax ordinance states that provisions of a certain title of the state statutes shall govern all matters not specifically provided for in the ordinance, the municipality is not required to comply with provisions of that title adopted thereafter which restrict the amount of taxes.²⁴ In the face of an evident legislative intent that the limitation prescribed shall not be exceeded, it cannot be enlarged by implication from general provisions conferring the power to contract, make improvements, and incur liability.²⁵

Taxes for special purposes. By constitutional, statutory, or charter provision a limitation may be imposed on the rate or amount of taxes levied for a special purpose.²⁶

Retroactive effect of limitation. The maximum rate authorized when municipal taxes are levied, rather than the rate authorized at a subsequent date, controls in determining whether rates are excessive,²⁷ and statutes limiting the rate or amount of

taxes will not be given a retroactive effect unless the intention of the legislature to do so is clearly shown.²⁸ Statutes fixing maximum tax levies for operating purposes and for debt service in a city are ineffectual to place limitations on tax levies for the payment of contemplated refunding bonds of the city to refund improvement bonds issued prior to the enactment of the statutes.²⁹

Exemptions from restriction. A statute segregating certain property for state taxation and limiting the rate of the tax thereof and further providing that certain other property shall be subject to be taxed locally, "as prescribed by law," impliedly exempts the latter taxes from the rate restriction applicable to the segregated property³⁰ and makes them subject to the restrictions contained in other statutes applicable thereto.³¹

Change of limitation. While a statutory limitation may be abrogated by an amendment to the constitution,³² the legislature has no power to remove a limitation imposed by the constitution on the amount of municipal taxation.³³ A charter or statutory limitation of the rate of municipal taxation

San Francisco, 141 P. 384, 167 Cal. 762, 52 L.R.A.N.S., 676.

Mo.—State v. Weinrich, 236 S.W. 872, 291 Mo. 461.

44 C.J. p 1275 note 65.

23. Mo.—Calland v. Springfield, 174 S.W. 396, 264 Mo. 296, explained and distinguished in State v. Weinrich, 236 S.W. 872, 291 Mo. 461.

44 C.J. p 1275 note 66.

24. Cal.—Rancho Santa Anita v. City of Arcadia, 125 P.2d 475, 20 Cal.2d 319.

25. U.S.—Cleveland v. U. S., Tenn., 111 F. 341, 49 C.C.A. 383.

44 C.J. p 1275 note 67.

26. Ark.—City of West Memphis v. Jordan, 208 S.W.2d 164, 212 Ark. 739—Vaughan v. City of Searcy, 135 S.W.2d 319, 199 Ark. 585.

Cal.—American Co. v. City of Lakeport, 32 P.2d 622, 220 Cal. 548.

Fla.—State ex rel. Women's Catholic Order of Foresters v. City of Fort Myers, 191 So. 289, 140 Fla. 224.

Ill.—People ex rel. Toman v. Park-Davis Co., 24 N.E.2d 166, 372 Ill. 354.

Okl.—Stone v. Bonaparte, 297 P. 228, 148 Okl. 70—Grubb v. Smiley, 285 P. 38, 142 Okl. 19.

Tex.—Joy v. City of Terrell, Civ. App., 143 S.W.2d 704, error dismissed, judgment correct.

W.Va.—Wilson v. Clay County Court, 175 S.E. 224, 114 W.Va. 603.

44 C.J. p 1278 note 23.

Inclusion in, or exemption from, general tax limit see *infra* § 1990 b.

Payment of judgments

N.D.—Appeal of Cunningham, 245 N.W. 896, 63 N.D. 62.

Bonded indebtedness and judgments

Statute relating to annual levy to pay bonded indebtedness and judgments against municipality constitutes limitation on amount of levy for sinking fund to pay judgments, but not limitation on number of annual levies for that purpose.—Kansas City Southern Ry. Co. v. Excise Board of Le Flore County, 33 P.2d 493, 168 Okl. 408.

Municipal improvements

(1) Words "each local improvement," in provision of Improvement Bond Act authorizing municipality to make a designated levy for each local improvement, were held to refer to improvement provided for in city's resolution of intention.—Hammond v. City of Burbank, 59 P.2d 495, 6 Cal.2d 646, appeal dismissed 57 S.Ct. 316, 299 U.S. 519, 81 L.Ed. 383.

(2) Special series of bonds issued by city in amount of partial assessments for improvement contemplated in single resolution of intention was held to represent but one local improvement, entitling bondholder to but one levy under the statute.—Hammond v. City of Burbank, *supra*.

27. Ill.—People ex rel. Gill v. Baum, 11 N.E.2d 373, 367 Ill. 249—People v. Chicago & E. I. Ry. Co., 175 N.E. 4, 343 Ill. 101—People v. Chicago & N. W. Ry. Co., 172 N.E. 13, 340 Ill. 102.

28. Ill.—People ex rel. Gill v. Baum,

11 N.E.2d 373, 367 Ill. 249—People v. Chicago & E. I. Ry. Co., 175 N.E. 4, 343 Ill. 101.

44 C.J. p 1275 note 68.

Tax to pay debts antedating limitation see *infra* § 1990 a.

Amendment subsequent to levy

Unauthorized excess in municipal taxes was not validated by amending statute subsequent to levy.—People v. Chicago & N. W. Ry. Co., 172 N.E. 13, 340 Ill. 102.

29. Fla.—State v. City of Inverness, 188 So. 767, 137 Fla. 629.

30. Va.—Richmond v. Drewry-Hughes Co., 90 S.E. 635, 94 S.E. 989, 122 Va. 178.

Exemption of:

Certain cities or cities of certain class from limitation see *infra* subdivision d of this section.

Taxes for particular purpose see *infra* § 1990 b.

31. Va.—Richmond v. Drewry-Hughes Co., *supra*.

32. Okl.—Branch v. Excise Board of Oklahoma County, 43 P.2d 90, 171 Okl. 585—Oklahoma Pipe Line Co. v. Excise Board of Carter County, 42 P.2d 499, 171 Okl. 203—Atchison, T. & S. F. Ry. Co. v. Excise Board of Washington County, 35 P.2d 274, 168 Okl. 619, followed in Lowden v. Excise Board of Carter County, 35 P.2d 472, 168 Okl. 416—Chicago, R. I. & P. Ry. Co. v. Excise Board of Stephens County, 34 P.2d 274, 168 Okl. 519.

33. Ark.—Adamson v. City of Little Rock, 134 S.W.3d 558, 199 Ark. 435.

may, within constitutional limitations, be enlarged or further restricted by a statute amending or repealing the earlier law.³⁴ So it is competent for the legislature to remove provisions of a city charter limiting tax levies to support bonds of the city, and to provide an unlimited tax to support outstanding bonds;³⁵ and the statutory limit on municipal taxation for bond-paying purposes may be removed so that refunding bonds may not be affected by tax limitations in force when the bonds being refunded were issued.³⁶ Where the rate for city taxes is limited to the rate for county taxes "now levied by law," a subsequent increase in the county rate does not enlarge the limitation of the city rate.³⁷

b. Authorization of Increase by Voters or State Tax Commission

Under some constitutional, statutory, or charter provisions authorization of the increase by popular vote is necessary and sufficient to warrant an increase of a tax rate beyond a prescribed limit; and authorization of indebtedness by popular vote is necessary and sufficient under other provisions to warrant a tax in excess of the prescribed rate to discharge the indebtedness. Approval by a state tax commission is necessary under some provisions.

Under some constitutional, statutory, or charter provisions authorization by popular vote is necessary and sufficient to warrant an increase of a tax rate beyond a prescribed limit.³⁸ Likewise, under some provisions authorization of indebtedness by popular vote is necessary and sufficient to warrant

a tax in excess of a prescribed rate to discharge the indebtedness.³⁹ Where the constitution fixes a minimum requirement with respect to the number of votes necessary to authorize an increase in the tax rate, the legislature may impose other, or additional, requirements or limitations.⁴⁰ Under constitutional or statutory provisions requiring propositions for excess levies to be submitted at a special election or at an election to be held for that purpose, the proposition may be submitted at a general election, since such election, as far as it relates to the propositions, constitutes a special election within the meaning of the provision;⁴¹ but in determining the number of votes cast at such special election within the meaning of a requirement that the number of voters voting shall constitute a specified per cent of the voters who voted at the last preceding gubernatorial election, only the number of voters voting on the proposition, and not the number of voters voting for officers in the general election, may be considered.⁴² Limitations of the increase which may be authorized by popular vote must be observed.⁴³

A statute making approval by a state tax commission a condition precedent to an increase of the rate or amount of taxation above a prescribed limit has been construed to apply only to a tax for ordinary expenditures⁴⁴ and not a tax for the purpose of providing a sinking fund and interest for bond issues voted by the people.⁴⁵

34. Ill.—People ex rel. McDonough v. Mills Novelty Co., 192 N.E. 286, 357 Ill. 285.

44 C.J. p 1276 note 76.

Change of charter provisions by general or special laws see *infra* subdivision c of this section.

Previous statute held not modified Ga.—Georgia Southern & F. Ry. Co v. Town of Lenox, 162 S.E. 650, 44 Ga.App. 660.

35. Fla.—State ex rel. Gulf Life Ins. Co. v. City of Jacksonville Beach, 194 So. 789, 142 Fla. 277 —State v. City of Manatee, 191 So. 529, 140 Fla. 248.

36. Fla.—State v. City of Punta Gorda, 197 So. 734, 144 Fla. 73 —State v. City of Manatee, 191 So. 529, 140 Fla. 248.

37. Or.—Tillamook City v. Tillamook County, 107 P. 482, 56 Or. 112.

38. Ky.—City of Hopkinsville v. Wheeler, 106 S.W.2d 1617, 269 Ky. 291—Wheeler v. City of Hopkinsville, 106 S.W.2d 1016, 269 Ky. 292. Mo.—Kansas City Power & Light Co. v. Town of Carrollton, 142 S.W.2d 849, 346 Mo. 802.

Okl.—Stone v. Bonaparte, 297 P. 228, 148 Okl. 70—Grubb v. Smiley, 285 P. 38, 142 Okl. 19—C. D. Coggeshall & Co. v. Smiley, 285 P. 48, 142 Okl. 8—In re Bliss, 285 P. 73, 142 Okl. 1—Pitts v. Allen, 281 P. 126, 138 Okl. 295—St. Louis-San Francisco Ry. Co. v. Caldwell, 182 P. 688, 75 Okl. 153.

44 C.J. p 1276 note 79.

Levies in excess of limitation see *infra* § 1991.

Submission to popular vote in general see *supra* § 1988.

Particular provisions construed

Mich.—Rentschler v. Board of Education of City of Detroit, 37 N.W.2d 645, 324 Mich. 603.

Submission of several proposals

Additional levy for poor relief was properly submitted to electors with proposal for additional levy for current expenses.—State v. Lutz, 182 N.E. 134, 42 Ohio App. 345.

Amendment increasing per cent of electors necessary to authorize additional levy of taxes was held inapplicable in respect of proceedings instituted prior to effective date of amendment.—State v. Lutz, *supra*.

39. Ky.—Nall v. Elizabethtown, 254 S.W. 893, 200 Ky. 321.

44 C.J. p 1276 note 80.

40. Wash.—Union High School Dist. No. 1, Skagit County, v. Taxpayers of Union High School Dist. No. 1 of Skagit County, 172 P.2d 591, 26 Wash.2d 1.

41. Wash.—American Smelting & Refining Co. v. Tacoma School Dist. No. 10, 129 P.2d 531, 15 Wash.2d 1.

42. Wash.—American Smelting & Refining Co. v. Tacoma School Dist. No. 10, *supra*.

Proposition held not adopted

Wash.—American Smelting & Refining Co. v. Tacoma School Dist. No. 10, *supra*.

43. Mo.—Kansas City Power & Light Co. v. Town of Carrollton, 142 S.W.2d 849, 346 Mo. 802. Okl.—Stone v. Bonaparte, 297 P. 228, 148 Okl. 70—St. Louis-San Francisco R. Co. v. Forbess, 237 P. 506, 111 Okl. 48.

44. N.M.—Albuquerque v. Water Supply Co., 174 P. 217, 24 NM 368, 5 A.L.R. 519.

45. N.M.—Albuquerque v. Water Supply Co., *supra*.

c. Municipalities Having Special Charters

Where the maximum limits of taxing power are fixed by the constitution, a municipal corporation may limit itself to a lower maximum rate fixed by its charter but may not exceed or increase the constitutional rate except as authorized to do so by the constitution. The general power to tax granted by a charter is subordinate to a general law of the state imposing a limit, but where the charter specifies a rate higher than the rate allowed by general law the charter rate controls; but the legislature may empower the municipality to levy a special tax in excess thereof.

A municipal corporation cannot go beyond the maximum limits of taxing power fixed by the constitution,⁴⁶ but it may limit itself to a lower maximum rate fixed by its charter.⁴⁷ Under some constitutional provisions the tax limitation prescribed by the constitution may be increased when provided for by the charter of a municipal corporation,⁴⁸ and, when the limitation has been thus increased, such increase is not in contravention of the constitution, but is in strict accord therewith.⁴⁹ It must be assumed that the framers of the constitution were conversant with established law under which charter provisions come into being by legislative enactment as well as adoption by local electors,⁵⁰ and such increase may, accordingly, be achieved by a legislative enactment read into the charter as well as by a charter provision adopted by the municipal electors.⁵¹

The power granted by a charter to a particular city, expressed in general terms, to impose taxes,

must be considered in subordination to a general law of the state imposing a limit on taxation by cities generally;⁵² but a rate limitation contained in a special charter will not be affected by a subsequent general law providing for an annual levy of taxes, but not containing any provision limiting the rate or amount,⁵³ or by later special legislation referring to the same city and giving a power to tax in general terms without mention of the limitation;⁵⁴ and where the charter, or an amendment thereto, specifies a rate higher than the rate allowed by general law the charter rate controls,⁵⁵ since it is a rule that a general law regulating the rate will not be deemed to take away greater powers granted to municipalities by special charter provisions unless it appears that the legislature intended such act to apply to them.⁵⁶ In some jurisdictions cities having special charters are excepted from general laws,⁵⁷ and among such cities, not subject to any particular classification, constitutional or statutory, higher rates may be allowed to some than to others.⁵⁸ The fact that the charter limits the amount of the tax does not preclude the right of the legislature to empower the municipality to levy a special tax in excess thereof,⁵⁹ as such a statute is in effect an amendment of the charter.⁶⁰

d. Municipalities of Stated Class or Population

Municipal corporations of a certain class or population may be made subject to, or exempt from, the operation of constitutional or statutory limitations on the rate or amount of taxes which may be levied.

46. Tex.—Supreme Forest Woodmen Circle v. City of Belton, Civ. App., 66 S.W.2d 439, error refused.

47. Tex.—Supreme Forest Woodmen Circle v. City of Belton, supra.

48. Mich.—Council of City of Saginaw v. Board of Trustees of Policemen and Firemen Retirement System of City of Saginaw, 32 N.W.2d 899, 321 Mich. 641—Simonton v. City of Pontiac, 255 N.W. 608, 268 Mich. 11—School Dist. of City of Pontiac v. City of Pontiac, 247 N.W. 474, 262 Mich. 338, rehearing denied 247 N.W. 787, 262 Mich. 338.

Charter amendment held to place city within constitutional limitation

Mich.—City of Pontiac v. Simonton, 261 N.W. 103, 271 Mich. 647.

49. Mich.—Council of City of Saginaw v. Board of Trustees of Policemen and Firemen Retirement System of City of Saginaw, 32 N.W.2d 899, 321 Mich. 641—Macomb County v. City of Mount Clemens, 260 N.W. 885, 271 Mich. 334.

50. Mich.—Council of City of Saginaw v. Board of Trustees of Policemen and Firemen Retirement System of City of Saginaw, 32 N.W.2d 899, 321 Mich. 641.

naw v. Board of Trustees of Policemen and Firemen Retirement System of City of Saginaw, 32 N.W.2d 899, 321 Mich. 641.

51. Mich.—Council of City of Saginaw v. Board of Trustees of Policemen and Firemen Retirement System of City of Saginaw, supra—City of Hazel Park v. Municipal Finance Commission, 27 N.W.2d 106, 317 Mich. 582.

Exercise of power of local self-government

Constitutional provision limiting total amount of taxes assessed to stated per cent of assessed valuation did not change right of villages and fourth class cities to exercise power of local self-government and to fix tax limits for local purposes.—School Dist. of City of Pontiac v. City of Pontiac, 247 N.W. 474, 262 Mich. 338, rehearing denied 247 N.W. 787, 262 Mich. 338.

52. Miss.—Smith v. Vicksburg, 54 Miss. 615.

53. Wash.—McGill v. Hedges, 113 P. 635, 62 Wash. 274.

54. Mo.—Strother v. Kansas City, 223 S.W. 419, 283 Mo. 283.

55. Ga.—Waycross v. Tomberlin, 91 S.E. 560, 146 Ga. 504.

56. Ill.—People v. Knopf, 57 N.E. 1059, 186 Ill. 457.

44 C.J. p 1277 note 93.

57. Ohio.—State ex rel. Thomas v. Heuck, 197 N.E. 376, 49 Ohio App. 436.

Particular charter construed

Under charter empowering city to levy, assess, and collect taxes and to borrow money "within limits prescribed by general laws," quoted words applied only to power to borrow money, not to levy, assess, and collect taxes.—Heriot v. City of Pensacola, 146 So. 654, 108 Fla. 480.

58. Tex.—Cave v. Houston, 65 Tex. 619.

44 C.J. p 1277 note 95.

59. Cal.—Kelsey v. Nevada, 18 Cal. 629.

Minn.—State v. Brown, 248 N.W. 822, 189 Minn. 257, adhered to 249 N.W. 569, 189 Minn. 257.

60. Cal.—Kelsey v. Nevada, 18 Cal. 629.

Amendment of municipal charter by legislative action generally see supra § 92.

Some constitutional or statutory provisions place a limitation on the rate or amount of the taxes which may be levied by municipal corporations of a certain class,⁶¹ such as those possessing a certain population.⁶² In applying such provisions the population of a city may be ascertained by the city council,⁶³ which has a right to determine, on sufficient evidence, that the city has more inhabitants than shown by the federal census;⁶⁴ or the population of the city may be ascertained by a census taken under an ordinance enacted by the city.⁶⁵ A statute providing for determination of the population by taking the last preceding census and adding a certain per cent thereof for each year that shall have elapsed after the census was taken permits the addition of the percentage adjustment for the year in which the levy is made.⁶⁶

Exemption from restriction. The constitution or statute may exempt cities of a certain class from its operation.⁶⁷ A constitutional exemption from the restriction granted to a particular city applies also to territory subsequently annexed thereto,⁶⁸ provided such territory did not formerly belong to any city subject to the restriction.⁶⁹

e. After Reorganization of Municipality

A municipal corporation which has reorganized may exercise any right to impose taxes at a higher rate which it may have obtained by reason of the reorganization; and statutes relating to the expenses of reorganization are not violative of constitutional provisions relating to limitations on the power of taxation.

A municipal corporation which has reorganized under the general law, thereby obtaining a right to levy taxes at a higher rate than before, may levy taxes at the higher rate in order to pay a judgment obtained against it after the reorganization,⁷⁰ even though the accrual of the cause of action antedated the reorganization.⁷¹ A statutory provision that any expense incurred in the preparation of the charter of a new municipality formed by the merger of two or more municipal corporations shall be borne equally by the municipalities concerned is not violative of a constitutional provision requir-

ing that legislative acts incorporating municipalities restrict their powers of taxation or of a provision limiting the amount of revenue which a city may raise by taxation.⁷²

f. Effect of Failure to Exhaust Limit in Previous Years

A municipal corporation may not generally add to the limit of the amount of tax allowed any one year the amounts under the limit not levied in prior years, although some statutes have been construed to allow the levying in one year of a tax for a preceding year provided the tax limit for the preceding year is not exceeded thereby.

A municipal corporation under restriction as to the rate or amount of tax which it is empowered to levy, may not generally add to the limit allowed any one year the amounts under the limit not levied in prior years,⁷³ although some statutes have been construed to allow the levying "in" one year of a tax "for" a preceding year provided the tax limit for the preceding year is not exceeded thereby,⁷⁴ especially where the tax authorized is to meet an annual charge against the city and the charges have not been paid for a number of years.⁷⁵

§ 1990. — Taxes Chargeable against Limitation

- a. In general
- b. Special tax or tax for special purpose

a. In General

Taxes chargeable against a limitation on the amount of tax which may be levied by a municipal corporation have been held, under various constitutional provisions, to include every tax levied, taxes to meet all items of expenditure during the fiscal year, and taxes levied to meet a debt assessed against the municipality; and have been held not to include special assessments for local improvements, except assessments covering all property in the municipality, loss and cost of collection, interest and penalties, and taxes for debts antedating the limitation.

Where a constitutional limit for "taxes of every kind and description, general or special" is fixed, every tax levied, whether general or special, is in-

61. Neb.—*Thomas v. City of Chadron*, 16 N.W.2d 447, 145 Neb. 316. 44 C.J. p 1277 note 99.

62. Tex.—*Bass v. Clifton*, Civ.App., 261 S.W. 795. 44 C.J. p 1277 note 1.

63. Ky.—*Moss v. Board of Councilmen of City of Frankfort*, 21 S.W.2d 813, 231 Ky. 470. 44 C.J. p 1277 note 1 [b].

64. Ky.—*Moss v. Board of Councilmen of City of Frankfort*, supra.

65. Ky.—*Moss v. Board of Councilmen of City of Frankfort*, supra.

66. Minn.—*Governmental Research Bureau v. Borgen*, 28 N.W.2d 760, 224 Minn. 313.

67. Tex.—*Williamson v. Cayo*, Civ. App., 198 S.W. 643.

68. Ala.—*State v. Birmingham*, 52 So. 461, 167 Ala. 451.

69. Ala.—*State v. Birmingham*, supra.

70. Ill.—*Carney v. Marselles*, 26 N.E. 491, 136 Ill. 401, 29 Am.S.R. 328. Exemption granted to city as applicable to territory subsequently an-

nexed thereto see supra subdivision d of this section.

71. Ill.—*Carney v. Marselles*, supra.

72. Or.—*State ex rel Cutlip v. Common Council of City of North Bend*, 137 P.2d 607, 171 Or. 329.

73. U.S.—*Cleveland v. U. S.*, Tenn., 111 F. 341, 49 C.C.A. 383.

74. Tex.—*Austin v. Cahill*, 88 S.W. 542, 89 S.W. 552, 99 Tex. 172.

75. Colo.—*Bowen v. West*, 50 P. 1085, 10 Colo. 322. 44 C.J. p 1280 note 32.

cluded in the computation;⁷⁶ and a constitutional limit for taxes to meet "current expenses" covers all items of expenditure during a current fiscal year,⁷⁷ including items in the nature of permanent investments⁷⁸ as well as the ordinary recurrent expenses of government administration.⁷⁹ Special assessments against abutting landowners for local improvements are not taxes in the sense of being chargeable against the general tax limit,⁸⁰ but a tax levied to meet a debt assessed against the municipality for public benefits from public improvements is chargeable against the general tax limit;⁸¹ and, where a special assessment for an improvement covers all the property in the municipality, it is subject to the same limitation as a general tax.⁸² Loss and cost of collection of the tax are not carried into the computation,⁸³ nor are interest and penalties

chargeable against the limit.⁸⁴ A privilege or occupational tax is not within a provision limiting the annual tax rate to a specified percentage of the assessed value of taxable property in the city.⁸⁵

Tax for debts antedating limitation. A tax levied in payment of a debt created prior to the adoption of the constitution or statute imposing the limitation is not chargeable against the limit established thereby, where, at the time such indebtedness was incurred, the municipality had the power to impose a tax sufficient to discharge it.⁸⁶ The city is without authority to levy a tax outside the charter limitation to pay bonds which were issued prior to the effective date of the charter limitation, however, where at the time the bonds were issued they were subject to a lower limitation than that provided in the charter.⁸⁷

76. Mo.—State ex rel. Emerson v. Mound City, 73 S.W.2d 1017, 335 Mo. 102, 94 A.L.R. 923.

44 C.J. p 1277 note 6.

Taxes for special purposes as included in, or exempted from, general tax limit generally see *infra* subdivision b of this section.

77. Okl.—Oklahoma News Co. v. Ryan, 224 P. 969, 101 Okl. 151.

78. Okl.—Oklahoma News Co. v. Ryan, *supra*.

79. Okl.—Oklahoma News Co. v. Ryan, *supra*.

80. U.S.—Bryant v. Commissioner of Internal Revenue, C.C.A.9, 111 F.2d 9.

Ky.—Wickliffe v. Greenville, 186 S. W. 476, 170 Ky. 528.

Tex.—Clark v. W. L. Pearson & Co., 39 S.W.2d 27, 121 Tex. 34.

44 C.J. p 1277 note 10.

No increase in tax rate

(1) Where city follows the plan of having street improvement done at expense of abutting property, it does not increase the tax rate.—Knepple v. City of Morehead, 192 S. W.2d 189, 301 Ky. 417.

(2) Service charge against property owners for sewer connections did not raise tax rate so as to invalidate ordinance establishing sewer system, since charge was for use of public facility which enhanced values of property.—Francis v. City of Bowling Green, 82 S.W.2d 804, 259 Ky. 525.

81. Ill.—People v. Chicago, etc., R. Co., 129 N.E. 167, 295 Ill. 284.

82. Neb.—Futscher v. Rulo, 186 N. W. 536, 107 Neb. 521.

44 C.J. p 1277 note 12.

83. Ill.—People v. Chicago, etc., R. Co., 152 N.E. 575, 322 Ill. 150.

44 C.J. p 1278 note 13.

84. U.S.—Chicago, etc., R. Co. v. Hartshorn, C.C.Iowa, 30 F. 541

Iowa.—Tobin v. Hartshorn, 29 N.W. 764, 69 Iowa 648.

85. Cal.—McAdams Oil Co. v. City of Los Angeles, 89 P.2d 729, 32 Cal.App.2d 359.

86. Ky.—City of Frankfort v. Fuss, 29 S.W.2d 603, 235 Ky. 143.

Ohio.—State ex rel. City of Akron v. Slusser, 61 N.E.2d 318, 75 Ohio App. 141, affirmed 56 N.E.2d 239, 144 Ohio St. 123.

W.Va.—Wilson v. Clay County Court, 175 S.E. 224, 114 W.Va. 603—Ree v. City of Huntington, 171 S.E. 539, 114 W.Va. 40—Finlayson v. City of Shinnston, 168 S.E. 479, 113 W.Va. 434.

44 C.J. p 1278 note 15.

Under express constitutional provisions

(1) Under constitutional amendment limiting amount of tax but excepting taxes levied for payment of prior debts, principal sum of obligations theretofore incurred and within exception of constitutional amendment cannot be increased by sale of new bonds or exchange of refunding bonds at less than par, and any difference must be absorbed by municipality under its other powers.—Wilcox v. Board of Com'rs of Sinking Fund of City of Detroit, 247 N. W. 923, 262 Mich. 699, rehearing denied 249 N.W. 467, 262 Mich. 699.

(2) The exception applies only when the basic constitutional rate is exclusively operative, moreover, and, where municipality increases basic rate by charter or vote under proviso in constitutional amendment, it cannot make separate levy to pay obligations theretofore incurred in

addition to charter or voted rate unless charter or voted increase so provides.—Wilcox v. Board of Com'rs of Sinking Fund of City of Detroit, *supra*.

(3) Unless authorized by ordinance, unissued bonds of municipality are not "authorized" within schedule to tax limitation provision, providing that levies for interest or retirement of bonds issued or authorized before effective date of provision are not subject to limitation.—State v. Thatcher, 178 N.E. 843, 124 Ohio St. 382.

(4) Municipal bonds properly authorized prior to adoption of tax limitation amendment but not sold and delivered until subsequent thereto were held not to constitute municipal debt pre-existing adoption of amendment so as to be immune from the operation of the limitation amendment.—Zimmerman v. Town of New Martinsville, 188 S.E. 124, 117 W.Va. 752, 109 A.L.R. 958.

Refunding bonds

Refunding bonds of city were not subject to constitutional or statutory tax limitation adopted or enacted subsequent to issuance of original bonds, on ground that they constituted a new contract subsequent to adoption or enactment of limitation, since refunding bonds were entitled to benefit of same taxing power, the pledge of which protected and formed a part of the obligation of the original bonds.

N.C.—Bryson City Bank v. Town of Bryson City, 195 S.E. 398, 213 N. C. 165.

Ohio.—State ex rel. Ohio Nat. Bank of Columbus v. Village of Hudson, 16 N.E.2d 266, 134 Ohio St. 150.

87. Ohio.—State ex rel. City of Akron v. Slusser, 56 N.E.2d 239, 144 Ohio St. 123.

b. Special Tax or Tax for Special Purpose

A special tax or a tax for a special purpose is chargeable against the general tax limit unless it is expressly or impliedly exempted therefrom.

A special tax or a tax for a special purpose is chargeable against the general tax limit,⁸⁸ even

though for a purpose properly designated as a state function,⁸⁹ unless it is expressly or impliedly exempted therefrom.⁹⁰ The tax is not exempted by a statute authorizing the levy of an additional tax for special purposes,⁹¹ unless the implication is clear that the legislature intended it to be exempt,⁹²

88. Ky.—City of Frankfort v. Fuss, 29 S.W.2d 603, 235 Ky. 143.

Mich.—School Dist. of City of Pontiac v. City of Pontiac, 247 N.W. 474, 262 Mich. 338, rehearing denied 247 N.W. 787, 262 Mich. 338. N.Y.—Martin v. City of Kingston, 61 N.Y.S.2d 552, 186 Misc. 124.

Ohio.—State ex rel. City of Akron v. Slusser, 61 N.E.2d 318, 75 Ohio App. 141, affirmed 56 N.E.2d 239, 144 Ohio St. 123—Kurtz v. City of Columbus, 22 N.E.2d 747, 61 Ohio App. 423, affirmed 28 N.E.2d 587, 137 Ohio St. 184.

Okl.—Chicago, R. I. & P. Ry. Co. v. Henderson, 29 P.2d 768, 167 Okl. 302—Aaronson v. Smiley, 285 P. 59, 142 Okl. 29—Grubb v. Smiley, 285 P. 38, 142 Okl. 19—Missouri-Kansas-Texas R. Co. v. Bennett, 250 P. 1021, 122 Okl. 102.

Wash.—Walker v. Wiley, 32 P.2d 1062, 177 Wash. 483—Denny v. Wooster, 27 P.2d 328, 175 Wash. 272.

W.Va.—Bee v. City of Huntington, 171 S.E. 539, 114 W.Va. 40—Finlayson v. City of Shinnston, 168 S.E. 479, 113 W.Va. 434.

44 C.J. p 1278 note 26.

Limitation on rate or amount of taxes for special purpose see supra § 1989 a.

89. N.Y.—Rochester Board of Education v. Van Zandt, 195 N.Y.S. 297, 119 Misc. 124, affirmed 197 N.Y.S. 899, 204 App.Div. 856, affirmed 138 N.E. 481, 234 N.Y. 644.

44 C.J. p 1279 note 27.

90. Ill.—People ex rel. Toman v. Advance Heating Co., 33 N.E.2d 206, 376 Ill. 158—People ex rel. Toman v. Park-Davis Co., 24 N.E.2d 166, 372 Ill. 354.

Ky.—City of Hickman v. First Nat. Bank in City & State of N. Y., 211 S.W.2d 801, 307 Ky. 702—City of Frankfort v. Fuss, 29 S.W.2d 603, 235 Ky. 143.

La.—Judice v. Village of Scott, 121 So. 592, 168 La. 111, certiorari denied Judice Co. v. Village of Scott, 50 S.Ct. 26, 280 U.S. 566, 74 L.Ed. 620.

N.C.—Bryson City Bank v. Town of Bryson City, 195 S.E. 398, 213 N.C. 165.

Okl.—Berryman v. Bonaparte, 11 P.2d 164, 155 Okl. 165—Protest of Chicago, R. I. & P. Ry. Co., 293 P. 539, 146 Okl. 100—In re Murray, 285 P. 80, 140 Okl. 240—In re Bliss, 285 P. 73, 142 Okl. 1—C. D. Coggeshall & Co. v. Smiley, 285 P. 48, 142 Okl. 8—Protest of Chicago, R.

I. & P. Ry. Co., 279 P. 319, 187 Okl. 186.

44 C.J. p 1279 note 28.

Particular constitutional provisions construed

Okl.—Lowden v. Excise Board of Jefferson County, 77 P.2d 1150, 182 Okl. 413—Adams v. City of Hobart, 27 P.2d 595, 166 Okl. 267.

Compromise of judgment

Statute providing for compromising of municipal judgment liabilities was held to authorize judgment creditor to enter into such a settlement with city and to receive bonds in payment of debt to be paid by levy of irrepealable tax, notwithstanding payment thereof might exceed limitation of a prior statute on additional tax levy to pay final judgments against a city.—G. W. Jones Lumber Co. v. City of Marmarth, 272 N.W. 190, 67 N.D. 309.

Pension fund

Taxes for policemen's and municipal employees' annuity and benefit funds are "taxes for purposes of pension fund" within statute exempting taxes for such purpose from limitation on total tax levy.—People ex rel. McDonough v. New York Cent. R. Co., 190 N.E. 94, 356 Ill. 67.

Bonded indebtedness generally

(1) A provision of village ordinance authorizing judgment-funding bonds for payment thereof by direct annual tax does not violate statute limiting amount of village taxes exclusive of amount levied to pay its bonded indebtedness.—People ex rel. Manifold v. Wabash R. Co., 59 N.E.2d 795, 389 Ill. 403—Elmhurst Nat. Bank v. Village of Bellwood, 23 N.E.2d 41, 372 Ill. 204.

(2) The legislature, in granting authority to municipalities, to levy an additional rate for hospital purposes, intended that the additional rate should include all taxes levied for payment of bonds and interest, issued for hospital purposes.—People ex rel. Goodman v. Wabash R. Co., 70 N.E.2d 718, 395 Ill. 520.

(3) The specific provisions in statute providing that all bonds issued for hospital purposes shall be paid out of the "Hospital Fund" must prevail over the general provisions of statute that taxes levied to pay refunding bonds shall be in addition to, and exclusive of, the maximum of all other taxes authorized to be levied, and that tax limitations applicable to municipalities under any statute shall not apply to taxes

levied for payment of such refunding bonds.—People ex rel. Goodman v. Wabash R. Co., supra.

(4) Law respecting amount of tax levy was held not to limit power to make additional tax levy for payment of interest and principal on bonds to such bonds as were outstanding when act became effective.—Tabb v. Funk, 17 P.2d 18, 170 Wash. 545.

Outstanding bonds and certificates

The statutory limitation of tax to be levied by city for interest and sinking fund on its outstanding bonds and certificates of indebtedness does not apply to bonds issued after effective date of act imposing such limitation.—State ex rel. Woman's Catholic Order of Foresters v. City of Fort Myers, 196 So 705, 143 Fla. 304.

Water tax

Under some statutes, a water tax is expressly exempted from the general tax rate limitation.—Bain v. Goldsboro, 80 S.E. 256, 164 N.C. 102.

Compensation for loss of tax revenue

The schedule attached to constitutional provision authorizing equalization of tax revenues through a tax rate outside the limitation provided in the provision, for bonds which had theretofore been issued, applies only to bonds issued within statutory limitation in force at time of issuance of the bonds, and then only to extent necessary to equalize tax loss resulting from a shrinkage in the tax base.—State ex rel. City of Akron v. Slusser, 61 N.E.2d 318, 75 Ohio App. 141, affirmed 56 N.E.2d 239, 144 Ohio St. 123.

91. Ill.—People v. Illinois Cent. R. Co., 139 N.E. 63, 307 Ill. 457.

44 C.J. p 1279 note 29.

92. Wis.—Oconto City Water Supply Co. v. Oconto, 80 N.W. 1113, 105 Wis. 76.

44 C.J. p 1279 note 30.

Tax for payment of refunding bonds

The limitation on taxing power of city was not applicable to refunding bonds issued under subsequent general refunding act, since limitation was repugnant to later requirement of general act to levy a sufficient tax to provide for payment of refunding bonds and interest thereon.—City of Zephyrhills, Fla., v. U. S. ex rel. Favre, C.C.A.Fla., 95 F.2d 506.

Constitutionality

Statutory exception of additional

as, for example, where the additional power is granted for the execution of mandatory provisions of a public health law.⁹³ A reference in the statute to the tax as a special tax,⁹⁴ or "extraordinary levy,"⁹⁵ will not operate to exempt the tax.

While a statute granting the power to levy an additional tax for a special purpose and limiting its rate is sometimes construed, not as exempting the tax from the general tax levy, but as operating to increase the general tax rate by the amount of the special rate,⁹⁶ provided at least the specified amount is levied for the special purpose,⁹⁷ on the other hand it has been held that a statutory amendment exempting and increasing a special tax which formerly had been included in the general tax rate will not operate to decrease the rate of the general tax to the extent that it has been relieved by the exemption.⁹⁸

Under a constitutional provision prohibiting municipalities from levying a special tax in excess of a specified rate except that the limitation should

not apply to public utilities, a municipal corporation is not authorized to levy a special tax which, when added to a prior levy for a public utility, will exceed the specified amount.⁹⁹

Taxes to pay involuntary liabilities generally. A limitation placed on the amount of taxes which municipalities may levy has been held to refer only to obligations voluntarily incurred,¹ or to debts created or attempted to be incurred by contract,² and such limitation does not apply to taxes levied to pay an indebtedness or liability imposed by a superior authority on a municipality,³ or a liability imposed by law for what is done without right.⁴

Taxes to pay judgments against the municipality are sometimes held to be chargeable against the general tax limit,⁵ as where the judgments are for ordinary indebtedness,⁶ or where taxes to pay the claims on which the judgments are based would be chargeable against the limit;⁷ but sometimes they are held not chargeable against the general limit,⁸ as where they are expressly or impliedly excepted

expenditures made necessary by legislative action from limitation imposed on municipal tax levy was held not unconstitutional—*Los Angeles Gas & Electric Corporation v. City Council of City of Seal Beach*, 63 P.2d 326, 18 Cal.App.2d 97.

Mandatory levy; current expenses

(1) Under statutes fixing limit at fifteen mills, but authorizing increase for current expenses, municipal current levy over eighteen mills is not defense to enforcement of mandatory duty involving additional mandatory tax levy, unless fifteen mills of current levy must be allocated to existing mandatory debt charges—*State v. City of Van Wert*, 184 N.E. 12, 126 Ohio St. 78.

(2) Where municipality's current expenses and bonds for complying with orders by state department of health cannot be provided for within fifteen-mill limitation, municipality must levy tax in excess of such limitation for current expenses.—*State v. City of Van Wert*, supra.

(3) In order to constitute defense to state health department's order requiring sewage plant construction, levy to pay bonds to finance plant, together with mandatory levies, must exceed fifteen-mill constitutional and statutory limitations.—*State v. City of Van Wert*, supra.

93. Ohio—*State v. Dean*, 116 N.E. 37, 95 Ohio St. 108—*State v. Zangerle*, 115 N.E. 511, 95 Ohio St. 58.

94. Mo.—*Union Trust Co. v. Pagenstecher*, 119 S.W. 1103, 221 Mo. 121, followed in 119 S.W. 1105, 221 Mo. 131.

44 C.J. p 1279 note 35.

95. Ga.—*Waycross v. Tomberlin*, 91 S.E. 560, 146 Ga. 504.

96. Wis.—*Sheldon v. City of Tomahawk*, 221 N.W. 656, 197 Wis. 202. 44 C.J. p 1279 note 38.

97. Wis.—*Sheldon v. City of Tomahawk*, supra.

Necessity of specifying particular portion as tax for special purpose

Under statute authorizing levy by common council of tax not exceeding three and five tenths per cent of the assessed value, with the exception that an additional tax for school purposes of eight mills on the dollar might be levied, the common council had authority to levy tax which in the aggregate did not exceed four and three tenths per cent without specifying any particular portion thereof as a special tax for school purposes, provided at least eight tenths per cent thereof is levied for school purposes—*Sheldon v. City of Tomahawk*, supra.

98. Tex.—*Ft. Worth v. Cureton*, 223 S.W. 531, 110 Tex. 590.

99. Ark.—*Watkins v. Duke*, 82 S.W. 2d 248, 190 Ark. 975.

1. Ariz.—*Wise v. First Nat. Bank*, 65 P.2d 1154, 49 Ariz. 146. N.M.—*Barker v. State ex rel. Napoleon*, 49 P.2d 246, 39 N.M. 434.

Amounts within control and discretion of body fixing tax

Cal.—*Los Angeles Gas & Electric Corporation v. City Council of City of Seal Beach*, 63 P.2d 326, 18 Cal. App.2d 97.

2. Ky.—*City of Catlettsburg v. Fabric Fire Hose Co.*, 95 S.W.2d 285,

264 Ky. 594—*City of Frankfort v. Fuss*, 29 S.W.2d 603, 235 Ky. 143.

3. Ariz.—*Wise v. First Nat. Bank*, 65 P.2d 1154, 49 Ariz. 146.

Cal.—*Los Angeles Gas & Electric Corporation v. City Council of City of Seal Beach*, 63 P.2d 326, 18 Cal. App.2d 97.

4. Ky.—*City of Frankfort v. Fuss*, 29 S.W.2d 603, 235 Ky. 143.

5. Mo.—*State ex rel. Emerson v. Mound City*, 73 S.W.2d 1017, 335 Mo. 702, 94 A.L.R. 923.

44 C.J. p 1278 note 16.

Judgment on award of workmen's compensation

S.C.—*Brown v. Town of Patrick*, 24 S.E.2d 365, 202 S.C. 236.

6. Ill.—*Chicago, etc., R. Co. v. People*, 52 N.E. 439, 177 Ill. 91.

44 C.J. p 1278 note 17.

Contractual debt

Ky.—*James C. Willson & Co. v. City of Ravenna*, 104 S.W.2d 965, 268 Ky. 232—*City of Catlettsburg v. Fabric Fire Hose Co.*, 95 S.W.2d 285, 264 Ky. 594.

7. Ill.—*People ex rel. Reconstruction Finance Corporation v. Board of Education of City of Chicago*, 54 N.E.2d 508, 386 Ill. 522, certiorari denied 65 S.Ct. 70, 323 U.S. 733, 89 L.Ed. 588, rehearing denied 65 S.Ct. 115, 323 U.S. 814, 89 L.Ed. 648.

44 C.J. p 1278 note 18.

8. N.M.—*Barker v. State ex rel. Napoleon*, 49 P.2d 246, 39 N.M. 434.

44 C.J. p 1278 notes 20, 21.

by statute,⁹ or where the judgments are for personal injuries resulting from the city's negligence.¹⁰

§ 1991. — Levies within, or in Excess of, Limitation

- a. In general
- b. What constitutes excessive levy
- c. Emergency taxes

a. In General

The rate or amount of the tax levied must not be in excess of the constitutional or statutory limitation applicable thereto, and levies in excess of the rate or amount permitted by law are illegal and void, but only to the extent of the excess if the taxes are separable. On the other hand, a levy within the constitutional or statutory limit is valid.

The rate or amount of the tax levied must not be in excess of the constitutional or statutory limitation applicable thereto,¹¹ and levies in excess of the rate or amount permitted by law are illegal and

void,¹² but only to the extent of the excess if the taxes are separable.¹³ An excess levy cannot be sustained on the ground that the assessor has rated the taxable property below its real value;¹⁴ nor can an attempt to tax in excess of the limit be upheld as an exercise of the police power, where its real and professed object is to raise revenue.¹⁵ The city council and the electors, whether acting separately or conjointly, may not levy taxes in excess of a constitutional limit,¹⁶ even though the legislature has authorized the electors of a municipal corporation to levy taxes.¹⁷

On the other hand, a levy within the constitutional or statutory limit as to amount or rate is valid;¹⁸ and, where the levy does not itself exceed the limit, it is not invalidated by a subsequent levy which taken together with the former is in excess of the limit.¹⁹ A tax in excess of the original general limit is not void if it is within the limit as increased

9. Neb.—In re Proceedings of Board of Equalization, 238 N.W. 735, 121 Neb. 773.

N.M.—Barker v. State ex rel. Napoleon, 49 P.2d 246, 39 N.M. 434.

S.D.—State v. City of Veblen, 237 N.W. 555, 58 S.D. 451.

44 C.J. p 1278 note 20.

10. Ky.—City of Catlettsburg v. Davis' Adm'r, 91 S.W.2d 56, 262 Ky. 726.

44 C.J. p 1278 note 21.

In Missouri

(1) There is authority supporting the rule of the text.—State ex rel. Pyle v. University City, 8 S.W.2d 73, 320 Mo. 451.—State ex rel. Poole v. City of Willow Springs, 183 S.W. 589.

(2) In a later case, however, the court concluded that these cases should not be followed.—State ex rel. Emerson v. Mound City, 73 S.W.2d 1017, 335 Mo. 702, 94 A.L.R. 923.

11. Ill.—People ex rel. Toman v. Advance Heating Co., 33 N.E.2d 206, 376 Ill. 158.

44 C.J. p 1280 note 41.

Enjoining collection of excessive tax see infra § 2106.

Levy and assessment in general see infra § 2030.

12. Ark.—Schuman v. Walthour, 163 S.W.2d 517, 204 Ark. 634.—**Corpus Juris** quoted in Adamson v. City of Little Rock, 134 S.W.2d 558, 561, 199 Ark. 435.

Ga.—Georgia Southern & F. Ry. Co. v. Town of Lenox, 162 S.E. 650, 44 Ga.App. 680.

Ill.—People ex rel. Toman v. Ames, 43 N.E.2d 1009, 380 Ill. 268.—People ex rel. Toman v. Crane, 23 N.E.2d 337, 372 Ill. 228.

Neb.—Thomas v. City of Chadron, 16 N.W.2d 447, 145 Neb. 316.

N.J.—Jersey City v. Bettcher, 34 A.2d 784, 22 N.J.Misc 16, followed in Applications of Jersey City for Increase of Tax Assessments for Year 1943, 34 A.2d 790, 22 N.J. Misc. 28, appeal dismissed Appeals of Jersey City, 44 A.2d 189, 23 N.J. Misc. 311.

Okl.—In re Bliss, 285 P. 73, 142 Okl. 1.—Aaronson v. Smiley, 285 P. 59, 142 Okl. 29.—C. D. Coggeshall & Co. v. Smiley, 285 P. 48, 142 Okl. 8.

Wash.—Walker v. Wiley, 32 P.2d 1062, 177 Wash. 483.—Denny v. Wooster, 27 P.2d 328, 175 Wash. 272.

44 C.J. p 1280 note 41.

Scaling excessive taxes see infra § 2035.

Levy in excess of limit for particular purpose

Where charter of city did not expressly authorize special tax for fire protection, and prohibited levy of tax in excess of seventy-five cents on one hundred dollars for general purposes, which was only fund under which fire department expense could be charged, and city levied full amount of seventy-five cent tax for general purposes, under the maxim, *Expressio unius est exclusio alterius*, the levy of an additional twenty-two cent tax for support of fire department was invalid, notwithstanding city's tax rate for all purposes was well below allowable maximum.—Joy v. City of Terrell, Tex.Civ.App., 143 S.W.2d 704, error dismissed, judgment correct.

13. Ark.—**Corpus Juris** quoted in Adamson v. City of Little Rock, 134 S.W.2d 558, 561, 199 Ark. 435.

Ill.—People ex rel. Schlaeger v. Frankenstein & Co., 72 N.E.2d 340, 396 Ill. 524.—People ex rel. Gill v. Baum, 11 N.E.2d 373, 367 Ill. 249.—People ex rel. McDonough v. Chicago, M., St. P. & P. R. Co., 188 N.E. 404, 354 Ill. 438.—People v. Chicago & N. W. Ry. Co., 172 N.E. 13, 340 Ill. 102.

44 C.J. p 1280 note 42.

14. Or.—Gadsby v. Portland, 63 P. 14, 38 Or. 135.

15. Or.—Gadsby v. Portland, *supra*

16. Ark.—Adamson v. City of Little Rock, 134 S.W.2d 558, 199 Ark. 435

17. Ark.—Adamson v. City of Little Rock, *supra*.

Authorization of increase by voters see *supra* § 1989 b.

18. Ala.—Jefferson County v. City of Birmingham, 38 So.2d 844, 251 Ala. 634.

Ill.—People ex rel. McDonough v. Mills Novelty Co., 192 N.E. 236, 357 Ill. 285.

Mo.—State ex rel. Carpenter v. City of St. Louis, 2 S.W.2d 713, 318 Mo. 870.

Tex.—Rachford v. City of Port Neches, Civ.App., 46 S.W.2d 1057, followed in Dearing v. City of Port Neches, 46 S.W.2d 1062, error refused.

44 C.J. p 1280 notes 45, 46.

Deficit levy held not excessive

Okl.—Le Flore County Excise Board v. St. Louis-San Francisco Ry. Co., 93 P.2d 1087, 185 Okl. 440.

19. Ill.—Cincinnati, etc., R. Co. v. People, 69 N.E. 938, 207 Ill. 566.

Tex.—Bassett v. El Paso, 30 S.W. 893, 88 Tex. 168.

by the statute authorizing the tax;²⁰ and a special tax in excess of the rate allowed by statute therefor is not invalid where it is levied for purposes within the scope of general taxes and the power to levy general taxes is unlimited.²¹

Where a tax is levied, which might have been authorized by either of two statutes, but which would be excessive if levied under one of them, it will be presumed to have been levied under the other.²² Also, if an excessive tax levy can be justified on the ground that the excess is for a purpose exempt from the limitation, there is a presumption in favor of the validity of the tax in the absence of proof that the tax was not levied for the exempted purpose;²³ but, where it is shown that the excess cannot be accounted for in this way, it is void.²⁴

An excess levy, while invalidating the tax, does not affect the validity of any particular appropriation ordinance alleged to have caused the excess.²⁵ Statutes authorizing municipal corporations to provide waterworks or other public utilities or improvements and issue bonds therefor payable solely from the revenues of the proposed system are not in violation of constitutional provisions prohibiting such municipal corporation from levying a tax exceeding prescribed limitations.²⁶ Where levies in excess of the constitutional limit are necessary to prevent impairment of a preëxisting debt, the excess levies need not be laid on the basis of a classification of property contained in the constitutional provision, but, under statutory authorization, may be laid uniformly on all classes of property.²⁷

b. What Constitutes Excessive Levy

"Excessive levy" refers to the amount of the levy regardless of the amount collected thereunder and, as applied to general taxes, to a levy on all the property in the municipal corporation; and some provisions limiting the rate to a specified percentage of the valuation of the

taxable property are construed to refer to actual rather than assessed value.

The words "excessive levy" refer to the amount of the levy regardless of the amount collected thereunder,²⁸ and, as applied to general taxes, to a levy on all the property in the municipal corporation.²⁹ Some charters or statutes limiting the rate to a specified percentage of the valuation of the taxable property are construed to refer to actual rather than assessed value;³⁰ and, under such a construction, a rate which is less than the specified percentage of the actual value of the taxable property is not excessive,³¹ although it is more than the specified percentage of the assessed valuation.³² A statute which does no more than require a city to set apart annually for a certain purpose a certain proportion of whatever amount it may derive from taxes imposed by itself cannot be said to be the levying of a tax in excess of the constitutional limit.³³ In jurisdictions where the purpose of the levy must be specifically set forth, it has been held that a tax for contingent or miscellaneous expenses must be a very small proportion of the total amount levied,³⁴ and that a tax in excess of the amount deemed reasonable for such purpose, taking into consideration the wealth and population of the city, is void as to the excess.³⁵

c. Emergency Taxes

An excessive tax can be justified as an emergency tax under statutes permitting it in certain cases on proof of an unforeseen emergency or necessity of grave character and serious moment, provided the levy ordinance segregates the expenditure for the purpose of meeting the emergency from others of a nonemergency character.

An excessive tax can be justified as an emergency tax within the meaning of a statute permitting it in certain cases, on proof of an unforeseen emergency or necessity of grave character and serious

20. Ill.—*People v. Chicago, etc., R. Co.*, 124 N.E. 658, 289 Ill. 282.

21. U.S.—*Darlington v. Atlantic Trust Co., S.C.*, 78 F. 596, 24 C.C.A. 257.

22. Ohio—*Lima v. McBride*, 34 Ohio St. 338.

23. Ky.—*Morgan v. Frankfort*, 121 S.W. 1033, 135 Ky. 178.
44 C.J. p 1280 note 51.

24. Ky.—*Harper v. Catlettsburg*, 102 S.W. 294, 31 Ky.L. 293.
44 C.J. p 1281 note 52.

25. Mo.—*State v. Miller*, 285 S.W. 504, 315 Mo. 41.
44 C.J. p 1281 note 54.

26. Ark.—*Jernigan v. Harris*, 62 S.W.2d 5, 187 Ark. 705.

27. W.Va.—*Wilson v. Clay County Court*, 175 S.E. 224, 114 W.Va. 603.

Tax for debts antedating limitation as not chargeable against limitation see supra § 1990 a.

28. Tex.—*Rassett v. El Paso, Civ. App.*, 28 S.W. 554.
44 C.J. p 1281 note 55.

29. Neb.—*Futscher v. Rulo*, 186 N.W. 536, 107 Neb. 521.
Special assessment on all property in city see supra § 1990 a.

30. Wash.—*Eldridge v. Bellingham*, 179 P. 109, 106 Wash. 96.

31. Wash.—*Eldridge v. Bellingham*, supra.

32. Wash.—*Eldridge v. Bellingham*, supra.

33. La.—*Benedict v. New Orleans*, 39 So. 792, 115 La. 645.

34. Ill.—*People ex rel. Frick v. Chicago & E. I. Ry. Co.*, 198 N.E. 212, 361 Ill. 470.

44 C.J. p 1281 note 62.
Statement of purpose of levy see infra § 2039.

35. Ill.—*People ex rel. Frick v. Chicago & E. I. Ry. Co.*, supra—*People v. Chicago, etc., R. Co.*, 97 N.E. 245, 253 Ill. 100.
44 C.J. p 1281 note 62.

Determination for court

The court will determine whether, in view of wealth and population of municipality, a tax levy for contingent purposes is an unreasonable amount.—*People ex rel. Goodman v. Wabash R. Co.*, 70 N.E.2d 718, 395 Ill. 520.

moment;³⁶ but it cannot be justified by a showing merely that the municipal corporation was unable to meet otherwise all of its alleged necessary running expenses,³⁷ or by a showing of an emergency of a nature that could have been foreseen and provided for in the annual levy;³⁸ and even where an emergency within the meaning of the statute is shown to exist, the excess tax cannot be upheld unless the levy ordinance segregates the expenditures for the purpose of meeting the emergency from others of a nonemergency character.³⁹ A municipality which has levied a tax for one year

in excess of the amount allowed for that period cannot justify its action on the ground of a charter amendment changing the fiscal year and necessitating a tax to cover the interim between the old and new fiscal years;⁴⁰ but the tax may be sustained where, in the light of the report of a committee recommending the tax levy and the circumstances surrounding the council at the time the levy is made, it appears that the intention was to levy a tax for a period longer than one year and the tax is not in excess of the limit allowed by statute for the actual period covered.⁴¹

c. Power and Duty to Tax for Special Purposes

§ 1992. In General

A municipal corporation may levy taxes for special purposes only to the extent that authority to do is expressly or impliedly conferred on it.

The general rule is that taxes cannot be imposed by a municipal corporation for special or unusual purposes, as distinguished from general municipal

purposes, except to the extent that power to impose such taxes is delegated either expressly or by necessary implication.⁴² A power to tax for general purposes does not include a power to tax for special or unusual purposes.⁴³ Even where a municipal corporation is authorized and required to provide a fund sufficient for a particular purpose,

36. Cal.—San Christiana Inv. Co. v. San Francisco, 141 P. 384, 167 Cal. 762, 52 L.R.A., N.S., 676.

Conclusiveness of council's declaration of emergency on court see *infra* § 2041.

37. Cal.—Burr v. San Francisco, 199 P. 1034, 186 Cal. 508, 17 A.L.R. 581.

38. Cal.—Spreckels v. San Francisco, 244 P. 919, 76 Cal.App. 267. 44 C.J. p 1281 note 69.

39. Cal.—Spreckels v. San Francisco, *supra*.

40. Tex.—San Antonio v. Berry, 48 S.W. 496, 92 Tex. 319—San Antonio v. Raley, Civ.App., 32 S.W. 180.

41. Tex.—Hernandez v. San Antonio, Civ.App., 39 S.W. 1023. 44 C.J. p 1281 note 72.

42. Fla.—City of Miami v. Kayfetz, 30 So.2d 521, 158 Fla. 758—Loeb v. City of Jacksonville, 134 So. 205, 101 Fla. 429, 79 A.L.R. 459.

Ill.—People ex rel. Schlaeger v. Bunge Bros. Coal Co., 64 N.E.2d 365, 392 Ill. 153—People ex rel. Toman v. Baltimore & O. & C. R. Co., 46 N.E.2d 60, 381 Ill. 585.

Miss.—Mayor and Aldermen of City of Vicksburg v. Crichlow, 16 So.2d 749, 196 Miss. 259.

Ohio.—Kinsey v. Bower, 68 N.E.2d 317, 147 Ohio St. 66.

Tex.—Anderson v. City of San Antonio, 67 S.W.2d 1036, 123 Tex. 163—Moreland v. City of San Antonio, Civ.App., 116 S.W.2d 823, error refused.

Wash.—Walker v. Wiley, 32 P.2d 1062, 177 Wash. 483.

44 C.J. p 1282 note 74.

Express or implied power to tax generally see *supra* § 1979.

Taxes imposed by city as state agent

(1) City, when acting under statute requiring it to impose tax to raise funds for corporation organized to care for delinquent and neglected children, is but arm of state government.—Fox v. Board for Louisville & Jefferson County Children's Home, 50 S.W.2d 67, 244 Ky. 1.

(2) In imposing emergency relief taxes under enabling acts, city is not exercising its ordinary taxing power to meet cost of local government, but is acting as agent of the state by express legislative authority, during a fixed period, to experiment in taxation for emergency relief as a state purpose.—In re David Brown Printing Co., 32 N.E.2d 787, 285 N.Y. 47, reargument and motion to amend remittitur denied 34 N.E.2d 905, 285 N.Y. 746.

Taxes held authorized

(1) For collection and disposal of garbage.

Ill.—People ex rel. Whiteside County Collector v. Roth, 55 N.E.2d 66, 387 Ill. 62.

Mont.—Northern Pac. Ry. Co. v. Lutey, 66 P.2d 785, 104 Mont. 321.

(2) For police protection.—Ex parte Newberg, 143 S.W.2d 786, 140 Tex.Cr. 211.

(3) For poor relief.

Mo.—Jennings v. City of St. Louis, 58 S.W.2d 979, 332 Mo. 173, 87 A.L.R. 365.

Ohio.—Ferrie v. Sweeney, Com.Pl., 72 N.E.2d 128.

(4) For upkeep and handling of fire engines—Ward v. Lester, 31 S.W.2d 924, 235 Ky. 595.

(5) To defray cost of maintenance of fire district.—Johnson v. Fontana County Fire Protection Dist., 101 P.2d 1092, 15 Cal.2d 380—Holman v. Santa Cruz County, Cal.App., 205 P.2d 767.

(6) To provide funds for city employees' retirement fund.—McAlpine v. Baumgartner, 74 P.2d 753, 10 Cal.2d 409.

(7) For other special purposes. Ill.—People ex rel. Schlaeger v. Bunge Bros. Coal Co., 64 N.E.2d 365, 392 Ill. 153. W.Va.—McCov v. City of Sistersville, 199 S.E. 260, 120 W.Va. 471.

Taxes held unauthorized

(1) For advertising the city.

Fla.—Loeb v. City of Jacksonville, 134 So. 205, 101 Fla. 429, 79 A.L.R. 459—City of De Land v. Moorhead, 119 So. 117, 96 Fla. 737.

Tex.—Anderson v. City of San Antonio, 67 S.W.2d 1036, 123 Tex. 163.

(2) For maintenance of tourist camp—International Harvester Co. v. State, 274 N.W. 217, 200 Minn. 242.

(3) For other special purposes.

Cal.—Holman v. Santa Cruz County, App., 205 P.2d 767.

Ill.—People ex rel. Nelson v. Beu, 85 N.E.2d 829, 403 Ill. 232—People ex rel. Wilson v. Wabash Ry. Co., 14 N.E.2d 650, 368 Ill. 497. 44 C.J. p 1282 note 74 [c].

43. Utah.—Woodring v. Straup, 143 P. 592, 45 Utah 173.

44 C.J. p 1283 note 20.

its power to levy a tax for such purpose may be limited by statutory restrictions.⁴⁴ It has been held that a general grant of power to expend municipal funds for a particular purpose impliedly authorizes the levy of a tax necessary and sufficient to raise a fund therefor;⁴⁵ but it has also been held that, where a statute makes expenditure for a particular purpose optional, it does not thereby impliedly authorize the levy of a special tax therefor.⁴⁶ In the absence of an authorizing act, municipalities have no power to tax and raise money for the purpose of abating a particular class of taxes,⁴⁷ but, by statute, one form of special tax may be substituted for others named in prior statutes.⁴⁸

§ 1993. Public Improvements

Under proper authority a municipal corporation may levy a tax to pay for a public improvement, and where the improvement is one inuring to the benefit of all the taxpayers the cost thereof may be taxed as a common charge on all.

Under delegated authority, a municipal corporation may levy a tax to pay for a public improvement,⁴⁹ provided it serves a public⁵⁰ or corporate or municipal⁵¹ purpose, and provided there has been a proper determination of the necessity of levying the tax in question.⁵² Authority may be implied from a statute giving a city power to establish and maintain the improvement⁵³ or authority to tax for city purposes.⁵⁴ While a special tax for the maintenance of an improvement may be authorized by statute,⁵⁵ provisions for a special tax

44. Iowa—Mathewson v. City of Shenandoah, 11 N.W.2d 571, 233 Iowa 1368.

Statutory restrictions on power to tax generally see supra § 1986

45. Tex.—Moreland v. City of San Antonio, Civ App., 116 S.W.2d 823, error refused.

46. Minn.—International Harvester Co. v. State, 274 N.W. 217, 200 Minn. 242.

47. Mass.—Cooley v. Granville, 10 Cush. 56.

44 C.J. p 1282 note 75.

48. U.S.—Amy & Co. v. Selma, C.C. Ala., 12 F. 414.

44 C.J. p 1282 note 76.

49. Ga.—Jackson v. City of Rome, 187 S.E. 386, 182 Ga. 848.

Kan.—Cow Creek Valley Flood Prevention Ass'n v. City of Hutchinson, 200 P.2d 299, 166 Kan. 78.

La.—Judice v. Village of Scott, 121 So. 592, 168 La. 111, certiorari denied Judice Co. v. Village of Scott, 50 S.Ct. 26, 280 U.S. 566, 74 L.Ed. 620.

Neb.—Hinman v. Temple, 274 N.W. 605, 133 Neb. 268, 111 A.L.R. 1217.

Ohio.—City of Youngstown v. Mitchell, Com.Pl., 14 Ohio Supp. 83.

44 C.J. p 1282 note 79.

Payment in part by levy

Words "in whole or in part," in statute providing that any municipal corporation may finance cost of public utility service in whole or in part by levying taxes or by issuance of bonds, have been held to mean that city may finance such project in part by taxation and in part by bond issue, and not that city may finance construction in part and that "authority" may finance construction in part.—Tierney v. Cohen, 198 N.E. 225, 268 N.Y. 464.

Levy held authorized

(1) For hospitals.—Burleson v. Board of Aldermen of Town of

Spruce Pines, 156 S.E. 241, 200 N.C. 80.

(2) For parks
Colo.—Perkins v. People, 147 P. 356, 59 Colo. 107.

Okl.—Excise Board of Oklahoma County v. Cooper, 82 P.2d 824, 183 Okl. 387.

(3) For public utilities.
Neb.—Carr v. Fenstermacher, 228 N.W. 114, 119 Neb. 172.

Ohio.—Priest v. City of Wapakoneta, App., 32 N.E.2d 869, appeal dismissed 9 N.E.2d 292, 132 Ohio St. 527.

Or.—Board of Directors of Northern Wasco County Peoples' Utility Dist. v. Kelly, 137 P.2d 295, 171 Or. 691.—Petition of Board of Directors of Tillamook People's Utility Dist., 86 P.2d 460, 160 Or. 530.

(4) For street lighting.—Drew v. Mumford, 206 N.W. 159, 114 Neb. 100.

50. Mo.—State ex rel. City of Jefferson v. Smith, 154 S.W.2d 101, 348 Mo. 554.

Stadium

Establishment and maintenance of an athletic stadium as a part of city park system is a public purpose within constitutional requirement that taxes be levied only for a public purpose.—Boney v. Board of Trustees of Kingston Graded Schools, 48 S.E.2d 56, 229 N.C. 136.

Municipality engaged in business

A municipality, when engaged in business, does not act as an arm of the state, and hence a rate charged for a public utility service or product is not a tax but a price at which and for which the service or product is sold, and the excess charged over and above cost as a profit enters into and becomes part of price.—City of Niles v. Union Ice Corporation, 12 N.E.2d 483, 133 Ohio St. 169.

51. Ill.—People v. Eastern Illinois

& M. R. Co., 167 N.E. 24, 335 Ill. 245.

44 C.J. p 1282 note 80.

Jointly owned airport

A city is authorized to levy a tax to pay for the acquisition and development of an airport jointly with another city, in view of statute authorizing two or more municipalities to own and hold in joint tenancy lands for use as airport, there being no constitutional provision prohibiting such statute or prohibiting two cities from owning property as tenants in common.—Ragsdale v. Hargraves, 129 S.W.2d 967, 198 Ark. 614, 123 A.L.R. 993.

Parks

Ill.—People ex rel. Toman v. Otis' Estate, 33 N.E.2d 202, 376 Ill. 112—Kocsis v. Chicago Park Dist., 198 N.E. 847, 362 Ill. 24.

Slum clearance

Where a statute declared as a matter of public policy that a slum area was detrimental to public safety, health, or morals, and gave city authority to eliminate slum areas, elimination of such slum area was a corporate purpose within the meaning of constitutional provision authorizing vesting of municipal corporations with authority to assess and collect taxes for corporate purposes.—People ex rel. Tuohy v. City of Chicago, 68 N.E.2d 761, 394 Ill. 477.

52. Mich.—Barnhart v. City of Grand Rapids, 211 N.W. 96, 237 Mich. 90.

53. Ky.—Ramsey v. Shelbyville, 83 S.W. 116, 1136, 119 Ky. 180, 26 Ky. L. 1102, 68 L.R.A. 300.

54. Utah.—Shepard v. Kaysville, 52 P. 592, 16 Utah 340.

55. Ala.—Montgomery v. Gilmer, 56 So. 264, 1 Ala.App. 526.

for the erection of a permanent improvement do not authorize the maintenance of such improvement by a special, as distinguished from a general, tax.⁵⁶ It is within the power of the legislature to limit the power of a city council to levy assessments for the cost of public improvements.⁵⁷

Before a tax for a public improvement project may be levied, it is necessary that a definite program for effectuating the project shall have been adopted;⁵⁸ a levy cannot be made to accumulate a fund for some project to be developed at some indefinite future time.⁵⁹ Under some statutes the power to levy a sewerage fund tax is restricted to cities which establish a system of sewerage,⁶⁰ but in the absence of any provision to the contrary, a city may levy a tax for constructing sewers and disposal plants to connect with, and dispose of the sewage from, sewer mains built not by itself but by sewer districts.⁶¹ The erection of a public utility plant under a statute providing that the costs thereof shall be paid out of earnings of the utility does not result in the incurring of a general obligation and the cost is in no manner payable by taxation.⁶²

Street or road poll taxes. As a general rule statutes authorizing municipalities to impose street or road poll taxes, and ordinances imposing such

taxes, have been held not unconstitutional,⁶³ and this is true of ordinances imposing such a tax but allowing persons liable therefor to perform work on public streets or roads for a stated number of days in lieu of payment of the tax.⁶⁴

Districts. Under some constitutional and statutory provisions a special tax for a public improvement may be levied by or for a special taxing or improvement district,⁶⁵ but after a repeal of the statute authorizing a tax on a special district a tax cannot be levied on the district to pay for improvement bonds issued while the district law was in force.⁶⁶ A utility district embracing within its limits another municipality may not tax property within such municipality for the purpose of purchasing or constructing utilities which would duplicate utilities already owned and operated by the municipality.⁶⁷

Taxation or special assessments. The power to levy a special tax for a particular improvement on the entire city and the power to make an assessment on abutting property are not inconsistent with each other⁶⁸ and may be possessed concurrently by the same municipality.⁶⁹ Where the improvement is one inuring to the benefit of all the taxpayers, the cost thereof may be taxed as a common charge on all,⁷⁰ although the operation of the proj-

56. Tex.—*Sherman v. Smith*, 35 S.W. 294, 12 Tex.Civ App. 580.

57. Wash.—*Kuehl v. Edmonds*, 148 P. 19, 85 Wash. 307, 157 P. 850, 91 Wash 195
13 C.J. p 289 note 54.

58. Ill.—*People ex rel. Toman v. Signode Steel Strapping Co.*, 44 N.E.2d 555, 380 Ill. 633

59. Ill.—*People ex rel. Leaf v. Roth*, 59 N.E.2d 643, 389 Ill. 287.

60. Ill.—*St. Louis Bridge Co. v. People*, 17 N.E. 468, 125 Ill. 226.

61. Ark.—*Downen v. McLaughlin*, 75 S.W.2d 227, 189 Ark. 827.

62. Iowa.—*Burns & McDonnell Engineering Co. v. Iowa City*, 282 N.W. 708, 225 Iowa 1241

Cost of engineering services

Iowa.—*Burns & McDonnell Engineering Co. v. Iowa City*, supra.

63. Kan.—*Shane v. City of Hutchinson*, 127 P. 606, 88 Kan. 188.

Utah.—*Salt Lake City v. Wilson*, 148 P. 1104, 46 Utah 60.

Wash.—*Town of Tekoa v. Reilly*, 91 P. 769, 47 Wash. 202, 13 L.R.A., N.S., 901.

64. Ala.—*City of Mobile v. Collins*, 130 So. 369, 24 Ala.App. 41, certiorari denied 130 So. 374, 222 Ala.

32.—*City of Montgomery v. Gilmer*, 56 So. 264, 1 Ala.App. 526.—*City of*

Montgomery v. Barefield, 56 So. 260, 1 Ala.App. 515

Ga.—*Coggins v. Davis*, 174 S.E. 628, 178 Ga. 796.—*Miller v. City of Waycross*, 176 S.E. 826, 50 Ga.App. 1.—*Grier v. City of Waycross*, 174 S.E. 221, 49 Ga.App. 111.

Failure to enforce uniformly

Failure of authorities to enforce uniformly ordinance subjecting residents to street duty or tax was no defense to prosecution for failure to perform street duty or pay tax.—*Coggins v. Davis*, 174 S.E. 628, 178 Ga. 796.—*Miller v. City of Waycross*, 176 S.E. 826, 50 Ga.App. 1.—*Grier v. City of Waycross*, 174 S.E. 221, 49 Ga.App. 111.

65. U.S.—*Pacific Gas & Electric Co. v. Sacramento Municipal Utility Dist.*, C.C.A.Cal., 92 F.2d 365, certiorari denied 58 S.Ct. 610, 303 U.S. 640, 82 L.Ed. 1100.
44 C.J. p 1283 note 94.

Park district

Ill.—*Kocsis v. Chicago Park Dist.*, 198 N.E. 847, 362 Ill. 24.

Anti-mosquito district

Fla.—*State ex rel. Robertson v. Gessner*, 16 So.2d 51, 153 Fla. 865.

66. Ohio.—*Alexander v. Spencer*, 13 Ohio Cir.Ct.N.S., 475, 32 Ohio Cir. Ct. 306.

67. Wash.—*Public Utility Dist. No. 1 v. Superior Court in and for*

Whatcom County, 90 P.2d 737, 199 Wash. 146.

68. Ky.—*Byrne v. Covington*, 21 S.W. 1050, 15 Ky.L. 33.

69. Ky.—*Byrne v. Covington*, supra.
La.—*Judice v. Village of Scott*, 121 So. 592, 168 La. 111, certiorari denied *Judice Co. v. Village of Scott*, 50 S.Ct. 26, 280 U.S. 566, 74 L.Ed. 620.

Ohio.—*City of Youngstown v. Mitchell*, Com Pl., 14 Ohio Supp. 83.

Election

Kan.—*Cow Creek Valley Flood Prevention Ass'n v. City of Hutchinson*, 200 P.2d 299, 166 Kan. 78.

70. U.S.—*Pacific Gas & Electric Co. v. Sacramento Municipal Utility Dist.*, C.C.A.Cal., 92 F.2d 365, certiorari denied 58 S.Ct. 610, 303 U.S. 640, 82 L.Ed. 1100.

Ill.—*People v. Eastern Illinois & M. R. Co.*, 167 N.E. 24, 335 Ill. 245.

Kan.—*Cow Creek Valley Flood Prevention Ass'n v. City of Hutchinson*, 200 P.2d 299, 166 Kan. 78.—*Board of Com'rs of Johnson County v. Robb*, 171 P.2d 784, 161 Kan. 683.

La.—*Judice v. Village of Scott*, 121 So. 592, 168 La. 111, certiorari denied *Judice Co. v. Village of Scott*, 50 S.Ct. 26, 280 U.S. 566, 74 L.Ed. 620.

ect may not be a governmental function⁷¹ or some taxpayers are benefited less than others.⁷² It has also been held that a part of the cost may be assessed on abutting property and the balance raised by a tax on all the taxpayers;⁷³ and even after the improvement has been paid for by abutting landowners in the form of a local assessment the burden may be shifted from them to the taxpayers, reimbursing those who have paid the local assessment.⁷⁴

As a general rule, when a municipality levies a special assessment and uses due diligence to make it productive in accordance with the statutes under which it is levied, no further liability of the municipality attaches except such as may be specifically provided by statute.⁷⁵ However, in addition to the imposition of a special assessment against property to pay the cost of a public improvement, the taxpayer may be required to pay an additional amount to make up deficiencies;⁷⁶ and the mere failure to collect special assessments from some property owners, necessitating the levy of a special tax, does not constitute unlawful imposition of double taxation.⁷⁷

§ 1994. Waterworks or Water Supply

Power to levy a tax for waterworks or for a water supply may be conferred on a municipal corporation either expressly or by implication; the exercise of such power is subject to constitutional, statutory, or charter limitations.

While power to levy a water tax may be expressly conferred on a municipal corporation by statute⁷⁸ or constitution,⁷⁹ the grant of authority to erect waterworks,⁸⁰ purchase an existing water plant,⁸¹ or contract for a water supply⁸² or for the construction of waterworks⁸³ carries with it by implication the power to levy taxes for such purposes; and an implication of power may arise from the course of legislation and existing conditions created under former statutory provisions.⁸⁴ When authorized by statute, the tax may be levied even in advance of the execution of a contract for the construction or purchase of the waterworks.⁸⁵ A water tax is not void because not every part of the municipality is supplied with water.⁸⁶

The power to tax for water purposes, whether express or implied, is subject to constitutional, statutory, or charter limitations,⁸⁷ such as limitations on the rate or amount of the tax;⁸⁸ and statutes enlarging the power by increasing the tax limit do

Neb.—Hinman v. Temple, 274 N.W. 605, 133 Neb. 268, 111 A.L.R. 1217.
N.Y.—O'Flynn v. Village of East Rochester, 54 N.E.2d 343, 292 N.Y. 156, certiorari denied 65 S.Ct. 39, 323 U.S. 713, 89 L.Ed. 574.

Ohio.—City of Youngstown v. Mitchell, Com Pl., 14 Ohio Supp. 83.
S.C.—Floyd v. Parker Water & Sewer Sub-District, 17 S.E.2d 223, 203 S.C. 276.

Wash.—Comfort v. City of Tacoma, 252 P. 929, 142 Wash. 249.
44 C.J. p 1283 note 91.

Statute held not invalid

Okl.—Boswell v. Chambless, 113 P. 2d 832, 189 Okl. 112.

Sewerage system

N.D.—Marks v. City of Mandan, 296 N.W. 39, 70 N.D. 474.

71. U.S.—Pacific Gas & Electric Co. v. Sacramento Municipal Utility Dist., D.C. Cal., 17 F.Supp. 685, affirmed, C.C.A., 92 F.2d 365, certiorari denied 58 S.Ct. 610, 303 U.S. 640, 82 L.Ed. 1100.

Or.—Petition of Board of Directors of Tillamook People's Utility Dist., 86 P.2d 460, 160 Or. 530.

72. Kan.—Cow Creek Valley Flood Prevention Ass'n v. City of Hutchinson, 200 P.2d 299, 166 Kan. 78.

73. Ill.—People ex rel. Chicago Title & Trust Co. v. Village of Glencoe, 23 N.E.2d 697, 372 Ill. 280—Kanka-

kee v. Illinois Cent. R. Co., 101 N.E. 592, 258 Ill. 368.

74. N.Y.—People v. Molloy, 54 N.Y.S. 1084, 35 App.Div. 136, affirmed 55 N.E. 1099, 161 N.Y. 621.
44 C.J. p 1283 note 93.

75. N.D.—Marks v. City of Mandan, 296 N.W. 34, 70 N.D. 434.

76. Fla.—Klemm v. Davenport, 129 So. 904, 100 Fla. 627, 70 A.L.R. 156.
N.D.—Marks v. City of Mandan, 296 N.W. 39, 70 N.D. 474—Marks v. City of Mandan, 296 N.W. 34, 70 N.D. 434.

77. Fla.—Klemm v. Davenport, 129 So. 904, 100 Fla. 627, 70 A.L.R. 156.

78. Neb.—State v. Kearney, 68 N.W. 533, 49 Neb. 325.
44 C.J. p 1283 note 96.

79. Wis.—Janes v. Racine, 143 N.W. 707, 155 Wis. 1.

80. Iowa.—Taylor v. McFadden, 50 N.W. 1070, 84 Iowa 262.
44 C.J. p 1283 note 98.

81. Pa.—Allentown v. Henry, 73 Pa. 404.

44 C.J. p 1283 note 99.

82. N.J.—State v. Summit Tp., Sup., 19 A. 966.

83. U.S.—City of Wheeling v. John F. Casey Co., C.C.A.W.Va., 89 F.2d 308, certiorari denied 58 S.Ct. 15, 302 U.S. 697, 82 L.Ed. 538.

84. Neb.—Union Pac. R. Co. v. Heuser, 150 N.W. 259, 97 Neb. 436.
44 C.J. p 1283 note 2.

85. Iowa.—Youngerman v. Murphy, 76 N.W. 648, 107 Iowa 686.

86. Mo.—Corpus Juris quoted in Palmer v. City of Liberal, 64 S.W. 2d 265, 268, 334 Mo. 266—Corpus Juris quoted in State ex rel. Kellett v. Johnson, 50 S.W.2d 121, 122, 330 Mo. 452.

N.J.—Van Giesen v. Bloomfield, 2 A. 249, 47 N.J.Law 442.

87. Okl.—In re Bliss, 285 P. 73, 142 Okl. 1.

44 C.J. p 1283 note 5.

Necessity of public purpose

Acquisition or operation of waterworks for other than public purposes, although authorized by charter, would violate constitutional provision that taxes may be collected for public purposes only.—Speas v. Kansas City, 44 S.W.2d 108, 329 Mo. 184.

88. Ill.—Dollahon v. Whittaker, 58 N.E. 301, 187 Ill. 84.

N.M.—Raton Waterworks Co. v. Raton, 49 P. 898, 9 N.M. 70.

Limitations of rate or amount generally see supra §§ 1989-1991.

Excessive water rates or charges may be deemed taxes in excess of limitations.—Cincinnati v. Roettlinger, 137 N.E. 6, 105 Ohio St. 145, 153—43 C.J. p 289 note 51 [b].

not operate retroactively.⁸⁹ Some statutes confer power to determine the rate and amount, within certain limitations, on a board of trustees, and impose on the council the duty of levying the tax determined by the board of trustees.⁹⁰ A power to tax for maintenance will not be extended to permit the levy of a tax, the result of which would be the building up of a needless surplus.⁹¹ On the other hand, the power to tax is not impaired by a charter provision requiring the amount of water rents collected over expenses to equal a certain per cent of the water debt.⁹²

§ 1995. Educational Purposes

In the absence of a constitutional prohibition, a municipal corporation may be authorized to levy a tax for the support of public schools and free libraries.

A municipal corporation has no power to levy a school tax where the constitution prohibits a delegation of such power by the state.⁹³ In the absence of constitutional prohibition, however, a municipality may be expressly authorized to levy a tax for the support of public schools,⁹⁴ but it cannot levy a tax in favor of a private⁹⁵ or parochial⁹⁶ school. Under a constitutional declaration making public education a state function, it has been held that the power to levy a school tax cannot be implied from authority to tax for the erection and construction of public buildings, bridges, and works of public improvement,⁹⁷ or from the general welfare clause of a charter.⁹⁸ A tax for the establishment of a state university in the municipality⁹⁹ or to induce it to remain there¹ has been upheld as a tax for corporate purposes within the meaning of the constitutional provision granting power to tax there-

for, even though, under the law, the institution is supported out of state funds.²

Under some statutes the power to tax for school purposes resides in a local board of education,³ subject to the approval of the city council.⁴ Under other statutes the board determines the amount necessary,⁵ and the council determines the rate and levies the tax.⁶ Under still other statutes the whole power to levy the tax is in the city council,⁷ and a statute granting the power to the city council has been held to repeal, by implication, an earlier statute granting it to the board of education.⁸ Where the power is in the city council, it acts as a state agency,⁹ and not as a municipal body,¹⁰ in carrying into effect the objects and purposes of the general school system. An ordinance giving the board of education power to say what taxes within the prescribed limits are necessary to maintain the schools is not subject to the objection that it vests in such board the power of a body politic where the tax is to be levied by the city commissioners.¹¹

Libraries. An express power to tax for the support of "free public libraries" may be exercised¹² in favor of libraries which are free and open to the public,¹³ even though privately owned and managed.¹⁴ Where a city is required by statute to levy a library tax, it cannot evade the law by allowing the time to pass in which it may regularly act,¹⁵ and a city is under a legal obligation to tax for the maintenance of a free public library where, under a power to tax for its establishment and maintenance, it has already passed a vote to do so and has accepted donations for its establishment.¹⁶ The power of a municipal corporation to tax for library purposes may be inferred from an express power

89. Neb.—State v. Kearney, 70 N. W. 255, 49 Neb. 337.

90. Iowa.—Jensen v. Zurmuehlen, 171 N.W. 34, 185 Iowa 593, 14 C.J. p 1283 note 10.

91. Iowa.—Jensen v. Zurmuehlen, supra.

44 C.J. p 1284 note 12.

92. N.Y.—People v. Long Island City, 76 N.Y. 20.

93. La.—Nelson v. Homer, 19 So. 271, 48 La. Ann. 258.

94. Ohio.—Findley v. City of Conneaut, Prob., 12 Ohio Supp. 161, modified on other grounds 62 N.E. 2d 318, 145 Ohio St. 480, affirmed 63 N.E.2d 449, 76 Ohio App. 153, 44 C.J. p 1284 note 17.

95. Ohio.—Findley v. City of Conneaut, supra.

Wis.—Curtis v. Whipple, 24 Wis. 350, 1 Am.R. 187.

96. Ill.—Alton Community Cons. School Dist. No. 151 Bd. of Educa-

tion v. Alton Water Co., 145 N.E. 683, 314 Ill. 466.

97. La.—Nelson v. Homer, 19 So. 271, 48 La. Ann. 258.

98. La.—Nelson v. Homer, supra.

99. Ill.—Burr v. Carbondale, 76 Ill. 455.

Mass.—Merrick v. Amherst, 12 Allen 500.

1. Neb.—Sinclair v. Lincoln, 162 N. W. 488, 101 Neb. 163, L.R.A.1917E 842.

2. Neb.—Sinclair v. Lincoln, supra.

3. Kan.—State v. Addis, 54 P. 1065, 59 Kan. 762.

4. Kan.—State v. Addis, supra.

44 C.J. p 1284 note 28.

5. Ky.—Covington Bd. of Education v. Covington, 45 S.W. 1045, 103 Ky. 634, 20 Ky.L. 289.

6. Wis.—State v. Mirlach, 162 N.W. 331, 174 Wis. 11.

44 C.J. p 1284 note 31.

7. Ga.—Americus Bd. of Public Education v. Barlow, 49 Ga. 232. Neb.—State v. Omaha, 7 Neb. 267.

8. Ga.—Americus Bd. of Public Education v. Barlow, 49 Ga. 232.

9. Ill.—Fuller v. Heath, 89 Ill. 296.

10. Ill.—Fuller v. Heath, supra.

11. N.C.—Taylor v. Greensboro, 95 S.E. 771, 175 N.C. 423.

12. Ill.—People ex rel. Kelly v. Baltimore & O. R. Co., 33 N.E.2d 604, 376 Ill. 393.

13. Wis.—State v. Bentley, 158 N. W. 306, 163 Wis. 632.

14. Wis.—State v. Bentley, supra.

15. Mo.—State ex rel. Carpenter v. City of St. Louis, 2 S.W.2d 713, 318 Mo. 870.

16. Ill.—People v. Turnbull, 161 Ill. App. 151.

granted to a county board to approve such tax.¹⁷ A power of library trustees to levy a tax for library purposes will be implied from an express power of school trustees to levy for school purposes taken in connection with a constitutional provision making it the duty of the legislature to provide for the creation and maintenance of an educational system.¹⁸

§ 1996. Aid to Corporations

A municipal corporation may not levy or be authorized to levy a tax in aid of a private manufacturing establishment; but it may be authorized to levy a tax in aid of railroads or corporations owning and operating toll roads and bridges.

No tax can be levied, even by legislative authority, as a bonus to a private manufactory.¹⁹ However, a tax levy for public purposes is not invalidated because it incidentally benefits private corporations.²⁰ A tax levy for dues to be paid to corporations organized to give service and confer benefits on municipalities and their officers, such as municipal leagues and conferences of mayors, is a levy for a proper municipal purpose and not for the purpose of aiding private corporations.²¹

Railroads. In the absence of any constitutional prohibition,²² a municipal corporation may under legislative authority, express²³ or implied,²⁴ levy taxes to aid a railroad running from, by, or through the municipality, unless under the terms of the act it appears that the aid so given does not necessarily serve a public purpose.²⁵ It is immaterial that the railroad extends beyond the city or state limits,²⁶ and, under some statutes, if the statutory conditions are met, it is not necessary that the rail-

road should pass through, or terminate in, the municipality.²⁷ Where, under established municipal divisions, one is included within the limits of another, each may levy a separate tax in aid of the same railroad company on the same property situated within the limits of both.²⁸ In some jurisdictions a constitutional prohibition against aid to private corporations has been construed to prohibit a tax in favor of railroad corporations, privately owned,²⁹ and, in the absence of delegated authority to do so, a municipality has no power to tax to aid a railroad.³⁰

Toll roads and bridges. Under constitutional or legislative authority, a municipality has power to tax in aid of private corporations owning and operating toll roads³¹ and bridges.³²

§ 1997. Payment of Debts and Bonds

- a. In general
- b. Implied power
- c. Necessity of municipality's liability for debt
- d. Duty to tax

a. In General

A municipal corporation has no power to levy a tax for the payment of its debts in the absence of delegated authority; but such authority is usually conferred by constitutional or statutory provisions.

In the absence of delegated authority to do so, express or implied, a municipality has no power to levy a tax for the payment of its debts.³³ Such authority, however, is sometimes conferred by constitutional provision,³⁴ and frequently by statute, either expressly or by implication;³⁵ and it has been

17. Okl.—Simmons v. Stuckey, 241 P. 124, 113 Okl. 200.

18. Ind.—Marion v. Forrest, 78 N.E. 187, 168 Ind. 94.

19. U.S.—Cleveland Commercial Nat. Bank v. Iola, Kan., 14 S.Ct. 1199, 154 U.S. 617, 22 L.Ed. 463. N.Y.—Weismer v. Douglas, 4 Hun 201, 6 Thomps. & C. 514, affirmed 64 N.Y. 91, 21 Am.R. 586.

Creation of port authority

Constitutional provision, prohibiting levy of taxes for benefit of chartered companies or payment of interest on bonds issued thereby for such purpose, is not violated by act creating Greater Miami Port Authority, which has no authority to levy or pledge proceeds of any taxes, but is authorized only to pledge net earnings of particular facilities or utilities to be acquired, benefited, extended, or constructed.—Gardner v. Fuller, 22 So.2d 150, 155 Fla. 833.

20. Fla.—City of Venice v. State, 118 So. 308, 96 Fla. 527.

21. Ill.—People ex rel. Schlaeger v. Hunge Bros. Coal Co., 64 N.E.2d 365, 392 Ill. 153.

22. Ohio.—Walker v. Cincinnati, 21 Ohio St. 14, 8 Am.R. 24.

23. U.S.—Otoe County v. Baldwin, Neb., 4 S.Ct. 265, 111 U.S. 1, 28 L.Ed. 331.

44 C.J. p 1284 note 46.

24. U.S.—Quincy v. U. S., Ill., 5 S.Ct. 544, 113 U.S. 332, 28 L.Ed. 1001. 44 C.J. p 1284 note 47.

25. Ohio.—Taylor v. Ross County, 23 Ohio St. 22.

26. Ala.—Stein v. Mobile, 24 Ala. 591.

27. La.—Clifton v. Hobgood, 31 So. 46, 106 La. 535.

28. La.—Vicksburg, etc., R. Co. v. Goodenough, 32 So. 404, 108 La. 442, 66 L.R.A. 314.

29. Mich.—People v. State Treasurer, 23 Mich. 499—People v. Salem, 20 Mich. 452, 4 Am.R. 400.

30. Ga.—Jones v. Columbus, 25 Ga. 610.

44 C.J. p 1285 note 54.

31. Ky.—Clark County Ct. v. Paris, etc., Turnpike Co., 11 B.Mon. 143.

32. Iowa.—Pritchard v. Magoun, 80 N.W. 512, 109 Iowa 364, 46 L.R.A. 381.

33. U.S.—U. S. v. Macon County, Mo., 99 U.S. 582, 25 L.Ed. 331.

Or.—Corbett v. Portland, 48 P. 428, 31 Or. 407.

34. Ky.—Fulton County Fiscal Court v. Southern Bell Telephone & Telegraph Co., 146 S.W.2d 15, 285 Ky. 17.

35. Fla.—State v. North Bay Village, 34 So.2d 876.

Ky.—Drane v. Weston, 125 S.W.2d 722, 276 Ky. 810.

Or.—Morris, Mather & Co. v. Port of Astoria, 15 P.2d 385, 141 Or. 251. Pa.—Wade v. Oakmont Borough, 30 A. 959, 165 Pa. 479.

44 C.J. p 1285 note 61.

held, without express reference to the source of its power, that a municipal corporation may make a levy so that it may pay its indebtedness as it becomes due.³⁶ Where the legislature authorizes a municipal corporation to contract and to exercise the power of taxation to meet its engagements, once the municipality enters into a contract the power thus given cannot be withdrawn until the contract is satisfied.³⁷

Where a restricted authority is granted, the power is confined within the limits of the restriction,³⁸ as, for example, where authority is granted to a designated class of municipal or quasi-municipal corporations,³⁹ or for the payment of a particular class of debts⁴⁰ or debts maturing within the year,⁴¹ but the restriction is removed by the subsequent enactment of legislation inconsistent with its continued existence.⁴² The grant of authority to tax for the payment of a particular indebtedness carries with it authority to tax for payment of the installments of the indebtedness as they fall due from year to year.⁴³ Under a statute to such effect, a city required to levy a tax sufficient to pay

the interest and principal accruing on a bond issue within the year for which the levy is made may, in its discretion, levy sufficient taxes to meet in whole or in part the balance of the bond issue, including both principal and interest.⁴⁴ Where authority is granted to levy a tax at a limited rate for the payment of a particular class of debts, a levy of a special tax may be made, even though the indebtedness is payable out of the general funds.⁴⁵ The power to tax for the payment of a particular indebtedness is not affected by a failure to exercise it due to a misunderstanding as to the city's liability for the debt.⁴⁶ The taxing power of a public corporation is not exhausted by a single levy which does not actually produce the money necessary to pay the debts, because a portion of the levy is never collected.⁴⁷

b. Implied Power

In the absence of provisions or indications to the contrary, the power of a municipal corporation to tax for payment of its debts may be implied; and such an implication may arise from the grant of power to incur indebtedness.

Implied power to tax for payment of debts or bonds see *infra* subdivision b of this section.

Judgments

Municipal corporations may levy taxes to pay judgments against them.

U.S.—*City of Mohall v. First Nat. Bank, C.C.A.N.D.*, 105 F.2d 315, certiorari denied *City of Mohall, North Dakota v. First Nat. Bank*, 60 S.Ct. 110, 308 U.S. 587, 84 L.Ed. 491—*City of Hialeah v. U. S. ex rel. Harris, C.C.A.Fla.*, 87 F.2d 953.
Cal.—*Johnson v. Fontana County Fire Protection Dist.*, 101 P.2d 1092, 15 Cal.2d 380.

Ill.—*People ex rel. Anderson v. Village of Bradley*, 11 N.E.2d 416, 367 Ill. 301.

Neb.—*In re Proceedings of Board of Equalization*, 238 N.W. 735, 121 Neb. 773.

N.D.—*Appeal of Cunningham*, 245 N.W. 896, 63 N.D. 62.

Okl.—*State ex rel. Crane Co. v. Goerke*, 126 P.2d 1005, 191 Okl. 1.

36. Fla.—*Fahs v. Kilgore*, 187 So. 170, 136 Fla. 701.

Ill.—*People ex rel. De Rosa v. Chicago & N. W. Ry. Co.*, 63 N.E.2d 401, 391 Ill. 347—*Neidhardt v. City of Wood River*, 69 N.E.2d 345, 329 Ill.App. 485.

37. Mo.—*Diekroeger v. Jones*, 151 S.W.2d 691, 235 Mo.App. 1117.

Priority over current expenses

Current requirements of existing contractual obligations must be provided for before levying for current governmental expenses.—*Bee v. City*

of Huntington, 171 S.E. 539, 114 W.Va. 40.

38. Colo.—*Montgomery v. City and County of Denver*, 80 P.2d 434, 102 Colo. 427.

Ga.—*DeJarnette v. Hospital Authority of Albany*, 23 S.E.2d 716, 195 Ga. 189.

N.M.—*Henning v. Town of Hot Springs*, 102 P.2d 25, 44 N.M. 321.

39. Pa.—*Heiser v. Shenandoah*, 1 Leg.Chron. 118.

44 C.J. p 1285 note 65

40. U.S.—*U. S. v. Cicero, Ind.*, 50 F. 147, 1 C.C.A. 499.

44 C.J. p 1285 note 66.

Partially paid bond issue

Colo.—*Montgomery v. City and County of Denver*, 80 P.2d 434, 102 Colo. 427.

41. Or.—*State v. Johnson*, 156 P. 579, 80 Or. 107.

42. Pa.—*Commonwealth v. Pittsburgh*, 34 Pa. 496.

43. Ky.—*Mayfield Woolen Mills v. Mayfield*, 61 S.W. 43, 111 Ky. 172, 22 Ky.L. 1676.

44. Cal.—*Rancho Santa Anita v. City of Arcadia*, 125 P.2d 475, 20 Cal.2d 319.

45. Kan.—*Atchison, etc., R. Co. v. Hutchinson*, 150 P. 534, 96 Kan. 202.

46. Kan.—*Brown v. Milliken*, 23 P. 167, 42 Kan. 769.

44 C.J. p 1285 note 71.

47. Fla.—*Jenkins v. Entzminger*, 135

So. 785, 102 Fla. 167, followed in *State v. Upper St. Johns River Nav. Dist.*, 135 So. 784, 102 Fla. 183.

Cumulative levies or double taxation

(1) In so far as a statute attempts to provide for cumulative levies of special taxes to discharge delinquency of local improvement district in prior years, such statute is unenforceable, because thereby a landowner would be charged for benefits conferred on his neighbor's land—*Gordon v. Wheatridge Water Dist.*, 109 P.2d 899, 107 Colo. 128.

(2) However, a levy of taxes by a municipal corporation was not subject to attack on ground of double taxation, because levies had been made in previous years, where the taxes collected were insufficient and the amounts represented by the judgments or bonds remained unpaid, since, in order to constitute objectionable double taxation, the two taxes must be imposed during the same taxing period.—*People ex rel. Toman v. Crane*, 23 N.E.2d 337, 372 Ill. 228—*People ex rel. Lindheimer v. Schweitzer*, 16 N.E.2d 897, 369 Ill. 355.

(3) A levy for the payment of judgments entered against the city was not objectionable on the ground that it constituted double taxation in that levy had been made in prior years for the payment of such judgments which amount remained unpaid, since a levy to pay judgments is for a single purpose—*People ex rel. Toman v. Advance Heating Co.*, 33 N.E.2d 206, 376 Ill. 158.

The legislature may by implication grant a municipal corporation the power to levy taxes to pay municipal debts⁴⁸ unless there is some provision in the constitution requiring such grant of power to be in express terms⁴⁹ or unless the power to tax is limited in rate or amount and the exercise of the power would result in a tax in excess of the limit.⁵⁰ Where the act authorizing the creation of an indebtedness provides for the levying of a special tax to meet it, and the municipality, in accordance therewith, levies a tax sufficient on its face for such purpose, there is no implied power to levy an additional tax thereafter on the ground that the first levy proved insufficient in fact because of the non-payment of some of the taxes levied.⁵¹ A power to compromise disputed claims implies a power to tax for payment of the amount agreed on in settlement.⁵² Likewise, a power to tax for a special purpose is very clearly implied from provisions creating a special maintenance and operating fund for its execution and from further provisions that such fund shall consist of all moneys collected by assessment or otherwise for maintenance and operation.⁵³

Implication from power to incur indebtedness. The power to tax may be implied, in a proper case, from the power to incur indebtedness.⁵⁴ Thus, where authority is granted by the legislature to a municipality having power to levy taxes, to contract a debt, or to issue bonds, for some specific object, and no special provision is made for payment, the municipal authorities are clothed with power by necessary implication to levy the requisite tax to pay

the debt⁵⁵ unless there is in the act itself, or in some general statute or in the constitution, some limitation or restriction which repels the inference;⁵⁶ and if the debt is for an extraordinary purpose, requiring special authority for its creation, a general limitation on the power of taxation for ordinary municipal purposes will not exclude such inference;⁵⁷ but where other provision is expressly made for the payment of the debt the power to levy a tax to pay the debt will not be implied⁵⁸ except to the extent that the provision so made proves to be inadequate for the purpose.⁵⁹

Implication from other powers to tax. The power to tax for payment of debts generally may be implied from the power to tax directly for the purposes in the execution of which the debts were incurred⁶⁰ or from a power to tax "for general and contingent expenses, or any other expenses not herein otherwise provided for;"⁶¹ but a power to levy to pay a floating indebtedness will not be implied from an express power to tax for a sinking fund.⁶²

c. Necessity of Municipality's Liability for Debt

A municipal corporation has no power to levy a tax for the payment of a claim which is not its lawful debt or valid obligation; authority to tax for the payment of bonds is conditioned on the liability of the municipality on the bonds.

There is no power to tax for the payment of a claim which is not a lawful debt of the municipal corporation,⁶³ such as the payment of a debt in

48. Me.—Paul v. Huse, 92 A. 520, 112 Me. 449.

44 C.J. p 1285 note 73.

49. Tenn.—State v. Bristol, 70 S.W. 1031, 109 Tenn. 315.

50. Or.—Corbett v. Portland, 48 P. 428, 31 Or. 407.

Tenn.—Walker v. Cookeville, 6 Tenn. Civ.App. 74, 83.

Limit as to rate or amount see supra § 1989.

51. Wash.—Gay v. New Whatcom, 67 P. 88, 26 Wash. 389.

52. Me.—Vose v. Frankfort, 64 Me. 229.

53. Tex.—Hidalgo County Water Impr. Dist. No. 4 v. Wiltsey, Civ. App., 271 S.W. 278.

54. U.S.—Village of Oshkosh, Neb., v. State of Nebraska ex rel. Fairbanks, Morse & Co., C.C.A.Neb., 20 F.2d 621, followed in Village of Oshkosh, Neb., v. State of Nebraska ex rel. McGraw Co., 20 F.2d 624. Or.—Corpus Juris cited in State ex rel. First Nat. Bank of Baker v.

Melville, 41 P.2d 1071, 1074, 149 Or. 532.

Wyo.—Stewart v. City of Cheyenne, 154 P.2d 355, 60 Wyo. 497. 44 C.J. p 1286 note 80.

55. U.S.—City of Wheeling v. John F. Casey, C.C.A.W.Va., 89 F.2d 308, certiorari denied 58 S.Ct. 15, 302 U.S. 697, 82 L.Ed. 538.

Fla.—Farmers & Bankers Life Ins. Co. v. Lake Hancock Imp. Dist., 25 So.2d 666—State ex rel. Woman's Catholic Order of Foresters v. City of Fort Myers, 196 So. 705, 143 Fla. 304—State ex rel. Gulf Life Ins. Co. v. City of Jacksonville Beach, 194 So. 789, 142 Fla. 277.

Or.—State ex rel. First Nat. Bank v. Melville, 41 P.2d 1071, 149 Or. 532 —Morris, Mather & Co. v. Port of Astoria, 15 P.2d 385, 141 Or. 251.

Wash.—Van Diest v. Yakima County, 65 P.2d 1080, 189 Wash. 411. 44 C.J. p 1286 note 83.

56. U.S.—U. S. v. New Orleans, La., 98 U.S. 381, 25 L.Ed. 225.

44 C.J. p 1286 note 84.

57. U.S.—Quincy v. U. S., Ill., 5 S. Ct. 544, 113 U.S. 332, 28 L.Ed. 1001.

44 C.J. p 1286 note 85.

58. U.S.—Cleveland v. U. S., Tenn., 111 F. 341, 49 C.C.A. 383—U. S. v. New Orleans, C.C.La., 27 F.Cas No. 15,871, 2 Woods 230, reversed on other grounds 98 U.S. 381, 25 L. Ed. 225.

59. Mont.—Glendive First Nat. Bank v. Dawson County, 240 P. 981, 74 Mont. 439—Glendive First Nat. Bank v. Sorenson, 210 P. 900, 65 Mont. 1.

60. Utah.—Shepard v. Kaysville, 52 P. 592, 16 Utah 340.

61. Ill.—Spring v. Olney, 78 Ill. 101.

62. Neb.—Burlington, etc., R. Co. v. Clay County, 13 N.W. 628, 13 Neb. 367.

44 C.J. p 1286 note 79.

63. U.S.—Oklahoma Utilities Co. v. City of Hominy, D.C.Okla., 2 F. Supp. 849.

Ill.—Sleight v. People, 74 Ill. 47.

Contingent debt

N.M.—Henning v. Town of Hot Springs, 102 P.2d 25, 44 N.M. 321.

excess of the constitutional debt limit, in so far as the excess is concerned,⁶⁴ the payment of a contract indebtedness incurred prior to the current year where no binding contract calling for payments beyond the fiscal year can be made,⁶⁵ or for the payment of a judgment where a tax could not be legally levied to pay the claim on which the judgment is based,⁶⁶ although it has been held that, under a statute making it the duty of a city council to levy a tax to pay a final judgment recovered against the city, the city cannot go behind the judgment and determine whether or not the judgment should have been entered.⁶⁷ However, where a contract indebtedness may be classed as a current expense of the municipality and is incurred during the current fiscal year, there may be power to tax for its payment as a current expense independently of the validity of the contract.⁶⁸ A municipality succeeding to the liability of another municipality as a result of obtaining a new or amended charter, as discussed supra § 97, has power to levy taxes to discharge such liability.⁶⁹

A constitutional provision prohibiting a city from incurring indebtedness in any year exceeding the income provided for that year does not bar a levy in subsequent years for payment of a judgment obtained on a contract claim in a prior year, where at the time of incurring the obligation under which the judgment arose there was money provided for

its payment and such money was not exhausted at the end of the year in which the obligation was incurred, although it was subsequently diverted to other purposes.⁷⁰ Where default of a maturing obligation is threatened by reason of a deficit in the proceeds derived from a tax levied to pay it, and money is temporarily diverted from some other fund to prevent such default, the municipality may levy a tax to repay such money to the fund from which it was diverted⁷¹ if the proceeds of the levy against which the loan is made are insufficient to complete repayment thereof.⁷²

Bonds. Authority to tax for the payment of the principal of, or interest on, bonds is conditioned on the liability of the municipality on the bonds;⁷³ but to the extent that such liability is established the authority to tax, when granted, exists.⁷⁴ A municipality has no power to levy a tax to pay bonds where the issuance thereof was forbidden by statute,⁷⁵ or in excess of the legal limit,⁷⁶ or where the bonds are otherwise invalid.⁷⁷ A constitutional provision giving the legislature power to authorize cities and towns to impose taxes for "municipal purposes" does not permit the giving to municipalities of such authority to issue bonds and to levy a municipal tax to pay the bonds, when the proceeds are to be used to erect schoolhouses and maintain a system of public education in the municipality contrary to other provisions in the constitution.⁷⁸ Un-

64. Ill.—Baltimore, etc., R. Co. v. People, 66 N.E. 148, 200 Ill. 541—Schulenburg, etc., Lumber Co. v. East St. Louis, 63 Ill.App. 214. 44 C.J. p 1287 note 94.

65. Ohio.—Jonas v. Cincinnati, 18 Ohio 318.

66. Cal.—Smith v. Broderick, 40 P. 1033, 107 Cal. 644, 48 Am.S.R. 167.

Claim barred by limitations

Okl.—Lowden v. Stephens County Excise Board, 126 P.2d 1023, 191 Okl. 5.

67. U.S.—City of Mohall v. First Nat. Bank, C.C.A.N.D., 105 F.2d 315, certiorari denied City of Mohall, North Dakota v. First Nat. Bank, 60 S.Ct. 110, 308 U.S. 587, 84 L.Ed. 491.

68. Ky.—Mayfield Woolen Mills v. Mayfield, 61 S.W. 43, 111 Ky. 172, 179, 22 Ky.L. 1676. 44 C.J. p 1287 note 97.

69. Tenn.—City of Brownsville v. Reid, 15 S.W.2d 745, 159 Tenn. 99. 43 C.J. p 169 note 66.

70. Cal.—Title Guarantee & Trust Co. v. City of Long Beach, 47 P.2d 472, 4 Cal.2d 56.

71. Ill.—People ex rel. Schlaeger v. Bunge Bros. Coal Co., 64 N.E.2d

365, 392 Ill. 153—People ex rel. McDonough v. Atchison, T & S F Ry. Co., 190 N.E. 362, 356 Ill. 251—People ex rel. McDonough v. New York Cent. R. Co., 188 N.E. 807, 355 Ill. 80.

72. Ill.—People ex rel. Schlaeger v. Bunge Bros. Coal Co., 64 N.E.2d 365, 392 Ill. 153—Gates v. Sweitzer, 179 N.E. 837, 347 Ill. 353, 79 A.L.R. 1151

Anticipation of failure of collection insufficient

Ill.—People ex rel. Schlaeger v. Bunge Bros. Coal Co., 64 N.E.2d 365, 392 Ill. 153.

73. Ark.—Ringgold v. Bailey, 97 S.W.2d 80, 93 Ark. 1.

Ind.—Letz Mfg. Co. v. Public Service Commission of Indiana, 4 N.E.2d 194, 210 Ind. 467.

La.—Mouton v. City of Lafayette, 152 So. 751, 178 La. 1041.

44 C.J. p 1287 note 98.

74. Ark.—McKenzie v. City of De Witt, 121 S.W.2d 71, 196 Ark. 1115—Morehart v. Mabelvale Road Imp. Dist. No. 29, 36 S.W.2d 68, 183 Ark. 411.

Ill.—People ex rel. Tuohy v. City of Chicago, 68 N.E.2d 761, 394 Ill. 477

—People ex rel. Toman v. Crane, 23 N.E.2d 337, 372 Ill. 228.

Minn.—State v. Brown, 248 N.W. 822, 189 Minn. 257, affirmed 249 N.W. 569, 189 Minn. 257.

Ohio.—City of Youngstown v. Mitchell, Com.Pl., 14 Ohio Supp. 83.

Okl.—Blake v. Abraham, 299 P. 488, 149 Okl. 112.

44 C.J. p 1287 note 99.

Bonds for nongovernmental purposes
U.S.—Murdock v. City of Asbury Park, D.C.N.Y., 48 F.Supp. 18.

Bonds issued for municipally owned utility

N.M.—State v. State Tax Commission, 280 P. 258, 34 N.M. 303.

Okl.—Perrine v. Bonaparte, 282 P. 332, 140 Okl. 165—St. Louis-San Francisco Ry. Co. v. Andrews, 278 P. 617, 137 Okl. 222.

75. Iowa.—Jeffries v. Lawrence, 42 Iowa 498.

76. Okl.—St. Louis-San Francisco Ry. Co. v. Hendrickson, 263 P. 148, 128 Okl. 266.

44 C.J. p 1287 note 3.

77. Ill.—Sherlock v. Winnetka, 68 Ill. 530.

78. Fla.—Brown v. Lakeland, 54 So. 716, 61 Fla. 508.

43 C.J. p 289 note 53.

der provisions for the levy of a tax each year sufficient to pay the principal and interest on the bonds falling due that year, a municipality may not levy a tax for any year in which no bond or interest on any bond will fall due,⁷⁹ and hence may not levy a tax to pay bonds which, although authorized to be issued by the taxpayers, have not been issued.⁸⁰

Tax anticipation warrants. A municipal corporation is without authority to levy a tax to pay tax anticipation warrants⁸¹ for a previous year,⁸² or the interest on such warrants for the current year⁸³ or for a preceding year.⁸⁴

Presumptions and burden of proof. To support the regularity of a tax, a presumption exists, in the absence of evidence to the contrary, that the indebtedness, for the payment of which the levy was made, is valid,⁸⁵ and the burden to prove the in-

validity of the indebtedness rests on the taxpayer who is seeking to avoid the payment of the tax.⁸⁶

d. Duty to Tax

It is the duty of a municipal corporation to levy taxes to pay its indebtedness, including bonded indebtedness, lawfully created and incurred.

It is the duty of a municipal corporation to assess, levy, and collect taxes to pay its indebtedness, including bonded indebtedness, lawfully created and incurred,⁸⁷ such duty being sometimes expressly imposed by statute⁸⁸ or constitutional provision.⁸⁹ Where bonds have been issued with a provision for the levy of stipulated taxes for their payment, the fund contracted to be raised by the agreed taxes is the foundation on which the bonds themselves rest, and the tax cannot thereafter be severed from the contract⁹⁰ so as to permit the municipality to refuse

79. La.—Mouton v. City of Lafayette, 152 So. 751, 178 La. 1041.

80. La.—Mouton v. City of Lafayette, supra—Kansas City Southern Railway Co. v. Hendricks, 90 So. 545, 150 La. 134.

Before amendment of constitution

La.—Gray v. Bourgeois, 32 So. 42, 107 La. 671.

44 C.J. p 1287 note 1.

81. Ill.—People ex rel. Gill v. Schiek, 14 N.E.2d 223, 368 Ill. 353.

Reasons for rule

(1) Tax anticipation warrants are not debts of the municipality as the term is commonly understood and are not a general liability against the city, but are to be paid only out of the taxes for the year against which the warrants are issued.—People ex rel. Lindheimer v. Axelrod, 26 N.E.2d 512, 373 Ill. 446.—People ex rel. Gill v. Schiek, 14 N.E.2d 223, 368 Ill. 353.—People ex rel. Gill v. Hamilton, 9 N.E.2d 243, 366 Ill. 455.

(2) One fund has already been created to pay such warrants, and a new levy would not be for a corporate purpose.—People ex rel. Lindheimer v. Axelrod, supra.

Warrants issued by another district
A park district has no statutory power to levy tax for payment of tax anticipation warrants lawfully issued by another park district, although it succeeded issuing district.—People ex rel. Gill v. Hamilton, 9 N.E.2d 243, 366 Ill. 455.

82. Okl.—In re Bliss, 285 P. 73, 142 Okl. 1.—C. D. Coggeshall & Co. v. Smiley, 285 P. 48, 142 Okl. 8.

83. Ill.—People ex rel. Gill v. Schiek, 14 N.E.2d 223, 368 Ill. 353.

84. Ill.—People ex rel. Reconstruction Finance Corporation v. Board of Education of City of Chicago, 54 N.E.2d 508, 386 Ill. 522, certiorari

denied 65 S.Ct. 70, 323 U.S. 733, 89 L.Ed. 588, rehearing denied 65 S.Ct. 115, 323 U.S. 814, 89 L.Ed. 648.—People ex rel. Gill v. Schiek, 14 N.E.2d 223, 368 Ill. 353.

85. Ill.—People ex rel. Schlaeger v. Bunge Bros. Coal Co., 64 N.E.2d 365, 392 Ill. 153.—Bigelow v. Washburn, 74 N.W. 362, 98 Wis. 553.

86. Ill.—People ex rel. Schlaeger v. Bunge Bros. Coal Co., 64 N.E. 365, 392 Ill. 153.

44 C.J. p 1287 note 6.

87. U.S.—North Miami, Fla., v. Meredith, CCA Fla., 121 F.2d 279, certiorari denied 62 S.Ct. 138, 314 U.S. 674, 86 L.Ed. 539.

Fla.—Town of North Miami v. Travis Co., 160 So. 360, 118 Fla. 879.

Ill.—People ex rel. McDonough v. New York Cent. R. Co., 188 N.E. 807, 355 Ill. 80.

Ky.—Wilson v. City of Covington, 295 S.W. 1069, 220 Ky. 795.

Okl.—Nipper v. Excise Board of Osage County, 39 P.2d 110, 170 Okl. 6.

Tex.—City of Houston v. McCraw, 113 S.W.2d 1215, 131 Tex. 127.

Wash.—Van Diest v. Yakima County, 65 P.2d 1080, 189 Wash. 411.

Bonds to which duty applies

(1) In general.—State ex rel. Georgia Bond & Mortgage Co. v. Cone, 189 So. 47, 137 Fla. 412.

(2) Municipal recreational revenue bonds payable solely from revenue of municipal recreational facilities and from proceeds of a utilities service tax, did not constitute an obligation of the city and no holder could coerce taxing power of city or enforce tax on realty to service principal or interest on bonds.—Schmeller v. City of Fort Lauderdale, Fla., 38 So.2d 36.

88. Cal.—Rancho Santa Anita v. City of Arcadia, 125 P.2d 475, 20 Cal.2d 319.

Fla.—Rountree v. State, 135 So. 888, 102 Fla. 246.

Ky.—Drane v. Weston, 125 S.W.2d 722, 276 Ky. 810.

Ohio.—State ex rel. Ohio Nat. Bank of Columbus v. Village of Hudson, 16 N.E.2d 266, 134 Ohio St. 150.

89. Ill.—People ex rel. Nash v. Westminster Bldg. Corporation, 197 N.E. 573, 361 Ill. 153.—People ex rel. McDonough v. New York Cent. R. Co., 188 N.E. 807, 355 Ill. 80.—People v. New York, C. & St. L. R. Co., 154 N.E. 193, 323 Ill. 493.

Ky.—Fulton County Fiscal Court v. Southern Bell Telephone & Telegraph Co., 146 S.W.2d 15, 285 Ky 17.—Wilson v. City of Covington, 295 S.W. 1069, 220 Ky. 795.

W.Va.—Zimmerman v. Town of New Martinsville, 188 S.E. 124, 177 W. Va. 752, 109 A.L.R. 958.

Bonds or debts embraced

(1) In general.

Ky.—Fulton County Fiscal Court v. Southern Bell Telephone & Telegraph Co., 146 S.W.2d 15, 285 Ky 17.—Herd v. City of Middlesboro, 99 S.W.2d 458, 266 Ky. 488.

N.M.—State v. State Tax Commission, 280 P. 258, 34 N.M. 303.

(2) Bonds issued before statehood.—Acres v. Excise Board of Muskegon County, 299 P. 136, 149 Okl. 84.—Pitts v. Allen, 281 P. 126, 138 Okl. 295.

Preference over other taxes

Ohio.—State ex rel. Stauss v. Cuyahoga County, 196 N.E. 890, 130 Ohio St. 64.

90. Fla.—Farmers & Bankers Life Ins. Co. v. Lake Hancock Imp. Dist., 25 So.2d 666.—City of Clearwater v. State, 147 So. 459, 108 Fla. 623.

Ill.—People ex rel. Browne v. Chicago & E. I. R. Co., 133 N.E. 212, 300 Ill. 467.

to levy the tax as long as it is in default on its obligations,⁹¹ and, similarly, constitutional or statutory provisions for the levying of a tax to support bonds or pay an indebtedness in effect at the time of issuing of the bonds or incurring of the indebtedness become part of the contract and binding on the municipality⁹² and the power and duty to levy taxes to meet such obligations cannot be abated or destroyed until the obligations have been fully satisfied.⁹³

The grant of power to tax for a payment of municipal indebtedness imposes on the municipality the duty of exercising such power⁹⁴ unless the whole amount of the taxes which it is allowed by law to levy has already been absorbed by the necessary current expenses of the corporation.⁹⁵ In some jurisdictions, when a judgment has been rendered against the city on its indebtedness, and is not barred by the statute of limitations,⁹⁶ the officers thereof are charged with the duty to levy

and collect sufficient taxes to pay it,⁹⁷ as by providing therefor in the general levy,⁹⁸ or by a special levy, if not already included in the general levy.⁹⁹ An agreement to levy a special tax cannot be implied from an ordinance making it the duty of the council to provide means to meet the payment of a designated debt when it becomes due.¹ A tax to be imposed as long as needed to pay a particular debt means an imposition of the tax until the debt is satisfied² or until a sum sufficient for that purpose has been raised.³ The obligation to levy a tax to pay bonds is a continuing one, and, where the time for the levy elapses, the duty remains and the tax must be levied in a subsequent year.⁴

Provisions requiring a municipality to provide for collection of taxes to pay municipal indebtedness contemplate not merely the levy of taxes sufficient to meet principal and interest payments but collection thereof as well;⁵ such obligation is not satisfied by an assessment and rate of levy sufficient

Pledge of full faith and credit

Fla.—State v. City of Lakeland, 16 So 2d 924, 154 Fla. 137.

91. Fla.—State ex rel. Harrington v. City of Daytona Beach, 160 So. 501, 118 Fla. 773.

Appropriation from other fund

Municipality cannot refuse to discharge its contractual duty to exercise its pledged taxing powers until it has appropriated sufficient funds from such other sources to render exercise of its pledged taxing powers unnecessary during particular period for which such powers would otherwise be required by existing law to be exercised.—State ex rel. Harrington v. City of Daytona Beach, *supra*.

92. Fla.—State ex rel. Woman's Catholic Order of Foresters v. City of Fort Myers, 196 So. 705, 143 Fla. 304.—State ex rel. Gulf Life Ins. Co. v. City of Jacksonville Beach, 194 So. 739, 142 Fla. 277.—State ex rel. Women's Catholic Order of Foresters v. City of Fort Myers, 191 So. 239, 140 Fla. 224.—State ex rel. Dos Amigos v. Lehman, 131 So. 533, 100 Fla. 1313.

Ill.—People v. New York, C. & St. L. R. Co., 154 N.E. 193, 323 Ill. 493.

Okl.—St. Louis-San Francisco Ry. Co. v. Andrews, 278 P. 617, 137 Okl. 222.

Wash.—State ex rel. Washington Mut. Sav. Bank v. City of Bellingham, 111 P.2d 781, 8 Wash.2d 233.

93. U.S.—Women's Catholic Orders of Foresters v. City of Arlington, D.C.Tex., 28 F.Supp. 663.

Wash.—State ex rel. Washington Mut. Sav. Bank v. City of Bellingham, 111 P.2d 781, 8 Wash.2d 233.

94. Fla.—State ex rel. Babson v.

City of Sebring, 155 So 669, 115 Fla. 176.—State ex rel. Montgomery v. City of Ft. Pierce, 143 So. 733, 106 Fla. 845.

Or.—State ex rel. First Nat. Bank v. Melville, 41 P.2d 1071, 149 Or. 532.—Morris, Mather & Co. v. Port of Astoria, 15 P.2d 385, 141 Or. 251. 44 C.J. p 1287 note 8.

95. Iowa.—Porter v. Thomson, 22 Iowa 391.

96. Neb.—State v. Royse, 91 N.W. 559, 3 Neb. (Unoff.) 262.

97. U.S.—City of Mohall v. First Nat. Bank, C.C.A.N.D., 105 F.2d 315, certiorari denied City of Mohall, North Dakota v. First Nat. Bank, 60 S.Ct. 110, 308 U.S. 587, 84 L.Ed. 491.—City of Wheeling v. John F. Casey Co., C.C.A.W.Va., 89 F.2d 308, certiorari denied 58 S.Ct. 15, 302 U.S. 697, 82 L.Ed. 538.—Village of Oshkosh, Neb., v. State of Nebraska ex rel. Fairbanks, Morse & Co., C.C.A.Neb., 20 F.2d 621, followed in Village of Oshkosh, Neb., v. State of Nebraska ex rel. McGraw Co., 20 F.2d 624.

Ill.—Neidhardt v. City of Wood River, 69 N.E.2d 345, 329 Ill.App. 485.

Iowa.—Middle States Utilities Co. v. City of Osceola, 1 N.W.2d 643, 231 Iowa 462.

N.Y.—Cherey v. City of Long Beach, 26 N.E.2d 945, 282 N.Y. 382, 127 A.L.R. 1210.

N.C.—Maryland Casualty Co. v. Le-

land, 199 S.E. 7, 214 N.C. 235. 44 C.J. p 1287 note 11.

General judgment
U.S.—City of Mohall v. First Nat. Bank, C.C.A.N.D., 105 F.2d 315, certiorari denied City of Mohall, North Dakota v. First Nat. Bank,

60 S.Ct. 110, 308 U.S. 587, 84 L.Ed. 491.

Judgment satisfied with borrowed money

Statutes require mayor and governing body of city to provide money for payment of judgment against it by levying sufficient tax in addition to authorized general tax levy for following year, whether or not judgment is first satisfied with borrowed money.—State v. City of Vebelen, 237 N.W. 555, 58 S.D. 451.

98. U.S.—Borough of Fort Lee, N. J. v. United States ex rel. Barker, C.C.A.N.J., 104 F.2d 275, certiorari dismissed Borough of Fort Lee v. U. S. ex rel. Barker, 60 S.Ct. 136, 308 U.S. 629, 84 L.Ed. 525.

La.—State v. New Orleans, 30 La. Ann. 129.

99. U.S.—Ex parte Parsons, C.C.S. C., 18 F.Cas.No.10,774, 1 Hughes 282.

1. US—U. S. v. Burlington, C.C. Iowa, 24 F.Cas.No.14,687, reversed on other grounds 14 S.Ct. 1212, 154 U.S. 568, 19 L.Ed. 495.

2. Ky.—Louisville v. Murphy, 5 S. W. 194, 86 Ky. 53, 9 Ky.L. 310.

3. Ky.—Louisville v. Murphy, *supra*.

4. Cal.—American Securities Co. v. Forward, 32 P.2d 343, 220 Cal. 566, 96 A.L.R. 1268.

5. Ill.—People ex rel. Gill v. 110 South Dearborn St. Corporation, 2 N.E.2d 68, 363 Ill. 286.—People ex rel. Nash v. Westminster Bldg. Corporation, 197 N.E. 573, 361 Ill. 153.—People ex rel. McDonough v. New York Cent. R. Co., 188 N.E. 807, 355 Ill. 80.

to pay the debt if all the taxes levied are collected,⁶ but requires that there be a sufficient assessment and levy actually to pay the debt after deduction of losses in collection.⁷ The municipality is vested with a certain amount of discretion as to the amount to be levied to pay maturing obligations,⁸ but the right to exercise such discretion is in the city council or board having power to tax⁹ and does not extend to other officers charged with ministerial duties in the assessment and collection of the tax.¹⁰ The city cannot be compelled to levy a tax greater than that which will produce a fund sufficient to pay its outstanding maturing obligations.¹¹

Under a statute providing for the issuance of improvement bonds to represent assessments levied for improvements, and providing that on default of payment of such assessments the land securing them shall be sold, and that if the city becomes the purchaser it must pay the amount of the delinquent assessment into a bond redemption fund or, if there are no available funds in the treasury to make such payment, levy a special tax and pay the proceeds into the redemption fund, the duty to levy such tax in a proper case is mandatory;¹² also, where special assessments under a statute authorizing a municipal bond issue are not imposed or collected in season to pay the principal and interest on the bonds, the municipality may be under a duty to

levy and collect a tax sufficient therefor.¹³

Commencement of foreclosure proceedings by the city does not permit it to escape such mandatory duty;¹⁴ nor is a mandatory duty to levy a tax to pay bonds satisfied by appropriating delinquent taxes or setting aside prospective future collections of special assessments to pay the bonds,¹⁵ by the fact that the bonds are based on mechanics' lien agreements,¹⁶ or by an assessment of costs of the improvement against abutting property owners.¹⁷ The poverty or unfortunate financial condition of a municipality does not excuse it from carrying out its mandatory duty to levy a tax annually sufficient to pay the principal and interest on its bonds;¹⁸ nor is the oppressiveness resulting from taxing in one year property within a municipality to pay accumulated defaults of many years on municipal bonds a good excuse.¹⁹

§ 1998. Sinking Fund

Under some constitutional or statutory provisions municipal corporations are authorized or required to levy taxes to create sinking funds for the payment of certain municipal obligations when due.

While taxation to create a sinking fund must be based on legislative authority,²⁰ under some constitutional or statutory provisions municipal corporations are authorized,²¹ and sometimes required,²²

6. U.S.—*Norris v. Montezuma Valley Irr. Dist.*, Colo., 248 F. 369, 160 C.C.A. 379, certiorari denied 39 S.Ct. 10, 248 U.S. 569, 63 L.Ed. 425.

Fla.—*Rountree v. State*, 135 So. 888, 102 Fla. 246—*Jinkins v. Entzminger*, 135 So. 785, 102 Fla. 167, followed in *State v. Upper St. Johns River Nav. Dist.*, 135 So. 784, 102 Fla. 183.

Ill.—*Gates v. Sweltzer*, 179 N.E. 837, 347 Ill. 853, 79 A.L.R. 1151.

7. U.S.—*Norris v. Montezuma Valley Irr. Dist.*, Colo., 248 F. 369, 160 C.C.A. 379, certiorari denied 39 S.Ct. 10, 248 U.S. 569, 63 L.Ed. 425. Fla.—*Jinkins v. Entzminger*, 135 So. 785, 102 Fla. 167, followed in *State v. Upper St. Johns River Nav. Dist.*, 135 So. 784, 102 Fla. 183—*Rountree v. State*, 135 So. 888, 102 Fla. 246.

Ill.—*Gates v. Sweltzer*, 179 N.E. 837, 347 Ill. 353, 79 A.L.R. 1151.

8. Wash.—*State v. Mutty*, 82 P. 118, 39 Wash. 624.

9. Ill.—*People v. Chicago, etc.*, R. Co., 124 N.E. 658, 289 Ill. 282.

10. Ill.—*People v. Chicago, etc.*, R. Co., *supra*.

11. Fla.—*State v. City of Clearwater*, 169 So. 602, 125 Fla. 73.

12. Cal.—*Union Safe Deposit Bank*

v. City of Menlo Park, 43 P.2d 811, 3 Cal.2d 264—*American Co. v. City of Lakeport*, 32 P.2d 622, 220 Cal. 548—*Los Angeles Gas & Electric Corporation v. City Council of City of Seal Beach*, 68 P.2d 326, 18 Cal. App.2d 97—*Thompson v. City of La Mesa*, 50 P.2d 504, 9 Cal.App.2d 542.

Statute held valid

Cal.—*American Co. v. City of Lakeport*, 32 P.2d 622, 220 Cal. 548.

City as "guarantor" of bonds

Cal.—*Wulff-Hansen & Co. v. Silvers*, 131 P.2d 373, 21 Cal.2d 253.

13. Fla.—*City of Sanford v. Dial*, 142 So. 233, 104 Fla. 1—*State ex rel. Gillespie v. Baskin*, 136 So. 262, 102 Fla. 329.

14. Cal.—*Hammond v. City of Burbank*, 59 P.2d 495, 6 Cal.2d 546, appeal dismissed 57 S.Ct. 316, 299 U.S. 519, 81 L.Ed. 383—*American Co. v. City of Lakeport*, 32 P.2d 622, 220 Cal. 548.

15. Fla.—*Rountree v. State*, 135 So. 888, 102 Fla. 246.

16. Tex.—*City of Fort Worth v. Bobbitt*, 41 S.W.2d 228, 121 Tex. 14.

17. Tex.—*City of Fort Worth v. Bobbitt*, *supra*.

18. Fla.—*State ex rel. Dos Amigos*

v. Lehman, 131 So. 533, 100 Fla. 1313.

Or.—*Morris, Mather & Co. v. Port of Astoria*, 15 P.2d 385, 141 Or. 251.

19. U.S.—*North Miami, Fla., v. Meredith*, C.C.A.Fla., 121 F.2d 279, certiorari denied 62 S.Ct. 138, 314 U.S. 674, 86 L.Ed. 539.

20. Neb.—*Union Pac. R. Co. v. York County*, 7 N.W. 270, 10 Neb. 612. 44 C.J. p 1288 note 22.

21. Fla.—*City of Bradenton v. Fusillo*, 184 So. 234, 134 Fla. 759.

Ky.—*City of Jackson v. First Nat Bank of Jackson*, 157 S.W.2d 321, 289 Ky. 1.

Okl.—*Blake v. Abraham*, 299 P. 488, 149 Okl. 112—*Perrine v. Bonaparte*, 282 P. 332, 140 Okl. 165—*St. Louis-San Francisco Ry. Co. v. Andrews*, 278 P. 617, 137 Okl. 222.

44 C.J. p 1288 note 22.

Authority held expressly granted

Iowa.—*Youngerman v. Murphy*, 76 N.W. 648, 107 Iowa 686. 44 C.J. p 1288 note 23.

22. Okl.—*Jones v. Blaine*, 300 P. 369, 149 Okl. 153—*Adjustment Realty Co. v. Excise Board of Muskogee County*, 289 P. 207, 149 Okl. 70—*Pitts v. Allen*, 281 P. 126, 138 Okl. 295—*St. Louis-San Francis-*

to levy taxes to create sinking funds for the payment of certain municipal obligations when due; and, under some provisions, where bonds are issued a tax levy sufficient to take care of sinking fund requirements must be levied each year during the life of the bonds.²³ A power to tax for a sinking fund will be implied from a charter provision that sinking fund charges must be annually provided for.²⁴ An express power to tax for a sinking fund authorizes a tax levy to pay the installments of the indebtedness which, by the terms of the contract creating it, fall due from year to year,²⁵ but, as discussed supra § 1997 b, does not authorize a levy to pay a floating indebtedness. The authority or duty to levy a sinking fund tax is controlled by the terms of the statute in force at the time the tax is levied²⁶ rather than by an earlier statute in force when improvement proceedings, because of which the sinking fund was established, were commenced.²⁷

A tax for a sinking fund in excess of the amount needed for such purposes in any one year is invalid as to the excess;²⁸ and a sinking fund tax cannot be continued after the purpose for which it was authorized has been accomplished.²⁹ The validity of the tax is not affected by its insufficiency to provide the fund necessary to discharge the indebtedness at maturity;³⁰ by its being made pay-

able to a sinking fund commission which no longer exists;³¹ by the fact that the city invested the proceeds of the tax in bonds representing the indebtedness;³² by the fact that the bonds representing the indebtedness were issued by the municipality to provide funds to comply with orders promulgated by a state board under the mandatory provisions of a statute;³³ or by the fact that the tax for sinking fund purposes will result in a general tax rate in excess of the legal limit, where the electors have power under the law to vote the excess tax and have so voted.³⁴

Where the legislature, however, acting under a power granted by the constitution, has provided that "in no case shall the combined maximum rate for all taxes levied in any year exceed" a stated amount, a tax cannot be levied for the sinking fund if it results in a general tax levy in excess of that amount.³⁵ Under a statute providing for a levy to be made to reimburse the sinking fund for the amount paid out of it in payment of a judgment against the municipality, such levy must include the principal amount of the judgment together with the interest thereon.³⁶ In determining the amount required to be levied for sinking fund purposes, no deduction can be made for estimated receipts from other sources.³⁷ Taxes levied for sinking fund

co Ry. Co. v. Andrews, 278 P. 617, 137 Okl. 222.

Wash.—State ex rel. Washington Mut. Sav. Bank v. City of Bellingham, 111 P.2d 781, 8 Wash.2d 233—Longview Co. v. Lynn, 108 P.2d 365, 6 Wash.2d 507.

23. Okl.—Adjustment Realty Co. v. Excise Board of Muskogee County, 299 P. 207, 149 Okl. 70.

Tex.—City of Odessa v. Elliott, Civ. App., 47 S.W.2d 866, reversed on other grounds, Com.App., 58 S.W. 2d 34.

Number of levies

(1) The number of levies authorized to retire municipal bonds at maturity is the number of fiscal years between the date of issue and the date of maturity.—Berryman v. Bonaparte, 11 P.2d 164, 155 Okl. 165—Jones v. Blaine, 300 P. 369, 149 Okl. 153—In re Gypsy Oil Co., 285 P. 66, 141 Okl. 298—Aaronson v. Smiley, 285 P. 59, 142 Okl. 29—C. D. Coggeshall & Co. v. Smiley, 285 P. 48, 142 Okl. 8.

(2) Where the maturity of the bonds during the fiscal year is on or after June 15, the number of tax levies should be equal to the number of fiscal years between the issuance of the bonds and their maturity, but the number of levies should

be one less than the number of intervening years if the maturity date is before June 15.—Berryman v. Bonaparte, supra—Jones v. Blaine, supra—Protest of Trimble, 300 P. 406, 151 Okl. 74.

(3) Municipality may begin sinking fund levy on twenty-fifth year before maturity of bonds maturing twenty-five years from issue, notwithstanding statute relieving municipality of duty of levying a tax for a sinking fund before the twentieth year prior to maturity—Commerce Trust Co., Kansas City, Mo., v. Morris, 11 P.2d 183, 157 Okl. 127.

24. Tex.—Wright v. San Antonio, Civ.App., 50 S.W. 406.

25. Ky.—Mayfield Woolen Mills v. Mayfield, 61 S.W. 43, 111 Ky. 172, 22 Ky.L. 1676.

26. Ohio.—Alexander v. Spencer, 13 Ohio Cir.Ct., N.S., 475, 32 Ohio Cir. Ct. 306, affirmed 94 N.E. 1115, 83 Ohio St. 492.

44 C.J., p 1288 note 25.

27. Ohio.—Alexander v. Spencer, supra.

44 C.J. p 1288 note 26.

28. Mont.—Corpus Juris quoted in Rogge v. Petroleum County, 80 P. 2d 380, 381, 107 Mont. 36.

Okl.—Protest of St Louis-San Fran-

cisco Ry. Co., 26 P.2d 212, 166 Okl. 50—Jones v. Blaine, 300 P. 369, 149 Okl. 153—St. Louis-San Francisco R Co v Forbess, 237 P. 596, 111 Okl. 48

"Working cash fund"

Ill.—People ex rel. McDonough v. Mills Novelty Co., 192 N.E. 236, 357 Ill. 285.

29. Ky.—Louisville v. Murphy, 5 S.W. 194, 86 Ky. 53, 9 Ky.L. 310.

Neb.—Union Pac. R. Co. v. Dawson County, 11 N.W. 307, 12 Neb. 254.

30. Tex.—Conklin v. El Paso, Civ. App., 44 S.W. 879.

31. Ky.—Woolley v. Louisville, 71 S.W. 893, 114 Ky. 556, 24 Ky.L. 1357.

32. Tex.—Conklin v. El Paso, Civ. App., 44 S.W. 879.

33. Ohio.—State v. Dean, 116 N.E. 37, 95 Ohio St. 108.

34. Mo.—State v. Payne, 109 S.W. 728, 211 Mo. 64.

Mont.—Glendive First Nat Bank v. Sorenson, 210 P. 900, 65 Mont. 1.

35. Ohio.—State v. Bish, 135 N.E. 816, 104 Ohio St. 206.

36. Okl.—Prairie Pipe Line Co. v. Excise Board of Pottawatomie County, 32 P.2d 868, 168 Okl. 250.

37. Okl.—Berryman v. Bonaparte,

purposes under a composition plan must be sufficient to satisfy the requirements of the plan.³⁸

Existence and nature of indebtedness. The nature of the indebtedness for the payment of which a city is authorized or required to create a sinking fund by taxation is determined by the statutory or constitutional provisions.³⁹ Unless the statute so authorizes,⁴⁰ a tax for the sinking fund cannot be levied before the creation of the debt,⁴¹ but a tax to pay interest for the fiscal year and the sinking fund charges may be levied, even though the indebtedness was created less than one year prior to the levy.⁴² Where only part of the authorized indebtedness is in existence at the time of the levy, and the indebtedness is divisible, as is the case if bonds are issued therefor, a tax for the sinking fund will be upheld to the extent that it is required for sinking fund charges on that part.⁴³ So, where municipal bonds payable in equal installments at intervals of several years constitute one transaction, a levy for the sinking fund should be made equally each year.⁴⁴ Taxes cannot be levied to create a sinking fund for void bonds.⁴⁵ The burden, however, is on the taxpayer to prove that the bonds are void.⁴⁶

Levy for sinking fund deficit. In some jurisdictions, in the absence of statute, a municipality has no authority to levy a tax to replenish a sinking fund deficit,⁴⁷ but it may be expressly authorized to do so by legislature;⁴⁸ and a statute conferring such authority is not unconstitutional.⁴⁹ The sole

requisite of such a levy is that there must be a deficit in the sinking fund at the time of the levy,⁵⁰ and no greater deficit levy should be made in any one fiscal year than is necessary to provide sufficient cash in the sinking fund to meet obligations when due,⁵¹ although it is not necessary in order to authorize the levy that those obligations fall due within the current fiscal year.⁵²

Report or approval as condition precedent. Under some statutes a report to the common council by sinking fund commissioners as to the amount to be raised for such fund is required before such a levy can be made.⁵³ Where the power to tax for a sinking fund is once shown to exist, its exercise is not made subject to the approval of the state tax commission by a statute making such approval a condition precedent to an increase of the general tax rate by the municipality.⁵⁴

Compelling levy. Where a levy for the sinking fund is discretionary with the council, such a levy cannot be compelled by the courts.⁵⁵ The rule is otherwise where under the statute the duty to tax is mandatory.⁵⁶

§ 1999. Deficit Tax

Under proper authority a municipal corporation may levy a tax to make up a past deficiency or to provide for a prospective one.

In the absence of statutory or charter restrictions, a municipal corporation may assess the deficiency of the preceding year in the next,⁵⁷ or may levy a

- 11 P.2d 164, 155 Okl. 165—Protest of Trimble, 300 P. 406, 151 Okl. 74—Adjustment Realty Co. v. Excise Board of Muskogee County, 299 P. 207, 149 Okl. 70—Gulf, C. & S. F. Ry. Co. v. Excise Board of Love County, 283 P. 1003, 141 Okl. 34—Pitts v. Allen, 281 P. 126, 138 Okl. 225—St. Louis-San Francisco Ry. Co. v. Andrews, 278 P. 617, 137 Okl. 222.
38. U.S.—Gentry v. City of Fort Lauderdale, C.C.A.Fla., 125 F.2d 52.
39. Ky.—Herd v. City of Middleboro, 99 S.W.2d 458, 266 Ky. 488.
40. Iowa—Youngerman v. Murphy, 76 N.W. 648, 107 Iowa 686.
41. Tex.—Nalle v. Austin, Civ.App., 42 S.W. 780.
- Bonds not sold**
- Okl.—Protest of Bledsoe, 17 P.2d 979, 161 Okl. 227.
- 44 C.J. p 1288 note 33 [a].
42. Tex.—Nalle v. Austin, Civ.App., 42 S.W. 780.
43. Tex.—Nalle v. Austin, supra.
44. Okl.—In re Gypsy Oil Co., 285 P. 66, 141 Okl. 298—C. D. Cogge-

- shall & Co. v. Smiley, 285 P. 48, 142 Okl. 8—St. Louis-San Francisco Ry. Co. v. Bailey, 257 P. 784, 125 Okl. 183.
45. Tex.—Tyler v. Tyler Bldg., etc., Assoc., 86 S.W. 750, 99 Tex. 6.
46. Mont.—Glendive First Nat. Bank v. Sorenson, 210 P. 900, 65 Mont. 1.
- Tex.—Tyler v. Tyler Bldg., etc., Assoc., 86 S.W. 750, 99 Tex. 6.
47. Okl.—Excise Board of Stephens County v. Chicago, R. I. & P. Ry. Co., 34 P.2d 968, 168 Okl. 523—Missouri, K. & T. R. Co. v. Goad, 245 P. 617, 117 Okl. 129.
- Deficit tax generally see *infra* § 1999.
48. Okl.—Excise Board of Stephens County v. Chicago, R. I. & P. Ry. Co., 34 P.2d 968, 168 Okl. 523.
49. Okl.—Excise Board of Stephens County v. Chicago, R. I. & P. Ry. Co., supra.
50. Okl.—Le Flore County Excise Board v. St. Louis-San Francisco Ry. Co., 93 P.2d 1087, 185 Okl. 440.
51. Okl.—Le Flore County Excise Board v. St. Louis-San Francisco Ry. Co., supra.

- Insufficient levy in preceding years**
- Where deficit appears in sinking fund for purpose of retiring municipal bonds because of failure to levy sufficient tax for preceding years, omitted amount cannot be included in levy for subsequent year.—Protest of Chicago, R. I. & P. Ry. Co., 10 P. 2d 398, 156 Okl. 197.
52. Okl.—Texas-Empire Pipe Line Co. v. Tulsa County Excise Board, 131 P.2d 745, 191 Okl. 586.
53. Minn.—St. Louis County v. Nettleton, 22 Minn. 356.
54. N.M.—Albuquerque v. Water Supply Co., 174 P. 217, 24 N.M. 368, 5 A.L.R. 519.
- 44 C.J. p 1288 note 39.
55. Ky.—Louisville Sinking Fund Com'rs v. Grainger, 32 S.W. 954, 98 Ky. 319, 17 Ky.L. 901.
56. Cal.—Wulff-Hansen & Co. v. Silvers, 131 P.2d 373, 21 Cal.2d 253.
- Ohio.—State v. Zangerle, 115 N.E. 1013, 94 Ohio St. 447.
57. Ill.—People ex rel. Schlaeger v. Frankenstein & Co., 72 N.E.2d 340, 396 Ill. 524—People ex rel. McDonough v. Mills Novelty Co., 192 N. E. 236, 357 Ill. 285.

tax to provide for a prospective deficiency;⁵⁸ and in some jurisdictions there are express statutory and charter provisions for the levy of a deficit tax to make up for uncollected taxes of past years.⁵⁹ Although a municipality may have discretionary

power to establish and use an emergency fund to supply deficiencies in any other fund,⁶⁰ the exercise of such discretion must be honest and not arbitrary.⁶¹

2. PERSONS AND PROPERTY TAXABLE AND PLACE OF TAXATION

a. In General

§ 2000. In General

- a. In general
- b. Personal liability and ownership of property
- c. Particular kinds of taxes

a. In General

Generally speaking, all persons and property within its corporate limits are taxable by a municipal corporation under legislative sanction and constitutional restrictions.

All persons and all property within the corporate limits, whether real or personal, if taxable by

the state, ordinarily are subject to municipal taxation under authority conferred by the legislature,⁶² although the property or taxpayer derives no benefit from the tax imposed.⁶³ In order to be the subject of such municipal exaction, however, the property must be taxable within the contemplation of the regulatory statute or ordinance⁶⁴ which is subject to the rule of strict construction,⁶⁵ although provisions imposing municipal taxes will be construed in the light of their context,⁶⁶ and with due regard for other statutes creating exemption from taxation.⁶⁷ Property may not be taxed in violation

Tex.—Corpus Juris quoted in Howth v. City of Beaumont, Civ.App., 118 S.W.2d 350, 353.

44 C.J. p 1289 note 51.

Levy for sinking fund deficit see *supra* § 1998.

58. La.—Oakley v. New Orleans, 1 La. 1.

Mich.—Burnett v. City of Grand Rapids, 250 N.W. 320, 264 Mich. 593.

Tex.—Corpus Juris quoted in Howth v. City of Beaumont, Civ.App., 118 S.W.2d 350, 353.

59. Tex.—Corpus Juris quoted in Howth v. City of Beaumont, Civ. App., 118 S.W.2d 350, 354.

Police pension fund

Ind.—Pavey v. Pavey, 42 N.E.2d 30, 220 Ind. 289.

60. Iowa.—Mathewson v. City of Shenandoah, 11 N.W.2d 571, 233 Iowa 1368.

61. Iowa.—Mathewson v. City of Shenandoah, *supra*.

Refusal to levy held proper

Iowa.—Mathewson v. City of Shenandoah, *supra*.

62. Fla.—City of Winter Haven v. A. M. Klemm & Son, 181 So. 153, 132 Fla. 334, rehearing denied 182 So. 841, 133 Fla. 525—**Long v. St. John**, 170 So. 817, 126 Fla. 1, 109 A.L.R. 809.

Ga.—City of Waycross v. Cottingham, 4 S.E.2d 87, 60 Ga.App. 483.

Ky.—Brown v. Town of Dover, 120 S.W.2d 225, 274 Ky. 692.

Mass.—United Shoe Machinery Corporation v. Gale Shoe Mfg. Co., 49 N.E.2d 913, 314 Mass. 142—**City of**

Boston v. Boston Port Development Co., 30 N.E.2d 896, 308 Mass. 72, 133 A.L.R. 515.

Mo.—Kansas City v. J. I. Case Threshing Mach. Co., 87 S.W.2d 195, 337 Mo. 913.

S.C.—Shillito v. City of Spartanburg, 51 S.E.2d 95, 214 S.C. 11.

W.Va.—McCoy v. City of Sistersville, 199 S.E. 260, 120 W.Va. 471. 44 C.J. p 1289 note 55.

63. Mo.—State ex rel. Kellett v. Johnson, 50 S.W.2d 121, 330 Mo. 452.

Neb.—Schulz v. Dixon County, 279 N.W. 179, 134 Neb. 549, 119 A.L.R. 1294.

Examples of tax without benefit

A citizen is obligated to pay his proportion of a school tax, although he has no children, and of a fire or police tax, although he has no buildings or personal property, or of a road tax, even though he never uses the road.—**Schulz v. Dixon County**, 279 N.W. 179, 134 Neb. 549, 119 A.L.R. 1294.

64. Mass.—United Shoe Machinery Corporation v. Gale Shoe Mfg Co., 49 N.E.2d 913, 314 Mass. 142.

N.Y.—Sterling Bag Co. v. Taylor, 7 N.Y.S.2d 45, 169 Misc. 5, affirmed **Sterling Bag Co. v. City of New York**, 11 N.Y.S.2d 297, 256 App. Div. 645, affirmed 22 N.E.2d 369, 281 N.Y. 269.

Pa.—City of Philadelphia v. Goldfine, 29 A.2d 233, 151 Pa.Super 59.

Personalty tax limited to items specified

The New York City personal prop-

erty tax law providing for a tax on specific items and groups of items of personal property situate or owned within New York City did not contemplate taxation of all personality, but only of those items specified therein.—**In re Rush Terminal Co.**, C.C.A.N.Y., 93 F.2d 659.

65. Pa.—In re Pennsylvania Co. for Insurances on Lives and Granting Annuities, 11 A.2d 160, 337 Pa. 321.

66. Pa.—In re Pennsylvania Co. for Insurances on Lives and Granting Annuities, *supra*.

Opening clause

The statute imposing four-mill tax for county and city purposes on loans, credits, securities, etc., does not intend to tax all personal property since opening clause limits property subject to tax to "the classes of property hereinafter enumerated" and statute describes property concerned with great particularity, avoiding general phrases, and where general phrases are used, they are linked with context so as to limit the generality of their application.—**In re Pennsylvania Co. for Insurances on Lives and Granting Annuities**, *supra*.

67. Mass.—New England Mut. Life Ins Co. v. City of Boston, 75 N.E. 2d 505, 321 Mass. 683.

Exemption generally see *infra* §§ 2006-2014.

Leased tangibles

A literal construction of statutory provision regarding taxation of tangible personal property leased for profit is not to be adopted where it would result in subjecting to local

of the owner's organic rights.⁶⁸ The determination of what articles or transactions are taxable is a legislative function, and administrative municipal tax authorities have power to determine only what articles fall within the field selected for taxation by the legislature,⁶⁹ and, where the facts are undisputed, the question whether any particular article falls within the field is a question of law.⁷⁰

The power to tax real and personal estate does not require the municipality to tax both kinds of property,⁷¹ and, unless prohibited by law, each may be taxed separately.⁷² The option given to municipalities by a constitutional provision to substitute for the ad valorem tax on personalty a tax based on income, licenses, or franchises necessarily carries with it the power to define the class of property as to which the substitution is made.⁷³ Authority to tax real property does not confer any power to tax personal property.⁷⁴ The question whether particular property is personalty or realty for purpose of taxation is to be determined by construing and applying the pertinent taxation statutes,⁷⁵ and not by ascertaining whether, under the strict rules of the common law, the property should, as between individuals, be termed "real estate" or "personal property."⁷⁶ Property which is taxable for one purpose must be held to be taxable for all purposes of general taxation.⁷⁷ However, a city cannot tax the same property twice unless authority to do so is conferred by the express words of a statute or by necessary implication.⁷⁸

Property under highway. Property of a taxpayer placed under a public highway is none the less taxable because it is suffered to remain there under a permit revocable by the city,⁷⁹ or because after the lapse of a fixed term it becomes the property of the city,⁸⁰ especially where, in the agreement with the city, the taxpayer covenants to pay taxes thereon.⁸¹

b. Personal Liability and Ownership of Property

One owning property on the tax date may become personally liable for municipal taxes thereon, and continue liable, even though he sells the property; on the other hand, the purchaser or lessee of property may become liable for taxes on his interest as beneficial owner.

In accordance with rules governing questions of ownership as affecting general taxation of property, as discussed in the C.J.S. title Taxation §§ 92-106, also 61 C.J. p 204 note 40-p 219 note 44, which rules ordinarily control as to matters respecting ownership of property for purposes of municipal taxation,⁸² one owning property on the tax date may become personally liable for the taxes thereon,⁸³ and such liability may continue, even though he sells the property to another before the taxes become payable.⁸⁴ The record owner of real estate on the date when taxes accrue and become due may be liable therefor, even though he sells the property during the year.⁸⁵ On the other hand, the purchaser's interest in property is subject to tax after he acquires a beneficial ownership, even though legal title may not yet have passed to him.⁸⁶

taxation personal property exempt from such taxation by another statute—*New England Mut. Life Ins. Co. v. City of Boston*, *supra*.

68. Fla.—*State ex rel. Harrington v. City of Pompano*, 188 So. 610, 136 Fla. 730.

69. N.Y.—*Good Humor Corporation v. McGoldrick*, 46 N.E.2d 881, 289 N.Y. 452.

70. N.Y.—*Good Humor Corporation v. McGoldrick*, *supra*.

71. La.—*New Orleans Second Municipality v. Duncan*, 2 La. Ann. 182—*Oakey v. New Orleans*, 1 La. 1.

72. La.—*New Orleans Second Municipality v. Duncan*, 2 La. Ann. 182.

73. Ky.—*Schuster v. Louisville*, 89 S.W. 689, 124 Ky. 189, 28 Ky.L. 588.

74. Miss.—*Adams v. Ducate*, 38 So. 497, 86 Miss. 276.

75. Conn.—*Comstock v. Waterford*, 81 A. 1059, 85 Conn. 6, 37 L.R.A., N.S., 1166.

N.Y.—*New York Telephone Co. v. Canough*, 36 N.Y.S.2d 283, 264 App.

Div. 937, affirmed *In re New York Telephone Co.*, 49 N.E.2d 999, 290 N.Y. 537, motion denied 51 N.E.2d 931, 291 N.Y. 648, and 52 N.E.2d 595, 291 N.Y. 709.
44 C.J. p 1289 note 60.

76. Conn.—*Comstock v. Waterford*, 81 A. 1059, 85 Conn. 6, 37 L.R.A., N.S., 1166.

Distinction between real and personal property generally see the C.J.S. title Property § 10, also 50 C.J. p 768 notes 73-89.

77. Wis.—*Hale v. Kenosha*, 29 Wis. 599.

78. Ga.—*Georgia Bank v. Savannah*, Dudl. 130.

79. N.Y.—*People v. Cantor*, 195 N.Y. S. 377, 202 App.Div. 194, affirmed 138 N.E. 442, 234 N.Y. 550.
44 C.J. p 1290 note 64.

80. N.Y.—*People v. Cantor*, *supra*.

81. N.Y.—*People v. Cantor*, *supra*.

82. Ill.—*People ex rel. Nash v. Westminster Bldg. Corporation*, 197 N.E. 573, 361 Ill. 153.

State's reservation of exclusive right to tax manufacture or sale as not precluding municipal taxation

predicated on ownership of property see *infra* § 2001.

Owner of undivided half interest

A widow who had an undivided one-half interest in property and a homestead estate in the other one half by abandoning the property as a homestead became liable only for city taxes chargeable against the undivided one-half interest which she owned in fee simple.—*Shelton v. Providence Washington Ins. Co.*, Tex. Civ.App., 131 S.W.2d 330.

83. U.S.—*Magruder v. Supplee, Md.*, 62 S.Ct. 1162, 316 U.S. 394, 86 L.Ed. 1555—*U. S. v. Certain Parcels of Land in City of Baltimore, D.C. Md.*, 61 F.Supp. 164.

84. U.S.—*Magruder v. Supplee, Md.*, 62 S.Ct. 1162, 316 U.S. 394, 86 L.Ed. 1555.

85. Pa.—*In re Glenside Bank & Trust Co.*, 32 Pa. Dist. & Co. 705

86. Ariz.—*Trigg v. City of Yuma*, 130 P. 59, 59 Ariz. 480.

Pa.—*City of Philadelphia v. Myers*, 157 A. 13, 102 Pa.Super. 424.

In this connection it has been said that a municipality may treat either the real or the registered owner as primarily liable for taxes,⁸⁷ although as between the two the latter is secondarily liable, and may recover from the real owner sums paid by him on account of municipal taxes.⁸⁸

A lessee of realty who places improvements thereon may be subject to tax as beneficial owner of the improvements, even though the lease provides that they shall become the property of the landowner, where the landowner's actual possession of the improvements is delayed until termination of the lease,⁸⁹ and this rule has been applied where the lessor is a tax-exempt institution.⁹⁰ On the other hand, it has been held that, where the lease provides that improvements shall be the property of the landlord, they are taxable to him and not to the tenant,⁹¹ and that, even though improvements are placed on realty by a tenant under a lease providing that they shall remain the tenant's property with right of removal, they may become subject to tax as part of the realty.⁹² Where the lessor has paid all taxes on leased property, it is not subject to further tax

in the hands of the lessee.⁹³ Personal property has been held taxable only to the owner thereof as of the assessing date,⁹⁴ and only in the hands of those specified by statute.⁹⁵

c. Particular Kinds of Taxes

A municipal corporation may have power to impose particular kinds of taxes, such as capitation, franchise, street, or other taxes.

In addition to its power to tax persons and property within its corporate limits, as discussed supra subdivisions a and b of this section, a municipal corporation may or may not have power to impose other particular kinds of taxes, such as capitation, inheritance, and other taxes discussed infra this subdivision, or income, sales, and other taxes, infra § 2020.

Capitation taxes. Authority to impose capitation or poll taxes is sometimes conferred.⁹⁶

Franchise tax. A municipal corporation may tax a franchise under a statute conferring the power to do so,⁹⁷ but in the absence of such power the

Property bought from city

Ariz.—Trigg v. City of Yuma, 130 P.2d 59, 59 Ariz. 480.

Vendee in possession

On execution of agreement of sale by city of former submerged land to adjoining upland owner, upland owner, as vendee in possession, and later as owner in possession, became responsible for payment of taxes—Wilson & Co. v. City of New York, 75 N.Y.S.2d 206.

87. Pa.—Fidelity-Philadelphia Trust Co. v. Land Title Bank & Trust Co., 192 A. 121, 326 Pa. 262.

88. Pa.—Fidelity-Philadelphia Trust Co. v. Land Title Bank & Trust Co., 192 A. 121, 326 Pa. 262.

89. Ky.—Louisville Garage Corp. v. City of Louisville, 198 S.W.2d 40, 303 Ky. 553—Broadway & Fourth Ave. Realty Co. v. City of Louisville, 197 S.W.2d 238, 303 Ky. 202.

90. Ky.—Broadway & Fourth Ave. Realty Co. v. City of Louisville, supra.

Construction of lease as controlling

In determining whether building erected by lessee on land owned by tax-exempt organization is subject to city taxation, every lease must be construed separately, each one according to its own spirit and purpose as they may be gathered from the four corners of each instrument under consideration; and, where taxpayer erected a building on land owned by tax-exempt organization and thereafter procured a twenty-year lease of the underlying land, and lease contained a deprivation

clause fixing taxpayer's interest in the building in event of loss by condemnation or sale prior to expiration of lease, taxpayer would be held owner of the building to extent of value fixed in deprivation clause, for city tax purposes, in view of finding that deprivation schedules in lease furnished an accurate index as to true ownership of the improvements on the leased property.—Steiden Stores v. City of Louisville, 198 S.W.2d 983, 303 Ky. 637.

91. Tex.—Nine Hundred Main v. City of Houston, Civ App., 150 S.W.2d 468, error dismissed, judgment correct.

Air conditioning system

Tex.—Nine Hundred Main v. City of Houston, supra.

92. N.Y.—Interstate Lien Corporation v. Schmidt, 44 N.Y.S.2d 709, 180 Misc. 910.

93. Mass.—New England Mut. Life Ins. Co. v. City of Boston, 75 N.E.2d 505, 321 Mass. 683.

Domestic corporation leasing from foreign corporation

Where domestic life insurance companies leased electric bookkeeping and accounting devices from foreign corporations which filed excise tax returns including the leased property and paid all taxes due commonwealth, the leased property was not subject to further tax by local assessment against lessees.—New England Mut. Life Ins. Co. v. City of Boston, supra.

94. N.J.—Harbor Tank Storage Co.

v. Jersey City, 15 A.2d 194, 18 N.J. Misc. 566.

Bailee for hire

Under statute, tank storage company was not subject to assessment by city for personal property taxes, where storage tanks operated by it for the warehousing of vegetable oils and molasses in bulk were leased from others, and the merchandise stored in the tanks did not belong to the company, but it was merely a bailee for hire.—Harbor Tank Storage Co. v. Jersey City, supra.

95. Pa.—In re Pennsylvania Co. for Insurances on Lives and Granting Annuities, 11 A.2d 160, 337 Pa. 321.

"Individual citizen"

A domestic company as secondary trustee of an equitable interest in another trust was not an "individual citizen" within statute imposing a tax on moneyed capital in hands of individual citizens of the state for city purposes so as to subject investment trust certificates to such tax.—In re Pennsylvania Co. for Insurances on Lives and Granting Annuities, supra.

96. U.S.—Morgan v. Rowan, D.C., 17 F.Cas.No.9,807, 2 Cranch C.C. 148.

44 C.J. p 1290 note 67.

97. Ala.—Alabama Tract. Co. v. Selma Trust, etc., Bank, 104 So. 517, 213 Ala. 269, 272.

Ky.—Frankfort v. Stone, 56 S.W. 679, 108 Ky. 400, 22 Ky.L. 25, rehearing denied 58 S.W. 373, 22 Ky.L. 502.

Tex.—Dallas v. Dallas Cons. Elec-

franchise may not be taxed.⁹⁸ Such tax is a tax on property⁹⁹ and not on occupation,¹ and may be levied under authority to tax all taxable property in the municipality,² but not under authority to tax particular kinds of property enumerated in which franchises are not included.³ Where the franchise is terminated by act of the company, the municipality loses such right to tax it as it may have,⁴ in the absence of any contract obligation on the part of the company to continue its existence.⁵

Inheritance tax. A municipality cannot tax an inheritance in the absence of express legislative or charter authority;⁶ and such authority is not conferred on a municipality by an act authorizing the levy of taxes on any property in the town limits and "on such other subjects as may at the time be assessed with state taxes against persons residing therein."⁷

Street tax. The validity of an annual street tax has been upheld as within the underlying principles of municipal taxation.⁸

Occupation tax has been held within the power of a municipality to impose.⁹

§ 2001. Under General or Restricted Powers

Under a general power a municipal corporation may tax all property within its borders subject to taxation; but, where the state reserves to itself exclusive power of taxation as to certain property, the latter is not subject to municipal taxation.

Under a general power to levy taxes, a municipal corporation may tax all property within its limits which is subject to taxation by the state or county under the general laws of the state,¹⁰ without regard to whether the property is actually taxed by the state¹¹ or county;¹² and, conversely, property not taxable for county purposes has been held not to be taxable by a municipality in such county.¹³ The state, however, may reserve to itself the right to tax a certain class of property without delegating a similar power to municipal corporations;¹⁴ and, where a statute or the constitution reserves the exclusive power of taxation to the state, a municipality may not tax property taxed by the state,¹⁵ and the same principle has been applied to relieve from local taxation property the income of which is subject to state tax.¹⁶ Statutes prohibiting a municipality from taxing transactions or property sub-

tric St. R. Co., 66 S.W. 835, 95 Tex. 268.

N.Y.—People ex rel. Hudson River Bridge Co. at Albany v. State Tax Commission, 27 N.Y.S.2d 153, 261 App.Div. 700, appeal denied 29 N.Y.S.2d 910, 261 App.Div. 700, affirmed 39 N.E.2d 935, 287 N.Y. 722.
Tex.—Texas & P. Ry. Co. v. City of El Paso, 85 S.W.2d 245, 126 Tex. 86.
44 C.J. p 978 note 17.

Taxable as personality under statute
N.Y.—Monroe County Savings Bank v. Rochester, 37 N.Y. 365, 4 Transcr.App. 473.

98. N.J.—Newark v. State Bd. of Taxation, 51 A. 67, 67 N.J.Law 246.

99. Ill.—Hub v. Hanberg, 71 N.E. 826, 211 Ill. 43.

1. Ill.—Hub v. Hanberg, supra.

2. Ky.—Middlesboro v. Coal, etc., Bank, 57 S.W. 497, 108 Ky. 680, 22 Ky.L. 380.
44 C.J. p 1305 note 19.

3. Ky.—Covington Gaslight Co. v. Covington, 17 S.W. 808, 92 Ky. 312, 13 Ky.L. 577.

4. Ky.—Louisville, etc., R. Co. v. Henderson, 157 S.W. 1105, 154 Ky. 575.

5. Ky.—Louisville, etc., R. Co. v. Henderson, supra.

6. Va.—Schoolfield v. Lynchburg, 78 Va. 366.

7. Va.—Wytheville v. Johnson, 62

S.E. 328, 108 Va. 589, 128 Am S.R. 981, 18 L.R.A., N.S., 960.

44 C.J. p 1304 note 85.

8. Ala.—City of Montgomery v. Barefield, 56 So. 260, 1 Ala.App. 515.

9. Mo.—Kansas City v. J. I. Case Threshing Mach. Co., 87 S.W.2d 195, 337 Mo. 913.

Ad valorem and occupation

Merchant can be required to pay to city both ad valorem tax on his merchandise and occupation tax.—Kansas City v. J. I. Case Threshing Mach. Co., supra.

10. Ga.—Augusta v. Augusta Nat. Bank, 47 Ga. 562.

44 C.J. p 1290 note 68.

11. Va.—Newport News, etc., R., etc., Co v. Newport News, 40 S.E. 645, 100 Va. 157.

44 C.J. p 1290 note 69.

12. Pa.—Blickensderfer v. Erie West Ward School Directors, 20 Pa. 38.

13. Ind.—Evansville v. Hall, 14 Ind. 27.

14. N.J.—Newark v. State Board of Taxation, 51 A. 67, 67 N.J.Law 246.

15. Ariz.—Pacific Fruit Express Co. v. City of Yuma, 261 P. 49, 32 Ariz. 601.

Miss.—Mississippi Power Co. v. City of Laurel, 28 So.2d 750, 201 Miss. 144, suggestion of error overruled 29 So.2d 313, 201 Miss. 144.

N.J.—Motor Finance Corp. v. City of

Newark, 55 A.2d 247, 136 N.J.Law 262, affirmed 61 A.2d 239, 137 N.J. Law 612.

44 C.J. p 1309 note 6.

Judgments

Pa.—In re Frederick's Estate, 197 A. 642, 130 Pa Super. 373, appeal dismissed 5 A.2d 91, 333 Pa. 327.

Meters

Pa.—People's Natural Gas Co. v. City of Pittsburgh, 175 A. 691, 317 Pa. 1.

Operating components

Record did not sustain contention that items of property assessed by city had been discontinued as operating components of electric company so as to be subject to assessment by city notwithstanding exclusive authority of state tax commission to assess electric company's property located in more than one county as a single operation.—Mississippi Power Co. v. City of Laurel, 29 So.2d 313, 201 Miss. 144.

16. Mass.—United Shoe Machinery Corporation v. Gale Shoe Mfg. Co., 49 N.E.2d 913, 314 Mass. 143.

Avoidance of double taxation

Where the income from property is taxable under the state income tax law, or would be taxable if yielding an income, such property is by statute exempt from local property taxes, and this exemption is for the purpose of avoiding double taxation.—United Shoe Machinery Corporation v. Gale Shoe Mfg. Co., supra.

ject to state tax do not apply to preclude municipal taxation of transactions or properties taxed by political subdivisions of the state.¹⁷ Reservation by the state of the exclusive right to license for revenue the manufacture or sale of particular property does not, by implication, prohibit a municipality

from levying personal property taxes predicated on the ownership of such property.¹⁸ A tax on all the ratable property in the city may not be made under a statute restricting it to a particular district or precinct.¹⁹

b. *Situs*

§ 2002. Residence and Place of Business

For municipal tax purposes, a taxpayer is assessable where he resides on the annual date fixed by statute; where business is carried on in a number of municipalities, the term "place of business" has been construed as the place where the business is carried on by its owners under their own control and on their own account.

A taxpayer is assessable where he resides on the annual date fixed by statute,²⁰ even though a change of territory may operate to change his residence before the assessment is completed.²¹ In this connection it has been said that for the purpose of fixing his status for municipal taxation, a person is deemed to have only one domicile at a time.²² It is immaterial in what part of the municipality the taxpayer lives, provided only his residence is within the municipal limits,²³ and one who moves into the municipality before the beginning of the fiscal year and brings personal estate with him thereby subjects such property to the municipal tax,²⁴ even though it has already been taxed for state and county purposes.²⁵ A beneficiary's personalty is, in the absence of a statute to the contrary, taxable at his own residence rather than that of his guardian,²⁶ or the executor,²⁷ or trustee;²⁸ but some statutes modify the rule as to property held in trust.²⁹

Where business is carried on in a number of municipalities, it has been held that the term "place of business," as used in a statute, must be construed as the place where the business is carried on by its owners under their own control and on their own account;³⁰ it is not the place where unused property is stored,³¹ or the place where only a few of their many business transactions are consummated by them,³² where the greater part of the business is transacted in some other city, unless, as in the case of distilled spirits, withdrawal of property from a warehouse subjects it to taxation in the city in which the warehouse is located.³³ A domestic corporation may be present in a municipality for tax purposes, even though its principal office is elsewhere.³⁴

§ 2003. Property outside Corporate Limits

- a. Realty
- b. Personalty

a. Realty

Ordinarily a municipal corporation may not tax realty beyond its corporate limits.

As a general rule, municipal taxes may not be levied on land situated beyond the corporate limits,³⁵

17. Pa.—McClelland v. City of Pittsburgh, 57 A.2d 846, 358 Pa. 448.

18. Cal.—Three G Distillery Corporation v. Los Angeles County, 116 P.2d 143, 46 Cal.App.2d 498.

City where distillery located

Where constitutional provision reserved to the state the exclusive right to license and regulate "the manufacture, sale, purchase, possession and transportation of intoxicating liquor within the state" and failed to include as well the power to license and regulate the ownership thereof, the power to tax the ownership thereof was not exclusively retained by the state but could be exercised by city where distillery was located.—Three G Distillery Corporation v. Los Angeles County, *supra*.

19. N.H.—Brown v. Concord, 56 N. H. 375.

20. Md.—Spencer v. Maryland Jockey Club of Baltimore City, 4 A.2d 124, 479, 176 Md. 82, appeal dismissed Maryland Jockey Club of Baltimore City v. Spencer, 59 S.Ct. 1034, 307 U.S. 612, 83 L.Ed. 1495.

21. Mass.—Harman v. New Marlborough, 9 Cush. 525.

22. Me.—Gilmartin v. Emery, 160 A. 874, 131 Me. 236.

23. Ky.—Asher v. Pineville, 131 S. W. 512, 140 Ky. 670, 672.

44 C.J. p 1290 note 78.

24. Ind.—Hilgenberg v. Wilson, 55 Ind. 210.

25. Ind.—Hilgenberg v. Wilson, *supra*.

26. Ky.—Louisville v. Sherley, 80 Ky. 71.

44 C.J. p 1290 note 81.

27. Ind.—McDougal v. Brazil, 83 Ind. 211.

28. Pa.—Carlisle v. Marshall, 36 Pa. 397.

29. N.H.—McLellan v. Concord, 97 A. 552, 78 N.H. 89.

44 C.J. p 1290 note 84.

30. Mass.—Little v. Cambridge, 9 Cush. 298.

31. Mass.—Little v. Cambridge, *supra*.

32. Tenn.—Bransford Realty Co. v. Andrews, 133 S.W. 1104, 123 Tenn. 577.

33. Ky.—Jetts Bros. Distilling Co. v. Carrollton, 199 S.W. 37, 178 Ky. 561.

34. Pa.—City of Philadelphia v. Westinghouse Elec. & Mfg. Co., 55 Pa. Dist. & Co. 343.

35. Fla.—Klich v. Miami Land & Development Co., 191 So. 41, 129 Fla. 794—Smith v. Amidon, 136 So. 253, 102 Fla. 492.

and the legislature has no power to authorize a municipal corporation to tax for its own local purposes lands lying beyond the corporate limits.³⁶ In some jurisdictions, however, it has been held not to be a violation of the constitution to authorize a municipality to tax property outside of its boundaries but adjacent thereto and within certain defined limits for purposes beneficial to the property taxed,³⁷ as, for example, property within a school district, for the construction and maintenance of schools,³⁸ property within a certain distance of a city's boundaries, for the purchase of the securities of a railroad serving the entire district,³⁹ or property irrigated by water distributed by the municipality.⁴⁰ A city has no prescriptive right to levy a tax on land outside its boundaries merely because it has exercised municipal authority over the owner of such land for twenty years;⁴¹ nor can it base such right on the owner's use of streets extended by the city beyond its corporate limits, the city consenting to such use.⁴² An assertion by a municipal corporation of a right to tax does not afford proof that its boundaries include certain land.⁴³

Property partly beyond limits. Where real estate lies partly within and partly without the corporate limits, the part lying within the limits is taxable by the municipality,⁴⁴ and the portion lying outside is not.⁴⁵ If the portions are not readily separable,⁴⁶ or if the municipal assessment is merely an adoption of a gross assessment made by state or

county authorities,⁴⁷ the whole assessment is void; as is also a supplemental assessment, separating the parts within and without the city, but made without authority of law.⁴⁸

Different municipalities. The property of one municipality may not be taxed by another municipality.⁴⁹

Estoppel. Repeated failure of a municipality to tax lands, and public recognition of their being outside the boundaries, do not estop the municipality from subsequently taxing such lands as in fact within its boundaries.⁵⁰

b. Personality

In some jurisdictions a municipal corporation may tax personal property belonging to its residents and physically situated beyond the municipal borders.

In some jurisdictions, personal property situated outside the municipal limits is not taxable by the municipal corporation,⁵¹ although the owner has his domicile therein,⁵² and the rule that personal property follows the person of the owner has been held not to apply as an absolute rule of law in such case.⁵³ Under the statutes of other jurisdictions, the situs of personal property for the purpose of taxation is the domicile of the owner rather than the actual situs of the property itself, and personalty outside the city owned by persons residing in the city is taxable therein,⁵⁴ unless the property

Ill.—People v. Calloway, 176 N.E. 912, 844 Ill. 488.

Neb.—Hardin v. Pavlat, 266 N.W. 637, 130 Neb. 829—State v. Nickerson, 156 N.W. 1039, 99 Neb. 517.

Tenn.—Town of Onelda v. Pearson Hardwood Flooring Co., 88 S.W.2d 998, 169 Tenn. 449.

44 C.J. p 1291 note 90.

Date as of which land must be within municipality

City cannot tax for given year property not within its territorial limits on January 1 of that year, where such date is specified by statute as controlling.—Plutus Mining Co. v. Orme, 289 P. 132, 76 Utah 286.

36. Mo.—Wells v. Weston, 22 Mo. 384, 66 Am D. 627.

37. Cal.—Wible v. Bakersfield, 183 P. 291, 42 Cal.App. 77.

44 C.J. p 1291 note 92.

Constitutional restrictions on municipal taxing power generally see supra § 1985.

38. Cal.—Wible v. Bakersfield, supra.

39. Va.—Langhorne v. Robinson, 20 Gratt. 661, 61 Va. 661.

40. Utah.—Pleasant Grove City v. Holman, 202 P. 1096, 59 Utah 242.

41. Me.—Ham v. Sawyer, 38 Me. 37.

42. Wash.—Pacific Sheet Metal Works v. Roeder, 66 P. 428, 26 Wash. 198.

43. N.Y.—Lawkins v. City of New York, 71 N.Y.S.2d 112, 272 App.Div. 920, affirmed 77 N.E.2d 516, 297 N.Y. 747.

Tax maps

The fact that city, after placing realty located outside its boundaries on its tax maps for several previous years, finally asserted a right to tax the lands, could not be regarded as a practical interpretation of the city's boundaries and justify taxation of those lands.—Lawkins v. City of New York, supra.

44. Ky.—Nicholasville v. Rarick, 43 S.W. 450, 102 Ky. 352, 19 Ky.L. 1415.

44 C.J. p 1291 note 1.

45. Neb.—Sioux City Bridge Co. v. Dakota County, 84 N.W. 607, 61 Neb. 75.

46. Miss.—Planters' Gin, etc., Co. v.

Greenville, 103 So. 796, 138 Miss. 876.

Neb.—Sioux City Bridge Co. v. Dakota County, 84 N.W. 607, 61 Neb. 75.

47. La.—Southport Mills v. Baton Rouge, 82 So. 705, 145 La. 567.

48. La.—Southport Mills v. Baton Rouge, supra.

49. Md.—Spencer v. Maryland Jockey Club of Baltimore City, 4 A.2d 124, 479, 176 Md. 82, appeal dismissed Maryland Jockey Club of Baltimore City v. Spencer, 59 S.Ct. 1034, 307 U.S. 612, 83 L.Ed. 1495.

50. Kan.—Wellman v. City of Burr Oak, 262 P. 607, 124 Kan. 780.

51. Alaska.—Fairbanks v. Independent Meat Market, 4 Alaska 147.

Ky.—Standard Oil Co. v. City of Barbourville, 120 S.W.2d 397, 274 Ky. 742.

44 C.J. p 1291 note 7.

52. Ill.—Wilkey v. Pekin, 19 Ill. 160.

53. Ill.—Wilkey v. Pekin, supra.

44 C.J. p 1291 note 10.

54. Ga.—Corpus Juris cited in O'Neal v. Whitley, 170 S.E. 876, 378, 177 Ga. 491.

is outside the state,⁵⁵ or the owner is making a mere temporary sojourn in the city;⁵⁶ and, as discussed infra § 2005, personalty inside the city owned by nonresidents is not taxable. It has also been held that the proper place to tax personalty is the residence of the owner,⁵⁷ provided it has not secured a situs for taxation elsewhere, in which latter event it is to be taxed where situated.⁵⁸ The situs at the date of the accrual of the tax is the test of taxability,⁵⁹ except in so far as such rule may be made inapplicable by statutes controlling in the case of removal of residence within the fiscal year.⁶⁰

Intangibles may have their situs at the domicile of the owner for purposes of municipal taxation.⁶¹ Under statutes providing for the taxation of intangible personal property in the city where the owner resides or has his principal place of business, an investment of capital in tangible property outside the city which is held for purposes of manufacture is deemed to be intangible property⁶² and taxable in the city where the owner resides or has his principal place of business,⁶³ rather than in the city where the property purchased is situated.⁶⁴ The fact that leased land is outside of the city limits will not affect the city's right to tax the lease as personalty when owned by a person having his place of business within the city limits.⁶⁵ The leg-

islature, however, may not authorize municipal taxation on business not carried on within the corporate limits.⁶⁶

Personal property merely temporarily within the city limits is regarded as property outside the limits for the purposes of municipal taxation.⁶⁷

Property of decedent's estate. Under statutes providing that, where an owner dies, the situs of his personal estate, for the purposes of municipal taxation, is that of his domicile at the time of his decease, the situs of deceased's personal estate, so determined at the time of his death, remains fixed during the administration of his estate,⁶⁸ even though the property is removed from the city by his personal representatives.⁶⁹

§ 2004. Property within Territory Annexed to, or Detached from, Municipality

- a. Annexed territory
- b. Detached or divided territory

a. Annexed Territory

Property brought within municipal limits by annexation is subject to taxation.

Property brought within municipal limits by annexation is subject to municipal taxation⁷⁰ which ordinarily includes taxation to pay municipal in-

Mo.—State v. Collier, 256 S.W. 455, 301 Mo. 72.
44 C.J. p 1291 note 12.

55. Mo.—American Mfg Co. v. St. Louis, 192 S.W. 402, 270 Mo. 40.

56. Ky.—Lancaster v. Pope, 160 S.W. 509, 156 Ky. 1, Ann.Cas.1915C 752

57. Tex.—Galveston v. Haden, Civ. App., 214 S.W. 766.

58. Tex.—Galveston v. Haden, supra

Dredging equipment

Vessels, derricks, horses, and wagons used in the business of dredging and marketing mud shell, permanently situated at places other than the city of Galveston, under the control of agents of the owner permanently residing at such places, were not subject to Galveston's personal property tax, although Galveston was the place of the owner's residence, tugboats were registered for the port of Galveston and discharged cargoes thereat, and the property was not taxed at the place of its situs.—Galveston v. Haden, supra.

59. Nev.—Virginia v. Chollar-Potosi Gold, etc., Min. Co., 2 Nev. 86.
44 C.J. p 1292 note 20.

60. Mass.—Lee v. Boston, 2 Gray 484.

44 C.J. p 1292 note 21.

61. N.J.—City of Newark v. State Board of Tax Appeals, 23 A 2d 789, 127 N.J. Law 521, affirmed City of Newark v. State Board of Tax Appeals, 28 A 2d 516, 129 N.J. Law 162

62. Va.—American Tobacco Co v. Richmond, 99 SE 777, 125 Va 29.

63. Va.—American Tobacco Co v. Richmond, supra

64. Va.—American Tobacco Co. v. Richmond, supra.

65. Miss.—Johnson v. Harrison Naval Stores Co., 67 So. 147, 108 Miss 627.

66. Ala.—White v. City of Decatur, 144 So. 873, 225 Ala. 646, 86 A L R 914.

67. Ill.—Lincoln v. Dehner, 108 N.E. 991, 268 Ill. 175

44 C.J. p 1292 note 24.
Rolling stock and vessels see infra §§ 2025, 2027.

68. Mo.—State ex rel. Walte v. Boatmen's Nat. Bank of St. Louis, 175 S.W.2d 795, 351 Mo. 1234—State v. Timbrook, 129 S.W. 1068, 145 Mo.App. 368.

69. Mo.—State ex rel. Walte v. Boatmen's Nat. Bank of St. Louis, 175 S.W.2d 795, 351 Mo. 1234—State v. Timbrook, 129 S.W. 1068, 145 Mo.App. 368.

70. Ala.—Johnson v. State ex rel City of Birmingham, 17 So 2d 662, 245 Ala 499—Young Women's Christian Ass'n of Plainfield, N J, v Gunter, 162 So. 120, 230 Ala 521

Fla.—City of Sebring v. Harder Hall, Inc., 9 So 2d 350, 150 Fla. 824—City of Winter Haven v. A. M Klemm & Son, 192 So 646, 141 Fla. 75.

N.Y.—Toch v. City of New York, 252 N.Y.S. 412, 141 Misc. 70—Leary v. Village of Lawrence, 252 N.Y S 409, 141 Misc. 549.

Ohio.—City of Cincinnati v Roettker, 180 N.E. 907, 41 Ohio App. 269.

Pa.—Pittsburgh Junction R Co v City of Pittsburgh, 42 A 2d 829, 352 Pa. 317.

Tenn.—Johnson City v. Clinchfield R. Co., 43 S W 2d 386, 163 Tenn. 332.
44 C.J. p 1292 note 30.

Real and personal property of residents of annexed territory is subject to tax.—Peterson v. Swan, 2 N. W 2d 70, 231 Iowa 745.

Effect of amendment of statute

The fact that statute was amended expressly to permit additions to tax rolls of land annexed to village did not require construction of statute as not having permitted such additions before amendment.—Leary v.

debtedness existing at the date of the annexation, as discussed supra § 79. For the purpose of determining the liability for taxes of property owners in annexed territory, the territorial limits of the city, as far as their location is concerned, are fixed by the terms of the statute extending them,⁷¹ and, as between the date when a tax was authorized and the date when it was actually levied, boundaries are to be considered as they exist on the day of the actual levy,⁷² rather than the day authority to tax was granted.⁷³ Annexation made subsequent to the invalid levy of a tax on property outside the corporate limits of a municipality does not cure the invalidity of such tax.⁷⁴ Where a town has duly levied its tax and assessed personal property therein taxable on a given date, it has been held that a city thereafter organized so as to include part of such town may not levy a tax for city purposes on any of the personal property so assessed and taxed by the town for the same year.⁷⁵ Property annexed prior to the commencement of the tax year but after enactment of an ordinance fixing the rate of taxation for that year is subject to taxation at the same rate as other properties in the municipality.⁷⁶

Residents of territory annexed to a city cannot escape taxation because the portion of the territory occupied by them has not yet been assigned to

a ward of the city,⁷⁷ or because they do not yet enjoy all the benefits of the city government,⁷⁸ or where they are estopped from denying the liability of their property for the tax.⁷⁹ Long-continued neglect of the municipality to tax annexed lands will not estop it from subsequently doing so.⁸⁰

Proof of annexation. The mere platting of land for addition does not amount per se to annexation, within the meaning of the foregoing rules,⁸¹ but it may with other circumstances constitute evidence of annexation.⁸²

An invalid annexation ordinarily affords no ground for taxing the territory attempted to be included within the municipal boundaries,⁸³ and the invalidity of a tax levied on land beyond the corporate limits is not cured by an extension of the city limits to include the property taxed, where such extension is invalid.⁸⁴

b. Detached or Divided Territory

Ordinarily property within a territory detached from a municipal corporation is no longer subject to tax by it.

Ordinarily property within a territory detached from a municipal corporation is no longer subject to tax by it,⁸⁵ and on a division of a municipality into two corporations, particular land is taxable by that municipality in which it is situated after the division.⁸⁶ Such exceptions to the rule as are

Village of Lawrence, 252 N.Y.S. 409, 141 Misc. 549.

71. Wash.—Pacific American Fisheries v. Whatcom County, 124 P. 905, 69 Wash. 291.

44 C.J. p 1292 note 32.

"Next succeeding assessment period"
Charter amendment passed in March, 1929, declaring that property owners and persons carrying on business in territory annexed to city should be assessable for taxes "at next succeeding assessment period," did not defer collection of taxes until 1931, but made taxes collectable for 1930—Johnson City v. Clinchfield R. Co., 43 S.W.2d 386, 163 Tenn. 332.

72. Va.—Johnston v. Huntington, 76 S.E. 142, 71 W.Va. 106.
44 C.J. p 1292 note 33.

73. R.I.—Sherman v. Benford, 10 R.I. 559.

74. Kan.—Atchison, etc., R. Co. v. Maquilkin, 12 Kan. 301.

75. Minn.—State v. Republic Steel Corporation, 271 N.W. 119, 199 Minn. 107.

76. Ala.—Johnson v. State ex rel. City of Birmingham, 17 So.2d 662, 245 Ala. 499.

77. Ky.—Specht v. Louisville, 58 S.W. 607, 22 Ky.L. 699.

78. Ky.—Specht v. Louisville, supra.

Taxation of agricultural and unplatted lands see infra § 2017.

79. Kan.—Seward v. Rheiner, 43 P. 423, 2 Kan. App. 95
44 C.J. p 1293 note 41.

80. Ky.—Brown v. Town of Dover, 120 S.W.2d 225, 274 Ky. 692.

Even fifty years' delay in beginning to tax lands annexed to a municipality will not work an estoppel to begin taxing such annexed territory—Brown v. Town of Dover, supra.

81. Mo.—Cameron v. Stephenson, 69 Mo. 372.

82. Ind.—Pidgeon v. McCarthy, 82 Ind. 321.

83. Fla.—Beaty v. Inlet Beach, 9 So.2d 735, 151 Fla. 495, motion denied and modified on other grounds 10 So.2d 807, 152 Fla. 276.

Validity of annexation upheld so as to subject annexed territory to taxation—Brown v. Town of Dover, 120 S.W.2d 225, 274 Ky. 692.

84. Fla.—Pensacola v. Louisville, etc., R. Co., 21 Fla. 492.

85. Fla.—Smith v. Amidon, 136 So. 256, 102 Fla. 492.

Neb.—Hardin v. Pavlat, 266 N.W. 637, 130 Neb. 829.

N.Y.—Toch v. City of New York, 252 N.Y.S. 412, 141 Misc. 70—Leary v. Village of Lawrence, 252 N.Y.S. 409, 141 Misc. 549.

Tenn.—Town of Oneida v. Pearson Hardwood Flooring Co., 88 S.W.2d 998, 169 Tenn. 449.

44 C.J. p 1293 note 58.

Liability of detached territory for preexisting indebtedness see supra § 80 d.

Temporary detachment

City is not entitled to taxes on territory segregated therefrom temporarily, during time of segregation, and is unauthorized to levy taxes on area segregated from city by decree of court during time when decree was in force, although decree was subsequently reversed.—Plutus Mining Co. v. Orme, 289 P. 132, 76 Utah 286.

Detachment excluding power to tax held not shown

N.Y.—Village of Kensington v. Town of North Hempstead, 185 N.E. 94, 261 N.Y. 260.

86. Me.—Cumberland v. Prince, 6 Me. 408.

N.H.—Lamprey v. Batchelder, 40 N.H. 522.

44 C.J. p 1294 note 62.

created by statute are construed to be temporary only.⁸⁷ A constitutional provision that cities and towns shall make their own assessments for municipal purposes on property within their limits does not forbid municipal taxation of land which was by statute included in the limits of the municipality, although the jurisdiction and authority of the municipality are ousted from the land, where rights have been acquired predicated on de facto power to tax the land before the municipal jurisdiction and authority over the land have been ousted.⁸⁸ In a proper case a municipality may reserve the right to tax lands then within its borders, even though they may subsequently be excluded.⁸⁹

Where bonds have been issued and thereafter some of the lands are excluded because they are not so located that they can derive benefit, the municipality lacks power to tax them to pay bonds issued while they formed part of the municipality unless it appears that the owners have in some way estopped themselves;⁹⁰ but, if the lands have been benefited by the improvement for which the bonds were issued, or are so situated as to be susceptible of receiving municipal benefits, they are subject to tax.⁹¹ In this connection it has been held that a constitutional command that, when a municipality is abolished, provision should be made for protection of its creditors contemplates that on withdrawal of lands from a municipality they should continue liable for taxation for the municipal debts unless creditors are otherwise protected.⁹² Conditions as they existed during incorporation of the land in the municipal borders are the controlling factor in determining taxability of lands under such circumstances.⁹³ However, it has been held that lands illegally added to a municipality and subsequently excluded were subject to tax where they were ben-

efited by public improvements for which municipal bonds were issued during the de facto jurisdiction of the municipality over such subsequently excluded lands.⁹⁴

§ 2005. Property of Nonresidents

Real and personal property of nonresidents, which has a situs within a municipal corporation, is subject to municipal taxation.

A municipal corporation may tax the real estate of nonresidents situated within its limits.⁹⁵ In accordance with the rules discussed in the C.J.S. title Taxation §§ 108-110, 189-196, also 61 C.J. p 220 note 56-p 221 note 72, p 340 note 7-p 359 note 79, a municipality may tax the personalty of a nonresident where such personalty has a situs within the municipality,⁹⁶ but not where it lacks such a situs.⁹⁷ Where the holder of the equitable title is, by statute, required to pay the taxes thereon, a trustee need not list personal property for taxation where the beneficial owner resides elsewhere;⁹⁸ and under statutes providing that the situs of the property of a decedent's estate, for purposes of municipal taxation, is that of his domicile at the time of his death, as discussed supra § 2002, a particular municipality in which decedent was not domiciled cannot tax the property of his estate.⁹⁹ Statutory authority to tax debts does not authorize a tax on a debt where the creditor is a nonresident, although the trustee is a resident;¹ but notes, accounts, and other choses in action in the hands of an agent of a nonresident doing business in a city, and which were received in the course of the business so conducted, have been held taxable by such city, at least where the city has general authority to tax property of every kind situated within its limits;² and, in some jurisdictions, by statute, it would seem

87. N.H.—*Lamprey v. Batchelder*, 40 N.H. 522.

44 C.J. p 1294 note 63.

88. Fla.—*City of Winter Haven v. A. M. Klemm & Son*, 181 So. 153, 132 Fla. 334, rehearing denied 182 So. 841, 133 Fla. 525.

89. Fla.—*State v. City of Venice*, 2 So.2d 365, 147 Fla. 70.

90. Fla.—*Certain Lands upon which Town of Lake Placid Taxes are Delinquent v. Town of Lake Placid*, 31 So.2d 249, 159 Fla. 219.

91. Fla.—*Certain Lands upon which Town of Lake Placid Taxes are Delinquent v. Town of Lake Placid*, supra—*Richmond v. Town of Largo*, 19 So.2d 791, 155 Fla. 226.

92. Fla.—*City of Winter Haven v. A. M. Klemm & Son*, 181 So. 153, 132 Fla. 334, rehearing denied 182 So. 841, 133 Fla. 525.

93. Fla.—*Allen v. Town of Largo*, 39 So.2d 549.

94. Fla.—*A. M. Klemm & Son v. City of Winter Haven*, 192 So 652, 141 Fla. 60, appeal dismissed 60 S.Ct. 810, 309 U.S. 638, 84 L.Ed. 993, rehearing denied 60 S.Ct. 897, 310 U.S. 656, 84 L.Ed. 1420.

95. U.S.—*Alexander v. Alexandria*, D.C., 5 Cranch 1, 3 L.Ed. 19.

Fla.—*State v. North Bay Village*, 34 So.2d 876.

Wharf

Pa.—*In re Baltimore & Philadelphia Steamboat Co.*, 153 A. 559, 302 Pa. 364.

96. Ill.—*Dunleith v. Reynolds*, 53 Ill. 45.

Mich.—*City of Detroit v. Phillip*, 20 N.W.2d 868, 313 Mich. 211.

Office furniture

N.J.—*Household Finance Corpora-*

tion v. State Board of Tax Appeals, 196 A. 219, 119 N.J. Law 230

97. Miss.—*City of Jackson v. Dixie Greyhound Lines*, 4 So.2d 721, 192 Miss. 133.

44 C.J. p 1294 note 70.

98. Ky.—*Lexington v. Fishback*, 60 S.W. 727, 109 Ky. 770, 22 Ky.L. 1392.

99. Ind.—*McDougal v. Brazil*, 83 Ind. 211.

44 C.J. p 1294 note 75.

1. Pa.—*Carlisle v. Marshall*, 36 Pa. 397.

2. Ga.—*Armour Packing Co. v. Augusta*, 45 S.E. 424, 118 Ga. 552—*Armour Packing Co. v. Savannah*, 41 S.E. 237, 115 Ga. 140.

Money, invested capital, and choses in action see infra § 2019.

also that moneys, notes, and credits,³ or personality generally,⁴ in the hands of a resident agent of a nonresident owner is taxable, and the agent is personally liable for the tax. In some jurisdictions, by statutes held to be valid,⁵ shares of stock of domestic corporations belonging to nonresidents are taxable in the city where the corporation has its principal office.⁶ So, by statute, in some jurisdictions, it would seem that persons living outside the corporate limits but whose ordinary avocations are pursued within the limits of the municipality are taxable the same as actual residents.⁷ Such statutes have been held valid,⁸ but are not applica-

ble to money held by a nonresident administrator in his representative capacity.⁹

Personalty in transit. While the state may for purposes of taxation separate from the domicile of the owner the situs of personalty kept in transit, and provide for the municipal taxation of such personalty at a situs other than such domicile,¹⁰ unless it does so a municipality may not give such personalty a separate situs so as to subject it to taxation,¹¹ and, where personalty kept in transit lacks a municipal situs, it is not properly the subject of municipal taxation.¹²

c. Exemptions in General

§ 2006. In General

Exemption from municipal taxation is ordinarily predicated on statutory authorization, and, where the exemption statute is purely permissive, municipal grant is also requisite.

Where statute grants to a municipal corporation power to exempt certain property from municipal taxes, such a statute is merely permissive, and, in order for such property to be exempt, the municipality must also grant the exemption.¹³ Also, a grant of a similar exemption under an earlier statute which has been superseded will not suffice to grant an exemption,¹⁴ and the fact that for many years annual ordinances have exempted certain lands from taxation for the respective years does not preclude their taxation thereafter.¹⁵ A taxpayer not prejudiced by an exemption of certain property belonging to another, as where his taxes have

not been thereby increased, may not object to such exemption.¹⁶ A person or corporation seeking exemption is not entitled to the benefit of an ordinance granting it until applicant has fulfilled the requirements laid down by such ordinance.¹⁷

Where the annexation of territory to a municipality is lawful, the owner of the annexed property is entitled to such exemptions or privileges as the statute grants to other property owners within the city similarly situated,¹⁸ including exemptions under statutes enacted after the annexation;¹⁹ but an exemption may not be claimed for annexed property which is not within the terms of the exempting statute.²⁰ Where general law exempts certain classes of property from taxation, including parks, legislation authorizing the establishment of public parks by municipalities outside their boundaries is

3. Iowa.—*German Trust Co. v. Davenport Board of Equalization*, 96 N.W. 878, 121 Iowa 325.

Money, stocks, and choses in action in general see *infra* § 2019.

4. Mich.—*Crawford v. Koch*, 135 N.W. 339, 169 Mich. 372.

5. Md.—*Corry v. Baltimore*, 53 A. 942, 96 Md. 310, 103 Am.S.R. 364.

6. Md.—*Corry v. Baltimore*, *supra*.
N.C.—*Planters' Bank, etc., Co. v. Lumberton*, 102 S.E. 629, 179 N.C. 409.

44 C.J. p 1294 note 81.

Municipal taxation of corporate stock generally see *infra* § 2021.

7. N.C.—*Moore v. Fayetteville*, 80 N.C. 154, 30 Am.R. 75.

8. N.C.—*Worth v. Fayetteville*, 60 N.C. 617.

9. N.C.—*Hall v. Fayetteville*, 20 S.E. 373, 115 N.C. 281.

10. Ga.—*Lewis & Holmes Motor Freight Corporation v. City of Atlanta*, 25 S.E.2d 699, 195 Ga. 842.
Rolling stock and vessels see *infra* §§ 2025, 2027.

11. Ga.—*Lewis & Holmes Motor Freight Corporation v. City of Atlanta*, *supra*.

Motor vehicles

Under city charter granting only general powers to the city to levy ad valorem taxes on property subject to taxation under state law, city was not authorized by "formula" to assess for taxation nonresident corporation's trucks moving into and out of city in interstate commerce and having no fixed location within city, on basis of the "average number" of trucks which might be treated as being at all times within city where no general statute authorized such assessment.—*Lewis & Holmes Motor Freight Corporation v. City of Atlanta*, *supra*.

12. Miss.—*City of Jackson v. Dixie Greyhound Lines*, 4 So.2d 721, 192 Miss. 133.

13. Md.—*Corpus Juris* cited in *Eastern Tar Products Corporation v. State Tax Commission of Maryland*, 4 A.2d 462, 464, 176 Md. 390

—*Grand Family Laundry v. Baltimore*, 106 A. 254, 134 Md. 99.

14. Md.—*Grand Family Laundry v. Baltimore*, *supra*.

15. U.S.—*Wells v. Savannah, Ga.*, 21 S.Ct. 697, 181 U.S. 531, 45 L.Ed. 986.

16. S.C.—*State v. Beaufort*, 17 S.E. 355, 39 S.C. 5.

17. Md.—*Eastern Tar Products Corporation v. State Tax Commission of Maryland*, 4 A.2d 462, 176 Md. 290.

18. Iowa.—*Winzer v. Burlington*, 27 N.W. 241, 68 Iowa 279.
44 C.J. p 1293 note 46.

19. Iowa.—*Winzer v. Burlington*, 27 N.W. 241, 68 Iowa 279—*Tubbesing v. Burlington*, 24 N.W. 514, 28 N.W. 19, 68 Iowa 691.

20. Md.—*United R., etc., Co. v. State*, 49 A. 923, 93 Md. 619, 86 Am.S.R. 453, 54 L.R.A. 942.
44 C.J. p 1293 note 48.

not invalid on the ground that the municipality exercises an unlawfully delegated power to exempt such parks from local taxation, since the power exercised by the municipality is that of establishing parks, not of exempting from taxation, and the exemption is a mere incident of the lawfully exercised power of establishing the park.²¹

§ 2007. Power to Grant

A municipal corporation lacks inherent power to grant exemption from taxation.

A municipal corporation has no inherent power to grant an exemption from,²² or commutation of,²³ taxes, even by way of compromising a tax suit,²⁴ and no omission of the city council to levy and collect taxes can operate to confer on a taxpayer the right of exemption by estoppel;²⁵ nor will a failure to assess taxes against a taxpayer for a long period of time raise any presumption that the city has released him from his obligation to pay, where the city is shown to have had no power to exempt.²⁶

The state, however, has power, as an attribute

of sovereignty, to grant exemption from taxation, as discussed in the C.J.S. title Taxation § 216, also 61 C.J. p 384 note 20—p 385 note 40, and it may, as considered in Constitutional Law § 140, delegate its power of exemption to municipal corporations which in the exercise of such delegated powers, and if acting within constitutional limitations,²⁷ may grant exemption from municipal taxes.²⁸ It has been held that municipal power to exempt may be implied,²⁹ although it has also been held that the power to exempt does not exist unless expressly conferred,³⁰ and that the power to exempt may not be implied from the power to tax.³¹ A power to exempt land sold by the city to another will not be implied from a power to sell such land on such terms as the city shall deem proper.³²

The power to exempt does not exist where it would conflict with some constitutional, statutory, or charter provision,³³ although in some states a prohibition against exemption, as worded, is construed to apply only to a certain class of taxes,³⁴ or to except such exemptions as are based on a consideration of public service.³⁵ A constitutional

21. Pa.—City of New Castle v. Lawrence County, 44 A.2d 589, 353 Pa. 175.

22. Fla.—Rio Vista Hotel & Improvement Co. v. Belle Mead Development Corporation, 182 So. 417, 132 Fla. 88, certiorari denied 59 S.Ct. 251, 305 U.S. 655, 83 L. Ed. 424, rehearing denied 59 S.Ct. 364, 305 U.S. 676, 83 L. Ed. 438—St. Lucie Estates v. Ashley, 141 So. 738, 105 Fla. 534.

N.Y.—Corpus Juris cited in Troy Union R. Co. v. City of Troy, 238 N.Y.S. 577, 581, 227 App.Div. 351, affirmed 171 N.E. 798, 253 N.Y. 597. Tex.—Valdez v. City of Laredo, Civ. App., 29 S.W.2d 802. 44 C.J. p 1295 note 94.

23. Conn.—Atwater v. O'Reilly, 71 A. 505, 81 Conn. 367. La.—City of New Orleans v. St. Charles St. R. Co., 28 La. Ann. 497. 44 C.J. p 1295 note 95.

24. Ky.—Walker v. Richmond, 189 S.W. 1122, 173 Ky. 26, Ann.Cas. 1918E 1084.

25. U.S.—Parkersburg v. Baltimore, etc., R. Co., C.C.A.W.Va., 296 F. 74, reversed on other grounds 45 S.Ct. 382, 268 U.S. 35, 69 L.Ed. 834. 44 C.J. p 1295 note 97.

26. N.J.—Jersey City v. North Jersey St. R. Co., 73 A. 609, 78 N.J. Law 72.

27. Mass.—In re Opinion of the Justices, 85 N.E.2d 222.

Veterans' housing

A bill providing that for the next five years all housing units to be constructed for sale to veterans of

World War II should be exempt from real estate taxation would violate Declaration of Rights and Constitution because of direct tendency to produce unreasonable or disproportional taxation.—In re Opinion of the Justices, supra.

28. N.Y.—Bush Terminal Co. v. City of New York, 26 N.E.2d 269, 282 N.Y. 306.

44 C.J. p 1295 note 2.

Effect of statute

Where the legislature has delegated to a municipality the power to grant exemption from taxation, the exercise of such delegated power of exemption has the effect of statute law.—Caverly-Gould Co. v. Village of Springfield, 78 A. 39, 83 Vt. 396.

29. Ga.—Athens v. Long, 54 Ga. 330.

44 C.J. p 1295 note 3.

30. U.S.—Valentine v. City of Juneau, C.C.A.Alaska, 36 F.2d 904, followed in Simpson v. City of Juneau, 36 F.2d 907.

Ala.—City of Anniston v. Anniston Office Bldg. Co., 149 So. 93, 227 Ala. 180—Bessemer Laundry Co. v. Bessemer, 109 So. 104, 215 Ala. 63.

31. Fla.—St. Lucie Estates v. Ashley, 141 So. 738, 105 Fla. 534.

32. Va.—Richmond v. Virginia R., etc., Co., 98 S.E. 691, 124 Va. 529.

33. Ky.—Walker v. City of Richmond, 189 S.W. 1122, 173 Ky. 26, Ann.Cas.1918E 1084.

N.J.—Whipple v. Teaneck Tp., 52 A.2d 44, 135 N.J.Law 345.

N.Y.—L. L. F. Realty Co. v. Fuchs, 75 N.Y.S.2d 356, 273 App.Div. 111.

Tenn.—American Bemberg Corporation v. City of Elizabethton, 175 S.W.2d 535, 180 Tenn. 373.

Tex.—City of Wichita Falls v. Cooper, Civ.App., 170 S.W.2d 777.

44 C.J. p 1295 note 99, p 1296 note 12.

Arbitrary exemption

Withdrawal of property from local tax by exemption may be so arbitrary or so extensive as to violate constitutional provisions respecting local self-government and home rule.—In re Watson, 123 N.E. 758, 226 N.Y. 384, reargument denied 125 N.E. 926, 227 N.Y. 584.

Deliberate omission

The deliberate omission of certain property from taxation by a city and its taxing officers was held the same in legal effect as if exempted under an ordinance.—City of Houston v. Baker, Tex.Civ.App., 178 S.W. 820, error refused.

Violation of constitution held not shown

Colo.—City and County of Denver v. Tax Research Bureau, 71 F.2d 809, 101 Colo. 140.

Miss.—Seward v. City of Jackson, 144 So. 686, 165 Miss. 478.

N.Y.—People ex rel. 1170 Fifth Ave. Corporation v. Goldfogle, 173 N.E. 685, 254 N.Y. 476.

34. S.C.—State v. Beaufort, 17 S.E. 355, 39 S.C. 5.

44 C.J. p 1296 note 13.

35. Ky.—Lancaster v. Clayton, 5 S.W. 864, 86 Ky. 373, 9 Ky.L. 611. 44 C.J. p 1296 note 14.

prohibition is not violated by an abatement of a landowner's taxes as a means of refunding to him overpayments on account of a local assessment;³⁶ nor is a constitutional prohibition against exemptions from general taxation violated by a statute exempting certain property from local assessments,³⁷ or by a failure to make an assessment, where under the statute the council is given discretionary power with respect thereto.³⁸ Where its charter prohibits a city from granting an exemption from general taxes, a provision for the payment by a public utility of a fixed annual charge, "in lieu of all other taxes" will be construed to refer to taxes for the use of the streets,³⁹ and not general taxes.⁴⁰

The power to exempt may not be exercised with respect to property which under the constitution is nonexempt,⁴¹ or after the power to tax is barred by the statute of limitations.⁴² Where, by statute, property can be exempted from municipal taxation only by a vote of the citizens, an agreement for exemption without such vote is a nullity.⁴³ It is not competent, by the petition for incorporation, to exempt from taxation for municipal purposes property which otherwise, under the law, would be subject to such taxation.⁴⁴

Annexed territory. Where the legislature has annexed territory to a municipality, the latter lacks power to provide that none of such territory shall be annexed without consent of the owners and that, if they consent, taxes on their property shall be remitted for a specified period.⁴⁵ Statutes respecting assumption of the indebtedness of annexed territory will be upheld as against the contention that they provide for exemption of property within the annexed territory in contravention of constitutional provisions, where the terms of the statutes do not extend an invalid exemption.⁴⁶

§ 2008. Construction of Statutes and Ordinances in General

The rule of strict construction ordinarily applies to statutes and ordinances providing for exemption from municipal taxation.

Statutes and ordinances granting exemptions from taxation are strictly construed,⁴⁷ and no claim for exemption can be sustained unless it is within the express letter or the necessary scope of the exemption laws.⁴⁸ A provision claimed to confer an exemption will be construed not to be applicable to the particular case unless the intention to render it applicable clearly appears.⁴⁹ On the other

36. Pa.—*Erie v. Griswold*, 39 A. 231, 184 Pa. 435.

44 C.J. p 1296 note 15.

37. Utah.—*Wey v. Salt Lake City*, 101 P. 381, 35 Utah 504.

44 C.J. p 1296 note 16.

38. Ky.—*Frankfort v. Morris*, 252 S.W. 142, 200 Ky. 59.

44 C.J. p 1296 note 17.

39. U.S.—*Nashville v. Cumberland Tel., etc., Co., Tenn.*, 145 F. 607, 76 C.C.A. 297, certiorari denied 27 S. Ct. 776, 203 U.S. 589, 51 L.Ed. 330.

40. U.S.—*Nashville v. Cumberland Tel., etc., Co., supra*.

44 C.J. p 1296 note 19.

41. Ga.—*Tarver v. Dalton*, 67 S.E. 929, 134 Ga. 462, 29 L.R.A.N.S., 183, 20 Ann.Cas. 281.

Nonenumerated property

Under a constitutional provision that "all laws exempting property from taxation other than the property herein enumerated shall be void," a city ordinance exempting from taxation nonenumerated property consisting of all new industries, corporate business, and business enterprises for period of five years was unconstitutional exemption of property from taxation.—*Norris v. Town of Union City*, 191 S.E. 105, 184 Ga. 283.

42. Ky.—*North Vernon Lumber Co. v. Louisville*, 173 S.W. 1120, 163 Ky. 467.

43. R.I.—*McTwiggan v. Hunter*, 33 A. 5, 19 R.I. 265, 29 L.R.A. 526.

44. Iowa.—*Hayzlett v. Mt. Vernon*, 33 Iowa 229.

45. Tenn.—*American Bemberg Corporation v. City of Elizabethton*, 175 S.W.2d 535, 180 Tenn. 373.

46. Tex.—*Wheeler v. City of Brownsville*, 220 S.W.2d 457.

47. Del.—*Banks v. Wilmington Terminal Co.*, 24 A.2d 592, 2 Terry 489, affirmed 28 A.2d 616, 3 Terry 616.

Md.—*State Tax Commission v. Standard Oil Co. of New Jersey*, 31 A.2d 621, 181 Md. 637.—*State Tax Commission v. Baltimore Asphalt Block & Tile Co.*, 26 A.2d 371, 180 Md. 620.

N.Y.—*Cornell University v. Thorne*, 57 N.Y.S.2d 6, 184 Misc. 630.

Tex.—*Graham v. City of Fort Worth*, Civ.App., 75 S.W.2d 930, error refused.—*Texas Employers' Ins. Ass'n v. City of Dallas*, Civ.App., 5 S.W.2d 614.

Vt.—*Spaulding v. City of Rutland*, 3 A.2d 556, 110 Vt. 186.

44 C.J. p 1296 note 21.

Curative act held inapplicable to validate ordinance improperly exempting property as "pioneer movement" from taxation.—*City of Anniston v. Anniston Office Bldg. Co.*, 149 So. 93, 227 Ala. 180.

48. Del.—*Banks v. Wilmington Terminal Co.*, 24 A.2d 592, 2 Terry

489, affirmed 28 A.2d 616, 3 Terry 616.

Ga.—*Head v. Wilkinson*, 198 S.E. 782, 186 Ga. 739.

Vt.—*Spaulding v. City of Rutland*, 3 A.2d 556, 110 Vt. 186.

44 C.J. p 1297 note 22.

"Taxation is the rule and exemption the exception . . . and . . . the intention to exempt property from taxation must be expressed in clear and unambiguous language"—*Portland Terminal Co. v. Hinds*, 187 A. 716, 719, 134 Me. 434, 108 A.L.R. 235.

A municipal vote exempting manufacturing establishments from taxation is subject to the same rule of construction as an exemption statute, and such a vote must be strictly construed, and no claim for exemption can be sustained unless it is within the express letter or the necessary scope of the exemption clause.—*Spaulding v. City of Rutland*, 3 A.2d 556, 110 Vt. 186.

49. La.—*J. M. Guffey Petroleum Co. v. Murrel*, 53 So. 705, 127 La. 466. 44 C.J. p 1297 note 23.

Class of city

The statute exempting property of water board from taxation for city purposes applies exclusively to cities of first class, and has no application to a city of the fourth class.—*Electric Plant Board of City*

hand, an exemption statute or ordinance will not be construed so strictly as to defeat its purpose,⁵⁰ and a statutory provision that state taxes therein authorized shall be in lieu of municipal taxes is not subject to the rule of strict construction,⁵¹ since it prescribes a method of taxation⁵² rather than an exemption.⁵³

Commencement and termination of exemption. The general rules, as discussed in the C.J.S. title Taxation §§ 237, 238, also 61 C.J. p 406 note 65—p 407 note 5, ordinarily govern the commencement and termination of exemption from municipal taxes.⁵⁴

§ 2009. Property Exempt

The property which is exempt from municipal taxation depends on the provisions under which the exemption is claimed.

The property which is exempt from municipal taxation depends on the provisions under which the exemption is claimed.⁵⁵ A statute exempting specific property will be construed to include an exemption of essential parts thereof,⁵⁶ and an exemption of the "operative property" of a car company has been held to include land⁵⁷ with railroad tracks and other incidents necessary thereto.⁵⁸ Where a municipal tax is assessed on property, a part of which is exempt, and there is no way to distinguish the exempt part, the whole will be exempt.⁵⁹ A municipal tax on exempt property is void.⁶⁰

Particular property entitled to exemption from municipal taxation is considered *infra* §§ 2015–2029.

§ 2010. Taxes within Exemption

Statutes exempting from taxation in general have been construed in some instances not to apply to municipal taxes, and statutes exempting from state and county taxes have been construed as not affording an exemption from municipal taxes. An exemption from municipal taxes has been considered as applicable only to general municipal taxes.

Statutes exempting from taxation in general have been construed in some instances as not to apply to municipal taxes.⁶¹ In other instances the statute has been held to apply to such taxes.⁶² Statutes exempting from state and county taxes have been construed as not affording an exemption from municipal taxes,⁶³ and statutes levying a tax in lieu of state and county taxes do not operate to exempt from municipal taxes.⁶⁴

An exemption from municipal taxes has been considered in some cases as applicable only to general municipal taxes as distinguished from special taxes for other purposes than the maintenance of the city government,⁶⁵ and from assessments for local improvements,⁶⁶ but the exemption applies to a special tax levied on the entire city for a local improvement,⁶⁷ or for aid to a railroad.⁶⁸

An exemption from a special tax does not exempt from a general tax,⁶⁹ even though used for the same purpose for which the special tax is

of *Mayfield v. City of Mayfield*, 185 S.W.2d 411, 299 Ky. 375.

50. Md.—*State Tax Commission v. Standard Oil Co. of New Jersey*, 31 A.2d 621, 181 Md. 637—*State Tax Commission v. Baltimore Asphalt Block & Tile Co.*, 26 A.2d 371, 180 Md. 620.

N.Y.—*People ex rel. Doctors Hospital v. Sexton*, 48 N.Y.S.2d 201, 267 App.Div. 736, affirmed 64 N.E.2d 273, 295 N.Y. 553.

44 C.J. p 1297 note 21½.

51. Cal.—*San Bernardino v. State Board of Equalization*, 155 P. 458, 172 Cal. 76.

44 C.J. p 1297 note 24.

52. Cal.—*San Bernardino v. State Board of Equalization*, *supra*.

53. Cal.—*San Bernardino v. State Board of Equalization*, *supra*.

54. Colo.—*City and County of Denver v. Tax Research Bureau*, 71 P.2d 809, 101 Colo. 140.

55. Fla.—*Bancroft Inv. Corp v. City of Jacksonville*, 27 So.2d 162, 157 Fla. 546.

56. N.Y.—*New York v. Deyo*, 143 N.

Y.S. 334, 158 App.Div. 319, affirmed 108 N.E. 1104, 213 N.Y. 706

44 C.J. p 1297 note 29.

57. Cal.—*San Bernardino v. State Board of Equalization*, 155 P. 458, 172 Cal. 76.

58. Cal.—*San Bernardino v. State Board of Equalization*, *supra*.

59. Vt.—*Spaulding v. City of Rutland*, 3 A.2d 556, 110 Vt. 186

60. Neb.—*McDonald v. Masonic Temple Craft of North Platte*, 280 N.W. 275, 135 Neb. 48, 118 A.L.R. 855—*East Lincoln Lodge No. 210, A. F. & A. M., v. City of Lincoln*, 268 N.W. 91, 131 Neb. 379.

61. N.Y.—*Union Free School Dist. No. 11 of Town of Urbana, Steuben County v. Steuben County*, 33 N.Y.S.2d 854, 178 Misc. 415, affirmed 36 N.Y.S.2d 440, 264 App.Div. 945.

44 C.J. p 1297 note 32—61 C.J. p 399 note 21.

62. Ga.—*Elder v. Home Building & Loan Ass'n*, 3 S.E.2d 75, 188 Ga. 113, 122 A.L.R. 738.

44 C.J. p 1297 note 33—61 C.J. p 398 note 10, p 399 note 21.

63. Mo.—*State v. Hannibal & St. J. R. Co.*, 21 S.W. 14, 113 Mo. 297

64. Iowa—*Dunlieth & Dubuque Bridge Co. v. Dubuque*, 32 Iowa 427

61 C.J. p 399 note 37.

65. Ky.—*Bamberger v. Louisville*, 82 Ky. 337.

44 C.J. p 1297 note 34.

66. Mich.—*Grand Rapids v. Grand Trunk R. System*, 182 N.W. 424, 211 Mich. 1

Vt.—*Caverly-Gould Co. v. Springfield*, 76 A. 39, 83 Vt. 396.

67. Mich.—*In re Auditor-General*, 197 N.W. 552, 226 Mich. 170.

Apportionment on city-wide basis

N.Y.—*Cooper Union for Advancement of Science and Art v. City of New York*, 71 N.Y.S.2d 204, 272 App.Div. 438, appeal and reargument denied 74 N.Y.S.2d 404, 272 App.Div. 1004, affirmed 81 N.E.2d 108, 298 N.Y. 578.

68. Ky.—*Henderson v. Lambert*, 8 Bush 607.

69. Or.—*Roney v. Lane County*, 159 P. 73, 81 Or. 372.

levied;⁷⁰ and a tax in lieu of certain enumerated taxes does not operate as an exemption from other taxes not within the enumeration,⁷¹ especially where the statute expressly provides against such exemption.⁷²

§ 2011. Exemption for Limited Period

Under statutes authorizing exemption from municipal taxes for a limited period, the municipal corporation may grant an exemption for a lesser period.

Statutory exemptions may be limited to a particular period of time, fixed by the terms of the statute. Where a statute authorizes an exemption from municipal taxes for a specified number of years, a vote of the council to exempt for a lesser time is valid;⁷³ but the granting of the exemption for a period not less than the statutory limit is a grant for the full statutory period.⁷⁴ Under authority to exempt property for a term of years, the term of exemption does not necessarily commence running from the passage of the statute;⁷⁵ but, if the exemption is voted within a reasonable time thereafter by the municipal council, it may begin then.⁷⁶ Where the statute is construed as granting an exemption for a term of years beginning on the happening of some future contingency, the exemption becomes operative at that time.⁷⁷

§ 2012. Repeal or Revocation

In the absence of contract rights, a municipal exemption from taxation may be repealed or revoked at any time.

The general rule is that an exemption from municipal taxation may be repealed or revoked at any time.⁷⁸ Where the exemption is granted by the state on the application of the municipal corporation

and the taxpayer, both acting under an agreement between themselves only, and the state is not a party, the subsequent repeal by the state is valid;⁷⁹ but, where an exemption was an inducement to a contract based on a consideration and entered into between the municipality and the person claiming the exemption, the municipality has no right to revoke the exemption within the period for which the exemption was granted.⁸⁰

Repeal by implication. A statutory power to exempt is repealed by implication by inconsistent provisions contained in a subsequent constitution⁸¹ or statute.⁸²

§ 2013. Remission of Taxes by Contract

While a municipal corporation may agree with a taxpayer to pay for benefits received an amount equal to the taxes on his property, in the absence of valid legislative authorization it may not agree to exempt his property from taxation.

It is well settled that a municipal corporation may agree with a taxpayer that, as a price of services to be rendered or commodities furnished by the taxpayer to the municipal corporation, the latter will pay a sum equal to the amount of the taxes to be levied on the property of the taxpayer, where the sum stipulated to be paid is a fair and just allowance and the stipulation is bona fide and not in the nature of an evasion of a prohibition against exemption from taxation;⁸³ but a distinction is made between a contract to pay for benefits received an amount equal to the taxes on the property of the person or corporation conferring the benefits and a contract granting an exemption therefor,⁸⁴ and it has been held that the latter is not within the power of the municipality to make,⁸⁵ without valid legislative authority.⁸⁶ A remission of taxes which

70. Or.—Roney v. Lane County, *supra*.

71. Ga.—Macon R., etc., Co., v. Macon, 72 S.E. 159, 136 Ga. 797.

72. Ga.—Macon R., etc., Co. v. Macon, *supra*.

73. Me.—Portland v. Portland Water Co., 67 Me. 135.

74. R.I.—Lonsdale Co. v. Taft, 84 A. 795, 34 R.I. 496.

75. Me.—Portland v. Portland Water Co., 67 Me. 135.

76. Me.—Portland v. Portland Water Co., *supra*.

77. R.I.—Lonsdale Co. v. Taft, 84 A. 795, 34 R.I. 496.

44 C.J. p 1298 note 51.

78. Tenn.—Galloway v. Memphis, 94 S.W. 75, 116 Tenn. 736.

44 C.J. p 1298 note 53.

79. N.Y.—People v. Mealy, 153 N.Y. S. 435, 88 Misc. 649, 663, affirmed

165 N.Y.S. 1106, 179 App.Div. 951, affirmed 120 N.E. 155, 224 N.Y. 187.

44 C.J. p 1298 note 54.

80. Ky.—Middlesborough v. New South Brewing, etc., Co., 56 S.W. 427, 21 Ky.L. 1782.

44 C.J. p 1298 note 56.

81. Mo.—State v. Hemenway, 198 S.W. 825, 272 Mo. 187.

82. N.Y.—People v. Yonkers, 127 N. E. 593, 229 N.Y. 1.

83. Me.—Milo Water Co. v. Inhabitants of Town of Milo, 173 A. 152, 133 Me. 4.

44 C.J. p 1298 note 60.

84. Ga.—Tarver v. Dalton, 67 S.E. 929, 134 Ga. 462, 29 L.R.A., N.S., 183, 20 Ann.Cas. 281.

44 C.J. p 1298 note 61.

85. La.—Edwards v. Town of Ponchatoula, 34 So.2d 394, 213 La. 116.

Me.—Milo Water Co. v. Inhabitants of Town of Milo, 173 A. 152, 133 Me. 4.

N.Y.—Troy Union R. Co. v. City of Troy, 230 N.Y.S. 653, 132 Misc. 534, affirmed 238 N.Y.S. 577, 227 App. Div. 351, affirmed 171 N.E. 798, 253 N.Y. 597.

Ohio.—Hines v. City of Bellefontaine, 11 Ohio Supp. 27, reversed on other grounds 57 N.E.2d 164, 74 Ohio App. 393.

Tex.—Wedgworth v. City of Fort Worth, Civ.App., 189 S.W.2d 40, error dismissed.

Va.—City of Bristol v. Dominion Nat. Bank, 149 S.E. 632, 153 Va. 71.

44 C.J. p 1298 note 62.

86. Fla.—Tampa Shipbuilding & Engineering Co. v. City of Tampa, 136 So. 458, 459, 102 Fla. 549.

"Without valid legislative authority, no city or town has power to bind itself by contract, either to

is based merely on a contract which, at the time of its execution, the city council had no authority to make, is void,⁸⁷ and it will not be validated by a subsequent authorizing statute which is not retroactive in its operation.⁸⁸ A municipality may not indirectly remit taxes by a provision that certain realty shall remain outside its borders for a specified period where the municipality lacks power to make such an agreement.⁸⁹

Under valid legislative authorization, a municipality may contract to exempt property from taxation,⁹⁰ and, where the contract is entered into before the effective date of the statute authorizing it, it has been held that the contract will be valid,⁹¹ although it may not operate to confer exemption until such effective date.⁹² In order to be valid, a contract remitting taxes must not impose conditions contrary to public policy.⁹³ The extent of the remission from taxes depends on the terms of the contract.⁹⁴ Rights to the remission of taxes based on contract are assignable according to some authorities,⁹⁵ and, according to others, are not.⁹⁶

Estoppel. A municipal corporation is not es-

topped from asserting the invalidity of the contract by the acceptance of benefits thereunder,⁹⁷ but it has been held that a city which has classified a taxpayer for a long period of years as among those entitled to exemptions under an ordinance is estopped thereafter from placing a different construction on its own ordinance and subjecting him to the tax,⁹⁸ and that a taxpayer who has accepted the benefits of an exemption for a shorter period than that named in the resolution granting it is estopped from afterward claiming it for a longer time.⁹⁹

§ 2014. Proceedings

A property owner claiming an exemption from municipal taxation must plead and prove his exemption.

Under the various statutes it has been held that the proper method to establish or enforce an exemption from municipal taxation is by a bill to restrain the assessment and collection of taxes,¹ or by abatement proceedings.² A property owner claiming an exemption must plead³ and, likewise, the

forbear to impose taxes on particular property, or to impose them only under given limitations, or on certain given conditions."—*Tampa Shipbuilding & Engineering Co. v. City of Tampa*, supra.

87. R.I.—*McTiggan v. Hunter*, 38 A. 5, 19 R.I. 265, 29 L.R.A. 526.

88. R.I.—*McTiggan v. Hunter*, supra.

89. Tenn.—*American Bemberg Corporation v. City of Elizabethton*, 175 S.W.2d 535, 180 Tenn. 373.

90. Ill.—*Krause v. Peoria Housing Authority*, 19 N.E.2d 193, 370 Ill. 356.

91. Ill.—*Krause v. Peoria Housing Authority*, supra.

Low-cost housing

A city could validly enter into contract to exempt slum clearance and low-cost housing projects from taxation, pursuant to Housing Authorities Act, before the act took effect, although contract could not exempt projects from taxation before statute became effective.—*Krause v. Peoria Housing Authority*, supra.

92. Ill.—*Krause v. Peoria Housing Authority*, supra.

93. Ohio.—*Vrooman v. Toledo*, 5 Ohio App. 230, 26 Ohio Cir.Ct., N.S., 135.

44 C.J. p 1299 note 63.

94. Ga.—*Atlanta St. R. Co. v. Atlanta*, 66 Ga. 104.

44 C.J. p 1299 note 70.

95. Mich.—*Detroit Citizens' St. R.* 64 C.J.S.—45

Co. v. Detroit, 85 N.W. 96, 86 N.W. 809, 125 Mich. 673, 84 Am.S.R. 589.

96. U.S.—*Parkersburg v. Baltimore, etc., R. Co.*, C.C.A.W.Va., 296 F. 74, reversed on other grounds 45 S.Ct. 382, 268 U.S. 35, 69 L.Ed. 834.

97. R.I.—*McTiggan v. Hunter*, 33 A. 5, 19 R.I. 265, 29 L.R.A. 526.

S.C.—*Millster v. Spartanburg*, 46 S.E. 539, 68 S.C. 26.

98. S.C.—*State v. Addison*, 2 S.C. 499.

99. N.J.—*Liondale Bleach, etc., Works v. McGrath*, 52 A. 714, 68 N.J. Law 215, affirmed 54 A. 1124, 68 N.J. Law 731.

1. Pa.—*Commonwealth v. Dauphin County*, 47 A.2d 807, 354 Pa. 556.

Appeal from assessment

If a property owner claims total exemption, in order to be safe, in addition to filing a bill in equity, he may also appeal from municipal assessment, thus preserving the right to press his claim of under-exemption if his bill in equity should fail.—*City of Philadelphia v. Dougherty*, 34 A.2d 918, 153 Pa.Super. 554.

2. Me.—*City of Lewiston v. All Maine Fair Ass'n*, 21 A.2d 625, 138 Me. 39.

Limitations

A religious and educational corporation's petitions, filed over six months after its receipt of bills for taxes assessed on its property by town, to abate such taxes on ground of property's exemption from taxation, were properly dismissed as

barred by limitations.—*Sisters of Mercy v. Town of Hooksett*, 42 A.2d 222, 93 N.H. 301.

Motion to dismiss

Where neither party to religious corporation's proceedings for abatement of taxes, assessed by town against petitioner's property, on ground of exemption thereof from taxation, put in issue question whether town officers assessed property disproportionately to assessments of other property in same town, town's motion to dismiss petition because plaintiff offered no evidence of assessed or true value of any other property in town was properly denied.—*Sisters of Mercy v. Town of Hooksett*, supra.

Trier of facts to weigh evidence

In religious and educational corporation's proceedings for abatement of taxes assessed on its property by town, weight of conflicting testimony as to market value of petitioners' school buildings, cost of reproduction thereof, and depreciation in such value was for presiding justice as supreme assessor.—*Sisters of Mercy v. Town of Hooksett*, supra.

3. La.—*Donaldsonville v. Ascension Parish Police Jury*, 36 So. 873, 113 La. 16.

Md.—*Corpus Juris cited in Eastern Tar Products Corporation v. State Tax Commission of Maryland*, 4 A. 2d 462, 464, 176 Md. 290.

N.H.—*Sisters of Mercy v. Town of Hooksett*, 42 A.2d 222, 93 N.H. 301.

property owner claiming an exemption must prove⁴ his exemption. It is never presumed that the right to tax is abandoned or surrendered by the municipality unless it clearly appears that such was the intention;⁵ and a contract of exemption will not be inferred from facts which do not lead irresistibly and necessarily to the existence of the contract;⁶ but, on the other hand, when the making of a contract remitting taxes is established, the presumption is in favor of its validity.⁷ A memorandum,

indorsed on the assessment roll of a municipal corporation, to the effect that the property of a corporation, not included in any constitutional or statutory exemption, is exempt from taxation, is incompetent to prove that it is in fact exempt,⁸ and cannot operate as notice of such fact to purchasers of municipal bonds.⁹ The findings¹⁰ and judgment¹¹ in proceedings to establish an exemption must be in accordance with, and be supported by, the pleadings and evidence.

d. Particular Persons and Property Liable or Exempted

§ 2015. Public Property

- a. In general
- b. Constitutional or statutory exemption generally
- c. Property sold to or by government
- d. Leased property

a. In General

In the absence of consent, public property ordinarily

is not subject to municipal taxation while devoted to a public use.

In accordance with general rules discussed in the C.J.S. title Taxation, §§ 197-214, also in 61 C.J. p 359 note 81-p 381 note 87, which rules usually control with respect to the municipal taxation or exemption of public property,¹² in the absence of statutory or constitutional consent public property ordinarily is not subject to municipal taxation while devoted to a public use,¹³ and it has been said that

Bill held to present proper case for relief

Pa.—Laureldale Cemetery Ass'n v. Matthews, 47 A.2d 277, 354 Pa. 239.

4. Fla.—Tamiambi Trail Tours v. City of Tampa, 31 So.2d 468, 159 Fla. 287.

Md.—Corpus Juris cited in Eastern Tar Products Corporation v. State Tax Commission of Maryland, 4 A.2d 462, 464, 176 Md. 290.

Pa.—Wynnefield United Presbyterian Church v. City of Philadelphia, 35 A.2d 276, 348 Pa. 252.

Tex.—Texas Employers' Ins. Ass'n v. City of Dallas, Civ.App., 5 S.W.2d 614.

44 C.J. p 1299 note 77.

Every fact

Landowner has burden of proving every fact essential to show exempt status of his land, and, when seeking under statute to exempt from taxation marsh and meadow lands, located in city and filled in by him so as to become high and fast, must show affirmatively when land became high and fast.—Stirlith Bros. Co. v. Mayor and Council of Wilmington, 189 A. 880, 21 Del.Ch. 356.

Evidence held sufficient

N.Y.—People ex rel. Doctors Hospital v. Sexton, 48 N.Y.S.2d 201, 267 App. Div. 736, affirmed 64 N.E.2d 273, 295 N.Y. 553.

Vt.—Troy Conference Academy and Green Mountain Junior College v. Town of Poultney, 66 A.2d 2.

Evidence held insufficient

(1) Generally.—City of Clifton v. State Bd. of Tax Appeals, 55 A.2d 58, 136 N.J.Law 213.

(2) To establish that a cemetery association was a mere agent or instrumentality of a dissolved cemetery corporation and created solely as a subterfuge to escape liability for taxation.—Laureldale Cemetery Ass'n v. Matthews, 47 A.2d 277, 354 Pa. 239.

5. Ga.—Wells v. Savannah, 32 S.E. 669, 107 Ga. 1, affirmed 21 S.Ct. 697, 181 U.S. 531, 45 L.Ed. 986. 44 C.J. p 1299 note 78.

Proving charitable character

A corporation claiming exemption from local taxes on ground that it was a public charity had burden of proving to the satisfaction of appellate tax board that it was a public charity operating without profit to its members or stockholders and for the benefit of the public at large or of some part thereof or of an indefinite class of persons.—Jacob's Pillow Dance Festival v. Assessors of Becket, 69 N.E.2d 463, 320 Mass. 311.

6. U.S.—Wells v. Savannah, Ga., 21 S.Ct. 697, 181 U.S. 531, 45 L.Ed. 986.

44 C.J. p 1299 note 80.

7. Me.—Belfast v. Belfast Water Co., 98 A. 738, 115 Me. 234, L.R.A. 1917B 908.

8. U.S.—Darlington v. Atlantic Trust Co., S.Ct., 68 F. 849, 16 C.C.A. 28.

9. U.S.—Darlington v. Atlantic Trust Co., supra.

10. N.H.—Sisters of Mercy v. Town of Hooksett, 42 A.2d 222, 93 N.H. 301.

Vt.—Spaulding v. City of Rutland, 3 A.2d 556, 110 Vt. 186.

11. N.J.—City of Newark v. General Motors Sales Corporation, Frigid-aire Division, 13 A.2d 792, 18 N.J. Misc. 418.

12. Mont.—Henderson v. City of Missoula, 79 P.2d 547, 106 Mont. 596, 116 A.L.R. 1425.

Pa.—Commonwealth v. Dauphin County, 6 A.2d 870, 335 Pa. 177.

Realty purchased with United States funds

Realty purchased by incompetent World War veteran's guardian with funds received from the United States as pension, compensation, and adjusted compensation in which realty guardian conveyed a life estate with remainder over to veteran's minor son, was exempt from city taxation as "property of the United States," in view of constitutional provision exempting from taxation property of the United States and statute providing that property derived from funds received from the United States should be exempt from all taxation as property of the United States.—Henderson v. City of Missoula, 79 P.2d 547, 106 Mont. 596, 116 A.L.R. 1425.

13. Fla.—Bancroft Inv. Corp. v. City of Jacksonville, 27 So.2d 162, 157 Fla. 546.

N.C.—Wells v. Housing Authority, of City of Wilmington, 197 S.E. 693, 213 N.C. 744.

Pa.—Com. v. Schuylkill County, 62 A.2d 922, 361 Pa. 126—Commonwealth v. Dauphin County, Com. Pl., 57 Dauph.Co. 215.

such exemption does not rest on statute but on general principles of justice and expediency.¹⁴ Thus, in the absence of consent, ordinarily a municipality may not tax the property of another municipality,¹⁵ a county,¹⁶ the state,¹⁷ agencies of the state,¹⁸ the United States,¹⁹ or agencies of the latter.²⁰

On the other hand, in the absence of a constitutional prohibition, the legislature may expressly authorize municipal taxation of state and county property,²¹ even though the general legislative policy in the state is against the taxing of public lands for local improvements,²² and even though the enactment of the authorizing statute involves the repeal, by implication, of an earlier statute exempting such property.²³ While a sovereign government may not be taxed by a municipality without its consent,²⁴ where it consents to local taxation of its own

or its instrumentality's property, such property becomes subject to municipal taxation in the same manner and to the same extent as other property of like character,²⁵ and the governmental instrumentality becomes subject to the usual incidents of collection.²⁶

Necessity of public use. In order for property of one municipality located in another to be free from taxation in the latter, it must appear that such property is devoted to a public use²⁷ or that it is held with the design within a reasonable time to devote it to such use.²⁸ When property formerly devoted to a public purpose is transferred to use in private enterprise, ordinarily it becomes subject to municipal taxation.²⁹

Property owned by taxing municipality. It has been held that a municipality may not tax property owned by itself;³⁰ but other authority holds that a

Building on private land

The fact that building constructed pursuant to contract between United States Navy and owner of realty with government money, was constructed brick by brick, and hence was not easily removable, did not make the building realty subject to tax assessment against owner of realty by city, if to do so would be contrary to the intention of the parties; and where contract for construction of brick building on realty with government money provided that no part of building or equipment was to become a fixture, that title was to vest in the United States, and that owner of realty was to pay rent for use of building, city could not assess building for taxation either against owner of realty or the United States Government.—*City of East Orange v. Joshua Hendy Iron Works*, 46 A.2d 383, 24 N.J.Misc. 82.

Insurance funds

Money authorized to be invested by statute providing that state workmen's insurance board may invest surplus or reserve belonging to state workmen's insurance fund in such securities and investments as are authorized for investment by savings banks is public property, and investment is a public purpose; and where state workmen's insurance board as authorized by statute invested surplus funds from state workmen's insurance fund in first mortgage, and, on mortgagor's default, board took a deed of realty from mortgagor and then rented realty to mortgagor, realty was public property and investment was for a public purpose within meaning of constitutional provisions authorizing exemption from taxation of public property used for public purposes, and therefore realty was not sub-

ject to taxation for city, school, and county purposes.—*Com. v. Dauphin County*, 47 A.2d 807, 354 Pa. 556.

14. Mass.—Collector of Taxes of Milton v. City of Boston, 180 N.E. 116, 117, 278 Mass. 274, 81 A.L.R. 1515.

"The reason is that property held and used for the benefit of the public ought not to be made to share the burden of paying the public expenses"—Collector of Taxes of Milton v. City of Boston, supra.

15. Mass.—Collector of Taxes of Milton v. City of Boston, supra.

16. Pa.—Piper v. Singer, 4 Serg. & R. 354.

44 C.J. p 1300 note 86.

17. Fla.—Bice v. Haines City, 195 So. 919, 142 Fla. 371.

Ga.—Newton v. City of Atlanta, 6 S.E.2d 61, 189 Ga. 441.

Tex.—Lubbock Independent School District v. Owens, Civ.App., 217 S.W.2d 186, error refused. 44 C.J. p 1300 note 87.

Statutory authorization requisite

It is not to be presumed that general provisions of statute subjecting all real estate to taxation by municipal bodies was meant to include property owned by commonwealth; and a municipality cannot tax state owned property, in absence of statute clearly authorizing it to do so.—*Commonwealth v. Dauphin County*, 6 A.2d 870, 335 Pa. 177.

18. Ga.—Newton v. City of Atlanta, 6 S.E.2d 61, 189 Ga. 441.

Pa.—Commonwealth v. Dauphin County, 67 Dauph.Co. 215. 44 C.J. p 1300 note 88.

19. U.S.—U. S. v. City of Philadelphia, D.C.Pa., 50 F.Supp. 170.

Pa.—Mint Realty Co. v. Philadelphia, 30 Pa.Co. 276.

20. N.J.—Borough of Brooklawn v.

Brooklawn Housing Corporation, 28 A.2d 199, 129 N.J.Law 77.

21. La.—State v. Recorder of Mortgages, 12 So. 880, 45 La.Ann. 566. 44 C.J. p 1300 note 90.

22. N.Y.—People v. Yonkers, 127 N. E. 593, 229 N.Y. 1.

44 C.J. p 1300 note 91.

23. N.Y.—People v. Yonkers, supra. 44 C.J. p 1300 note 92.

24. Pa.—Borough of Homestead v. Defense Plant Corporation, 52 A.2d 581, 356 Pa. 500.

25. Pa.—Borough of Homestead v. Defense Plant Corp., supra—Borough of Homestead v. Reconstruction Finance Corp., Com.Pl., 94 Pittsb Leg J. 186

Entire Property

Under federal statute subjecting real property of federal defense plant corporation to local taxation, entire property of federal defense plant corporation owning steel mill, including land, buildings, machinery, and equipment, was subject to borough taxation.—*Borough of Homestead v. Defense Plant Corp.*, 52 A.2d 581, 356 Pa. 500.

26. Pa.—Borough of Homestead v. Defense Plant Corp., supra.

Interest and attorney's fee

Pa.—Borough of Homestead v. Defense Plant Corp., supra.

27. Mass.—Collector of Taxes of Milton v. City of Boston, 180 N.E. 116, 278 Mass. 274, 81 A.L.R. 1515.

28. Mass.—Collector of Taxes of Milton v. City of Boston, supra.

29. Fla.—Bancroft Inv. Corp. v. City of Jacksonville, 27 So.2d 162, 157 Fla. 546.

30. La.—New Orleans v. McDonogh, 12 La.Ann. 240.

44 C.J. p 1300 note 85.

municipality having general powers of taxation may tax its own property.³¹ Also, a municipality may tax property in which it has no present interest but only one to become vested in the future,³² or the property of a corporation, even though the municipality owns all the shares of stock of the corporation.³³

Municipally operated utility. A municipality owning and operating an electric power plant within its own borders for the purpose of serving its own inhabitants has been held not subject to an ad valorem tax by an adjoining municipality on poles and other equipment extending into the adjoining municipality for the purpose of serving consumers residing in the latter.³⁴

Housing authority. The property of a governmental housing authority has been held to be exempt from municipal taxation as property used for a public purpose,³⁵ even though private individ-

uals may receive direct benefit from such property;³⁶ but under some statutes it has been held that the state legislature did not confer complete immunity from municipal taxation on such housing authorities,³⁷ and that power to determine the amount to be paid by the housing authority in lieu of taxes is delegated to the municipal officers.³⁸ It has been held not an invalid surrender of its police power for a municipality to agree with a housing authority to exempt the latter's property from taxation.³⁹

b. Constitutional or Statutory Exemption Generally

Public property within the scope of constitutional or statutory provisions exempting such property is not subject to municipal taxation.

Public property within the scope of constitutional and statutory provision therefor is exempt from municipal taxation.⁴⁰ The status of the property on the annual assessment date has been held con-

31. Ohio.—Trustees of Cincinnati Southern R. Co. v. Roth, 17 Ohio Cir.Ct.N.S., 562.

Va.—Norfolk v. J. W. Perry Co., 61 S.E. 867, 108 Va. 28, 128 Am.S.R. 940, affirmed 31 S.Ct. 465, 220 U.S. 472, 55 L.Ed. 548.

32. Ala.—Mobile v. Stein, 54 Ala. 23. Cal.—Fall v. Marysville, 19 Cal. 391.

33. Ky.—Louisville v. McAteer, 81 S.W. 698, 26 Ky.L. 425, 1 L.R.A., N.S., 766.

44 C.J. p 1300 note 95.

34. N.J.—Landis Tp. v. Borough of Vineland, 50 A.2d 403, 25 N.J.Misc. 73.

No more taxable than privately owned utility

A municipality operating public utilities may not make distribution in adjoining municipality without paying the same taxes which a private corporation operating such utilities is required to pay, and, where a private corporation could have been taxed only under the gross receipts statute, the municipality was not subject to personal property tax.—Landis Tp. v. Borough of Vineland, supra.

35. U.S.—U. S. v. City of Milwaukee, D.C.Wis., 49 F.Supp. 436, affirmed, C.C.A., 140 F.2d 286, certiorari denied 64 S.Ct. 1047, 322 U.S. 735, 88 L.Ed. 1568.—U. S. v. City of Philadelphia, D.C.Pa., 48 F.Supp. 379.

Ill.—Krause v. Peoria Housing Authority, 19 N.E.2d 193, 370 Ill. 356.

N.C.—Wells v. Housing Authority of City of Wilmington, 197 S.E. 693, 213 N.C. 744.

Validity of exemption

Under state constitution exempting

from taxation property belonging to any municipal corporation, exemption of real and personal property of housing authorities from local taxation under statute providing for low-rent housing or slum clearance projects is valid, and such provision is not rendered invalid because of the possibility of a foreclosure in which title to the property might be lost, since the status of the property as tax-exempt while in the hands of the authority is not altered by its possible status after disposition by the authorities.—Housing Authority of Los Angeles County v. Dockweiler, 94 P.2d 794, 14 Cal.2d 437.

36. U.S.—U. S. v. Boyle, D.C.Ohio, 52 F.Supp. 906, affirmed City of Cleveland v. U. S., 65 S.Ct. 280, 323 U.S. 329, 89 L.Ed. 274.

Slum clearance

The use of property owned by Federal Public Housing Authority for a low-cost housing slum-clearance project constituted a public use authorized under federal Constitution, although private individuals received direct benefit from the project, and, hence, property was exempt from municipal taxation.—U. S. v. Boyle, D.C.Ohio, 52 F.Supp. 906, affirmed City of Cleveland v. U. S., 65 S.Ct. 280, 323 U.S. 329, 89 L.Ed. 274.

37. Md.—Pittman v. Housing Authority of Baltimore City, 25 A.2d 466, 180 Md. 457.

38. Md.—Pittman v. Housing Authority of Baltimore City, supra.

Taxing power not bargained away
Objection against tax exemption of houses built under slum clearance statutes would not be maintainable if project was within municipal powers, since property would be owned by a public agency, formed

for exercise of police power; and an objection that city bargains away its taxing power in granting tax exemption in its contract with local authority constructing houses under slum clearance laws is not maintainable, since exemption is of property of public agency for accomplishment of public municipal purposes and expressly provided for by statute.—Matthaei v. Housing Authority of Baltimore City, 9 A.2d 835, 177 Md. 506.

39. Va.—Mumpower v. Housing Authority of City of Bristol, 11 S.E. 2d 732, 176 Va. 426.

Acknowledgment of constitutional right

Provision of agreement between city and housing authority exempting property of authority from taxation does not surrender police power or bind future councils on legislative matters, since provision merely acknowledges legal right of authority under the constitution to such exemption.—Mumpower v. Housing Authority of City of Bristol, supra.

40. Mich.—Lucking v. People, 31 N. W.2d 707, 320 Mich. 495.

N.J.—Delaware River Joint Commission v. City of Camden, 31 A.2d 36, 130 N.J.Law 19—City of Clifton v. State Board of Tax Appeals, 17 A.2d 476, 126 N.J.Law 205.

N.C.—Town of Weaverville v. Hobbs, 194 S.E. 860, 212 N.C. 684.

Pa.—Commonwealth v. Dauphin County, 6 A.2d 870, 335 Pa. 177—Commonwealth v. Dauphin County, Com.Pl., 57 Dauph.Co. 215.

"Excess lands"

Lands acquired by the state for the construction and improvement of state highways and known as "excess lands" in that they were held

trolling in determining whether or not it is exempt under such provisions.⁴¹ On the other hand, where the property does not fall within the terms of the exemption provision, it will not be exempt thereunder,⁴² as where devotion to a public purpose is made essential and the property is not devoted to such a purpose.⁴³ Property of the United States awaiting disposition after the United States has ceased its active use for governmental functions has been held exempt from taxation under a state statute exempting property of the United States used for governmental functions, on the theory that disposal of such property is in itself a governmental function,⁴⁴ and the leasing of such property to private persons subject to cancellation in event of

sale does not render it subject to municipal taxation.⁴⁵

c. Property Sold to or by Government

Ordinarily land sold to, or otherwise vested in, the government, as for delinquent taxes, is not subject to municipal taxation; but after the government has sold land to a private owner it becomes subject to municipal tax.

Lands sold to, or vested in, the government for delinquent taxes may not be taxed by a municipal corporation while the title thereto is in the government,⁴⁶ unless otherwise provided by law,⁴⁷ or unless title is not actually acquired by the government,⁴⁸ as where the government fails to perfect

by the state after the completion of the highway for disposition by the highway commissioner were not subject to municipal taxation, notwithstanding title to the lands was taken in the name of a trustee.—*People v. Sparks*, 20 N.W.2d 136, 312 Mich. 140.

The word "moneys," in section of state employees' retirement act exempting "moneys" in fund created thereunder from state and municipal taxes, was used comprehensively and synonymously with word "property" and hence includes real estate.—*Commonwealth v. Dauphin County*, 6 A.2d 870, 335 Pa. 177.

Tunnel approach

N.J.—*Port of New York Authority v. Union City*, 20 A.2d 653, 19 N.J. Misc. 421.

Water supply

N.J.—*Town of Morristown v. Randolph Tp.*, 20 A.2d 355, 19 N.J. Misc. 413.

41. Ariz.—*City of Phoenix v. Elias*, 166 P.2d 589, 64 Ariz. 95.

Exemption for full tax year

Realty owned by city as of assessing date is exempt from taxation for the entire tax year, and no partial or proportionate tax assessment thereon may be made against one purchasing the realty during the tax year.—*Corrado v. City of Hoboken*, 25 A.2d 287, 20 N.J. Misc. 134.

42. Me.—*City of Bangor v. City of Brewer*, 45 A.2d 434.

43. N.Y.—*Herkimer County v. Village of Herkimer*, 18 N.E.2d 854, 279 N.Y. 560.

Land owned by city in proprietary capacity was not exempt from taxation under a statute exempting land of a municipal corporation held for a public use.—*Wilson & Co. v. City of New York*, 78 N.Y.S.2d 206—*City of New York v. Wilson*, 278 N.Y. 86.

Public purpose held sufficiently shown

Pa.—*Commonwealth v. Dauphin County*, 6 A.2d 870, 335 Pa. 177.

44. U.S.—*City of Springfield v. U. S.*, C.C.A.Mass., 99 F.2d 860, certiorari denied 59 S.Ct. 592, 306 U.S. 650, 83 L.Ed. 1049.

45. U.S.—*City of Springfield v. U. S.*, supra.

46. Fla.—*Rice v. Haines City*, 195 So. 919, 142 Fla. 371.

N.Y.—*Budd v. Franco*, 185 N.Y.S. 797, 194 App.Div. 803—*Sweeney v. City of Rome*, 75 N.Y.S.2d 154, 190 Misc. 263.

Tex.—*Childress County v. Schultz*, Civ.App., 199 S.W.2d 860—*Puckett v. Rollison*, Civ.App., 193 S.W.2d 974, error granted.

Wis.—*Oconto County v. City of Gillett*, 22 N.W.2d 528, 248 Wis. 486.

Lands sold to county for taxes are not subject to municipal taxation while held by the county.—*Budd v. Franco*, 185 N.Y.S. 797, 194 App.Div. 803.

Lands acquired by another municipality

(1) The text rule has been applied to lands acquired by one municipality within the territory of another.—*Petition of City of Pittsburgh*, 38 Pa. Dist. & Co. 463, 31 Mun. L.R. 169, 88 Pittsb. Leg. J. 71.

(2) On the other hand, if the real estate produced revenue or its use was diverted to any other purpose save the public use, the real estate would be taxable.—*Petition of City of Pittsburgh*, supra.

Delay in reselling land sold to state for delinquent state and county taxes did not estop state or its grantee from asserting that the land while thus held by state was not subject to city taxes.—*Lubbock Independent School Dist. v. Owens*, Tex. Civ. App., 217 S.W.2d 186, error refused.

47. Fla.—*Bice v. Haines City*, 195 So. 919, 142 Fla. 371.

N.Y.—*Herkimer County v. Village of Herkimer*, 18 N.E.2d 854, 279 N.Y. 560.

Lands taken by taxing city

Properties which are bid in by city treasurer at a tax sale or against which city holds tax liens are subject to taxation even though annual city taxes are not extended to them, since it is not necessary that property be on tax rolls in order to be subject to taxation; and the governing body of a city could amend charter at any time so as to make annual taxes extendable to properties which were bid in by city treasurer at a tax sale or against which city held tax liens.—*L. L. F. Realty Co. v. Fuchs*, 75 N.Y.S.2d 356, 273 App.Div. 111.

Removal from tax rolls

City, by removing from tax rolls properties which were bid in by city treasurer at a tax sale or against which city holds tax liens does not exempt properties from taxation but merely withholds charging them with their share of taxes accruing during period tax liens against them are held by it.—*L. L. F. Realty Co. v. Fuchs*, supra.

48. Mo.—*Kansas City v. Tiernan*, 202 S.W.2d 20, 356 Mo. 138.

Deed not conferring title

Where city bid in property at city tax sale and city treasurer issued to city a tax deed, but taxes for which sale was made were transferred to back tax records and carried as delinquent taxes, city did not acquire title by such deed and property was not exempt from taxation.—*Kansas City v. Tiernan*, supra.

Period allowed for redemption

Taxing statutes plainly indicate the legislature did not intend that land purchased by county commissioners for unpaid taxes should be tax exempt during the period allowed for redemption; and the title acquired by county at tax sale is not absolute where the right to redeem is present and such land is not public property within the ordinary, accepted meaning of the term or within statute exempting public

its title after a sale to it,⁴⁹ in which cases the property is taxable provided there is no contractual obligation of the grantor to exempt the land.⁵⁰ Lands under contract of sale by the United States to a purchaser have been held not subject to municipal taxation as long as title thereto remains in the United States,⁵¹ although it has also been held that where the land is occupied and used for private purposes it becomes subject to municipal tax despite retention of title by the United States.⁵² Property sold by the government to a private owner becomes subject to tax after such sale,⁵³ and property held by a private owner pending sale to the government remains subject to municipal tax.⁵⁴

d. Leased Property

Ordinarily a municipal corporation may tax land rented to private persons by the government in so far as the lessee's interest is concerned.

A municipal corporation may tax a lessee of government land with respect to his interest therein,⁵⁵ in the absence of a stipulation in the lease exempting his interest from taxation.⁵⁶ It has been held that a city may tax even the land itself to which it holds title where the lease contains a clause for perpetual renewal and a covenant by the lessee to pay all the public taxes.⁵⁷ Statutes providing that property owned by a municipality and leased for business purposes is taxable to the lessees to the

same extent as though they were owners in fee have been construed as contemplating a dominant use of the premises for business purposes in order to render them so taxable.⁵⁸ The fact that the government leases its property to private persons does not preclude exemption where the property constitutes part of a state fund for governmental purposes and the rentals are applied to such purposes.⁵⁹ Where land is exempt from municipal taxation on the date set for assessment, because it is then public property, the fact that it is subsequently leased to a private owner as of the assessment date does not subject it to tax.⁶⁰

Improvements made by the lessee on the land under an agreement that they shall be the property of the lessor have been held not taxable.⁶¹

§ 2016. Bridges and Approaches Thereto

Bridges and their approaches within the corporate limits are taxable by a municipal corporation in the absence of statutory or other provision for exemption.

Unless the constitution or a statute provides otherwise,⁶² a bridge within the corporate limits is subject to municipal taxation⁶³ although it derives no material benefit from the municipal government⁶⁴ and although it is devoted to a public use,⁶⁵ provided it is owned by private interests⁶⁶ and not acquired by eminent domain.⁶⁷ A bridge outside the corporate limits cannot be taxed,⁶⁸ but the portion

property from taxation—Appeal of City of Erie, 46 A.2d 502, 159 Pa. Super. 18.

49. Ky.—Kentucky Lands Inv. Co. v. Fitch, 137 S.W. 1040, 144 Ky. 273, Ann.Cas.1913A 672.
44 C.J. p 1300 note 97.

50. U.S.—Wells v. Savannah, Ga., 21 S.Ct. 697, 181 U.S. 531, 45 L.Ed. 986.
44 C.J. p 1300 note 99.

51. Pa.—Mint Realty Co. v. Philadelphia, 30 Pa.Co. 276.
44 C.J. p 1300 note 1.

52. Fla.—Bancroft Inv. Corp. v. City of Jacksonville, 27 So 2d 162, 157 Fla. 546.

Title retained for security
Fla.—Bancroft Inv. Corp. v. City of Jacksonville, supra.

53. Ariz.—City of Phoenix v. Elias, 166 P.2d 589, 64 Ariz. 95.
44 C.J. p 1300 note 98.

Taxes previously accrued and to accrue

Lands sold by state are subject to unpaid valid municipal tax liens acquired before lands became vested in state, and are also subject to authorized taxation after conveyance by state to private persons.—Bice v.

Haines City, 195 So. 919, 142 Fla. 371.

54. U.S.—U. S. v. Certain Parcels of Land in Philadelphia, Pa., C.C.A. Pa., 130 F.2d 782.

Government option to purchase
U.S.—U. S. v. Certain Parcels of Land in Philadelphia, Pa., supra.

55. Ga.—Henry Grady Hotel Co. v. Atlanta, 135 S.E. 68, 162 Ga. 818.
44 C.J. p 1300 note 2.

56. Ala.—Stein v. Mobile, 24 Ala. 591.

Cal.—Los Angeles v. Los Angeles City Waterworks Co., 49 Cal. 638.
44 C.J. p 1301 note 3.

57. Va.—Norfolk v. J. W. Perry Co., 61 S.E. 867, 108 Va. 28, 128 Am. S.R. 940, 35 L.R.A., N.S., 167, affirmed 31 S.Ct. 465, 220 U.S. 472, 55 L. Ed. 548.
44 C.J. p 1301 note 4.

58. Mass.—Stoneman v. City of Boston, 160 N.E. 788, 263 Mass. 255.

59. N.C.—Town of Weaverville v. Hobbs, 194 S.E. 860, 212 N.C. 684.

Veterans' loans

N.C.—Town of Weaverville v. Hobbs, supra.

60. Mass.—Irvin Usen Co. v. Board of Assessors of Boston, 36 N.E.2d 373, 309 Mass. 544.

61. Cal.—Oakland v. Albers Bros Milling Co., 184 P. 868, 43 Cal.App. 191.

62. N.Y.—People ex rel. Buffalo & Fort Erie Public Bridge Authority v. Davis, 296 N.Y.S. 787, 163 Misc. 192, motion denied 12 N.E.2d 564, 276 N.Y. 534, affirmed 14 N.E.2d 74, 277 N.Y. 292.

63. Mass.—Connecticut Valley St. R. Co. v. Northampton, 99 N.E. 516, 213 Mass. 54.
44 C.J. p 1301 note 13.

64. Ill.—St. Louis Bridge Co. v. East St. Louis, 12 N.E. 723, 121 Ill. 238.

Ky.—Louisville Bridge Co. v. Louisville, 65 S.W. 814, 23 Ky.L. 1655, 58 S.W. 598, 22 Ky.L. 703.

65. Mass.—Connecticut Valley St. R. Co. v. Northampton, 99 N.E. 516, 213 Mass. 54.

66. Mass.—Connecticut Valley St. R. Co. v. Northampton, supra.

67. Mass.—Connecticut Valley St. R. Co. v. Northampton, supra.

68. Ark.—Fort Smith & Van Buren Bridge Co. v. Hawkins, 16 S.W. 565, 54 Ark. 509, 12 L.R.A. 487.

Neb.—Waubensie Bridge Co. v. Nebraska City, 244 N.W. 793, 123 Neb. 832—Sioux City Bridge Co. v.

of the bridge to the thread of a river which it crosses may be taxable where such portion is deemed to be within the municipal limits.⁶⁹ Where a statute confers on a city power to tax the real estate of corporations, except such as is indispensable to the exercise of the corporate rights of public or quasi-public corporations, it has been held that land used as an approach to a bridge is not taxable.⁷⁰ Where, however, the statute exempts the right of way of a street railway company, it has been held that the term "right of way" refers only to such rights of way as the company has in the public streets,⁷¹ and that a bridge is not to be included in the exemption.⁷²

§ 2017. Agricultural and Unplatted Lands

In some jurisdictions municipal taxation of agricultural lands within municipal limits is permitted, irrespective of benefit, while in other jurisdictions benefit is made a prerequisite. Statutes exempting rural or agricultural lands from municipal taxation or favoring such lands with a lower rate have in some instances been held valid and in others invalid.

In some jurisdictions agricultural and unplatted lands within the corporate limits of a municipality are taxable according to their value, the same as other lands, although they receive little or no benefit from such taxation.⁷³ In other jurisdictions, however, agricultural and unplatted land within the boundaries of a municipality cannot be taxed by the municipality where it receives no benefit from the municipal expenditures;⁷⁴ and, conversely, under such view the land is taxable, although used for agricultural purposes, if it falls within the range of municipal benefits.⁷⁵ A benefit accrues to the

owner, within the meaning of the rule, where his property is so near the settled and improved parts of the municipality that the corporate authorities cannot open and improve its streets and extend to the residents its usual police regulations and advantages without incidentally benefiting such owner or his property;⁷⁶ and in such case the owner's intention to continue the land in its present unimproved condition does not entitle him to an exemption from the tax.⁷⁷ Land held for future sale as city property is not within the exemption.⁷⁸ The exemption applies only to taxes required for strictly municipal purposes from which the property receives no benefit,⁷⁹ and not to taxes in aid of the construction of a railroad.⁸⁰

In a number of jurisdictions there are, or at times have been, statutes which exempt rural lands from municipal taxation, at least in certain cases, or prescribe for them a rate lower than that imposed on other property in the municipality.⁸¹ Such statutes have, in some instances, been declared unconstitutional, as violative of provisions requiring equality and uniformity of taxation,⁸² but under other constitutions the courts have upheld the power of the legislature to prescribe different rates of taxation for city purposes as between property which is within the range of municipal benefits and that which is not.⁸³ Where the statute fixes a lower rate for rural or suburban portions of a city than for the fully developed portions, the rate to be levied on a particular portion depends on its character as to density of population⁸⁴ and not on its distance from the center of the city,⁸⁵ and, if the statute itself stipulates conditions precedent to the levying

Dakota County, 84 N.W. 607, 61 Neb. 75—Chicago. B. & Q. R. Co. v. City of Nebraska City, 73 N.W. 952, 53 Neb. 453.

69. Ky.—Ironton & Russell Bridge Co. v. City of Russell, 91 S.W.2d 1, 262 Ky. 778.

70. Pa.—Monongahela Bridge Co. v. Pittsburgh, 12 Pa. Co. 87.

71. Mass.—Connecticut Valley St. R. Co. v. Northampton, 99 N.E. 516, 213 Mass. 54.

72. Mass.—Connecticut Valley St. R. Co. v. Northampton, *supra*.

73. Mich.—Mitchell v. Negaunee, 71 N.W. 646, 113 Mich. 359, 67 Am. S. R. 468, 38 L.R.A. 157.

44 C.J. p 1301 note 23, p 1302 note 25.

74. Fla.—City of Winter Haven v. A. M. Klemm & Son, 192 So. 646, 141 Fla. 75.

Iowa.—McKeon v. City of Council Bluffs, 221 N.W. 351, 206 Iowa 556, 62 A.L.R. 1006.

44 C.J. p 1302 note 26.

75. Iowa.—Perkins v. Burlington, 42 N.W. 441, 77 Iowa 553.
44 C.J. p 1302 note 29

76. Iowa.—Brooks v. Polk County, 3 N.W. 494, 52 Iowa 460.
44 C.J. p 1302 note 30.

77. Iowa.—Perkins v. Burlington, 42 N.W. 441, 77 Iowa 553.

78. Iowa.—Farwell v. Des Moines Brick Mfg. Co., 66 N.W. 176, 97 Iowa 286, 35 L.R.A. 63—Durant v. Kauffman, 34 Iowa 194.

79. Iowa.—Sears v. Iowa Midland R. Co., 39 Iowa 417.

80. Iowa.—Sears v. Iowa Midland R. Co., *supra*.
Ky.—Courtney v. Louisville, 12 Bush 419.

81. Iowa.—Winzer v. Burlington, 27 N.W. 241, 68 Iowa 279.
44 C.J. p 1302 note 35.

82. Del.—Monaghan v. Lewis, 59 A. 948, 5 Pennw. 218, 10 Ann.Cas. 1048.

La.—City of New Orleans v. Caze-lar, 27 La. Ann. 156.

Wis.—Knowlton v. Rock County, 9 Wis. 410

42 C.J. p 1303 note 42.

Equality and uniformity of taxation generally in respect of urban and suburban or agricultural land see the C.J.S. title Taxation § 38, also 61 C.J. p 137 notes 7-9.

83. Pa.—Appeal of Roup, 81* Pa. 211.

44 C.J. p 1303 note 43.

84. Del.—Corpus Juris cited in Philadelphia. B. & W. R. Co. v. Mayor and Council of Wilmington, 57 A.2d 759, 766.

Pa.—Castor v. Philadelphia, 26 Leg. Int. 189.

85. Del.—Corpus Juris cited in Philadelphia. B. & W. R. Co. v. Mayor and Council of Wilmington, 57 A.2d 759, 766.

Pa.—Castor v. Philadelphia, 26 Leg. Int. 189.

of the full city rate on any portion, the existence of such conditions must be proved before the full rate will attach.⁸⁶

The statutes under consideration are not retroactive in operation.⁸⁷ While they have been strictly construed against the right of the city to levy the full rate,⁸⁸ the taxpayer's rights are not to be extended by implication beyond the express limitations of the statute.⁸⁹ An exemption of a particularly described class of property is not extended by implication to property not within the classification,⁹⁰ nor does it apply to land apparently, but not really, within the classification.⁹¹ An exemption from particular taxes named is not extended by implication to other taxes.⁹² So also, in the case of an exemption from all municipal taxes except particular taxes named, the exception is not extended by implication to other taxes.⁹³ A statute authorizing the city to levy a particular tax "on all property within such city" has been construed not to repeal by implication an earlier special statute exempting agricultural lands,⁹⁴ or classifying city property into urban and suburban property subject to different tax rates.⁹⁵

Annexed lands. Under the rule that municipal taxation of agricultural lands is conditioned on benefits received, agricultural and unplatted lands, brought within municipal limits by annexation, are subject to municipal taxation when, and only when, they receive municipal benefits.⁹⁶

§ 2018. Educational, Charitable, and Religious Institutions

- a. In general
- b. Character of institution
- c. Property exempt

a. In General

Under constitutions, statutes, and ordinances so providing, property of charitable, educational, and religious institutions may be exempt from municipal taxation.

Under constitutions, statutes, and ordinances so providing, property of charitable, educational, and religious institutions may be exempt from municipal taxation,⁹⁷ and the power to exempt is not limited to cases where benefit resulting to the public is an exact equivalent of the added burden imposed on other properties in the taxing districts by such exemption.⁹⁸ The mere grant of authority to exempt such institutions from municipal taxation is not mandatory.⁹⁹ Statutes exempting such institutions from general taxation have been held to exempt them from municipal taxation,¹ but there is also authority to the contrary.²

"Charitable purposes." The legal meaning of "charitable purposes," as the phrase is employed in provisions for exemption from municipal taxation, is not limited to free service to the poor, but may include other services beneficial to the general public.³

86. Md.—Baltimore v. Harris, 77 A. 335, 113 Md. 227—Baltimore v. Knell, 75 A. 638, 111 Md. 583.

87. Ind.—Stiltz v. Indianapolis, 81 Ind. 582.

Iowa.—Perkins v. Burlington, 42 N. W. 441, 77 Iowa 553.

88. Md.—Baltimore v. Harris, 77 A. 335, 113 Md. 227.

44 C.J. p 1303 note 46.

89. Iowa.—Windsor v. Polk County, 80 N.W. 323, 109 Iowa 156.

90. Iowa.—Windsor v. Polk County, supra.
44 C.J. p 1303 note 48.

91. Iowa.—Farwell v. Des Moines Brick Mfg. Co., 66 N.W. 176, 97 Iowa 286, 35 L.R.A. 63.

92. Ky.—Bamberger v. Louisville, 82 Ky. 337—Henderson v. Lambert, 8 Bush 607.
44 C.J. p 1303 note 50.

93. Iowa.—Huddleston v. Webster City, 171 N.W. 1, 185 Iowa 706.
44 C.J. p 1303 note 51.

94. Ind.—Blain v. Bailey, 25 Ind. 165.

95. Conn.—Chamberlain v. Bridgeport, 91 A. 380, 88 Conn. 480.

96. Iowa.—Wertz v. Ottumwa, 208 N.W. 511, 201 Iowa 947.

44 C.J. p 1293 notes 52-55.

97. N.Y.—People ex rel. Doctors Hospital v. Sexton, 48 N.Y.S.2d 201, 267 App.Div. 736, affirmed 64 N.E.2d 273, 295 N.Y. 553.

Pa.—Young Men's Christian Ass'n of Philadelphia v. City of Philadelphia, 11 A.2d 529, 139 Pa.Super. 332.

Estoppel

A half century of exemption has been held to estop the city to change its construction of a doubtful ordinance.—State v. Addison, 2 S.C. 499.

General court as representative of state

Under statute exempting from local taxation real estate owned and occupied by charitable institutions for purposes for which they are incorporated, the exemption is not granted by the city or town in which the property is situated but by the general court as representative of the commonwealth.—Board of Assessors of City of Quincy v. Cunningham Foundation, 26 N.E.2d 335, 305 Mass. 411.

Ground of exemption

Under statute exempting from local taxation real estate owned and occupied by charitable institutions for purposes for which they are incorporated, the ground of exemption is that the use of exempted property alleviates some burden of government by conferring benefits which will advance public interest.—Board of Assessors of City of Quincy v. Cunningham Foundation, supra.

98. Mass.—Board of Assessors of City of Quincy v. Cunningham Foundation, supra.

99. Ill.—Cook County v. Chicago, 103 Ill. 646.

1. Del.—Wilmington v. Tower Hill School Ass'n, 122 A. 442, 32 Del. 377.

44 C.J. p 1303 note 58.

2. Vt.—Morgan v. Cree, 46 Vt. 773, 14 Am.R. 640.

44 C.J. p 1303 note 59.

3. N.Y.—People ex rel. Doctors Hospital v. Sexton, 48 N.Y.S.2d 201, 267 App.Div. 736, affirmed 64 N.E.2d 273, 295 N.Y. 553.

b. Character of Institution

Where exemption is conferred on charitable, educational, religious, or similar institutions, in order to be entitled to the exemption the organization or institution must be of the kind specified in the exemption law or ordinance.

Where exemption is conferred on charitable, educational, religious, or similar institutions, in order to be entitled to the exemption the organization or institution must be of the kind specified in the exemption law or ordinance.⁴ Even if its purposes of incorporation and by-laws would permit an organization to operate as a public charity, that fact alone will not entitle it to exemption from taxation, but it must in addition show that it is in fact so

conducted that in actual operation it constitutes a public charity.⁵ An institution falling within an exempt category is entitled to exemption⁶ even though it may lack some of the attributes ordinarily associated with such institutions.⁷ Under some provisions exemption from municipal taxation is extended to include schools charging tuition as well as those which are free,⁸ and the fact that an institution makes charges incidental to its educational activities will not deprive it of the right to exemption.⁹

Cemeteries. Cemeteries and cemetery associations may be exempt from municipal taxation.¹⁰ Where the statute exempts all burial grounds and

4. Mich.—Engineering Soc. of Detroit v. City of Detroit, 14 N.W.2d 79, 308 Mich. 539.

N.J.—Phi Zeta of Lambda Chi Alpha Fraternity v. City of New Brunswick, 8 A.2d 553, 123 N.J.Law 237.

Business college operating for profit was not exempt from municipal taxation as a charitable institution.—City of Trenton v. State Board of Tax Appeals, 21 A.2d 644, 127 N.J. Law 105, affirmed City of Trenton v. Rider College, 25 A.2d 630, 128 N.J. Law 320.

College as seminary of learning

A college, empowered to confer degrees, is entitled to exemption from municipal taxation as a seminary of learning as against the contention that the term "seminary" necessarily refers exclusively to a school of preparatory or precollege rank.—Sisters of Mercy v. Town of Hooksett, 42 A.2d 222, 93 N.H. 301.

Inclusion of dancing and swimming in curriculum

Facts that an association taught swimming, dancing, etc., and that fees were paid for such services or that the recipients of such service paid for lodging did not prevent the exemption of the property of the association from taxation, since swimming and dancing are generally taught in schools and have come to be a recognized part of our system of education.—Young Women's Christian Ass'n v. Baumann, 130 S. W.2d 499, 344 Mo. 898.

Normal school conducted by a sisterhood for its novitiates with a high school background, wherein they have normal and religious training and are instructed in domestic sciences and housekeeping, is entitled to exemption from municipal taxation as a seminary of learning.—Sisters of Mercy v. Town of Hooksett, 42 A.2d 222, 93 N.H. 301.

Sanitarium charging fees above cost

A sanitarium for treatment of mental and nervous diseases which charged fees above cost for most of

its service, and whose income exceeded expense, was not exempt from taxation by town as an educational institution or as a scientific, literary, or benevolent association, notwithstanding sanitarium was operated by nonstock, nonprofit corporation and that knowledge acquired by treatment was promulgated to the medical profession.—Rogers Memorial Sanitarium v. Town of Summit, 279 N.W. 623, 228 Wis. 507.

Veterans' organization

An organization incorporated, among other things, to maintain harmonious and fraternal relations with veterans of the United States armies, and to promote principles of peace and patriotism, was not organized exclusively for the moral and mental improvement of men, women, and children, or for charitable purposes, within meaning of statute granting exemption from taxation, and hence was not entitled to be exempt from taxation by city on its realty and building.—Jersey City v. Polish Army War Veterans, Post 51, 11 A.2d 136, 18 N.J.Misc. 40.

Wrongful exemption of others

The fact that property belonging to other organizations on parity with plaintiff club was exempted from taxation by municipality did not justify exempting property of plaintiff club from taxation as a religious, charitable, or educational institution, where it was not such, since two wrongs do not make a right and property owners had remedy by mandamus to coerce tax assessors to levy proper assessments against such other property.—University Club v. Lanier, 161 So. 78, 119 Fla. 146.

5. Mass.—Jacob's Pillow Dance Festival v. Assessors of Becket, 69 N.E.2d 463, 320 Mass. 311.

6. N.Y.—People ex rel. Outer Court of the Order of the Living Christ v. Miller, 292 N.Y.S. 674, 161 Misc. 603, affirmed 10 N.Y.S.2d 208, 256

App.Div. 814, affirmed 21 N.E.2d 881, 280 N.Y. 825.

7. N.Y.—People ex rel. Outer Court of the Order of the Living Christ v. Miller, supra.

Religious organization

Land owned by corporation organized for religious, charitable, and educational purposes and operated as retreat for religious training for membership or for teaching was exempt from municipal taxation, notwithstanding active membership was composed of three persons who were in absolute control of corporation and corporation was incorporated under membership law rather than religious corporations law, and was not recognized sect or denominational church, and religious purposes were not open to public.—People ex rel. Outer Court of the Order of the Living Christ v. Miller, supra.

8. Mo.—Young Women's Christian Ass'n v. Baumann, 130 S.W.2d 499, 344 Mo. 898.

9. Mo.—Young Women's Christian Ass'n v. Baumann, supra.

Cafeteria

Fact that an association charged for meals prepared by girls in training for cooking and waitress work did not prevent its exemption from taxation, and the conduct of cafeteria by an association otherwise exempt from taxation did not render it subject to taxation, since the conduct of the cafeteria was incidental to, and a part of, its educational activities.—Young Women's Christian Ass'n v. Baumann, supra.

10. When exemption begins

Although cemetery property becomes exempt from city taxation during the taxable year, the exemption does not commence until the ensuing year and taxes assessed prior thereto are neither diminished nor prorated.—Laureldale Cemetery Ass'n v. Matthews, 47 A.2d 277, 354 Pa. 239.

Use forbidden

Land within a city owned by a

all mausoleums, vaults, crypts, or structures intended to hold or contain the bodies of the dead, not used or held for private or corporate profit, the nonprofit status of a cemetery association under such statute entitling it to exemption is not destroyed by the circumstance that its members were former officers of a profit corporation whose entire assets were purchased by the association¹¹ or by the fact that its bondholders were former shareholders of such profit corporation.¹² The profit which will preclude exemption under statutes of this character is a profit arising from use and operation of the property by the cemetery association,¹³ and, in the absence of sale at inflated values,¹⁴ any profit which may have accrued to a predecessor corporation or its shareholders from sale of all assets to the nonprofit association will not deprive the association of its exemption.¹⁵ Reasonable compensation paid for services or labor rendered in connection with the association and the burial grounds will not constitute profit within the meaning of the exemption statute.¹⁶

Hospitals. Under permissive constitutional and statutory provisions, hospitals may be exempt from municipal taxation.¹⁷ Realty used exclusively for

hospital purposes may be exempt from municipal taxation even though the hospital furnishes no free service to the poor.¹⁸ Hospitals devoted to the care of the sick and injured which aid in maintaining public health and make contributions to the advancement of medical science are rightly regarded as charitable and benevolent within the meaning of tax laws,¹⁹ and a hospital not conducted for profit which devotes all of its funds exclusively to maintenance of the institution is a public charity entitled to exemption from municipal taxation irrespective of whether patients are required to pay for services rendered.²⁰ Where the legislature, instead of generally exempting the property of hospitals, prescribes the terms on which an exemption as a hospital will be granted, such provision is controlling.²¹

c. Property Exempt

The property which is exempt from municipal taxation as property used for charitable, educational, and religious purposes depends on the provisions of law granting the exemption.

The constitutional, statutory, or charter provision granting the exemption controls as to the character,²² extent²³ and location of the property²⁴ and,

cemetery association, and which cannot be used by it for any other purpose, is exempt, although, by an ordinance of the city, no burials can be made there, and even though no body has in fact ever been buried there.—*People v. Pratt*, 29 N.E. 7, 129 N.Y. 68, motion denied 30 N.E. 64.

11. Pa.—*Laureldale Cemetery Ass'n v. Matthews*, 47 A.2d 277, 354 Pa. 239.

12. Pa.—*Laureldale Cemetery Ass'n v. Matthews*, supra.

13. Pa.—*Laureldale Cemetery Ass'n v. Matthews*, supra.

14. Pa.—*Laureldale Cemetery Ass'n v. Matthews*, supra.

15. Pa.—*Laureldale Cemetery Ass'n v. Matthews*, supra.

Interest not profit

With respect to exemption from city and other local taxation, nonprofit status of cemetery association was not affected by fact that bonds secured by purchase-money mortgage issued by association called for four per cent interest which approximated annual dividend previously paid by profit cemetery corporation from whom the association's assets were purchased, since bondholders were entitled to a reasonable interest on the debt, and four per cent was not exorbitant, especially in view of a provision against accumulation of interest if not fully earned.—*Laureldale Cemetery Ass'n v. Matthews*, supra.

16. Pa.—*Laureldale Cemetery Ass'n v. Matthews*, supra.

17. **Noncompliance with health regulations** of the municipality in which it is located will not preclude exemption of a mental hospital and its property from municipal taxation where such property is devoted to hospital purposes and the institution in all essential respects complies with the requirements of the exemption statute.—*Jewish Mental Health Soc. v. Village of Hastings-on-Hudson*, 5 N.Y.S.2d 567, 255 App.Div. 77, affirmed 18 N.E.2d 857, 279 N.Y. 764.

18. N.Y.—*People ex rel. Doctors Hospital v. Sexton*, 48 N.Y.S.2d 201, 267 App.Div. 736, affirmed 64 N.E.2d 273, 295 N.Y. 553.

Relation to free work

A city tax exemption is not required to bear any relation to free charitable work rendered, as city officials have no discretionary power to determine whether exemption shall or shall not be granted, but exemption must be determined by law.—*People ex rel. Doctors Hospital v. Sexton*, supra.

19. N.Y.—*People ex rel. Doctors Hospital v. Sexton*, supra.

20. N.Y.—*People ex rel. Doctors Hospital v. Sexton*, supra.

State aid

A hospital for the mentally ill which did not receive state aid was not entitled to tax exemption under general exemption provision apply-

ing to charitable corporations, in view of specific provision exempting property of hospital societies receiving state appropriations; and charter provision increasing amount of property which hospital might hold and providing that property should be entitled to tax exemption in accordance with provisions of general statutes meant that property should not be exempt from taxation unless made so by some provision of the general statutes.—*Institute of Living v. Town & City of Hartford*, 50 A.2d 822, 133 Conn. 258.

22. Pa.—*City of Meadville v. Allegheny College*, 200 A. 105, 131 Pa. Super. 343.

23. N.H.—*Sisters of Mercy v. Town of Hooksett*, 42 A.2d 222, 93 N.H. 301.

Land in excess of one acre

Land in an incorporated city in excess of one acre could not be exempted from taxation under 1875 constitution, although it was used exclusively for religious worship or for purposes purely charitable.—*Evangelical Lutheran Synod of Mo., Ohio and Other States v. Hoehn*, 196 S.W.2d 134, 355 Mo. 257.

24. Miss.—*City of Jackson v. Belhaven College*, 15 So.2d 621, 195 Miss. 734.

N.Y.—*Cornell University v. Thorne*, 57 N.Y.S.2d 6, 184 Misc. 630.

likewise, controls as to the ownership,²⁵ and use²⁶ of the property of a charitable, educational, or religious institution essential to entitle it to be exempt from municipal taxation. Under some statutes exempting property of charitable or similar institutions occupied for such charitable or similar purposes, it has been held that the property must be occupied directly for such purpose²⁷ and that exemption will be denied where the property is occupied by the institution for commercial purposes even though the proceeds are devoted to charitable or

similar purposes.²⁸ Where, however, the statute does not require realty to be used exclusively for charitable or similar purposes, but does require application of the entire net income to such purposes in order to secure exemption, where the entire net income of realty is devoted to the specified purposes the fact that part of such property is used for commercial purposes will not preclude exemption.²⁹

Under constitutional provisions to the effect that realty may be exempted from taxation when used

Pa.—*City of Meadville v. Allegheny College*, 200 A. 105, 131 Pa.Super. 343.

Waterfront property separated from institution

Under legislative mandate authorizing the trustees of proposed home for aged sailors to purchase a waterfront tract affording an unobstructed view of the New York City harbor and under court's approval of site selected, the entire water-front tract purchased was exempt from taxation by city of New York, notwithstanding a portion of the property which was partly under water and partly upland and was physically separated from the remainder of the property by a street was not used as freely as the remainder and was not essential to maintenance of the institution.—*People ex rel. Trustees of Sailors' Snug Harbor in City of New York v. Miller*, 6 N.Y.S.2d 787, 169 Misc. 19.

25. Fla.—*Jefferson Standard Life Ins. Co. v. City of Wildwood*, 160 So. 208, 118 Fla. 771.

N.J.—*Jersey City v. Trustees of Congregation Anshei Sfard*, 26 A.2d 169, 20 N.J.Misc. 212.

Both legal and equitable title to realty must be in the institution to entitle its realty to exemption.—*Jersey City v. New Jersey Baptist Convention*, 12 A.2d 150, 18 N.J.Misc. 209.

Outstanding lien does not preclude ownership by institution under tax exemption requirements.—*Jersey City v. Trustees of Congregation Anshei Sfard*, 26 A.2d 169, 20 N.J.Misc. 212.

Purely formal ownership

(1) An office building owned by a charitable corporation was not exempt from municipal taxes under statute, where transfer to charitable corporation by vendor was scarcely more than a form, and vendor was the actual owner in real interest, and charitable corporation was to receive income from building only if net earnings should exceed limits prescribed by vendor, which would absorb practically all income that might reasonably be anticipated over

many years, since, under the statute, property must both belong to, and be used exclusively for, the named purposes to be exempt from taxation.—*Odd Fellows Benevolent & Charitable Ass'n v. City of Nashville*, 114 S.W.2d 791, 173 Tenn. 55.

(2) The fact that legal title is in the institution claiming exemption will not suffice to support such claim where it appears that the property is occupied and used by a different organization for purposes not within the purview of the statute.—*Cornell University v. Thorne*, 57 N.Y.S.2d 6, 184 Misc. 630.

26. Fla.—*Rogers v. City of Leesburg, Lake County*, 27 So.2d 70, 157 Fla. 784.

Mich.—*Engineering Soc. of Detroit v. City of Detroit*, 14 N.W.2d 79, 308 Mich. 539.

N.H.—*Trustees of Phillips Exeter Academy v. Exeter*, 11 A.2d 569, 27 A.2d 569, 90 N.H. 472.

N.Y.—*People ex rel. Trustees of Sailors' Snug Harbor in City of New York v. Miller*, 6 N.Y.S.2d 787, 169 Misc. 19.

Pa.—*School Dist. of Borough of Freeport v. Armstrong County*, 57 A.2d 692, 162 Pa.Super. 237.

Tenn.—*State ex rel. Beeler v. City of Nashville*, 157 S.W.2d 839, 178 Tenn. 344.

Property not occupied for purposes of institution, but rented out by it, has been denied exemption.—*Sisters of Mercy v. Town of Hooksett*, 42 A.2d 222, 93 N.H. 301.

Readiness for use

Where building to be used as a home for aged, indigent persons was acquired and remodeled and was ready for use by middle of September, and institution was ready, able and willing to accept inmates at that time, but, none was actually admitted until November, building was actually used for charitable purposes within statute exempting from taxation buildings "actually used" for charitable purposes, as of the assessing date October 1, so as to be exempt from city taxes notwithstanding there was not then resident

in building, any object of its charity.—*Trenton Ladies Sick Benefit Soc. v. City of Trenton*, 17 A.2d 809, 19 N.J.Misc. 176.

Pecuniary profit

A building owned by a holding company and used by four fraternal organizations for their exclusive use for lodge purposes was not disqualified for exemption as "used for pecuniary profit" within the meaning of statutory provisions because of the payment by each of such fraternal organizations of fixed annual sums of money to the holding company for maintaining the building, and the payment of principal and interest by holding company on account of bonds issued for original construction of building did not constitute a "use of property for pecuniary profit."—*Craftsmen's Club of Rahway v. City of Rahway*, 11 A.2d 36, 18 N.J.Misc. 114.

27. Mass.—*Hairenik Ass'n v. City of Boston*, 47 N.E.2d 9, 313 Mass. 274.

28. Mass.—*Hairenik Ass'n v. City of Boston*, supra.

29. N.Y.—*People ex rel. Trustees of Masonic Hall and Asylum Fund v. Miller*, 18 N.E.2d 8, 279 N.Y. 137.

Exemption of entire building

Where the rental from a part of a building owned and occupied by an institution is used for purposes bringing it within the exempted class, the entire building has been held to be exempt.—*Henderson v. Independent Order of Odd Fellows*, 10 Ky.Op. 238.

Per cent rented

A lot and lodge building belonging to trustees for a fraternal association were exempt from municipal taxes where property was used for purposes for which association was organized, and not more than seventy-five per cent of the floor space was rented, and rents were used for charitable and fraternal purposes.—*Rogers v. City of Leesburg, Lake County*, 27 So.2d 70, 157 Fla. 784.—*State ex rel. Cragor Co. v. Doss*, 8 So.2d 15, 150 Fla. 486.

exclusively for religious worship, for schools, or for purposes purely charitable, and statutes providing that such property shall be exempted, the law is satisfied if the uses are either charitable, religious, or educational,³⁰ and the same use may partake of more than one of such purposes.³¹ The fact that others than those for whose benefit a charitable or similar organization holds property derive an indirect benefit therefrom is not fatal to the exemption of such property.³² Statutes providing a state-wide rule of exemption from local taxation for real estate owned and occupied by charitable or similar corporations for the purposes of their incorporation do not, in the absence of constitutional requirement or express statutory provision, limit the exemption to realty used in such manner as to benefit the inhabitants of the municipality in which the real estate is situated.³³

Under some statutes property held by an educational institution by way of investment is ex-

empt as well as property used exclusively for carrying out the purposes of the institution.³⁴ Property may be exempt from taxation where it is used for purposes of the institution even though physically separated from the main grounds of the school, college, or university.³⁵ Land occupied by buildings of a nontaxable character has been held to be nontaxable,³⁶ while land occupied by taxable buildings is taxable.³⁷

Particular properties of educational institutions held to be exempt from municipal taxation under the various provisions include administration buildings,³⁸ athletic and pleasure grounds,³⁹ campus,⁴⁰ chapel or church,⁴¹ dormitories,⁴² gymnasium,⁴³ infirmary,⁴⁴ library,⁴⁵ recitation or lecture halls,⁴⁶ and buildings used for storage and repair purposes.⁴⁷ On the other hand, under other provisions, a faculty club,⁴⁸ a principal's house in so far as used for residential purposes,⁴⁹ private fraternity hous-

30. Mo.—Young Women's Christian Ass'n v. Baumann, 130 S.W.2d 499, 344 Mo. 898.

31. Mo.—Young Women's Christian Ass'n v. Baumann, *supra*.

32. Mass.—Board of Assessors of City of Quincy v. Cunningham Foundation, 26 N.E.2d 335, 305 Mass. 411.

Public park

Mass.—Board of Assessors of City of Quincy v. Cunningham Foundation, *supra*.

33. Mass.—Board of Assessors of City of Quincy v. Cunningham Foundation, *supra*.

Restriction of use

Where a charitable corporation organized under statute authorizing formation of corporations for charitable and religious purposes had as its purpose the improvement and beautification of town, and corporation's charter permitted it to acquire and hold real estate, and such corporation owned a tract of land, part of which was in town and part in nearby city, and entire tract was open to citizens of town as a public park, and corporation attempted to limit use of tract to citizens of town, the part of tract situated in city was "property used for public purposes" and exempt from local taxation by city.—Board of Assessors of City of Quincy v. Cunningham Foundation, *supra*.

34. Tenn.—State ex rel. Beeler v. City of Nashville, 157 S.W.2d 839, 178 Tenn. 344.

35. Miss.—City of Jackson v. Belhaven College, 15 So.2d 621, 195 Miss. 734.

Farm property

Where unimproved tract owned by

college having less than the maximum acreage exempt from taxation was about one fourth of a mile from the campus, and was used for trucking and growing corn and hay for horses owned by the college, the tract was exempt from city taxation.—City of Jackson v. Belhaven College, *supra*.

Residence of college president

A dwelling house which was not on the campus and which was purchased by a college as a residence for its president and occupied by him and his family, rent free, as an agreed part of the president's official compensation when the former house occupied by the president, which was located on the campus, had been converted into a dormitory for students, was exempt from local taxation by the municipality.—City of Meadville v. Allegheny College, 200 A. 105, 131 Pa.Super. 343.

36. N.H.—Trustees of Phillips Exeter Academy v. Exeter, 11 A.2d 569, 27 A.2d 569, 90 N.H. 472.

37. N.H.—Trustees of Phillips Exeter Academy v. Exeter, *supra*.

Partial taxability

Land used by an academy for its central heating plant followed the plant in partial taxability by city.—Trustees of Phillips Exeter Academy v. Exeter, *supra*.

38. N.H.—Trustees of Phillips Exeter Academy v. Exeter, *supra*.

39. N.H.—Trustees of Phillips Exeter Academy v. Exeter, *supra*. N.Y.—People v. New York, 6 Hun 109, affirmed 64 N.Y. 656.

Golf course, used in connection with educational institution, may be exempt.—Sisters of Mercy v. Town of Hooksett, 42 A.2d 222, 93 N.H. 301.

40. N.H.—Trustees of Phillips Exeter Academy v. Exeter, 11 A.2d 569, 27 A.2d 569, 90 N.H. 472.

41. N.H.—Sisters of Mercy v. Town of Hooksett, 42 A.2d 222, 93 N.H. 301—Trustees of Phillips Exeter Academy v. Exeter, 11 A.2d 569, 27 A.2d 569, 90 N.H. 472.

42. N.H.—Trustees of Phillips Exeter Academy v. Exeter, *supra*.

N.Y.—Cornell University v. Thorne, 57 N.Y.S.2d 6, 184 Misc. 630—People v. New York, 6 Hun 109, affirmed 64 N.Y. 656.

43. N.H.—Trustees of Phillips Exeter Academy v. Exeter, 11 A.2d 569, 27 A.2d 569, 90 N.H. 472.

44. N.H.—Trustees of Phillips Exeter Academy v. Exeter, *supra*.

45. N.H.—Trustees of Phillips Exeter Academy v. Exeter, *supra*.

46. N.H.—Trustees of Phillips Exeter Academy v. Exeter, *supra*.

47. N.H.—Trustees of Phillips Exeter Academy v. Exeter, *supra*.

48. N.H.—Trustees of Phillips Exeter Academy v. Exeter, *supra*.

49. N.H.—Trustees of Phillips Exeter Academy v. Exeter, *supra*.

Property owned by school district

Statute conferring power on fourth-class school districts to expend funds to purchase or build a residence for principals, teachers, or janitors and to charge a rental therefor does not alone confer any immunity from taxation, provision therein declaring that property acquired under act shall be held by school district the same as other school property relating to matters of title and conveyancing, not taxation. The independent benefit or convenience to school district of

es,⁵⁰ unused buildings,⁵¹ unimproved lots without present use,⁵² and wood and farm land not affirmatively shown to be occupied for purposes for which the educational institution was established⁵³ have been held not to be exempt.

Ordinarily under the various constitutions, statutes, and ordinances providing for exemptions, property constituting a house of public worship is exempt from municipal taxation,⁵⁴ but the occasional use of property for religious services has

been held insufficient to exempt it,⁵⁵ and property not reasonably necessary for occupancy and enjoyment of a church may be denied exemption.⁵⁶ Under some statutes it is necessary, in order for property to be exempt, that the religious corporation own the legal title to the property,⁵⁷ and it has been held that a private corporation is not entitled to claim an exemption of property leased to the congregation of a church and used for religious purposes.⁵⁸

owning a residence rented to principal did not establish that residence was being held for a public purpose so as to make it tax exempt.—School Dist. of Borough of Freeport v. Armstrong County, 57 A.2d 692, 162 Pa Super. 237.

Residence held not a "schoolhouse or grounds"

Pa.—School Dist. of Borough of Freeport v. Armstrong County, supra.

50. N.Y.—Cornell University v. Thorne, 57 N.Y.S.2d 6, 184 Misc. 630.

51. N.H.—Trustees of Phillips Exeter Academy v. Exeter, 11 A.2d 569, 27 A.2d 569, 90 N.H. 472.

52. N.Y.—Trustees of Phillips Exeter Academy v. Exeter, supra.

53. N.H.—Sisters of Mercy v. Town of Hooksett, 42 A.2d 222, 93 N.H. 301.

54. N.H.—Sisters of Mercy v. Town of Hooksett, supra.

Chapel

A religious and educational corporation's chapel, used for religious services by its community of sisters and novitiates daily and on Sundays by such sisters, convent visitors, students at its educational institutions, and residents of its charitable homes in same city, is house of public worship, exempt from taxation, although not a church in the accepted sense or attended by parish members.—Sisters of Mercy v. Town of Hooksett, supra.

"Public" character

A house of worship is "public" within the meaning of statutes exempting public houses of worship from municipal taxation, where it is not used solely by the members of a religious order owning it and their private guests and is not used at all for the profit of members of the order, and where there is free admission for that indefinite portion of the general public who are the beneficiaries of the educational and charitable institutions conducted by the order.—Sisters of Mercy v. Town of Hooksett, supra.

55. Pa.—Wynnefield United Presbyterian Church v. City of Philadelphia, 35 A.2d 276, 348 Pa. 252.

Vacant lot

The occasional use of a vacant lot adjoining a church building for open air services was insufficient to bring the vacant lot within the definition of a "regular place of stated worship" which is exempt from taxation.—Wynnefield United Presbyterian Church v. City of Philadelphia, supra.

56. Pa.—Wynnefield United Presbyterian Church v. City of Philadelphia, supra.—First Baptist Church of Pittsburgh v. City of Pittsburgh, 20 A.2d 209, 341 Pa. 568, 134 A.L.R. 1169.

Word "necessary" in statute exempting from city and school taxes all churches with ground thereto annexed necessary for occupancy and enjoyment thereof does not import an absolute necessity and is not so broad as to comprehend that which is merely desirable, and means a reasonable necessity.—First Baptist Church of Pittsburgh v. City of Pittsburgh, supra.

Light and air

(1) Sufficient ground to afford light and air may be included in the realty of a church entitled to exemption as necessary for the use and enjoyment of the religious edifice.—First Baptist Church of Pittsburgh v. City of Pittsburgh, supra.

(2) Where, however, a fifteen-foot strip of land adjoining the church affords sufficient light and air, there is not ground for exempting a fifty-foot wide vacant lot adjoining the church as essential for such purposes.—Wynnefield United Presbyterian Church v. City of Philadelphia, 35 A.2d 276, 348 Pa. 252.

Entrance and exit

(1) Sufficient ground for entrance into, and exit from, church is properly included within property entitled to exemption as necessary to its use and enjoyment.—First Baptist Church of Pittsburgh v. City of Pittsburgh, 20 A.2d 209, 341 Pa. 568, 134 A.L.R. 1169.

(2) On the other hand, where a fifteen-foot strip of land adjoining church building was sufficient for ingress and egress, a vacant lot fifty

feet wide adjoining the strip was not exempt from taxation as being reasonably necessary for the occupancy and enjoyment of church building.—Wynnefield United Presbyterian Church v. City of Philadelphia, 35 A.2d 276, 348 Pa. 252.

Parking lot

Claim of church that entire lot adjoining church was exempt from municipal taxation was not supported by showing that portion of lot was used by members for purpose of parking automobiles.—First Baptist Church of Pittsburgh v. City of Pittsburgh, 20 A.2d 209, 341 Pa. 568, 134 A.L.R. 1169.

Property held for future expansion

Pa.—First Baptist Church of Pittsburgh v. City of Pittsburgh, supra.

57. Multiple uses as affecting ownership

A religious corporation using realty for purposes stated in tax exemption statute was the "owner" of the realty within meaning of the statute, so as to be exempt from taxation by city, notwithstanding recital in deed to corporation that the premises were to be used as a house of worship according to the tenets of orthodox Judaism, and as a free school of religion, and as a place of dwelling of the rabbi or sexton thereof.—Jersey City v. Trustees of Congregation Anshei Sfard, 26 A.2d 169, 20 N.J.Misc. 212.

Title in state governing body

Where trustees of church conveyed title of parsonage of church to state governing body for safe-keeping because church was in financial difficulties, and parsonage continued to remain in possession of the pastor of the church, the parsonage was not exempt from taxation by city, since it is necessary under the act that legal title, and not merely equitable title, be in religious corporation whose clergyman occupies the parsonage, for the exemption to apply.—Jersey City v. New Jersey Baptist Convention, 12 A.2d 150, 18 N.J.Misc. 209.

58. Fla.—Jefferson Standard Life Ins. Co. v. City of Wildwood, 160 So. 208, 118 Fla. 771.

§ 2019. Money, Invested Capital, and Choses in Action

Under permissive statute, moneys, choses in action, and invested capital are taxable by a municipal corporation; but as a general rule a municipality cannot tax securities issued or owned by government.

Moneys and choses in action owned by residents are generally taxable by a municipal corporation,⁵⁹ since they are regarded as "property" within the meaning of that term as used in charter or statutory provisions relating to taxation;⁶⁰ and such items having a situs within the municipality have been held subject to tax although they are owned by foreign corporations.⁶¹ In some jurisdictions, however, it has been held that, in the absence of express statutory authority, moneys and choses in action are not taxable,⁶² and, of course, they are not taxable where the statute in express terms exempts them.⁶³

Capital employed by merchants in a city is taxable under an authority to the city to levy a tax "upon any property" therein,⁶⁴ but may not be taxed as "tangible personal property."⁶⁵ "Cash capital" includes money owing to the taxpayer and drawing interest,⁶⁶ as well as money on hand.⁶⁷

Securities issued or owned by government. A

municipality cannot tax its own bonds⁶⁸ or a judgment obtained against itself.⁶⁹ A city cannot tax bonds issued by the state⁷⁰ or mortgages in which the funds of the state have been invested.⁷¹ Stock issued by the United States under the provision of the constitution authorizing congress to borrow money is not subject to municipal taxation.⁷²

§ 2020. Income, Earnings, Receipts, and Sales

In the absence of authority delegated by the legislature, a municipal corporation has no authority to levy an income tax or to tax earnings, receipts, or sales.

In the absence of express or implied authority delegated by the legislature, a municipal corporation has no power to levy an income tax,⁷³ even where, under the terms of a statute providing for the levy, assessment, and collection of an income tax by a state officer or officers, intangible personal property producing the income and otherwise taxable by a municipality is thereafter made exempt.⁷⁴ Authority to impose a gross income tax will not be implied from authority to tax property and levy a poll tax⁷⁵ or from authority to tax property, privileges, and professions capable of being taxed for state purposes.⁷⁶ Under power delegated by the legisla-

59. Ky.—Asher v. Pineville, 131 S. W. 512, 140 Ky. 670.
44 C.J. p 1304 note 71.

Surplus

Employers' insurance association's surplus existing at close of year and subject to be returned in dividends to subscribers was held subject to tax lien allowed city where home office was located—Texas Employers' Ins. Ass'n v. City of Dallas, Tex. Civ.App., 5 S.W.2d 614.

60. Ky.—Trimble v. Mt. Sterling, 12 S.W. 1066, 11 Ky L. 727.
44 C.J. p 1304 note 72.

61. N.J.—Household Finance Corporation v. State Board of Tax Appeals, 196 A. 219, 119 N.J. Law 230 —City of Newark v. Household Finance Corporation, 12 A.2d 899, 18 N.J. Misc. 295.

62. N.C.—Pullen v. Raleigh, 68 N.C. 451.

63. N.Y.—People v. Keefe, 104 N. Y.S. 154, 119 App.Div. 713, affirmed 83 N.E. 1130, 190 N.Y. 555.

- Pa.—Goepf v. Bethlehem, 28 Pa. 249.

Secured loans

N.J.—Household Finance Corporation v. State Board of Tax Appeals, 196 A. 219, 119 N.J. Law 230.

Invalid exemption

Resolution purporting to amend general tax ordinance of city by exempting bonds, moneys, and choses

in action was held unauthorized—Valentine v. City of Juneau, 36 F.2d 904, followed in Simpson v. City of Juneau, C.C.A. Alaska, 36 F.2d 907.

64. Va.—Virginia Wholesale Co. v. Appalachia, 108 S.E. 660, 131 Va. 357.

65. Va.—City of Roanoke v. James W. Michael's Bakery Corporation, 21 S.E.2d 788, 180 Va. 132.

Technical term

Term "tangible personal property," as used in constitutional provision segregating tangible personal property for local taxation, is a restricted or technical term and does not include capital used in business in view of legislative interpretation of the term and practical construction by administrative officials, although capital includes some items of personal property tangible in fact.—City of Roanoke v. James W. Michael's Bakery Corporation, *supra*.

Trucks, furniture, and fixtures

Delivery trucks, furniture, and fixtures of bakery company constituted capital used in business, and were not tangible personal property, within constitutional provision segregating tangible personal property for local taxation, and therefore such items were not subject to municipal taxation.—City of Roanoke v. James W. Michael's Bakery Corporation, *supra*.

66. Ky.—Richmond v. Walker, 1 Ky. L. 399, 10 Ky Op. 861.

67. Ky.—Richmond v. Walker, *supra*.

68. U.S.—Murray v. Charleston, S. C., 96 U.S. 432, 24 L.Ed. 760.
44 C.J. p 1304 note 78–80.

69. Pa.—In re Frederick's Estate, 23 Pa. Dist. & Co. 475.

70. Ga.—Augusta v. Dunbar, 50 Ga. 387.

71. N.J.—Public Schools Trustees v. Trenton, 30 N.J. Eq. 667.

72. U.S.—Weston v. Charleston, S. C., 2 Pet. 448, 7 L.Ed. 481.

73. Mass.—Duffy v. Treasurer, etc., 125 N.E. 135, 234 Mass. 42.

74. Mass.—Duffy v. Treasurer, etc., *supra*.
44 C.J. p 1305 note 89.

75. Ga.—Savannah v. Hartridge, 8 Ga. 23.

76. Fla.—City of De Land v. Florida Public Service Co., 161 So. 740, 119 Fla. 819—City of De Land v. Florida Public Service Co., 161 So. 735, 119 Fla. 804.

Direct tax

Ordinance imposing on power company ten per cent tax on charge made for every sale of electricity in city and prohibiting passing of tax to consumer or consideration thereof in determining rate was a direct tax on gross income, and beyond

ture, however, a municipality may be authorized to tax incomes.⁷⁷ The persons⁷⁸ and income⁷⁹ taxable depend on the provisions exacting the tax. Under an ordinance imposing a tax on the salaries, commissions, and other compensation of residents

of the municipality, all residents are subject to tax,⁸⁰ and the doctrine of governmental immunity does not apply to municipal corporations so as to exempt the compensation of municipal residents who are employed by governmental agencies.⁸¹ A

power of municipality under charter authorizing taxation of property, privileges, and professions capable of being taxed for state purposes.—*City of De Land v. Florida Public Service Co.*, *supra*.

77. Pa.—*Dole v. City of Philadelphia*, 11 A.2d 163, 337 Pa. 375, opinion supplemented 11 A.2d 767, 337 Pa. 375—*Stoudt v. City of Philadelphia*, 38 Pa. Dist. & Co. 222.

Extent of power

The city may tax only such income as is authorized by statute.—*Brooklyn Union Gas Co. v. McGoldrick*, 59 N.Y.S.2d 243, 270 App. Div. 186, appeal granted 72 N.Y.S.2d 259, 272 App. Div. 873, appeal dismissed 74 N.E.2d 177, 297 N.Y. 469, appeal dismissed 80 N.E.2d 342, 297 N.Y. 936, affirmed 80 N.E.2d 669, 298 N.Y. 536.

Provision for review

Income tax ordinance is not invalid on ground that it contains no provision for hearing, appeal, or judicial review, where ordinance requires receiver of taxes to bring suit for recovery of amount he claims, since, in such suit, taxpayer necessarily has his opportunity for hearing, appeal and judicial review.—*Dole v. City of Philadelphia*, 11 A.2d 163, 337 Pa. 375, opinion supplemented 11 A.2d 767, 337 Pa. 375.

Repeal

Repeal of statute authorizing a city to impose tax on salaries earned by residents of the city would deprive city of all authority to impose such tax.—*Marson v. City of Philadelphia*, 21 A.2d 228, 342 Pa. 369.

Franchise tax

A local law imposing a franchise tax, measured by gross income, against utilities was held valid.—*New York Rapid Transit Corporation v. City of New York*, 58 S.Ct. 721, 803 U.S. 573, 82 L.Ed. 1024, rehearing denied 58 S.Ct. 939, 304 U.S. 588, 82 L.Ed. 1548—*Brooklyn & Queens Transit Corporation v. City of New York*, 58 S.Ct. 721, 303 U.S. 573, 82 L.Ed. 1024, rehearing denied 58 S.Ct. 939, 304 U.S. 588, 82 L.Ed. 1548.

78. A priest may be engaged in a profession within the contemplation of an ordinance imposing a tax on earned income.—*Ross v. City of Philadelphia*, 25 A.2d 834, 149 Pa. Super. 33.

Utilities

(1) Under laws imposing a tax on the gross income of utilities doing

business as such within a municipality, the company must constitute a utility within the meaning of the law in order to be subject to such municipal taxation.—*Empire City Subway Co. v. City of New York*, 6 N.Y.S.2d 55, 168 Misc. 775.

(2) Where parcel deliveries of parcel delivery company were confined largely to the city commercial zone, and only seven per cent of its total gross income was from out-of-city transportation, and company's competitors who had no out-of-city deliveries were not required to pay a utility tax, company was not a utility subject to the tax under city utility tax law.—*United Parcel Service of N. Y. v. Joseph*, 70 N.Y.S.2d 22, 272 App. Div. 194, reargument denied 72 N.Y.S.2d 260, 272 App. Div. 874. Affirmed 80 N.E.2d 533, 297 N.Y. 1004.

79. Income derived from federal government

(1) A municipality has the power to tax income of its residents even though derived from the federal government.—*City of Philadelphia v. Schaller*, 25 A.2d 406, 148 Pa. Super. 276, certiorari denied 63 S.Ct. 43, 317 U.S. 649, 87 L.Ed. 522.

(2) When the disability of the state to tax federal incomes was removed, powers originally granted, broad enough to include all income regardless of source, were sufficient to enable city to tax federal incomes.—*Kiker v. City of Philadelphia*, 31 A.2d 289, 346 Pa. 624—*City of Philadelphia v. Schaller*, 25 A.2d 406, 148 Pa. Super. 276, certiorari denied 63 S.Ct. 43, 317 U.S. 649, 87 L.Ed. 522.

Earned income

(1) An ordinance has been construed as imposing a tax on earned income only.—*Pennsylvania Co. for Insurance on Lives & Granting Annuities v. City of Philadelphia*, 31 A.2d 137, 346 Pa. 406.

(2) Earned income implies some labor, management or supervision in production thereof, not income derived merely from ownership of property.—*Pennsylvania Co. for Insurance on Lives & Granting Annuities v. City of Philadelphia*, *supra*.

(3) Voluntary offerings of money and other articles of value received by a priest, in addition to and not in lieu of a regular fixed salary, do not constitute earned income or net profits earned.—*Ross v. City of Philadelphia*, 25 A.2d 834, 149 Pa. Super. 33.

(4) Regulation promulgated by city's receiver of taxes that marriage fees, baptismal offerings, and other moneys received by clergymen, religious workers, or evangelists, for performance of religious services, or in connection therewith, are considered as income from a profession or activity, the net profits of which are taxable under the terms of the ordinance could not be sustained as embraced within the scope of city's income tax ordinance levying tax on net profits earned on businesses, professions, or other activities, since the regulation exceeds the basic purpose of the ordinance which is the imposition of a tax on earned income alone.—*Ross v. City of Philadelphia*, *supra*.

(5) The fact that income is received by one acting in a fiduciary capacity will not deprive it of its quality as earned income.—*Pennsylvania Co. for Insurance on Lives & Granting Annuities v. City of Philadelphia*, 31 A.2d 137, 346 Pa. 406.

Salary of bank officer is assessable under a by-law taxing income from employment.—*Lining v. Charleston*, 12 S.C.L. 345.

80. Pa.—*Marson v. City of Philadelphia*, 21 A.2d 228, 342 Pa. 369.

81. Pa.—*Marson v. City of Philadelphia*, *supra*.

Absence of competing claims

The doctrine of governmental immunity was not applicable to city ordinance imposing tax on salaries earned by city residents, as applied to commonwealth officers and employees residing in city, since ordinance did not give rise to competing claims between commonwealth and nation.—*Marson v. City of Philadelphia*, *supra*.

Refusal to collect at source

Refusal of commonwealth to furnish city with list of commonwealth employees residing in city and to collect at the source, with respect to commonwealth employees residing in city, city tax on salaries earned by city residents, did not render unconstitutional the ordinance providing for such tax, or show that statute authorizing such ordinance was not intended by legislature to give city the power to enact an ordinance subjecting commonwealth employees residing in city to the tax.—*Marson v. City of Philadelphia*, *supra*.

municipality may not, however, impose a tax on income received by a nonresident from services performed within a federal area to which the federal government has been granted exclusive jurisdiction⁸² unless congress grants its consent.⁸³

Under an ordinance expressly taxing net profits derived by residents of the municipality from business, profession, or other activity conducted by such residents, a corporate trustee operating real estate as mortgagee or owner to protect the assets of estates committed to its care pending liquidation and sale of assets, is a "resident" within the meaning of the ordinance,⁸⁴ and, where acting as mortgagee in possession, the trustee is taxable as the proprietor of the business within the meaning of the ordinance.⁸⁵ Where such an ordinance undertakes to define the word "business," the ordinance definition is controlling as against other and general definitions of the term,⁸⁶ and a corporate trustee managing realty for trusts committed to its care is engaged in business so as to subject the net profits to tax,⁸⁷ and, under an ordinance definition of "person" as every natural person, copartnership, fidu-

ciary, or association, a corporate trustee is a person subject to tax on income.⁸⁸

Provisions for collection of a municipal income tax at its source through deductions from compensation to be made by an employer have been held valid.⁸⁹

Earnings. A municipality has been denied power to impose a tax on the earnings of nonresidents in respect of their activities within the municipality.⁹⁰

Receipts. Authority to tax receipts will not be implied from a power to tax goods, wares, and merchandise, and all articles of trade and commerce,⁹¹ or from a power to tax auction sales and sales of merchandise,⁹² but authority to tax the gross amount of sales, receipts, or earnings has been held to be conferred on a municipality by a grant of full power to tax inhabitants or those who hold taxable property as shall appear expedient,⁹³ or by a grant of authority to license, tax, and regulate occupations.⁹⁴ A municipal tax on the gross receipts of parking lots is not invalidated as to corporations by imposition of a state tax on

82. Pa.—Kiker v. City of Philadelphia, 31 A.2d 289, 346 Pa. 624.

83. Pa.—Kiker v. City of Philadelphia, supra.

Imposition of penalty

City of Philadelphia had jurisdiction to impose a penalty of one hundred dollars on nonresident employees of United States at League Island for failure to file returns of their income as required by earned income tax ordinance, where League Island was within the limits of such city for tax purposes.—City of Philadelphia v. Cline, 44 A.2d 610, 158 Pa. Super. 179, certiorari denied Barnes v. City of Philadelphia, 66 S.Ct. 1120, 328 U.S. 848, 90 L.Ed. 1621.

84. Pa.—Pennsylvania Company for Insurances on Lives & Granting Annuities v. City of Philadelphia, 81 A.2d 137, 346 Pa. 406.

85. Pa.—Pennsylvania Co. for Insurances on Lives & Granting Annuities v. City of Philadelphia, supra.

86. Pa.—Pennsylvania Co. for Insurances on Lives & Granting Annuities v. City of Philadelphia, supra.

87. Pa.—Pennsylvania Co. for Insurances on Lives & Granting Annuities v. City of Philadelphia, supra.

Activity and taxpayer's participation

Where city ordinance, imposing taxes on earned net profits of businesses conducted by city residents, defined "business" as "enterprise" or

"undertaking" "conducted for profit", which words signify activity and participation by taxpayer, city tax receiver's regulation, classifying as taxable enterprises involving employment of labor by trustee or requiring active management and supervisory efforts, was within spirit and letter of ordinance.—Pennsylvania Co. for Insurances on Lives & Granting Annuities v. City of Philadelphia, supra.

Purpose or period of operation held immaterial

Pa.—Pennsylvania Co. for Insurances on Lives & Granting Annuities v. City of Philadelphia, supra.

88. Pa.—Pennsylvania Co. for Insurances on Lives & Granting Annuities v. City of Philadelphia, supra.

89. Pa.—Dole v. City of Philadelphia, 11 A.2d 163, 337 Pa. 375, opinion supplemented 11 A.2d 767, 337 Pa. 375.

Attachment of wages

Provision of income tax ordinance requiring collection of tax at source from employees working within city does not render ordinance invalid on ground that deduction is equivalent to an attachment of wages prohibited by statute, since statute applies to debts only, and taxes are not debts in ordinary sense of word.—Dole v. City of Philadelphia, supra.

Relief of employee from liability

An income tax ordinance is not in-

valid on ground that it imposes duty on employer to deduct tax from salaries and wages, but does not relieve employee from liability where employer fails to pay tax to city, since provision holding employee liable on failure of employer to pay tax to city would be interpreted as applying only to cases where employer has neglected to make deductions, or where employer is not subject to jurisdiction of city and cannot be compelled to make deductions.—Dole v. City of Philadelphia, supra.

90. Mo.—Carter Carburetor Corp. v. City of St. Louis, 208 S.W.2d 438, 356 Mo. 646.

Species of income tax

City "earning tax" of one fourth of one per cent on gross salaries, wages, and commissions and on profits covering not only residents but nonresidents, with respect to activities in city, imposed for general revenue purposes, is not a license tax under police power, but a species of income tax.—Carter Carburetor Corp. v. City of St. Louis, supra.

91. Pa.—Appeal of Pittsburgh, 16 A. 92.

92. Ala.—Selma v. Selma Press, etc., Co., 67 Ala. 430.

93. Ga.—Pearce v. Augusta, 37 Ga. 597.

94. Mo.—American Union Express Co. v. Joseph, 66 Mo. 675, 27 Am. R. 382.

44 C.J. p 1305 note 98.

net corporate income, since the two taxes are on different privileges.⁹⁵

Sales. A city cannot levy a tax on sales where the statute expressly prohibits it,⁹⁶ nor can it levy a tax on auction sales of particular property which are expressly exempted from the operation of a statute authorizing a tax on auction sales generally.⁹⁷ Power to tax sales is not conferred by a mere grant of authority to levy on real and personal property⁹⁸ or taxable property.⁹⁹ The power to impose a municipal sales tax may be granted by statute,¹ and express power to tax sales in the city includes authority to tax sales of goods stored in a warehouse in the city, and owned by persons domiciled in the city,² even though the contracts of sales are entered into by agents outside the city.³

§ 2021. Corporate Stock and Property

Within certain restrictions, corporate stock and property may be the subjects of municipal taxation.

Shares of stock of foreign corporations have been held taxable in the hands of their owners as personal property,⁴ but the stock of domestic corporations has been held nontaxable where the legislature has put the shares of domestic and foreign corporations in different classes and provided against taxation of the shares of the former.⁵ The capital stock of a corporation has been held not taxable as a corporate asset under a general provision authorizing the taxation of all real and personal property.⁶ In jurisdictions where the capital stock of a corporation is taxable as a corporate asset, a city which has taxed the stock can-

not also tax the personal property belonging to the corporation.⁷ Where a municipal tax on the property of a corporation is authorized, a tax for the current year may be levied on the property of a newly organized corporation on the tax day following its organization.⁸ Under statutes taxing mortgages and judgments "owned, held or possessed" by any corporation in its own right or as active trustee, or in any other capacity for the benefit of any other corporation, it has been held that mortgages and judgments held by a trustee as collateral security for a corporate bond issue are not taxable by a municipality.⁹ A constitutional provision for a state tax on the gross earnings of certain corporations in lieu of all other taxes relieves such corporations from liability for municipal taxes.¹⁰ An exemption in favor of a corporation granted by ordinance prior to the constitution prohibiting the exemption of property of corporations does not inure to the benefit of a consolidated corporation, of which the exempted corporation was one of the constituent companies, organized after the adoption of such constitution.¹¹

Situs. The intangible personalty of a corporation has been held to be taxable in the municipality where it has its chief office.¹²

§ 2022. — Banks

Within certain limitations and exemptions, banks and their property and shares of stock are subject to municipal taxation.

Ordinarily a bank is subject to municipal taxation,¹³ according to the decisions on the ques-

95. Pa.—Hixon v. City of Philadelphia, 32 Pa. Dist. & Co. 436.

96. Ga.—Columbus v. Flournoy, 65 Ga. 231.

44 C.J. p 1305 note 90.

Sales as subjects of privilege tax see Licenses § 30 d (2).

Sales tax as excise or privilege tax see Licenses § 1.

97. S.C.—Charleston v. Condy, 38 S.C.L. 254.

98. La.—New Orleans v. Fassman, 14 La. Ann. 865.

99. Ala.—Lott v. Ross, 38 Ala. 156.

1. N.Y.—In re Thomas J. Waters & Sons, 2 N.Y.S.2d 595, 166 Misc. 783.

2. Pa.—Pittsburgh v. Kalchthaler, 7 A. 921, 114 Pa. 547.

3. Pa.—Shriver v. Pittsburgh, 66 Pa. 446.

4. Ga.—Coca-Cola Co. v. City of Atlanta, 110 S.E. 730, 152 Ga. 558, 23 A.L.R. 1339.

44 C.J. p 1305 note 8.

5. Ga.—Coca-Cola Co. v. City of

Atlanta, 110 S.E. 730, 152 Ga. 558, 23 A.L.R. 1339—City of Albany v. Brown, 74 S.E. 518, 137 Ga. 796—Georgia R. Co. v. Wright, 54 S.E. 52, 125 Ga. 589.

Taxability of shares of stock of domestic corporation when owned by nonresident see supra § 2005

6. Ga.—Macon v. Macon Constr. Co., 21 S.E. 456, 94 Ga. 201.

7. Md.—Hyattsville v. Chesapeake, etc., Tel. Co., 103 A. 133, 131 Md. 589.

44 C.J. p 1305 note 11.

8. Ala.—People's Bank v. Red Level, 80 So. 880, 202 Ala. 496.

9. U.S.—City of Philadelphia v. Pennsylvania Co. for Insurances on Lives & Granting Annuities, C.C.A.Pa. '98 F.2d 539.

10. Cal.—San Francisco v. Pacific Tel., etc., Co., 135 P. 971, 166 Cal. 244.

11. U.S.—Yazoo etc., R. Co. v. Vicksburg, Miss., 28 S.Ct. 510, 209 U.S. 358, 52 L.Ed. 833.

44 C.J. p 1299 note 66 [a].

12. N.J.—City of Newark v. State Board of Tax Appeals, 23 A.2d 789, 127 N.J. Law 524, affirmed City of Newark v. State Board of Tax Appeals, 28 A.2d 516, 129 N.J. Law 162.

Chief office held not within municipality

N.J.—City of Newark v. State Board of Tax Appeals, supra.

13. U.S.—Farmers' Bank v. Fox, D. C., 8 F.Cas.No.4,658, 4 Cranch C.C. 330.

44 C.J. p 1306 note 24.

Duty to contribute to municipal support

Where, under the general law, the property of a bank was liable to taxation, the bank was under a natural obligation to contribute its proportionate share to support of municipal government from which it derived benefits.—Central Savings Bank & Trust Co. v. City of Monroe, 194 So. 767, 194 La. 743.

tion, subject to such limitations¹⁴ and exemptions¹⁵ as are imposed or granted by law. An exemption from, or a limitation on, state taxation of banks has been held not applicable to municipal taxes.¹⁶

In some jurisdictions the capital stock of a bank is not taxable as an asset of the bank,¹⁷ or, at least, it is not so taxable before authority is conferred by the legislature¹⁸ or where the charter of the bank exempts its capital stock from taxation except for state purposes.¹⁹ In other jurisdictions bank stock is taxable against the bank,²⁰ unless the bank is not incorporated until after the date fixed by the ordinance for taxing such stock.²¹ Such a tax has been regarded as an ad valorem tax payable by the bank or trust company as agent for its shareholders with right of reimbursement from them.²²

Bank stock in the hands of stockholders is generally taxable,²³ even though the money paid for such stock may have been previously taxed for municipal purposes to the same person as money on hand.²⁴ While bank stock in the hands of stockholders is not taxable if under the terms of the charter the city is without power to tax it,²⁵ or if,

under a statute applicable to the particular stock, it is exempt,²⁶ an exemption of bank stock from taxation for municipal purposes does not exempt it from taxation for school purposes²⁷ or to aid in the building of a railroad.²⁸

Limitations imposed by federal statute on the power of states to tax national banks have been construed not to prevent municipal taxation of the shares of stock of such banks under proper legislative grant from the state.²⁹ Where congress has accorded municipalities the statutory "right" to tax shares of national bank stock standing in the name of the Reconstruction Finance Corporation, but in reality owned by the United States, such statutory "right" is a mere bounty or gratuity subject to be withdrawn at any time,³⁰ and congress has the constitutional power to withdraw the privilege to tax such bank stock even where the tax has become a lien by state law before enactment of the amendment withdrawing the privilege.³¹

Capital. When applied to a bank with reference to municipal taxation, the word "capital" includes the entire assets, whether represented by the money paid in for the issuance of the stock, surplus, undivided profits, or other property.³²

Ordinance taxing bank stock held valid

Mo.—First Nat. Bank of St. Joseph v. Buchanan County, 205 S.W.2d 726, 356 Mo. 1204.

Repeal of authorizing statute held not shown

Mo.—First Nat. Bank of St. Joseph v. Buchanan County, *supra*.

14. Miss.—Huntley v. Winona Bank, 13 So. 832, 69 Miss. 663.
44 C.J. p 1306 note 25.

Realty outside city

City may not assess part of capital, surplus, and undivided profits invested by bank in land outside city limits.—Merchants' & Farmers' Bank v. City of Kosciusko, 116 So. 88, 149 Miss. 835.

15. Ky.—Louisville Trust Co. v. Louisville, 30 S.W. 991, 17 Ky.L. 265.

La.—New Orleans v. New Orleans Southern Bank, 15 La. Ann. 89.

Implied exemption

In the case of a state bank which is a public corporation chartered for the benefit of the state, it has been held that, although its charter is silent on the subject, there is an implied exemption from municipal taxation precluding tax of lots owned by such bank within the municipal boundaries.—Nashville v. Bank of Tennessee, 1 Swan, Tenn., 269.

16. Mo.—Paris v. Farmers' Bank, 30

Mo. 575—Lexington v. Aull, 30 Mo. 480.

17. Ind.—Madison v. Whitney, 21 Ind. 261.

Ky.—Eminence v. Eminence Deposit Bank, 12 Bush 538.

18. S.C.—Chester Bank v. Chester, 44 S.C.L. 104.

19. Miss.—O'Donnell v. Bailey, 24 Miss. 386.

20. N.C.—Planters' Bank, etc., Co. v. Lumberton, 102 S.E. 629, 179 N.C. 409.

44 C.J. p 1306 note 31.

Bank stock having situs within city is subject to municipal tax.—First Trust Joint Stock Land Bank of Chicago v. City of Dallas, Tex. Civ.App., 167 S.W.2d 783, error refused.

Liability of successor bank

Where stock of nonresident shareholders of liquidated joint stock land bank located within the state had a taxable situs in the city and such stock was properly assessed by the city against bank as agent for such shareholders, successor bank was liable for the tax where state had assessed an ad valorem tax on all personality within the state.—First Trust Joint Stock Land Bank of Chicago v. City of Dallas, *supra*.

21. Ga.—Bibb Nat. Bank v. Macon, 97 S.E. 72, 148 Ga. 478.

22. Ky.—Board of Sup'rs of City of Frankfort v. State Nat. Bank of

Frankfort, 189 S.W.2d 942, 300 Ky. 620—Board of Sup'rs of Somerset v. Farmers Nat. Bank of Somerset, 168 S.W.2d 371, 293 Ky. 157.

23. Ky.—Board of Sup'rs of City of Frankfort v. State Nat. Bank of Frankfort, 189 S.W.2d 942, 200 Ky. 620.

44 C.J. p 1306 note 33.

24. Ind.—Richmond v. Scott, 48 Ind. 568.

44 C.J. p 1306 note 34.

25. Ala.—Baldwin v. Montgomery, 53 Ala. 437.

44 C.J. p 1306 note 35.

26. Ind.—Craft v. Tuttle, 27 Ind. 332.

44 C.J. p 1306 note 36.

27. Ind.—Root v. Erdelmeyer, 37 Ind. 225.

28. Ind.—Root v. Erdelmeyer, *supra*

29. U.S.—City of Longview, Tex., v. First Nat. Bank of Longview, Tex., C.C.A. Tex., 152 F.2d 97, certiorari denied First Nat. Bank of Longview, Tex., v. City of Longview, Tex., 66 S.Ct. 684, 327 U.S. 784, 90 L.Ed. 1011.

30. U.S.—Reconstruction Finance Corporation v. Elder, D.C. Ga., 26 F. Supp. 772.

31. U.S.—Reconstruction Finance Corporation v. Elder, *supra*.

32. Va.—West v. Newport News, 51 S.E. 206, 104 Va. 21.

§ 2023. — Insurance Companies

An insurance company is entitled to such exemptions from municipal taxation as are accorded by law.

An insurance company is entitled to such exemptions from municipal taxation as are accorded by law.³³ An insurance company has been held not to be taxable as a business corporation,³⁴ and a stock insurance company having no office in a municipality on the assessing date has been held not to be subject to taxation for that tax year on its capital stock and accumulated surplus in such municipality.³⁵

A statutory provision that a fixed license tax on an insurance company shall be in lieu of further assessment throughout the state has been variously construed as applying only to state taxes³⁶ and not to preclude municipal taxation,³⁷ or as relating exclusively to license taxes,³⁸ and not to apply to taxation of the property and capital of insurance companies.³⁹ In any event such a provision has no retroactive effect,⁴⁰ and has been held to be unconstitutional if applied to municipal taxation.⁴¹ Power to tax insurance companies to procure fire apparatus and proper reservoirs does not authorize a levy for the support of the fire department.⁴²

Surplus and reserve funds. The reserve of a life insurance company, aside from the fund required to be invested for the protection of policyholders, is a liability,⁴³ rather than an asset,⁴⁴ of the company, and is not subject to tax;⁴⁵ but where, un-

der statutory requirements, a reserve fund is accumulated and invested in securities such fund is subject to tax.⁴⁶ Under statutes exempting the invested and accumulated funds of an insurance company organized under the laws of the state, excepting life insurance companies, it has been held that a building purchased by a fire insurance company with money accumulated in its business and held as an investment is exempt from taxation.⁴⁷

Shares of stock. Under some statutes or charter provisions, the shares of stock of an insurance company are taxable as property of the company.⁴⁸

Premiums. Annual premiums received by an agent residing in a city have been held not to be subject to taxation as personal property.⁴⁹ On the other hand, it has also been held that such premiums are taxable as property,⁵⁰ and that the taxing of premiums received by agents of foreign insurance companies is not invalid as discriminating against such companies⁵¹ or subject to limitations on license fees.⁵² Under local laws taxing the business of insurance on the basis of receipts from premiums paid, receipts from annuity contracts have been held nontaxable.⁵³

§ 2024. — Manufacturing Companies

- a. In general
- b. Particular kinds of business; old or new establishments

a. In General

Manufacturers or their property may be exempt from

33. Mass.—New England Mut. Life Ins. Co. v. City of Boston, 75 N.E. 2d 505, 321 Mass. 683—Assessors of Boston v. Metropolitan Life Ins. Co., 70 N.E.2d 806, 320 Mass. 559.
Mich.—Standard Accident Ins. Co. v. City of Detroit, 12 N.W.2d 463, 307 Mich. 720.

Compensation and rating bureau was not an insurance company entitled to the exemption of its personal property.—State ex rel. Wis. Compensation Rating and Inspection Bureau v. City of Milwaukee, 23 N.W.2d 501, 249 Wis. 71.

Exemption statute held reasonable and nondiscriminatory
Mass.—Assessors of Boston v. Metropolitan Life Ins. Co., 70 N.E.2d 806, 320 Mass. 559.

34. Mass.—New England Mut. Life Ins. Co. v. City of Boston, 75 N.E.2d 505, 321 Mass. 683.

35. N.J.—City of Newark v. Excess Ins. Co., 11 A.2d 741, 18 N.J.Misc. 181.

36. U.S.—Insurance Co. v. New Or-

leans, C.C.La., 13 F.Cas.No.7,052, 1 Woods 85.

37. U.S.—Insurance Co. v. New Orleans, supra.

38. La.—New Orleans v. Salamander Ins. Co., 25 La. Ann. 650.

39. La.—New Orleans v. Salamander Ins. Co., supra.

40. La.—New Orleans v. Louisiana Mut. Ins. Co., 26 La. Ann. 499.

41. Ill.—Raymond v. Hartford F. Ins. Co., 68 N.E. 745, 196 Ill. 329.

42. Ill.—Alton v. Aetna Ins. Co., 82 Ill. 45.

43. Tex.—Waco v. Amicable L. Ins. Co., Com.App., 248 S.W. 332.

44. Tex.—Waco v. Amicable L. Ins. Co., supra.

45. Tex.—Waco v. Amicable L. Ins. Co., supra.

46. Tex.—Waco v. Amicable L. Ins. Co., supra.

47. Ky.—Franklin Ins. Co. v. Louisville, 46 S.W. 502, 20 Ky.L. 489.

48. Ala.—Mobile v. Stonewall Ins. Co., 53 Ala. 570.

Stock and surplus

A stock insurance company engaged in insuring titles to realty was subject, under statute, to assessment by city for its capital stock and accumulated surplus, minus assessed value of realty and such of its nontaxable and exempt assets as entered into the determination of its capital stock and accumulated surplus—Franklin Mortgage & Title Guaranty Co. v. City of Newark, 11 A.2d 410, 18 N.J. Misc. 34.

49. Iowa.—Dubuque v. Northwestern L. Ins. Co., 29 Iowa 9.

44 C.J. p 1306 note 57.

50. Neb.—Phoenix Ins. Co. v. Omaha, 36 N.W. 522, 23 Neb. 312.

51. Ill.—Hartford F. Ins. Co. v. Peoria, 40 N.E. 967, 156 Ill. 420.

52. Ill.—Hartford F. Ins. Co. v. Peoria, supra.

53. N.Y.—Guardian Life Ins. Co. of America v. Joseph, 71 N.Y.S.2d 396, 272 App.Div. 481, affirmed 80 N.E.2d 360, 297 N.Y. 976.

municipal taxation under the provisions of some constitutions, statutes, and ordinances.

Under permissive constitutional, statutory, and ordinance provisions a manufacturing company may be exempt from municipal taxation.⁵⁴ Where the statute authorizing the exemption is merely permissive, the exemption may not be claimed until the city has actually granted it.⁵⁵ Some statutes have been construed to authorize a municipality to exempt all manufacturers by an ordinance general in character, but to preclude the exemption of some and the exclusion of others.⁵⁶ Some authorities have held that a statute exempting manufacturing establishments violates a constitutional requirement of uniformity of taxation.⁵⁷

The purpose of statutes of this character is to attract and retain manufactories through liberal tax policies.⁵⁸ Statutes authorizing exemption of manufacturing establishments have been construed as designed to exempt the property rather than the owner,⁵⁹ and a municipal vote exempting manufacturing establishments acquiring designated property and machinery, capital and personal property, has been held to grant an exemption as broad as the authorizing statute, subject only to limitations designated.⁶⁰

Period of exemption. A manufacturing establishment which accepts an exemption for a shorter period of time than is granted to it by the resolution of the city council is thereafter precluded from claiming the exemption for the full term contained in the resolution.⁶¹ Also, an exemption may be terminated by the breach of a condition subsequent imposed by statute or contract,⁶² but, in the absence of any condition subsequent or breach thereof, a contract exemption, after it has come into existence, continues for the full term provided in the contract.⁶³

Leased property. There is authority granting exemption to property used in manufacturing although it is leased to others by the owner,⁶⁴ but it has also been held that an owner of property leased to a manufacturing establishment cannot lawfully be granted, or enjoy, an exemption in respect of such property.⁶⁵

Property used in distribution. Property used by manufacturing establishments in the distribution, as distinguished from the manufacture, of their products is not exempt from municipal taxation.⁶⁶

An exemption of the stock of a manufacturing corporation for a term of years under an authoriz-

54. Fla.—*American Can Co. v. City of Tampa*, 14 So.2d 203, 152 Fla. 798.

Md.—*Eastern Tar Products Corporation v. State Tax Commission of Maryland*, 4 A.2d 462, 176 Md. 290.

City levies exempted irrespective of disposition

Taxes for "county and municipal purposes" within statute exempting manufacturing plants from such taxes include all city levies on property located within their territorial areas to be used for the benefit of the people within the areas, whether funds, when collected, are to go to city, county, or state functions within areas.—*Pullman Car & Manufacturing Corporation of Alabama v. Hamilton*, 181 So. 244, 236 Ala. 209.

55. Md.—*Corpus Juris* cited in *Eastern Tar Products Corporation v. State Tax Commission of Maryland*, 4 A.2d 462, 464, 176 Md. 290—*Grand Family Laundry v. Baltimore*, 106 A. 254, 134 Md. 99.

Contract with manufacturer

(1) Tax exemptions under statute authorizing exemption of manufacturers by vote of city are governed by law of contract, and the vote is the "offer" which becomes a valid contract when accepted and acted on, provided the conditions are complied with.—*Spaulding v. City of Rutland*, 3 A.2d 556, 110 Vt. 186.

(2) The statutes empowering cities

to exempt manufacturing plants from taxation for municipal purposes for five years are an open offer by the state to induce investments in new properties through exemption for a limited time, and statutes should be construed to carry out in good faith the state's commitment.—*Pullman Car & Manufacturing Corporation of Alabama v. Hamilton*, 181 So. 244, 236 Ala. 209.

City's right to regulate

Legislature, in conferring on city privilege of granting manufacturer's exemptions from city taxation on tangible personalty, intended to preserve right of city to prescribe reasonable regulations for execution of the law, such as provision for filing applications for exemption; and an ordinance providing for filing of applications for exemption of manufacturer's tangible personalty from city taxation, and fixing time limit therefor not later than time for revision and correction of tax lists, does not conflict with charter provision that applications shall be made before annual revision and correction of tax lists.—*Eastern Tar Products Corporation v. State Tax Commission of Maryland*, 4 A.2d 462, 176 Md. 290.

56. Md.—*American Newspapers v. McCardell*, 197 A. 574, 174 Md. 56, 116 A.L.R. 1108.

57. Me.—*Farnsworth Co. v. Lisbon*,

62 Me. 451—*Brewer Brick Co. v. Brewer*, 62 Me. 62, 16 Am.R. 395.

58. Pa.—*Gulf Oil Corp. v. City of Philadelphia*, 53 A.2d 250.

59. Vt.—*Spaulding v. City of Rutland*, 3 A.2d 556, 110 Vt. 186.

60. Vt.—*Spaulding v. City of Rutland*, supra.

61. N.J.—*Liondale Bleach, etc., Works v. McGrath*, 52 A. 714, 68 N.J.Law 215, affirmed 54 A. 1124, 68 N.J.Law 731.

62. **Failure to operate at full capacity**

Md.—*Havre de Grace Real Est., etc., Co. v. Havre de Grace*, 61 A. 662, 102 Md. 33.

63. Vt.—*Caverly-Gould Co. v. Springfield*, 76 A. 39, 83 Vt. 396.

64. Vt.—*Spaulding v. City of Rutland*, 3 A.2d 556, 110 Vt. 186—*Caverly-Gould Co. v. Springfield*, 76 A. 39, 83 Vt. 396.

65. N.H.—*Portsmouth Shoe Co. v. Portsmouth*, 66 A. 1045, 74 N.H. 222.

44 C.J. p 1308 note 88.

66. Ky.—*Kentucky Electric Co. v. Buechel*, 143 S.W. 58, 146 Ky. 660, 38 L.R.A.N.S., 907, Ann.Cas.1913C 714.

44 C.J. p 1308 note 90.

ing statute exempts shares of stock in the hands of a stockholder.⁶⁷

b. Particular Kinds of Business; Old or New Establishments

The process of manufacturing, in order to entitle a manufacturer to exemption from municipal taxation under some statutes and ordinances, is one resulting in the creation of a new product. Where the exemption is so worded as to be limited to establishments which are new in the municipal corporation, it is not available to going concerns already established there.

The word "manufacture" as used in statutes or ordinances exempting manufacturing companies from municipal taxation escapes exact definition,⁶⁸ and what constitutes a "manufacturing industry" depends largely on the particular facts;⁶⁹ but to "manufacture" may be broadly defined as meaning to work raw or partly wrought materials into forms suitable for use,⁷⁰ and it has been held that if the process does not result in the creation of a new product it is not manufacturing within the meaning of the tax exemption laws.⁷¹ Terms such as "manufacture," "manufacturing establishment," and the like, as employed in municipal tax exemption laws, have been held not to include a laundry,⁷² a milk pasteurizing corporation,⁷³ a tailoring establishment making clothing from samples and measurements on individual orders secured by mer-

chant tailors and sent to it for execution,⁷⁴ a tobacco warehouse from which leaf tobacco is shipped to other cities for manufacture,⁷⁵ or a water filtration plant;⁷⁶ but it has been held that such terms do include an establishment for the making of ice cream on a large scale,⁷⁷ a company reducing steel ship hulls into heavy melting steel,⁷⁸ a maker of shirts,⁷⁹ and, according to some,⁸⁰ although not other,⁸¹ authorities, an establishment for the generation of electricity for sale.

A publisher may or may not be a manufacturer within municipal tax exemption laws in accordance with the character of work done in his establishment,⁸² and the mere fact that he is a publisher does not compel the inference that he is a manufacturer.⁸³ A publisher to the extent that he is a job printer,⁸⁴ or his equipment to the extent that it is used in the business of book and job printing, engraving, electrotyping, and lithographing for the trade,⁸⁵ has been held to be entitled to exemption, but exemption has been denied a newspaper publisher⁸⁶ or a publisher and dealer in books printed and bound by independent contractors.⁸⁷

Old or new establishments. Where a provision exempting manufacturing establishments from municipal taxation is so worded as to be limited to es-

67. Vt.—Richardson v. St. Albans, 47 A. 100, 72 Vt. 1.

68. Ky.—City of Louisville v. Ewing Von-Allmen Dairy Co., 105 S.W.2d 801, 268 Ky. 652.

69. Md.—State Tax Commission v. Standard Oil Co. of New Jersey, 31 A.2d 621, 181 Md. 637.

Transporting mixture from plant to paving site

Tools and machinery used in transportation of asphalt mixture from plant to site upon which mixture was to be laid for street paving and used in laying such mixture in street bed for street paving were not used entirely or chiefly in connection with manufacturing within meaning of enabling statute and ordinance exempting from taxation for municipal purposes personal property used entirely or chiefly in connection with manufacturing in city, but were used in connection with construction and were taxable.—State Tax Commission v. Baltimore Asphalt Block & Tile Co., 26 A.2d 371, 180 Md. 620.

70. Ky.—City of Louisville v. Ewing Von-Allmen Dairy Co., 105 S.W.2d 801, 268 Ky. 652.

71. Ky.—Prestonsburg Water Co. v. Prestonsburg Board of Sup'rs, 131 S.W.2d 451, 279 Ky. 551.—City of Louisville v. Ewing Von-Allmen

Dairy Co., 105 S.W.2d 801, 268 Ky. 652.

72. Ala.—Bessemer Laundry Co. v. Bessemer, 109 So. 104, 215 Ala. 63.

73. Ky.—City of Louisville v. Ewing Von-Allmen Dairy Co., 105 S.W.2d 801, 268 Ky. 652.

No new product made

Ky.—City of Louisville v. Ewing Von-Allmen Dairy Co., supra.

74. Ky.—Standard Tailoring Co. v. Louisville, 153 S.W. 764, 152 Ky. 504, 44 L.R.A.N.S., 303, Ann.Cas. 1915B 220.

44 C.J. p 1307 note 71.

75. Ky.—American Tobacco Co. v. Bowling Green, 205 S.W. 570, 181 Ky. 416.

76. Ky.—Prestonsburg Water Co. v. Prestonsburg Board of Sup'rs, 131 S.W.2d 451, 279 Ky. 551.

77. Ky.—Hughes v. Lexington, 277 S.W. 981, 211 Ky. 596.

78. Md.—City of Baltimore v. Price, 155 A. 739, 181 Md. 234.

79. Md.—Mayor and City Council of Baltimore v. Price, 177 A. 160, 168 Md. 174.

80. Ky.—Kentucky Electric Co. v. Buechel, 143 S.W. 58, 146 Ky. 660, 38 L.R.A.N.S., 907, Ann.Cas.1913C 714.

81. Md.—Frederick Electric Light,

etc., Co. v. Frederick City, 36 A. 362, 84 Md. 599, 36 L.R.A. 130.

82. Md.—American Newspapers v. McCardell, 197 A. 574, 174 Md. 56, 116 A.L.R. 1108.

83. Md.—American Newspapers v. McCardell, supra.

84. Md.—State Tax Commission v. Standard Oil Co. of New Jersey, 31 A.2d 621, 181 Md. 637.

"Articles of commerce"

An oil company in operating a job printing plant in Baltimore was engaged in manufacturing "articles of commerce" within ordinance adopted pursuant to statute authorizing exemption from taxation of personal property used in such business, even though products of plant were sold chiefly to independently operated affiliates of oil company.—State Tax Commission v. Standard Oil Co. of New Jersey, supra.

85. Md.—American Newspapers v. McCardell, 197 A. 574, 174 Md. 56, 116 A.L.R. 1108.

86. Ky.—Lexington v. Lexington Leader Co., 235 S.W. 31, 193 Ky. 107.

87. Md.—H. M. Rowe Co. v. State Tax Commn., 131 A. 509, 149 Md. 251.

establishments which are new in the municipal corporation, it is not available to going concerns already established there,⁸⁸ even though they enlarge or expand their businesses⁸⁹ or rebuild factories destroyed by fire,⁹⁰ nor is it available to corporations which take over an old business already located in the city;⁹¹ but it does cover entirely new kinds of business located in the city by the proprietors of an old business already there⁹² or by the purchasers of the old business,⁹³ and the fact that a few articles formerly made are still manufactured by the new proprietors does not bar their right to an exemption, where their business is a new and different manufacturing enterprise.⁹⁴ Under some statutes a municipality may exempt an already existing establishment from tax as a manufacturing concern.⁹⁵ Under the provisions of some statutes,⁹⁶ but not under the provisions of other statutes,⁹⁷ the exemption includes a manufacturing establishment located in territory brought within the municipal limits by annexation.

Designation of particular establishment in grant of exemption. Some statutes authorizing municipalities to grant exemption from taxation to manufacturing establishments require the municipal grant of exemption to specify the particular establishments exempted,⁹⁸ while others do not.⁹⁹

§ 2025. — Railroad and Street Railroad Companies

- a. Liability to tax
- b. Exemption from tax

a. Liability to Tax

- (1) In general
- (2) Real property
- (3) Rolling stock
- (4) Capital stock

(1) In General

Railroad property within a municipal corporation may be subject to municipal taxation.

Subject to such restrictions or limitations as may be imposed by law,¹ railroad and street railway property within municipal limits is ordinarily subject to municipal taxation,² even though the tracks extend beyond such limits.³ The power of the municipal corporation to tax is not revoked by a provision conferring on a state board of equalization power to assess the taxable value of all railroad property in the state, including such property located in the municipality,⁴ but thereafter the municipality must exercise the power under the terms of the equalization statute,⁵ and charter powers, as far as they are inconsistent therewith, are repealed thereby.⁶ Railroad property is not subject to municipal taxation where the federal government⁷ or the state⁸ expressly or impliedly reserves the sole

88. Ky.—Louisville, etc., R. Co. v. Louisville, 136 S.W. 611, 143 Ky. 258.

44 C.J. p 1307 note 76.

89. Ky.—Mengel Box Co. v. Sea, 180 S.W. 347, 167 Ky. 193, L.R.A.1916D 108.

44 C.J. p 1307 note 77.

90. Ky.—Elam v. Salisbury, 202 S.W. 56, 180 Ky. 142.

91. Ky.—Louisville v. New York Baking Co., 152 S.W. 980, 151 Ky. 758.

44 C.J. p 1307 note 79.

92. Ky.—Bristow v. Wood-Mosaic Co., 266 S.W. 60, 205 Ky. 574, 579.

44 C.J. p 1307 note 80.

93. Ky.—Vogt Bros. Mach. Co. v. Sea, 204 S.W. 76, 181 Ky. 327—Mengel Box Co. v. Louisville, 79 S.W. 255, 117 Ky. 735, 25 Ky.L. 1861.

94. Ky.—Vogt Bros. Mach. Co. v. Sea, 204 S.W. 76, 181 Ky. 327.

44 C.J. p 1307 note 82.

95. Vt.—Spaulding v. City of Rutland, 3 A.2d 556, 110 Vt. 186.

96. Ky.—Bristow v. Wood-Mosaic Co., 266 S.W. 60, 205 Ky. 574.

97. Miss.—Robertson v. Southern Paper Co., 80 So. 384, 119 Miss. 113—Adams v. Lamb-Fish Lumber Co., 60 So. 645, 103 Miss. 491.

98. N.H.—Franklin Falls Pulp Co. v. Franklin, 20 A. 333, 66 N.H. 274.

99. Vt.—Caverly-Gould Co. v. Springfield, 76 A. 39, 83 Vt. 396.

44 C.J. p 1308 note 87.

1. Idaho.—City of Pocatello v. Ross, 6 P.2d 481, 51 Idaho 395.

2. N.Y.—New York Rapid Transit Corporation v. City of New York, 9 N.E.2d 558, 275 N.Y. 258, followed in Brooklyn & Queens Transit Corporation v. City of New York, 11 N.E.2d 293, 275 N.Y. 454, and affirmed New York Rapid Transit Corporation v. City of New York, 58 S.Ct. 721, 303 U.S. 573, 82 L.Ed. 1024, rehearing denied 58 S.Ct. 939, 304 U.S. 588, 82 L.Ed. 1548, and Brooklyn & Queens Transit Corporation v. City of New York, 58 S.Ct. 939, 304 U.S. 588, 82 L.Ed. 1548—People ex rel. New York Cent. R. Co. v. Graves, 21 N.Y.S.2d 221, 260 App.Div. 227, appeal denied 22 N.Y.S.2d 536, 260

App.Div. 828, affirmed 35 N.E.2d 929, 286 N.Y. 580.

N.C.—Piedmont R. Co. v. Reidsville, 8 S.E. 124, 101 N.C. 404, 2 L.R.A. 284.

Tex.—Texas & Pacific R. Co. v. City of El Paso, 85 S.W.2d 245, 126 Tex. 86.

44 C.J. p 1308 note 99—61 C.J. p 316 note 65.

3. Va.—Newport News, etc., R., etc., Co. v. Newport News, 40 S.E. 645, 100 Va. 157.

4. U.S.—Central Trust Co. v. Wabash, etc., R. Co., C.C.Mo., 27 F. 14.

5. U.S.—Central Trust Co. v. Wabash, etc., R. Co., supra.

6. U.S.—Union Pac. R. Co. v. Ryan, Wyo., 5 S.Ct. 601, 113 U.S. 516, 28 L.Ed. 1098.

Mo.—Pacific R. Co. v. Watson, 61 Mo. 57.

7. U.S.—Alaska Northern R. Co. v. Seaward, Alaska, 229 F. 667, 144 C.C.A. 77.

8. Ga.—Houston County v. Central R. Co., 72 Ga. 211—Albany v. Savannah, etc., R. Co., 71 Ga. 158.

right to tax it, or where the state has not granted the power to the city.⁹

Intangible property of a railroad may be subject to municipal taxation.¹⁰

Power house. It has variously been held under different statutes that a power house owned by a railroad company¹¹ or a company operating a sub-way,¹² but not one owned by a street railroad company,¹³ is subject to municipal taxation.

(2) Real Property

Under permissive statute lands of a railroad located in a municipal corporation are subject to municipal taxation.

Under statutes providing that all realty within a municipal corporation owned by any railroad company shall be subject to taxation for municipal purposes, the same as other realty in the municipality, all lands located in a municipality and belonging to a railroad are taxable regardless of whether or not they are indispensable to its operation.¹⁴ However, the power, if any, of a municipal corporation to tax real property belonging to a railroad company is limited to that delegated to it by the legislature;¹⁵ and, under the restricted powers conferred by some statutes, a municipality may tax such,¹⁶ and only such,¹⁷ real property of a railroad company within the municipal boundaries as is not used in the operation or ordinary business of the railroad. If a parcel of land is taxed as a whole, and a part of it is used for the operation of the road and is exempt under the statute, the whole tax is void.¹⁸

(3) Rolling Stock

Under some constitutional provisions the legislature has plenary power to determine the situs of railroad rolling stock for purposes of municipal taxation.

Under some constitutional provisions the legislature has plenary power to determine the situs of railroad rolling stock for purposes of municipal taxation;¹⁹ and under particular provisions it has been both affirmed²⁰ and denied²¹ that a municipality has power to tax the rolling stock of a railroad. It is not necessary to the application of an ordinance taxing each streetcar which runs within the municipality that each car shall run every day²² or the whole of any particular day.²³

(4) Capital Stock

The capital stock of a railroad may be subject to municipal taxation in the hands of its holders.

Shares of capital stock in railway companies are subject to municipal taxation, just as other stocks, in the hands of the holders,²⁴ unless the statutes relating to municipal taxation are construed not to give the city power to tax them.²⁵

b. Exemption from Tax

Railroad property may be exempt from municipal taxes under statute or by reason of exemption implied from its devotion to a public purpose.

Exemption of the property of a railroad company from taxation may be effected by statutory or charter provisions,²⁶ but railroad property is not exempt where it does not fall within the scope of the ex-

⁹ U.S.—Savannah v. Atlantic, etc., R. Co., C.C.Ga., 21 F.Cas No. 12,385, 3 Woods 432.

44 C.J. p 1308 note 7.

10. Tex.—Texas & P. Ry. Co. v. City of El Paso, 85 S.W.2d 245, 126 Tex. 86.

Franchise of bridge company operating railroad

A corporation which was created to erect and maintain a bridge over a navigable river for railroad purposes, and which did construct and for a considerable period of time maintained and was given the right to operate and did operate the bridge for such purposes, did "construct, maintain and operate a railroad" within the meaning of the tax law so as to subject it to a special franchise assessment by city over whose streets the bridge crossed, notwithstanding the bridge company was a subsidiary wholly controlled by the railroad company, and its employees were paid by such company.—People ex rel. Hudson River Bridge Co. at Albany v. State Tax Commission, 27 N.Y.S.2d 153, 26d App.Div. 700, ap-

peal denied 29 N.Y.S.2d 910, 26d App Div. 921, affirmed 39 N.E.2d 935, 287 N.Y. 722.

11. N.H.—Boston, etc., R. Co. v. Portsmouth, 112 A. 394, 80 N.H. 7—Boston, etc., R. Co. v. Franklin, 84 A. 44, 76 N.H. 459.

12. N.Y.—People v. O'Donnel, 95 N. E. 762, 202 N.Y. 313.

13. Pa.—Philadelphia v. Electric Tract, Co., 57 A. 354, 208 Pa. 157.

14. Pa.—Pennsylvania R. Co. v. Pittsburgh, 104 Pa. 522.
44 C.J. p 1309 note 10.

15. Pa.—Federal St., etc., R. Co. v. Pittsburgh, 75 A. 662, 226 Pa. 419.

16. N.J.—In re Lehigh Valley R. Co., Sup., 71 A. 126.
44 C.J. p 1309 note 12.

17. Vt.—Montpelier v. Central Vermont R. Co., 93 A. 1047, 89 Vt. 36.
44 C.J. p 1309 note 13.

18. Vt.—Montpelier v. Central Vermont R. Co., supra.

19. Tex.—Gulf, C. & S. F. Ry. Co. v.

City of Dallas, Com.App., 16 S.W. 2d 292.

20. Va.—Orange, etc., R. Co. v. Alexandria, 17 Gratt. 176, 58 Va. 176.

21. Tex.—Gulf, C. & S. F. Ry. Co. v. City of Dallas, Com App., 16 S.W. 2d 292.

44 C.J. p 1309 note 20—37 C.J. p 302 note 37 [a].

22. Pa.—Braddock Borough v. Monongahela St. R. Co., 28 Pa.Super. 262.

23. Pa.—Braddock Borough v. Monongahela St. R. Co., supra.

24. Iowa.—Dubuque, etc., R. Co. v. Dubuque, 17 Iowa 120.

25. Va.—Richmond v. Daniel, 14 Gratt. 385, 55 Va. 385.

26. N.J.—New York Cent. R. Co. v. Division of Tax Appeals, Dept. of Taxation and Finance, 60 A.2d 619, 137 N.J.Law 472.

44 C.J. p 1309 note 23.

emption granted.²⁷ A statute exempting railroad property from taxes generally has been held to exempt from municipal taxes.²⁸ Under statutes exempting a railroad right of way from municipal taxation, railroad property outside such right of way has been held subject to tax.²⁹ A statute which in express terms makes the municipal taxes and exemptions therefrom follow the law regulating state and county taxation exempts railroad property from municipal taxes where such property is exempt from state and county taxes;³⁰ but where municipal taxation does not follow the state and county scheme statutes exempting railroad property from state and county taxes do not exempt it from municipal taxes.³¹ An exemption of railroad property from taxation for municipal purposes will not be inferred from a payment of license fees on cars that the railroad company runs over the road,³² or from a payment of a bonus or franchise tax which is not based on any property valuation,³³ unless the statute provides that the particular tax authorized shall be in lieu of all other taxes.³⁴

Public purpose and implied exemption. There is authority holding that, in the absence of express statutory provision to the contrary, railroad property may be exempt from municipal taxation as property taken or purchased and held for a public purpose or use,³⁵ and statutes providing that all property is subject to tax unless expressly exempted do not preclude abatement of a municipal tax against property of a railroad under such implied exemption.³⁶ It has also been held that such implied exemption is not removed by other statutory provisions which neither directly nor by necessary implication remove the exemption from taxation claimed by the railroad,³⁷ and that amendments of the corporate charter exempting it from taxes for a specified period do not have the effect of subjecting it to municipal tax at the expiration of such period in violation of the implied exemption.³⁸ The implied exemption does not arise out of contract,³⁹ but exists under the law as long as the public use of the property continues.⁴⁰ The taking of land by one municipality in another to extend rapid transit

Franchise tax

A statute exempting railroad property from municipal taxes and charges in the nature of a tax has been construed to exempt it from liability for moneys due the municipality under a franchise ordinance.—*Williams v. Mayor and City Council of Baltimore, Md.*, 53 S.Ct. 431, 289 U.S. 36, 77 L.Ed. 1015.

Passenger terminal station

La.—*Hotard v. City of New Orleans*, 35 So.2d 752, 218 La. 843, appeal dismissed 69 S.Ct. 57, 335 U.S. 803, 93 L.Ed. —.

Use of temporary frame buildings by railroad to house without charge itinerant laborers who were employed to load and unload freight because of the stringent labor market resulting from the then existing state of war was an appropriate railroad function bringing buildings within statutory exclusion from local taxation of buildings used for railroad purposes.—*New York Cent. R. Co. v. Division of Tax Appeals, Dept. of Taxation and Finance*, 60 A.2d 619, 137 N.J.Law 472.

27. *Pa.*—*Reading St. Ry. Co. v. City of Reading, Com.Pl.*, 32 Berks Co. L.J. 141—*Reading St. Ry. Co. v. City of Reading, Com.Pl.*, 32 Berks Co.L.J. 118.

Machinery for screening coal and picking slate, used by mining and narrow gauge railroad company, was not exempt from local taxation as property for use in public service.—*East Broad Top Railroad & Coal Co. v. Huntingdon County Com'rs*, 90 Pa.Super. 170.

28. *Ill.*—*Neustadt v. Illinois Cent. R. Co.*, 31 Ill. 484, 44 C.J. p 1309 note 26.

29. *Me.*—*Portland Terminal Co. v. Hinds*, 187 A. 716, 134 Me. 434, 108 A.L.R. 235.

Terminal

Words "located right of way" in statute subjecting lands and fixtures of railroad company outside its located right of way to local taxation meant only four-rod strip containing main track, and hence land outside four-rod strip used for terminal facilities was subject to taxation by municipality in which such land was located.—*Portland Terminal Co. v. Hinds*, *supra*.

30. *Wash.*—*Columbia, etc., R. Co. v. Chilberg*, 34 P. 163, 6 Wash. 612.

31. *Va.*—*Orange, etc., R. Co. v. Alexandria*, 17 Gratt. 176, 58 Va. 176, 44 C.J. p 1309 note 30.

32. *Ky.*—*Newport v. South Covington, etc., R. Co.*, 11 S.W. 954, 89 Ky. 29, 11 Ky.L. 319—*Louisville City R. Co. v. Louisville*, 4 Bush 478.

33. *Tex.*—*Dallas v. Dallas Consol. Electric St. R. Co.*, 66 S.W. 835, 95 Tex. 268.

34. *Wash.*—*Columbia, etc., R. Co. v. Chilberg*, 34 P. 163, 6 Wash. 612.

35. *Mass.*—*Assessors of Boston v. Boston, Revere Beach & L. R. Co.*, 66 N.E.2d 36, 319 Mass. 378—*Inhabitants of Worcester v. The Western R. R. Corp.*, 4 Metc. 564.

Electric passenger railroad

The operation of a transportation

system for carriage of passengers by electric railway constitutes a business of a public nature, and property of the corporation engaged in furnishing such service is devoted to a public use, and where it was acquired or might have been acquired by eminent domain it is exempt from taxation by the city or town in which located in absence of statute subjecting it to such taxation.—*Assessors of Boston v. Boston Elevated Ry. Co.*, 70 N.E.2d 812, 320 Mass. 588.

Estoppel or waiver held not shown

Mass.—*Assessors of Boston v. Boston Elevated Ry. Co.*, *supra*.

36. *Mass.*—*Assessors of Boston v. Boston Elevated Ry. Co.*, *supra*.

Legislative inactivity

The statute providing that all property is subject to tax unless expressly exempt from local property taxes does not preclude abatement of local assessment against property of an electric railway under its implied exemption, in light of legislative inactivity after announcement of decisions establishing implied exemption of property which could have been taken for a public use by eminent domain.—*Assessors of Boston v. Boston Elevated Ry. Co.*, *supra*.

37. *Mass.*—*Assessors of Boston v. Boston Elevated Ry. Co.*, *supra*.

38. *Mass.*—*Assessors of Boston v. Boston Elevated Ry. Co.*, *supra*.

39. *Mass.*—*Assessors of Boston v. Boston Elevated Ry. Co.*, *supra*.

40. *Mass.*—*Assessors of Boston v. Boston Elevated Ry. Co.*, *supra*.

facilities has been held a public use within the contemplation of such doctrine of implied exemption,⁴¹ but property so taken and not in fact used for railroad purposes will not be entitled to exemption.⁴²

§ 2026. — Other Companies

Under permissive constitutional and statutory provisions the property of public utilities or other public service companies may be exempt from municipal taxation.

Under the various constitutional, statutory, and charter provisions, property of public utilities may be subject to municipal taxation,⁴³ and it has been held that a municipality has no inherent power to exempt from taxation the property of a water, gas, or electric light company.⁴⁴ On the other hand, under the different charter or statutory provisions, an exemption may be available as to property appropriated for public purposes;⁴⁵ property required to carry out the corporate purposes of the company and already included in the capital stock on which it pays a state tax;⁴⁶ aqueducts;⁴⁷ or improve-

ments,⁴⁸ as distinguished from land alone.⁴⁹

A statute exempting property of water companies where the city accepts their services without charge does not apply where the city has paid for such services;⁵⁰ and, under a statute or charter providing that the payment of a license on an occupation or business shall exempt from payment of an ad valorem tax thereon, payment of a license tax by a gas company does not exempt from payment of an ad valorem tax on property engaged in the business.⁵¹ A statute exempting property used in "supplying" electricity includes property used in "manufacturing" it.⁵² Under some statutes an exemption may be granted to a water company only at the same time that the franchise itself is granted.⁵³ A statute providing that property and franchises of utility corporations using public places shall be subject to taxation only as provided in the statute does not constitute an exemption in the unqualified sense of the word, but merely a substitution of the tax provided by the statute for the direct municipal

41. Mass.—Collector of Taxes of Milton v. City of Boston, 180 N.E. 116, 278 Mass. 274, 81 A.L.R. 1515.

Payment of rental

Municipality's land and structures connected with track in another municipality, taken for improving rapid transit, was exempt as held for public use, although property was leased to railroad and rental paid therefor.—Collector of Taxes of Milton v. City of Boston, *supra*.

42. Mass.—Collector of Taxes of Milton v. City of Boston, *supra*.

Vacant tract

Mass.—Collector of Taxes of Milton v. City of Boston, *supra*.

43. U.S.—City of Fort Worth v. Western Union Telegraph Co., C.C.A.Tex., 80 F.2d 977, rehearing denied 81 F.2d 1016.

Remission by contract

(1) Contracts between municipalities and third parties requiring latter to furnish former with gas or water or electrical current, in consideration of taxes being remitted, have been generally sustained.

Fla.—Tampa Shipbuilding & Engineering Co. v. City of Tampa, 136 So. 458, 102 Fla. 549.

Ga.—Cartersville Improvement, Gas & Water Co. v. Mayor etc. of Cartersville, 16 S.E. 25, 85 Ga. 683.

(2) Public utilities commission, modifying town's contract with water company by increasing amount payable by town for services therefore paid for by abatement of taxes, relieved town of obligation to refrain from taxing company.—In-

habitants of Town of Milo v. Milo Water Co., 163 A. 163, 131 Me. 872.

Subclassification of utilities for tax purposes

Mo.—Springfield City Water Co. v. City of Springfield, 182 S.W.2d 613, 353 Mo. 445.

Telephone company

(1) Telephone company's franchise or easement in streets and alleys contemplating maintenance of poles, wires, and underground cables held subject to ad valorem property tax by city, and the company's located right to use definite portions of streets appropriated for poles and underground cables may be termed "easement" with respect to taxation thereof by city, dedication of such portions being justified by fact that company's business is, in a sense, a public business.—City of Fort Worth v. Southwestern Bell Telephone Co., C.C.A.Tex., 80 F.2d 972, rehearing denied 81 F.2d 1016.

(2) Telephone company's station apparatus, installations, and private branch exchanges located on property not belonging to company within city were subject to municipal taxation as real property.—In re New York Telephone Co., 49 N.E.2d 999, 290 N.Y. 537, motion denied 51 N.E.2d 931, 291 N.Y. 648, motion denied 52 N.E.2d 595, 291 N.Y. 709.

Telegraph company's property held subject to municipal tax.—City of Fort Worth v. Western Union Telegraph Co., C.C.A.Tex., 80 F.2d 977, rehearing denied 81 F.2d 1016.

Occupation tax law withholding authority from cities to levy occupation tax held not to preclude city

from levying ad valorem property tax on telephone company's located right to use portions of streets appropriated for poles and underground cables, such tax not being tax on business or occupation, nor compensation for use of streets.—City of Fort Worth v. Southwestern Bell Telephone Co., *supra*.

44. Ga.—Cartersville Water Works Co. v. Cartersville, 16 S.E. 70, 89 Ga. 689.

Wis.—Monroe Water Works Co. v. Monroe, 85 N.W. 685, 110 Wis. 11.

45. Me.—Augusta v. Augusta Water Dist., 63 A. 663, 101 Me. 148.

44 C.J. p 1310 note 47.

46. Pa.—Pittsburg v. Consolidated Gas Co., 34 Pa.Super. 234.

44 C.J. p 1310 note 48.

47. N.Y.—People v. Neville, 170 N.Y.S. 583, 183 App.Div. 799, affirmed 126 N.E. 919, 228 N.Y. 510.

44 C.J. p 1310 note 49.

48. N.J.—Jersey City v. Huber, 101 A. 378, 90 N.J.Law 692.

44 C.J. p 1310 note 50.

49. N.J.—Jersey City v. Huber, *supra*.

50. Me.—Dover v. Maine Water Co., 38 A. 101, 90 Me. 180.

51. Ky.—Newport Light Co. v. Newport, 20 S.W. 434, 14 Ky.L. 464

44 C.J. p 1310 note 53.

52. Pa.—Southern Electric Light, etc., Co. v. Philadelphia, 43 A. 123, 191 Pa. 170.

44 C.J. p 1310 note 54.

53. R.I.—Bowen v. Newell, 14 A. 878, 16 R.I. 238.

44 C.J. p 1310 note 55.

tax,⁵⁴ and under such a statute intangible personal property of a utility is not subject to tax.⁵⁵

Property extending through several municipalities. Under the express provisions of some statutes, where a supply of water is secured at a distance from the city supplied, the property is subjected to taxes in the various municipalities in which it is located.⁵⁶ On the other hand, a statute exempting from taxation generally the property of a company supplying a single municipal district but reaching out into other municipalities for its supply exempts the property from municipal taxes wherever its property is located.⁵⁷

Companies in competition with municipal plant. A municipality building and owning a waterworks system cannot tax a competing waterworks company for the cost of construction and maintenance of the municipal plant, where it appears that the private company has a franchise for the entire municipality and has not defaulted in its contract to furnish an adequate supply of pure and wholesome water;⁵⁸ but, where it appears that there is no contract between the municipality and the private company for the supply of water, the municipality may tax the company for the construction and maintenance of a municipal plant,⁵⁹ even though the municipality has applied to the state water commission for permission to purchase the company's plant and has failed to purchase after such permission

has been granted.⁶⁰

Public policy. There is authority to the effect that the property essential to the exercise of its corporate franchises by a public or quasi-public corporation is not subject to municipal tax in the absence of legislative authority for the imposition of such taxes,⁶¹ and the fact that the state confers power of eminent domain on a corporation is official recognition of its status as a quasi-public corporation whose property essential to administration of the trust is entitled to exemption from all taxation except that imposed directly by the sovereign.⁶² The only corporations whose property is entitled to exemption under this doctrine, however, are those whose business is so important to the public welfare that it may justly be considered as being in the nature of a public duty with performance of which the sovereign will not permit any local subdivision of government to interfere by taxation.⁶³ The question whether a corporation is quasi-public within the meaning of the doctrine under discussion is for the court to determine on the facts of each case,⁶⁴ and a corporation is not necessarily a quasi-public corporation entitled to exemption under the doctrine because it is a common carrier⁶⁵ or because it possesses a certificate of public convenience.⁶⁶ Where the corporation does not fall within the class contemplated by such doctrine it is not exempt from taxation thereunder,⁶⁷ and the fact that it may lease

54. N.J.—Landis Tp. v. Division of Tax Appeals of State Dept. of Taxation and Finance, 59 A.2d 258, 137 N.J.Law 224—Jersey Cent. Power & Light Co. v. City of Asbury Park, 24 A.2d 526, 128 N.J. Law 141, affirmed Jersey Central Power & Light Co. v. Monmouth County Board of Taxation, 29 A.2d 139, 129 N.J.L. 253.

55. N.J.—Jersey Cent. Power & Light Co. v. City of Asbury Park, 24 A.2d 526, 128 N.J. Law 141, affirmed Jersey Central Power & Light Co. v. Monmouth County Board of Taxation, 29 A.2d 139, 129 N.J.L. 253.

56. Cal.—Temescal Water Co. v. Niemann, 133 P. 992, 22 Cal.App. 174.

N.Y.—New York v. Deyo, 143 N.Y.S. 334, 158 App.Div. 319, affirmed 108 N.E. 1104, 213 N.Y. 706.

57. N.H.—Canaan v. Enfield Village Fire Dist., 70 A. 250, 74 N.H. 517.

58. N.Y.—Skaneateles Water Works Co. v. Skaneateles, 55 N.E. 562, 161 N.Y. 154, 45 L.R.A. 687, affirmed 22 S.Ct. 400, 184 U.S. 354, 46 L.Ed. 585.

44 C.J. p 1811 note 59.

59. N.Y.—Matter of Beauty Spring Water Co., 118 N.Y.S. 659, 134 App.

Div. 17, affirmed 91 N.E. 1101, 198 N.Y. 413—Beauty Spring Water Co. v. Lyons Falls, 130 N.Y.S. 845, 71 Misc. 577, affirmed 134 N.Y.S. 290, 149 App.Div. 418, affirmed 104 N.E. 1126, 210 N.Y. 601.

60. N.Y.—Matter of Beauty Spring Water Co., 118 N.Y.S. 659, 134 App. Div. 17, affirmed 91 N.E. 1101, 198 N.Y. 413.

44 C.J. p 1311 note 61.

61. Pa.—Pittsburgh Joint Stock Yards Co. v. Board of Property Assessment, Appeals and Review of Allegheny County, 44 A.2d 564, 353 Pa. 135—Conoy Tp Sup'rs v. York Haven Electric Power Plant, 71 A. 207, 222 Pa. 319—Reading St. Ry. Co. v. City of Reading, Com. Pl., 32 Berks Co.L.J. 118.

62. Pa.—Philadelphia Rural Transit Co. v. City of Philadelphia, 159 A. 861, 309 Pa. 84.

63. Pa.—Philadelphia Rural Transit Co. v. City of Philadelphia, supra.

64. Pa.—Philadelphia Rural Transit Co. v. City of Philadelphia, supra.

65. Pa.—Philadelphia Rural Transit Co. v. City of Philadelphia, supra.

Bus company

Company operating motorbusses as common carrier of passengers for hire was not quasi-public corporation, and its realty was subject to municipal taxes.—Philadelphia Rural Transit Co. v. City of Philadelphia, supra.

66. Pa.—Philadelphia Rural Transit Co. v. City of Philadelphia, supra.

67. Pa.—Pittsburgh Joint Stock Yards Co. v. Board of Property Assessment, Appeals and Review of Allegheny County, 44 A.2d 564, 353 Pa. 135.

Coal-mining company is not quasi-public corporation within rule exempting property devoted to public service from local taxation.—East Broad Top Railroad & Coal Co. v. Huntingdon County Com'rs, 90 Pa. Super. 170.

A stock yards company, chartered as ordinary business corporation and engaged in purely competitive business for profit, is not a public service corporation exempt from local taxation, even though subject to control by state utility commission or Interstate Commerce Commission.—Pittsburgh Joint Stock Yards Co. v. Board of Property Assessment, Ap-

its property to a public service corporation will not exempt such property from tax.⁶⁸ The exemption inheres only as to what is reasonably essential to the performance by a quasi-public corporation of its public duties.⁶⁹

§ 2027. Vessels

Vessels having their situs within a municipal corporation may be subject to municipal taxation.

Vessels may be the subject of municipal taxation.⁷⁰ The situs of a vessel for purposes of municipal taxation may be the place where it is docked or stored,⁷¹ the place of registration and port from and to which it regularly departs and returns,⁷² unless it has acquired an actual and permanent situs outside the city where it is enrolled and registered⁷³ or unless a statute expressly provides that the vessel shall be taxable in the city where the owner resides, and the owner resides elsewhere.⁷⁴ A coasting vessel registered under the federal statutes is taxable where it is being regularly used,⁷⁵ although the owner is a resident of another state where he is assessed therefor.⁷⁶ A municipality may not levy a tax on vessels passing a certain bridge,⁷⁷ or only temporarily within its limits,⁷⁸ and power to tax property within the city limits does not authorize the taxing of ships outside the limits.⁷⁹

Ships of a foreign country sailing between it and

a United States port have no situs within such port for purposes of municipal taxation.⁸⁰

§ 2028. Buildings

Buildings may be subject to municipal taxation separately from the land on which they are situated, or may be exempted where still in course of construction on the assessment date.

While, under a properly worded ordinance, buildings may be liable to taxation separately and apart from the land upon which they stand,⁸¹ some ordinances are construed not to make them so liable,⁸² except where they stand on leased land exempt from taxation.⁸³

A statute allowing cities to exempt new buildings completed after a specified date or commenced before another specified date is an enabling statute⁸⁴ and requires action by the city before the taxpayer is entitled to the exemption.⁸⁵ An ordinance passed by the city under the authority of such a statute is construed not to grant any exemption from taxes already fixed for the current year.⁸⁶

Buildings in course of construction. A charter or statutory provision that a building in course of construction, commenced since the preceding assessment day and not ready for occupancy, shall not be assessed, has been construed to give an exemption from taxes for the tax year in which the

peals and Review of Allegheny County, 44 A.2d 564, 353 Pa. 135.

Right must be clear

Right to tax exemption on ground that property is devoted to public service must be clear.—East Broad Top Railroad & Coal Co. v. Huntingdon County Com'rs, 90 Pa.Super. 170.

68. Pa.—Pittsburgh Joint Stock Yards Co. v. Board of Property Assessment, Appeals and Review of Allegheny County, 44 A.2d 564, 353 Pa. 135.

69. Pa.—People's Telephone Corporation v. City of Butler, 99 Pa.Super. 256.—East Broad Top Railroad & Coal Co. v. Huntingdon County Com'rs, 90 Pa.Super. 170.

Mere convenience

Evidence supported finding that occupancy of property by telephone company was mere convenience as regards exemption from local taxation.—People's Telephone Corporation v. City of Butler, 99 Pa.Super. 256.

Mining of coal is not performance of public service within tax exemption because done by company holding franchise for operating railroad.—East Broad Top Railroad & Coal Co. v. Huntingdon County Com'rs, 90 Pa.Super. 170.

70. U.S.—Ott v. Mississippi Val.

Barge Line Co., La., 69 S.Ct. 432, 336 U.S. 169, 93 L.Ed. —, rehearing denied 69 S.Ct. 653, 336 U.S. 928, 93 L.Ed. —.

71. Mich.—City of Detroit v. Philip, 20 N.W.2d 868, 313 Mich. 211.

Yacht sailing Great Lakes

A yacht sailing on the Great Lakes, which was docked and anchored within city of Detroit during navigation season and stored therein during other portions of year, had a situs within city of Detroit, so as to be subject to assessment by the city for personal property taxes, notwithstanding owner was not a resident of the city.—City of Detroit v. Philip, supra.

72. Ky.—Newport v. Berry, 19 S.W. 238, 14 Ky.L. 29.
44 C.J. p 1311 note 63.

73. Tex.—Galveston v. Haden, Civ. App., 214 S.W. 766.—Galveston v. J. M. Guffey Petroleum Co., 113 S.W. 585, 51 Tex.Civ.App. 642.

74. Ga.—St. Simons Transit Co. v. Brunswick, 81 S.E. 199, 141 Ga. 477.—Wright v. Brunswick, 78 S.E. 839, 140 Ga. 231, Ann.Cas.1914D 287.

75. Ala.—Battle v. Mobile, 9 Ala. 234, 44 Am.D. 438.

76. Ala.—Battle v. Mobile, supra.

77. La.—Rabassa v. New Orleans, 3 Mart. 218.

78. La.—Blanc v. New Orleans, 1 Mart. 119.

79. Ala.—Tennessee Coal, Iron & R. Co. v. State, 193 So. 143, 239 Ala. 19.

La.—Blanc v. New Orleans, 1 Mart. 119.

80. N.Y.—Compagnie Generale Transatlantique v. McGoldrick, 4 N.Y.S.2d 661, 254 App.Div. 237, affirmed 18 N.E.2d 28, 279 N.Y. 192, reargument denied and remittitur amended 21 N.E.2d 199, 280 N.Y. 691, reversed on other grounds McGoldrick v. Compagnie Generale Transatlantique, 60 S.Ct. 670, 309 U.S. 430, 84 L.Ed. 849.

81. S.C.—State v. Elfe, 34 S.C.L. 395.

82. S.C.—State v. Elfe, supra.

83. S.C.—State v. Elfe, supra.

84. N.Y.—People v. Cantor, 190 N.Y.S. 277, 116 Misc. 169, affirmed 190 N.Y.S. 947, 198 App.Div. 989.

85. N.Y.—People v. Cantor, supra.

86. N.Y.—People v. Cantor, supra.

construction of the building was commenced, where the building is not finished and ready for occupancy before the close of the tax year,⁸⁷ but a substantial commencement of construction before the preceding assessment date will preclude exemption of the building even though it is not ready for occupancy by the following assessment date.⁸⁸ The commencement of construction within the meaning of the charter or statute is the act of bringing together and uniting the materials which enter into the construction,⁸⁹ and not the beginning of excavation or preparing the land for the buildings.⁹⁰ The building must be both finished and ready for occupancy in order to make it taxable for the year in which construction was commenced.⁹¹ Where the statute authorizes a municipality to grant exemption from local taxation on certain buildings provided excavation for construction thereof is begun before a specified date and completed within a specified period, a claim for exemption will be denied if it appears that excavation was not commenced in

good faith before the date specified.⁹²

§ 2029. Other Particular Persons or Property

Particular persons and property have been held to be subject to, or to be exempt from, municipal taxation.

Under the rules discussed supra §§ 2000-2005, particular persons or property other than those discussed supra §§ 2015-2028, have been held to be subject,⁹³ or not to be subject,⁹⁴ to municipal taxation. Accordingly, under the various constitutions, statutes, charters, and ordinances, abstract cards,⁹⁵ lands below high-water mark of tidal waters,⁹⁶ and projection equipment of a motion picture theatre⁹⁷ have been held to be subject to municipal taxation. On the other hand, coal,⁹⁸ documents,⁹⁹ investment trust certificates,¹ lands below high-water mark of tidal waters,² and submerged land³ have been held not to be taxable under particular provisions.

Particular persons or property have been held to be exempt⁴ or not exempt⁵ from municipal taxation.

87. N.Y.—*People v. Purdy*, 153 N.Y. S. 300, 167 App.Div. 637, reversed on other grounds 111 N.E. 1097, 216 N.Y. 704.

44 C.J. p 1311 note 80.

88. N.Y.—*People ex rel. Shelton Holding Corporation v. Goldfogle*, 221 N.Y.S. 583, 220 App.Div. 451.

Footings and grillage

Construction of footings and installation of some of grillage was a commencement of construction for taxation purposes.—*People ex rel. Shelton Holding Corporation v. Goldfogle*, supra.

89. N.Y.—*People v. Purdy*, 111 N.E. 1097, 216 N.Y. 704.

44 C.J. p 1312 note 81.

90. N.Y.—*People v. Purdy*, 111 N.E. 1097, 216 N.Y. 704.

44 C.J. p 1312 note 82.

91. N.Y.—*People v. Cantor*, 130 N.E. 305, 230 N.Y. 312.

44 C.J. p 1312 note 83.

92. N.Y.—*People ex rel. 71 Park Ave. v. Goldfogle*, 235 N.Y.S. 189, 226 App.Div. 241, affirmed 171 N.E. 788, 253 N.Y. 572.

Excavation not sufficiently begun

Digging hole before demolition of existing buildings was not an "excavation actually and in good faith begun" as respects tax exemption under statutory provision for exemption of certain buildings if excavation for their erection is begun before a specified date.—*People ex rel. 71 Park Ave. v. Goldfogle*, supra.

93. Ky.—*Asher v. Pineville*, 131 S.W. 512, 140 Ky. 670.

44 C.J. p 1289 note 55 [a].

94. N.Y.—*People v. Feitner*, 60 N.Y.S. 687, 44 App.Div. 278.

44 C.J. p 1289 note 55 [b].

95. Tex.—*Hidalgo Guarantee Abstract Co. v. City of Edinburg*, Civ. App., 181 S.W.2d 597, error refused.

96. Mass.—*City of Boston v. Boston Port Development Co.*, 30 N.E.2d 896, 308 Mass. 72, 133 A.L.R. 515.

97. Mass.—*Board of Assessors of City of Brockton v. Brockton Olympia Realty Co.*, 77 N.E.2d 391, 322 Mass. 351.

"Machinery used in conduct of business"

Projection equipment, sound reproducing equipment, and three kilowatt generator and induction motor used for operation of organ, owned by domestic business corporation operating motion picture theaters were "machinery used in conduct of business" of corporation so as to be subject to local taxation.—*Board of Assessors of City of Brockton v. Brockton Olympia Realty Co.*, supra.

Excluded by ejusdem generis

Under rule of ejusdem generis, words "other combustibles," as used in personal property tax law imposing tax on oil, gas, gasoline, and other combustibles, did not include coal, and coal was not taxable, notwithstanding it was a combustible.—*In re Bush Terminal Co.*, C.C.A.N.Y., 93 F.2d 659.

99. Pa.—*City of Philadelphia v. Goldfine*, 29 A.2d 233, 151 Pa.Super. 59.

Bailment lease

Pa.—*City of Philadelphia v. Goldfine*, supra.

Regarded as taxing statute

City ordinance imposing a documentary stamp tax on any written obligation to pay money and any executory contract for payment of

money is a taxing statute.—*City of Philadelphia v. Goldfine*, supra.

1. Pa.—*In re Pennsylvania Co. for Insurances on Lives and Granting Annuities*, 11 A.2d 160, 337 Pa. 321.

2. N.J.—*Central R. Co. v. Atlantic Highlands*, 66 A. 936, 75 N.J.Law 80—*Roberts v. Jersey City*, 25 N.J.Law 525.

3. Fla.—*Baylen St. Wharf Co. v. City of Pensacola*, 39 So.2d 66.

Circumstances under which nontaxable

Portions of submerged land which were improved and used for mooring small fishing craft and which were rendered worthless by discharge of silt, oil and refuse from municipal storm sewer were not taxable by municipality.—*Baylen St. Wharf Co. v. City of Pensacola*, supra.

4. Wis.—*Federal Refrigerator Mfg. Co. v. Crowley*, 32 N.W.2d 351, 252 Wis. 532.

Notes given for building of home held exempt from municipal tax as "exempt from taxation of every kind."—*Bond v. Town of Tarboro*, 136 S.E. 713, 193 N.C. 248.

Proceeds of life insurance

Under statute imposing four-mill personal property tax for city and county purposes, but providing that statute shall not apply to proceeds of any life insurance policy held in whole or in part by insurer, city could not tax proceeds of life policy which beneficiary did not collect but allowed insurer to retain under contract providing for payment of interest thereon.—*Loeb v. Benham*, 34 A.2d 835, 153 Pa.Super. 601.

5. N.Y.—*Standard Oil Co. of New*

Accordingly, custodians,⁶ dependents,⁷ and public charges⁸ have been held to be exempt. Likewise, grain,⁹ hotels,¹⁰ machinery,¹¹ and stock in trade¹² have been held exempt. On the other hand, building and loan associations,¹³ property in the hands of a receiver,¹⁴ and realty set aside for support of widow and children¹⁵ have been held not to be exempt.

Homesteads may be subject to municipal taxation,¹⁶ and provisions exempting homesteads from taxation for state purposes do not exempt them from taxation for municipal purposes.¹⁷ Where municipal indebtedness is incurred before adoption of a constitutional provision exempting homesteads, the latter remain subject to tax for payment of refunding obligations issued after adoption of the

York v. Goldfogle, 8 N.Y.S.2d 571, 255 App.Div. 1022, reargument denied 11 N.Y.S.2d 368, 256 App.Div. 989, affirmed 24 N.E.2d 986, 282 N.Y. 566.

Pool table

Statute providing that persons specifically taxed for keeping pool table need not give in value thereof held inapplicable to municipal taxation, hence did not exempt pool table from ad valorem taxation by city which levied special taxes on business of operating pool tables.—City of Valdosta v. Blum, 184 S.E. 700, 182 Ga. 174.

6. Pa.—In re Thaw's Estate, 63 A. 2d 417, 163 Pa.Super. 484.

Trustee held not mere custodian

Death of life beneficiary of active testamentary trust and election by his appointees as remaindermen to take trust property in kind did not make trustee a mere custodian exempt under statutes from personal property taxes levied on trust property in its possession by city, the trustee still having active functions to perform.—In re Thaw's Estate, supra.

7. N.Y.—In re Sinning's Estate, 300 N.Y.S. 446, 253 App.Div. 723.

Dependency not shown

Petitioners were not dependents, in sense contemplated by tax law, so as to be entitled to reduction in village tax assessment because of exemption, where application for exemption stated no facts to show dependency, and petitioners' total worth, based on assessed valuation of various pieces of realty, including premises in question, and bank account, was fourteen thousand one hundred and twenty dollars, and income from rentals on realty was one hundred and five dollars a month.—In re Sinning's Estate, supra.

8. Kan.—City of Liberal v. Blankenship, 21 P.2d 893, 137 Kan. 475.

Physically incapacitated property holder

Man physically incapacitated but owning home and automobile was not public charge within ordinance exempting public charge from payment of poll tax.—City of Liberal v. Blankenship, supra.

9. Wis.—Jos. Schlitz Brewing Co. v. City of Milwaukee, 286 N.W. 602, 232 Wis. 118, 122 A.L.R. 1431.

"Malt" as "grain"

"Malt" or "malted barley" is "grain" within statute requiring elevator and warehouse operators to pay an occupation tax on "grain" handled, and malt or barley owned by a brewery and stored in its own warehouses and elevators until required for the manufacture of beer is subject to the occupation tax and is exempt from municipal personal property tax.—Jos. Schlitz Brewing Co. v. City of Milwaukee, supra.

Validity of exemption act

Statute providing for occupational tax on the operators of grain elevators and warehouses and exempting property so taxed from municipal or state taxation is not unconstitutional as discriminating against owners of grain which is not stored in warehouses or elevators.—Jos. Schlitz Brewing Co. v. City of Milwaukee, supra.

10. Miss.—Natchez Inv. Co. v. City of Natchez, 124 So. 654, 155 Miss. 473.

Particular hotel properties

Under ordinance exempting permanent hotels from taxation, lot was exempt, but furnishings and equipment were not.—Natchez Inv. Co. v. City of Natchez, supra.

11. Pa.—Gulf Oil Corp. v. City of Philadelphia, 53 A.2d 250, 357 Pa. 101.

Chemical apparatus

Apparatus, even though it does not apply force or involve the quality of motion, and even though the major action therein is chemical, may constitute machinery within statute exempting from real estate tax assessment machinery used in manufacturing.—Gulf Oil Corp. v. City of Philadelphia, supra.

Tanks of an oil refinery used to perform various essential operations in manufacture of refined petroleum products were machinery and tools used in manufacturing within statute excluding such machinery and tools from real estate tax assessment.—Gulf Oil Corp. v. City of Philadelphia, supra.

12. Mass.—New England Mut. Life Ins. Co. v. City of Boston, 75 N.E.2d 505, 321 Mass. 683.

13. Ga.—Elder v. Home Building &

Loan Ass'n, 3 S.E.2d 75, 188 Ga. 113, 122 A.L.R. 738.

Validity of statute

A statute purporting to exempt mutual building and loan associations from taxation on their capital lent to stockholders or members is unconstitutional to extent that it attempts to exempt capital of a home building and loan association lent to members and evidenced by notes, from city taxes.—Elder v. Home Building & Loan Ass'n, supra.

14. U.S.—Baltimore Trust Co. v. Inter-ocean Oil Co., D.C.Md., 30 F. Supp. 560.

15. Ga.—City of Waycross v. Cottingham, 4 S.E.2d 67, 60 Ga.App. 463.

Exemption denied

Under laws of Georgia, there is no specific exemption from taxation, either by municipalities or otherwise, of real estate which has been set aside under the laws of the state as a year's support for a widow or minor children of a deceased person; and property set aside to a widow and minor children as a year's support out of the estate of her deceased husband was not exempt from taxation by a municipality, which under the general laws of Georgia has the right to assess and levy a tax on the property, where the tax accrued after the year's support had been set aside.—City of Waycross v. Cottingham, supra.

16. Fla.—State v. Town of Gulfport, 189 So. 703, 138 Fla. 505—Long v. St. John, 170 So. 317, 126 Fla. 1, 106 A.L.R. 809.

17. Tex.—Graham v. City of Fort Worth, Civ.App., 75 S.W.2d 930, error refused.

Charter provision that property exempt from taxation by constitution and laws of state shall be exempt from taxation by city and that city council shall have power to levy for general purposes tax on all property within territorial limits of city, not exempt from taxation by constitution and laws of state, did not exempt residence homestead of value of three thousand dollars or less from taxation for city purposes, even if city had power to make such exemption.—Graham v. City of Fort Worth, supra.

exemption provision in payment of such prior indebtedness,¹⁸ but homesteads are not taxable in payment of new indebtedness incurred subsequent to adoption of the exemption provision.¹⁹ Under some provisions homesteads are exempt from municipal taxation,²⁰ and continuous physical presence of the owner is not requisite to constitute a homestead for tax exemption purposes.²¹ Where property has acquired a homestead status, the mere transfer of its ownership does not of itself alter such status so as to destroy the tax exemption of the property,²² which may remain as much a tax-free homestead in the hands of its new owner as in the hands of the old,²³ and no action on the part of the old owner after he has parted with title can affect the homestead status of the property for municipal tax purposes.²⁴

Marsh and meadow lands. The purpose of statutes providing that all marsh and meadow lands within the limits of a municipality which are protected from overflow by the tides by banks at the expense of the owners, whereon no houses or other buildings are constructed, shall be exempt from all taxes for municipal purposes, is to encourage the reclamation and subsequent improvement of marsh and meadow lands within the municipality.²⁵ Land taxable before enactment of such a statute becomes exempt thereafter.²⁶ Where land is ex-

empt under such statutes prior to a fill, it retains such exemption until the physical aspects of the land are so changed as to deprive it of the character of marsh or meadow land.²⁷ Marsh land, within the meaning of such statutes, is soft, wet land commonly covered in whole or in part by water,²⁸ and, where land is filled in to an extent raising its elevation to that of the protecting bank, it ceases to be entitled to exemption as marsh land.²⁹ Under provisions exempting for a limited time all marsh or meadow land which has subsequently become high and fast land by being raised above high water, following filling operations by the owner, the elevation of a bank constructed to protect marsh land fixes the elevation beyond which the owner may not contend that the land need be filled in order to bring it above high water,³⁰ and an owner who fills the land so as to raise it still higher than such bank creates no new and additional exemption.³¹ The term "above high water," as used in such statutory provisions, means above a tide which might reasonably be expected to recur with some degree of frequency,³² and will not be construed to mean beyond any unforeseeable or unpredictable tide,³³ nor, it has been held, does the phrase mean above the average or ordinary high tide,³⁴ and whether or not in any particular case land has been raised above high water will

18. Fla.—State v. City of Bartow, 2 So.2d 125, 147 Fla. 67—State v. Town of Gulfport, 189 So. 703, 138 Fla. 505—State v. City of Inverness, 188 So. 767, 137 Fla. 629—State v. City of Lakeland, 180 So. 754, 132 Fla. 489—City of Fort Myers v. State, 176 So. 483, 129 Fla. 166—City of Coral Gables v. State, 176 So. 40, 128 Fla. 874—State v. City of Sanford, 174 So. 339, 128 Fla. 171—State v. City of St. Petersburg, 173 So. 434, 127 Fla. 509—State v. City of Orlando, 170 So. 887, 126 Fla. 251, 127 Fla. 280—State v. City of Clearwater, 169 So. 602, 125 Fla. 73.

Extension of tax act to cover refunding bonds

Constitutional and statutory requirements permitting taxation of homesteads for payment of city bonds at time of issuance of bonds to be refunded by issuance of new bonds may be renewed and extended to inure to benefit of takers of refunding bonds.—State v. City of Daytona Beach, 171 So. 814, 126 Fla. 728.

19. Fla.—State ex rel. Harrington v. City of Pompano, 188 So. 610, 136 Fla. 730—City of Coral Gables v. State, 176 So. 40, 128 Fla. 874.

20. Fla.—City of Jacksonville v. Bailey, 30 So.2d 529, 159 Fla. 11.

21. Fla.—City of Jacksonville v. Bailey, supra.

22. Fla.—Simpson v. Hirshberg, 30 So.2d 912.

23. Fla.—Simpson v. Hirshberg, supra.

24. Fla.—Simpson v. Hirshberg, supra.

25. Del.—Banks v. Wilmington Terminal Co., 24 A.2d 592, 2 Terry 489, affirmed 28 A.2d 616, 3 Terry 126—Delaware Registration Trust Co. v. Delaware Forge & Steel Co., 138 A. 620, 15 Del.Ch. 381—Electric Hose & Rubber Co. v. Wilmington, 94 A. 741, 5 Boyce 444.

26. Del.—Banks v. Wilmington Terminal Co., 24 A.2d 592, 2 Terry 489, affirmed 28 A.2d 616, 3 Terry 126.

27. Del.—Banks v. Wilmington Terminal Co., supra.

28. Del.—Banks v. Wilmington Terminal Co., supra.

29. Del.—Banks v. Wilmington Terminal Co., supra.

30. Del.—Banks v. Wilmington Terminal Co., supra.

- Phrase "high and fast land," as used in statute providing that any

marsh or meadow land which has been filled in or raised above high water, so as to become high and fast land, shall be exempt from all taxes for municipal purposes for a period of ten years, means land above high water.—Banks v. Wilmington Terminal Co., Del., 24 A.2d 592, 2 Terry 489, affirmed 28 A.2d 616, 3 Terry 126.

Presumptions

Court would not presume that depression land, which was surrounded by high and fast lands, was so surrounded for such a short period of time as would save owner from tax liability under statute relating to exemption from taxation of marsh and meadows lands located in city and filled in by owner so as to be high and fast.—Stirlith Bros. Co. v. Mayor and Council of Wilmington, 189 A. 880, 21 Del.Ch. 356.

31. Del.—Banks v. Wilmington Terminal Co., 24 A.2d 592, 2 Terry 489, affirmed 28 A.2d 616, 3 Terry 126.

32. Del.—Banks v. Wilmington Terminal Co., supra.

33. Del.—Banks v. Wilmington Terminal Co., supra.

34. Del.—Banks v. Wilmington Terminal Co., supra.

depend on all the facts involved.³⁵ The provision of the statute requiring the filling or raising of the land to be at the expense of the owner in order to secure tax exemption means merely that the work shall not be done at public expense,³⁶ and for purposes of tax exemption it makes no difference

whether the work is done at the expense of the owner himself or at that of some other private person.³⁷ Such statutes do not contemplate that land lying below tide level, but which is in the midst of high and fast land and therefore not subject to overflow, shall be exempt.³⁸

3. LEVY AND ASSESSMENT

a. Levy

§ 2030. In General

Power to tax implies the power to levy, and, in the absence of statutory requirements, the municipal officers may adopt any reasonable method in making a levy; but to the extent that the method of levy is controlled by statutory or charter provisions, there should be at least a substantial compliance with such provisions.

The power to tax, as discussed supra §§ 1978-1999, implies a power to levy,³⁹ although the word "levy" is not used in the constitutional or statutory provision giving the municipal authorities the power to assess and collect taxes;⁴⁰ and, in the absence of statutory provisions prescribing the method of levy, the grant of power to levy carries with it the authority to adopt any reasonable method to make the power effectual.⁴¹ Municipal officers, however, in levying a tax must proceed strictly in accordance with the authority given by law,⁴² and must comply, at least substantially, with statutory and charter provisions as to the making of the levy,⁴³ such as with respect to the territory or boundaries within which property may be levied on.⁴⁴ If a tax is void for failure to comply with the statutory requirements, a proper levy may be

made subsequently.⁴⁵ A statute requiring a levy by the excise board to be certified to the officer required to make up the tax rolls is merely directory.⁴⁶

§ 2031. Conformity to State and County Tax Systems

In the absence of a constitutional or statutory requirement, a municipal system of taxation need not conform to that of the state as to the manner of imposition; but a local departure from the general policy of the state in imposing taxes will not be justified unless expressly authorized.

Except where it is required by constitutional or statutory provisions,⁴⁷ it is not essential that the system of taxation in a municipal corporation be made to conform exactly to that of the state as to the manner of imposition,⁴⁸ but a local departure from the general policy of the state in imposing taxes will not be justified unless expressly authorized,⁴⁹ and, in the absence of express authorization or directions, a municipal tax may be levied according to the general tax law of the state,⁵⁰ or,

35. Del.—Banks v. Wilmington Terminal Co., supra.

36. Del.—Banks v. Wilmington Terminal Co., supra.

37. Del.—Banks v. Wilmington Terminal Co., supra.

Marsh lands filled free of charge by dredging company, however, have been held not exempt from municipal taxation.—Delaware Registration Trust Co. v. Delaware Forge & Steel Co., 138 A. 620, 15 Del.Ch. 381.

38. Del.—Banks v. Wilmington Terminal Co., 24 A.2d 592, 2 Terry 489, affirmed 28 A.2d 616, 3 Terry 126—Stirith Bros. Co. v. Mayor and Council of Wilmington, 189 A. 880, 21 Del.Ch. 356.

39. S.C.—Gaud v. Walker, 53 S.E. 2d 316.

44 C.J. p 1312 note 86.

40. S.C.—Gaud v. Walker, supra.

41. Mo.—Aurora v. McGannon, 39 S.W. 469, 138 Mo. 38.

42. Me.—Inhabitants of Town of

Frankfort v. Waldo Lumber Co., 145 A. 241, 128 Me 1.

43. Ill.—People ex rel Anderson v. Baltimore & O. S. W. R. Co., 18 N. E.2d 201, 370 Ill 128.

Neb.—Chicago & N. W. Ry. Co. v. Bauman, 271 N.W. 256, 132 Neb. 67. 44 C.J. p 1312 note 88.

Compliance with statutory or charter provisions as to assessment see infra § 2045.

Statutes providing for installment payment of taxes and interest on delinquent taxes, and for application of proceeds from delinquent taxes have been held not to alter course of procedure in making of proper tax levy.—Chicago & N. W. Ry. Co. v. Bouman, 271 N.W. 256, 132 Neb. 67.

Where a substantial compliance is shown, the levy is valid.—Johnston v. Huntington, 76 S.E. 142, 71 W.Va. 106.

44. U.S.—City of Winter Haven v. Gillespie, C.C.A.Fla., 84 F.2d 285, certiorari denied Hartridge-Can-

non Co. v. Gillespie, 57 S.Ct. 232, 299 U.S. 606, 81 L.Ed. 447, rehearing denied 57 S.Ct. 927, 301 U.S. 668, 81 L.Ed. 1333.

S.C.—Grier v. City Council of City of Spartanburg, 26 S.E.2d 690, 203 S.C. 203.

45. Ky.—Somerset v. Somerset Banking Co., 60 S.W. 5, 109 Ky. 549, 22 Ky.L. 1129—Levi v. City of Louisville, 30 S.W. 973, 97 Ky. 394, 28 A.L.R. 480.

46. Okl.—Berryman v. Bonaparte, 11 P.2d 164, 155 Okl. 165.

47. Ky.—Blades v. Falmouth, 98 S.W. 1017, 124 Ky. 259, 30 Ky.L. 420. Okl.—Sapulpa v. Land, 223 P. 640, 101 Okl. 22.

48. Tex.—Dallas v. Dallas Cons. Electric St. R. Co., 66 S.W. 835, 95 Tex. 268.

44 C.J. p 1313 note 94.

49. Ga.—Sanders v. Butler, 30 Ga. 679.

44 C.J. p 1313 note 95.

50. Mich.—Huron-Clinton Metropol-

in case of a special tax, according to the method of levy of other city taxes.⁵¹

§ 2032. General Laws or Special Charters

Where authority to levy municipal taxes may be granted or exercised under general laws only, such a general law prevails over a city charter; but, where a method of levy different from that prescribed by general law is authorized by the legislature, the method provided by special law or charter will prevail over that prescribed by general law.

Under constitutional provisions requiring authority to levy municipal taxes to be granted by, or exercised under, general laws only, a general law prevails over a city charter.⁵² However, in the absence of a constitutional restriction, the legislature may authorize taxes within a city to be levied in a mode different from that prescribed by the general laws of the state,⁵³ and, in such case, the method provided by special law or charter will prevail over that prescribed by a general law.⁵⁴ While a later general law will prevail over special charter or statutory provisions in the absence of a provision clearly indicating a legislative intent to the contrary,⁵⁵ the charter provisions will control, notwithstanding the later law, where it is clearly established that the legislature intended that they should.⁵⁶ Statutes providing that the method of levying and collecting taxes offered by the gen-

eral law may be adopted by a two-thirds vote of the city council have been construed as requiring an adoption by ordinance only in the case of cities which have previously adopted some other method.⁵⁷

§ 2033. Who May Exercise Power to Levy

The power of a municipal corporation to levy a tax may be exercised only by certain designated officials, and may not be redelegated to any other officer, board, or body.

The matter of levying municipal taxes is a matter of municipal prerogative and concern,⁵⁸ and generally may be exercised only by certain designated officials,⁵⁹ and it may not be redelegated to any other officer, board, or body.⁶⁰

Common council. The municipal function of taxation generally belongs to the common council.⁶¹ Power vested in commissioners to approve or reject any part of a tax levy includes authority to veto,⁶² but not to modify,⁶³ the levy, the latter being a function of the common council.⁶⁴

Review. A county or state board may be designated as a reviewing tribunal of a municipality's levy of a tax;⁶⁵ but a municipality's exercise of its discretion in making a levy is not subject to review by such a board, as long as the municipality acts within constitutional and statutory limitations.⁶⁶

itan Authority v. Board of Sup'rs of Oakland County, 25 N.W.2d 646, 316 Mich. 632.

51. Ga.—Scott v. Town of McIntyre, 19 S.E.2d 49, 66 Ga.App. 640.

Street and bridge tax

Ill.—People ex rel. Siekmann v. Pennsylvania R. Co., 52 N.E.2d 796, 385 Ill. 350.

52. Okl.—Ryan v. Roach Drug Co., 239 P. 912, 113 Okl. 130.

44 C.J. p 1313 note 1.

53. N.J.—State v. Blundell, 24 N.J. Law 402.

54. Iowa.—Burke v. Jeffries, 20 Iowa 145.

N.Y.—People v. Woodbury, 117 N.Y. S. 676, 133 App.Div. 503, affirmed 94 N.E. 1098, 201 N.Y. 532.

55. U.S.—Central Trust Co. v. Wabash, etc., R. Co., C.C.Mo., 27 F. 14.

56. N.J.—State v. Blunden, 24 N.J. Law 402.

57. Tex.—Rising Star v. Dill, Civ. App., 259 S.W. 652.

58. Mich.—Lucking v. People, 31 N.W.2d 707, 320 Mich. 495.

59. Ind.—Douglas v. Tash, 200 N.E. 608, 209 Ind. 675.

Mich.—Lucking v. People, 31 N.W.2d 707, 320 Mich. 495.

44 C.J. p 1313 note 9.

De facto or de jure board

N.C.—Kennedy v. Town of Wilkesboro, 199 S.E. 35, 214 N.C. 271.

Statutory right

A city's right to have a tax levied for general purposes of the city by the budget commission is purely statutory.—State v. Hale, 156 N.E. 221, 24 Ohio App. 166.

60. Ga.—Johnston v. Macon, 62 Ga. 645.

44 C.J. p 1313 note 10.

A chancery court cannot substitute its judgment for that of municipal authorities as to whether taxes should be levied.—Lucking v. People, 31 N.W.2d 707, 320 Mich. 495.

61. La.—State ex rel. Walmsley v. Board of Liquidation of City Debt, 129 So. 724, 171 La. 110.

44 C.J. p 1313 note 11.

City council and not quorum court has been held to have power to levy tax to pay street improvement bond issue, and, therefore, alleged irregularity in levy made by quorum court was immaterial.—Rhodes v. City of Stuttgart, 95 S.W.2d 101, 192 Ark. 822.

As legislative body

Where city concedes liability for damages, or when judgment liability is imposed by law, only municipal authority with power to provide

means of payment by tax levy of one-tenth per annum is city's legislative body.—Douglass v. City of Los Angeles, 53 P.2d 353, 5 Cal.2d 123.

Excise board is not "proper authority" of municipality, within constitutional provision relating to assessment of taxes for purely local purposes, to determine amount of money to be raised and expended, and for what purposes.—City of Ardmore v. Excise Board of Carter County, 8 P.2d 2, 155 Okl. 126.

62. Ohio—Ampt v. Cincinnati, 10 Ohio Dec. (Reprint) 824, 21 Cinc. L.Bul. 216.

63. Ohio—Ampt v. Cincinnati, supra.

64. Ohio—Ampt v. Cincinnati, supra.

65. Ind.—Douglas v. Tash, 200 N.E. 608, 209 Ind. 675.

Effect on taxing officials' authority

A statute providing for court of tax review has been held not to fix time when authority of taxing officials over levies expires, or when levy is completely withdrawn from authority of local taxing officials.—Greer County Excise Board v. Lowden, 57 P.2d 612, 177 Okl. 7.

66. Okl.—City of Ardmore v. Excise Board of Carter County, 8 P.2d 2, 155 Okl. 126.

§ 2034. Time to Levy and Period Covered Thereby

The time for making a levy of municipal taxes, and the period covered by the levy, ordinarily are governed by statutory or charter provisions, and there should be a substantial compliance with such provisions in order to make a valid levy.

The time for making the annual levy ordinarily is fixed by statute or charter provisions,⁶⁷ and, where such provisions, as that the levy shall be made at a certain time of the year, or on or before a certain date, or between certain dates, are regarded as mandatory,⁶⁸ a levy thereunder, in order to be valid, must be made at or within the time prescribed,⁶⁹ and this has also been held to apply to a change in the levy.⁷⁰ On the other hand, some statutory or charter provisions as to the time of levy have been regarded as merely directory,⁷¹ so that the fact that the levy is not made at or within the time prescribed does not make it invalid.⁷² Where the statute is construed as mandatory, a tax duly levied at the statutory time is not invalidated by a later amendment of the original

levy which merely reduces the levy and does not add any new tax;⁷³ and, where an original tax levy ordinance is valid, a subsequent alleged validating ordinance is ineffective to change the date of the levy to the date of the passage of such subsequent ordinance.⁷⁴ A levy is not invalid because it is voted at a meeting adjourned from the statutory date.⁷⁵ If the statute fixes no time for the levy, an ordinance stating the day may be passed at any time⁷⁶ within the year.⁷⁷

Period covered by levy. Ordinarily the levy can be only for the taxes for one year;⁷⁸ and, where the sole power and duty of the municipality are to levy a certain special tax annually for a specific purpose, only one such levy may be made yearly,⁷⁹ and the municipality may not in any year pyramid or cumulate the levies, because the duty to make levies in past years has been refused or neglected;⁸⁰ nor may it reserve from present funds an amount for the paying of a liability which will arise in the next fiscal year.⁸¹ However, in the absence of charter or statutory direction, either the fiscal or

67. Ga.—Bibb Nat. Bank v. Macon, 97 S.E. 72, 148 Ga. 478.

Ill.—People ex rel. Gill v. Hamilton, 9 N.E.2d 243, 366 Ill. 455.

Legislative intent

Provision of statute that city councils of metropolitan cities should in first week in January, after levy of municipal taxes, set aside certain funds has been held to evidence legislative intent that first levy of municipal taxes thereunder was to be made not later than January of succeeding year.—Chicago & N. W. Ry. Co. v. Bauman, 271 N.W. 256, 132 Neb. 67.

68. Cal.—Union Safe Deposit Bank v. City of Menlo Park, 45 P.2d 347, 44 C.J. p 1313 note 17.

69. Ill.—People ex rel. Franklin v. Wabash R. Co., 56 N.E.2d 820, 387 Ill. 460.—People ex rel. McDonough v. Chicago, M., St. P. & P. R. Co., 188 N.E. 821, 354 Ill. 630, 44 C.J. p 1313 note 17.

Resolution authorizing tax levy must be enacted within statutory time, although certification of resolution to budget commission is directory.—State v. Hale, 156 N.E. 221, 24 Ohio App. 166.

Fire district tax

Ill.—People ex rel. Heuer v. Chicago, B. & Q. R. Co., 36 N.E.2d 925, 377 Ill. 470.

70. Ky.—Friedman v. City of Owensboro, 213 S.W.2d 793, 308 Ky. 315.

Prior to fiscal year

Ky.—Friedman v. City of Owensboro, supra.

71. U.S.—U. S. v. Certain Parcels of Land in City of Baltimore, D.C. Md., 61 F.Supp. 164.

Land in City of Baltimore, D.C. Md., 61 F.Supp. 164.

Kan.—School Board of Rural High School Dist. No. 4, Russell County v. Rupp, 106 P.2d 669, 152 Kan. 636.

Ky.—Morton v. City of Fullerton, 16 S.W.2d 797, 229 Ky. 76, 44 C.J. p 1313 note 18.

72. U.S.—U. S. v. Certain Parcels of Land in City of Baltimore, D.C. Md., 61 F.Supp. 164.

Ky.—Morton v. City of Fullerton, 16 S.W.2d 797, 229 Ky. 76.

Tex.—City of Raymondville v. Harding, Civ.App., 40 S.W.2d 888, affirmed Harding v. City of Raymondville, Com.App., 58 S.W.2d 55.

73. Miss.—McCready v. Lansdale, 58 Miss. 877.

74. Tex.—Nalle v. Austin, Civ.App., 93 S.W. 141.

75. Mich.—Hubbard v. Winsor, 15 Mich. 146.

76. Cal.—San Luis Obispo v. Pettit, 25 P. 694, 87 Cal. 499.

Ga.—Harper v. Elberton, 23 Ga. 566.

77. Ind.—Williamsport v. Kent, 14 Ind. 306.

78. Ill.—People ex rel. Gill v. Schiek, 14 N.E.2d 223, 368 Ill. 353.—People ex rel. Gill v. Hamilton, 9 N.E.2d 243, 366 Ill. 455.

Miss.—Adams v. Greenville, 27 So. 990, 77 Miss. 881.

Tex.—Masterson v. Hedley, Civ.App., 265 S.W. 406.

44 C.J. p 1314 note 24.

Word "annually" means yearly in statute authorizing ad valorem tax.—

Morton v. City of Fullerton, 16 S.W. 2d 797, 229 Ky. 76.

A city incorporated in July of a certain year could levy taxes for that year.—Rachford v. City of Port Neches, Tex.Civ.App., 46 S.W.2d 1057, followed Dearing v. City of Port Neches, 46 S.W.2d 1062, error refused.

79. U.S.—Brown-Crummer Inv. Co. v. City of Burbank, D.C.Cal., 17 F.Supp. 469, appeal dismissed, C. C.A., 97 F.2d 993.

Okl.—Pitts v. Allen, 281 P. 126, 138 Okl. 295.

80. U.S.—Brown-Crummer Inv. Co. v. City of Burbank, D.C., 17 F. Supp. 469, appeal dismissed C.C.A., 97 F.2d 993.

A levy may not be made for a past year, in the absence of statutory authority therefor.—People ex rel. McDonough v. New York Cent. R. Co., 190 N.E. 94, 356 Ill. 67.

For matured unpaid assessments

The statutory requirement that tax levies for payment of street paving assessments against public property be made annually precludes idea of statutory authority to levy tax for payment of all matured unpaid instalments of such assessments in any one year after maturity of street improvement bonds.—Wilson v. City of Hollis, 142 P.2d 633, 193 Okl. 241, 150 A.L.R. 1385.

81. Okl.—In re Protest of Chicago, R. I. & P. Ry. Co., 289 P. 258, 143 Okl. 287.—In re Protest of Texas Pipe Line Co. of Oklahoma, 288 P. 334, 143 Okl. 177.—C. D. Coggeshall

calendar year may be adopted by the council as the year for which the taxes are to be levied;⁸² and, under some circumstances, a levy for a longer period than one year is justifiable,⁸³ as, for example, for the purpose of providing for a few months' interval following a change in the fiscal year,⁸⁴ or for a deficiency in the year just closing, by combining it with the tax for the following year;⁸⁵ and, where an ordinance is passed levying taxes for the current year and succeeding years to retire a bonded indebtedness, an ordinance in succeeding years levying such a tax is not necessary.⁸⁶ Where, under a statute which requires a levy for the next fiscal year, the necessary steps for a levy are not taken until after the commencement of the new fiscal year, the levy need not be made until the following year.⁸⁷ Under some statutes which have been held reasonable,⁸⁸ if a levy for the following fiscal year is not made at or within the time prescribed, the tax rate for the preceding year continues.⁸⁹

Taxes for special purposes. Under some statutes, a levy for a special purpose may be required to be levied on or before the next general tax levy for municipal purposes.⁹⁰ A levy cannot be made to meet contract expenses before the contract is entered into,⁹¹ or to retire bonds before they have been sold,⁹² or to pay for land sought to be condemned in advance of a determination of the necessity for the proposed improvement;⁹³ but taxes to meet the payment of outstanding bonds may be levied in advance of the time when such obligations fall due,⁹⁴ or after the passage of an annual appropriation ordinance to pay bonds authorized by subsequent ordinances.⁹⁵ Under some statutes, where

the date of maturity of municipal bonds is prior to June fifteenth of the fiscal year, the number of tax levies for a sinking fund for such bonds should be one less than the number of fiscal years intervening between the date of the issuance and the maturity of the bonds,⁹⁶ but, where the date of maturity is on or after June fifteenth, the number of levies should be the number of fiscal years intervening between the issuance and the maturity of the bonds.⁹⁷

§ 2035. Conditions Precedent

- a. In general
- b. Appropriations, estimates, or budgets
- c. Determination of rate or amount

a. In General

Statutory or charter requirements, in the nature of conditions precedent to the levy, must be at least substantially complied with.

As a general rule, a levy of a municipal tax is valid when, and only when, there has been at least a substantial compliance, in all material particulars, with the methods and various steps which are required by statute or charter as conditions precedent to the regularity and validity of the tax,⁹⁸ such as those with respect to the submission of the proposition to, and approval by, popular vote, as discussed supra § 1988, the sanction or petition of a designated number of the taxpayers to be affected by the tax,⁹⁹ or the consent or recommendation of a designated officer, person, or body.¹ However, as has been held, no consent of the parties is required for the imposition or a change of a municipal tax or taxable rate.²

& Co. v. Smiley, 285 P. 48, 142 Okl. 8.

82. Mo.—Benoist v. St. Louis, 19 Mo. 179.

83. U.S.—North Miami, Fla. v. Meredith, C.C.A. Fla., 121 F.2d 279, certiorari denied 62 S.Ct. 138, 314 U.S. 674, 86 L.Ed. 539.

Ill.—People v. Wabash R. Co., 117 N.E. 1048, 281 Ill. 382.
44 C.J. p 1314 note 26.

84. Tex.—Hernandez v. San Antonio, Civ.App., 39 S.W. 1022.

85. La.—New Orleans Second Municipality v. Orleans Cotton Press Co., 6 Rob. 411.

86. Tex.—Adams v. Royse City, Civ. App., 61 S.W.2d 853, error refused.

87. Cal.—Le Clerg v. City of San Diego, 24 P.2d 819, 218 Cal. 672.

88. Ky.—Friedman v. City of Owensboro, 213 S.W.2d 798, 308 Ky. 315.

89. Ky.—Friedman v. City of Owensboro, supra.

Statute held valid

Ky.—Friedman v. City of Owensboro, 213 S.W.2d 798, 308 Ky. 315.

90. Cal.—Union Safe Deposit Bank v. City of Menlo Park, 45 P.2d 347.

91. Ind.—Brewer v. Bridges, 78 N.E. 811, 164 Ind. 358.

92. Ill.—People ex rel. McDonough v. Chicago, M., St. P. & P. R. Co., 188 N.E. 821, 354 Ill. 630.

La.—Kansas City Southern R. Co. v. Hendricks, 90 So 545, 150 La. 134.

93. Mich.—Barnhart v. Grand Rapids, 211 N.W. 96, 237 Mich. 90.

94. Ill.—Wright v. People, 87 Ill. 582.

95. Ill.—People ex rel. McDonough v. Chicago, M., St. P. & P. R. Co., 188 N.E. 821, 354 Ill. 630.

96. Okl.—Protest of Chicago, R. I. & P. Ry. Co., 10 P.2d 398, 156 Okl. 197.

97. Okl.—Protest of Chicago, R. I. & P. Ry. Co., supra.

98. Ohio.—Mehling v. Moorehead, 14 N.E.2d 15, 133 Ohio St. 395—State v. Hale, 156 N.E. 221, 24 Ohio App. 166.

A municipality is required to levy a tax only when the necessary steps have been taken, under the statute, to make it its duty to make the levy.
—Le Clerg v. City of San Diego, 24 P.2d 819, 218 Cal. 672.

99. Md.—Henderson v. Baltimore, 8 Md. 352.

44 C.J. p 1314 note 36.

1. Ga.—Solomon v. Tarver, 52 Ga. 405.

44 C.J. p 1314 note 37.

2. Va.—Danville Traction & Power Co. v. City of Danville, 101 S.E. 592, 168 Va. 430.

Notice and hearing. Except in so far as it is otherwise provided by statute, notice to the taxpayer is not a condition precedent to the validity of a tax,³ since the law in this respect differs from the law applicable to special assessments.⁴ Notice and a hearing are not necessary, with respect to the levy of general or ad valorem municipal taxes, to pay for a given project,⁵ or to meet delinquencies in assessments for local improvements;⁶ but an ordinance has been held invalid which authorizes a levy of taxes for street improvements, without providing for notice to abutting owners of the time and place of levy.⁷

Levy of state tax. If the amount of a special tax levied by the city is limited to a fraction of the state tax for the same purposes, the levy of the state tax is a condition precedent to the levy of the municipal tax.⁸

b. Appropriations, Estimates, or Budgets

Statutory or charter provisions requiring the making and filing of an appropriation bill, estimate, or budget, as a condition precedent to the levy of taxes for the ensuing year, must be at least substantially complied with.

Under some statutes or charters, it is required that certain municipal officials shall adopt⁹ and publish,¹⁰ or otherwise prepare and file, with designated officers, an appropriation bill, budget, or estimate of the rate or amount of taxes required to be raised for the ensuing year, as a condition precedent to the levy thereof, and it is essential that there shall be a compliance with such requirement in every substantial particular,¹¹ since an illegal or invalid appropriation or budget cannot afford the basis of a valid tax.¹² The statutory or charter requirements must be complied with, with respect

3. Iowa.—Dubuque, etc., R. Co. v. Mitchell, 131 N.W. 25, 152 Iowa 187.

44 C.J. p 1314 note 40.

Notice before passage or publication of ordinance see *infra* § 2038.

4. Iowa.—Dubuque, etc., R. Co. v. Mitchell, *supra*.

Notice of special assessments see *supra* §§ 1399-1401.

5. U.S.—Pacific Gas & Electric Co. v. Sacramento Municipal Utility Dist., D.C.Cal., 17 F.Supp. 685, affirmed, C.C.A., 92 F.2d 365, certiorari denied 58 S.Ct. 610, 303 U.S. 640, 82 L.Ed. 1100.

S.C.—Smith v. Robertson, 41 S.E.2d 631, 210 S.C. 99.

To finance building plant

Taxes levied on property within municipal utility district to pay for bonds issued to finance building of electric plant are "general taxes" which can be imposed without hearing as to whether property included within district would be benefited by proposed improvement.—Pacific Gas & Electric Co. v. Sacramento Municipal Utility Dist., D.C.Cal., 17 F.Supp. 685, affirmed, C.C.A., 92 F.2d 365, certiorari denied 58 S.Ct. 610, 303 U.S. 640, 82 L.Ed. 1100.

6. Cal.—American Co. v. City of Lakeport, 32 P.2d 622, 220 Cal. 548.

Where street improvements could be made by use of ordinary funds derived from general taxation without notice and hearing as to individual benefits, deficiency in fund raised by local assessment could be met by general taxation without notice and hearing.—American Co. v. City of Lakeport, *supra*.

7. Iowa.—Auer v. City of Dubuque, 22 N.W. 914, 65 Iowa 650.

8. Tex.—Hoesling v. San Antonio, 20 S.W. 85, 85 Tex. 228, 16 L.R.A.

608—Hirshfield v. Dallas, 15 S.W. 124, 29 Tex.App. 242.

9. Fla.—Town of North Miami v. Travis Co., 160 So. 360, 118 Fla. 879.

44 C.J. p 1314 note 43.

10. Ill.—People ex rel. Montgomery v. Wabash R. Co., 195 N.E. 665, 360 Ill. 173.

44 C.J. p 1315 note 44.

Sufficiency

A levy for city's current expense purposes has been held void where publication of estimate required by statute was contained in only single issue of daily newspaper.—Commerce Trust Co., Kansas City, Mo., v. Morris, 11 P.2d 183, 157 Okl. 127.

11. U.S.—Southland Ice Co. v. City of Temple, C.C.A.Tex., 100 F.2d 825.

111.—People ex rel. Prindable v. New York Cent. R. Co., 72 N.E.2d 821, 397 Ill. 50.

Iowa.—Dyer v. City of Des Moines, 300 N.W. 562, 230 Iowa 1246.

Mass.—Bell v. Assessors of Cambridge, 28 N.E.2d 1, 306 Mass. 249.

Okl.—Pitts v. First Nat. Bank, 281 P. 133, 138 Okl. 284.

Pa.—Woodward v. City of Philadelphia, 3 A.2d 167, 333 Pa. 80—Commonwealth ex rel. Kelley v. Pommer, 199 A. 485, 330 Pa. 421.

Construction of statute

The local budget law must be reasonably construed in keeping with common understanding of its terms, except for terms of art, which must be given their technical sense.—City Affairs Committee of Jersey City v. Division of Local Government of State Dept. of Taxation and Finance, 46 A.2d 558, 134 N.J.Law 198.

Purposes of estimate or budget law

(1) "That taxpayer shall pay less money by virtue of the fact that

the income other than taxation shall be deducted."—Dyer v. City of Des Moines, 300 N.W. 562, 230 Iowa 1246.

(2) To advise taxpayers of anticipated expenditures, and to fix a rate which will produce taxes as nearly as possible to equal the exact amount required to pay for the anticipated expenses of the year.

Ariz.—City of Tucson v. Tucson Sunshine Climate Club, 164 P.2d 598, 64 Ariz. 1.

Cal.—Southern Service Co. v. Los Angeles County, 82 P.2d 397, reheard 97 P.2d 963, 15 Cal.2d 1, appeal dismissed 60 S.Ct. 979, 310 U.S. 610, 84 L.Ed. 1388, rehearing denied 60 S.Ct. 1086, 310 U.S. 658, 84 L.Ed. 1421.

(3) "To require municipalities coming within its terms to prepare a budget in advance of the amount of funds to be expended for each purpose during the current year."—People ex rel. Larson v. Thompson, 35 N.E.2d 355, 361, 377 Ill. 104, 140 A. L.R. 948.

Objections

The statute respecting tax objections going to form of appropriation ordinance embraces only those objections made to the form of the appropriation, the degree of itemization, or the reasonableness of any amount appropriated, and the statute does not extend to the unlawful classification of an item in an inappropriate fund.—Central Ill. Public Service Co. v. Lawless, 83 N.E.2d 467, 401 Ill. 528.

12. Ill.—People ex rel. Bergan v. New York Cent. R. Co., 64 N.E.2d 895, 392 Ill. 525.

Mass.—Bell v. Assessors of Cambridge, 28 N.E.2d 1, 306 Mass. 249.

N.Y.—Rhynus v. Shaffer, 39 N.Y.S.2d

to the officers or board by whom the appropriation bill, budget, or estimate is to be prepared, signed, and submitted,¹³ and the official or board with which the estimate or budget is to be filed or submitted,¹⁴ and its action thereon.¹⁵ Substantial compliance must also be had with the requirements of the statute or charter, as to the matters to be contained in the estimate or budget,¹⁶ such as a statement of the purpose or purposes for which the funds are to be expended;¹⁷ and, when made by the city council, as to its approval by the mayor,¹⁸ or as to its being passed over his veto.¹⁹

Under other statutes, however, as where the purpose of the budget is to bring about a uniform specification and classification of revenue and expenditures for accounting purposes,²⁰ the adoption of a budget and an appropriation ordinance in accordance with the budget law is not a condition precedent to the levying of a tax,²¹ except where the fiscal year begins after the time for fixing the tax levy.²² The validity of a tax levy is not affect-

ed by a failure to pass an appropriation ordinance prior thereto,²³ and, if the budget contains a defect which shows a noncompliance with the terms of the statute, the levy does not thereby fall with the budget.²⁴ An appropriation bill, estimate, or budget for a particular year is not required for the levy of a tax for a special purpose, made under authority of a special statute authorizing such levy for a period of years,²⁵ for a levy for a sinking fund required by a constitutional provision,²⁶ for a proposed bond issue authorized by an emergency statute enacted after the budget law,²⁷ or for the levy of taxes for the payment of refunding bonds issued under a general refunding statute.²⁸

Where an appropriation is required, it must be an appropriation of a specific²⁹ and definite³⁰ amount, and it must be voted within the limit of time fixed by the statute;³¹ and, where there are several purposes, they should be sufficiently itemized or separately stated to inform the taxpayers of how the funds are to be expended.³² Where the purpose of

599, affirmed 39 N.Y.S.2d 621, 265 App.Div. 961.

13. Ohio.—State ex rel. Turner v. Village of Bremen, 156 N.E. 134, 116 Ohio St. 294.

Okl.—Protest of Bledsoe, 17 P.2d 979, 161 Okl. 227—Protest of Trimble, 300 P. 406, 151 Okl. 74.

Pa.—Woodward v. City of Philadelphia, 3 A.2d 167, 333 Pa. 80.

14. Ohio.—State ex rel. Turner v. Village of Bremen, 156 N.E. 134, 116 Ohio St. 294.

Excise board

Okl.—Protest of Bledsoe, 17 P.2d 979, 161 Okl. 227—Pitts v. First Nat. Bank, 281 P. 133, 188 Okl. 284.

True fiscal condition of municipality at close of fiscal year as basis for ad valorem tax is question of fact determinable by county excise board, court of tax review, or supreme court.—Protest of Bledsoe, 17 P.2d 979, 161 Okl. 227.

15. N.Y.—Hutton v. Goodsell, 84 N.Y.S.2d 734, 274 App.Div. 373.

Okl.—State v. Moroney, 10 P.2d 480, 156 Okl. 200—State v. Excise Board of Payne County, 10 P.2d 446, 156 Okl. 193—City of Guthrie v. Fry, 10 P.2d 447, 156 Okl. 190.

Opinion of reviewing board

In matters relating to municipal budget, the opinion of local government board sitting in review of local commissioner's approval of budget is entitled to much weight.—In re City Affairs Committee of Jersey City, 30 A.2d 581, 129 N.J.Law 589.

16. Cal.—Arthur v. Horwege, 153 P. 980, 28 Cal.App. 738.

Ohio.—State ex rel. Turner v. Village

of Bremen, 156 N.E. 134, 116 Ohio St. 294.

17. Ill.—People ex rel. Toman v. Advance Heating Co., 33 N.E.2d 206, 376 Ill. 158—Siegel v. City of Belleville, 181 N.E. 687, 349 Ill. 240.

Iowa.—Dyer v. City of Des Moines, 300 N.W. 562, 230 Iowa 1246.

Fire towers

N.Y.—De Angelis v. Laino, 257 N.Y.S. 154, 235 App.Div. 390, affirmed 184 N.E. 185, 260 N.Y. 661.

Salaries of employees

Wash.—State ex rel. Pike v. City of Bellingham, 48 P.2d 602, 183 Wash. 439.

Obligation not debt of city

A statutory provision requiring levy of tax sufficient to pay interest or principal on municipal bonds has been held inapplicable, where obligation incurred does not constitute debt of city.—Fjeldstad v. Ogden City, 28 P.2d 144, 83 Utah 278.

18. Pa.—Woodward v. City of Philadelphia, 3 A.2d 167, 333 Pa. 80.

19. Pa.—Woodward v. City of Philadelphia, supra.

20. Ill.—People ex rel. Manifold v. Chicago, B. & Q. R. Co., 54 N.E.2d 389, 386 Ill. 56.

21. Ill.—People ex rel. Prindable v. New York Cent. R. Co., 72 N.E.2d 821, 397 Ill. 50—People ex rel. Manifold v. Chicago, B. & Q. R. Co., 54 N.E.2d 389, 386 Ill. 56.

22. Ill.—People ex rel. Prindable v. New York Cent. R. Co., 72 N.E.2d 821, 397 Ill. 50—People ex rel. Manifold v. Chicago, B. & Q. R. Co., 54 N.E.2d 389, 386 Ill. 56.

23. Ill.—People ex rel. Larson v. Thompson, 35 N.E.2d 355, 377 Ill. 104, 140 A.L.R. 948.

S.D.—Henderson v. Hughes County, 83 N.W. 682, 13 S.D. 576, 586. 44 C.J. p 1315 note 46.

24. Ill.—People ex rel. De Rosa v. Chicago & N. W. Ry. Co., 63 N.E.2d 401, 391 Ill. 347.

25. Ill.—People v. Madlener, 115 N.E. 900, 278 Ill. 278—People v. Daemicke, 115 N.E. 898, 278 Ill. 53—People v. Day, 115 N.E. 732, 277 Ill. 543.

Appropriations and estimates generally, see supra §§ 1885-1889.

26. Okl.—Protest of Bledsoe, 17 P.2d 979, 161 Okl. 227.

27. Utah.—Wadsworth v. Santaquin City, 28 P.2d 161, 83 Utah 321.

28. Fla.—State v. City of Sanford, 174 So. 339, 128 Fla. 171—State v. City of Orlando, 170 So. 887, 126 Fla. 251, 127 Fla. 280—State v. City of Pensacola, 166 So. 851, 123 Fla. 331.

29. Idaho.—Standrod v. Case, 133 P. 651, 24 Idaho 365.

Ill.—People v. Arnold, 118 N.E. 702, 282 Ill. 305.

44 C.J. p 1315 note 48.

30. Ill.—People v. Arnold, supra. 44 C.J. p 1315 note 49.

31. Ill.—People v. Read, 104 N.E. 202, 261 Ill. 502.

Within first quarter of fiscal year
Ill.—People ex rel. Goethe v. Chicago, B. & Q. R. Co., 46 N.E.2d 25, 382 Ill. 120.

32. Ill.—People ex rel. McWard v. Wabash R. Co., 70 N.E.2d 36, 395 Ill. 243—People ex rel. Toman v.

the levy, in each instance, is for a single object, the appropriation may consist of several items,³³ and it is immaterial that some expense for the object has already been incurred.³⁴ The appropriation may be added to by a subsequent appropriation to provide for items omitted in the original appropriation ordinance, where the items were such as the city council was under legal obligation to provide for, and the subsequent appropriation is made before the time for certifying the annual levy.³⁵ If the improvement for which an appropriation is made for a particular year is not commenced during the year, the appropriation lapses at the end of the year,³⁶ and, if a greater amount is appropriated for the purpose the succeeding year, but the levy specifies that the amount is not to be paid from the money raised by the tax levy, and the current assets which may be appropriated exceed the amount appropriated for the improvement, the sum levied in the preceding year constitutes an asset, and may be reappropriated the succeeding year and does not enter into the computation of the current levy.³⁷

Under some statutes, a report of a board of estimate stating a rate of taxation sufficient to realize the amount of taxes needed must be made before the levy ordinance can be passed;³⁸ and, under other statutes, a levy cannot be made before an estimate of the probable amount of money necessary to be raised has been prepared and placed be-

fore the common council,³⁹ or before the assessment roll is completed.⁴⁰

Financial statement and estimated needs. Under some statutes, a financial statement of the true fiscal condition of the municipality at the close of the fiscal year and an itemized statement of the estimated needs of the municipality are required;⁴¹ but the financial statement and the itemized statement of the estimated needs may be published separately,⁴² and the itemized statement of the estimated needs may be made the basis of a valid appropriation and tax levies, although the financial statement is not legally published.⁴³ Such a financial statement may not include receipts or disbursements made after the beginning of a new fiscal year;⁴⁴ but it should show taxes collected and suspended pursuant to a protested levy, as a part of the balance on hand,⁴⁵ and the amount of the protested tax may be deducted.⁴⁶ A statement of the estimated needs should be itemized to show by classes the several amounts necessary for the current expenses of the municipality and of each officer and department thereof,⁴⁷ and the itemization must be such as to permit the excise board, or other proper board or officer to compute therefrom the amount of the appropriation,⁴⁸ and no valid appropriation or levy of rates may be computed from a statement of such needs which is not made in conformity with the statute.⁴⁹ Such a statement and estimate, however, are not essential to a levy of taxes for a sinking fund for a municipal bond issue.⁵⁰

Advance Heating Co., 33 N.E.2d 206, 376 Ill. 158—People ex rel. Anderson v. Baltimore & O. S. W. R. Co., 194 N.E. 568, 359 Ill. 301—Siegel v. City of Belleville, 181 N. E. 687, 349 Ill. 240—People v. Irvin, 156 N.E. 292, 325 Ill. 497.

Specification of each particular item of expense for which appropriation is made is not necessary, as long as general purpose designated informs taxpayer of purposes for which money is to be expended, but, where under general heading money may be expended for purposes essentially different, taxpayer has right to have purposes separately stated.—People ex rel. Nash v. Chicago, M., St. P. & P. R. Co., 194 N.E. 570, 359 Ill. 351.

33. Ill.—People ex rel. Toman v. Advance Heating Co., 33 N.E.2d 206, 376 Ill. 158.

34. Ill.—People ex rel. Toman v. Advance Heating Co., supra.

35. Idaho.—Standrod v. Case, 133 P. 651, 24 Idaho 365.
44 C.J. p 1315 note 51.

36. Ill.—People ex rel. Toman v.

Ames, 43 N.E.2d 1009, 380 Ill. 268.

37. Ill.—People ex rel. Toman v. Ames, 43 N.E.2d 1009, 380 Ill. 268.

38. Md.—Baltimore v. Gorter, 48 A. 445, 93 Md. 1.

39. Idaho.—Graves v. Berry, 207 P. 718, 35 Idaho 498.

40. La.—New Orleans v. New Orleans Union Bank, 15 La. Ann. 123. Pa.—Groman v. Bethlehem, 29 Pa. Dist. 779.

Assessment rolls, books, and warrants generally see *infra* § 2053.

41. Okl.—Protest of Bledsoe, 17 P. 2d 979, 161 Okl. 227—Jones v. Blaine, 300 P. 369, 149 Okl. 153.

Money held by county treasurer to credit of municipality, but which has not been paid over to city treasurer, need not be shown on financial statement of city as cash on hand.—Protest of Bledsoe, 17 P.2d 979, 161 Okl. 227.

Failure to certify financial statement of municipality to excise board does not render tax levy void.—Jones v. Blaine, 300 P. 369, 149 Okl. 153.

42. Okl.—Jones v. Blaine, supra.

43. Okl.—Jones v. Blaine, supra.

44. Okl.—Protest of Trimble, 300 P. 406, 151 Okl. 74.

45. Okl.—Protest of Trimble, supra.

46. Okl.—Protest of Trimble, supra.

47. Okl.—Protest of Bledsoe, 17 P. 2d 979, 161 Okl. 227.

"Miscellaneous supplies"

Statements of estimated needs of municipality, including items under heading "Misc. supplies and maintenance," have been held insufficient to support appropriation and levy computed for such supplies and maintenance.—Jones v. Blaine, 300 P. 369, 149 Okl. 153.

48. Okl.—Protest of Bledsoe, 17 P. 2d 979, 161 Okl. 227.

49. Okl.—Jones v. Blaine, 300 P. 369, 149 Okl. 153.

Valid appropriations and rates of levy may be computed from insufficient statement of estimated needs of municipality as far as itemized statement conforms to statute.—Jones v. Blaine, supra.

50. Okl.—Commerce Trust Co., Kansas City, Mo., v. Morris, 11 P.2d 183, 157 Okl. 127.

c. Determination of Rate or Amount

- (1) In general
- (2) Limitation and excess in general
- (3) Exercise of discretion

(1) In General

The statutory or charter requirements, with respect to the determination and fixing of the rate or amount of taxes to be levied, must be at least substantially complied with.

In determining and fixing the rate or amount of taxes to be levied, there must be at least a substantial compliance with constitutional, statutory, or charter requirements with respect thereto,⁵¹ such as with respect to the board or officer by whom the rate or amount is to be fixed or determined,⁵² and as to the time⁵³ and manner or mode of determining and fixing such rate or amount,⁵⁴ and as to a review of the rate.⁵⁵

In making an estimate or preparing a budget as a basis for a general levy, consideration should be given to all the anticipated expenditures for the ensuing year,⁵⁶ and, although, in the absence of any constitutional or statutory requirement therefor, a municipality in fixing the tax rate is not required to take into account cash on hand and incoming revenue, as a deduction from such expenditures,⁵⁷ ordinarily all anticipated income and revenue from every known material source, other than the ad valorem taxation, which would be on hand at the beginning of the succeeding year, and which are subject to appropriation for the purpose of the levy, should be taken into consideration and accounted for as a deduction in determining the amount to be levied,⁵⁸ and a tax should be levied for an amount necessary to pay municipal expenses as appropriated

51. Iowa.—Dyer v. City of Des Moines, 300 N.W. 562, 230 Iowa 1246.

Okl.—Protest of St. Louis-San Francisco Ry. Co., 42 P.2d 537, 171 Okl. 180.

52. Ill.—People ex rel. Schlaeger v. Frankenstein & Co., 72 N.E.2d 340, 396 Ill. 524—People ex rel. Toman v. Chicago & N. W. Ry. Co., 37 N.E.2d 169, 377 Ill. 547.

Okl.—Protest of Trimble, 300 P. 406, 151 Okl. 74.

53. U.S.—U. S. v. Certain Parcels of Land in City of Baltimore, D.C. Md., 61 F.Supp. 164.

Ky.—Friedman v. City of Owensboro, 213 S.W.2d 793, 308 Ky. 315.

Md.—City of Havre de Grace v. Bauer, 137 A. 344, 152 Md. 521.

54. Ill.—People ex rel. Toman v. B. Mercil & Sons Plating Co., 37 N.E.2d 839, 378 Ill. 142.

Iowa.—Dyer v. City of Des Moines, 300 N.W. 562, 230 Iowa 1246.

Mass.—Dowling v. Board of Assessors of City of Boston, 168 N.E. 73, 268 Mass. 480.

N.Y.—Wright v. Albany Port Dist. Commission, 5 N.Y.S.2d 701, 254 App.Div. 915, affirmed 21 N.E.2d 512, 280 N.Y. 731, reargument denied and motion granted 22 N.E.2d 489, 281 N.Y. 666, certiorari denied 60 S.Ct. 137, 308 U.S. 604, 84 L.Ed. 505, and motion granted 35 N.E.2d 920, 286 N.Y. 566.

Okl.—Excise Board of Oklahoma County v. Cooper, 82 P.2d 824, 183 Okl. 387—Branch v. Excise Board of Oklahoma County, 82 P.2d 225, 183 Okl. 295—Sinclair-Prairie Pipe Line Co. v. Excise Board of Seminole County, 42 P.2d 501, 171 Okl. 382—Protest of Trimble, 300 P. 406, 151 Okl. 74.

Wash.—Pacific First Fed. Sav. & Loan Ass'n v. Pierce County, 178 P.2d 351, 27 Wash.2d 347.

Assessed valuation; location of property

Okl.—Texas-Empire Pipe Line Co. v. Tulsa County Excise Board, 131 P.2d 745, 191 Okl. 586.

Statute providing for rate of taxation of metropolitan district constructed

Mich.—Huron-Clinton Metropolitan Authority v. Board of Sup'rs of Oakland County, 25 N.W.2d 646, 316 Mich. 632—Huron-Clinton Metropolitan Authority v. Board of Sup'rs of Five Counties, 8 N.W.2d 84, 304 Mich. 328—Huron-Clinton Metropolitan Authority v. Boards of Sup'rs of Wayne, Washtenaw, Livingston, Oakland and Macomb Counties, 1 N.W.2d 430, 300 Mich. 1.

55. Conn.—Davis Holding Corporation v. Wilcox, 153 A. 169, 112 Conn. 543.

56. Cal.—Southern Service Co. v. Los Angeles County, 82 P.2d 397, reheard 97 P.2d 963, 15 Cal.2d 1, appeal dismissed 60 S.Ct. 979, 310 U.S. 610, 84 L.Ed. 1388, rehearing denied 60 S.Ct. 1086, 310 U.S. 658, 84 L.Ed. 1421.

Ill.—People ex rel. Prindable v. New York Cent. R. Co., 72 N.E.2d 821, 397 Ill. 50—People ex rel. De Rosa v. Chicago & N. W. Ry. Co., 63 N.E.2d 401, 391 Ill. 347.

Utah.—Fjeldsted v. Ogden City, 28 P.2d 144, 83 Utah 278.

Interest

(1) Under some statutes, the item of interest for tax anticipation warrants issued by city is required to be appropriated, but is not to enter into the computation of the amount of tax levies to be made.—People ex rel. Gill v. Schiek, 14 N.E.2d 223, 368 Ill. 353.

(2) However, amount necessary to pay interest coupons maturing on July 1 of next fiscal year may not be

lawfully reserved from balance on hand at close of municipality's present fiscal year.—Protest of Trimble, 300 P. 406, 151 Okl. 74.

57. Cal.—Rancho Santa Anita v. City of Arcadia, 125 P.2d 475, 20 Cal.2d 319.

58. Cal.—Southern Service Co. v. Los Angeles County, 82 P.2d 397, reheard 97 P.2d 963, 15 Cal.2d 1, appeal dismissed 60 S.Ct. 979, 310 U.S. 610, 84 L.Ed. 1388, rehearing denied 60 S.Ct. 1086, 310 U.S. 658, 84 L.Ed. 1421.

Ill.—People ex rel. McWard v. Wabash R. Co., 70 N.E.2d 36, 395 Ill. 243—People ex rel. De Rosa v. Chicago & N. W. Ry. Co., 63 N.E.2d 401, 391 Ill. 347—People ex rel. Toman v. Ames, 43 N.E.2d 1009, 380 Ill. 268.

Iowa.—Dyer v. City of Des Moines, 300 N.W. 562, 230 Iowa 1246.

N.J.—City of Camden v. Local Government Board, 21 A.2d 292, 127 N.J.Law 175.

Okl.—Excise Board of Oklahoma County v. Cooper, 82 P.2d 824, 183 Okl. 387—Sinclair-Prairie Pipe Line Co. v. Excise Board of Seminole County, 42 P.2d 501, 171 Okl. 382—Protest of Reid, 15 P.2d 995, 160 Okl. 3.

Pa.—Fitzpatrick v. Thomas, 166 A. 493, 311 Pa. 191.

Utah.—Fjeldsted v. Ogden City, 28 P.2d 144, 83 Utah 278.

Wash.—Pacific First Federal Sav. & Loan Ass'n v. Pierce County, 178 P.2d 351, 27 Wash.2d 347.

Approval of anticipated revenue

Under some statutes, moneys received by city from sources reasonably capable of anticipation in excess of amount received in cash from same sources during preceding fiscal year or from other than regular sources may be included in its current annual budget as anticipated

for, above the amount received from such miscellaneous sources.⁵⁹

Within this rule consideration should be given to the amount of miscellaneous receipts from other sources which, judging from past experience, will probably be received,⁶⁰ municipal taxes in process of collection,⁶¹ the estimated return from the new tax levies,⁶² and the amount which has been illegally transferred from the fund available for the purpose for which the levy is being made.⁶³ However, in determining the tax rate or amount for a general fund, estimated receipts from a special fund or tax and a balance on hand therefrom may not be considered,⁶⁴ unless such special fund and its purpose are included in the purpose of the general fund;⁶⁵ nor need consideration be given to unanticipated income or revenue from sources from which there is no reasonable probability of receiving revenue,⁶⁶ or to revenue which is not available to pay municipal expenses.⁶⁷

Surplus. Although the policy of the law has been declared to be that no taxing body should be

permitted to accumulate unnecessary surpluses from taxes collected, but should confine its levies to the amounts actually needed to be determined annually,⁶⁸ in determining the rate or amount of taxation for the fiscal year consideration should be given to any surplus of available funds on hand at the close of the preceding fiscal year,⁶⁹ less an amount sufficient to liquidate all valid unsettled contracts or claims made during the present fiscal year;⁷⁰ and, where there is an ample surplus and an estimated income from miscellaneous sources to satisfy the approved needs of the city's general fund, a tax levy is not necessary,⁷¹ and if made, is invalid.⁷² However, in the absence of a constitutional or statutory provision requiring the municipality to spend all its tax funds during the year for which they are collected, as long as the funds are ultimately utilized for a municipal purpose, the city is free to acquire by taxation more funds than are necessary for the expenditures of any given year, and thereby to accumulate a surplus available for municipal expenditures for purposes of tax re-

revenue only with local government commissioner's approval at instance of local governing body—City Affairs Committee of Jersey City v. Division of Local Government of State Dept. of Taxation and Finance, 46 A.2d 558, 134 N.J.Law 198, affirmed 48 A.2d 920, 134 N.J.Law 614.

Police pension fund

Ind.—Pavey v. Pavey, 42 N.E.2d 30, 220 Ind. 289.

59. Ill.—People ex rel. Toman v. Ames, 43 N.E.2d 1009, 380 Ill. 268—People ex rel. Gill v. Schiek, 14 N.E.2d 223, 368 Ill. 353.

60. Ill.—People ex rel. Gill v. Schiek, *supra*.

Pa.—Woodward v. City of Philadelphia, 3 A.2d 167, 333 Pa. 80.

61. Okl.—Branch v. Excise Board of Oklahoma County, 43 P.2d 90, 171 Okl. 585.

62. Pa.—Woodward v. City of Philadelphia, 3 A.2d 167, 333 Pa. 80.

Mode of estimation

Pa.—Woodward v. City of Philadelphia, *supra*.

63. Okl.—Protest of Chicago, R. I. & P. Ry. Co., 293 P. 539, 146 Okl. 100.

64. Okl.—Protest of Bledsoe, 17 P.2d 979, 161 Okl. 227.

Not "liquid assets"

Cash and collection warrants in revolving capital accounts created by city to provide labor, material, and equipment needed by various city departments, with reimbursement from proper corporate purpose funds, were not "liquid assets" subject to

appropriation in determining amount necessary to be raised by city by taxation for certain year—People ex rel. Schlaeger v. Hamilton, 56 N.E.2d 429, 387 Ill. 250.

65. Okl.—Protest of Bledsoe, 17 P.2d 979, 161 Okl. 227.

66. N.J.—City Affairs Committee of Jersey City v. Division of Local Government of State Dept. of Taxation and Finance, 46 A.2d 558, 134 N.J.Law 198, affirmed 48 A.2d 920, 134 N.J.Law 614—In re City Affairs Committee of Jersey City, 30 A.2d 581, 129 N.J.Law 589.

Okl.—Excise Board of Stephens County v. Chicago, R. I. & P. Ry. Co., 34 P.2d 268, 168 Okl. 523.

67. Ill.—People ex rel. Prindable v. New York Cent. R. Co., 72 N.E.2d 821, 397 Ill. 50.

68. Ill.—People ex rel. Toman v. Signode Steel Strapping Co., 44 N.E.2d 555, 380 Ill. 633—People ex rel. Kelly v. Baltimore & O. R. Co., 33 N.E.2d 604, 376 Ill. 393.

N.J.—Jersey City v. Bettcher, 34 A.2d 784, 22 N.J.Misc. 16, followed in Applications of Jersey City for Increase of Tax Assessments for Year 1943, 34 A.2d 790, 22 N.J.Misc. 28, and appeal dismissed Appeals of Jersey City, 44 A.2d 189, 23 N.J.Misc. 311.

Wash.—Pacific First Federal Sav. & Loan Ass'n v. Pierce County, 178 P.2d 351, 27 Wash.2d 347.

69. Okl.—Excise Board of Oklahoma County v. Cooper, 82 P.2d 824, 183 Okl. 387—Gallion v. Excise Board of Oklahoma County, 42 P.2d 508, 171 Okl. 76—Sinclair-Prairie Pipe

Line Co. v. Excise Board of Seminole County, 42 P.2d 501, 171 Okl. 382—Protest of St. Louis-San Francisco Ry. Co., 38 P.2d 513, 169 Okl. 648—Adjustment Realty Co. v. Excise Board of Muskogee County, 299 P. 207, 149 Okl. 70—In re Bliss, 285 P. 73, 142 Okl. 1.

In determining whether there is

surplus balance on hand in general fund at end of fiscal year to be used in financing appropriations for ensuing fiscal year, all legally issued outstanding warrants drawn against such fund may be considered.—Oklahoma County Excise Board v. Continental Oil Co., 49 P.2d 540, 173 Okl. 577.

Surplus from operation of utility

Okl.—City of McAlester v. State ex rel. Board of Public Affairs, 154 P.2d 579, 195 Okl. 1—In re Bliss, 285 P. 73, 142 Okl. 1.

Utah.—Wadsworth v. Santaquin City, 28 P.2d 161, 83 Utah 321.

70. Okl.—C. D. Coggeshall & Co. v. Smiley, 285 P. 48, 142 Okl. 8.

Amount reserved for appropriation

Excise board is without authority to permit deduction from funds on hand at close of fiscal year of amount reserved "for appropriation," as not being a legal obligation.—In re Bliss, 285 P. 73, 142 Okl. 1—Aaronson v. Smiley, 285 P. 59, 142 Okl. 29—C. D. Coggeshall & Co. v. Smiley, 285 P. 48, 142 Okl. 8.

71. Okl.—Protest of St. Louis-San Francisco Ry. Co., 78 P.2d 806, 182 Okl. 522.

72. Okl.—Protest of St. Louis-San Francisco Ry. Co., *supra*.

duction in later years,⁷³ even though the city council has adopted a budget setting forth estimated expenditures for the year;⁷⁴ and, accordingly, under some statutes, any surplus on hand at the close of a fiscal year need not be appropriated for the ensuing year's budget in toto,⁷⁵ but may be used in whole or in part or reserved intact for the future,⁷⁶ and the question whether the surplus in its entirety shall be appropriated in the budget for the ensuing year, in reduction of the amount to be raised by taxation, rests in the discretion of the municipal body.⁷⁷

Under some of such statutory provisions, the cash surplus balance must be deducted from the total appropriation as determined prior to the addition of a certain percentage for reserve for delinquent taxes,⁷⁸ and may not be deducted from the amount to be raised by the ad valorem tax levy after the surplus balances and estimated income have been deducted from the total appropriation.⁷⁹ A surplus accumulated from penalties and interest on special street improvement assessments, which the city uses as a revolving fund in temporarily financing street improvements, should not be considered as money on hand, in making a levy for either a general or a sinking fund.⁸⁰ Funds collected in any fiscal year from general fund tax levies for prior years, in excess of the obligations for which the taxes were originally levied, become part of the general fund of the year in which they are collect-

ed,⁸¹ unless otherwise specifically provided by statute,⁸² and may form the basis for making supplemental appropriations as any other general fund asset.⁸³

Delinquent taxes. Under some statutes, in estimating the appropriations or budget, uncollected delinquent taxes for preceding years should be considered,⁸⁴ as far as they may be expected to be collected promptly and with a reasonable degree of certainty,⁸⁵ by making a reasonable allowance for the nonpayment of such taxes;⁸⁶ or, under other statutes, the average proportion of delinquent tax collections for a designated number of preceding years may be used as a standard to measure the estimated receipts from delinquent taxes for the ensuing year.⁸⁷ However, as has been held, such uncollected and unincumbered taxes for prior years may not be included in the term "surplus balance," on hand at the close of the preceding fiscal year;⁸⁸ and, in the absence of statute, it is not necessary to give value to uncollected taxes for a preceding year, merely because of the existence of such taxes on the books.⁸⁹

Tax to cover loss and cost. In estimating the amount of tax levy necessary to cover loss and cost, as provided for under some statutes, consideration should be given to the previous experience with respect to collections,⁹⁰ to existing economic conditions,⁹¹ and to all other factors affecting the esti-

73. Cal.—Rancho Santa Anita v. City of Arcadia, 125 P.2d 475, 20 Cal.2d 319.

74. Cal.—Rancho Santa Anita v. City of Arcadia, *supra*.

75. N.J.—In re City Affairs Committee of Jersey City, 30 A.2d 581, 129 N.J.Law 589.

"Surplus revenue appropriated"

Under statute providing that anticipated revenue shall be classified as surplus revenue appropriated, etc., the words "surplus revenue appropriated" recognize the existence of surplus revenue unappropriated.—In re City Affairs Committee of Jersey City, *supra*.

76. N.J.—In re City Affairs Committee of Jersey City, *supra*.

77. N.J.—In re City Affairs Committee of Jersey City, *supra*.
Exercise of discretion in general in determining rate or amount see *infra* subdivision c (3) of this section.

78. Okl.—Protest of St. Louis-San Francisco Ry. Co., 38 P.2d 513, 169 Okl. 648.

79. Okl.—Protest of St. Louis-San Francisco Ry. Co., *supra*.

80. Okl.—Chicago, R. I. & P. Ry.

Co. v. Excise Board of Canadian County, 25 P.2d 70, 165 Okl. 82.

81. Okl.—Oklahoma County Excise Board v. Continental Oil Co., 49 P.2d 540, 173 Okl. 577—St. Louis-San Francisco Ry. Co. v. Choctaw County Excise Board, 48 P.2d 312, 173 Okl. 312—Gallion v. Excise Board of Oklahoma County, 42 P.2d 508, 171 Okl. 76.

82. Okl.—St. Louis-San Francisco Ry. Co. v. Choctaw County Excise Board, 48 P.2d 312, 173 Okl. 312.

83. Okl.—Oklahoma County Excise Board v. Continental Oil Co., 49 P.2d 540, 173 Okl. 577.

84. Okl.—Berryman v. Bonaparte, 11 P.2d 164, 155 Okl. 165—Protest of Trimble, 300 P. 406, 151 Okl. 74.

Pa.—Woodward v. City of Philadelphia, 3 A.2d 167, 333 Pa. 80.

Net taxes

Ill.—People ex rel. Toman v. B. Mercil & Sons Plating Co., 37 N.E. 2d 839, 378 Ill. 142.

85. Okl.—Sinclair-Prairie Pipe Line Co. v. Excise Board of Seminole County, 42 P.2d 501, 171 Okl. 382.

86. La.—Mouton v. City of Lafayette, 152 So. 751, 178 La. 1041.

Tex.—Howth v. City of Beaumont, Civ.App., 118 S.W.2d 350.

87. Pa.—Woodward v. City of Philadelphia, 3 A.2d 167, 333 Pa. 80.

Estimated value

Ill.—People ex rel. Toman v. B. Mercil & Sons Plating Co., 37 N.E.2d 839, 378 Ill. 142.

88. Okl.—Sinclair-Prairie Pipe Line Co. v. Excise Board of Seminole County, 42 P.2d 501, 171 Okl. 382—Berryman v. Bonaparte, 11 P.2d 164, 155 Okl. 165—Protest of Trimble, 300 P. 406, 151 Okl. 74.

89. Ill.—People ex rel. Gill v. Diversey Hotel Corporation, 4 N.E.2d 365, 364 Ill. 298.

Mass.—Dowling v. Board of Assessors of City of Boston, 168 N.E. 73, 268 Mass. 480.

Statute requiring deduction

Ill.—People ex rel. Nash v. S. A. Maxwell & Co., 195 N.E. 26, 359 Ill. 570, 98 A.L.R. 494.

90. Ill.—People ex rel. Schlaeger v. Jourdan Packing Co., 58 N.E.2d 910, 389 Ill. 163.

Decline in delinquencies

Ill.—People ex rel. Schlaeger v. Jourdan Packing Co., *supra*.

91. Ill.—People ex rel. Schlaeger v.

mated loss and cost of collecting taxes for the fiscal year,⁹² including forfeitures and abatements in the annual appropriation bill.⁹³ Lapsed appropriations, however, may not be considered for this purpose,⁹⁴ as unexpended appropriations must be treated as assets in the budget for such year.⁹⁵

Tax for sinking fund. In computing the rate or amount of a levy for ad valorem taxation for city sinking fund purposes, the amount of the needs of the sinking fund must be determined,⁹⁶ to which may be added a certain per cent for delinquent taxes.⁹⁷ For the purpose of estimating the amount of the needs of the sinking fund, or in other words the amount to be raised, consideration may be given to the estimated income,⁹⁸ the sources of revenue other than the ad valorem tax,⁹⁹ and to an excess balance on hand in the general fund as a part of the sinking fund.¹ However, no deduction may be made for estimated receipts from other sources.² In estimating a tax to pay bonds and interest falling due, a deficit occurring in the preceding year may be included.³ Under a statute authorizing deficit levies where the sinking fund is not sufficient to meet accrual liabilities, the calculation of the minimum amount necessary to reinstate the sinking fund is governed by the problem presented by the detailed condition of the sinking fund in each par-

ticular case and may vary at different tax levying periods,⁴ and, where such is the intention of the statute, additional levies of equal amount annually should be provided to replenish a depleted sinking fund to the extent that the indebtedness may be paid when due,⁵ but no greater deficit levy should be made in any one fiscal year than is necessary to provide sufficient cash in the sinking fund to meet obligations when due.⁶

(2) Limitation and Excess in General

The rate or amount of the tax levied ordinarily must not be in excess of the amount authorized by the budget.

The rate per cent or amount of the tax levied must not be in excess of the amount authorized by the annual budget,⁷ since the budget constitutes an appropriation of the sums therein set forth as appropriations, and an authorization of the amount to be raised by taxation for municipal purposes,⁸ and a levy based on an increase in the total value of ratables, after the determination of the tax rate for the year, is illegal to the extent of the increased amount raised by such taxes.⁹ An excess, however, which is so small that its elimination will not change the rate of taxation will be disregarded.¹⁰ A reduction should be made, under some statutes, in an additional levy for a specific purpose, proportionate

Jourdan Packing Co., *supra*—People ex rel. Gill v. Schweitzer, 10 N.E.2d 337, 366 Ill. 568.

92. Ill.—People ex rel. Schlaeger v. Jourdan Packing Co., 58 N.E.2d 910, 389 Ill. 163—People ex rel. Toman v. Advance Heating Co., 33 N.E.2d 206, 376 Ill. 158.

93. Ill.—People ex rel. Toman v. Advance Heating Co., *supra*.

94. Ill.—People ex rel. Schlaeger v. Jourdan Packing Co., 58 N.E.2d 910, 389 Ill. 163.

95. Ill.—People ex rel. Schlaeger v. Jourdan Packing Co., *supra*.

96. Okl.—Protest of Chicago, R. I. & P. Ry. Co., 23 P.2d 158, 164 Okl. 114—Protest of St. Louis-San Francisco Ry. Co., 19 P.2d 1086, 163 Okl. 1.

Pa.—Petition of Borough of Narberth, Quar. Sess., 64 Montg. Co. 126, 39 Mun. L.R. 248.

97. Okl.—Protest of Chicago, R. I. & P. Ry. Co., 23 P.2d 158, 164 Okl. 114.

98. Okl.—Protest of Bledsoe, 17 P. 2d 979, 161 Okl. 227.

From special taxes

Amount to be raised from automobile license tax, gasoline excise tax, and gross production tax which are in lieu of ad valorem taxation not to exceed revenue from those sources for preceding year, may be

deducted in determining amount to be raised by ad valorem taxation for sinking fund—Express Realty Co. v. Harnage, 299 P. 905, 149 Okl. 217—Butler v. Harnage, 299 P. 876, 149 Okl. 216—Adjustment Realty Co. v. Excise Board of Muskogee County, 299 P. 207, 149 Okl. 70—Acres v. Excise Board of Muskogee County, 299 P. 136, 149 Okl. 84.

99. Okl.—Sutton v. Kalka, 285 P. 1, 141 Okl. 233.

1. Okl.—In re Tax Levies of City of Woodward, 288 P. 458, 143 Okl. 204.

2. Okl.—In re St. Louis-San Francisco Ry. Co.'s Protest, 287 P. 1028, 143 Okl. 105.

3. La.—Mouton v. City of Lafayette, 152 So. 751, 178 La. 1041.

4. Okl.—Le Flore County Excise Board v. St. Louis-San Francisco Ry. Co., 93 P.2d 1087, 185 Okl. 440.

5. Okl.—Le Flore County Excise Board v. St. Louis-San Francisco Ry. Co., *supra*.

6. Okl.—Le Flore County Excise Board v. St. Louis-San Francisco Ry. Co., *supra*.

7. N.J.—Union City v. Capitol Theatre Amusement Co., 57 A.2d 226, 26 N.J.Misc. 102—Appeals of Jersey City, 49 A.2d 26, 24 N.J.Misc. 315

—Appeals of Jersey City, 44 A.2d 189, 23 N.J.Misc. 311.

Limitation of amount or rate of taxation generally see *supra* §§ 1989–1991.

"Taxpayers cannot be burdened by taxes in excess of the sum of money necessary for the operation of the municipality. The amount of taxes to be levied for municipal purposes is prescribed and limited by the budget resolution."—Jersey City v. Bettcher, 34 A. 784, 787, 22 N.J.Misc. 16, followed in Applications of Jersey City for Increase of Tax Assessments, for Year 1943, 34 A.2d 790, 22 N.J.Misc. 28, and appeal dismissed Appeals of Jersey City, 44 A.2d 189, 23 N.J.Misc. 311.

8. N.J.—Jersey City v. Bettcher, 34 A.2d 784, 787, 22 N.J.Misc. 16, followed in Applications of Jersey City for Increase of Tax Assessments for Year 1943, 34 A.2d 790, 22 N.J.Misc. 28, and appeal dismissed Appeals of Jersey City, 44 A.2d 189, 23 N.J.Misc. 311.

9. N.J.—Appeals of Jersey City, 49 A.2d 26, 24 N.J.Misc. 315—Appeals of Jersey City (1943 Assessments), 44 A.2d 189, 23 N.J.Misc. 311.

10. Ill.—People ex rel. Schlaeger v. Hamilton, 56 N.E.2d 429, 387 Ill. 250—People ex rel. Toman v. Chicago & N. W. Ry. Co., 37 N.E.2d 169, 377 Ill. 547.

to the increase in total valuation of the property in the taxing subdivision by the reassessment,¹¹ and in determining the question whether a levy is for a specific purpose within the statute, all the surrounding circumstances must be closely scrutinized,¹² and an additional levy is not made for a specific purpose merely because it is made for a particular department of the government if it is made for the general purposes of that department.¹³

A levy is excessive to the extent of amounts received and available from other known sources than the ad valorem tax, which are not accounted for in the estimate or budget.¹⁴ If the aggregate estimated receipts from other sources, including uncollected taxes in process of collection, exceed the amount that can be raised by ad valorem taxes within the allocated limit of the levy, the aggregate appropriation must be reduced to such a sum as will leave a final remainder which can be raised from such taxes within the limit of the levy,¹⁵ and the fact that, after final computation, the reduced amount of the appropriation is less than the aggregate amount of cash surplus on hand, plus the estimated income from other sources, does not justify or require the levying board to refuse to make

the tax levy which the municipality is entitled to have under its allocation of limit of levy.¹⁶ An appropriation for sundry contingent expenses, as a basis for a tax levy, may not be made in an amount disproportionate to appropriations for other legal purposes.¹⁷

Scaling. Under some statutes, where taxes are so high as to make the total rate in excess of the rate provided by law, a tax for a particular purpose may be subject to scaling,¹⁸ and the amount or rate may be reduced by the proper authorities in order to bring the aggregate amount of the appropriation within the statutory limit,¹⁹ or within the budget requirements;²⁰ or, if too low, it may be raised.²¹ Accordingly it is not necessary that the municipal officers appropriate and levy the exact amount of taxes which can actually be collected for each purpose for which the taxes are levied,²² and a levy is not invalid because the taxpayer is required to compute the amount levied for each purpose specified.²³ However, adding the full specific taxes to the tax for general purposes, and then scaling the aggregate, invalidates the levy to the extent of the excess of the special taxes over what should have been levied on that account.²⁴

11. Ohio.—Kinsey v. Bower, 68 N. E.2d 317, 147 Ohio St. 66.

Park district

Ohio.—Kinsey v. Bower, *supra*.

12. Ohio.—Kinsey v. Bower, 17 Ohio Supp. 75, reversed on other grounds 68 N.E.2d 317, 147 Ohio St. 66.

13. Ohio.—Kinsey v. Bower, 17 Ohio Supp. 75, reversed on other grounds 68 N.E.2d 317, 147 Ohio St. 66.

14. Ill.—People ex rel. Nelson v. Beu, 85 N.E.2d 829, 403 Ill. 232.—People ex rel. McWard v. Wabash R. Co., 70 N.E.2d 36, 395 Ill. 243.—People ex rel. Franklin v. Wabash R. Co., 86 N.E.2d 820, 387 Ill. 450.

The elimination from the city budget of an item of income to be received from a city department is unauthorized and results in an excessive levy, where the city council knew that such department had appropriated in its proposed budget and in its final department budget a sum of money to be paid to the city.—Southern Service Co. v. Los Angeles County, 82 P.2d 397, reheard 97 P.2d 963, 15 Cal.2d 1, appeal dismissed 60 S.Ct. 979, 310 U.S. 610, 84 L.Ed. 1388, rehearing denied 60 S.Ct. 1088, 310 U.S. 658, 84 L.Ed. 1421.

Inclusion of loss and cost fees

A tax levy is not excessive in that there was included in total appropriated fees for loss and cost of collection of taxes, since statute re-

quires that appropriation ordinances should include an amount estimated to be sufficient to cover loss and cost of collecting taxes to be levied for any fiscal year.—People ex rel. Gill v. Diversey Hotel Corporation, 4 N. E.2d 365, 364 Ill. 298.

15. Okl.—Branch v. Excise Board of Oklahoma County, 82 P.2d 225, 183 Okl. 295.

16. Okl.—Branch v. Excise Board of Oklahoma County, *supra*.

17. Okl.—Protest of Bledsoe, 17 P. 2d 979, 161 Okl. 227.

Appropriations held disproportionate Okl.—Protest of Bledsoe, *supra*.

18. Ill.—People ex rel. Toman v. Chicago & N. W. Ry. Co., 37 N.E.2d 169, 377 Ill. 547.—People v. Cleveland, C. & St. L. Ry. Co., 171 N. E. 175, 339 Ill. 169.

Held subject to scaling

(1) Tax for general corporate purposes.—People v. Cleveland, C. & St. L. Ry. Co., *supra*.

(2) Tax levy for park purposes.—People v. Cleveland, C. & St. L. Ry. Co., *supra*.

19. Ill.—People ex rel. Wysong v. Wabash R. Co., 100 N.E. 246, 256 Ill. 394.

Pa.—Woodward v. City of Philadelphia, 3 A.2d 167, 333 Pa. 80.

In absence of final order; emergency

(1) If county tax adjustment board makes no final order specifying changes in municipal corporations' budgets and tax levies, and

also refuses to declare emergency pursuant to statute governing tax rates, state board of tax commissioners must bring total rate within statutory limits.—Douglas v. Tash, 200 N.E. 608, 209 Ind. 675.

(2) If emergency exists, and county tax adjustment board has declared emergency pursuant to statute governing tax rates, but has made no final order, state board of tax commissioners may revise municipal corporations' budgets and tax levies without necessity of bringing total rate within statutory limits.—Douglas v. Tash, *supra*.

20. Kan.—City of Independence v. Smith, 26 P.2d 258, 138 Kan. 484.

21. Pa.—Woodward v. City of Philadelphia, 3 A.2d 167, 333 Pa. 80.

Estimate insufficient

Where an estimate of needs for sinking fund purposes, as made by the municipal officers, is insufficient, the excise or other proper board should fix the rate of the ad valorem tax therefor in the amount required by the constitutional provisions, notwithstanding a legislative limitation.—Protest of Bledsoe, 17 P.2d 979, 161 Okl. 227.

22. Ill.—People ex rel. Toman v. Chicago & N. W. Ry. Co., 37 N.E.2d 169, 377 Ill. 547.

23. Ill.—People ex rel. Toman v. Chicago & N. W. Ry. Co., *supra*.

24. Ill.—People v. Wabash R. Co., 100 N.E. 246, 256 Ill. 394.

(3) Exercise of Discretion

Within certain limitations, the levying officer or board may exercise reasonable discretion in determining what amount or rate of taxation shall be levied.

Subject to the restriction that the statutory or charter requirements be complied with with respect to the manner or mode of determining and fixing the amount or rate of the levy, the levying official or board, provided it acts in good faith,²⁵ and uses sound business judgment to see that the credit of the municipal corporation is not impaired,²⁶ may exercise a reasonable discretion in determining and fixing what amount or rate of taxes shall be levied for any general or special purpose,²⁷ except as to requirements which are mandatory.²⁸ Accordingly where the city council is limited only as to the amount to be raised and not as to rate, it has a discretionary power to fix a rate sufficient to produce the sum required,²⁹ and the exercise of this discretion will be interfered with by the courts only where there is a clear abuse of such discretion,³⁰ even though the levy is in fact somewhat in excess of actual requirements.³¹ Where a rate restriction is placed on the power to tax, the city council has a discretionary power to fix the rate at any point within the prescribed limit.³²

25. Pa.—Woodward v. City of Philadelphia, 3 A.2d 167, 333 Pa. 80.

26. Ill.—Gates v. Sweitzer, 179 N.E. 837, 347 Ill. 353, 79 A.L.R. 1151.

27. Ill.—Mathews v. City of Chicago, 174 N.E. 35, 342 Ill. 120.

Kan.—City of Wichita v. Wyman, 150 P.2d 154, 158 Kan. 709.

"May," as used in statute relative to fixing tax rate for city, is permissive.—Dowling v. Board of Assessors of City of Boston, 168 N.E. 73, 268 Mass. 480.

Contingent expenses

(1) The assessment of a relatively small amount for contingent expenses is necessary, but the amount of such levy rests in the sound discretion of taxing body and is not subject to change by county court on objections to levy.—People ex rel. Prindable v. New York Cent. R. Co., 72 N.E.2d 821, 397 Ill. 50.

(2) Under the cash basis and budget laws where existence and amount of certain contingent municipal expenses is uncertain, a rational estimate thereof by proper officials charged therewith is sufficient.—City of Wichita v. Wyman, 150 P.2d 154, 158 Kan. 709.

Appropriation of reserve fund

How much of city's reserve fund shall be appropriated in budget for current year rests in governing body's sound discretion, subject to statutory condition classifying un-

anticipated income applicable to general expenditures as surplus revenue not included in anticipated revenues stated in budget.—City Affairs Committee of Jersey City v. Division of Local Government of State Dept. of Taxation and Finance, 46 A.2d 558, 134 N.J.Law 198.

28. Pa.—Commonwealth ex rel. Kelley v. Pommer, 199 A. 485, 330 Pa. 421.

Provisions held mandatory

Provisions that the city council shall adopt by December 15th a financial program for the ensuing year and that for default in fixing the tax rate the old rate shall apply are mandatory rather than discretionary.—Commonwealth ex rel. Kelley v. Pommer, supra.

Police pension fund

Ind.—Pavey v. Pavey, 42 N.E.2d 30, 220 Ind. 289.

29. Pa.—Fitzpatrick v. Thomas, 166 A. 493, 311 Pa. 191.

44 C.J. p 1276 note 85.

30. Ill.—Mathews v. City of Chicago, 174 N.E. 35, 342 Ill. 120—People ex rel. Stuckart v. Chicago & A. Ry. Co., 124 N.E. 658, 289 Ill. 282.

Pa.—Petition of Borough of Narberth, Quar.Sess., 64 Montg.Co. 126, 39 Mun.L.R. 248.

44 C.J. p 1276 note 86.

31. Ill.—People ex rel. Stuckart v.

§ 2036. Additional Levies

Ordinarily a municipal corporation may make only one levy a year for the same purpose.

Generally a municipal corporation is authorized to make only one levy a year for the same purpose,³³ and it cannot in the same year make a second levy to cover items which could and should have been included in the general tax levy,³⁴ even though the general levy was for less than the maximum rate allowed by statute or charter,³⁵ and the law, in this respect, cannot be evaded by designating the additional tax by a different name and placing it in a different class.³⁶ An additional tax, however, may and should be levied when and to the extent that it is authorized by statute,³⁷ or wherever it is necessary to discharge a contractual obligation of the city,³⁸ and a statute interfering in any way with the discharge of this obligation is unconstitutional.³⁹

§ 2037. Ordinance or Resolution

Ordinarily a municipal tax must be levied by an ordinance, and not by a mere motion or resolution.

The enactment of an ordinance fixing the rate of assessment is a legislative function,⁴⁰ and ordinarily municipal taxes must be levied by ordinance;⁴¹ and proof of the levy must be made by

Chicago & A. Ry. Co., 124 N.E. 658, 289 Ill. 282.

32. Ill.—Baltimore, etc., R. Co. v. People, 66 N.E. 246, 200 Ill. 623.
44 C.J. p 1276 note 88.

33. Wash.—Gay v. New Whatcom, 67 P. 88, 26 Wash 389

Additional appropriations before certification of levy see supra § 2035.

34. Kan.—Atchison, etc., R. Co. v. Humboldt, 123 P. 727, 87 Kan. 1, 41 L.R.A., N.S., 175.

35. Mo.—State v. Van Every, 75 Mo. 530.

36. Kan.—Atchison, etc., R. Co. v. Humboldt, 123 P. 727, 87 Kan. 1, 41 L.R.A., N.S., 175.

37. Ill.—Central Illinois Public Service Co. v. Lawless, 79 N.E.2d 67, 400 Ill. 161.

Street and bridge tax

Ill.—Central Illinois Public Service Co. v. Lawless, supra.

38. U.S.—Louisiana v. New Orleans, La., 30 S.Ct. 40, 215 U.S. 170, 54 L.Ed. 144.

39. U.S.—Louisiana v. New Orleans, supra.

40. Va.—Southern Ry. Co. v. City of Danville, 7 S.E.2d 896, 175 Va. 300.

41. Tex.—Adams v. Royse City, Civ. App., 61 S.W.2d 853, error refused —City of Liberty v. Llewellyn, Civ.App., 15 S.W.2d 713, error dismissed.

44 C.J. p 1316 note 63.

offering the ordinance in evidence.⁴² A mere motion⁴³ or resolution⁴⁴ by the city council, or its adoption of a report of the finance committee recommending the amount and apportionment of the proposed tax,⁴⁵ ordinarily is not sufficient to authorize or constitute a levy. A levy by resolution may be cured by an ordinance passed within the fiscal year for which the levy was made,⁴⁶ or it may be validated by statute.⁴⁷ However, under some statutes, a resolution, if in the prescribed form, is sufficient;⁴⁸ an ordinance is not necessary where the statute itself operates as a levy of the tax.⁴⁹ Even where an ordinance is required, an amendment or ratification of an already existing tax levy ordinance may be by motion,⁵⁰ unless the statute makes an ordinance a vital formality,⁵¹ and as long as the taxing power is not exhausted, a new ordinance may be passed correcting defects in a prior levy,⁵² or superseding a void levy.⁵³

It has been held that, where the city council was invested with the power and duty of levying the tax, a taxpayer is not entitled to complain that the council performed its duty by a resolution rather than by ordinance as required by statute.⁵⁴ Where a municipal debt is created by an ordinance providing for a yearly levy of a tax to meet annual

payments, the ministerial duty of fixing the necessary tax rate each succeeding year may be done by motion.⁵⁵ A levy founded on a void ordinance is also void.⁵⁶

§ 2038. — Adoption, Publication, Filing, and Repeal

- a. In general
- b. Publication
- c. Filing certified copy

a. In General

An ordinance levying a municipal tax should be adopted with all the formalities of ordinances generally, and should comply with all the charter or statutory requirements relating to tax-levying ordinances.

An ordinance levying a municipal tax should be adopted with substantially all the formalities, solemnities, and characteristics of ordinances generally,⁵⁷ and should comply with all the charter or statutory requirements relating to tax-levying ordinances.⁵⁸ The ordinance must be passed by the council at a meeting held at the regular place;⁵⁹ but, unless there is a mandatory statutory requirement that the ordinance be adopted at a regular meeting,⁶⁰ it may be passed at either a regular or a special meeting.⁶¹ According to the decisions on

42. Tex.—Earle v. Henrietta, 43 S. W. 15, 91 Tex. 301—City of Odessa v. Elliott, Com.App., 58 S.W.2d 34.

The tax rolls alone are not sufficient to establish the fact of the levy.—Earle v. Henrietta, 43 S.W. 15, 91 Tex. 301.

43. Tex.—City of Odessa v. Elliott, Com.App., 58 S.W.2d 34—Vance v. Pleasanton, Civ.App., 261 S.W. 457, affirmed, Com.App., 277 S.W. 89.

44. Fla.—Certain Lots Upon Which Taxes Are Delinquent v. Town of Monticello, 31 So.2d 905, 159 Fla. 134.

44 C.J. p 1316 note 65.

45. Tex.—People's Nat. Bank v. Ennis, Civ.App., 50 S.W. 632.

46. Md.—City of Havre de Grace v. Bauer, 137 A. 344, 152 Md. 521.

47. Fla.—Hendricks v. Town of Green Cove Springs, 137 So. 229, 103 Fla. 81, followed in Fisher v. Town of Milton, 137 So. 696, 103 Fla. 524, 525, 526.

Tex.—Morris v. City of Conroe, Civ. App., 47 S.W.2d 690, error refused.

48. N.Y.—Witheril v. Mosher, 9 Hun 412.

Ordinance or resolution

Where charter does not require a tax levy to be made by ordinance, the municipality may proceed either by ordinance or resolution to levy and assess taxes.—Certain Lots Upon Which Taxes Are Delinquent v.

Town of Monticello, 31 So.2d 905, 159 Fla. 134.

49. Ill.—Davis v. Brace, 82 Ill. 542. Ky.—Smith v. Louisville, 14 S.W. 349, 12 Ky.L. 337.

44 C.J. p 1316 note 70.

50. Va.—Johnston v. Huntington, 76 S.E. 142, 71 W.Va. 106.

51. Va.—Johnston v. Huntington, supra.

52. Ky.—Morton v. City of Fullerton, 16 S.W.2d 797, 229 Ky. 76.

53. Ky.—Morton v. City of Fullerton, supra.

54. Mont.—Glendive First Nat. Bank v. Sorenson, 210 P. 900, 65 Mont. 1.

44 C.J. p 1316 note 73.

Informalities and irregularities generally see infra § 2041 b.

55. Tex.—City of Odessa v. Elliott, Com.App., 58 S.W.2d 34.

56. Cal.—Josselyn v. San Francisco, 143 P. 705, 168 Cal. 436.

57. Tex.—Rachford v. City of Port Neches, Civ.App., 46 S.W.2d 1057, followed in Dearing v. City of Port Neches, 46 S.W.2d 1062, error refused—Vance v. Pleasanton, Civ. App., 261 S.W. 457, affirmed, Com. App., 277 S.W. 89.

Ordinance held not inadmissible, as being adopted on first reading without cause to waive further reading.—Rachford v. City of Port

Neches, Tex.Civ.App., 46 S.W.2d 1057, followed in Dearing v. City of Port Neches, 46 S.W.2d 1062, error refused.

58. Ill.—People ex rel. Anderson v. Chicago & N. W. Ry. Co., 71 N.E. 2d 701, 396 Ill. 466.

Mich.—Pontiac v. Axford, 12 N.W. 914, 49 Mich. 69.

Roll call and recording of each vote
Ill.—People ex rel. Anderson v. Chicago & N. W. Ry. Co., 71 N.E.2d 701, 396 Ill. 466—People ex rel. Franklin v. Wabash R. Co., 56 N.E.2d 820, 387 Ill. 450—People ex rel. Smith v. Wabash Ry. Co., 35 N.E. 2d 325, 377 Ill. 68.

Ordinance correcting error

Where certain tax levy was required to meet maturities on several bond issues, ordinance correcting erroneous distribution of levy among issues, but not changing total, was sufficient, although not properly adopted, since formal ordinance was not necessary.—Mouton v. City of Lafayette, 152 So. 751, 178 La. 1041.

59. Ky.—Springfield v. People's Deposit Bank, 63 S.W. 271, 111 Ky. 105, 23 Ky.L. 519.

60. La.—Louisiana Western R. Co. v. Duson, 83 So. 455, 146 La. 190.

61. Mich.—Auditor-General v. Sparrow, 74 N.W. 881, 116 Mich. 574.

Tex.—Rachford v. City of Port Neches, Civ.App., 46 S.W.2d 1057,

the question, a quorum must be present.⁶² A yea and nay vote may be the method required for the passage of the ordinance,⁶³ and, when so required by charter or statute, the vote must be recorded.⁶⁴ In the case of an ordinance levying a special tax, the ordinance must be passed by the number of favorable votes prescribed by the statute for such tax.⁶⁵

Notice and hearing. Under some statutes, notice to taxpayers is not necessary before the adoption of an ordinance levying a municipal tax;⁶⁶ but, under other statutes, notice⁶⁷ and a public hearing⁶⁸ are necessary, at least where the ordinance is passed at a special meeting,⁶⁹ and the giving of notice may be presumed in the absence of any record thereof in the minutes of the meeting.⁷⁰

Signing, approval, or veto by mayor. Under some statutes, the levy must be approved by the mayor⁷¹ or burgess of a borough,⁷² or, in the absence of the mayor, by the acting mayor,⁷³ even though, in his capacity as president of the board of aldermen, he may have already passed on it.⁷⁴ Under other statutes, however, the ordinance becomes effective on submission for approval and failure of the mayor or burgess to return the ordinance to the city council within a specified time;⁷⁵ and, under still other statutes, the mayor has no veto power,⁷⁶ and, where his approval is not required, his failure to sign the ordinance is not fatal.⁷⁷ Where the action of the

council in levying taxes is in the nature of a resolution, although clothed in the form of an ordinance, it may have the effect of a valid resolution, although not signed by the presiding officer, in the absence of a statute requiring such a signature.⁷⁸

Record. Taxes levied under an ordinance duly enacted are not invalid because the ordinance has not been recorded.⁷⁹

Repeal. An ordinance repealing a levy for a special purpose and adding it to a levy for general municipal purposes is not invalid as discriminatory against taxpayers who had paid their taxes before the tax ordinance was so amended;⁸⁰ and a tax levy ordinance of a district which has been superseded, and against which levy no anticipation warrants have been issued, may be repealed by the adoption of an ordinance by the superseding district, levying a tax for the same year.⁸¹ However, an ordinance levying a tax for a certain purpose in pursuance of the result of an election cannot be repealed after such purpose has been accomplished.⁸²

b. Publication

Under some statutes or charters, an ordinance levying a municipal tax must be published in a prescribed time and manner in a designated newspaper.

Under some statutes or charters, an ordinance levying a tax must be published in a prescribed time and manner,⁸³ and for a prescribed period or number of times in a designated newspaper,⁸⁴ but

followed in *Dearing v. City of Port Neches*, 46 S.W.2d 1062, error refused.

62. Ky.—*Somerset v. Somerset Banking Co.*, 60 S.W. 5, 109 Ky. 549, 22 Ky.L. 1129.

63. Ill.—*People ex rel. Franklin v. Wabash R. Co.*, 56 N.E.2d 820, 387 Ill. 450.

La.—*Louisiana Western R. Co. v. Duson*, 83 So. 455, 146 La. 190.

64. Ill.—*People ex rel. Franklin v. Wabash R. Co.*, 56 N.E.2d 820, 387 Ill. 450.

Mich.—*Pontiac v. Axford*, 12 N.W. 914, 49 Mich. 69.

44 C.J. p 1316 note 87.

65. Ill.—*Spring v. Olney*, 78 Ill. 101.

66. Tenn.—*Memphis v. Memphis*, 9 Baxt. 76.

67. Ind.—*State Tax Com'rs v. State*, 153 N.E. 404, 576, 198 Ind. 343.

Publication

A statutory requirement that notice of intention to pass an ordinance thereunder be advertised preliminarily in a newspaper of general circulation is not extended by other statutes into also requiring such advertisement in the legal newspaper of the county.—*Bloom v. City of Scranton*, 64 Pa.Dist. & Co. 358.

68. Ind.—*State Tax Com'rs v. State*, 153 N.E. 404, 576, 198 Ind. 343.

69. Mich.—*Auditor-General v. Sparrow*, 74 N.W. 881, 116 Mich. 574.

70. Mich.—*Auditor-General v. Sparrow*, supra.

71. N.D.—*O'Neill v. Tyler*, 53 N.W. 434, 3 N.D. 47.

72. Pa.—*Commonwealth v. Repp*, 88 A. 1007, 242 Pa. 240—*O'Mara v. Exeter Borough*, 21 Pa.Dist. 962.

73. Vt.—*Walker v. Burlington*, 56 Vt. 131.

74. Vt.—*Walker v. Burlington*, supra.

75. Pa.—*Commonwealth v. Repp*, 88 A. 1007, 242 Pa. 240.

76. Cal.—*Truman v. San Francisco*, 42 P. 421, 110 Cal. 128.

77. Ky.—*Fields v. Whitesburg*, 243 S.W. 930, 195 Ky. 688.

78. Ohio.—*Blanchard v. Bissell*, 11 Ohio St. 96.

79. Ky.—*Edge v. City of Lexington*, 127 S.W.2d 393, 277 Ky. 750.

80. Ky.—*Herd v. City of Middlesboro*, 99 S.W.2d 458, 266 Ky. 488.

81. Ill.—*People ex rel. Gill v. Hamilton*, 9 N.E.2d 243, 366 Ill. 455.

82. La.—*Missouri, etc., Trust Co. v. Smart*, 25 So. 443, 51 La Ann. 416. Repeal of ordinance generally see supra §§ 435-438.

83. Ky.—*Muir v. Bardstown*, 87 S.W. 1096, 120 Ky. 739, 27 Ky.L. 1150—*Southern Warehouse, etc. Co. v. Mechanics' Trust Co.*, 56 S.W. 162, 21 Ky.L. 1734.

"As soon as practicable"

La.—*Beasley Motor Co v Town of Ruston*, 156 So. 179, 180 La. 72.

84. La.—*Beasley Motor Co. v. Town of Ruston*, supra.

More than once

A tax ordinance is invalid where published not more than once where charter provides that all ordinances shall be published for "three weeks," which means once a week for three weeks in a newspaper published weekly.—*Beasley Motor Co. v. Town of Ruston*, supra.

Resolution

A provision of an ordinance that a resolution by which the tax shall be levied shall be published for two weeks in the official paper of the city is not merely directory, but must be complied with in order to give the tax any legal existence.—*City of Dubuque v. Wooton*, 28 Iowa 571.

there is a presumption of publication where the tax bills are properly authenticated;⁸⁵ and, where the statute provides that the ordinance shall take effect from and after its passage, other provisions thereof requiring publication are directory merely,⁸⁶ and a failure to comply therewith does not affect the validity of the ordinance.⁸⁷ Under some statutes, an appropriation ordinance must be published before a levy ordinance is passed, as discussed *supra* § 2035 b, but a requirement that a levy ordinance be published does not follow as a necessary implication from a statute requiring publication of an appropriation ordinance,⁸⁸ or from a statute requiring publication of notice that an assessment had been made and giving interested parties the right to appear and contest it.⁸⁹

Where a judgment declares a tax ordinance void for want of publication, the ordinance cannot be revived by publication after the judgment is signed;⁹⁰ but the only orderly proceedings after such a final judgment is by an application for a new trial and an appeal if the application is denied.⁹¹

c. Filing Certified Copy

When so required by statute, a certified copy of the tax-levy ordinance must be filed with a designated official, and such filing is essential to authority to extend the tax.

Under some statutes, a certified copy of the tax-levy ordinance must be filed with a designated official,⁹² and it is not a sufficient compliance with such requirement to file the appropriation ordi-

nance,⁹³ or the original tax-levy ordinance.⁹⁴ The certified copy of the tax ordinance contains the data for the city clerk or other proper official in extending the tax,⁹⁵ and it is the only source legally open to him for such purpose,⁹⁶ and, accordingly, its filing is regarded as jurisdictional and essential to authority to extend the tax.⁹⁷ It is not necessary that the certified copy should refer to the statute authorizing the levy,⁹⁸ and an incorrect reference may be rejected as surplusage.⁹⁹

Cure of error or amendment. An error in filing the original tax levy ordinance cannot be cured by the subsequent attachment thereto of a certificate of authentication,¹ nor can it be cured by amendment;² but, if the paper filed with the clerk appears on its face to be a copy, it may be amended in a proper case,³ as for the purpose of adding a complete and proper certificate,⁴ or correcting a mistake in the certified copy.⁵ The character of the paper as a copy for purposes of amendment is not established by the absence of a file mark thereon⁶ by the fact that it was typed through carbon paper instead of through ribbon,⁷ or by the fact that words purporting to show the paper to be a copy are written across its face, where the evidence indicates that the words were written by some unauthorized person.⁸ The failure to file a certified copy of the ordinance may be cured by a statutory provision continuing for the current tax year the levy for the preceding year, where it was for the same purposes and at the same rate as that fixed in the ordinance;⁹ and it has been held that, if the levy is duly and properly made, it is not invalid

85. Ky.—Fonda v. Louisville, 49 S. W. 785, 20 Ky.L. 1652.

86. Neb.—Johnson v. Finley, 74 N. W. 1080, 54 Neb. 733.
Time of taking effect generally see *infra* § 2041 a.

87. Neb.—Johnson v. Finley, *supra*.

88. Ill.—Mix v. People, 106 Ill. 425.

89. Ala.—Hooper v. Albertville, 88 So. 868, 205 Ala. 621.

90. La.—Beasley Motor Co. v. Town of Ruston, 156 So. 179, 180 La. 72.

91. La.—Beasley Motor Co. v. Town of Ruston, *supra*.

92. Ill.—People ex rel. McWard v. Wabash R. Co., 70 N.E.2d 36, 395 Ill. 243.

44 C.J. p 1319 note 57.

A city clerk subscribing his official attestation to copies of resolutions fixing levy certifies to their correctness.—Morse v. Kroger, 285 P. 185, 87 Mont. 54.

93. Ill.—Russellville v. Purdy, 68 N. E. 1085, 206 Ill. 142.

94. Ill.—People ex rel. McWard v. Wabash R. Co., 70 N.E.2d 36, 395 Ill. 243—People ex rel. Wangelin v. Pitcairn, 21 N.E.2d 753, 371 Ill. 616—People ex rel. Dooley v. New York, C. & St. L. R. Co., 15 N.E.2d 297, 368 Ill. 536.
44 C.J. p 1319 note 59.

95. Ill.—People v. N. J. Sandberg Co., 118 N.E. 469, 282 Ill. 245.

96. Ill.—People v. N. J. Sandberg Co., *supra*.
44 C.J. p 1320 note 69.

97. Ill.—People ex rel. Wangelin v. Pitcairn, 21 N.E.2d 753, 371 Ill. 616—People ex rel. Dooley v. New York, C. & St. L. R. Co., 15 N.E.2d 297, 368 Ill. 536.

Certificate held sufficient

Ill.—People ex rel. Manifold v. Chicago, B. & Q. R. Co., 54 N.E.2d 389, 386 Ill. 56.

98. Ill.—People v. Clark, 129 N.E. 583, 296 Ill. 46.

99. Ill.—People v. Clark, *supra*.

1. Ill.—People v. Belleville, etc., R.

Co., 83 N.E. 950, 232 Ill. 454—People v. Kankakee, etc., R. Co., 75 N. E. 1063, 218 Ill. 588.

2. Ill.—People ex rel. Wangelin v. Pitcairn, 21 N.E.2d 753, 371 Ill. 616.
44 C.J. p 1319 note 61.

3. Ill.—People ex rel. Stuckart v. Patten, 122 N.E. 471, 287 Ill. 392—People v. Cincinnati, etc., R. Co., 97 N.E. 692, 253 Ill. 420.

4. Ill.—People ex rel. Wangelin v. Pitcairn, 21 N.E.2d 753, 371 Ill. 616—People v. Chicago, etc., R. Co., 143 N.E. 460, 312 Ill. 58.

5. Ill.—People v. Wabash R. Co., 149 N.E. 739, 319 Ill. 183.

6. Ill.—People v. Chicago, etc., R. Co., 146 N.E. 499, 315 Ill. 424.

7. Ill.—People v. Chicago, etc., R. Co., 146 N.E. 499, 315 Ill. 424.

8. Ill.—People v. Chicago, etc., R. Co., 143 N.E. 460, 312 Ill. 58.
44 C.J. p 1320 note 67.

9. Ala.—Johnson v. State ex rel. City of Birmingham, 17 So.2d 662, 245 Ala. 499.

merely because the officer whose duty it is to certify the levy failed to do so.¹⁰

Loss after filing. The fact that the files contain no certified copy of the tax levy ordinance does not invalidate the tax where it appears that such copy had been filed and lost.¹¹

§ 2039. — Form and Contents

- a. In general
- b. Statement of purpose
- c. Statement of rate and amount

a. In General

The form and contents of an ordinance or resolution levying a municipal tax must fully comply with the statutory requirements relating thereto, except to the extent that such requirements are merely directory.

Except when, and as to the extent that, statutory requirements may be considered merely directory,¹² requirements as to the form and contents of the ordinance or resolution levying a municipal tax must be fully complied with,¹³ and, where the statutory requirements are met, the ordinance is sufficient,¹⁴ even though it is inartificially drawn;¹⁵ or, as conversely stated, an ordinance levying an annual tax is not invalid, although not according to the prescribed form, unless the charter or governing law makes such formality vital.¹⁶ The ordinance must contain an enacting clause.¹⁷

The contents required may be supplied by reference to another ordinance,¹⁸ and the fact that the ordinance referred to is void will not affect the

validity of the levy.¹⁹ The ordinance must state the property in general subject to the tax,²⁰ and a designation in general terms will be sufficient.²¹ On the other hand, it is not necessary to designate the particular manner in which the tax is to be collected,²² and a provision making it payable to a person or board not entitled thereto does not invalidate the levy.²³ A tax levy ordinance is invalid where none of the items of the levy agree with those specified in the appropriation ordinance.²⁴

The ordinance must not delegate the authority to levy,²⁵ but an unlawful delegation of authority to levy a part of the total amount may be treated as surplusage, not invalidating the ordinance.²⁶ Ministerial details connected with the levy may be assigned or left to city officials other than the council.²⁷ An ordinance which attempts to bind the municipality to levy an annual tax for a certain purpose for all time to come is void.²⁸

b. Statement of Purpose

- (1) In general
- (2) Itemization and classification

(1) In General

An ordinance levying a municipal tax should, either directly or by reference to another ordinance, state the purpose of the tax.

An ordinance levying a municipal tax must at least substantially comply with the constitutional, statutory, or charter requirements with respect to its specifying the purpose of the tax levy.²⁹ It

10. Okl.—Berryman v. Bonaparte, 11 P.2d 164, 155 Okl. 165.

11. Ill.—People v. Cairo, etc., R. Co., 100 N.E. 241, 256 Ill. 286.

12. W.Va.—Johnston v. Huntington, 76 S.E. 142, 71 W.Va. 106.

13. Tex.—Austin v. Austin Gas-Light, etc., Co., 7 S.W. 200, 69 Tex. 180—Vance v. Pleasanton, Civ. App., 251 S.W. 457, affirmed, Com. App., 277 S.W. 89.

14. Ky.—Fields v. Whitesburg, 243 S.W. 930, 195 Ky. 688.

15. Ky.—Fields v. Whitesburg, supra.

Informalities and irregularities generally see infra § 2041 b.

16. Fla.—Certain Lots Upon Which Taxes Are Delinquent v. Town of Monticello, 31 So.2d 905, 159 Fla. 134.

17. Tex.—Castleberry v. Coffee, Com.App., 272 S.W. 767—Coffee v. Castleberry, Civ.App., 258 S.W. 889.

Enacting clause generally see supra § 414.

18. Md.—Baltimore City v. Gorter, 48 A. 445, 93 Md. 1.

Tex.—Doherty v. San Augustine Independent School Dist., Civ.App., 178 S.W.2d 866, error refused.

19. Md.—Baltimore City v. Gorter, 48 A. 445, 93 Md. 1.

20. Ala.—Hooper v. Albertville, 88 So. 868, 205 Ala. 621.

Ky.—Covington Gas-Light Co. v. Covington, 84 Ky. 94.

21. Ala.—Hooper v. Albertville, 88 So. 868, 205 Ala. 621.

Ky.—Covington Gas-Light Co. v. Covington, 84 Ky. 94.

44 C.J. p 1317 note 4.

22. Ky.—Frantz v. Jacob, 11 S.W. 654, 88 Ky. 52, 11 Ky.L. 55.

23. Ky.—Woolley v. Louisville, 71 S.W. 893, 114 Ky. 556, 24 Ky.L. 1357.

24. Ill.—Cincinnati, etc., R. Co. v. People, 69 N.E. 938, 207 Ill. 566. Appropriation as condition precedent see supra § 2038.

25. Tex.—Bassett v. El Paso, Civ. App., 28 S.W. 554.

26. Tex.—Bassett v. El Paso, supra. 44 C.J. p 1317 note 10.

27. Mich.—Shippy v. Mason, 51 N.W. 353, 90 Mich. 45—Fay v. Wood, 32 N.W. 614, 65 Mich. 390.

44 C.J. p 1317 note 12.

28. Or.—Johnson v. City of Pendleton, 280 P. 873, 131 Or. 46.

29. Idaho.—Village of Oakley v. Wilson, 296 P. 185, 50 Idaho 334.

Ill.—People ex rel. Anderson v. Baltimore & O. S. W. R. Co., 194 N.E. 568, 359 Ill. 301.

Ky.—Pure Milk Producers & Distributors Ass'ns v. Morton, 125 S.W.2d 216, 276 Ky. 736—City of Frankfort v. Fuss, 29 S.W.2d 603, 235 Ky. 143.

Purpose mentioned in statute

The ordinance need only set out therein the purpose mentioned in the statute, without specifically pointing out the tax from which it should be paid, and such ordinance is sufficient authority for county clerk to extend the tax.—People ex rel. Toman v. New York Central Lines, 44 N.E.2d 549, 380 Ill. 581.

must either itself state the purpose of the tax,³⁰ or refer to another ordinance, such as an appropriation ordinance, which does specify such purpose.³¹ While an ordinance omitting the purpose may be upheld as levying a tax for general purposes, under a statute requiring a tax for general purposes, interest, and sinking fund,³² the levy of a tax for general purposes cannot be upheld as a compliance with a statute requiring the levy of a special tax.³³ Where the statement of the purpose involves a description of certain obligations which the tax is designed to meet, a misdescription will invalidate the levy.³⁴ A failure to state the purpose of the levy may be cured by later adopting

another ordinance making a new levy,³⁵ but not by amending the old ordinance.³⁶

(2) Itemization and Classification

Under some statutes, an ordinance levying a municipal tax should state specifically the several purposes for which the levy is made.

In the absence of any constitutional or statutory provision requiring it, there is no necessity for a levy to be made of separate items for different purposes.³⁷ Where, however, the statute provides or designates separately the different purposes for which the taxes may be levied, particularly where it requires an itemized statement thereof, the ordinance must specify in detail,³⁸ and with certainty,³⁹

A constitutional provision, requiring that ordinance specify purpose of tax and that tax be devoted to no other purpose, is self-executing.—City of Frankfort v. Fuss, 29 S.W.2d 603, 235 Ky. 143.

30. Mich.—Petition of Auditor General, 197 N.W. 552, 226 Mich. 170. 44 C.J. p 1317 note 14.

31. Ill.—Chicago, etc., R. Co. v. People, 75 N.E. 1021, 218 Ill. 463—Spring Valley Coal Co. v. People, 41 N.E. 874, 157 Ill. 453. 44 C.J. p 1317 note 15.

Reference to preceding portion of ordinance

Ill.—People ex rel. Toman v. Chicago & N. W. Ry. Co., 37 N.E.2d 169, 377 Ill. 547.

Correspondence with appropriation ordinance

Where appropriation ordinance contained twenty general headings, appropriations for three of which came from special funds so that no current tax levy was required, levy ordinance properly listed only seventeen of the twenty departments or functions for which amounts appropriated were to be collected from general tax levy.—People ex rel. Toman v. Chicago & N. W. Ry. Co., *supra*.

32. S.D.—Henderson v. Hughes County, 83 N.W. 682, 13 S.D. 576.

33. Iowa.—State v. Davenport, 12 Iowa 335.

34. Cal.—Hellman v. Los Angeles, 82 P. 313, 147 Cal. 653. 44 C.J. p 1317 note 18.

35. Ky.—Somerset v. Somerset Banking Co., 60 S.W. 5, 109 Ky. 549, 22 Ky.L. 1129. 44 C.J. p 1317 note 19.

36. Tex.—Dean v. Lufkin, 54 Tex. 265.

44 C.J. p 1318 note 20.

Amendment held error

It has been held error to permit village to amend tax levy to show that items for payment of interest on general indebtedness and redemption of principal indebtedness

were for bonded indebtedness, in absence of showing that original certificate of levy referred to bonded indebtedness, or that certified copy of bond issue ordinance was on file with county clerk.—People ex rel. McDonough v. Chicago, M., St. P. & P. R. Co., 188 N.E. 821, 354 Ill. 630.

37. Ga.—White v. Forsyth, 76 S.E. 58, 138 Ga. 753.

44 C.J. p 1318 note 21.

38. Ill.—Central Ill. Public Service Co. v. Lawless, 79 N.E.2d 67, 400 Ill. 161—People ex rel. Thompson v. Chicago & N. W. Ry. Co., 73 N.E. 2d 418, 397 Ill. 266—People ex rel. McWard v. Wabash R. Co., 70 N.E. 2d 86, 395 Ill. 243—People ex rel. Schlaeger v. Reilly Tar & Chemical Corp., 59 N.E.2d 843, 389 Ill. 434—People ex rel. Toman v. Advance Heating Co., 33 N.E.2d 206, 376 Ill. 158—People ex rel. Anderson v. Baltimore & O. S. W. R. Co., 194 N.E. 568, 359 Ill. 301—People v. Irvin, 156 N.E. 292, 325 Ill. 497.

44 C.J. p 1318 note 22.

Modification of requirement

Ill.—Mathews v. City of Chicago, 174 N.E. 35, 342 Ill. 120.

Itemizations held sufficient

Ill.—People ex rel. Thompson v. Chicago & N. W. Ry. Co., 74 N.E. 2d 510, 397 Ill. 319—People ex rel. Schlaeger v. Frankenstein & Co., 72 N.E.2d 340, 396 Ill. 524—People ex rel. McWard v. Wabash R. Co., 70 N.E.2d 86, 395 Ill. 243—People ex rel. Oller v. New York Cent. R. Co., 58 N.E.2d 51, 388 Ill. 382—People ex rel. Toman v. B. Mercil & Sons Plating Co., 37 N.E.2d 839, 378 Ill. 142—People ex rel. Toman v. Chicago & N. W. Ry. Co., 37 N.E.2d 169, 377 Ill. 547—People ex rel. Wangelin v. Illinois Cent. R. Co., 198 N.E. 694, 361 Ill. 590—People ex rel. Frick v. Chicago & E. I. Ry. Co., 198 N.E. 212, 361 Ill. 470.

Itemizations held insufficient

Ill.—People ex rel. Schlaeger v. Bunge Bros. Coal Co., 64 N.E.2d

365, 392 Ill. 153—People ex rel. Franklin v. Wabash R. Co., 56 N.E.2d 820, 387 Ill. 450—People ex rel. Wangelin v. Illinois Cent. R. Co., 198 N.E. 694, 361 Ill. 590—People ex rel. Frick v. Chicago & E. I. Ry. Co., 198 N.E. 212, 361 Ill. 470—People ex rel. Hoennicke v. New York Cent. R. Co., 196 N.E. 815, 360 Ill. 569—People ex rel. Nash v. Chicago, M., St. P. & P. R. Co., 194 N.E. 570, 359 Ill. 351—People ex rel. Anderson v. Baltimore & O. S. W. R. Co., 194 N.E. 568, 359 Ill. 301—Siegel v. City of Belleville, 181 N.E. 687, 349 Ill. 240.

39. U.S.—Phoenix Mut. Life Ins. Co. v. City of McAllen, C.C.A.Tex., 82 Fed.2d 581.

Ill.—Central Ill. Public Service Co. v. Lawless, 79 N.E.2d 67, 400 Ill. 161—People ex rel. Schlaeger v. Reilly Tar & Chemical Corporation, 59 N.E.2d 843, 389 Ill. 434—People ex rel. Wilson v. Wabash Ry. Co., 14 N.E.2d 650, 368 Ill. 497—People ex rel. Batman v. Illinois Central R. Co., 9 N.E.2d 310, 366 Ill. 408—People ex rel. McDonough v. Mills Novelty Co., 192 N.E. 236, 357 Ill. 285.

Itemizations held indefinite

(1) For "cemetery fund" and "park fund" because of uncertainty, since it could not be determined whether the fund in either case was to be used for buying land or for improvements, etc.—People ex rel. Wilson v. Wabash Ry. Co., 14 N.E.2d 650, 368 Ill. 497.

(2) "Public grounds and buildings," as being uncertain whether amount levied was to be used in erection or repair of buildings, acquisition of public grounds, or for maintenance.—People ex rel. McClusky v. Alton & E. R. Co., 194 N.E. 573, 359 Ill. 440.

(3) For "water fund, \$5000," and "light fund, \$4000," as being impossible to determine whether amount levied was to be expended for water and light, respectively, or for sal-

the several purposes for which the levy is made, regardless of the smallness of the municipality.⁴⁰

The object of such a requirement is to furnish a taxpayer with information as to the purposes for which the taxes are levied, in order to enable him to compel the application of public funds to the purposes for which they were appropriated, and prevent their application to other purposes, and to prevent the raising of greater amounts than are necessary for legitimate and corporate purposes,⁴¹ and accordingly the right of a taxpayer to have the purposes of a levy separately stated is a substantial right of which he may not be deprived,⁴² as under the guise of the possible needs of the municipality.⁴³ These itemization requirements, however, must be accorded a practical and common sense con-

struction,⁴⁴ and, while a designation of the purposes of the levy in general terms is not sufficient, where the funds may be expended for essentially different purposes,⁴⁵ it is not required that the ordinance shall specify every item which the municipality may pay out on an appropriation,⁴⁶ and the designation of a single general purpose is sufficient to include every appropriate expenditure or purpose embraced within, or required for, such general purpose, although there may be a number of items in the appropriation or levy,⁴⁷ particularly where it is difficult to determine in advance the precise amount of the several items,⁴⁸ as where the general term is used to cover a number of small expenses or appropriate items which cannot be classified,⁴⁹ and which may properly be described as contingent, miscellaneous, or incidental ex-

aries, equipment, realty, repairs, or other expenses.—People ex rel. Frick v. Chicago & E. I. Ry. Co., 198 N.E. 212, 361 Ill. 470.

Itemizations held not indefinite

Ill.—People ex rel. Wilson v. Wabash Ry. Co., 14 N.E.2d 650, 368 Ill. 497—People ex rel. Batman v. Illinois Central R. Co., 9 N.E.2d 310, 366 Ill. 408.

40. Ill.—People ex rel. Anderson v. Baltimore & O. S. W. R. Co., 194 N.E. 568, 359 Ill. 301.

41. Ill.—People ex rel. Ammann v. Wabash R. Co., 62 N.E.2d 819, 391 Ill. 200—People ex rel. Oller v. New York Cent. R. Co., 58 N.E.2d 51, 388 Ill. 382—People ex rel. Toman v. Signode Steel Strapping Co., 44 N.E.2d 555, 380 Ill. 633—People ex rel. Frick v. Chicago & E. I. Ry. Co., 198 N.E. 212, 361 Ill. 470—People ex rel. Anderson v. Baltimore & O. S. W. R. Co., 194 N.E. 568, 359 Ill. 301.

42. Ill.—Voss v. Chicago Park Dist., 64 N.E.2d 731, 392 Ill. 429—People ex rel. Ammann v. Wabash R. Co., 62 N.E.2d 819, 391 Ill. 200—People ex rel. Schlaeger v. Reilly Tar & Chemical Corp., 59 N.E.2d 843, 389 Ill. 434—People ex rel. Toman v. Signode Steel Strapping Co., 44 N.E.2d 555, 380 Ill. 633—People ex rel. Nash v. Chicago, M., St. P. & P. R. Co., 194 N.E. 570, 359 Ill. 351—Siegel v. City of Belleville, 181 N.E. 687, 349 Ill. 240.

43. Ill.—People ex rel. Schlaeger v. Bunge Bros. Coal Co., 64 N.E.2d 365, 392 Ill. 153—People ex rel. Toman v. Otis' Estate, 33 N.E.2d 202, 376 Ill. 112—People ex rel. Wangelin v. Pitcairn, 21 N.E.2d 753, 371 Ill. 616—People ex rel. Anderson v. Baltimore & O. S. W. R. Co., 194 N.E. 568, 359 Ill. 301—People v. Chicago, M. & St. P. Ry. Co., 157 N.E. 200, 346 Ill. 179.

44. Ill.—Voss v. Chicago Park Dist., 64 N.E.2d 731, 392 Ill. 429—People ex rel. Schlaeger v. Bunge Bros. Coal Co., 64 N.E.2d 365, 392 Ill. 153—People ex rel. Ammann v. Wabash R. Co., 62 N.E.2d 819, 391 Ill. 200—People ex rel. Schlaeger v. Reilly Tar & Chemical Corp., 59 N.E.2d 843, 389 Ill. 434—People ex rel. Toman v. Otis' Estate, 33 N.E.2d 202, 376 Ill. 112—People ex rel. Gibbons v. Clark, 129 N.E. 583, 296 Ill. 46.

Separate subdivisions into which a given tax levy should be divided are decided largely in accordance with the special facts of each case.—People v. Vogt, 104 N.E. 226, 262 Ill. 170—44 C.J. p 1318 note 24.

45. Ill.—People ex rel. Wilson v. Wabash Ry. Co., 14 N.E.2d 650, 368 Ill. 497—People ex rel. Nash v. Chicago, M., St. P. & P. R. Co., 194 N.E. 570, 359 Ill. 351—People v. Fenton, etc., R. Co., 96 N.E. 864, 252 Ill. 372.

N.C.—Sing v. City of Charlotte, 195 S.E. 271, 213 N.C. 60.

44 C.J. p 1318 note 25.

46. Ill.—People ex rel. Frick v. Chicago & E. I. Ry. Co., 198 N.E. 212, 361 Ill. 470—People ex rel. Anderson v. Baltimore & O. S. W. R. Co., 194 N.E. 568, 359 Ill. 301—Siegel v. City of Belleville, 181 N.E. 687, 349 Ill. 240—People v. Eastern Illinois & M. R. Co., 167 N.E. 24, 335 Ill. 245—Murrie v. Harper, 249 Ill.App. 566.

47. Ill.—People ex rel. Schlaeger v. Bunge Bros. Coal Co., 64 N.E.2d 365, 392 Ill. 153—People ex rel. Ammann v. Wabash R. Co., 62 N.E.2d 819, 391 Ill. 200—People ex rel. Schlaeger v. Reilly Tar & Chemical Corp., 59 N.E.2d 843, 389 Ill. 434—People ex rel. Oller v. New York Cent. R. Co., 58 N.E.2d 51, 388 Ill. 382—People ex rel. Frick v. Chicago & E. I. Ry. Co.,

198 N.E. 212, 361 Ill. 470—People ex rel. Nash v. Chicago, M., St. P. & P. R. Co., 194 N.E. 570, 359 Ill. 351—People ex rel. Anderson v. Baltimore & O. S. W. R. Co., 194 N.E. 568, 359 Ill. 301—Siegel v. City of Belleville, 181 N.E. 687, 349 Ill. 240—People ex rel. Rooke v. Eastern Illinois & M. R. Co., 167 N.E. 24, 335 Ill. 245.

"Operating" or "capital" expense

"Operating expense" as regards itemization requirements, would include clerical salaries, travel, and purchase of supplies and printing, but purchase of typewriters, desks, chairs, or other equipment would constitute "capital expenditures" and not operating expense.—People ex rel. Schlaeger v. Reilly Tar & Chemical Corporation, 59 N.E.2d 843, 389 Ill. 434.

A levy for public parks and parkways and maintenance thereof states a single general purpose and it is not necessary to state each particular purpose for which tax is levied.—People ex rel. Oller v. New York Cent. R. Co., 58 N.E.2d 51, 388 Ill. 382.

Street and alley fund

Items in tax levy ordinances for "street and alley fund," "streets and alleys," and "street and alleys," respectively, are not objectionable, such levies being for single purpose.—People ex rel. Batman v. Illinois Central R. Co., 9 N.E.2d 310, 366 Ill. 408—People v. Eastern Illinois & M. R. Co., 167 N.E. 24, 335 Ill. 245.

48. Ill.—People ex rel. Schlaeger v. Bunge Bros. Coal Co., 64 N.E.2d 365, 392 Ill. 153—People ex rel. Schlaeger v. Reilly Tar & Chemical Corp., 59 N.E.2d 843, 389 Ill. 434.

49. Ill.—People v. Wabash R. Co., 151 N.E. 601, 321 Ill. 39—People v. Fenton, etc., R. Co., 96 N.E. 864, 252 Ill. 372.

penses,⁵⁰ and which are ordinarily found in a municipal tax levy.⁵¹ A levy for miscellaneous purposes, not separately stated, constituting a substantial proportion of the entire levy is invalid.⁵²

It has been held that taxes for different purposes, not within a single general object, cannot be consolidated under a single classification;⁵³ that special taxes for different purposes cannot be combined and a tax for the entire sum levied, where the special taxes are authorized by different statutes;⁵⁴ and that an ordinance levying a tax for a single purpose is not invalidated by a failure to specify in detail how the money raised is to be expended.⁵⁵

c. Statement of Rate and Amount

An ordinance levying a municipal tax must ordinarily state the rate or amount of the tax or both.

An ordinance levying a municipal tax must ordinarily state the rate or amount of the tax or both,⁵⁶ and the statement of a rate recommended by the board of estimate in its report to the city

council cannot be accepted as a valid substitute for, or cure of, an improper statement in the ordinance.⁵⁷ Under a statute limiting the tax rate only, an ordinance stating the rate but not the amount is valid;⁵⁸ but, under a statute providing for the fixing of the amount by the city council and the rate by a specified officer, an ordinance fixing the rate but not the amount is invalid.⁵⁹

Under some statutes the amount of city taxes levied for each of several purposes should be separately stated,⁶⁰ and the amounts needed for several purposes cannot be lumped and a single tax levied for the aggregate amount;⁶¹ but the statute should be given a reasonable construction,⁶² and a gross sum may be levied for a single purpose without stating the amount for each particular item embraced within that purpose.⁶³ A bond ordinance which does not fix specific rates of taxation for succeeding years is not self-executing, as regards taxes.⁶⁴

50. Ill.—People ex rel. Schlaeger v. Bunge Bros. Coal Co., 64 N.E.2d 365, 392 Ill. 153—People ex rel. Ammann v. Wabash R. Co., 62 N.E.2d 819, 391 Ill. 200.
44 C.J. p 1318 note 27.

Engineering services

A tax levy for streets, sidewalks, and alleys is sufficient basis for payment for engineering services in connection with street paving.—Murrie v. Harper, 249 Ill.App. 586.

51. Ill.—People ex rel. Batman v. Illinois Central R. Co., 9 N.E.2d 310, 366 Ill. 408.

52. Ill.—People v. Missouri Pac. R. Co., 168 N.E. 348, 332 Ill. 53.

53. Ill.—People v. Missouri Pac. R. Co., supra.
44 C.J. p 1318 note 28.

Levy for "sidewalk and bridges" is objectionable as for two separate purposes.—People ex rel. Batman v. Illinois Central R. Co., 9 N.E.2d 310, 366 Ill. 408.

54. N.Y.—North Tonawanda v. Western Transp. Co., Sheld. 371, 16 Abb.Pr.N.S. 297.
Pa.—Scranton v. Delaware, etc., R. Co., 2 Pa.C.Pl. 29.

55. Ind.—Aurora v. Lamar, 59 Ind. 400.
44 C.J. p 1318 note 30.

56. Ill.—People ex rel. Anderson v. Baltimore & O. S. W. R. Co., 194 N.E. 568, 359 Ill. 301.
44 C.J. p 1318 note 31.

Definite sum

Tax levy ordinance, failing to show definite sum was appropriated, is invalid.—Koons v. City of Mt. Vernon, 245 Ill.App. 165.

57. Md.—Baltimore City v. Gorter, 48 A. 445, 93 Md. 1.
44 C.J. p 1318 note 32

58. Mich.—Boyce v. Peterson, 47 N. W. 1095, 84 Mich. 490
Minn.—State v. Keyes, 246 N.W. 547, 188 Minn. 79.
Or.—State v. Keeney, 262 P. 943, 123 Or. 508.

Limitation of rate or amount generally see supra §§ 1989–1991.

59. Minn.—In re Cloquet Lumber Co., 63 N.W. 628, 61 Minn. 233.

60. Ill.—People ex rel. Schlaeger v. Bunge Bros. Coal Co., 64 N.E.2d 365, 392 Ill. 153—People ex rel. Ghent v. Cleveland, C. & St. L. Ry. Co., 6 N.E.2d 851, 365 Ill. 443, 110 A.L.R. 119—People ex rel. Hoennicke v. New York Cent. R. Co., 196 N.E. 815, 360 Ill. 569—People ex rel. Anderson v. Baltimore & O. S. W. R. Co., 194 N.E. 568, 359 Ill. 301—People ex rel. Nash v. Chicago & N. W. Ry. Co., 194 N.E. 560, 359 Ill. 435.

Street and bridge tax

Under statute authorizing street and bridge tax by cities in addition to any tax that such cities were already authorized to levy for street or bridge purposes, levy for "street and bridge purposes" by municipal authorities was a levy for two separate purposes and should have specified amount for streets and amount for bridges separately.—Central Ill. Public Service Co. v. Lawless, 79 N. E.2d 67, 400 Ill. 161.

61. Ill.—Central Ill. Public Service Co. v. Lawless, supra—People ex rel. Anderson v. Baltimore & O. S. W. R. Co., 194 N.E.2d 568, 359

Ill. 301—People v. Millard, 139 N. E. 113, 307 Ill. 556.
44 C.J. p 1318 note 38.

62. Ill.—People v. Clark, 129 N.E. 583, 296 Ill. 46—People v. Vogt, 104 N.E. 226, 262 Ill. 170.

63. Ill.—People ex rel. Schlaeger v. Bunge Bros. Coal Co., 64 N.E.2d 365, 392 Ill. 153—People ex rel. Schlaeger v. Reilly Tar & Chemical Corp., 59 N.E.2d 843, 389 Ill. 434—People ex rel. Oiler v. New York Cent. R. Co., 58 N.E.2d 51, 388 Ill. 382—People ex rel. McDonough v. Mills Novelty Co., 192 N.E. 236, 357 Ill. 285—People v. Millard, 139 N.E. 113, 307 Ill. 556—People v. Clark, 129 N.E. 583, 296 Ill. 46.

44 C.J. p 1318 note 40.

A tax levy for erection of new buildings is for a single purpose and need not be further itemized to show different amounts for buildings in process of construction and to be constructed.—People ex rel. Schlaeger v. Bunge Bros. Coal Co., 64 N.E.2d 365, 392 Ill. 153.

General and special purposes

Levy ordinance declaring that total amount of appropriation for all corporate purposes was a sum in excess of the levy for general corporate purposes was not objectionable where the amount in excess of the levy for general corporate purposes was to be raised by additional taxes at rates over and above the general corporate rate.—People ex rel. Toman v. Chicago & N. W. Ry. Co., 37 N.E.2d 169, 377 Ill. 547.

64. Tex.—City of Odessa v. Elliott, Civ.App., 47 S.W.2d 866, reversed on other grounds, Com.App., 58 S.W.2d 84.

Reference to appropriations. Under some statutes, a levy ordinance should specify in detail the purposes for which the appropriations are made and the amount appropriated for each purpose.⁶⁵ A levy ordinance which states the amounts appropriated for the separate purposes of the municipal government, and then stipulates that certain deductions are to be made from the aggregate and levies a tax for the balance in a lump sum, is valid,⁶⁶ inasmuch as it can be determined by calculation from the figures set forth in the ordinance how much of the tax is levied for each purpose.⁶⁷

§ 2040. — Construction

General rules apply to the construction of an ordinance, resolution, or motion levying a municipal tax.

An ordinance, resolution, or motion levying a municipal tax should be construed in accordance with the basic principles of construction applicable to taxing statutes.⁶⁸ It should be construed so as to give effect to the intent of the city council or other body enacting or adopting it,⁶⁹ and, if possible, so as to sustain the levy.⁷⁰ A tax levy ordinance ordinarily should be strictly construed,⁷¹ and while it should be construed most strongly against the municipality and in favor of a taxpayer,⁷² it should also be given a practical and

common sense construction,⁷³ and a uniform construction, as it affects every person within its range,⁷⁴ and its provisions should not be extended by implication beyond the clear import of the language used.⁷⁵ Different sections of such an ordinance must be viewed in the light of their cumulative significance and combined result in determining whether or not the tax is authorized.⁷⁶

§ 2041. Operation and Effect of Levy

- a. In general
- b. Validity
- c. Judicial control
- d. On dissolution of municipality

a. In General

The date when a levy ordinance goes into effect is generally determined by statute or charter.

The date when a levy ordinance goes into effect is generally determined by statute or charter.⁷⁷ Where the charter provides that tax-levy ordinances shall take effect on their passage, the ordinance will take effect immediately,⁷⁸ and its operation will not be postponed until after the taking of a referendum where the referendum provision in the statute requires that a petition therefor shall be filed before the date when the ordinance shall take effect.⁷⁹

65. Ill.—People ex rel. Prindable v. New York Cent. R. Co., 72 N.E.2d 821, 397 Ill. 50.

66. Ill.—Chicago, etc., R. Co., v. People, 80 N.E. 295, 225 Ill. 463, 466

67. Ill.—Chicago, etc., R. Co. v. People, supra.
44 C.J. p 1319 note 42.

68. N.Y.—Emigrant Industrial Sav. Bank v. McGoldrick, 50 N.Y.S.2d 955, 268 App Div. 277.

69. Ky.—Middlesboro v. Coal, etc., Bank, 57 S.W. 497, 108 Ky. 680, 22 Ky.L. 380.

Miss.—Adams v. Capital State Bank, 20 So. 881, 74 Miss. 307.
44 C.J. p 1319 note 44.

70. Ohio.—Lima v. McBride, 34 Ohio St. 338.

Based on different acts

Where the levy is capable of being construed as based on either of two acts, and it would be valid under one but not the other, that construction will be adopted which will sustain the levy.—Lima v. McBride, supra.

71. U.S.—City of St. Louis v. Mississippi River Fuel Corporation, C.C.A.Mo., 97 F.2d 726.

Pa.—City of Philadelphia v. Goldfine, 29 A.2d 233, 151 Pa.Super. 59.

72. U.S.—City of Sedalia ex rel. and to Use of Ferguson v. Shell Petroleum Corporation, C.C.A.Mo., 81 F.2d 193, 106 A.L.R. 1327.

Ky.—Metropolitan Life Ins. Co. v. Darenkamp, 66 S.W. 1125, 23 Ky.L. 2249.

Any doubt as to the imposition of tax by city ordinance should be resolved in favor of the taxpayer.—City of Philadelphia v. Goldfine, 29 A.2d 233, 151 Pa.Super. 59.

A liberal construction of ordinance is not applicable when taxing power of city is sought to be exercised.—City of St. Louis v. Pope, 126 S.W.2d 1201, 344 Mo. 479.

73. Fla.—City of De Land v. Florida Public Service Co., 161 So. 735, 119 Fla. 804.

Itemization of purposes of levy ordinance see supra § 2039 b.

The nature of the ordinance must be determined by the character of its application and practical operation rather than by its name.—City of De Land v. Florida Public Service Co., supra.

74. Va.—City of Richmond v. Eubank, 18 S.E.2d 397, 179 Va. 70.

75. U.S.—City of St. Louis v. Mississippi River Fuel Corporation, C.C.A.Mo., 97 F.2d 726.

Ga.—Wynne v. Eastman, 31 S.E. 737, 105 Ga. 614.

Ky.—Metropolitan Life Ins. Co. v. Darenkamp, 66 S.W. 1125, 23 Ky.L. 2249.

44 C.J. p 1319 note 46.

"For Garbage Collection"

Tax levy ordinance providing for levy of specified sum "for Garbage Collection, payable out of the special Garbage tax" was limited to purpose of collection of garbage, which is a necessary element in establishment and maintenance of garbage system or plant, and did not include in its terms the purchase of equipment.—People ex rel. Whiteside County Collector v. Roth, 55 N.E.2d 66, 387 Ill. 62.

76. Fla.—City of De Land v. Florida Public Service Co., 161 So. 740, 119 Fla. 819.

77. Ala.—Johnson v. State ex rel. City of Birmingham, 17 So.2d 662, 245 Ala. 499.

Idaho.—Swain v. Fritchman, 125 P. 319, 21 Idaho 783.

78. Idaho.—Swain v. Fritchman, supra.

Necessity of publishing ordinance which, under statute, takes immediate effect see supra § 2038.

79. Idaho.—Swain v. Fritchman, supra.

44 C.J. p 1320 note 77.

b. Validity

- (1) In general
- (2) Presumptions and burden of proof

(1) In General

Mere errors or informalities which do not affect the substantial justice of the tax ordinarily do not invalidate a municipal tax levy; but the levy may be avoided on the protest or objection of a taxpayer because of omissions or defects which result in injustice to him.

A tax levy is ultra vires and void, if it is made by a municipal corporation when power to do so has not been granted,⁸⁰ and is invalid if it makes an illegal imposition of taxes on property within the municipality;⁸¹ but mere errors or informalities in the levy not affecting the substantial justice of the tax itself do not ordinarily invalidate the levy,⁸² where no appeal is taken therefrom, as authorized by statute,⁸³ and particularly where the statute provides that informalities which do not prejudice the substantial rights of the taxpayers shall not vitiate the tax.⁸⁴ Where there is a law authorizing a levy, the levy is valid, even though it was intended to be made under a different law.⁸⁵ While a tax levy is invalidated by a failure to comply with a mandatory provision of the statute in some vital matter,⁸⁶ directory provisions in a statute need not be strictly followed.⁸⁷

A levy is not rendered invalid by a failure of the city officials to comply with a tax budget statute, dealing with the expenditure of public funds;⁸⁸

and under a charter provision restricting the annual expenses of the city to the amount of its income, the levy itself is not invalidated by the fact that expenditures for the current year exceed the amount of the levy,⁸⁹ regardless of whether the charter provision is construed to be mandatory or directory.⁹⁰ A levy also is not rendered invalid by the fact that the levy ordinance makes the levy delinquent at a period later than that provided by the statute;⁹¹ nor is it invalid because it contains illegal as well as legal items, where the illegal items may be deleted without affecting the computation of the legal items.⁹²

Protests or objections. The levy may be avoided on the protest or objection of a taxpayer, because of material omissions or defects in the levy which result in injustice or injury to him,⁹³ as where a levy made for the express purpose of creating a surplus or to raise funds for another and different purpose is not a legal levy.⁹⁴ A taxpayer's duty to present his objections at the preliminary budget hearing does not mean that he must protest alleged errors or irregularities which have not been committed, are not known, and cannot reasonably be foreseen at that time.⁹⁵ If defects which render the levy illegal are not manifest on the record, and can be established only by extrinsic evidence, the levy is subject to collateral attack.⁹⁶

Waiver or estoppel. A taxpayer may waive or be estopped to object to the validity of a tax levy by reason of his failure to assert his objection at

80. Fla.—*Certain Lots Upon Which Taxes Are Delinquent v. Town of Monticello*, 81 So.2d 905, 159 Fla. 134.

81. Ark.—*Arkansas-Missouri Power Corp. v. City of Rector*, 217 S.W.2d 335.

82. Cal.—*Skelly Estate Co. v. City and County of San Francisco*, 69 P.2d 171, 9 Cal.2d 28.

Ill.—*People ex rel. Toman v. Signode Steel Strapping Co.*, 44 N.E.2d 555, 380 Ill. 633—*People ex rel. Toman v. North Shore Theatre Bldg. Corporation*, 30 N.E.2d 679, 375 Ill. 208—*People v. Missouri Pac. R. Co.*, 163 N.E. 348, 332 Ill. 53—*People v. Illinois Cent. R. Co.*, 107 N.E. 253, 266 Ill. 240.

La.—*Mouton v. City of Lafayette*, 152 So. 751, 178 La. 1041.

Tex.—*Joy v. City of Terrell*, Civ. App., 143 S.W.2d 704, error dismissed, judgment correct—*Deutsch v. City of San Angelo*, Civ. App., 78 S.W.2d 125, reversed on other grounds, *City of San Angelo v. Deutsch*, 91 S.W.2d 308, 126 Tex. 532—*City of Raymondville v. Harding*, Civ. App., 40 S.W.2d 888,

affirmed *Harding v. City of Raymondville*, Com. App., 58 S.W.2d 55, 44 C.J. p 1320 note 79.

New ordinance not required

Where part of tax levy required to meet maturities on certain bond issues was erroneously added to levy to meet another issue, new ordinance was not required to levy such excess, where original ordinances authorizing bonds provided for sufficient levy each year to pay maturities.—*Mouton v. City of Lafayette*, 152 So. 751, 178 La. 1041.

83. Ind.—*Douglas v. Tash*, 200 N.E. 608, 209 Ind. 675.

84. Ill.—*People v. Chicago, B. & Q. R. Co.*, 59 N.E. 946, 189 Ill. 397, 44 C.J. p 1321 note 80.

85. Ill.—*Davis v. Brace*, 82 Ill. 542.

86. Wash.—*Tremmel v. Mess*, 89 P. 487, 46 Wash. 137.

87. Minn.—*State v. West Duluth Land Co.*, 78 N.W. 115, 75 Minn. 456.

Wash.—*Wingate v. Ketner*, 35 P. 591, 8 Wash. 94.

88. Tex.—*Rachford v. City of Port Neches*, Civ. App., 96 S.W.2d 167, error refused.

89. Ga.—*McCord v. Jackson*, 69 S. E. 23, 135 Ga. 176.

90. Ga.—*McCord v. Jackson*, *supra*.

91. Tex.—*Rachford v. City of Port Neches*, Civ. App., 96 S.W.2d 167, error refused.

92. Ill.—*People ex rel. Toman v. Chicago & N. W. Ry. Co.*, 37 N.E. 2d 169, 377 Ill. 547.

93. Ill.—*People ex rel. Gill v. Schiek*, 14 N.E.2d 223, 368 Ill. 353.

94. Ill.—*People ex rel. Toman v. Signode Steel Strapping Co.*, 44 N.E.2d 555, 380 Ill. 633.

95. Cal.—*Southern Service Co. v. Los Angeles County*, 82 P.2d 397, reheard 97 P.2d 963, 15 Cal.2d 1, appeal dismissed 60 S.Ct. 979, 310 U.S. 610, 84 L.Ed. 1388, rehearing denied 60 S.Ct. 1086, 310 U.S. 658, 84 L.Ed. 1421.

96. N.Y.—*Cooper Union for Advancement of Science and Art v. City of New York*, 71 N.Y.S.2d 204, 272 App.Div. 438, appeal and reargument denied 74 N.Y.S.2d 404, 272 App.Div. 1004, affirmed 81 N.E.2d 108, 298 N.Y. 578.

the proper time,⁹⁷ or by reason of the defect or irregularity being in his favor.⁹⁸ A taxpayer's failure, however, to appear before a budget session of the city council and protest the elimination of an item of income from the proposed budget does not preclude him from thereafter asserting the invalidity of the tax because of such elimination, where no notice of the removal of the item was given prior to the budget session.⁹⁹

Partial invalidity. It has been maintained that a levy which is illegal as to part is wholly void;¹ but, generally, a tax levy containing illegal items or parts will not be entirely invalid if the part which is legal can be separated from that which is illegal,² although, if the parts are not separable, the tax is void in toto.³

(2) Presumptions and Burden of Proof

In the absence of evidence to the contrary, a tax levy is presumed to be valid, and the burden of proving its invalidity is on the person who attacks it.

Ordinarily a presumption of the validity of the tax levy prevails in the absence of controlling evidence to the contrary;⁴ and the burden of proving the invalidity of the levy is on the taxpayer or person who attacks it.⁵ In accordance with this rule, it will be presumed that any excess or surplus in municipal income from taxes in one fiscal year enters into the computation of the tax rate for

the next year.⁶ A tax levy made to procure funds for payment of indebtedness incurred by a municipality while the lands against which it was levied were *prima facie* within the corporate limits will be presumed valid, even though such lands were thereafter ousted from the jurisdiction of the municipality,⁷ but such presumption is rebuttable.⁸ A presumption of validity, however, does not prevail where there are reasons of public policy why it should not be indulged in;⁹ and, when no steps to collect the tax are taken for a long period of years, no presumption will be indulged favorable to the regularity of the tax proceedings beyond what appears on the face of the record.¹⁰

c. Judicial Control

The courts have no general control over the levying of taxes by a municipal corporation, except in so far as such control or jurisdiction is given by statute.

While certiorari may lie to review the proceedings of a municipal organization in levying a tax,¹¹ except in so far as such control or jurisdiction is given by statute, the courts have no general control over, and ordinarily will not interfere with, the determination of the council or other proper municipal officers as to the necessity, propriety, or validity of a tax levy,¹² where the tax is for a proper purpose, as discussed *supra* § 1987, and the amount of the levy is within the limits prescribed by con-

97. Cal.—Griffith Co. v. Belchez, 172 P.2d 511, 76 Cal.App.2d 155.

98. Tex.—Rachford v. City of Port Neches, Civ.App., 96 S.W.2d 167.

99. Cal.—Southern Service Co. v. Los Angeles County, 82 P.2d 397, reheard 97 P.2d 963, 15 Cal.2d 1, appeal dismissed 60 S.Ct. 979, 310 U.S. 610, 84 L.Ed. 1388, rehearing denied 60 S.Ct. 1086, 310 U.S. 658, 84 L.Ed. 1421.

1. Mich.—Rogers v. White, 35 N.W. 799, 68 Mich. 10.
44 C.J. p 1321 note 89.

2. Mont.—Northern Pac. Ry. Co. v. Lutey, 66 P.2d 785, 104 Mont. 321
44 C.J. p 1321 note 90.
Levies partly excessive in amount see *supra* § 1891.

3. Mont.—Northern Pac. Ry. Co. v. Lutey, *supra*.
44 C.J. p 1321 note 91.

4. Idaho.—Mountain States Power Co. v. City of Sandpoint, 290 P. 400, 49 Idaho 569.

Ill.—People ex rel. Toman v. Chicago & N. W. Ry. Co., 37 N.E.2d 169, 377 Ill. 547.

Md.—City of Havre de Grace v. Bauer, 137 A. 844, 152 Md. 521.

Tex.—Hickson v. City of Van Al-

styne, Civ.App., 195 S.W.2d 571—Denman v. Quin, Civ.App., 116 S.W.2d 783, error refused.
44 C.J. p 1321 note 93.

On motion to dissolve injunction

Tax levies made by city were presumed legal in city's motion to dissolve injunction improvidently issued against it.—Mountain States Power Co. v. City of Sandpoint, 290 P. 400, 49 Idaho 569.

Evidence

Where city had no power to levy tax for band purposes, but had right to levy tax for musical entertainment, evidence sustained finding that levy was made for musical entertainment, although words "band purposes" and "band fund" were inadvertently used in the record of the levy.—State v. Keyes, 246 N.W. 547, 188 Minn. 79.

5. Ill.—People ex rel. Toman v. B. Mercil & Sons Plating Co., 37 N.E.2d 839, 378 Ill. 142.

Mont.—Glendive First Nat. Bank v. Sorenson, 210 P. 900, 65 Mont. 1.
Okl.—Oklahoma County Excise Board v. Continental Oil Co., 49 P.2d 540, 173 Okl. 577.

Evidence held insufficient to meet burden

Ill.—People ex rel. Toman v. Signode

Steel Strapping Co., 44 N.E.2d 555, 380 Ill. 633.

6. Cal.—Hammond v. City of Burbank, 59 P.2d 495, 6 Cal.2d 646, appeal dismissed 57 S.Ct. 316, 299 U.S. 519, 81 L.Ed. 383—Stuart Arms Co. v. City and County of San Francisco, 263 P. 218, 203 Cal. 150.

7. Fla.—Certain Lands upon which Town of Lake Placid Taxes are Delinquent v. Town of Lake Placid, 31 So.2d 249, 159 Fla. 219.

8. Fla.—Certain Lands upon which Town of Lake Placid Taxes are Delinquent v. Town of Lake Placid, *supra*.

9. Ill.—People v. Cleveland, etc., R. Co., 133 N.E. 255, 300 Ill. 368.
44 C.J. p 1321 note 94.

10. ND.—Martin v. Burleigh County, 165 N.W. 520, 38 N.D. 373.

11. Wis.—State v. Bell, 64 N.W. 845, 91 Wis. 271.

Certiorari against city officers generally see Certiorari § 46.

12. Ill.—People ex rel. Schlaeger v. Siebel, 57 N.E.2d 378, 388 Ill. 98.
Okl.—Breeding v. Excise Board of Oklahoma County, 69 P.2d 638, 180 Okl. 379.

W.Va.—Davis v. City of Fairmont, 174 S.E. 377, 114 W.Va. 830.

44 C.J. p 1321 note 98.

stitutional, statutory, or charter provisions, as discussed supra §§ 1989-1991, unless an arbitrary abuse of discretion on the part of the council, or of such officers, is shown.¹³ However, the determination of the council or board that an emergency exists, permitting it under the terms of the statute to levy a tax in excess of the constitutional or statutory limit, is not conclusive on the court;¹⁴ nor is a recital of facts in the tax ordinance to show the necessity or emergency conclusive of the truth of the facts stated.¹⁵ A court of equity may act to relieve the hardship which would be caused to taxpayers by paying a large judgment recovered against the municipality out of a single tax levy, by permitting the municipality to spread over a series of years the assessment and levy of taxes to pay the judgment.¹⁶

Scope of hearing or review. Except in so far as controlled by statute, the rules relating to appeal and error in general, apply with respect to an appeal from, or review of, the action of a lower tribunal on a taxpayer's protest or objection to a mu-

nicipal tax levy.¹⁷ On a tax protest, a court of tax review is limited to the examination of questions which involve only the legality or illegality of the levy,¹⁸ and to the making of such orders as are necessarily incidental to the correction of the levy.¹⁹ It may not determine that the municipality had a surplus balance on hand at the end of the fiscal year, unless the evidence shows that the legal assets properly calculated exceed the legal liabilities properly calculated;²⁰ and in determining the appropriations and rate of taxation it is not bound by a confession of error filed by the attorneys for the municipality,²¹ and a judgment based on such a confession of error is erroneous and will be reversed on appeal.²² Where an objection to a levy is withdrawn by the objector on appeal, the lower court's judgment sustaining such objection should be reversed.²³

d. On Dissolution of Municipality

The dissolution of a municipality deprives its authorities of the power to levy taxes, and ordinarily annuls a tax levy.

13. Ill.—People ex rel. Schlaeger v. Siebel, 57 N.E.2d 378, 388 Ill. 98 —People ex rel. Toman v. Signode Steel Strapping Co., 44 N.E.2d 555, 380 Ill. 633.

W.Va.—Davis v. City of Fairmont, 174 S.E. 377, 114 W.Va. 830.

Admissibility of evidence

Where the city council in making tax levy for library fund was required to make the necessary deductions for losses and costs and other uncollectible items, in estimating net amount to be received from taxes for prior years, testimony of deputy city comptroller that amount shown in budget was not the amount of net receivables was incompetent to change budget figures.—People ex rel. Schlaeger v. Siebel, 57 N.E.2d 378, 388 Ill. 98.

14. Cal.—San Christina Inv. Co. v. San Francisco, 141 P. 384, 167 Cal. 762, 52 L.R.A.N.S., 676, 44 C.J. p 1322 note 3.

15. Cal.—Burr v. San Francisco, 199 P. 1034, 186 Cal. 508, 17 A.L.R. 581.

16. U.S.—North Miami, Fla., v. Meredith, C.C.A.Fla., 121 F.2d 279, certiorari denied 62 S.Ct. 138, 314 U.S. 674, 86 L.Ed. 539.

- N.Y.—Cherey v. City of Long Beach, 26 N.E.2d 945, 282 N.Y. 382, 127 A.L.R. 1210.

17. Ill.—People ex rel. Toman v. B. Mercil & Sons Plating Co., 37 N.E.2d 839, 378 Ill. 142.

- Iowa.—Woodbury County Taxpayers Conference v. Carr, 284 N.W. 122, 226 Iowa 204.

Ruling adding loss and cost

Where a ruling of the county court in sustaining a given objection to an annual tax levy carried with it the additional sum of ten per cent for loss and cost of collection, a decision on the main item of the objection necessarily carried with it the correctness of the court's ruling in adding loss and cost thereto, as against contention that the point was not available on appeal, and in addition the point was open under assignment challenging ruling in sustaining objections for proportionate amount of loss and cost in challenged items of tax levy.—People ex rel. Toman v. B. Mercil & Sons Plating Co., 37 N.E.2d 839, 378 Ill. 142.

Objectors not before court

Supreme court was not authorized to consider objection to tax item levied by the city where the taxpayers interposing the objection were not before the court.—People ex rel. Toman v. Baltimore & O. & C. R. Co., 46 N.E.2d 60, 381 Ill. 585.

Law and fact

Whether appropriation by municipality for sundry contingent expenses is disproportionate to appropriations for other legal purposes is mixed question of law and fact for court of tax review.—Protest of Bledsoe, 17 P.2d 979, 161 Okl. 227.

18. Okl.—Oklahoma County Excise Board v. Continental Oil Co., 49 P.2d 540, 173 Okl. 577.

Exercise of authority and duties

Examination may be made only in to questions concerning whether the governing boards and officials have

properly exercised or have exceeded their legal authority and duties in the matter of the appropriations and levies.—Texas-Empire Pipe Line Co. v. Tulsa County Excise Board, 131 P.2d 745, 191 Okl. 586.

19. Okl.—Oklahoma County Excise Board v. Continental Oil Co., 49 P.2d 540, 173 Okl. 577.

Where all the items of appropriation have been made for lawful purposes, within the legal limits of the levy, the court of tax review cannot require the taxing official to cancel one item of the appropriation and substitute therefor an equal appropriation for another purpose, notwithstanding such other purpose would have been a proper one for appropriation originally.—Oklahoma County Excise Board v. Continental Oil Co., 49 P.2d 540, 173 Okl. 577.

Division of rate among funds

Where the excise board, authorized to fix a rate of levy for each of several funds, fixes a single rate for all of such funds, the court of tax review may divide the rate so fixed among the several funds, so as to produce the amount estimated to be needed for each fund.—Protest of Trimble, 300 P. 406, 151 Okl. 74.

20. Okl.—Oklahoma County Excise Board v. Continental Oil Co., 49 P.2d 540, 173 Okl. 577.

21. Okl.—Protest of Bledsoe, 17 P. 2d 979, 161 Okl. 227.

22. Okl.—Protest of Bledsoe, supra.

23. Ill.—People ex rel. Toman v. B. Mercil & Sons Plating Co., 37 N.E.2d 839, 378 Ill. 142.

The dissolution of a municipality deprives its authorities of the power to levy taxes;²⁴ and ordinarily annuls a tax levy,²⁵ unless its force is preserved and continued by statute.²⁶ Ordinarily the courts cannot levy taxes, in case of such a dissolution,²⁷ but under some statutes, where the prop-

erty of the dissolved corporation is not sufficient to pay all claims legally established against it, the courts may levy a tax on all real and personal property within the limits of the municipality as previously incorporated for the purpose of discharging such claims.²⁸

b. Assessment

§ 2042. In General

An assessment is the valuation given to property by the municipal assessor as a basis for the application of the tax rate and the ascertainment of the tax.

The word "assessment" is used to refer to two entirely different concepts.²⁹ In its initial meaning the word refers to the valuation which is given to property by the municipal assessor as a basis for the application of the tax rate and the ascertainment of the tax.³⁰ Its secondary meaning, to describe an imposition in the nature of a tax, such as an assessment on property specially benefited by a public improvement, is discussed *supra* § 1290.

Assessments are governed by constitutional, statutory, or charter provisions,³¹ and under a constitutional provision to that effect the municipal corporation must tax property on the principles established for state taxation,³² and this rule applies to assessments against railroad property;³³ but such provision has reference to the organic requirements of taxation and does not apply to the mechanics of assessing authorized tax levies.³⁴ Under some statutes or charter provisions certain municipalities may have authority to adopt and amend local laws relating to the preparation, making, confirmation,

and correction of local assessments for taxation purposes,³⁵ and may change or supersede previous statutory provisions which do not in terms and in effect apply alike to all cities.³⁶ A home-rule city may avail itself of the benefits and privileges of the general state laws with reference to the assessment of taxes, or may act under its own charter provisions,³⁷ although a municipality may sometimes maintain its own assessor and make its own assessment rolls on its own valuations,³⁸ and may take steps to equalize its taxes with a view to equality and uniformity.³⁹ Where a municipality transfers its taxing functions to the county and adopts the county tax system, it accepts such system charged with all the incidents thereof created by valid statutory and constitutional provisions applicable to county assessments.⁴⁰

Taxes are assessed against specific property,⁴¹ and property which is exempted from taxation by statute is not subject to assessment.⁴² A statute authorizing the redemption of property adjudicated to the state for unpaid state taxes does not suspend or abolish municipal assessments on property after its adjudication to the state.⁴³ The creation of municipal assessment districts rests within the power

24. N.C.—*Lilly v. Taylor*, 88 N.C. 489.

25. Fla.—*Pensacola v. Sullivan*, 6 So. 922, 23 Fla. 1.

26. U.S.—*Meriwether v. Garrett*, Tenn., 102 U.S. 472, 26 L.Ed. 197.

Fla.—*Pensacola v. Sullivan*, 6 So. 922, 23 Fla. 1.

27. U.S.—*Meriwether v. Garrett*, Tenn., 102 U.S. 472, 26 L.Ed. 197.

28. Tex.—*Carthage v. Burton*, 111 S.W. 440, 51 Tex.Civ.App. 195.

29. N.J.—*Kuvin v. City of Newark*, 28 A.2d 271, 129 N.J.Law 115.

30. N.J.—*Kuvin v. City of Newark*, *supra*.

An assessment constitutes a determination of value based on the judgment of the assessors following their examination of the taxable property.—*People ex rel. Pennsylvania Tunnel & Terminal R. Co. v. Miller*, 26 N.Y.S.2d 232.

31. Fla.—*Rio Vista Hotel & Improvement Co. v. Belle Mead Development Corporation*, 182 So. 417, 132 Fla. 88, certiorari denied 59 S.Ct. 251, 305 U.S. 655, 83 L.Ed. 424, rehearing denied 59 S.Ct. 364, 305 U.S. 676, 83 L.Ed. 438.

32. Fla.—*Rio Vista Hotel & Improvement Co. v. Belle Mead Development Corporation*, *supra*.

33. Fla.—*Atlantic Coast Line R. Co. v. City of Orlando*, 167 So. 655, 123 Fla. 371—*Tampa Southern R. Co. v. City of Bradenton*, 165 So. 679, 122 Fla. 173.

Valuation of railroad property see *infra* § 2049 d (2).

34. Fla.—*Rio Vista Hotel & Improvement Co. v. Belle Mead Development Corporation*, 182 So. 417, 132 Fla. 88, certiorari denied 59 S.Ct. 251, 305 U.S. 655, 83 L.Ed. 424, rehearing denied 59 S.Ct. 364, 305 U.S. 676, 83 L.Ed. 438.

35. N.Y.—*Griffin v. City of Syracuse*, 38 N.Y.S.2d 476, 179 Misc.

250, affirmed 45 N.Y.S.2d 724, 266 App Div 1055, appeal denied 47 N.Y.S.2d 292, 267 App Div. 854.

36. N.Y.—*Griffin v. City of Syracuse*, *supra*.

37. Ariz.—*City of Phoenix v. Elias*, 166 P.2d 589, 64 Ariz. 95.

38. Ariz.—*City of Phoenix v. Elias*, *supra*.

39. Fla.—*St. Lucie Estates v. Ashley*, 141 So. 738, 105 Fla. 534.

40. Cal.—*Los Angeles County v. Superior Court in and for Los Angeles County*, 112 P.2d 10, 17 Cal. 2d 707.

41. U.S.—*U. S. v. City of Greenville*, C.C.A.S.C., 118 F.2d 963.

42. Mass.—*New England Mut. Life Ins. Co. v. City of Boston*, 75 N.E.2d 505, 321 Mass. 683.

43. La.—*Touchstone v. Comer*, App., 183 So. 291.

of the legislature;⁴⁴ and the legislature also has the power to reorganize assessment districts.⁴⁵

Irregularities. Mere irregularities in connection with municipal assessments,⁴⁶ such as irregularities in the levy or proceedings preliminary to an assessment,⁴⁷ do not invalidate the assessment or afford a taxpayer a ground or right to defeat the assessment against his property; and the same is true under statutes specifically so providing.⁴⁸ Accordingly, an assessment cannot be defeated except on a meritorious ground;⁴⁹ and an assessment is not rendered void by the failure to fix the bond⁵⁰ or the compensation⁵¹ of the assessing officer. Moreover, it has been held that the legislature has the power to validate and legalize assessments which but for such action would be irregular and invalid.⁵²

Tax of miscellaneous properties together; realty and personalty. Where lands subject to a tax are blended in an assessment, so as not to be distinguishable, with lands not subject to the tax, the assessment is void.⁵³ Under a statute so providing, real and personal property must be assessed separately;⁵⁴ and where they are assessed togeth-

er the assessment is invalid.⁵⁵ Whether particular property is real or personal for assessment purposes depends on the terms of the statutes and the particular circumstances.⁵⁶ In some jurisdictions a municipality may assess the land, owned by one person, and the building thereon, owned by the lessee of the land, together as a unit;⁵⁷ and it is proper to assess taxes on the entire property as a unit against the owner of the leasehold and building,⁵⁸ or against the owner of the land.⁵⁹

Apportionment. Where assessments have been made against several properties, upon which there is one building, the municipality may properly apportion the taxes among the properties in behalf of a purchaser of some of the lots.⁶⁰ A statute providing for the apportionment of a tax among various properties where they are separate and distinct does not apply to the various floors of a building or to subdivisions of one floor in a building.⁶¹

Tax on public utilities. In some jurisdictions public utilities are subject to a tax on their property in accordance with the provisions of the statutes.⁶² In assessing or computing a tax on public utilities

44. Pa.—Kraus v. City of Philadelphia, 10 A.2d 393, 337 Pa 30

45. Pa.—Kraus v. City of Philadelphia, supra.

46. Tex.—Howth v. City of Beaumont, Civ.App., 118 S.W.2d 850.

Irregularities and waiver thereof with respect to proceedings before boards of equalization or review see infra § 2056 f.

47. Tex.—Howth v. City of Beaumont, supra.

48. N.J.—P. J. Ritter Co. v. Mayor of City of Bridgeton, 50 A.2d 1, 135 N.J.Law 22, affirmed 59 A.2d 422, 137 N.J.Law 279—Becker v. Mayor and Council of Borough of Little Ferry, 19 A.2d 657, 126 N.J.Law 838.

Statute held inapplicable

Fla.—Henderson v. Boose, 196 So. 671, 142 Fla. 804.

49. N.J.—P. J. Ritter Co. v. Mayor of City of Bridgeton, 50 A.2d 1, 135 N.J.Law 22, affirmed 59 A.2d 422, 137 N.J.Law 279—Becker v. Mayor and Council of Borough of Little Ferry, 19 A.2d 657, 126 N.J.Law 838.

50. Tenn.—King v. City of Bristol, 4 S.W.2d 343, 156 Tenn. 648.

51. Tenn.—King v. City of Bristol, supra.

52. Fla.—Orlando v. Giles, 40 So. 834, 51 Fla. 422—Jacksonville v. Basnett, 20 Fla. 525.

Assessment without levy of millage
Fla.—Gautier v. Town of Crescent City, 189 So. 842, 138 Fla. 573.

53. Del.—Banks v. Wilmington Terminal Co., 24 A.2d 592, 2 Terry 489, affirmed 28 A.2d 616, 3 Terry 126—Banks v. Talley, 194 A. 362, 8 W.W.Harr. 512.

Blending of lands in separate tax districts

Del.—Banks v. Talley, 194 A. 362, 8 W.W.Harr. 512.

Exemption of marsh land

Del.—Banks v. Wilmington Terminal Co., 24 A.2d 592, 2 Terry 489, affirmed 28 A.2d 616, 3 Terry 126—Stirlith Bros. Co. v. Mayor and Council of Wilmington, 189 A. 880, 21 Del.Ch. 356—Delaware Registration Trust Co. v. Delaware Forge & Steel Co., 138 A. 620, 15 Del.Ch. 381.

54. Fla.—Gautier v. Town of Crescent City, 189 So. 842, 138 Fla. 573.

Mass.—City of Chelsea v. Richard T. Green Co., 65 N.E.2d 11, 319 Mass. 162.

55. Fla.—Gautier v. Town of Crescent City, 189 So. 842, 138 Fla. 573.

56. Mass.—City of Chelsea v. Richard T. Green Co., 65 N.E.2d 11, 319 Mass. 162.

Property held real property

Mass.—City of Chelsea v. Richard T. Green Co., supra.

Property held personalty

N.Y.—People ex rel. National Exhibition Co. v. Miller, 31 N.Y.S.2d 581, 263 App.Div. 799, affirmed 43 N.E.2d 88, 288 N.Y. 698.

57. Pa.—In re Andrews Land Corp., Com.Pl., 28 Erie Co. 133.

Wis.—City of Milwaukee v. Chicago, M., St. P. & P. Ry. Co., 269 N.W. 688, 223 Wis. 73.

Assessment held not apportionable
Pa.—Heymann v. Sarnoff-Irving Hat Stores, 97 Pa.Super. 287.

58. Wis.—City of Milwaukee v. Chicago, M., St. P. & P. Ry. Co., 269 N.W. 688, 223 Wis. 73.

59. N.J.—Becker v. Mayor and Council of Borough of Little Ferry, 19 A.2d 657, 126 N.J.Law 838.

60. N.J.—H. P. Varley Ass'n v. McFeely, 193 A. 787, 118 N.J.Law 463.

61. Pa.—City of Philadelphia v. Dougherty, 34 A.2d 918, 153 Pa.Super. 554.

62. Wis.—State ex rel. Milwaukee Gas Light Co. v. Arnold, 209 N.W. 601, 190 Wis. 602.

Property used in rendering service
Under provisions to that effect, property used by a gas company "for generating and furnishing gas" is subject to the tax on personal property of the company; such phrase does not include appliances kept for sale by the gas company.—State ex rel. Milwaukee Gas Light Co. v. Arnold, supra.

Use of streets

Cities may have the power to assess the franchise of any public corporation using the streets of the city separately from the tangible property of such corporation.—Texas & P. Ry. Co. v. City of El Paso, 85 S.W.2d 246, 126 Tex. 86.

for the privilege of exercising a corporate franchise, or of holding property, or of doing business in the municipality, the tax may be determined on the basis of the utility's gross income,⁶³ without any deductions.⁶⁴

Reassessment. Under a statute so providing, where an assessment has been set aside as erroneous or illegal, the property may be reassessed;⁶⁵ and, where an assessment is declared invalid, the taxing authorities may reassess such property within the current year next ensuing after termination of the litigation.⁶⁶ The right of reassessment has been held not to be limited to the year preceding the placing of the property on the assessment roll, but to apply to any year;⁶⁷ and it has further been held, on the ground that such statute relates only to remedy and procedure and confers no new right or remedy, that such statute should be given retroactive effect.⁶⁸ Where taxes for past years have been properly assessed, but for some reason have not been collected, they may be properly added to the assessment of taxes for a subsequent year.⁶⁹

Conclusiveness of assessment. The action of the municipal assessing officers in making an assessment, while subject to review, as discussed *infra* §§ 2054-2057, is judicial and conclusive,⁷⁰ and not subject to collateral attack,⁷¹ in the absence of fraud,⁷² discrimination,⁷³ illegality,⁷⁴ or other facts which would render it void.⁷⁵

§ 2043. Appointment, Tenure, and Authority of Assessors

- a. In general
- b. Authority, powers, and duties

a. In General

Except in so far as there may be provisions specifically relating to assessors, rules governing the appointment, tenure, and other matters relating to municipal officers and employees generally apply to municipal assessing officers.

Municipal assessors are public officers selected by municipal corporations.⁷⁶ They are not state officers in the ordinary sense of that term,⁷⁷ nor are they subordinates, or members, or agents of the state department of taxation or of the commissioner of such department;⁷⁸ and they act under the direction of the commissioner of taxation only within the limits of the power of direction conferred on the commissioner by statute.⁷⁹ Except in so far as there may be statutes or charter provisions specifically relating to assessors,⁸⁰ rules governing the appointment, tenure, and other matters relating to municipal officers and employees generally, discussed *supra* §§ 462-744, have been applied to municipal assessing officers.⁸¹

The question who is to make the assessment is dependent on the provisions of the statutes.⁸² The assessment must be made by the proper and duly ap-

63. U.S.—*In re New York, O. & W. Ry. Co.*, C.C.A.N.Y., 161 F.2d 518.

64. U.S.—*In re New York, O. & W. Ry. Co.*, *supra*.

65. N.Y.—*Western New York & P. Ry. Co. v. City of Buffalo*, 27 N.Y.S.2d 249, 176 Misc. 350, affirmed 35 N.Y.S.2d 751, 264 App.Div. 832, appeal denied 36 N.Y.S.2d 640, 264 App.Div. 947, appeal denied 44 N.E.2d 616, 289 N.Y. 642, affirmed 49 N.E.2d 633, 290 N.Y. 702.

66. Tex.—*City of Cisco v. Walling*, Civ. App., 176 S.W.2d 363.

67. Fla.—*City of Coral Gables v. Fluvia Corporation*, 185 So. 621, 135 Fla. 544.

68. N.Y.—*Western New York & P. Ry. Co. v. City of Buffalo*, 27 N.Y.S.2d 249, 176 Misc. 350, affirmed 35 N.Y.S.2d 751, 264 App.Div. 832, appeal denied 36 N.Y.S.2d 640, 264 App.Div. 947, appeal denied 44 N.E.2d 616, 289 N.Y. 642, affirmed 49 N.E.2d 633, 290 N.Y. 702.

69. N.Y.—*Western New York & P. Ry. Co. v. City of Buffalo*, *supra*.

70. Ill.—*Watson v. Village of Sibley*, 25 N.E.2d 1, 373 Ill. 633.

71. N.Y.—*New York v. Vanderveer*, 86 N.Y.S. 659, 91 App.Div. 303, 44 C.J. p 1334 note 56.

Conclusiveness of valuation see *infra* § 2049 a.

71. N.J.—*In re Hazeltine's Estate*, 177 A. 108, 13 N.J.Misc. 152, reversed on other grounds 182 A. 357, 119 N.J.Eq. 308, affirmed 187 A. 177, 121 N.J.Eq. 49.

Tex.—*Mississippi Valley Life Ins. Co. v. City of El Paso*, Civ.App., 131 S.W.2d 191, 44 C.J. p 1334 note 56.

72. Tex.—*Mississippi Valley Life Ins. Co. v. City of El Paso*, Civ. App., 131 S.W.2d 191.

73. Tex.—*Mississippi Valley Life Ins. Co. v. City of El Paso*, *supra*.

74. Tex.—*Mississippi Valley Life Ins. Co. v. City of El Paso*, *supra*.

75. Tex.—*Mississippi Valley Life Ins. Co. v. City of El Paso*, *supra*.

76. Mass.—*Hobart v. Commissioner of Corporations and Taxation*, 41 N.E.2d 38, 311 Mass. 341.

Assistant assessors are municipal officers

S.C.—*Coogan v. State*, 1 S.C. 468.

Clerk

An assessor's clerk is not an officer.—*People v. Langdon*, 40 Mich. 673—43 C.J. p 618 note 59 [a].

Village assessor is officer of village Minn.—*Vesely v. Village of Hopkins*, 251 N.W. 680, 190 Minn. 318.

77. Mass.—*Hobart v. Commissioner of Corporations and Taxation*, 41 N.E.2d 38, 311 Mass. 341.

78. Mass.—*Hobart v. Commissioner of Corporations and Taxation*, *supra*.

79. Mass.—*Hobart v. Commissioner of Corporations and Taxation*, *supra*.

80. N.Y.—*People ex rel. Powott Corporation v. Woodworth*, 21 N.Y.S.2d 785, 260 App.Div. 168.

81. Tenn.—*Cummings v. Sharp*, 122 S.W.2d 423, 173 Tenn. 637.

Appointment, tenure, and rights and liabilities of assessors generally see the C.J.S. title *Taxation* §§ 373-389, also 61 C.J. p 578 note 9—p 618 note 29.

82. N.J.—*Peck v. New Barbadoes Tp.*, 172 A. 743, 12 N.J.Misc. 508, affirmed 176 A. 317, 114 N.J.Law 118.

Classification of municipalities

One is not entitled to reëstablish board of assessors of township, reinstate himself as member thereof, and vacate appointment by city council, elected under municipal

pointed or elected municipal officer or officers⁸³ except where constitutional or statutory provisions require the assessment to be made by officers other than a municipal officer;⁸⁴ and no one other than the authorized person or board can make a valid assessment.⁸⁵ The power to create the office of assessor rests in the legislature,⁸⁶ and a municipality has no authority to employ tax assessors except in so far as it is granted such authority by statute.⁸⁷ By the same token, the legislature has the power to abolish such office.⁸⁸

Appointment or election. Municipal assessing officers must be appointed⁸⁹ or elected⁹⁰ by such persons and in such manner as may be prescribed by statutory or charter provisions. Statutes regulating the appointment of assessors for cities in a particular class⁹¹ and placing restrictions on the personnel of the board⁹² have been held constitutional. An appointment becomes complete and irrevocable where the duly appointed assessor complies with the statutory requirement and takes his oath of office.⁹³ The fact that there is no record of the appointment of the assessors⁹⁴ or that

they omitted to take the statutory oath⁹⁵ will not invalidate an assessment. Where the term of office under the statute extends over a number of years, a reappointment each year is not required.⁹⁶ An assessor holding office legally under a particular statute cannot be ousted by one claiming under a later unconstitutional statute.⁹⁷

Effect of civil service laws; veterans' preference. Rules relating to the effect of civil service acts on appointment to, employment in, and eligibility for, municipal office or employment generally, discussed supra §§ 469, 488, 711-717, have been applied to municipal assessing officers and clerks.⁹⁸ Rules relating to the right of veterans under statutes providing for preference to veterans in appointment to municipal office generally, considered supra § 470, have been applied to veterans seeking appointments as assessing officers.⁹⁹ However, a statute providing for preference to honorably discharged veterans in appointment, employment, and promotion with respect to municipal office, but excepting from its operation positions of confidence and duties of officials and departments, has been held not

manager act, of assessor of city, in view of change in name of township to city, and fact that boundaries of improvement commission were not completely coextensive with boundaries of township—Peck v. New Barbadoes Tp., supra.

83. Ky.—Springfield v. People's Deposit Bank, 63 S.W. 271, 111 Ky. 105, 23 Ky.L. 519.
44 C.J. p 1322 note 9.

De facto assessor

Tenn.—State, for Use of City of Chattanooga v. Bayless, App., 209 S.W.2d 504.

Action by one member of board

Under statute an assessment made by one member without action and concurrence of other members is void.—Boyd v. Dillman, 197 A. 830, 9 W.W.Harr., Del., 231.

84. S.C.—Germania Sav. Bank v. Darlington, 27 S.E. 846, 50 S.C. 337.
44 C.J. p 1322 note 10.

County officers

Fla.—State ex rel. Hanson v. Morqus, 34 So 2d 113.

Valuation and classification by state
La.—State ex rel. Walmsley v. Board of Liquidation of City Debt, 129 So. 724, 171 La. 110.

85. Ill.—Hundley v. Lincoln Park, 67 Ill. 559.
44 C.J. p 1322 note 11.

86. Pa.—Kraus v. City of Philadelphia, 10 A.2d 393, 337 Pa. 30.

Home-rule city may maintain its own assessor

Ariz.—Brown v. City of Phoenix, 200 P.2d 720.

87. Miss.—Fitzgerald v. Town of Magnolia, 184 So. 59, 183 Miss. 334.

General statute held insufficient
Miss.—Fitzgerald v. Town of Magnolia, 184 So. 59, 183 Miss. 334.

88. Pa.—Kraus v. City of Philadelphia, 10 A.2d 393, 337 Pa. 30.

89. Neb.—Eppley Hotels Co. v. City of Lincoln, 276 N.W. 196, 133 Neb. 550, certiorari denied 58 S.Ct. 1045, 304 U.S. 576, 82 L.Ed. 1540.

N.Y.—City of New Rochelle v. Seacord, 30 N.Y.S.2d 240.

Appointment held valid

Tenn.—King v. City of Bristol, 4 S.W.2d 343, 156 Tenn. 643.

Appointment, not election, held proper

Neb.—Eppley Hotels Co. v. City of Lincoln, 276 N.W. 196, 133 Neb. 550, certiorari denied 58 S.Ct. 1045, 304 U.S. 576, 82 L.Ed. 1540.

Appointment after time limited

N.Y.—People v. Woodruff, 32 N.Y. 355, 29 How.Pr. 203.
43 C.J. p 610 note 34 [a].

90. Vt.—Richford Sav. Bank & Trust Co. v. Thomas, 17 A.2d 239, 111 Vt. 393.

Election by council

Mass.—Mansfield v. O'Brien, 171 N.E. 487, 271 Mass. 515.

N.Y.—Casler v. Tanzer, 234 N.Y.S. 571, 134 Misc. 48.

Discretion of commissioners

Fla.—Frith v. State ex rel. Kinsaul, 28 So.2d 255.

Election held invalid

Vt.—Richford Sav. Bank & Trust Co. v. Thomas, 17 A.2d 239, 111 Vt. 393.

91. N.J.—Livelli v. Hoboken, 73 A. 77, 78 N.J.Law 245.

92. N.J.—Livelli v. Hoboken, supra

93. N.Y.—Casler v. Tanzer, 234 N.Y.S. 571, 134 Misc. 48.

94. Ky.—Fields v. Whitesburg, 243 S.W. 930, 195 Ky. 688.
44 C.J. p 1322 note 14.

95. Ky.—Fields v. Whitesburg, supra—Blades v. Falmouth, 98 S.W. 1017, 124 Ky. 259, 30 Ky.L. 420.

96. Ky.—Blades v. Falmouth, supra.

97. N.Y.—People v. Eysaman, 214 N.Y.S. 416, 126 Misc. 853.

98. N.Y.—Davis v. Wiener, 21 N.Y. S.2d 121, 260 App.Div. 127, affirmed 32 N.E.2d 828, 285 N.Y. 537—Kilcoyne v. Lohr, 235 N.Y.S. 207, 226 App.Div. 218, affirmed 170 N.E. 129, 252 N.Y. 528.

Fitness and determination thereof

N.Y.—Davis v. Wiener, 21 N.Y.S.2d 121, 260 App.Div. 127, affirmed 32 N.E.2d 828, 285 N.Y. 537.

Expiration of eligible list

N.Y.—McNamara v. Holling, 25 N.E. 2d 867, 282 N.Y. 109.

99. N.Y.—McNamara v. Holling, 13 N.Y.S.2d 477, 257 App.Div. 411, reversed on other grounds 25 N.E.2d 867, 282 N.Y. 109—Mancuso v. Harrell, 296 N.Y.S. 723, 163 Misc. 270.

to include in its application the office of municipal assessor,¹ even though such office is not expressly excepted from the benefits of the act;² and statutes providing for the appointment of municipal assessors have been held not to be in conflict with veterans' preference acts.³

Term of office. The term of office of assessing officers is determined by the provisions of the statutes;⁴ and, to the extent that a statute changing the term so provides, it is applicable to those in office when the statute was enacted.⁵ In the absence of provisions to the contrary, a reappointment may be made retroactive to the date of the expiration of the prior appointment.⁶ Under a statute requiring the chairman of the board of assessors to be a member of the board, on the expiration of the term of membership of the chairman he is not entitled to continue as chairman until a successor is appointed to supersede him, since, when his membership ceases, he can no longer be the chairman.⁷

Removal and reinstatement; disciplinary action. Authority and procedure for dismissal of an assessing officer depend on constitutional, statutory, and charter provisions.⁸ Thus, under provisions to that effect, an assessor may be removed at the pleasure of the appointing power;⁹ but under other provisions a municipal assessing officer may not be removed without charges being preferred against him and a full and fair hearing thereon.¹⁰ An assessing officer may be summarily dismissed where the proper procedure therefor is followed;¹¹ and where such dismissal was by the city manager with the approval of the city council it is final and can-

not be affected by the council's attempted rescission of such approval.¹² Where a deputy assessor, claiming to have been unlawfully removed, seeks reinstatement he may be precluded therefrom by laches.¹³

Compensation. Under statutes so providing, a municipality has been held to have the power and authority to fix the salary of its assessor;¹⁴ and the courts will not interfere with the amount fixed, provided the compensation fixed is not so inadequate for the services actually performed as to be unreasonable.¹⁵ It has been held that a de facto assessing officer, who actually renders services as an assessor, is entitled to the compensation therefor during the time which he has served.¹⁶ In the absence of waiver or estoppel, a municipal assessor can recover salary from the municipality for the period of his wrongful dismissal,¹⁷ notwithstanding the salary for such period had been paid by the municipality to a de facto officer.¹⁸ A statement of an assessing officer's claim for compensation should contain information sufficient to enable the body to which it is presented to pass on it.¹⁹ Where a municipal assessor accepts less than his full salary, he may thereby intend to make a voluntary donation to the city of the unpaid portions of his salary;²⁰ and whether he intends to do so is a question of fact to be determined by the jury.²¹

b. Authority, Powers, and Duties

While assessors cannot delegate their powers, they are entitled to have the assistance of experts or appraisers.

1. Iowa.—Tusant v. City of Des Moines, 300 N.W. 690, 231 Iowa 116.

2. Iowa.—Tusant v. City of Des Moines, supra.

3. Iowa.—Tusant v. City of Des Moines, supra.

4. N.J.—Keaster v. Bianchi, 19 A. 2d 200, 126 N.J.Law 225.
43 C.J. p 647 note 71 [b] (1).

Construction of statute

As used in a statute relating to the terms of municipal officers and excluding assessors from its operation, the word "assessors" was held to refer not only to election assessors, but to city or property assessors as well.—Commonwealth v. Mallans, 87 A. 301, 240 Pa. 37.—Commonwealth v. Samuel, 85 A. 1101, 238 Pa. 155.

Statute held inapplicable

N.J.—Keaster v. Bianchi, 19 A.2d 200, 126 N.J.Law 225.

5. N.J.—Keaster v. Bianchi, supra.

6. N.J.—Keaster v. Bianchi, supra.

Estoppel to object

N.J.—Keaster v. Bianchi, supra.

7. N.J.—Keaster v. Bianchi, supra.

8. Pa.—Kraus v. City of Philadelphia, 10 A.2d 393, 337 Pa. 30.—Schnur v. City of Erie, Com.Pl., 31 Erie Co. 147.

Discretion of authorities

Tenn.—Cummings v. Sharp, 122 S.W. 2d 423, 173 Tenn. 637.

9. Pa.—Kraus v. City of Philadelphia, 10 A.2d 393, 337 Pa. 30.

Statute held valid

Pa.—Kraus v. City of Philadelphia, supra.

Reduction of number of assessors

Pa.—Kraus v. City of Philadelphia, supra.

10. N.Y.—Casler v. Tanzer, 234 N.Y. S. 571, 134 Misc. 48.

N.D.—State v. Board of Com'rs of City of Fargo, 245 N.W. 887, 63 N.D. 33.

Hearing and evidence

N.Y.—Elgo v. Wheeler, 289 N.Y.S. 34, 248 App.Div. 53.

11. Cal.—Doan v. City of Long Beach, 20 P.2d 777, 130 Cal.App. 526.

12. Cal.—Doan v. City of Long Beach, supra.

13. Cal.—Doan v. City of Long Beach, supra.

14. Minn.—Vesely v. Village of Hopkins, 251 N.W. 630, 190 Minn. 318.

15. Minn.—Vesely v. Village of Hopkins, supra.

16. N.J.—Petrone v. City of Newark, 19 A.2d 450, 19 N.J.Misc. 318.

17. N.D.—Ness v. City of Fargo, 251 N.W. 843, 64 N.D. 231.

Pa.—Schnur v. City of Erie, Com.Pl., 31 Erie Co. 147.

18. N.D.—Ness v. City of Fargo, 251 N.W. 843, 64 N.D. 231.

19. Colo.—Walpole v. Pueblo, 54 P. 910, 12 Colo.App. 151.

20. Pa.—Schwarz v. City of Philadelphia, 12 A.2d 294, 337 Pa. 500.

21. Pa.—Schwarz v. City of Philadelphia, supra.

The authority, powers, and duties of an assessing officer or board depend on the provisions of the statute creating the office or board and other statutes relating thereto.²² Under statutes so providing, it is the duty of the assessing officers or board to make out correct lists for each district, showing the number of persons and estates on the city assessment.²³ Assessors, duly appointed or elected, cannot delegate their powers to another.²⁴ Thus they cannot make a contract with a corporation, providing thereby for the installation and superintendence of an appraisal system, where such contract is equivalent to the delegation of their powers;²⁵ nor will an authority to make such a contract be implied from a statutory provision authorizing the city assessors to employ expert assistants.²⁶ However, under or apart from statutes so providing, assessing officers are entitled to have the assistance of experts²⁷ or appraisers,²⁸ such as appraisers appointed by the municipality to appraise the property and report on it.²⁹

A municipality may have the power to contract with an appraisal company for the purpose of employing it to appraise or reappraise the taxable property in the municipality,³⁰ and it has been held not improper for the municipality to appoint the employees of such a company as assistant assessors as

a matter of convenience to facilitate the collection of the necessary data by enabling such employees to inspect various properties,³¹ nor is such a contract invalid on the ground that it deprives the assessor of authority to value property, where the contract provides that the assessor's judgment shall be final.³² Nevertheless, in the final analysis the valuation of the property to be assessed must be made by the assessing officer;³³ and where the figures of an appraiser or appraisal organization are taken by the assessor without the exercise of his own judgment the assessment may be invalid,³⁴ but the fact that the figures presented by the appraisers were adopted by the assessing officer will not necessarily invalidate the assessment, since such figures may have been adopted as the best available evidence of the value of the property,³⁵ particularly where the property owner filed no objection to the assessment on that ground.³⁶

The deputies of a municipal assessor act for, and in place of, the assessor as to a portion of the duties imposed on him,³⁷ and their duties are practically the same.³⁸ The chief deputy performs the duty of the assessor in the event of a vacancy.³⁹ A statute authorizing the appointment of deputies is not void for uncertainty because it also requires the officer to make oath to the correctness of the

22. Del.—*Banks v. Talley*, 194 A. 362, 8 W.W.Harr. 512.

Rights, powers, and duties of assessors generally see the C.J.S. title Taxation §§ 376-383, also 61 C.J. p 584 note 33-p 605 note 56.

Control of legislature

Tax assessors have never been emancipated by legislature which constituted them municipal officers, but remain subject to superior control and direction of legislature.—*People ex rel. Buffalo & Fort Erie Public Bridge Authority v. Davis*, 298 N.Y.S. 787, 163 Misc. 192, motion denied 12 N.E.2d 564, 276 N.Y. 534, affirmed 14 N.E.2d 74, 277 N.Y. 292.

23. Del.—*Banks v. Talley*, 194 A. 362, 8 W.W.Harr. 512.

24. Fla.—*Tampa v. Kaunitz*, 23 So. 416, 39 Fla. 683, 63 Am.S.R. 202.

25. Ohio—*State v. Sayre*, 15 Ohio Cir.Ct., N.S., 267, 33 Ohio Cir.Ct. 602.

26. Ohio.—*State v. Sayre*, *supra*.

27. Cal.—*Storke v. Santa Barbara*, 244 P. 158, 76 Cal.App. 40.

Self-executing statute

Where the statute authorizes the employment of expert assistants, a contract for the service of expert assistants as assistants to the assessors is valid, and where such statute is self-executing an ordinance authorizing the contract is not

necessary.—*Storke v. Santa Barbara*, *supra*.

28. Miss.—*City of Greenwood v. Humphreys*, 127 So. 694, 157 Miss. 879, followed in *City of Greenwood v. Gwin*, 127 So. 696. Suggestion of error overruled *City of Greenwood v. Humphreys*, 128 So. 885, 157 Miss. 879.

N.Y.—*People ex rel. Bray v. Golder*, 83 N.Y.S.2d 186.

29. Fla.—*Smythe v. City of Bradenton*, 4 So.2d 694, 148 Fla. 461.

30. Mich.—*Conroy v. City of Battle Creek*, 22 N.W.2d 275, 314 Mich. 210.

N.H.—*Stocklan v. Brackett*, 61 A.2d 140.

Order of state tax commission not required

A city's proposed contract with private company for revaluation of all taxable property in city is not illegal because reappraisal of such property has not been ordered by state tax commission, as authorized by statute.—*Stocklan v. Brackett*, *supra*.

31. Mich.—*Conroy v. City of Battle Creek*, 22 N.W.2d 275, 314 Mich. 210.

32. N.H.—*Stocklan v. Brackett*, 61 A.2d 140.

33. Fla.—*Smythe v. City of Bradenton*, 4 So.2d 694, 148 Fla. 461.

N.Y.—*People ex rel. Bray v. Golder*, 83 N.Y.S.2d 186.

Clerical assistant

If the work is done under the personal supervision of the assessor, or if he personally considers and adopts it, the assessment is valid, although another person is employed in a clerical capacity to write up the assessment roll and put the valuation of the property thereon.—*Tampa v. Mugge*, 24 So. 489, 40 Fla. 326.

34. Miss.—*City of Greenwood v. Humphreys*, 127 So. 694, 157 Miss. 879, followed in *City of Greenwood v. Gwin*, 127 So. 696. Suggestion of error overruled *City of Greenwood v. Humphreys*, 128 So. 885, 157 Miss. 879.

N.Y.—*People ex rel. Bray v. Golder*, 83 N.Y.S.2d 186.

Grand list held not invalid

Conn.—*Conzelman v. City of Bristol*, 188 A. 659, 122 Conn. 218.

35. Fla.—*Smythe v. City of Bradenton*, 4 So.2d 694, 148 Fla. 461.

36. Fla.—*Smythe v. City of Bradenton*, *supra*.

37. Iowa.—*Tusant v. City of Des Moines*, 300 N.W. 690, 231 Iowa 116.

38. Iowa.—*Tusant v. City of Des Moines*, *supra*.

39. Iowa.—*Tusant v. City of Des Moines*, *supra*.

entire assessment.⁴⁰ An assessor cannot act outside his district;⁴¹ but his jurisdiction is not restricted geographically by a statute prescribing a residence qualification.⁴²

Authority to decide objections and amend tax rolls. The power of the assessor to hear and decide objections to assessments depends on, and is limited by, the terms of the statute or charter provision granting such power;⁴³ and statutory or charter provisions determine when the power of the municipal assessing officer to correct the assessment rolls terminates.⁴⁴ Thus, under charter and statutory provisions to that effect, the assessor's authority to amend the assessment rolls terminates with the completion of the rolls,⁴⁵ or with their verification immediately preceding delivery,⁴⁶ or with delivery of the assessment roll or books to the official designated to receive them.⁴⁷ He cannot thereafter repossess himself of the books and make a new assessment,⁴⁸ not even after the old assessment has been declared illegal by the court;⁴⁹ nor can he then amend the old assessment.⁵⁰ It has been held that assessors cannot include in their assessment for a particular year a reassessment for taxes in prior years, where they have no jurisdiction to hear objections thereto;⁵¹ but, under a statute so providing, the assessing officer has authority to assess a person or property for taxation where, for any reason, such person or property has escaped taxation for the previous year;⁵² and the rule applies to property which was actually on the

assessment roll, where such roll had been adjudged void.⁵³

Reassessment after an invalid assessment is considered generally *supra* § 2042.

§ 2044. Time and Frequency of Assessment

Except where otherwise provided, municipal assessments are made every year, and are required to be made or completed on or before a certain day.

Except where otherwise provided,⁵⁴ municipal assessments are usually made every year,⁵⁵ and continue in force through the year unaffected by a repeal of the municipal charter under which the assessment is made and the substitution of a new charter therefor.⁵⁶ Statutes providing for assessments at intervals longer than one year have been construed to authorize an assessment in any or every of the intervening years;⁵⁷ and the levy of taxes for successive years, based on the same assessment, is not open to the objection that it is double taxation.⁵⁸ Under a statute so providing, all the real estate in the municipality is required to be revalued at least once during every period of years specified by the statute.⁵⁹ However, such provision does not require that the revaluation be done as to all the properties in the same year⁶⁰ or that the grand list of property prepared by the city assessors for a particular year be based on revaluations made for that particular list;⁶¹ and it is sufficient if each piece of property is viewed and revalued at some time within the specified period.⁶²

40. Neb.—*State v. Aitken*, 87 N.W. 153, 62 Neb. 428.

41. Cal.—*People v. Stockton, etc., R. Co.*, 49 Cal. 414—*People v. Placerville, etc., R. Co.*, 34 Cal. 656.

42. N.Y.—*People v. Feltner*, 51 N.Y. S. 1094, 30 App.Div. 241, affirmed 51 N.E. 1093, 156 N.Y. 694. 44 C.J. p 1323 note 26.

43. N.Y.—*People ex rel. Powott Corporation v. Woodworth*, 21 N.Y.S. 2d 785, 260 App.Div. 168.

Time limitation

N.Y.—*People ex rel. Powott Corporation v. Woodworth*, *supra*.

44. N.Y.—*Goldstein v. Mills*, 57 N.Y. S.2d 810, 185 Misc. 851, affirmed 62 N.Y.S.2d 619, 270 App.Div. 930.

Reassessments held unauthorized

Tenn.—*Sanford Realty Co. v. City of Knoxville*, 110 S.W.2d 325, 172 Tenn. 125.

45. N.Y.—*People ex rel. New York Tel. Co. v. Taylor*, 64 N.Y.S.2d 326, 187 Misc. 550.

46. N.Y.—*People ex rel. Powott Corporation v. Woodworth*, 15 N.Y.S. 2d 985, 172 Misc. 791.

47. Mo.—*State v. Jaudon*, 227 S.W. 48, 286 Mo. 181.

44 C.J. p 1323 note 27.

48. Mo.—*State v. Jaudon*, *supra*.

49. N.Y.—*People v. Garland*, 131 N. Y.S. 180, 72 Misc. 413.

50. La.—*City-Item Co-op. Printing Co. v. New Orleans*, 25 So. 313, 51 La. Ann. 713.

51. N.Y.—*People v. Garland*, 131 N. Y.S. 180, 72 Misc. 413. 44 C.J. p 1323 note 31.

52. Miss.—*City of Greenwood v. Humphreys*, 127 So. 694, 157 Miss. 879, followed in *City of Greenwood v. Gwin*, 127 So. 696. Suggestion of error overruled *City of Greenwood v. Humphreys*, 128 So. 885, 157 Miss. 879.

53. Miss.—*City of Greenwood v. Humphreys*, 127 So. 694, 157 Miss. 879, followed in *City of Greenwood v. Gwin*, 127 So. 696. Suggestion of error overruled *City of Greenwood v. Humphreys*, 128 So. 885, 157 Miss. 879.

54. Cal.—*Kelsey v. Nevada*, 18 Cal. 629.

Ky.—*Worton v. Paducah*, 93 S.W. 617, 29 Ky.L. 450.

Triennial assessment

Pa.—*Appeal of Schneller*, 35 Pa. Dist. & Co. 278.

55. Mich.—*Attorney General v. Cogshall*, 65 N.W. 2, 107 Mich. 181. 44 C.J. p 1323 note 34.

56. Tex.—*Garey v. Galveston*, 42 Tex. 627.

Taxes and assessments as affected by new charter generally see *supra* § 97.

57. Pa.—*Glen Alden Coal Co. v. Scranton*, 127 A. 307, 282 Pa. 45. 44 C.J. p 1323 note 37.

58. Mo.—*State v. Young*, 187 S.W. 995, 259 Mo. 52.

59. Conn.—*Conzelman v. City of Bristol*, 188 A. 659, 122 Conn. 218.

60. Conn.—*Conzelman v. City of Bristol*, *supra*.

61. Conn.—*Conzelman v. City of Bristol*, *supra*.

62. Conn.—*Conzelman v. City of Bristol*, *supra*.

Assessment date. Where provision is made that the assessment shall be made or completed on or before a certain day, assessments made after the day fixed are invalid;⁶³ but under others they may be valid.⁶⁴ A special statute fixing a particular day for the completion of an assessment will prevail over the provisions of a general law fixing a different date.⁶⁵ Where a statute grants the power, a city council may adopt a date different from the day set for assessment under the law relating to state and county taxes;⁶⁶ and, even where the statute stipulates that the municipal assessment shall not exceed the assessment made by the state board, a municipal assessment filed before the state board has made its report is valid if the state assessment is not exceeded.⁶⁷

A charter provision fixing the time of the assessment is not affected in any way by a contract entered into with an expert assistant and providing for weekly reports of the work done by him.⁶⁸ Under a resolution of the city council ordering an assessment to be made on or before a specified day, the board of assessors may select a date of assessment prior to that named in the resolution,⁶⁹ provided the date selected is not so early as to prevent the giving of the requisite statutory notice.⁷⁰ Where the ordinance of the city council and the notice of the tax assessors fix no specified day for the valuation of property, the assessment is deemed to have been made the day following the last day on which the taxpayers are notified to file an account of their ratable estate.⁷¹ Under charter or statutory provisions to that effect, the determination of whether property is taxable to a taxpayer must be made on the date specified in the provisions;⁷² and property acquired by a taxpayer after the speci-

fied date cannot be included in the assessment rolls.⁷³

Change of assessment date. Under a statute granting the power, a city council has discretionary power to change the assessment date,⁷⁴ and such power may be exercised even after the date originally fixed by the statute.⁷⁵ A change of the assessment date may be effected by a change in the general law where under the terms of the city charter taxation is subject to the provisions of the general law.⁷⁶

Tax period. Where a charter or statutory provision fixes the beginning and end of the municipal fiscal year, reference in the tax rolls to specific years may be regarded as designating fiscal years beginning in the calendar year specified.⁷⁷ Moreover, there is no inconsistency between the provisions of a charter with reference to the fiscal year and recognition by the municipality of a tax period corresponding with the calendar year.⁷⁸

§ 2045. Mode of Assessment

Statutory or charter provisions specifying the mode of making assessments and the procedure connected therewith must be complied with if mandatory.

The power given to the legislature to confer on the proper authorities of a municipal corporation the authority to assess and collect taxes necessarily carries with it the power to regulate how the taxes shall be assessed and collected.⁷⁹ Accordingly, statutory or charter provisions specifying the mode of making assessments and the procedure connected therewith, if mandatory, must be complied with in every substantial particular or the assessment will be invalid,⁸⁰ although noncompliance with a statutory requirement which is merely directory will not invalidate the assessment.⁸¹ Mere irregulari-

63. Tenn.—Sanford Realty Co. v. City of Knoxville, 110 S.W.2d 325, 172 Tenn. 125.

44 C.J. p 1323 note 42.

64. Ky.—Fields v. Whitesburg, 243 S.W. 930, 195 Ky. 688.

44 C.J. p 1323 note 43.

65. N.Y.—Cohoes v. Cohoes Co., 4 How.Pr. 343.

66. Cal.—Escondido v. Escondido Lumber, etc., Co., 97 P. 197, 8 Cal. App. 435, followed in Escondido v. Wohlford, 97 P. 199.

67. Mo.—State v. Jaudon, 227 S.W. 48, 286 Mo. 181.

68. Cal.—Storke v. Santa Barbara, 244 P. 158, 76 Cal.App. 40.

69. R.I.—Greenough v. Central Falls, 82 A. 411, 34 R.I. 84.

70. R.I.—Greenough v. Central Falls, supra.

71. R.I.—Horgan v. Taylor, 89 A. 1058, 36 R.I. 232.

72. N.Y.—Goldstein v. Mills, 57 N.Y. S.2d 810, 185 Misc. 851, affirmed 62 N.Y.S.2d 619, 270 App.Div. 930.

73. Mich.—Detroit Trust Co. v. City of Detroit, 227 N.W. 715, 248 Mich. 612.

74. Ind.—Tousey v. Bell, 23 Ind. 423.

75. Ind.—Tousey v. Bell, supra.

76. Iowa.—Tackaberry v. Keokuk, 32 Iowa 155.

77. Fla.—Smythe v. City of Bradenton, 4 So.2d 694, 148 Fla. 461.

78. Fla.—Smythe v. City of Bradenton, supra.

79. Ga.—Scott v. Town of McIntyre, 19 S.E.2d 49, 66 Ga.App. 640.

Ky.—Covington, etc., Bridge Co. v. Davidson, 102 S.W. 339, 31 Ky.L. 425.

80. Mass.—Irvin Usen Co. v. Board of Assessors of Boston, 36 N.E.2d 373, 309 Mass. 544.

Pa.—Vollmer v. City of Philadelphia, 38 A.2d 266, 350 Pa. 223.

44 C.J. p 1312 note 88, p 1324 note 55.

Tax bills made by proper officers

Taxes are assessed on municipality's grand list by means of tax bills made out and delivered to collector or treasurer by proper officers, who are village trustees.—Richford Sav. Bank & Trust Co. v. Thomas, 17 A.2d 239, 111 Vt. 393.

Annexed territory

Ala.—Johnson v. State ex rel. City of Birmingham, 17 So.2d 662, 245 Ala. 499.

81. N.Y.—Lancaster Sea Beach

ties in an assessment will not invalidate it,⁸² particularly where the irregularities constitute a failure to follow directory, rather than mandatory, provisions.⁸³ While cities may have the right to provide for the mode and method of assessing taxes, both real and personal,⁸⁴ in the absence of express authorization the general tax law relative to the mode of assessment for state or county purposes is applicable to municipal taxation,⁸⁵ and the city has no power to contract for the installation and superintendence of a method of assessment other than that provided by statute.⁸⁶

The failure of the assessor to follow the statutes in making assessments cannot be excused on the ground of his own carelessness;⁸⁷ and, since the assessor, as well as others, is charged with knowledge of facts disclosed by the record of his county,⁸⁸ his failure to follow the statute in making assessments of property as to which there is a record is not excused by his carelessness.⁸⁹ A tax properly laid on particular property is not invalidated by mere statements made by the assessor after his work is completed,⁹⁰ or by the knowledge of the assessor that the tax would not be collected,⁹¹ even though his motive in making the assessment was to deceive the other taxpayers into the belief that the property was being taxed.⁹²

Invalidation of entire grand list. To invalidate an entire grand list of a municipality is an act fraught with very serious consequences,⁹³ and, while a breach of duty by the assessors may be of such a nature as necessarily to affect the entire grand list of property prepared by them,⁹⁴ as where they are guilty of a failure to obey a mandatory statutory requirement,⁹⁵ an error which

affects only the valuation of the property of a particular taxpayer does not invalidate the entire grand list;⁹⁶ but, as discussed *infra* § 2054, an aggrieved taxpayer may be entitled to appeal to the board of review or equalization. In order to justify the invalidation of an entire grand list, errors in the method of valuation of individual properties must be such that the levy of a tax on the grand list would be likely to produce a substantial injustice to the taxpayers of the community as a whole.⁹⁷

Waiver by taxpayer. A taxpayer may, by his conduct, waive the right to challenge the validity of assessments.⁹⁸

§ 2046. — Listing by Taxpayer

In some jurisdictions residents must deliver to the assessing officer a written list or inventory of their property for the purposes of taxation.

In some jurisdictions it is required by constitution or statute that residents of a municipal corporation shall, by a specified time, deliver to the assessor or other officer a written list or inventory of their property for the purposes of taxation⁹⁹ or that such a list shall be furnished on demand;¹ and the municipality itself may make such a requirement under its general power to levy and collect taxes.² Such a provision is applicable to all persons who are property owners at the time of its enactment,³ and is not restricted to those who become owners after the legislation goes into effect.⁴ Also, the provision is applicable to resident property belonging to nonresidents of the state.⁵ Some of these statutes are construed as being directory only, and as not making the listing by the taxpayer a condition precedent to a valid assessment,⁶ although

Impr. Co. v. New York, 108 N.E. 90, 214 N.Y. 1.

44 C.J. p 1324 note 56.

82. Tex.—Sam Bassett Lumber Co. v. City of Houston, Civ.App., 194 S.W.2d 114, reversed on other grounds, 198 S.W.2d 879, 145 Tex. 492.

83. Tex.—Sam Bassett Lumber Co. v. City of Houston, *supra*.

84. Tex.—Texas & P. Ry. Co. v. City of El Paso, 85 S.W.2d 245, 126 Tex. 86.

85. N.J.—Ridgefield v. Goodday, 46 A. 590, 65 N.J.Law 153.

86. Pa.—Bucher v. Johnstown, 25 Pa.Dist. 307.

44 C.J. p 1324 note 57.

87. Colo.—Reagan v. Dick, 293 P. 333, 88 Colo. 122.

88. Colo.—Reagan v. Dick, *supra*.

89. Colo.—Reagan v. Dick, *supra*.

90. Pa.—Von Storch v. Scranton, 3 Pa.Co. 567.

91. Fla.—Tampa v. Kaunitz, 23 So. 416, 39 Fla. 683, 63 Am.S.R. 202.

92. Fla.—Tampa v. Kaunitz, *supra*.

93. Conn.—Conzelman v. City of Bristol, 188 A. 659, 122 Conn. 218.

94. Conn.—Conzelman v. City of Bristol, *supra*.

95. Conn.—Conzelman v. City of Bristol, *supra*.

96. Conn.—Conzelman v. City of Bristol, *supra*.

97. Conn.—Conzelman v. City of Bristol, *supra*.

98. Tex.—Hickson v. City of Van Alstyne, Civ.App., 195 S.W.2d 571.

99. U.S.—In re Eldredge Brewing Co., D.C.N.H., 32 F.Supp. 604, affirmed, C.C.A., Eldredge Brewing Co. v. City of Portsmouth, 118 F.2d 410.

Tex.—Markowsky v. Newman, 136

S.W.2d 808, 134 Tex. 440, answers to certified questions conformed to, Civ.App., 138 S.W.2d 896.

44 C.J. p 1324 note 63.

Failure to comply with statutes as forfeiting right of appeal to state court see *infra* § 2057.

1. R.I.—Horgan v. Taylor, 89 A. 1058, 36 R.I. 232.

44 C.J. p 1324 note 64.

2. Kan.—Topeka v. Boutwell, 35 P. 819, 53 Kan. 20, 27 L.R.A. 593.

44 C.J. p 1324 note 65.

3. Pa.—Philadelphia v. Unknown Owner, 20 Pa.Super. 203.

4. Pa.—Philadelphia v. Unknown Owner, *supra*.

5. Iowa.—German Trust Co. v. Davenport Tp. Bd. of Equalization, 96 N.W. 878, 121 Iowa 325.

6. Ga.—Dobbing v. Cartersville, 73 Ga. 137.

Me.—Boothbay v. Race, 68 Me. 351.

the assessor must give the taxpayer notice and an opportunity to be heard before he can list the property himself.⁷

In some jurisdictions it has been held that the provision is directory in so far as the time fixed for the submission of the inventory or list is concerned.⁸ It has been held that, where the assessor has received a list not sworn to as required by charter or statute, he cannot treat the case as one of neglect, failure, or refusal on the part of the taxpayer to furnish a list.⁹ The municipal taxing authorities are not under a duty to inspect real estate for the purpose of supplying deficiencies in its description as given in the tax lists filed by the property owner.¹⁰ The above rules and course of procedure are not altered or affected by statutes providing for installment payment of taxes, interest on delinquent taxes, and the application of the proceeds from delinquent taxes.¹¹

Return on special form. Under a statute relating to the assessment of a personal property tax, the assessor must furnish the taxpayer with a blank form for the taxpayer's return;¹² and the assessor may file a return on behalf of the taxpayer if the latter fails to file such a return within a specified period after being properly notified to do so.¹³ Under a statute making national banking institutions and joint stock land banks agents of nonresident stockholders, on the failure of such an institution to make a return as to nonresident stockholders

for personal property tax purposes a municipality is authorized to assess the bank in solido for such stock.¹⁴

§ 2047. — Description of Property

An accurate description of the property assessed is essential to the validity of the assessment; a description is sufficient if it is capable of being made certain by extrinsic evidence.

An accurate description of the property assessed is essential to the validity of the assessment;¹⁵ and where identification of the land is impossible from the description given the assessment is fatally defective.¹⁶ However, the description is generally sufficient if it is capable of being made certain by extrinsic evidence.¹⁷ The necessity of reciting descriptive details will be determined by the requirements of the statute;¹⁸ and a special statute will prevail over the general law in the absence of constitutional provisions to the contrary.¹⁹

The assessment has been held not to be invalidated by a failure to state the abstract and survey numbers of the land,²⁰ by a failure to give the numbers of the block and lots, even though the ordinance provides therefor,²¹ or by an inaccuracy in the description in the memorandum of one of the assessors, where the description in the assessment roll itself is correct.²² If the owner is not prejudiced or misled thereby, an assessment which describes certain property only as "personal property" is not too indefinite and general to create a tax

7. Ga.—Lane v. Unadilla, 114 S.E. 636, 154 Ga. 577.

8. Tex.—Markowsky v. Newman, 136 S.W.2d 808, 134 Tex. 440, answers to certified questions conformed to, Civ.App., 138 S.W.2d 896—DuBose v. Ainsworth, Civ. App., 139 S.W.2d 307, error dismissed.

9. Ind.—Powell v. Madison, 21 Ind. 335.

10. Conn.—Bridgeport Screw Co. v. City of Bridgeport, 7 A.2d 649, 125 Conn. 593.

11. Neb.—Chicago & N. W. Ry. Co. v. Bouman, 271 N.W. 256, 132 Neb. 67.

12. Pa.—City of Philadelphia v. Kolb, 30 Pa. Dist. & Co. 229.

Duty to "furnish"

Provision that assessor shall "furnish" copy of blank form to every taxable person, upon which form taxpayer's return shall be made, does not mean that such form must be personally served on each taxable person but merely that it shall be made available to every person who seeks to make return.—City of Philadelphia v. Kolb, supra.

13. Pa.—City of Philadelphia v. Kolb, supra.

14. Tex.—First Trust Joint Stock Land Bank of Chicago v. City of Dallas, Civ.App., 167 S.W.2d 783, error refused.

15. N.Y.—Lancaster Sea Beach Impr. Co. v. New York, 108 N.E. 90, 214 N.Y. 1.

44 C.J. p 1324 note 74.

16. N.Y.—Allter v. St. Johnsville, 114 N.Y.S. 355, 130 App.Div. 297. 44 C.J. p 1324 note 75.

Descriptions held insufficient

N.Y.—McCann v. Village of Lindenhurst, 18 N.Y.S.2d 952, 174 Misc. 14.

Tenn.—City of Bristol v. Delinquent Taxpayers, 168 S.W.2d 782, 179 Tenn. 604.

Tex.—City of Cisco v. Walling, Civ. App., 176 S.W.2d 363.

44 C.J. p 1324 note 75 [a].

17. Tex.—San Antonio v. Terrill, Civ.App., 202 S.W. 361.

44 C.J. p 1324 note 76.

Descriptions held sufficient

Fla.—Smythe v. City of Bradenton, 4 So.2d 694, 148 Fla. 461—Broad-

water v. City of Tampa-Shores, 170 So. 657, 126 Fla. 116.

N.Y.—Griffin v. City of Syracuse, 38 N.Y.S.2d 476, 179 Misc. 250, affirmed 45 N.Y.S.2d 724, 266 App. Div. 1055, appeal denied 47 N.Y.S.2d 292, 267 App.Div. 854—City of Syracuse v. Murray, 38 N.Y.S.2d 465, 179 Misc. 244, appeal dismissed 42 N.Y.S.2d 576.

44 C.J. p 1324 note 76 [a].

18. N.Y.—Lancaster Sea Beach Impr. Co. v. New York, 108 N.E. 90, 214 N.Y. 1—Matter of Wood, 54 N.Y.S. 978, 35 App.Div. 363, affirmed 57 N.E. 1128, 163 N.Y. 605.

19. N.Y.—Rudolph Wallach Co. v. Rooney, 164 N.Y.S. 616, 177 App. Div. 640.

44 C.J. p 1325 note 78.

20. Tex.—Eustis v. Henrietta, 39 S.W. 567, 90 Tex. 468—Dallas Title, etc., Co. v. Oak Cliff, 27 S.W. 1036, 8 Tex.Civ.App. 217.

21. Tex.—Cooper Grocery Co. v. Waco, 71 S.W. 619, 30 Tex.Civ. App. 623.

22. N.H.—Drew v. Morrill, 62 N.H. 22.

charge against the taxpayer.²³ It has been held that in determining the sufficiency of the description of property the column in the assessment roll showing to whom the property is assessed is no part of the description of the property.²⁴

Subdivision of land on assessment maps. The manner in which land is subdivided on assessment maps must not be purely arbitrary,²⁵ but must be done with due regard to the various factors involved, such as separate ownership, lines of record title, physical possession as evidenced by structures, the existence of streets, natural barriers, and landmarks.²⁶ However, the subdivision of land for tax purposes, and the ownership and physical possession thereof, need not be reconciled to the point of exact mathematical precision.²⁷ Accordingly, tax maps need not be exact surveys,²⁸ all that is required being that the premises be described with sufficient definiteness to identify the parcel intended to be subjected to the tax.²⁹

Auditor's plat. Under a statute so providing, where certain subdivisions of land owned by two or more persons in severalty are difficult to describe sufficiently and accurately for assessment purposes, the county auditor may make and record a plat thereof in accordance with the statutory requirements;³⁰ but where the owner or owners of such platted property object to their being so platted they may maintain an action in equity for the vacation of the plat.³¹

§ 2048. — Statement of Ownership

In whose name property must be assessed and the

effect of error or omission depend on the terms of the statutory or charter provisions.

Under some provisions property must be assessed in the name of the true owner,³² and an assessment of property belonging to a lessee, and used by him on the leased land, against the owner of the land, is void.³³ Under other statutes taxes may be assessed against persons connected with the property other than the true owner,³⁴ such as the owner of the first freehold estate,³⁵ which may be a life estate;³⁶ and it has been held that an assessment against a life tenant covers also the owners in fee in remainder and their respective estates.³⁷

On the other hand, under some statutes the tax is assessed against the land;³⁸ and it has been held that if the assessment roll identifies the land the name of the owner need not be given,³⁹ especially where the owner has not availed himself of the protection accorded by the registration of his title.⁴⁰ In such jurisdictions an assessment against one other than the true owner, through ignorance or mistake, is not void where the land is sufficiently described to identify it.⁴¹ So also, the name of the owner, last known owner, or reputed owner is sometimes required to be stated solely as an aid to identification of the property,⁴² so that a mistake in the name of such owner, last known owner, or reputed owner,⁴³ or the absence of a name,⁴⁴ will not affect the validity of the assessment based thereon.

Moreover, under some charters or statutes a tax is not rendered invalid because of error or omission

23. Tex.—Howth v. City of Beaumont, Civ.App., 118 S.W.2d 350.

24. Tenn.—City of Bristol v. Delinquent Taxpayers, 168 S.W.2d 782, 179 Tenn. 604.

25. N.Y.—Levine v. Jonkheer Realty Corporation, 17 N.Y.S.2d 926.

26. N.Y.—Levine v. Jonkheer Realty Corporation, supra.

Reason for rule

A contrary conclusion might conceivably involve the mingling of fractions of buildings and premises of various descriptions belonging to many different owners to the point of confusion resulting in absurdity.—Levine v. Jonkheer Realty Corporation, supra.

27. N.Y.—Levine v. Jonkheer Realty Corporation, supra.

28. N.Y.—Levine v. Jonkheer Realty Corporation, supra.

29. N.Y.—Levine v. Jonkheer Realty Corporation, supra.

30. Iowa.—Schemmel v. Town of Alvord, 242 N.W. 89, 214 Iowa 321.

31. Iowa.—Schemmel v. Town of Alvord, supra.

32. U.S.—Washington v. Pratt, D.C., 8 Wheat. 680, 5 L.Ed. 714.

Assessments in name of former owner were nullities and could not form bases of valid sales.—Unterein v. City of New Orleans, 120 So 884, 10 La.App. 667.

33. N.Y.—People v. Prendergast, 168 N.Y.S. 907, 101 Misc. 686, reversed on other grounds 172 N.Y.S. 849, 185 App.Div. 461, affirmed 123 N.E. 884, 226 N.Y. 573.

34. Ky.—Rains v. City of Lexington, 145 S.W.2d 516, 284 Ky. 609. Pa.—Greager v. Bradley, Com.Pl., 54 Dauph.Co. 359.

35. Ky.—Rains v. City of Lexington, 145 S.W.2d 516, 284 Ky. 609.

36. Ky.—Rains v. City of Lexington, supra.

37. R.I.—Madden v. Chernick, 7 A. 2d 269.

38. Del.—Pottock v. Mellott, 22 A. 2d 843, 2 Terry 361.

39. N.Y.—Rudolph Wallach Co. v. Rooney, 164 N.Y.S. 616, 177 App. Div. 640.

Pa.—Philadelphia v. Unknown Owner, 20 Pa.Super 203.

40. Pa.—Philadelphia v. Unknown Owner, supra.

41. N.Y.—People v. Mealey, 120 N. E. 155, 224 N.Y. 187.

42. Del.—Pottock v. Mellott, 22 A. 2d 843, 2 Terry 361.

43. Del.—Pottock v. Mellott, supra.

Purpose of provision

This provision was for protection of subsequent grantees and owners of lands on which city taxes might be unpaid for more than four years.—Boyd v. Dillman, 197 A. 830, 9 W. W.Harr. Del., 231.

Assessment to prior owner

The incorrect assessment of taxes to a prior owner did not affect right of city collector to a tax judgment against owner for unpaid taxes.—Boyd v. Dillman, supra.

44. Del.—Pottock v. Mellott, 22 A.2d 843, 2 Terry 361.

in naming the owner or owners of the property,⁴⁵ or because of failure to include all of the owners of the property within the assessment,⁴⁶ or because the property is erroneously classed as the land of an unknown or nonresident owner.⁴⁷ However, even though an error in the assessment of land to other than the true owner may not invalidate the assessment,⁴⁸ and such error, on the face of the assessment, can be corrected,⁴⁹ the error must be corrected, where a statute provides therefor, before the city can maintain an action for the tax.⁵⁰

An assessment is sufficient if made to the person who appears to be the record owner⁵¹ or if it is made to the husband of the true owner,⁵² and the assessment is not invalidated by a failure to state that the husband of the person whose land is assessed has an estate by curtesy therein.⁵³ In jurisdictions permitting a reference to tax maps in place of the detailed description in tax rolls, a part owner of a divided lot assessed as one parcel may have the tax map changed to show the division by making application therefor to the proper authorities.⁵⁴

Personal property. Under a statute so providing as to a personal property tax, the tax may be assessed against the owners or persons in possession of any personal property⁵⁵ or certain personal property.⁵⁶

Nonresident owners. Under a statute so providing, assessments against nonresident owners must give their names, or such description of them as can be given, and their places of abode.⁵⁷ It has been held that an assessment to a nonresident owner in the same manner as though he were a resident owner is not void.⁵⁸

§ 2049. — Valuation

- a. In general
- b. Taxes on property other than realty
- c. Particular methods of, and factors in, valuation
- d. Use of town, county, or state assessment
- e. Increase or reduction in valuation

a. In General

Property should be taxed at its just value, determined in the prescribed manner; and assessed values should bear a uniform ratio to real values throughout the municipality.

Property should be taxed at its just value, determined by the proper assessing officer in the manner prescribed by statute, charter provision, or ordinance;⁵⁹ and assessed values should bear a uniform ratio to real values throughout the municipality.⁶⁰ However, the valuation of property by municipal

45. N.J.—Becker v. Mayor and Council of Borough of Little Ferry, 19 A.2d 657, 126 N.J.Law 338.

What constitutes "real property" within provision

Service station buildings, tanks, and equipment placed on leased premises by tenant under lease providing for retention of title and right of removal were taxable as real property within such provision.—Interstate Lien Corporation v. Schmidt, 44 N.Y.S.2d 709, 180 Misc. 910.

46. N.J.—Becker v. Mayor and Council of Borough of Little Ferry, 14 A.2d 493, 126 N.J.Law 141, affirmed 19 A.2d 657, 126 N.J.Law 338.

47. N.J.—Becker v. Mayor and Council of Borough of Little Ferry, supra.

48. Ky.—Thornton's Unknown Heirs and Devisees v. City of Dayton, 288 S.W. 310, 216 Ky. 543—Frankfort v. Gordon, 201 S.W. 472, 180 Ky. 128.

49. Fla.—City of Fort Myers v. Heitman, 5 So.2d 410, 149 Fla. 203, denying rehearing 4 So.2d 871, 148 Fla. 432.

50. Ky.—Frankfort v. Gordon, 201 S.W. 472, 180 Ky. 128.

51. Fla.—Palbickie v. Hanover Nat.

Corporation, 162 So. 694, 120 Fla. 299.

Mass.—City of Boston v. Quincy Market Cold Storage & Warehouse Co., 45 N.E.2d 959, 312 Mass. 638
N.Y.—Cary v. Hatch, 154 N.Y.S. 759, 91 Misc. 269.

R.I.—Madden v. Chernick, 7 A.2d 269, 63 R.I. 100.

52. Ky.—Frankfort v. Gordon, 201 S.W. 472, 180 Ky. 128.

53. Ky.—Louisville v. Sonne, 146 S.W. 739, 148 Ky. 394.

54. N.Y.—Rudolph Wallach Co. v. Rooney, 164 N.Y.S. 616, 177 App. Div. 640.

44 C.J. p 1325 note 97.

55. Mich.—City of Detroit v. Gray, 22 N.W.2d 771, 314 Mich. 516.

56. Mass.—New England Mut. Life Ins. Co. v. City of Boston, 75 N.E.2d 505, 321 Mass. 683.

Tangible property leased for profit

Mass.—New England Mut. Life Ins. Co. v. City of Boston, supra.

57. Mass.—City of Lowell v. Lowell Bldg. Corporation, 34 N.E.2d 618, 309 Mass. 166.

Assessment against trustees

Where assessed realty was owned by trustees whose places of abode, outside taxing city, were unknown to assessors, and declaration of trust provided that trustees should do

business as the "Lowell Building Trust," assessment list containing such name of trust, names of trustees, and certain address in city was not insufficient.—City of Lowell v. Lowell Bldg. Corporation, supra.

58. N.Y.—Glover v. Edgewater, 3 Thomps. & C. 497.

59. Fla.—Graham v. West Tampa, 71 So. 926, 71 Fla. 605, 611.

44 C.J. p 1325 note 99.

Valuation as property only

With respect to assessment of ad valorem property tax by city, telephone company's right to use portions of city's streets for poles and underground cables should be regarded solely as property, without special reference to receipts from company's business.—City of Fort Worth v. Southwestern Bell Telephone Co., C.C.A.Tex., 80 F.2d 972, rehearing denied 81 F.2d 1016.

Particular valuations held proper
N.Y.—People ex rel. Union Bag & Paper Corporation v. Fitzgerald, 2 N.Y.S.2d 290, 166 Misc. 237.

Tex.—Burson v. City of Silverton, Civ.App., 138 S.W.2d 921, error dismissed, judgment correct.

60. Pa.—Appeal of Stevens, 18 Pa. Dist. & Co. 698.

44 C.J. p 1325 note 1.

Assessments held fair and proper
Conn.—Thaw v. Town of Fairfield,

assessors is a matter of discretion;⁶¹ and the sources of information open to assessing officers on which they can base their opinions as to real estate values are not limited by such legal proof as is received at a trial.⁶² A large latitude is allowed;⁶³ and it is generally sufficient that the methods employed result in a fair approximation to reasonable value as a basis for the assessment.⁶⁴ Nevertheless, the assessment is void if the valuation is arbitrarily⁶⁵ or fraudulently⁶⁶ made; and fraud may be inferred if the assessment discloses such a degree of discrimination between properties of the same or different classes as to evince a willful disregard of constitutional and statutory requirements.⁶⁷ The rules and course of procedure for determining values are not altered or affected by statutes providing for installment payment of taxes, interest on delinquent taxes, and the application of the proceeds from delinquent taxes.⁶⁸

Under constitutional and statutory provisions to that effect, assessed valuations must be for the full value of the property,⁶⁹ even though a higher tax rate is thereby compelled.⁷⁰ The assessable value of land is enhanced by improvements thereon⁷¹ except in so far as the improved property may be exempt from the particular tax.⁷² Under statutes providing that the land and the improvements thereon must be assessed separately, the assessors must

follow some proper method of valuing the land independently of the buildings.⁷³ A single structure may not be valued for assessment purposes by separating it into sections serving different purposes, and attaching a value to one section while disregarding another entirely;⁷⁴ and a structure must be valued as an entirety, especially where all parts of it are revenue producing.⁷⁵ Where a city has surrendered its special charter and has elected to be classed under the general law it may use an assessment made under the special charter as a basis for valuation in an assessment made after it has adopted the general law,⁷⁶ regardless of whether the earlier assessment was valid or invalid.⁷⁷ However, in the case of annexed lands, the assessment by the city to which the land formerly belonged cannot be used as the basis for a tax levy by the city to which it is annexed.⁷⁸ A referee's report fixing the value of property for a particular year is not conclusive on the assessing authorities in determining valuation for a subsequent year;⁷⁹ but in the preparation of the municipal assessment for the next municipal tax year the basis is the assessed value of the then current tax year.⁸⁰

Effect of requirement of uniformity. While the constitutional requirements of equality and uniformity applicable to taxation generally apply, and as between the standard of true value and the require-

43 A.2d 65, 132 Conn. 173, 160 A.L.R. 679.

Mich.—22 Charlotte, Inc. v. City of Detroit, 293 N.W. 647, 294 Mich. 275.

Pa.—Appeal from Assessment of Tosl, Com.Pl., 27 Wash.Co. 134.

Assessments held unfair and improper

Fla.—Coombes v. City of Coral Gables, 168 So. 524, 124 Fla. 374.

Ky.—City of Lexington v. Cooke, 218 S.W.2d 58, 309 Ky. 518.

N.Y.—People ex rel. Fifth Avenue and 37th Street Corporation v. Miller, 26 N.Y.S.2d 219, 261 App.Div. 550, affirmed 36 N.E.2d 682, 286 N.Y. 628.

Pa.—Appeal of Joseph Horne Co., Com.Pl., 90 Pittsb.Leg.J. 356.

61. Conn.—State ex rel. Waterbury Corrugated Container Co. v. Kilduff, 25 A.2d 62, 128 Conn. 647.

62. N.Y.—People ex rel. Union Bag & Paper Corporation v. Fitzgerald, 2 N.Y.S.2d 290, 166 Misc. 237.

63. Miss.—City of Clarksdale v. Stuart, 185 So. 588, 184 Miss. 179.

64. Fla.—Tampa v. Mugge, 24 So. 489, 40 Fla. 326.

Iowa.—Trustees of Flynn's Estate v. Board of Review of City of Des Moines, Polk County, 278 N.W. 342, suspended on other grounds Trustees of Flynn's Estate v. Board of

Review of City of Des Moines, 286 N.W. 483, 226 Iowa 1353.

65. Ga.—Cumming v. Savannah, R. M. Charlt., Ga., 26.

66. Cal.—Mahoney v. San Diego, 245 P. 189, 198 Cal. 388.

67. Cal.—Mahoney v. San Diego, supra 44 C.J. p 1326 note 5.

68. Neb.—Chicago & N. W. Ry. Co. v. Bouman, 271 N.W. 256, 132 Neb. 67.

69. N.Y.—People ex rel. Pennsylvania Tunnel & Terminal R. Co. v. Miller, 26 N.Y.S.2d 232.

70. N.Y.—People ex rel. Pennsylvania Tunnel & Terminal R. Co. v. Miller, supra.

71. Fla.—Yowell v. Rogers, 175 So. 772, 128 Fla. 881.

72. Fla.—Yowell v. Rogers, supra.

73. Wis.—Buildings Development Co. v. City of Milwaukee, 274 N. W. 298, 225 Wis. 357.

Methods held not improper

(1) Where assessor first fixed value of the property as an entirety and then fixed value of the land and allocated the balance to the building, the method used was proper.—

Appeal of John Wanamaker, Philadelphia, Pa., 63 A.2d 349.

(2) Under statute requiring assessment of land and improvements separately, use by municipal tax assessors of per cents of increase in valuation of land based on location in respect of street corners and alleys was not improper as to taxpayers who suggested no proper separate valuation of land, but contended that method used had no bearing on sale value of land, on which office buildings were located.—Buildings Development Co. v. City of Milwaukee, 274 N.W. 298, 225 Wis. 357.

74. N.J.—Jersey City v. Seaboard Terminal & Refrigeration Co., 17 A.2d 577, 19 N.J.Misc. 178.

75. N.J.—Jersey City v. Seaboard Terminal & Refrigeration Co., supra.

76. Mo.—State v. Young, 167 S.W. 995, 259 Mo. 52.

77. Mo.—State v. Young, supra.

78. Ky.—Covington v. Carroll, 108 S.W. 295, 32 Ky.L. 1255. 44 C.J. p 1326 note 11.

79. N.Y.—People v. Brady, 173 N. Y.S. 125, 184 App.Div. 901.

80. Ala.—Johnson v. State ex rel. City of Birmingham, 17 So.2d 662, 245 Ala. 499.

ment of uniformity, uniformity will be given effect,⁸¹ in order to reduce an assessment of land below its actual value in the interest of equality there must be proof by a preponderating weight of the evidence of a fixed ratio of assessment to market value, uniformly applied throughout the taxing district,⁸² and land may not be revalued for tax purposes merely because other land is assessed still higher and still other land too low.⁸³ While a uniformly high valuation usually will not harm a taxpayer if the overassessment is general throughout the municipality and is uniformly determined by applying the same standard of measuring value,⁸⁴ a uniformly high assessment above market values cannot be sustained if it is the means of evading a statutory requirement that the levy, in terms of millage based on actual values, be kept within stated limits.⁸⁵

Aggregate valuation of several properties. Although generally a taxpayer is entitled to have each separate tract or parcel of land separately valued and assessed,⁸⁶ where two or more tracts or parcels are occupied and used together by the property owner for a single purpose their separate identities become merged into one and they may be valued and assessed in solido;⁸⁷ and it has been held that, where there is no statutory definition of the lot or parcel of land that is the lawful unit for purposes of taxation, contiguous parcels of land, although divided on a plan, may be assessed separately or as a unit.⁸⁸ Under some circumstances the rule may even apply to contiguous lots used for a single purpose even though such lots are owned by differ-

ent persons.⁸⁹ Certainly where the statute or charter authorizes it the value of several lots may be lumped and assessment made for the aggregate amount,⁹⁰ even though they are not adjoining lots or in any way connected with each other,⁹¹ provided only the lots are properly designated.⁹²

Conclusiveness of valuation. Under a statute or charter provision to that effect, a valuation by the assessors is conclusive on a taxpayer, subject only to his right of appeal;⁹³ and in some jurisdictions an assessment in the prescribed mode, without fraud or collusion, is conclusive on the question of value as far as the courts are concerned.⁹⁴

b. Taxes on Property Other than Realty

Methods of evaluation for purposes of taxes on property other than realty, such as taxes on personal property, taxes based on corporate or company capital, or taxes on bank stock, depend on charter or statutory provisions and the relevant facts and circumstances.

Methods of determining the value of property for purposes of taxes on property other than realty depend on charter or statutory provisions⁹⁵ and the relevant facts and circumstances.⁹⁶ In ascertaining the value of personal property, every fact and circumstance bearing on the cost or value must be considered.⁹⁷ Under a statute so providing, personal property consisting of stocks in trade and materials used in manufacture and completed products must be valued at the average of such personalty located in the municipality during the assessment period preceding the date as of which the assessment is made.⁹⁸ Under a statute imposing a personal property tax, a taxpayer may be entitled

81. Pa.—Appeal of City of Allentown, 24 A.2d 109, 147 Pa.Super. 885.

82. Pa.—In re Phinney, 53 A.2d 889, 161 Pa.Super. 101.

Evidence held not to warrant reduction

Pa.—In re Phinney, supra.

Assessment reduced for uniformity

Pa.—Appeals of Matson, 33 A.2d 464, 152 Pa.Super. 424.

83. Pa.—In re Phinney, 53 A.2d 889, 161 Pa.Super. 101.

84. Pa.—Appeal of McConomy, 40 A.2d 99, 156 Pa.Super. 264.

85. Pa.—Appeal of McConomy, supra—Appeal of Snyder, Com.Pl., 21 Lehigh Co Leg.J. 351.

86. Tex.—City of Edinburg v. Magee, Civ.App., 97 S.W.2d 983.

87. Tex.—City of Edinburg v. Magee, supra.

88. Mass.—City of Boston v. Boston Port Development Co., 30 N.E.2d 896, 308 Mass. 72, 133 A.L.R. 515.

89. N.Y.—People ex rel. Bray et al. v. Golder, 83 N.Y.S.2d 186.

One building on several lots

N.Y.—People ex rel. Bray et al. v. Golder, supra.

90. N.J.—State v. Platt, 24 N.J.Law 108.

N.Y.—People v. Yonkers, 127 N.E. 593, 229 N.Y. 1.

91. Me.—Rockland v. Ulmer, 24 A. 949, 84 Me. 503.

92. N.J.—State v. Platt, 24 N.J.Law 108.

93. Ga.—Swinson v. City of Dublin, 173 S.E. 93, 178 Ga. 323.

Right of appeal see infra §§ 2054–2057.

94. Tex.—Rachford v. City of Port Neches, Civ.App., 96 S.W.2d 167, error refused.

44 C.J. p 1328 note 60.
Scope of judicial review see infra § 2057 h.

95. N.J.—Bankers Indemnity Ins. Co. v. City of Newark, 15 A.2d 123, 18 N.J.Misc. 523.

96. Ga.—Consolidated Distributors v. City of Atlanta, 20 S.E.2d 421, 193 Ga. 853, certiorari denied 63 S.Ct. 61, 317 U.S. 665, 87 L.Ed. 532.

97. Ga.—Consolidated Distributors v. City of Atlanta, supra.

Mich.—S. S. Kresge Co. v. City of Detroit, 268 N.W. 740, 276 Mich. 565, 107 A.L.R. 1258.

Inclusion of federal excise taxes

Ga.—Consolidated Distributors v. City of Atlanta, 20 S.E.2d 421, 193 Ga. 853, certiorari denied 63 S.Ct. 61, 317 U.S. 662, 87 L.Ed. 532.

98. N.J.—General Motors Corporation v. State Board of Tax Appeals, 16 A.2d 632, 126 N.J.Law 574.

Salability of manufacturing materials

N.J.—General Motors Corporation v. State Board of Tax Appeals, supra.

Cost to taxpayer as fair market value

N.J.—General Motors Corporation v.

to deductions from the assessed value of his personal property for debts bona fide due and owing to creditors residing in the state, provided he makes a proper claim in accordance with the requirements prescribed by the statute.⁹⁹ However, it has been held that foreign corporations subject to a tax on its capital employed in the state in doing business are not entitled to make such deductions.¹

Where legacies have matured by the lapse of time from the date of the testator's death, they are assessable against the legatees under a statute imposing a personal property tax;² and the amount of such matured legacies may be deducted by the testator's estate from its personal estate under a statute authorizing the deduction of debts owing to creditors residing in the state.³

Taxes based on corporate or company capital. Under the provisions of a statute imposing a personal property tax on fire and stock insurance companies, in order to determine the taxable capital stock and accumulated surplus of such insurance companies the municipality must first determine the true value of the gross assets of the company⁴ and then deduct therefrom such debts and liabilities as are certain and definite both as to obligation and amount as of the assessing date,⁵ its assessed real estate,⁶ and assets which are exempt or nontaxable

under the tax statutes.⁷ Under a statute imposing a tax on certain corporations, and providing for deductions for exempt property, etc., and for real estate, the value of the franchise of a railroad corporation is not deductible as the franchise is not land or a part thereof.⁸ Under the provisions of a statute providing for a tax on bank stock, the assessor's method of fixing the value of the taxable stock must conform to constitutional or statutory provisions.⁹

c. Particular Methods of, and Factors in, Valuation

Generally the assessment of property must be made on the basis of actual market value or cash value, to be determined by the assessor in the light of all relevant facts. Depending on the circumstances, various methods may be used and factors considered in determining value.

The basis on which property should be valued for municipal tax purposes depends on the terms of the ordinance, or constitutional, statutory, or charter provisions;¹⁰ and, where there is a conflict between an ordinance and a provision of the charter as to the amount at which property should be valued for assessment purposes, the charter provision ordinarily is controlling.¹¹ In general, the assessment must be made on the basis of actual market value¹² or the assessment must be made on the

State Board of Tax Appeals, *supra*.

99. N.J.—City of Newark v. Household Finance Corporation, 12 A.2d 899, 18 N.J.Misc. 295.

Statement as to time debt incurred
N.J.—City of Newark v. Hahne & Co., 23 A.2d 297, 20 N.J.Misc. 39.

1. N.J.—City of Newark v. Household Finance Corporation, 12 A.2d 899, 18 N.J.Misc. 295.

2. N.J.—City of Newark v. Lehman's Estate, 14 A.2d 792, 18 N.J. Misc. 510.

3. N.J.—City of Newark v. Lehman's Estate, *supra*.

4. N.J.—Bankers Indemnity Ins. Co. v. City of Newark, 15 A.2d 123, 18 N.J.Misc. 523—American Ins. Co. v. City of Newark, 15 A.2d 119, 18 N.J.Misc. 516—Franklin Mortgage & Title Guaranty Co. v. City of Newark, 11 A.2d 410, 18 N.J.Misc. 34.

Items held deductible or not assets
N.J.—American Ins. Co. v. City of Newark, 15 A.2d 119, 18 N.J.Misc. 516—Commercial Casualty Ins. Co. v. City of Newark, 12 A.2d 156, 18 N.J.Misc. 233.

Items held assets and not deductible
N.J.—Commercial Casualty Ins. Co. v. City of Newark, *supra*.

5. N.J.—Commercial Casualty Ins. Co. v. City of Newark, *supra*.

Deductions held allowable

N.J.—American Ins. Co. v. City of Newark, 15 A.2d 119, 18 N.J.Misc. 516—Franklin Mortgage & Title Guaranty Co. v. City of Newark, 11 A.2d 410, 18 N.J.Misc. 34.

Deductions held not allowable

N.J.—American Ins. Co. v. City of Newark, 15 A.2d 119, 18 N.J.Misc. 516.

6. N.J.—Bankers Indemnity Ins. Co. v. City of Newark, 15 A.2d 123, 18 N.J.Misc. 523—American Ins. Co. v. City of Newark, 15 A.2d 119, 18 N.J.Misc. 516—Commercial Casualty Ins. Co. v. City of Newark, 12 A.2d 156, 18 N.J.Misc. 233—Franklin Mortgage & Title Guaranty Co. v. City of Newark, 11 A.2d 410, 18 N.J.Misc. 34.

7. N.J.—Bankers Indemnity Ins. Co. v. City of Newark, 15 A.2d 123, 18 N.J.Misc. 523—American Ins. Co. v. City of Newark, 15 A.2d 119, 18 N.J.Misc. 516—Commercial Casualty Ins. Co. v. City of Newark, 12 A.2d 156, 18 N.J.Misc. 233—Firemen's Ins. Co. v. City of Newark, 11 A.2d 726, 18 N.J.Misc. 180—Franklin Mortgage & Title Guaranty Co. v. City of Newark, 11 A.2d 410, 18 N.J.Misc. 34.

8. N.Y.—People v. New York Tax

Commissioners, 10 N.E. 437, 104 N. Y. 210.

9. Iowa—Iowa-Des Moines Nat. Bank & Trust Co. v. City of Des Moines, 288 N.W. 408, 227 Iowa 372.

Fair cash value

Ky.—Board of Sup'rs of Somerset v. Farmers Nat. Bank of Somerset, 168 S.W.2d 371, 293 Ky. 157.

10. Fla.—Tampa Theatre Bldg. v. City of Tampa, 193 So. 61, 141 Fla. 299.

11. Fla.—Tampa Theatre Bldg. v. City of Tampa, *supra*.

12. Pa.—Appeal of Secretary of Banking, 49 A.2d 337, 355 Pa. 226. 44 C.J. p 1326 note 13.

"Actual value" as meaning market value

Neb.—Eppley Hotels Co. v. City of Lincoln, 293 N.W. 234, 138 Neb. 347.

Pa.—Vollmer v. City of Philadelphia, 38 A.2d 266, 350 Pa. 223—Appeal by Borough of Millbourne, 198 A. 49, 329 Pa. 321—In re Phinney, 53 A.2d 889, 161 Pa.Super. 101—Appeal of Rohrbach, 40 A.2d 142, 156 Pa.Super. 283—Appeal of McCconomy, 40 A.2d 99, 156 Pa.Super. 264—Appeals of Matson, 33 A.2d 464, 152 Pa.Super. 424—Appeal of City of Allentown, 24 A.2d 109, 147 Pa. Super. 385—Reed Mfg. Co. v. City

basis of cash value.¹³ "Market value" has been defined as the price which a purchaser willing but not obliged to buy, would pay an owner, willing but not obliged to sell, taking into consideration all uses to which the property is adapted and might in reason be applied;¹⁴ and "cash value" has been defined as the usual selling price at the place where the property shall be at the time of assessment, being the price which could be obtained at private sale, and not at forced or auction sale.¹⁵ A statute providing that a municipality shall lay its assessments of real property "at the full value thereof," refers to value to be determined by arriving at a calculation of what such property would sell for under ordinary circumstances.¹⁶

Where the cash or market value of property is not readily ascertainable, the true and actual value of the property must be determined by the consideration of some other method or methods of valuation;¹⁷ and the fact that the final determination of the value of the property was so reached does not invalidate the result, provided all appropriate elements of value and methods of ascertaining value

were considered.¹⁸ This rule applies where there have been no sales of similar property in many years;¹⁹ and in such cases the "usual selling price" test is merely a guide rather than the controlling factor.²⁰ The rule also applies in the case of property which could not conceivably be put to any use or have any salability or value except for the one purpose for which it was constructed.²¹

The ascertainment of the value of property for taxation purposes is not simply a matter of formula,²² but depends on the exercise of the judgment of the assessing officer,²³ on a proper consideration of all relevant facts,²⁴ although such facts may properly include a formula based on a mathematical calculation,²⁵ the assessor using his judgment as to the extent to which it shall be employed.²⁶ Under a constitutional provision that assessments shall be made at the actual or cash value of the property, statutes are held unconstitutional and void which direct the assessors to take into account certain elements which enter into the actual value of the property and to disregard other elements which also have a bearing on actual value²⁷ or which direct

of Erie, Com.Pl., 20 Erie Co. 308—Appeal of Baldwin, Com.Pl., 20 Erie Co. 98—Appeal of Snyder, Com.Pl., 21 Lehigh Co.Leg J. 351—Appeal of Ritter, Com.Pl., 19 Lehigh Co.Leg J. 60.

13. Fla.—Tampa Theatre Bldg. v. City of Tampa, 193 So. 61, 141 Fla. 299.

Mich.—22 Charlotte, Inc., v. City of Detroit, 293 N.W. 647, 294 Mich. 275—Saltonstall v. Cheboygan, 93 N.W. 246, 132 Mich. 196.

"True cash value" as meaning market value

Pa.—Appeals of Matson, 33 A.2d 464, 152 Pa.Super. 424—Appeal of Phipp, Com.Pl., 86 Pittsb.Leg J. 161.

14. Fla.—City of Tampa v. Colgan, 163 So. 577, 121 Fla. 218

N.Y.—People ex rel. Pennsylvania Tunnel & Terminal R. Co. v. Miller, 26 N.Y.S.2d 232—People ex rel. Mortgage Commission v. Miller, 6 N.Y.S.2d 677.

Pa.—Vollmer v. City of Philadelphia, 38 A.2d 266, 269, 350 Pa. 223—Appeal by Borough of Millbourne, 198 A. 49, 329 Pa. 321—In re Phinney, 53 A.2d 889, 161 Pa.Super. 101—Appeal of Rohrbach, 40 A.2d 142, 156 Pa.Super. 283—Appeal of McCornomy, 40 A.2d 99, 156 Pa.Super. 264—Appeal of Stevens, 18 Pa. Dist. & Co. 698—Appeal of Baldwin, Com.Pl., 20 Erie Co. 98—Appeal of Secretary of Banking, Com.Pl., 29 Erie Co. 61.

15. Mich.—22 Charlotte, Inc., v. City of Detroit, 293 N.W. 647, 294 Mich. 275.

16. N.Y.—People ex rel. Hotel St. George Corporation v. Lilly, 45 N.Y.S.2d 599, reversed on other grounds 49 N.Y.S.2d 374, 268 App. Div. 830, reversed on other grounds 60 N.E.2d 30, 293 N.Y. 898.

17. Conn.—Eitington v. Town and City of Stamford, 34 A.2d 878, 130 Conn. 418—Lomas & Nettleton Co. v. City of Waterbury, 188 A. 433, 122 Conn. 228.

N.Y.—People ex rel. Union Bag & Paper Corporation v. Fitzgerald, 2 N.Y.S.2d 290, 166 Misc. 237.

18. Conn.—Lomas & Nettleton Co. v. City of Waterbury, 188 A. 433, 122 Conn. 228.

19. Conn.—Lomas & Nettleton Co. v. City of Waterbury, supra. Mich.—22 Charlotte, Inc., v. City of Detroit, 293 N.W. 647, 294 Mich. 275.

20. Mich.—22 Charlotte, Inc., v. City of Detroit, supra.

21. U.S.—City of Detroit v. Detroit & Canada Tunnel Co., C.C.A. Mich., 92 F.2d 838.

Tunnel

U.S.—City of Detroit v. Detroit & Canada Tunnel Co., supra.

22. Pa.—Vollmer v. City of Philadelphia, 38 A.2d 266, 350 Pa. 223.

Practical problem

Pa.—Vollmer v. City of Philadelphia, supra.

23. Conn.—Lomas & Nettleton Co. v. City of Waterbury, 188 A. 433, 122 Conn. 228.

44 C.J. p 1326 note 15.

Determination by court

Determination of valuation of

property for taxation by court is expression of court's opinion reached by weighing opinions of experts in light of all circumstances in evidence bearing on value and court's own general knowledge of elements going to establish value.—Lomas & Nettleton Co. v. City of Waterbury, supra.

24. N.J.—City of Plainfield v. State Board of Tax Appeals, 19 A.2d 815, 126 N.J.Law 407.

N.Y.—People ex rel. Hotel St. George Corporation v. Lilly, 45 N.Y.S.2d 599, reversed on other grounds 49 N.Y.S.2d 374, 268 App.Div. 830, reversed on other grounds 60 N.E.2d 30, 293 N.Y. 898—People ex rel. Pennsylvania Tunnel & Terminal R. Co. v. Miller, 26 N.Y.S.2d 232—People ex rel. Guaranty Trust Co. of New York v. Cook, 18 N.Y.S.2d 965, affirmed People ex rel. Longken, Inc. v. Dooley, 27 N.Y.S.2d 999, 261 App.Div. 993.

Pa.—Reed Mfg. Co. v. City of Erie, Com.Pl., 20 Erie Co. 308.

Wis.—Buildings Development Co. v. City of Milwaukee, 274 N.W. 298, 225 Wis. 357.

44 C.J. p 1326 note 15.

Factors which motivated sales

Mich.—22 Charlotte, Inc., v. City of Detroit, 293 N.W. 647, 294 Mich. 275.

25. Pa.—Groman v. Bethlehem, 29 Pa.Dist. 779.

26. Pa.—Groman v. Bethlehem, supra.

27. Mich.—Saltonstall v. Cheboygan, 93 N.W. 246, 132 Mich. 196. 44 C.J. p 1326 note 20.

that unplatted lands shall not be assessed otherwise than by the acre as agricultural lands.²⁸

Methods which may be used, or factors which may be considered, in determining the value of property for municipal tax purposes include sales of, or assessment on, comparable property in a proper case,²⁹ and book value, that is, the value at which the property is carried on the taxpayer's books.³⁰ In determining the value of property it is proper to consider the expense which would be involved in removing an obsolete building which is a liability instead of an asset.³¹ Where a property is in liquidation its scrap or salvage value may be considered.³²

Income or rental value; capitalization thereof. It has been held that the income of the assessed property or the capitalization of such income, although not conclusive, may be used, or is a fac-

tor which may be considered, in determining the taxable value of the property,³³ and this is also true of the earning capacity³⁴ or the rental value³⁵ of the property. The rental value of premises is what they would have been worth in the market if the lessor had been free and able to rent them;³⁶ but it is not necessarily measured by the actual rent received,³⁷ although that may be some evidence of the rental value.³⁸

Capitalization of the net earnings of the enterprise housed in the property, as distinguished from the capitalization of the rental value of the building, does not determine the true value of the building for assessment purposes,³⁹ particularly where the net earnings on which it is suggested that the value be computed is determined by making extraordinary deductions from the gross earnings of the building⁴⁰ or where there are other extraordi-

28. Mo.—State v. O'Brien, 1 SW 763, 89 Mo. 631.

29. Pa.—In re Nos. 1340 to 1348, Inc., Chestnut St., 64 A.2d 769, 361 Pa. 231—Reed Mfg. Co. v. City of Erie, Com.Pl., 20 Erie Co. 308.

Other properties held not comparable Pa.—Appeal of Carnegie, 53 A.2d 425, 357 Pa. 138.

30. N.J.—Jersey City v. Seaboard Terminal & Refrigeration Co., 17 A.2d 577, 19 N.J.Misc. 178—Jersey City v. Harborside Warehouse Co., 17 A.2d 572, 19 N.J.Misc. 222, certiorari dismissed Harborside Warehouse Co. v. Jersey City, 25 A.2d 291, 128 N.J.Law 263, affirmed 28 A.2d 91, 129 N.J.Law 62, certiorari denied 63 S.Ct. 763, four cases, 318 U.S. 769, 87 L.Ed. 1140.

31. Neb.—Nebraska State Building Corporation v. City of Lincoln, 290 N.W. 421, 137 Neb. 535.

32. N.Y.—People ex rel. New York, O. & W. Ry. Co. v. Rosenheim, 84 N.Y.S.2d 251, 274 App.Div. 396.

33. U.S.—City of Detroit v. Detroit & Canada Tunnel Co., C.C.A.Mich., 92 F.2d 833.

Conn.—Lomas & Nettleton Co. v. City of Waterbury, 188 A. 433, 122 Conn. 228.

N.Y.—People ex rel. Parklin Operating Corporation v. Miller, 38 N.E. 2d 465, 287 N.Y. 126—People ex rel. Manhattan Square Beresford v. Sexton, 29 N.E.2d 654, 284 N.Y. 145, motion granted 31 N.E.2d 204, 284 N.Y. 737.

Pa.—In re Nos. 1340 to 1348, Inc., Chestnut St., 64 A.2d 769, 361 Pa. 231.

Commercial building

N.Y.—People ex rel. Mortgage Commission v. Miller, 6 N.Y.S.2d 677.

Capitalization of stabilized net income

Conn.—Lomas & Nettleton Co. v. City of Waterbury, 188 A. 433, 122 Conn. 228.

Income, other than rent, derived from the building, must also be considered.—People ex rel. Clinton Trust Co. v. Sexton, 18 N.Y.S.2d 19, 258 App.Div. 1082, reversed on other grounds 43 N.E.2d 78, 288 N.Y. 678.

Valuation held excessive

N.Y.—People ex rel. Mortgage Commission v. Miller, 6 N.Y.S.2d 677.

34. U.S.—City of Detroit v. Detroit & Canada Tunnel Co., C.C.A.Mich., 92 F.2d 833.

Conn.—Lomas & Nettleton Co. v. City of Waterbury, 188 A. 433, 122 Conn. 228.

Iowa—Trustees of Flynn's Estate v. Board of Review of City of Des Moines, 286 N.W. 483, 226 Iowa 1353.

35. Pa.—Appeal by Borough of Millbourne, 198 A. 49, 329 Pa. 321—Appeals of Matson, 33 A.2d 464, 152 Pa.Super. 424.

36. N.Y.—People ex rel. Mortgage Commission v. Miller, 6 N.Y.S.2d 677.

37. N.Y.—People ex rel. Mortgage Commission v. Miller, supra.

Pa.—Appeals of Matson, 33 A.2d 464, 152 Pa.Super. 424.

Rental value of vacant space

N.Y.—People ex rel. Clinton Trust Co. v. Sexton, 18 N.Y.S.2d 19, 258 App.Div. 1082, reversed on other grounds 43 N.E.2d 78, 288 N.Y. 678.

Earnings during boom years

Earnings derived from operation of hotel from 1939 to 1942 were not within phrase "ordinary circumstances" in code requiring taxable

full value of realty to be determined by arriving at what such property would sell for under ordinary circumstances.—People ex rel. Hotel St. George Corporation v. Lilly, 45 N.Y. S.2d 599, reversed on other grounds 49 N.Y.S.2d 374, 268 App.Div. 830, reversed on other grounds 60 N.E.2d 30, 293 N.Y. 898.

38. N.Y.—People ex rel. Mortgage Commission v. Miller, 6 N.Y.S.2d 677.

39. N.J.—Jersey City v. Seaboard Terminal & Refrigeration Co., 17 A.2d 577, 19 N.J.Misc. 178—Jersey City v. Harborside Warehouse Co., 17 A.2d 572, 19 N.J.Misc. 222, certiorari dismissed Harborside Warehouse Co. v. Jersey City, 25 A.2d 291, 128 N.J.Law 263, affirmed 28 A.2d 91, 129 N.J.Law 62, certiorari denied 63 S.Ct. 763, four cases, 318 U.S. 769, 87 L.Ed. 1140. Pa.—Continental Rubber Works v. City of Erie, Com.Pl., 20 Erie Co. 305.

40. N.J.—Jersey City v. Harborside Warehouse Co., 17 A.2d 572, 19 N.J.Misc. 222, certiorari dismissed Harborside Warehouse Co. v. Jersey City, 25 A.2d 291, 128 N.J.Law 263, affirmed 28 A.2d 91, 129 N.J.Law 62, certiorari denied 63 S.Ct. 763, four cases, 318 U.S. 769, 87 L.Ed. 1140.

Deductions

N.J.—Jersey City v. Seaboard Terminal & Refrigeration Co., 17 A.2d 577, 19 N.J.Misc. 178—Jersey City v. Harborside Warehouse Co., 17 A.2d 572, 19 N.J.Misc. 222, certiorari dismissed Harborside Warehouse Co. v. Jersey City, 25 A.2d 291, 128 N.J.Law 263, affirmed 28 A.2d 91, 129 N.J.Law 62, certiorari denied 63 S.Ct. 763, four cases, 318 U.S. 769, 87 L.Ed. 1140.

nary circumstances;⁴¹ but, on the other hand, it has been held that the assessing officers may not go beyond the productive use of the realty and penalize business acumen and enterprise.⁴² In evaluating the local plant of a taxpayer also having plants elsewhere, the assessor should appraise the lands and buildings as he finds them, giving no consideration whatever to the question of the profit or loss made in any particular plant, mill, or building.⁴³ Where a commercial property is neither a paying property nor in liquidation it is proper to consider earnings as a criterion for determining its value;⁴⁴ and the property is required to be assessed each year on the basis of its then value and income rather than on the basis of an average income over a period of years.⁴⁵

Cost of reproduction; depreciation; obsolescence. The cost of reproduction of the assessed building, less depreciation and obsolescence, although not itself conclusive, may be used, or is a factor which may be considered, in determining the taxable value

of property;⁴⁶ the weight to be given to depreciated reproduction cost depending on the facts of the particular case;⁴⁷ but it has also been held that it is improper to consider the reproduction cost of a building for any purpose⁴⁸ and that it is not of controlling effect.⁴⁹ It has been held that the result obtained by computing the reproduction cost of a building or improvement and deducting depreciation determines, in the absence of extraordinary circumstances, the maximum value which may be placed thereon for tax purposes,⁵⁰ although other methods of assessing value may be weighed and considered;⁵¹ but such a rule of valuation may be utilized as the sole test only in the case of a paying property.⁵² The assessing officers may not consider the obsolescence of a building as a ground for reduction of the valuation unless it is shown that the building has no usable value for any purpose,⁵³ since it is insufficient merely to show that the building is unsuited to purposes other than that for which it was constructed.⁵⁴

41. N.J.—Jersey City v. Harborside Warehouse Co., 17 A.2d 572, 19 N.J. Misc. 222, certiorari dismissed Harborside Warehouse Co. v. Jersey City, 25 A.2d 291, 128 N.J. Law 263, affirmed 28 A.2d 91, 129 N.J. Law 62, certiorari denied 63 S.Ct. 763, four cases, 318 U.S. 769, 87 L.Ed. 1140.

Full rental value not realized

N.J.—Jersey City v. Harborside Warehouse Co., 17 A.2d 572, 19 N.J. Misc. 222, certiorari dismissed Harborside Warehouse Co. v. Jersey City, 25 A.2d 291, 128 N.J. Law 263, affirmed 28 A.2d 91, 129 N.J. Law 62, certiorari denied 63 S.Ct. 763, four cases, 318 U.S. 769, 87 L.Ed. 1140.

42. N.Y.—People ex rel. Hotel St. George Corporation v. Lilly, 45 N.Y.S.2d 599, reversed on other grounds 49 N.Y.S.2d 374, 268 App. Div. 830, reversed on other grounds 60 N.E.2d 30, 293 N.Y. 898.

43. N.Y.—People ex rel. Union Bag & Paper Corporation v. Fitzgerald, 2 N.Y.S.2d 290, 166 Misc. 237.

44. N.Y.—People ex rel. New York, O. & W. Ry. Co. v. Rosenheim, 84 N.Y.S.2d 251, 274 App. Div. 396.

Actual earnings; mismanagement

N.Y.—People ex rel. New York, O. & W. Ry. Co. v. Rosenheim, supra.

45. N.Y.—People ex rel. New York, O. & W. Ry. Co. v. Rosenheim, supra.

46. Conn.—Eltington v. Town and City of Stamford, 34 A.2d 878, 130 Conn. 418—Lomas & Nettleton Co. v. City of Waterbury, 188 A. 433, 122 Conn. 228.

N.Y.—People ex rel. New York, O. &

W. Ry. Co. v. Rosenheim, 84 N.Y.S. 2d 251, 274 App. Div. 396—People ex rel. Union Bag & Paper Corporation v. Fitzgerald, 2 N.Y.S.2d 290, 166 Misc. 237—People ex rel. Pennsylvania Tunnel & Terminal R. Co. v. Miller, 26 N.Y.S.2d 232.

Relationship to market value

N.J.—Jersey City v. Harborside Warehouse Co., 17 A.2d 572, 19 N.J. Misc. 222, certiorari dismissed Harborside Warehouse Co. v. Jersey City, 25 A.2d 291, 128 N.J. Law 263, affirmed 28 A.2d 91, 129 N.J. Law 62, certiorari denied 63 S.Ct. 763, four cases, 318 U.S. 769, 87 L. Ed. 1140.

Fairness of result as factor

Mich.—22 Charlotte, Inc., v. City of Detroit, 293 N.W. 647, 294 Mich. 275.

"Rule of thumb" methods of municipal assessors in computing reproduction cost of buildings on basis of cubical contents were not improper, especially under supporting testimony of competent engineers.—Buildings Development Co. v. City of Milwaukee, 274 N.W. 298, 225 Wis. 357.

Cost less depreciation as sole basis held error

U.S.—City of Detroit v. Detroit & Canada Tunnel Co., C.C.A. Mich., 92 F.2d 833.

47. N.J.—Jersey City v. Seaboard Terminal & Refrigeration Co., 17 A.2d 577, 19 N.J. Misc. 178—Jersey City v. Harborside Warehouse Co., 17 A.2d 572, 19 N.J. Misc. 222, certiorari dismissed Harborside Warehouse Co. v. Jersey City, 25 A.2d 291, 128 N.J. Law 263, affirmed

28 A.2d 91, 129 N.J. Law 62, certiorari denied 63 S.Ct. 763, four cases, 318 U.S. 769, 87 L.Ed. 1140.

48. Pa.—Appeal by Borough of Millbourne, 198 A. 49, 329 Pa. 321—Appeal of Metropolitan Edison Co., 161 A. 303, 307 Pa. 401—Reed Mfg. Co. v. City of Erie, Com Pl. 20 Erie Co. 308.

49. Pa.—In re Nos. 1840 to 1848, Inc., Chestnut St., 64 A.2d 769, 361 Pa. 231—General Electric Co. v. City of Erie, 168 A. 534, 110 Pa. Super. 206.

50. N.Y.—People ex rel. Parklin Operating Corporation v. Miller, 38 N.E.2d 465, 287 N.Y. 126—People ex rel. Manhattan Square Beresford v. Sexton, 29 N.E.2d 654, 284 N.Y. 145, motion granted 31 N.E.2d 204, 284 N.Y. 737—People ex rel. New York, O. & W. Ry. Co. v. Rosenheim, 84 N.Y.S.2d 251, 274 App. Div. 396—People ex rel. Pennsylvania Tunnel & Terminal R. Co. v. Miller, 26 N.Y.S.2d 232.

51. N.Y.—People ex rel. Parklin Operating Corporation v. Miller, 38 N.E.2d 465, 287 N.Y. 126—People ex rel. Manhattan Square Beresford v. Sexton, 29 N.E.2d 654, 284 N.Y. 145, motion granted 31 N.E. 2d 204, 284 N.Y. 737.

52. N.Y.—People ex rel. New York, O. & W. Ry. Co. v. Rosenheim, 84 N.Y.S.2d 251, 274 App. Div. 396.

53. N.Y.—People ex rel. Union Bag & Paper Corporation v. Fitzgerald, 2 N.Y.S.2d 290, 166 Misc. 237.

54. N.Y.—People ex rel. Union Bag & Paper Corporation v. Fitzgerald, supra.

Sale price. The sale price of property, although an item to be considered in fixing its valuation for municipal tax purposes,⁵⁵ does not conclusively establish that price as the fair value of the property,⁵⁶ or its actual or market value,⁵⁷ or the "usual selling price."⁵⁸

Valuation placed on property by taxpayer. The valuations placed on the taxpayer's property in rendition sheets to the city, which were signed or prepared by the taxpayer⁵⁹ or his agent,⁶⁰ are, in the absence of fraud or mistake, binding on the taxpayer, who cannot thereafter complain that the valuations are too high. The valuation placed on the property by the taxpayer for purposes of receiving damages for the condemnation of a portion of the property may be taken into consideration in making an assessment.⁶¹

d. Use of Town, County, or State Assessment

(1) In general

(2) Property of public service corporations; railroads

(1) In General

A municipal corporation may be required to use the town, county, or state assessment roll for its own tax

purposes, or may have the right to make an independent assessment, with the use of such outside assessment roll as optional.

Under some constitutional, statutory, or charter provisions municipal authorities need not make an independent assessment but may use the town, county, or state assessment roll,⁶² even though there has been a failure by the assessors to comply with the statutory requirement that the use of such assessment roll shall be directed by the local council.⁶³ In some jurisdictions such provisions are mandatory, rather than permissive;⁶⁴ and, where the provision is contained in the constitution, a statute authorizing an independent assessment by city officers is in violation thereof.⁶⁵ In other jurisdictions, however, such provisions are not compulsory,⁶⁶ and the municipal corporation may make its own assessment rolls on its own independent valuations,⁶⁷ as long as the general form of the rolls used in the county is followed and the fundamental principles required by the general ad valorem revenue laws are observed.⁶⁸

Where there is no mandatory provision for the use of town, county, or state assessment rolls, the municipality itself may nevertheless adopt such rolls to the extent that it deems it expedient.⁶⁹

55. Pa.—In re Nos. 1340 to 1348, Inc., Chestnut St., 64 A.2d 769, 361 Pa. 231—Appeal of Secretary of Banking, 49 A.2d 337, 355 Pa. 226 —Appeal of Herold, 54 A.2d 98, 161 Pa.Super. 221.

56. Pa.—Appeal of Secretary of Banking, 49 A.2d 337, 355 Pa. 226.

Taxpayer as not "willing purchaser"

Where taxpayer purchased realty at private sale, and it did not appear that property was generally on the market or that other solicitation had been made, taxpayer was not a "willing purchaser" in complete sense of that term as used as basis for municipal tax assessments, and contract price did not conclusively establish fair value of property for tax assessment purposes.—City of Plainfield v. State Board of Tax Appeals, 19 A.2d 815, 126 N.J.Law 407.

57. Pa.—Appeal of Herold, 54 A.2d 98, 161 Pa.Super. 221—Weihe v. City of Connellsville, Com.Pl., 6 Fay.L.J. 93.

Sale by receiver in liquidation

Pa.—Appeal of Secretary of Banking, 49 A.2d 337, 355 Pa. 226.

Rule embodied in statute

Pa.—Appeal of City of Allentown, 24 A.2d 109, 147 Pa.Super. 385.

58. Mich.—22 Charlotte, Inc., v. City of Detroit, 293 N.W. 647, 294 Mich. 275.

The bargain price at which a taxpayer purchased a piece of property

is not controlling evidence of the usual selling price of the property at private sale.—22 Charlotte, Inc., v. City of Detroit, supra.

59. Tex.—State v. Houser, 156 S.W. 2d 968, 138 Tex. 28—Hickson v. City of Van Alstyne, Civ.App., 195 S.W.2d 571.

60. Tex.—Mississippi Valley Life Ins. Co. v. City of El Paso, Civ. App., 131 S.W.2d 191.

61. Conn.—Cohn v. City and Town of Hartford, 25 A.2d 69, 128 Conn. 669.

Increase of assessment held justified Conn.—Cohn v. City and Town of Hartford, supra.

62. N.Y.—People ex rel. International Hydro-Electric Corporation v. Podvin, 14 N.Y.S.2d 476, 171 Misc. 785.

44 C.J. p 1326 note 23.

Objects of provision

"The provision in the statute in respect to copying the county assessment rolls has two objects: First, to provide an expeditious and economical method for making municipal assessments; and, second, to avail of the opinions and conclusions of the county taxing authorities by way of assistance in the making of said municipal assessments."—City of Greenwood v. Humphreys, 127 So. 694, 695, 157 Miss. 879, followed in City of Greenwood v. Gwin, 127 So. 696. Suggest-

tion of error overruled City of Greenwood v. Humphreys, 128 So. 885, 157 Miss 879

63. Me.—Paul v. Huse, 92 A. 520, 112 Me. 449.

64. Va.—West v. Newport News, 51 S.E. 206, 104 Va. 21.
44 C.J. p 1326 note 25.

65. La.—McCune v. White, 68 So. 621, 137 La. 310.

66. N.Y.—People ex rel. International Hydro-Electric Corporation v. Podvin, 14 N.Y.S.2d 476, 171 Misc. 785.

Construction in connection with prior statute

N.Y.—People ex rel. International Hydro-Electric Corporation v. Podvin, supra

67. Ariz.—Brown v. City of Phoenix, 200 P.2d 720.

Home-rule cities

Ariz.—Brown v. City of Phoenix, supra.

68. Miss.—City of Greenwood v. Humphreys, 127 So. 694, 157 Miss. 879, followed in City of Greenwood v. Gwin, 127 So. 696, suggestion of error overruled City of Greenwood v. Humphreys, 128 So. 885, 157 Miss. 879.

69. Fla.—Vassar v. Arnold, 18 So. 2d 906, 154 Fla. 757.

N.Y.—People ex rel. International Hydro-Electric Corporation v. Podvin, 14 N.Y.S.2d 476, 171 Misc. 785.

Moreover, in some jurisdictions municipalities are authorized by constitutional provisions to place their own valuation on property for municipal tax purposes,⁷⁰ so that a statute requiring municipalities to adopt bodily the county assessment roll for such city is invalid in that it violates such constitutional provision.⁷¹

Where the constitution of the state so provides, the valuation of property for the purpose of municipal taxation cannot exceed the valuation of the same property for the purposes of state and county taxation;⁷² but when authorized by a constitutional provision,⁷³ or when not prohibited,⁷⁴ a municipality may place a higher valuation on property than that placed on it by the state and county if such higher value is not an overvaluation. When an outside assessment roll is used, it must be the one authorized to be so used,⁷⁵ and must be the latest one made,⁷⁶ including subsequent adjustments made prior to its adoption by the municipality;⁷⁷ but changes made in the roll after its adoption for use by the city will not affect the city assessment;⁷⁸ and where a city is given by law an election to adopt the assessment as equalized by the state board of equalization but has failed to do so, an assessment on the basis of changes in the valuation by the state board cannot be made.⁷⁹

The right or authority of a municipality to place its own valuation on property cannot be extended to property taxable by the municipality but not located therein,⁸⁰ as in the case of the property of some public service corporations such as railroads, discussed *infra* subdivision d (2) of this section.

(2) Property of Public Service Corporations; Railroads

Under various statutes the entire property in the state of certain public service corporations, or of railroads, or certain property of railroads, is assessed by a state board or officer and apportioned to the municipal corporations, and the extent to which municipalities are bound by such valuations depends on the provisions of statutes.

In some jurisdictions, under constitutional or statutory authority and direction, the entire property in the state of certain public service corporations, including railroads, is assessed by a state board or officer, and then distributed and apportioned to the municipalities in which the property is located.⁸¹ In other jurisdictions there are similar provisions with relation only to railroads.⁸² Under other statutes municipalities are bound by the state assessment and apportionment of the intangible assets of railroads⁸³ or by the state's valuation of the transitory property and appurtenant supplies of railroads;⁸⁴ but they are not bound by the assessment or valuation made by the state authorities as to the mileage of track in the corporate limits.⁸⁵

Provisions expressly granting municipalities authority to make their own assessments on property within their limits render state assessments inapplicable;⁸⁶ and, in so far as the municipality can make its own assessment of railroad property for municipal purposes, it is not compelled to accept the assessment or valuation made by the state authorities.⁸⁷ However, the municipality must assess the railroad's mileage in its corporate limits at a just valuation⁸⁸ and in accordance with the principles established for state taxation;⁸⁹ and in conformity

Use of town roll as foundation

N.Y.—*People ex rel. International Hydro-Electric Corporation v. Podvin*, *supra*.

70. Fla.—*Vassar v. Arnold*, 18 So.2d 906, 154 Fla. 757—*City of Bradenton v. Seaboard Air Line Ry. Co.*, 130 So. 21, 100 Fla. 606—*Harkness v. Seaboard Air Line Ry.*, 128 So. 264, 99 Fla. 1027.

71. Fla.—*Vassar v. Arnold*, 18 So.2d 906, 154 Fla. 757.

72. Mo.—*State v. Jaudon*, 227 S.W. 48, 286 Mo. 181.
44 C.J. p 1326 note 27.

73. Fla.—*Auburndale v. Cline*, 89 So. 427, 82 Fla. 121—*Merrell v. St. Petersburg*, 60 So. 349, 64 Fla. 367.

74. Tenn.—*Fulgum v. Nashville*, 8 Lea 635.

75. N.C.—*City of Winston-Salem v. Shepherd*, 160 S.E. 835, 201 N.C. 835.

76. Pa.—*Commonwealth v. Repp*, 88 A. 1007, 242 Pa. 240.

77. Ala.—*City of Bessemer v. Tennessee Coal, Iron & R. Co.*, 31 So. 492, 181 Ala. 138.

Pa.—*Commonwealth v. Repp*, 88 A. 1007, 242 Pa. 240.

78. Miss.—*Adams v. Lamb-Fish Lumber Co.*, 60 So. 645, 103 Miss. 491, 61 So. 6, 104 Miss. 48.
44 C.J. p 1327 note 32.

79. Cal.—*Madary v. Fresno*, 128 P. 340, 20 Cal.App. 91.

80. Fla.—*Harkness v. Seaboard Air Line Ry.*, 128 So. 264, 99 Fla. 1027.

81. Ky.—*City of Newport v. Pennsylvania R. Co.*, 154 S.W.2d 719, 287 Ky. 613.

Refrigerator car company

Ky.—*American Refrigerator Transit Co. v. City of Lexington*, 155 S.W. 2d 848, 288 Ky. 295.

Telephone company

Ky.—*City of Lexington v. Lexington Telephone Co.*, 157 S.W.2d 119, 288 Ky. 640.

82. Neb.—*State v. Back*, 100 N.W. 952, 72 Neb. 402, 69 L.R.A. 561.
44 C.J. p 1327 note 34.

Provision held constitutional

Va.—*Commonwealth v. Chesapeake, etc., R. Co.*, 87 S.E. 622, 118 Va. 261.

83. Tex.—*Texas & P. Ry. Co. v. City of El Paso*, 85 S.W.2d 245, 126 Tex. 86.

84. Fla.—*City of Bradenton v. Seaboard Air Line Ry. Co.*, 130 So. 21, 100 Fla. 606—*Harkness v. Seaboard Air Line Ry.*, 128 So. 264, 99 Fla. 1027.

85. Fla.—*City of Bradenton v. Seaboard Air Line Ry. Co.*, 130 So. 21, 100 Fla. 606.

86. S.C.—*State v. Talley*, 27 S.E. 803, 50 S.C. 374.

87. Fla.—*Atlantic Coast Line R. Co. v. City of Orlando*, 167 So. 655, 123 Fla. 371—*City of Bradenton v. Seaboard Air Line Ry. Co.*, 130 So. 21, 100 Fla. 606.

88. Fla.—*City of Bradenton v. Seaboard Air Line Ry. Co.*, *supra*.

89. Fla.—*Tampa Southern R. Co. v. City of Bradenton*, 165 So. 679, 122 Fla. 173.

with such principles the assessor must take into consideration the fact that a railroad is limited to the use of its property for railroad purposes only,⁹⁰ and cannot base his valuation on the general speculative and investment value of the property.⁹¹ Moreover, a provision that municipalities may make their own assessments has been held not to give the city unrestricted power to make its own valuation, but merely to give it power to increase or reduce the valuation of the state board for the purpose of equalizing the assessments on all property throughout the city,⁹² the city being compelled to accept the valuation of the state board as the basis for its work of equalization,⁹³ and, in equalizing the assessment, to observe the principles underlying the state assessment in combining values of different kinds of property belonging to the railroad.⁹⁴

Where the valuation of railroad property in a municipality as a tax district has been fixed by the state, the municipal assessors are not required further to apportion such value among the various wards of the municipality but may properly place the whole amount on the assessment roll for the ward in which the principal office of the company was located.⁹⁵

e. Increase or Reduction in Valuation

In order to effect a change in the valuation of property, requirements of statutes or ordinances, such as the giving of notice, must be complied with. A change in valuation may be effected by adjustment or com-

promise between the taxpayer and the municipal corporation.

In order to effect a change in the valuation of property, there must be a compliance with all requirements of the statutes or ordinances, as, for example, requirements that notice shall be given to the taxpayer either before⁹⁶ or after⁹⁷ the change is made, or that changes shall be made only in certain months.⁹⁸ A municipal corporation is not required to give notice of increases made by a state board in a state assessment which the city uses;⁹⁹ and individual owners of shares of stock are not entitled to notice of increases in assessment of the stock,¹ a notice to the corporation being sufficient.² If the statute fully protects the taxpayer by giving him a right to notice after the change is made and an opportunity to make objections and to be heard thereon, he has no ground for complaint because the statute does not provide for any appeal or other judicial investigation.³ The manner of giving notice must be in accordance with the requirements of statutory or charter provisions.⁴

Agreement between city and taxpayer. An increase or reduction in valuation may be made the subject of adjustment or compromise between the taxpayer and the municipality;⁵ and an agreement reached between them covering the taxes for an entire year cannot be rescinded by the municipality after taxes for one half the year have been paid and accepted by the municipality thereunder.⁶

Assessment held invalid

Fla.—Tampa Southern R. Co. v. City of Bradenton, *supra*.

90. Fla.—Tampa Southern R. Co. v. City of Bradenton, *supra*.

91. Fla.—Tampa Southern R. Co. v. City of Bradenton, *supra*.

Assessment held invalid

Fla.—Tampa Southern R. Co. v. City of Bradenton, *supra*.

92. Fla.—Ellis v. Atlantic Coast Line R. Co., 68 So. 1005, 68 Fla. 160.

Neb.—State v. Back, 100 N.W. 952, 72 Neb. 402, 69 L.R.A. 447.

93. Fla.—Ellis v. Atlantic Coast Line R. Co., 66 So. 1005, 68 Fla. 160.

94. Fla.—Ellis v. Atlantic Coast Line R. Co., *supra*.

95. N.Y.—Heerwagen v. Crosstown St. R. Co., 86 N.Y.S. 218, 90 App. Div. 275, modified on other grounds 71 N.E. 729, 179 N.Y. 99.

96. Ky.—Buckner v. Clay, 206 S.W. 2d 827, 306 Ky. 194.

Miss.—Herrick v. Pascagoula St. R., etc., Co., 54 So. 660, 97 Miss. 637.

97. Ky.—Veith v. Newport, 136 S.W. 645, 143 Ky. 294.

Tex.—El Paso v. Howze, Civ.App., 248 S.W. 99.

Grand list not invalidated

Conn.—Conzelman v. City of Bristol, 188 A. 659, 122 Conn. 218.

Ordinance not repealed by statute

An ordinance requiring notice to the taxpayer after an increase in his assessment is not repealed by a subsequent statute providing for annual corrections of assessments.—Veith v. Newport, 136 S.W. 645, 143 Ky. 294.

98. Miss.—Herrick v. Pascagoula St. R., etc., Co., 54 So. 660, 97 Miss. 637.

44 C.J. p 1327 note 50.

99. Md.—James Clark Distilling Co. v. Cumberland, 52 A. 661, 95 Md. 468.

44 C.J. p 1327 note 52.

1. Md.—James Clark Distilling Co. v. Cumberland, *supra*.

2. Md.—James Clark Distilling Co. v. Cumberland, *supra*.

3. Ga.—Friedlander v. Moultrie, 116 S.E. 845, 155 Ga. 184.

4. Ky.—Board of Sup'rs of City of Somerset v. Smith, 128 S.W.2d 546, 278 Ky. 223.

Notice held sufficient

Ky.—Board of Sup'rs of City of Somerset v. Smith, *supra*.

5. Ky.—Covington v. Covington Bridge Co., 7 Ky.L. 684, 13 Ky.Op. 977.

Pa.—In re Compromise Taxes, 16th and 17th Sts., Com.Pl., 24 Erie Co. 231.—In re Compromise of Delinquent Taxes on Lot of Ground and Building Thereon, in Borough of Scottsdale, Com.Pl., 28 West.Co. L.J. 61.

Power of municipality to adjust or compromise tax claims see *infra* § 2073.

Who must consent to compromise

Order correcting judgment roll and reducing property assessment of city board of assessors, which was made by mayor, corporation counsel, and taxpayer and approved by board of estimate and apportionment and common council, was held valid notwithstanding order was entered without consent of majority of board of assessors.—People ex rel. Beaunit Weaving Mills Corporation v. Shine, 280 N.Y.S. 920, 245 App.Div. 790.

6. Ky.—Covington v. Covington Bridge Co., 7 Ky.L. 684, 13 Ky.Op. 977.

Triennial assessments. Where statutes provide for triennial assessments, the assessor may, in a proper case and on proper notice, reassess property in the years between the triennial assessments,⁷ and may correct errors of law, fact, or judgment which may have been made in making the triennial assessment;⁸ but under statutory provisions authorizing the reduction of the assessed valuation of real property for certain causes he may not reduce the valuation except for such changes in the condition of the property as are specified in the statute.⁹

§ 2050. — Persons and Property Omitted from List

- a. In general
- b. Omissions in prior years
- c. Proceedings to place on list or assess

a. In General

In some instances, a municipal corporation may assess or proceed against property omitted from the assessment roll, and may contract for a private search for concealed property. In some jurisdictions an intentional omission may invalidate the entire assessment.

While the power of the assessor, unless it is otherwise specially provided, generally ends with the return of his roll or list to the proper office, as discussed supra § 2043, in some jurisdictions provisions are made for assessing, placing on the roll, or proceeding against property overlooked when the assessment was made.¹⁰ These provisions are mandatory,¹¹ even though permissive in form;¹² they are retroactive in operation;¹³ and they have been held to be constitutional notwithstanding they confer a quasi-judicial power on the assessment board.¹⁴ Authority conferred on the collector of taxes to assess persons whom the assessor has failed

to list does not authorize him to add to an assessment property omitted therefrom but belonging to a person whom the assessor has listed.¹⁵ When an assessment roll has been substantially completed before passage of an ordinance levying a city tax, the fact that property not reported by owners is afterward added to the roll does not invalidate the tax;¹⁶ but after the assessment has been returned and the tax levied thereon, the council has no power, in the absence of special statutory provisions, to order an additional assessment to be made of property subsequently coming within the city limits;¹⁷ nor, as discussed infra § 2056, can it add such property to the original assessment in review proceedings.

Contracts for search for concealed property. Except where such a contract is in excess of its authority,¹⁸ a municipal corporation may contract with a private person to search for property secreted and omitted from the tax list.¹⁹ Under such contract the municipality may reserve to itself a right to reject any property discovered if, in its discretion, the tax thereon is considered uncollectable,²⁰ although, if the tax is later collected, the city will be liable for the commissions thereon.²¹

Municipality's use of outside assessment rolls. Provisions relating to omitted property have no application to cities which use a state assessment roll in the absence of a statute expressly authorizing municipal officers to make additions to it,²² and such authority will not be implied from provisions authorizing state officers to make such additions;²³ but it has been held that, where the city uses a county assessment roll and relies on county officials to list all taxable property thereon, it may act independently and contract for searches to be made for omitted property.²⁴ Moreover, a stat-

7. Pa.—Appeal of Schneller, 35 Pa. Dist. & Co. 278.—In re Assessment of Property of Container Co., Com. Pl., 38 Berks Co.L.J., 3.—Appeal of Joseph Horne Co., Com.Pl., 90 Pittsb.Leg.J. 356.—Appeal of Gulf Bldg., Com.Pl., 87 Pittsb.Leg.J. 590.

Failure of notice held not fatal defect

Pa.—Appeal of Schneller, 35 Pa. Dist. & Co. 278.

8. Pa.—Appeal of Schneller, supra.

9. Pa.—Appeal of Smith, 54 Pa.Dist. & Co. 453, 37 Berks Co.L.J. 259.

Reduction held required

Pa.—Appeal of Seyfert, 54 Pa.Dist. & Co. 339, 37 Berks Co.L.J. 275.

Reduction held not required

Pa.—Appeal of Smith, 54 Pa.Dist. & Co. 453, 37 Berks Co.L.J., 259.

10. Ky.—Ironton & Russell Bridge

Co. v. City of Russell, 91 S.W.2d 1, 262 Ky. 778.

44 C.J. p 1328 note 63.

11. Ky.—Elam v. Salisbury, 202 S. W. 56, 180 Ky. 142.

12. Ky.—Elam v. Salisbury, supra.

13. Ky.—Hegan v. Louisville, 108 S.W. 805, 32 Ky.L. 668, rehearing denied 107 S.W. 809, 32 Ky.L. 1082.

44 C.J. p 1328 note 66.

14. Ky.—Muir v. Bardstown, 87 S. W. 1096, 120 Ky. 739, 27 Ky.L. 1150.

44 C.J. p 1328 note 67.

15. Ind.—Wise v. Eastham, 30 Ind. 133.

16. Tex.—Scollard v. Dallas, 42 S. W. 640, 16 Tex.Civ.App. 620.

17. Or.—Oregon Steam Nav. Co. v. Portland, 2 Or. 81.

18. Miss.—Fitzgerald v. Town of Magnolia, 184 So. 59, 183 Miss. 334.

Contracts for collection of taxes see infra § 2072.

19. Ind.—Richmond v. Clifford, 103 N.E. 789, 105 N.E. 385, 182 Ind. 17.

44 C.J. p 1328 note 68.

Advances on commissions

Ga.—Armistead v. City of Atlanta, 7 S.E.2d 409, 61 Ga.App. 831.

20. Ind.—McCaslin v. Greencastle, 104 N.E. 871, 56 Ind.App. 54.

21. Ind.—McCaslin v. Greencastle, supra.

22. La.—Elks Theater Co. v. New Iberia, 78 So. 433, 143 La. 162.

23. La.—Elks Theater Co. v. New Iberia, supra.

24. Ind.—Richmond v. Clifford, 103

ute or charter provision authorizing a municipality to assess or proceed against property which has been omitted from the assessment list has been held to apply only to omitted property which is subject to taxation and assessment by the municipal authorities.²⁵ Accordingly, such a statute or charter provision has been held not to authorize a municipality to assess or proceed against omitted property of a public service corporation, such as a railroad, the property of which is required by another statute to be assessed by a state agency,²⁶ and the remedy of a municipality for the failure of such state officer or agency to assess such omitted property is by mandamus.²⁷

Effect of omission on entire assessment. While it has been held that a municipality does not lose its right to taxes justly owing on certain property, simply by reason of the failure of its officers, negligently or designedly, to assess other property that is likewise taxable,²⁸ it has also been held that, if the taxing officers intentionally omit taxable property from the assessment roll, the entire roll is void,²⁹ and a right of complaint is given against the entire assessment to anyone whose burdens are

thereby unduly increased.³⁰ However, accidental omissions of persons or property from the assessment roll do not vitiate the entire tax;³¹ and this rule applies to mistakes of law as well as of fact.³² Accordingly, if the omission is in consequence of a bona fide belief that the property is exempt from taxation, the entire assessment will not be invalid.³³

b. Omissions in Prior Years

Under some statutes, property omitted for several years may be assessed for each of such years, provided the right to assess and collect taxes is not barred by limitations.

In accordance with the provisions of some statutes, taxable property omitted for several years may be assessed for each of the years;³⁴ and such assessment may be made at any time before the right to assess and collect taxes is barred by limitations.³⁵ It has been held to be immaterial that the municipal assessor had knowledge of the existence of such property during the years when it was omitted from the assessment rolls.³⁶ The fact that the property is not taxable at the time the assessment is made will not affect the city's right to list it for the years when it was taxable;³⁷ but the failure to assess

N.E. 789, 105 N.E. 385, 182 Ind. 17.

25. Ky.—City of Newport v. Pennsylvania R. Co., 154 S.W.2d 719, 287 Ky 613

26. Ky.—City of Lexington v. Lexington Telephone Co., 157 S.W.2d 119, 288 Ky. 640—American Refrigerator Transit Co. v. City of Lexington, 155 S.W.2d 848, 288 Ky. 295—City of Newport v. Pennsylvania R. Co., 154 S.W.2d 719, 287 Ky. 613.

Property held not within rule

Statutes requiring assessment of corporation's intangible property and specifically enumerated types of tangible property by state tax commission and certification thereof to municipal corporation were held not to affect power of city council to levy assessment for omitted tax against bridge company for bridge located within boundaries of city.—Iron-ton & Russell Bridge Co. v. City of Russell, 91 S.W.2d 1, 262 Ky. 778.

27. Ky.—City of Newport v. Pennsylvania R. Co., 154 S.W.2d 719, 287 Ky. 613.

28. Tex.—Howth v. City of Beaumont, Civ.App., 118 S.W.2d 350—City of Wichita Falls v. J. J. & M. Refining Co., Civ.App., 74 S.W.2d 524.

29. Fla.—Rio Vista Hotel & Improvement Co. v. Belle Mead Development Corporation, 182 So. 417, 132 Fla. 88, certiorari denied 59 S.Ct. 251, 305 U.S. 655, 83 L.Ed.

424, rehearing denied 59 S.Ct. 364, 305 U.S. 676, 83 L.Ed. 438

Invalidation of entire grand list because of breach of duty on part of assessors generally see *supra* § 2045.

30. Fla.—Rio Vista Hotel & Improvement Co. v. Belle Mead Development Corporation, *supra*.

31. U.S.—Valentine v. City of Juneau, C.C.A.Alaska, 36 F.2d 904, followed in Simpson v. City of Juneau, 36 F.2d 907.

32. U.S.—Valentine v. City of Juneau, C.C.A.Alaska, 36 F.2d 904, followed in Simpson v. City of Juneau, 36 F.2d 907.

33. Fla.—Rio Vista Hotel & Improvement Co. v. Belle Mead Development Corporation, 182 So. 417, 132 Fla. 88, certiorari denied 59 S.Ct. 251, 305 U.S. 655, 83 L.Ed. 424, rehearing denied 59 S.Ct. 364, 305 U.S. 676, 83 L.Ed. 438.

Void attempt to effect exemption

Omission from assessment roll of stock and bonds, which city attempted to exempt by void resolution, was held not to affect validity of taxes as a whole.—Valentine v. City of Juneau, C.C.A.Alaska, 36 F.2d 904, followed in Simpson v. City of Juneau, 36 F.2d 907.

34. Ariz.—Trigg v. City of Yuma, 130 P.2d 59, 59 Ariz. 480.

Ky.—*Corpus Juris* cited in Mullins v. Wilson, 138 S.W.2d 484, 487, 282 Ky. 316.

Miss.—City of Jackson v. Belhaven College, 15 So.2d 621, 195 Miss. 734.

N.Y.—People ex rel. New York Tel. Co. v. Taylor, 64 N.Y.S.2d 326, 187 Misc. 550.

Pa.—In re Assessment of Property of Container Co., Com.Pl., 37 Berks Co. 277.

S.C.—Grier v. City Council of City of Spartanburg, 26 S.E.2d 690, 203 S.C. 203.

Tex.—Texas Land & Cattle Co. v. City of Fort Worth, Civ.App., 73 S.W.2d 860, error refused, appeal dismissed 55 S.Ct. 658, 295 U.S. 716, 79 L.Ed. 1672, rehearing denied 55 S.Ct. 913, 295 U.S. 769, 79 L.Ed. 1710.

43 C.J. p 169 note 64[a]—44 C.J. p 1328 note 78.

35. Ky.—Botto v. Louisville, 79 S.W. 241, 117 Ky. 798, 25 Ky.L. 1918. 43 C.J. p 169 note 64 [a].

Tax on bank stock within rule

Ky.—Richardson v. State Nat. Bank, 123 S.W. 294, 1189, 135 Ky. 772, error dismissed State Nat. Bank v. Richardson, 32 S.Ct. 838, 225 U.S. 696, 56 L.Ed. 1262.

No limitation as to number of years N.Y.—People ex rel. New York Tel. Co. v. Taylor, 64 N.Y.S.2d 326, 187 Misc. 550.

36. N.Y.—People ex rel. New York Tel. Co. v. Taylor, *supra*.

37. Ala.—Hooper v. Albertville, 88 So. 868, 205 Ala. 621.

property and enter it on the assessment rolls, where such failure is due to a statutory suspension of authority to assess such property in prior years because of its assessment by the state tax commission, which assessment was set aside as erroneous, is not such an omission as is contemplated by the statute providing for the assessment of property omitted from the assessment roll of the preceding year.³⁸

One paying a tax on property erroneously placed on an assessment list, where it does not belong, and omitted from the proper list, is entitled to the protection afforded by a limitation provision contained in a statute relating to the correction of erroneous assessment,³⁹ and is not subject thereafter to be proceeded against under the statute relating to omitted property.⁴⁰ On the other hand, a taxpayer, not otherwise protected, cannot escape liability for taxes on omitted property by alleging that the omission was due to his own,⁴¹ or the city's,⁴² mistake, or by showing that, at the time the omitted property should have been assessed, he had listed all the property with the assessor which the latter deemed subject to assessment.⁴³ The fact that property was placed on the unrendered roll and the name of the owner thereof was not shown would not make a tax subsequently entered against the property invalid.⁴⁴

Omitted intangible property. Under a statute so providing, omitted intangible property may not be assessed for years prior to a certain specified date.⁴⁵

c. Proceedings to Place on List or Assess

Statutes prescribing the procedure for placing omitted property on the assessment list or for subjecting such property to assessment for years during which it was not assessed must be complied with.

Statutes prescribing the procedure for placing omitted property on the assessment list or for subjecting such property to assessment for years during which it was not assessed must be complied with.⁴⁶

The city council may act directly to correct the omission,⁴⁷ and, if the omission is corrected by a board having no authority to assess, the adoption of such action by the officer who is authorized to assess after notice to the owner cures the irregularity.⁴⁸ The taxpayer cannot successfully resist the placing of his omitted property on the assessment roll by claiming an exemption where it appears that, under the terms of the exemption statute, he is not entitled thereto,⁴⁹ or by alleging an agreement with city officials that the property should be omitted, where the officials had no authority under the law to make such agreement.⁵⁰ Thus, where property had been erroneously considered exempt by the municipal taxing authorities, the owner of the property may not avoid a back assessment finally made, on the ground that it would impose an unjustifiable burden requiring readjustment of finances in order to pay the taxes.⁵¹ The taxpayer may have no right to an appeal from the decision placing the property on the list.⁵²

The omitted property must be described with sufficient particularity to identify it;⁵³ but it is incumbent on the taxpayer relying on the insufficiency of the description to show that he did not know and could not know from the description what property was meant.⁵⁴ It is essential that the taxpayer be given proper notice in accordance with the statutory requirements of the time and place for the hearing of objections to the assessment.⁵⁵ However, the owner of the property cannot complain

38. N.Y.—*Western New York & P. Ry. Co. v. City of Buffalo*, 27 N.Y. S.2d 249, 176 Misc. 350, affirmed 35 N.Y.S.2d 751, 264 App.Div. 832, appeal denied 36 N.Y.S.2d 640, 264 App.Div. 947, appeal denied 44 N.E. 2d 616, 289 N.Y. 642, affirmed 49 N.E.2d 633, 290 N.Y. 702.

Part of railway's special franchise
N.Y.—*Western New York & P. Ry. Co. v. City of Buffalo*, supra.

39. Va.—*American Tobacco Co. v. Richmond*, 99 S.E. 777, 125 Va. 29, 33.

40. Va.—*American Tobacco Co. v. Richmond*, supra.

44 C.J. p 1329 note 84.

41. N.C.—*Smith v. Dunn*, 76 S.E. 242, 160 N.C. 174.

42. Ky.—*Asher v. Pineville*, 131 S. W. 512, 140 Ky. 670.

43. Ky.—*Hegan v. Louisville*, 106

S.W. 805, 32 Ky.L. 668, rehearing denied 107 S.W. 809, 32 Ky.L. 1082.

44. Tex.—*Deutsch v. City of San Angelo*, Civ.App., 78 S.W.2d 125, reversed on other grounds *City of San Angelo v. Deutsch*, 91 S.W.2d 308, 126 Tex. 532.

45. Okl.—*Love v. Silverthorn*, 101 P.2d 254, 187 Okl. 114, 129 A.L.R. 676.

Provision not invalid as extinguishing indebtedness
Okl.—*Love v. Silverthorn*, supra.

46. Miss.—*City of Jackson v. Belhaven College*, 15 So.2d 621, 195 Miss. 734.

Valuation of omitted property
Miss.—*City of Jackson v. Belhaven College*, supra.

47. Ala.—*Hooper v. Albertville*, 88 So. 868, 205 Ala. 621.

48. Neb.—*Chicago House Wrecking*

Co. v. Omaha, 119 N.W. 253, 83 Neb. 179.

44 C.J. p 1329 note 89.

49. Ky.—*Louisville Car Wheel, etc., Co. v. Louisville*, 142 S.W. 1046, 146 Ky. 573.

50. Ky.—*Louisville Car Wheel, etc., Co. v. Louisville*, supra.

51. Conn.—*Institute of Living v. Town & City of Hartford*, 50 A.2d 822, 133 Conn. 258.

52. Ky.—*Muir v. Bardstown*, 87 S.W. 1096, 120 Ky. 739, 27 Ky.L. 1150.

53. Ky.—*Asher v. Pineville*, 131 S. W. 512, 140 Ky. 670.

44 C.J. p 1329 note 94.

54. Ky.—*Pettit v. Lexington*, 237 S.W. 391, 193 Ky. 679.

55. Miss.—*City of Jackson v. Belhaven College*, 15 So.2d 621, 195 Miss. 734.

of a failure to notify him of the assessment where it appears that he had knowledge thereof,⁵⁶ or where he does not claim that the value of the property was improperly assessed⁵⁷ or that any injury was suffered from the failure to give notice.⁵⁸

Direct action in courts. Under statutes so providing, some municipalities may proceed against omitted property by a direct action in the courts for a judgment against the person liable for the payment of such taxes.⁵⁹ A suit to recover taxes on omitted property for a series of years is based on distinct causes of action for each year,⁶⁰ which may properly be joined in a single suit.⁶¹

§ 2051. — Poll Tax

Poll taxes must be assessed in accordance with statutes authorizing such taxes.

Poll taxes must be assessed by municipalities in accordance with the statutes authorizing such taxes.⁶² The assessor may generally be required to ascertain the names of all persons liable to a poll tax,⁶³ and enter them on the roll.⁶⁴ If a poll tax is assessed on a person exempt from such tax, as by reason of age, infirmity, and poverty, or on a person not an inhabitant of the municipality, the assessors may, of their own motion, abate it.⁶⁵

§ 2052. — Notice and Hearing

There must be a compliance with statutes and charters providing for notice and a hearing before the assessment becomes final.

Since, under the due process clauses of the state and federal constitutions, a taxpayer is entitled to

notice of a municipal assessment and an opportunity to be heard by the assessors, as discussed in Constitutional Law § 650 a, a statute or charter authorizing assessments which fails to provide for notice and a hearing before the assessment becomes final is invalid, even though it provides for an appeal from the assessment.⁶⁶ However, where notice and opportunity for a hearing before the assessment becomes final are provided for, the constitutional requirement of due process of law is met.⁶⁷ The right to a hearing includes the right to submit evidence to support the taxpayer's objections.⁶⁸ A failure to give notice as required is a jurisdictional defect,⁶⁹ and fatal to the recovery of taxes based on the assessment;⁷⁰ but, if the assessment roll or books are deposited as the statute requires, an erroneous statement by a city official as to the time when the assessment would be made up will not invalidate the act.⁷¹

Under a statute requiring the service of notice "upon each person residing in the town whose property has been assessed," nonresidents are not entitled to notice.⁷² It has been held that, where the owners of property have failed to make return or have returned the property at a value deemed to be too low, such property may be assessed without notice to such owner;⁷³ but the owner is required to be given notice after the assessment has been made.⁷⁴ It has been held, in the absence of provisions designating some other mode of giving notice, that notice is sufficiently given by the mailing of notices to persons entitled thereto,⁷⁵ the leaving of notices at the owners' residences,⁷⁶ or publica-

Affirmative adjudication of due notice

Miss.—City of Jackson v. Belhaven College, *supra*.

58. La.—Hodding v. New Orleans, 20 So. 199, 48 La. Ann. 982.

44 C.J. p 1329 note 90.

57. Tex.—Millers' Mut. Fire Ins. Co. v. Austin, Civ. App., 210 S.W. 825.

58. Tex.—Millers' Mut. Fire Ins. Co. v. Austin, *supra*.

59. Ky.—Dixie Greyhound Lines v. City of Paducah, 158 S.W.2d 433, 289 Ky. 196.

Action held properly dismissed

Ky.—City of Lexington v. Lexington Telephone Co., 157 S.W.2d 119, 288 Ky. 640.

Effect of statute subsequent to action

In action by city to assess omitted property of a bus company, finding of state tax commission as to assessment of defendant's tangible property under provisions of a statute

as amended in 1938 would not be considered by appellate court, where city's action was instituted in 1936.—Dixie Greyhound Lines v. City of Paducah, 158 S.W.2d 433, 289 Ky. 196.

60. Ky.—Pettit v. Lexington, 237 S.W. 391, 193 Ky. 679.

44 C.J. p 1328 note 81.

61. Ky.—Pettit v. Lexington, *supra*.

62. N.J.—Fish v. Branin, 23 N.J. Law 484.

63. N.Y.—Trumbull v. Palmer, 87 N.Y.S. 614, 42 Misc. 628, modified on other grounds 93 N.Y.S. 349, 104 App. Div. 51.

64. N.Y.—Trumbull v. Palmer, *supra*.

65. Mass.—Gordon v. Sanderson, 43 N.E. 128, 165 Mass. 375.

66. Ga.—Swinson v. City of Dublin, 173 S.E. 93, 178 Ga. 323.

67. Ga.—White v. City of Forsyth, 76 S.E. 58, 138 Ga. 753.

N.Y.—In re 801-815 East New York Ave., Borough of Brooklyn, City

of New York, 48 N.E.2d 502, 290 N.Y. 236.

44 C.J. p 1329 note 4.

Provision by ordinance for notice and hearing

Ga.—Simmons v. Newton, 174 S.E. 703, 178 Ga. 806.

68. Ga.—City of Macon v. Ries, 176 S.E. 21, 179 Ga. 320.

69. N.Y.—People v. New Rochelle, 45 N.Y.S. 836, 17 App. Div. 603.

70. Ky.—Reamer v. Louisville, 6 Ky. L. 748, 13 Ky. Op. 387.

71. N.Y.—People v. Feltner, 72 N.Y. S. 641, 65 App. Div. 224.

72. Alaska.—Valdez v. Fish, 4 Alaska 427.

73. Ga.—Jones v. City of Fairburn, 198 S.E. 216, 186 Ga. 493.

74. Ga.—Jones v. City of Fairburn, *supra*.

75. Alaska.—Ketchikan v. Zimmerman, 4 Alaska 256.

76. Md.—Wannenwetch v. Baltimore, 81 A. 2, 115 Md. 446.

tion in the proper paper;⁷⁷ and, under some statutes, the filing of the assessment roll is itself notice of such fact⁷⁸ and of the contents of the roll.⁷⁹

Filing of affidavits or other proof of notice. It is held that it is improper to admit in evidence affidavits as to the posting and serving of notices and the completing and filing of assessment rolls not duly filed, but produced and filed later.⁸⁰ However, it is also held that, where filing is not required, absence of proof of notice on file raises no presumption that the required notice was not given.⁸¹ Where the minutes of a city recite that the date for hearing objections to the assessment rolls had been duly fixed, and that such order had been duly published and advertised, it will be presumed that such order was made, even though it was not recorded in the minutes.⁸²

Requisites and sufficiency of objections. Objections to assessments of a municipal tax filed with the assessor need not be expressed with the same particularity required of a petition in a judicial proceeding,⁸³ although the grounds must be presented to the assessor in intelligible form.⁸⁴

§ 2053. Assessment Rolls, Books, and Warrants

In accordance with provisions relating to assessment rolls, the rolls are generally required to be signed, verified, and filed or deposited with a designated officer for public inspection.

While statutory, charter, and ordinance provisions as to the form and contents of the tax or assessment roll should be complied with,⁸⁵ mere errors or irregularities will not ordinarily affect the validity of the assessment,⁸⁶ particularly where the irregularities constitute a failure to follow directory, rather than mandatory, provisions;⁸⁷ and a manifest clerical error will not invalidate the assessment.⁸⁸ Under some statutes, the assessing officer must make an original and a copy of the assessment rolls,⁸⁹ and provisions specifying a time for the completion of the assessment roll and for grievance days have been held to be valid.⁹⁰ The assessment roll and tax levy are distinct,⁹¹ and, under the statutes, particular matters to be included in the latter are not necessarily to be included in the former.⁹² Where municipal taxes are collected by the county in which the municipality is situated, it is the duty of the county taxing officers to compute and extend the municipal taxes on the general tax rolls.⁹³

Signing and verification. While a signing and an authentication of a municipality's assessment roll are not necessary if they are not expressly required by statute,⁹⁴ they are necessary where they are so required.⁹⁵ Accordingly, a failure to comply with such statute has been held to be fatal to the validity of any further proceedings dependent on the legality of the assessment,⁹⁶ unless there is a curative

77. N.Y.—New York v. Vanderveer, 86 N.Y.S. 659, 91 App.Div. 303.

78. Miss.—Planters' Gin, etc., Co. v. Greenville, 103 So. 796, 138 Miss. 876.

Deposit of assessment roll for inspection generally see *infra* § 2053.

79. Miss.—Planters' Gin, etc., Co. v. Greenville, *supra*.

80. N.Y.—Buffalo Loan, etc., Co. v. Depew Mfg. Co., 121 N.Y.S. 900, 66 Misc. 630.

81. Mich.—Sherman v. Fisher, 101 N.W. 572, 138 Mich. 391.

82. Miss.—Hawkins v. City of West Point, 27 So.2d 549, 200 Miss. 616.

83. N.Y.—People ex rel. Powott Corporation v. Woodworth, 15 N.Y.S. 2d 985, 172 Misc. 791.

84. N.Y.—People ex rel. Powott Corporation v. Woodworth, *supra*.

85. Tex.—Sam Bassett Lumber Co. v. City of Houston, Civ.App., 194 S.W.2d 114, reversed on other grounds, 198 S.W.2d 879, 145 Tex. 492.

44 C.J. p 1331 notes 41, 42.

86. Tex.—Sam Bassett Lumber Co. v. City of Houston, *supra*.

The duty to pay legal municipal tax levies is imposed by law, even

though there are errors in making up the assessment rolls.—City of Fort Myers v. Heitman, 5 So.2d 410, 149 Fla. 203.

87. Tex.—Sam Bassett Lumber Co. v. City of Houston, Civ.App., 194 S.W.2d 114, reversed on other grounds, 198 S.W.2d 879, 145 Tex. 492.

88. Tex.—Sam Bassett Lumber Co. v. City of Houston, *supra*.

Omission of dollar sign
Cal.—Howard v. Judson, 194 P.2d 138, 86 Cal.App.2d 128.

Personal property in real estate column

Tex.—Sam Bassett Lumber Co. v. City of Houston, Civ.App., 194 S.W.2d 114, reversed on other grounds, 198 S.W.2d 879, 145 Tex. 492.

89. N.Y.—Halftown Realty Co. v. Joy, 45 N.Y.S.2d 583.

90. N.Y.—City of New Rochelle v. Seacord, 30 N.Y.S.2d 240.

Change of dates

N.Y.—City of New Rochelle v. Seacord, *supra*.

91. N.Y.—Allter v. St. Johnsville, 114 N.Y.S. 355, 130 App.Div. 297.

44 C.J. p 1330 note 20.

92. N.Y.—Allter v. St. Johnsville, *supra*.

44 C.J. p 1330 note 21.

93. Idaho.—Village of Oakley v. Wilson, 296 P. 185, 50 Idaho 334.

Ministerial duty

Idaho.—Village of Oakley v. Wilson, *supra*.

County clerk's source of information

In extending tax for principal and interest on unsold bonds of municipal corporation, county clerk must obtain his information solely from the tax-levy ordinance and bond ordinances certified and filed in his office, and may not consider information which the commissioners may have as to amount of money in bond fund derived from prior levies.—People ex rel. Nash v. Westminster Bldg. Corporation, 197 N.E. 572, 361 Ill. 153.

94. Fla.—Rio Vista Hotel & Improvement Co. v. Belle Mead Development Corporation, 182 So. 417, 132 Fla. 88, certiorari denied 59 S.Ct. 251, 305 U.S. 655, 83 L.Ed. 424, rehearing denied 59 S.Ct. 364, 305 U.S. 676, 83 L.Ed. 438.

95. Fla.—Rio Vista Hotel & Improvement Co. v. Belle Mead Development Corporation, *supra*.

96. Fla.—Rio Vista Hotel & Im-

statute validating and curing such omission;⁹⁷ and it has been held that, if the assessment roll fails to have attached to it the taxing officer's certificate or verification,⁹⁸ or if the certificate or verification attached is materially defective,⁹⁹ the taxes are illegally assessed and all proceedings thereunder are void. However, in some jurisdictions, the statutory requirement that the assessors sign the certificate of assessment is directory only,¹ so that a failure of some,² or all,³ of the assessors to sign does not invalidate the assessment.

While an incomplete verification has been held not to be sufficient,⁴ it is not necessary that the signature⁵ or verification⁶ should follow any particular form in the absence of express statutory requirements with respect thereto; nor, in the absence of express statutory requirement, is it necessary that the tax books should embody the verification elsewhere required in the statute.⁷ A taxpayer cannot complain of a failure to verify the roll after it has been approved by the council where the statute provides that such failure is immaterial in such circumstances.⁸ Statutes relating to state and county taxes, and requiring authentication and a warrant to the tax collector, have been held not applicable to municipal taxes.⁹

Filing or deposit for public inspection. It is generally required that the assessment roll, when com-

pleted, or a copy thereof, shall be filed with,¹⁰ or delivered to,¹¹ a designated officer, or be left with him a certain time for public inspection,¹² or be left at the assessor's office for that purpose.¹³ The failure of the assessing officer to make and lodge a record of the assessments with the designated officer, as required by statute, has been held not to invalidate the assessment,¹⁴ where an otherwise satisfactory record was filed;¹⁵ and, where such a record was filed, the absence of a certificate that the appraisers took the oath required by statute will not invalidate the assessment.¹⁶ A charter or statutory provision requiring the filing, in a municipal office, of the court's order confirming the assessment roll is not unconstitutional.¹⁷

In some jurisdictions the statutory requirement that the assessors deliver the assessment on a particular day is directory only,¹⁸ so that a failure to deposit the assessment roll on the day stated does not invalidate the assessment.¹⁹ In any event, a taxpayer cannot complain of delay in the depositing of the assessment roll if he is not prejudiced thereby.²⁰ The temporary removal of the roll or books to the office of another city officer for lawful and necessary purposes will not be regarded as a suspension or prevention of the invited inspection.²¹ In the absence of express statutory requirement it is not necessary that the city clerk should indorse

provement Co. v. Belle Mead Development Corporation, *supra*.

97. Fla.—Rio Vista Hotel & Improvement Co. v. Belle Mead Development Corporation, *supra*.

Validation of acts and proceedings

Statutes providing that all acts and proceedings done and performed by officials of a certain town in connection with assessments, valuation of properties, and levies of taxes, were ratified, confirmed, validated, and legalized, did not have effect of curing defect of omission of certificate of authentication and warrant of tax assessor.—Rio Vista Hotel & Improvement Co. v. Belle Mead Development Corporation, *supra*.

98. Fla.—State ex rel. Dofnos Corporation v. Lehman, 131 So. 333, 100 Fla. 1401.

99. Fla.—State ex rel. Dofnos Corporation v. Lehman, *supra*.

1. N.H.—Drew v. Morrill, 62 N.H. 23—Odiorne v. Rand, 59 N.H. 504.

2. N.H.—Drew v. Morrill, 62 N.H. 23.

3. N.H.—Odiorne v. Rand, 59 N.H. 504.

4. Cal.—Leonard v. Jaffray, 165 P. 956, 175 Cal. 371.

44 C.J. p 1330 note 28.

5. N.H.—Paul v. Linscott, 56 N.H. 347.

44 C.J. p 1330 note 29.

6. N.Y.—Lord v. Cooper, 46 N.Y.S. 519, 19 App.Div. 535.

44 C.J. p 1330 note 30.

7. N.Y.—Lancaster Sea Beach Impr. Co. v. New York, 146 N.Y.S. 734, 161 App.Div. 469, affirmed 108 N.E. 90, 214 N.Y. 1.

8. Miss.—Planters' Gin, etc., Co. v. Greenville, 103 So. 796, 138 Miss. 876.

44 C.J. p 1330 note 40.

9. Fla.—Rio Vista Hotel & Improvement Co. v. Belle Mead Development Corporation, 182 So. 417, 132 Fla. 88, certiorari denied 59 S.Ct. 251, 305 U.S. 655, 83 L.Ed. 424, rehearing denied 59 S.Ct. 364, 305 U.S. 676, 83 L.Ed. 438.

10. Minn.—State v. Ensign, 56 N.W. 41, 54 Minn. 372.

44 C.J. p 1330 note 23.

11. N.Y.—New York v. Ferris, 86 N.Y.S. 600, 91 App.Div. 223.

44 C.J. p 1330 note 24.

12. N.Y.—People v. New Rochelle, 45 N.Y.S. 836, 17 App.Div. 603.

44 C.J. p 1330 note 25.

13. N.Y.—Halftown Realty Co. v. Joy, 45 N.Y.S.2d 583.

Sufficiency of copy provided

Although the assessors had provided for public inspection only a copy of the preceding year's assessment roll, containing pencil and ink interlineations and other changes, the entire assessment roll would not be invalidated, in view of the assessors' claims that they had followed the construction placed on the charter for many years, but such precedent would not excuse future non-compliance.—Halftown Realty Co. v. Joy, *supra*.

14. U.S.—Eldredge Brewing Co. v. City of Portsmouth, C.C.A.N.H., 118 F.2d 410.

15. U.S.—Eldredge Brewing Co. v. City of Portsmouth, *supra*.

16. U.S.—Eldredge Brewing Co. v. City of Portsmouth, *supra*.

17. Minn.—State v. Ensign, 56 N.W. 41, 54 Minn. 372.

18. N.Y.—New York v. Ferris, 86 N.Y.S. 600, 91 App.Div. 223.

19. N.Y.—New York v. Ferris, *supra*.

20. R.I.—Rives v. Taylor, 113 A. 113, 43 R.I. 426, 429.

44 C.J. p 1330 note 39.

21. Ala.—Day v. Montgomery, 96 So. 894, 209 Ala. 609, 611.

44 C.J. p 1330 note 38.

the filing on the assessment roll in the absence of a statute requiring him to do so.²²

Tax warrant. The tax warrant is generally required to be signed²³ and sealed.²⁴ Where the statute permits a signature by a deputy on certain contingencies, a presumption arises in favor of the regularity of his signature;²⁵ and it has been held that a tax collector's warrant given under the hand of the assessor is evidence from which a court can find that a proper and valid assessment of municipal taxes has been made.²⁶ Under a statute providing that any acts of omission or commission on the part of a tax assessor may be corrected at any time, the failure of an assessor to annex the statutory warrant does not render the assessment roll void;²⁷ and the assessor may annex the warrant at any time, and the omission will in no way affect any process provided by law for the enforcement of the collection of any such tax.²⁸

Operation and effect. Under a statute so providing, on and after the specified date in each year, the roll, completed as required, becomes the roll for the current year.²⁹ When it is verified and filed on or before the specified date, the roll constitutes the basis on which the tax is imposed,³⁰ and there is no power to alter or change it.³¹ It has been held that a tax bill authenticated by the assessor by his signature is prima facie proof that all steps have been taken to make it binding;³² and affidavits annexed to the assessment roll that it is correct have been held conclusive of the fact recited as against

a collateral attack.³³ It has also been held that an assessment roll is conclusive as to persons and property for apportioning the sums to be raised by the taxation.³⁴

§ 2054. Equalization and Review of Assessment

Generally, the legislature may provide for a board to review the work of the assessors, and the nature of such body, the right of appeal thereto, and the personnel thereof depend on statutory provisions.

Within constitutional limitations,³⁵ it is within the power of the legislature to provide an exclusive method of reviewing assessments;³⁶ and, where the legislature has provided an exclusive method, that method only can be followed.³⁷ In the exercise of its power, the legislature may provide by statute or charter for a board to review the work of the assessors, either for the correction of errors and inequalities of individual assessments or for equalization after examination of the assessment as an entirety.³⁸ The law relating to the review of assessments is remedial.³⁹

A constitutional provision requiring that the legislature provide for equalizing the valuation of property subject to taxation has been held to apply to municipalities;⁴⁰ and it is the duty of the legislature to provide for the equalization of taxes in municipalities by setting up boards for that purpose.⁴¹ However, such duty has been held to be discharged by a statute granting eligible cities the power of self-government and authorizing them to

22. Miss.—Planters' Gin, etc., Co. v. Greenville, 103 So. 796, 138 Miss. 876.

23. N.Y.—New York v. Streeter, 72 N.E. 631, 180 N.Y. 507.

24. N.Y.—Rochester v. Bloss, 79 N.Y.S. 236, 77 App.Div. 28, affirmed 66 N.E. 1105, 173 N.Y. 646.

25. N.Y.—New York v. Streeter, 72 N.E. 631, 180 N.Y. 507.
44 C.J. p 1331 note 45.

26. U.S.—In re Eldredge Brewing Co., D.C.N.H., 32 F.Supp. 604, affirmed, C.C.A., Eldredge Brewing Co. v. City of Portsmouth, 118 F. 2d 410.

27. Fla.—Rio Vista Hotel & Improvement Co. v. Belle Mead Development Corporation, 182 So. 417, 132 Fla. 88, certiorari denied 59 S.Ct. 251, 305 U.S. 655, 83 L.Ed. 424, rehearing denied 59 S.Ct. 364, 305 U.S. 676, 83 L.Ed. 438.

28. Fla.—Rio Vista Hotel & Improvement Co. v. Belle Mead Development Corporation, supra.

29. N.Y.—People ex rel. New York

Tel. Co. v. Taylor, 64 N.Y.S.2d 326, 187 Misc. 550.

30. N.Y.—People ex rel. New York Tel. Co. v. Taylor, supra.

31. N.Y.—People ex rel. New York Tel. Co. v. Taylor, supra.

32. Ky.—Reed v. Louisville, 61 S.W. 11, 22 Ky.L. 1636.

33. N.Y.—New York v. Vanderveer, 86 N.Y.S. 659, 91 App.Div. 303.

34. N.Y.—People ex rel. New York Tel. Co. v. Taylor, 64 N.Y.S.2d 326, 187 Misc. 550.

35. Ga.—Toole v. Anderson, 171 S.E. 714, 177 Ga. 814.

Referendum necessary

Ga.—Toole v. Anderson, supra.

36. N.Y.—In re Syracuse University, 212 N.Y.S. 253, 214 App.Div. 375.

44 C.J. p 1331 note 50.

Increase or reduction of municipal assessments generally see supra § 2049 e.

37. N.Y.—In re Syracuse University, supra.

Pa.—City of Philadelphia v. Dough-

erty, 34 A.2d 918, 153 Pa.Super. 554.

44 C.J. p 1331 note 51.

38. Wis.—Morey v. Racine, 92 N.W. 426, 116 Wis. 8.

44 C.J. p 1331 note 52.

General rights, powers, and duties of:

Board of assessment, revision, and appeal and members thereof see supra § 682.

Board of equalization and members thereof see supra § 683.

39. N.Y.—People ex rel. Fifth Avenue and 37th Street Corporation v. Miller, 26 N.Y.S.2d 219, 261 App. Div. 550, affirmed 36 N.E.2d 682, 286 N.Y. 628.

40. Tex.—Board of Equalization of City of Fort Worth v. McDonald, 129 S.W.2d 1135, 133 Tex. 521—Forwood v. City of Taylor, Civ. App., 208 S.W.2d 670, rehearing denied 209 S.W.2d 434, affirmed, Sup., 214 S.W.2d 282.
Contra Scollard v. Dallas, 42 S.W. 640, 16 Tex.Civ.App. 620.

41. Tex.—Forwood v. City of Taylor, 214 S.W.2d 282.

provide for the levying of ad valorem taxes not inconsistent with the constitution,⁴² since such a city has the authority and duty to create a board of equalization.⁴³ A properly created board of equalization is a legal body;⁴⁴ and even where a board of equalization is a de facto board, its action, if proper, is legal.⁴⁵ While a board of revision hearing an appeal from a municipal assessment is a quasi-judicial body,⁴⁶ a city council sitting as a board of revision performs the functions of, and acts as, an administrative body,⁴⁷ and is subject to rules governing the actions of administrative bodies generally.⁴⁸

Statutory or charter provisions relating to appeals from the decisions of the tax assessor to the board of assessment review are invalid if they discriminate unreasonably between aggrieved taxpayers as to the right to appeal.⁴⁹ Under a statute so providing, the right to the review of an assessment is open to any person claiming to be aggrieved thereby.⁵⁰ Under a statute providing for review of assessments by the state tax commission, review of assessments of the property of others may be had at the request of any taxpayer.⁵¹

Personnel, qualifications, and appointment of reviewing authorities. Statutory restrictions as to the personnel or qualifications of members of the board of review must be complied with;⁵² and charter provisions respecting the personnel of a board of

equalization are controlled by the constitution and the general laws.⁵³ An appointment may be made only by the board or body vested with authority to do so by a valid statute in force at the time of the appointment;⁵⁴ and statutes providing for the appointment of members of a board of review must conform to constitutional provisions.⁵⁵ Thus, a statute has been held to be unconstitutional which provides for the appointment of members of a municipality's board of review by state officers,⁵⁶ or by officers on whom such duties constituting a public trust may not be placed.⁵⁷

The chairman or presiding officer of the board of review need not be a member of the board.⁵⁸ Where it is provided that the town council shall act as the local board of review, it will be presumed in the absence of a contrary showing that the mayor presides over board meetings as well as meetings of the council,⁵⁹ even though the council does not act as such while sitting as the local board of review.⁶⁰

§ 2055. — Jurisdiction and Power

The power of boards or officers to review or equalize municipal assessments is determined by, and must be exercised in accordance with, the terms of the constitution or statute under which they act.

The power of boards or officers to review or equalize municipal assessments is determined by the terms of the constitution or statute under which

42. Tex.—Forwood v. City of Taylor, *supra*.

43. Tex.—Forwood v. City of Taylor, *supra*.

44. Tex.—Forwood v. City of Taylor, *supra*—City of El Paso v. Texas & P. Ry. Co., Civ.App., 53 S.W.2d 821, reversed on other grounds, Texas & P. Ry. Co. v. City of El Paso, 85 S.W.2d 245, 126 Tex. 86.

45. Tex.—Forwood v. City of Taylor, Civ.App., 209 S.W.2d 434, affirmed, Sup., 214 S.W.2d 282.

46. Pa.—In re Reading Trust Co.'s Assessment, 17 A.2d 625, 143 Pa. Super. 277.

47. Pa.—In re Reading Trust Co.'s Assessment, *supra*.

48. Pa.—In re Reading Trust Co.'s Assessment, *supra*.

49. N.Y.—People ex rel. Powott Corporation v. Woodworth, 15 N.Y.S.2d 985, 172 Misc. 791.

Provision held not invalid

N.Y.—People ex rel. Powott Corporation v. Woodworth, 21 N.Y.S.2d 785, 260 App.Div. 168.

50. Conn.—Conzelman v. City of Bristol, 188 A. 659, 122 Conn. 218.

Lessor

Application for review is properly

brought by a lessor, even though under the terms of the lease the taxes are to be paid by the lessee.—People v. Cantor, 188 N.Y.S. 885, 115 Misc. 519, affirmed 197 N.Y.S. 939, 204 App.Div. 863.

51. Mich.—Fruehauf Trailer Co. v. City of Detroit, 31 N.W.2d 848, 321 Mich. 11.

Member of board of assessors as individual taxpayer

A member of city board of assessors could, as an individual taxpayer, request state tax commission to review assessment and to reassess another taxpayer's personal property.—Fruehauf Trailer Co. v. City of Detroit, *supra*.

52. Okla.—Bodine v. Oklahoma City, 187 P. 209, 79 Okl. 106.

44 C.J. p 1331 note 58.

53. Tex.—Forwood v. City of Taylor, Civ.App., 208 S.W.2d 670, rehearing denied 209 S.W.2d 434, affirmed, Sup., 214 S.W.2d 282.

54. Pa.—Selig v. Philadelphia, 81 A. 308, 232 Pa. 309.

44 C.J. p 1331 note 60.

55. N.Y.—Brown-Lipe Gear Co. v. Ferris, 10 N.E.2d 466, 275 N.Y. 418 —Prescott v. Ferris, 295 N.Y.S.

818, 251 App.Div. 113—In re Household Realty Corporation, 286 N.Y.S. 413, 158 Misc. 667.

56. N.Y.—Brown-Lipe Gear Co. v. Ferris, 10 N.E.2d 466, 275 N.Y. 418 —Prescott v. Ferris, 295 N.Y.S. 818, 251 App.Div. 113—In re Household Realty Corporation, 286 N.Y.S. 413, 158 Misc. 667.

57. N.Y.—In re Brown-Lipe Gear Co., 299 N.Y.S. 169, 252 App.Div. 720, affirmed Brown-Lipe Gear Co. v. Ferris, 10 N.E.2d 466, 275 N.Y. 418—Prescott v. Ferris, 295 N.Y.S. 818, 251 App.Div. 113.

58. Iowa.—Fuller v. Board of Review of Town of Rolfe, 2 N.W.2d 758, 231 Iowa 1015.

Mayor

Fact that the mayor of town is not a member of council and therefore not a member of local board of review would not prevent him from being its chairman or presiding officer.—Fuller v. Board of Review of Town of Rolfe, *supra*.

59. Iowa.—Fuller v. Board of Review of Town of Rolfe, *supra*.

60. Iowa.—Fuller v. Board of Review of Town of Rolfe, *supra*.

they act.⁶¹ Generally, under authority granted by statute, the local board of equalization may increase⁶² or reduce⁶³ the valuation of any particular property, and may act on a reassessment made after the original assessment was found to be invalid.⁶⁴ Also, where property, physically united, is owned by two or more persons separately, the board may, on application, divide and apportion the assessment made on the entire property among the separate owners.⁶⁵

On the other hand, in the absence of statutory authority, the local board does not possess power arbitrarily to reduce or remit a particular assessment after the levy and assessment have been made,⁶⁶ especially after the delivery of the roll to the collector;⁶⁷ and authority to equalize conferred on local boards does not carry with it by implication a power to determine whether particular property is subject to the tax;⁶⁸ nor does mere power to equalize confer authority to raise the assessed value of all the property in the municipality a certain per cent,⁶⁹ or to group several lots into one parcel and equalize the assessments in a single sum for each year against the group.⁷⁰

It has been held that a city council may assume the burden and perform the duties of a board of equalization;⁷¹ and a council so doing constitutes at least a de facto board of equalization.⁷² Power conferred on the mayor and aldermen to levy, assess, and collect taxes through a city assessor authorizes them to amend an assessment so made;⁷³ and, under a statute authorizing the common council to abate any tax where good cause therefor is

shown, the council may abate a tax where the person against whom the assessment is made has become insolvent since the assessment.⁷⁴

Under a statute so providing, the board of trustees may cause a mistake in the assessment roll to be rectified.⁷⁵ However, where the assessor alone has the power to assess, and there is no provision in the statute authorizing the council, or the mayor, and aldermen, to change or otherwise interfere with the values returned by the assessor, they have no power to raise or otherwise amend the assessment.⁷⁶ There is no implied power in a city official to reduce an assessment, where the express authority on which the implied power is claimed to rest is held to have no existence.⁷⁷ Under statutes so providing, the state tax commission, on proper application, has jurisdiction to review and increase an assessment.⁷⁸ The lack of power of the board of assessment review to modify tax rolls because of the invalidity of the statute authorizing such review would not affect assessments confirmed by the city council which has final authority to amend and confirm all portions of the rolls;⁷⁹ but the council is not required to hear complaints of aggrieved taxpayers, notwithstanding such authority.⁸⁰

Time during which power continues. The power of a board or officer to review or equalize municipal assessments is restricted to and must be exercised during the period prescribed therefor by the constitution or statutes;⁸¹ and the failure of a board to render a judgment within a prescribed period deprives it of jurisdiction in the case,⁸² so that a judgment rendered after such period is void.⁸³

61. Cal.—Oakland v. Southern Pac. Co., 63 P. 371, 131 Cal. 226.
44 C.J. p 1331 note 62.

Valuations of taxpayer's property are for the board of equalization.—Rachford v. City of Port Neches, Tex.Civ.App., 96 S.W.2d 167, error refused.

62. Cal.—Oakland v. Southern Pac. Co., 63 P. 371, 131 Cal. 226.
44 C.J. p 1332 note 71.

63. Fla.—Tampa v. Mugge, 24 So. 489, 40 Fla. 326.

64. Ky.—Veith v. Newport, 136 S. W. 645, 143 Ky. 294.

65. N.Y.—In re Donner-Hanna Coke Corp., 209 N.Y.S. 62, 212 App.Div. 338, affirmed 150 N.E. 541, 241 N. Y. 530.
44 C.J. p 1332 note 74.

66. N.Y.—Manufacturers' Bank v. Troy, 24 How.Pr. 250.
Pa.—Stevens v. Scranton, 3 Pa.C.Pl. 149.

67. Iowa.—Collins v. Davis, 10 N. W. 643, 57 Iowa 256.

68. Tex.—San Antonio St. R. Co. v.

San Antonio, 54 S.W. 907, 22 Tex. Civ.App. 341.

44 C.J. p 1332 note 77.

69. Or.—Dalton v. East Portland, 5 P. 193, 11 Or. 426.

70. N.J.—Mackie v. Donohue, 111 A. 730, 92 N.J.Eq. 149.

71. Tex.—Burson v. City of Silverton, Civ.App., 138 S.W.2d 921, error dismissed, judgment correct.

72. Tex.—Burson v. City of Silverton, supra.

73. Tenn.—East Tennessee, etc., R. Co. v. Morristown, Ch.A., 35 S.W. 771.

74. N.H.—In re Briggs, 29 N.H. 547.

75. N.Y.—People ex rel. International Hydro-Electric Corporation v. Podvin, 14 N.Y.S.2d 476, 171 Misc. 785.

Clerical error in copying valuation. N.Y.—People ex rel. International Hydro-Electric Corporation v. Podvin, supra.

76. N.J.—Aichele v. Borough of Oaklyn, 64 A.2d 924.

44 C.J. p 1332 note 67.

77. Conn.—Bridgeport Brass Co. v. Drew, 128 A. 413, 102 Conn. 206.

78. Mich.—Fruehauf Trailer Co. v. City of Detroit, 31 N.W.2d 848, 321 Mich. 11.

After confirmation by city review board.

Mich.—Fruehauf Trailer Co. v. City of Detroit, supra.

79. N.Y.—People ex rel. Powott Corporation v. Woodworth, 15 N. Y.S.2d 985, 172 Misc. 791.

80. N.Y.—People ex rel. Powott Corporation v. Woodworth, supra.

81. N.J.—Toone v. City of Camden, 22 A.2d 351, 19 N.J.Misc. 600.

Power restricted to term.

The power is generally restricted to a review of assessments made during the term for which the board was appointed.—Mancil v. Pearson, 123 S.E. 207, 159 Ga. 279—44 C.J. p 1331 note 63.

82. N.J.—Toone v. City of Camden, 22 A.2d 351, 19 N.J.Misc. 600.

83. N.J.—Toone v. City of Camden, supra.

Moreover, the power is exhausted when the determination of the board with respect to a particular assessment has been recorded.⁸⁴

Conditions. Under provisions to that effect, application to the assessor for a correction of the assessment is a condition precedent to redress by the board of assessment review.⁸⁵ In some jurisdictions the board of review is authorized to make alterations of its own motion;⁸⁶ but, in other jurisdictions, the board can act only after notice has been given to the taxpayer, as discussed *infra*, § 2056 d, or after complaint has been made by him.⁸⁷ In some jurisdictions it cannot increase an assessment without a hearing⁸⁸ and the introduction of evidence.⁸⁹ Where the board of review is shown to have jurisdiction over the subject matter, it cannot condemn the assessment in the absence of evidence to impeach it;⁹⁰ and, even where there is some evidence to impeach the assessment, the board has jurisdiction to sustain it, if there is any evidence which, in any reasonable view of it, justifies that course.⁹¹

Adoption of outside assessment. Sometimes a statute giving a city authority to adopt the state list and to levy taxes thereon, and adoption by the city of such list, does not subject the city to subsequent equalizations by the state board for state taxes.⁹² However, where an equalization of taxes by a state board is made binding on city boards of equalization, the latter have no authority to increase or reduce the state board assessment on particular property, since its function is purely ministerial after the state board has acted.⁹³ A taxpayer cannot object to the classification adopted by the state board in

making its assessment under a statutory authority to do so.⁹⁴ The taxpayer's remedy is by injunction if the local authorities transcend their power and levy a tax based on the full state assessment value against some, and only on a percentage of the state assessment value against others.⁹⁵

§ 2056. — Procedure

- a. In general
- b. Limitation of time
- c. Form and contents of application
- d. Notice, meetings, and records
- e. Scope of review; hearing; decision
- f. Irregularities and waiver

a. In General

The procedure of the board of review or the city council acting as such must comply with charter or statutory provisions.

The procedure of the board of review⁹⁶ or of the city council acting as such⁹⁷ must be in strict compliance with the statutory or charter provisions. The taxpayer cannot claim the benefits of a procedure not granted him by the statute,⁹⁸ as, for example, an arbitration,⁹⁹ or an auction sale, the highest bids received to determine the true valuation.¹ A system of procedure contained in a city charter prevails over that contained in the general tax law where the two systems are inconsistent;² and statutes specifically applying to certain municipalities prevail over general taxing statutes;³ and, within the tax law or the charter, specific provisions relating to procedure prevail over general provisions.⁴

84. N.Y.—*People v. Cantor*, 186 N. Y.S. 466, 195 App.Div. 190, 191, affirmed 132 N.E. 885, 231 N.Y. 553. 44 C.J. p 1331 note 64.

85. N.Y.—*People ex rel. Powott Corporation v. Woodworth*, 15 N. Y.S.2d 985, 172 Misc. 791. Correction of assessment by assessor after his authority has terminated see *supra* § 2043 b.

No appeal from tentative assessment N.Y.—*People ex rel. Powott Corporation v. Woodworth*, *supra*.

86. Ohio.—*Day v. Week*, 19 Ohio Cir.Ct.N.S. 172—*Ludlow v. Lewis*, 9 Ohio S. & C.P. 600, 6 Ohio N. P. 513.

87. Cal.—*Rickard v. Santa Barbara*, 192 P. 726, 49 Cal.App. 58. Pa.—*Evans v. Lancaster*, 81 Pa.Super. 60.

88. Cal.—*Oakland v. Southern Pac. Co.*, 63 P. 371, 131 Cal. 226.

89. Cal.—*Oakland v. Southern Pac. Co.*, *supra*.

90. Wis.—*State v. Willcuts*, 128 N. W. 97, 143 Wis. 449.

91. Wis.—*State v. Willcuts*, *supra*.

92. Cal.—*Madary v. Fresno*, 128 P. 340, 20 Cal.App. 91. Subsequent changes in state assessment adopted by municipality generally see *supra* § 2049 d.

93. Mo.—*Mercantile Trust Co. v. Schramm*, 190 S.W. 886, 269 Mo. 489. 44 C.J. p 1332 note 89.

94. Mo.—*State v. Gardner*, 234 S.W. 53, 290 Mo. 143.

95. U.S.—*Jersey City v. New Jersey Cent. R. Co.*, N.J., 212 F. 76, 128 C.C.A. 532.

96. Mass.—*Eastern Racing Ass'n v. Assessors of Revere*, 16 N.E.2d 64, 300 Mass. 578. 44 C.J. p 1332 note 94.

97. La.—*Board of Liquidation v. Thoman*, 8 So. 482, 42 La.Ann. 605.

Pa.—*In re Assessment of Property of Reading Trust Co.*, Com Pl., 32 Berks Co L.J. 249. 44 C.J. p 1332 note 95.

98. Ga.—*Friedlander v. Moultrie*, 116 S.E. 845, 155 Ga. 184. Ky.—*Collins v. Parrent*, 219 S.W. 1072, 187 Ky. 592.

99. Ga.—*Friedlander v. Moultrie*, 116 S.E. 845, 155 Ga. 184.

1. Ky.—*Collins v. Parrent*, 219 S.W. 1072, 187 Ky. 592.

2. N.Y.—*People v. Woodbury*, 117 N.Y.S. 676, 133 App.Div. 503, affirmed 94 N.E. 1098, 201 N.Y. 532—*People ex rel. Sprague Realty Corp. v. Mills*, 71 N.Y.S.2d 132. Tex.—*Smith v. City of Austin*, Civ. App., 212 S.W.2d 947.

3. N.Y.—*People ex rel. Hermax Realty Corporation v. Barker*, 24 N.Y.S.2d 498, 260 App.Div. 1036.

4. Tex.—*Smith v. City of Austin*, Civ.App., 212 S.W.2d 947.

b. Limitation of Time

An appeal from an assessment, or an application for an abatement of taxes, must be made within the period fixed by the statute of limitations.

An appeal from an assessment must be filed within the period fixed by the statute of limitations,⁵ and the assessment becomes conclusive and binding if the appeal is not filed within such time.⁶ The statute begins to run from the time the assessment is approved,⁷ and not from the time it is made.⁸ In some jurisdictions, a statutory provision fixing the time for the completion of work by the board of review is directory only.⁹

An application for an abatement of taxes must be made within the period prescribed in the statute providing for such remedy;¹⁰ and, as discussed infra subdivision f of this section, the municipal board of assessors cannot waive that requirement. The right to appeal to an appellate tax board from the denial of, or refusal to consider, an application for abatement of taxes may also be barred by the failure to appeal within the period prescribed by statute.¹¹

c. Form and Contents of Application

Charter or statutory provisions as to the form and contents of an application to correct an assessment are controlling and must be complied with.

Charter or statutory provisions as to the formal requisites,¹² or the contents,¹³ of an application to correct an assessment are controlling and must be complied with. In the absence of a provision to that effect, an application for review or correction of assessment need not be in writing,¹⁴ or under oath,¹⁵ or subscribed by the signature of the taxpayer.¹⁶ However, under some statutory or charter provisions the protest or application for correction of an assessment must be made in writing,¹⁷ and signed,¹⁸ and sworn to,¹⁹ in the manner prescribed; and life cannot be given to the document by permitting an amendment of it to correct the deficiency.²⁰

The application in a proceeding to reduce or abate an assessment should state the objections to the assessment and the grounds therefor.²¹ It is not necessary that the application for a review should state the market value of the property,²² an allegation that the assessment is incorrect and based on an overvaluation being sufficient.²³ More-

5. Pa.—City of Philadelphia v. Dougherty, 34 A.2d 918, 153 Pa.Super. 554.

6. Pa.—City of Philadelphia v. Dougherty, supra—City of Erie v. Ruberoid Co., Com.Pl., 28 Erie Co. 82.

7. Miss.—Gloster Compress, etc., Co. v. Gloster, 76 So. 550, 115 Miss. 578.

44 C.J. p 1333 note 4.

8. Miss.—Gloster Compress, etc., Co. v. Gloster, supra.

9. N.Y.—People v. Cantor, 186 N.Y.S. 466, 195 App.Div. 190, affirmed 132 N.E. 885, 231 N.Y. 553.

44 C.J. p 1333 notes 6, 7.

10. Mass.—Old Colony R. Co. v. Board of Assessors of Quincy, 26 N.E.2d 313, 305 Mass. 509.

11. Mass.—Eastern Racing Ass'n v. Assessors of Revere, 16 N.E.2d 64, 300 Mass. 578.

12. N.Y.—People ex rel. Sprague Realty Corp. v. Mills, 71 N.Y.S.2d 132.

Not subject to change by tax commission.

N.Y.—People ex rel. Sprague Realty Corp. v. Mills, supra.

The statute penalizing false statements on an application to reduce tax or assessment whether oral or in writing has no bearing on the question of the sufficiency of an application for correction of an assessment made in statutory form.—People ex rel. 243 Corporation v. Miller, 29 N.E.2d 655, 284 N.Y. 150.

13. N.Y.—People ex rel. Relmar Operating Corp. v. Mills, 65 N.Y.S.2d 194.

14. N.Y.—People ex rel. Hermax Realty Corporation v. Barker, 24 N.Y.S.2d 498, 260 App.Div. 1036.

Complaint before board of equalization

Under a statute providing for a review by the board of equalization on complaint by the person assessed, it is not necessary that the complaint shall be in writing.—Rickards v. Santa Barbara, 192 P. 726, 49 Cal. App. 58.

15. N.Y.—People ex rel. Schwartz v. Miller, 24 N.E.2d 465, 281 N.Y. 554.

16. N.Y.—People ex rel. 243 Corporation v. Miller, 29 N.E.2d 655, 284 N.Y. 150.

17. N.Y.—People ex rel. 243 Corporation v. Miller, supra—People ex rel. Sprague Realty Corp. v. Mills, 71 N.Y.S.2d 132.

18. N.J.—Household Finance Corporation v. State Board of Tax Appeals, 196 A. 219, 119 N.J.Law 230.

19. N.J.—Household Finance Corporation v. State Board of Tax Appeals, supra.

N.Y.—People v. Purdy, 179 N.Y.S. 944, 190 App.Div. 957—Application of Purity Co-op. Bakery Ass'n, 22 N.Y.S.2d 184, 174 Misc. 879—People ex rel. Sprague Realty Corp. v. Mills, 71 N.Y.S.2d 132.

ple ex rel. Sprague Realty Corp. v. Mills, 71 N.Y.S.2d 132.

Verification by officer or agent

A petition of appeal to county board of taxation from city tax assessment, filed by corporation which was agent of property owner for such purpose, and signed and verified by person who was in fact authorized officer of corporation, could be received and determined by board under statute, notwithstanding fact of agency or status of officer did not affirmatively appear on face of petition.—City of Hackensack v. Hackensack Trust Co., 18 A.2d 552, 19 N.J.Misc. 260.

20. N.Y.—Application of Purity Co-op. Bakery Ass'n, 22 N.Y.S.2d 184, 174 Misc. 879.

21. N.Y.—People ex rel. Sprague Realty Corp. v. Mills, 71 N.Y.S.2d 132.

Application held sufficient

Mass.—Assessors of Boston v. Boston Elevated Ry. Co., 70 N.E.2d 812, 320 Mass. 588.

22. N.Y.—People v. Cantor, 188 N.Y.S. 885, 115 Misc. 519, affirmed 197 N.Y.S. 939, 204 App.Div. 863—People ex rel. Relmar Operating Corp. v. Mills, 65 N.Y.S.2d 194.

23. N.Y.—People v. Cantor, 188 N.Y.S. 885, 115 Misc. 519, affirmed 197 N.Y.S. 939, 204 App.Div. 863.

Amount to be shown at hearing

N.Y.—People ex rel. Relmar Operating Corp. v. Mills, 65 N.Y.S.2d 194.

over, the failure to state the specific value or overvaluation, if a defect at all, is a mere procedural defect which may be corrected.²⁴ The landowner cannot raise the objection that the assessment on his property is unequal and unjust as compared with other assessments where his application for a review contains no statement of specific inequality.²⁵ A proceeding by the assessors to rectify a mistake may be merged with a property owner's complaint that the valuation contended for was too high.²⁶

d. Notice, Meetings, and Records

The board of review must act at a regular, or regularly adjourned, meeting, and must give notice of an increase in an assessment.

The board of review must act at a regular meeting,²⁷ or at a regularly adjourned meeting,²⁸ at the time and place prescribed by law and fixed by the notice given.²⁹ Usually notice of the sittings must be duly given;³⁰ but in some jurisdictions it is not required,³¹ as in jurisdictions where there are provisions that a review of the assessment shall be made at the regular meeting of the board to be held on a fixed day.³² If all members of the board have been notified of the meeting, the action of a majority at such meeting is legal.³³

Notice of increase. It is usually expressly provided that notice of an increase of an assessment on particular property must be given before the increase will become effectual;³⁴ but, if notice is

given of a meeting at which equalization of property generally will be considered, additional notices to the particular owners affected by increases before such increases are made is not required;³⁵ and, where under the statute the assessed value of corporate stock is to be its market value minus the value of real estate, owned by the corporation already assessed, an increase in assessed value of stock resulting not from an increase in the gross valuation, but from a decrease in the real estate assessment, is not an increase in valuation within the meaning of the statute requiring notice.³⁶

The requisites and sufficiency of the notice of change in assessment are determined by the statutory or charter provisions;³⁷ but it has been held that it is sufficient if the requirement is substantially complied with and the taxpayer is not deprived of any rights.³⁸ Where notice is required, it is properly given to a person who is a life tenant of the property and trustee for the remaindermen.³⁹ Where the taxpayer has been given proper notice, the fact that he does not appear before the board of equalization to protest an increased assessment and present evidence as to a proper assessment does not affect the validity of an increase granted by the board.⁴⁰

Records. The board of review must keep a record of its proceedings if the statute so provides,⁴¹ but not otherwise.⁴²

24. N.Y.—People ex rel. Relmar Operating Corp. v. Mills, *supra*.

25. N.Y.—People v. Brady, 173 N.Y.S. 125, 184 App.Div. 901.

26. N.Y.—People ex rel. International Hydro-Electric Corporation v. Podvin, 14 N.Y.S.2d 476, 171 Misc. 785.

27. Wis.—Cramer v. Stone, 38 Wis. 259.

44 C.J. p 1333 note 16.

28. Miss.—Nixon v. Biloxi, 25 So. 664, 76 Miss. 810.

Adjourned meeting held valid

Miss.—Stewart v. Mayor and Aldermen of City of Vicksburg, 13 So.2d 40, 195 Miss. 189, followed in 13 So.2d 44, three cases, suggestion of error overruled 13 So.2d 648, 195 Miss. 189—City of Vicksburg v. Melshelmer, 184 So. 68, 183 Miss. 517, modified on other grounds on suggestion of error 185 So. 207, 183 Miss. 517.

29. Neb.—Curtis v. South Omaha, 93 N.W. 743, 67 Neb. 539.

Statutory requirements held valid

Mo.—State ex rel. Lindell Tower Apartments v. Guise, 206 S.W.2d 320, 357 Mo. 50.

30. Ky.—U. S. Fidelity, etc., Co. v.

Somerset Bd. of Education, 86 S.W. 1120, 27 Ky.L. 863.

44 C.J. p 1333 note 19.

Publication of notice held sufficient

Miss.—Stewart v. Mayor and Aldermen of City of Vicksburg, 13 So.2d 40, 195 Miss. 189, followed in 13 So.2d 44, three cases, suggestion of error overruled 13 So.2d 648, 195 Miss. 189.

Proof of publication

Miss.—Stewart v. Mayor and Aldermen of City of Vicksburg, *supra*.

31. Alaska.—Ketchikan v. Zimmerman, 4 Alaska 286.

32. Alaska.—Ketchikan v. Zimmerman, *supra*.

33. Mich.—Cuming v. Grand Rapids, 9 N.W. 141, 46 Mich. 150.

34. Pa.—In re Reading Trust Co.'s Assessment, 17 A.2d 625, 143 Pa. Super. 277.

44 C.J. p 1333 note 22.

35. Ill.—Crammon v. Chicago, 44 Ill. 269.

Okl.—Brockhaus v. Baysinger, 126 P. 223, 34 Okl. 483.

36. N.Y.—Apgar v. Hayward, 18 N.E. 85, 110 N.Y. 225.

44 C.J. p 1333 note 24.

37. Tex.—Smith v. City of Austin, Civ.App., 212 S.W.2d 947.

Charter provision controlling

Tex.—Smith v. City of Austin, *supra*.

Requirement of publication held directory

Mo.—State ex rel. Lindell Tower Apartments v. Guise, 206 S.W.2d 320, 357 Mo. 50.

Notice held defective

Mo.—State ex rel. Lindell Tower Apartments v. Guise, *supra*.

38. Miss.—Lavecchia v. Mayor and Aldermen of City of Vicksburg, 20 So.2d 831, 197 Miss. 860.

39. Md.—Baltimore v. Gittings, 77 A. 319, 113 Md. 119.

40. Tex.—West Texas Hotel Co. v. City of El Paso, Civ.App., 83 S.W.2d 772, error dismissed.

41. Mich.—Story, etc., Piano Co. v. Hilderink, 155 N.W. 445, 189 Mich. 123.

Contents of minutes

Miss.—Lear v. Hendrix, 187 So. 746, 186 Miss. 289—Alvis v. Hicks, 116 So. 612, 150 Miss. 306.

42. N.Y.—Lancaster Sea Beach Impr. Co. v. New York, 146 N.Y.S. 734, 161 App.Div. 469, affirmed 108 N.E. 90, 214 N.Y. 1.

e. Scope of Review; Hearing; Decision

An appeal from the decision of tax assessors is triable de novo. The taxpayer is entitled to a hearing, and general rules of evidence are applicable. The board's decision is not ordinarily subject to collateral attack.

Under charter or statutory provisions to that effect, an appeal from the decision of tax assessors to a board of tax review,⁴³ or to the mayor and city council,⁴⁴ contemplates a de novo trial of all the issues presented by the petition and answer. The taxpayer must give to the board full and truthful information touching all matters that will enable it to arrive at a correct valuation of the property;⁴⁵ and, while it is the duty of the board of equalization on request to furnish to the taxpayer the facts and figures on which it proposes to estimate the value of the property,⁴⁶ and information as to the method which it will employ in arriving at its conclusion,⁴⁷ it is still incumbent on the taxpayer to make a request for such information if, in the establishment of his case, he relies on the failure of the board to give it to him.⁴⁸

In determining the propriety of the valuation of property made by the municipal assessor, the board of tax appeals is required to use the same standard of valuation used by the original assessor.⁴⁹ A charge of discrimination in municipal assessments cannot be sustained unless it is predicated on the relative assessments of two or more properties.⁵⁰

The council, in reviewing an assessment, cannot add property belonging to the taxpayer which was not a part of the city at the time the assessment roll was completed.⁵¹

Hearing, evidence, and findings. The appealing taxpayer is entitled to a hearing,⁵² and has the right to introduce evidence thereon.⁵³ More specifically, the tribunal should give applicant an opportunity to supply particulars of his claim of overvaluation as set out in his application.⁵⁴ Where a taxpayer appeals to the board of equalization to correct errors in the assessment, every presumption is to be taken in favor of the regularity of the assessment,⁵⁵ which will not be disturbed unless clearly excessive;⁵⁶ and the burden is on the taxpayer to point out the error to the board.⁵⁷ However, where there are inconsistencies in assessments, the board of tax appeals will consider the issues on the basis of the evidence adduced before it, aside from the usual presumptions as to the correctness of assessments and local board determinations.⁵⁸ Rules governing such matters in civil actions generally have been applied in proceedings to review an assessment with respect to the admissibility of evidence,⁵⁹ and the weight and sufficiency thereof.⁶⁰ The findings of an appellate tax board must conform to the evidence, the facts, and rules of law.⁶¹

43. Mass.—City of Revere v. Revere Const. Co., 189 N.E. 73, 285 Mass. 243.

44. Ga.—City of Macon v. Ries, 179 S.E. 529, 180 Ga. 371—City of Macon v. Ries, 176 S.E. 21, 179 Ga. 320.

45. Ky.—Kentucky Heating Co. v. Louisville, 192 S.W. 4, 174 Ky. 142.

46. Ky.—Kentucky Heating Co. v. Louisville, supra.

47. Ky.—Kentucky Heating Co. v. Louisville, supra.

48. Ky.—Kentucky Heating Co. v. Louisville, supra.

49. Mass.—City of Revere v. Revere Const. Co., 189 N.E. 73, 285 Mass. 243.

Methods of valuation see supra § 2049 c.

Fair cash value

Mass.—City of Revere v. Revere Const. Co., supra.

50. N.J.—Jersey City v. Bettcher, 34 A.2d 784, 22 N.J.Misc. 16, followed in Applications of Jersey City for Increase of Tax Assessments for Year 1943, 34 A.2d 790, 22 N.J.Misc. 28, appeal dismissed, Appeals of Jersey City, 44 A.2d 189.

51. Mich.—Koch v. Detroit, 210 N.W. 239, 236 Mich. 338.
44 C.J. p 1334 note 42.

52. N.Y.—People ex rel. Sprague Realty Corp. v. Mills, 71 N.Y.S.2d 132.

53. Ga.—City of Macon v. Ries, 179 S.E. 529, 180 Ga. 371—City of Macon v. Ries, 176 S.E. 21, 179 Ga. 320.

54. N.Y.—People ex rel. Relmar Operating Corp. v. Mills, 65 N.Y.S.2d 194.

Contrary rule of commission held invalid

N.Y.—People ex rel. Relmar Operating Corp. v. Mills, supra.

55. Mo.—Heather v. Palmyra, 276 S.W. 872, 311 Mo. 32.
44 C.J. p 1334 note 31.

56. La.—New Orleans v. Jefferson Gas Light Co., 35 La. Ann. 627.
N.Y.—People v. Purdy, 136 N.Y.S. 667, 152 App.Div. 175, affirmed 101 N.E. 1116, 207 N.Y. 695.

57. Ky.—Kentucky Heating Co. v. Louisville, 192 S.W. 4, 174 Ky. 142.
44 C.J. p 1334 note 33.

58. N.J.—Jersey City v. Harborside Warehouse Co., 17 A.2d 572, 19 N.J.Misc. 222, certiorari dismissed Harborside Warehouse Co. v. Jersey City, 25 A.2d 291, 128 N.J.Law

263, affirmed 28 A.2d 91, 129 N.J.Law 62, certiorari denied 63 S.Ct. 763, four cases, 318 U.S. 769, 87 L.Ed. 1140.

59. Ga.—City of Macon v. Ries, 179 S.E. 529, 180 Ga. 371.

Evidence held admissible

Ga.—City of Macon v. Ries, supra.
N.J.—General Motors Corporation v. State Board of Tax Appeals, 16 A.2d 632, 125 N.J.Law 574.

Exclusion of evidence held not erroneous

Mass.—City of Revere v. Revere Const. Co., 189 N.E. 73, 285 Mass. 243.

60. Iowa.—Miller v. Board of Review of Sioux City, 298 N.W. 921, 230 Iowa 765.

Evidence held sufficient

Evidence that land had declined in value since a prior assessment was held sufficient to warrant a reduction in the assessment for the current year.

Iowa.—Miller v. Board of Review of Sioux City, supra.

Pa.—Appeal of Seyfert, 54 Pa. Dist. & Co. 339, 37 Berks Co.L.J. 275.

61. Mass.—Jacob's Pillow Dance Festival v. Assessors of Becket, 69 N.E.2d 463, 320 Mass. 311.

Operation and effect of decision. The decision of the board is final,⁶² subject only to review by the court in a proper case, as discussed *infra* § 2057. Its action is judicial and not subject to collateral attack,⁶³ except for want of jurisdiction;⁶⁴ or for fraud;⁶⁵ or something equivalent thereto;⁶⁶ or for an abuse of discretion;⁶⁷ or where the proceedings are void;⁶⁸ or, where the statute permits it, for gross injustice or mistake.⁶⁹ Since a proceeding by the assessors to rectify a mistake may be merged with the property owner's complaint that the valuation contended for was too high, after the decision in such proceeding the property owner cannot maintain a separate proceeding to change the valuation placed on his property.⁷⁰ If the decision is illegally made in violation of a constitutional requirement, it is void,⁷¹ and leaves the original assessment in force if the latter is itself within the constitutional limitations.⁷²

f. Irregularities and Waiver

Under some statutes irregularities in assessment or

review which do not affect the board's jurisdiction or the rights of the property owner do not invalidate the assessment; and various defects may be waived.

Under the statutes in force in some jurisdictions, irregularities in the assessment, or review thereof, which do not affect the jurisdiction of the board and do not prejudice the property rights of the owner do not invalidate the assessment;⁷³ but an irregularity in the procedure affecting the jurisdiction of the board is fatal.⁷⁴ Proceeding to a hearing on the merits constitutes a waiver on the part of the city of alleged defects in the application of the taxpayer,⁷⁵ at least as to defects that are not jurisdictional;⁷⁶ and proceeding to a hearing on the merits also constitutes a waiver by the taxpayer of notice of an increase in his assessment by the board,⁷⁷ or of alleged defects in or respecting such notice.⁷⁸

So, also, the action of a municipal tax commission in refusing to allow an applicant to present the particulars of his claim of overvaluation as set out in the application constitutes a waiver of

Findings held not erroneous

Mass.—Assessors of Boston v. Boston Elevated Ry. Co., 70 N.E.2d 812, 320 Mass. 588—Jacob's Pillow Dance Festival v. Assessors of Becket, 69 N.E.2d 463, 320 Mass. 311.

62. Ky.—Kentucky Heating Co. v. Louisville, 192 S.W. 4, 174 Ky. 142
Neb.—Nebraska State Building Corporation v. City of Lincoln, 290 N.W. 421, 137 Neb. 535.

Pa.—City of Philadelphia v. Dougherty, 34 A.2d 918, 153 Pa.Super. 554.

Tenn.—Cox v. City of Bristol, 187 S.W.2d 637, 28 Tenn.App. 136.

Wis.—Burling v. Village of Green Lake, 20 N.W.2d 717, 248 Wis. 103.

63. Pa.—City of Philadelphia v. Dougherty, 34 A.2d 918, 153 Pa.Super. 554—In re Compromise of Delinquent Taxes on Lot of Ground and Building Thereon, in Borough of Scottsdale, Com.Pl., 28 West.Co. L.J. 61.

Tenn.—King v. City of Bristol, 4 S.W.2d 343, 156 Tenn. 643.

Tex.—Hickson v. City of Van Alstyne, Civ.App., 195 S.W.2d 571—City of El Paso v. Texas & P. Ry. Co., Civ.App., 53 S.W.2d 821, reversed on other grounds, Sup., Texas & P. Ry. Co. v. City of El Paso, 85 S.W.2d 245, 126 Tex. 86.
Wis.—Burling v. Village of Green Lake, 20 N.W.2d 717, 248 Wis. 103.
44 C.J. p 1334 note 52.

On appeal in collateral action

The authority of a *de facto* board of equalization, made up of the members of the city council, may not be attacked on appeal from a judgment

for delinquent municipal taxes.—Burson v. City of Silverton, Tex.Civ. App., 138 S.W.2d 921, error dismissed, judgment correct.

64. U.S.—Jersey City v. Jersey City Cent. R. Co., N.J., 212 F. 76, 128 C.C.A. 532.
44 C.J. p 1334 note 53.

65. Tex.—Hickson v. City of Van Alstyne, Civ.App., 195 S.W.2d 571.
44 C.J. p 1334 note 54.

Alleged manipulation of assessments by city assessor does not justify review by bill in chancery, in view of review by board of equalization.—King v. City of Bristol, 4 S.W.2d 343, 156 Tenn. 643.

66. Tex.—Hickson v. City of Van Alstyne, Civ.App., 195 S.W.2d 571

67. Tex.—City of El Paso v. Texas & P. Ry. Co., Civ.App., 53 S.W.2d 821, reversed on other grounds, Texas & P. Ry. Co. v. City of El Paso, 85 S.W.2d 245, 126 Tex. 86.

68. Tenn.—King v. City of Bristol, 4 S.W.2d 343, 156 Tenn. 643.

Improper method of valuation

Where the method of valuation of property is illegal, arbitrary, and fundamentally wrong, and does not comply with the rules prescribed by the constitution and the decisions relating to such matters, the assessment is void, and may be attacked in an action by the municipality to collect the tax.—Texas & P. Ry. Co. v. City of El Paso, 85 S.W.2d 245, 126 Tex. 86.

69. Neb.—Wead v. Omaha, 102 N.W. 675, 73 Neb. 321.
44 C.J. p 1334 note 55.

70. N.Y.—People ex rel. International Hydro-Electric Corporation v. Podvin, 14 N.Y.S.2d 476, 171 Misc. 785.

71. N.J.—Blume v. Bowes, 47 A. 487, 65 N.J.Law 470.

72. N.J.—Blume v. Bowes, *supra*.

73. Mich.—Story, etc., Piano Co. v. Hilderink, 155 N.W. 445, 189 Mich. 123.

44 C.J. p 1334 note 45.
Effect of irregularities on assessment generally see *supra* § 2042.
Irregularities in levy see *supra* § 2011

74. Cal.—Huntley v. Auburn, 131 P. 859, 165 Cal. 298.

44 C.J. p 1334 note 46.

75. N.Y.—People ex rel. Irving Trust Co. v. Miller, 37 N.Y.S.2d 266, 264 App.Div. 270—People v. Cantor, 188 N.Y.S. 885, 115 Misc. 519, affirmed 197 N.Y.S. 939, 204 App.Div. 863

76. N.Y.—People ex rel. Fifth Avenue and 37th Street Corporation v. Miller, 26 N.Y.S.2d 219, 261 App.Div. 550, affirmed 36 N.E.2d 682, 286 N.Y. 628.

77. Mo.—State ex rel. Lindell Tower Apartments v. Guise, 206 S.W.2d 320, 357 Mo. 50.

N.Y.—People v. Schoonover, 62 N.Y.S. 180, 47 App.Div. 278, affirmed 60 N.E. 1118, 166 N.Y. 629.

78. Miss.—Stewart v. Mayor and Aldermen of City of Vicksburg, 13 So.2d 40, 195 Miss. 189, followed in 13 So.2d 44, three cases, suggestion of error overruled 13 So.2d 648, 195 Miss. 189.

any defect in the application in failing to set out a specific claimed value.⁷⁹ However, an appearance of a taxpayer before a committee acting merely in an advisory capacity to the board does not operate as a waiver of notice of the action of the board on the committee's report.⁸⁰ The requirement that an application for abatement of taxes must be made within the prescribed period cannot be waived by the municipal authorities;⁸¹ nor can a statutory requirement that the application be made under oath be so waived.⁸² The fact that the taxpayer had filed an application for review of the assessment by the board of review would not bar him from attacking the authority of such board, where the board was created by a void statute.⁸³

§ 2057. — Relief from Action of Board of Equalization or Review

- a. In general
- b. Persons entitled to relief
- c. Limitations and laches
- d. Conditions precedent; notice
- e. Parties
- f. Pleadings
- g. Evidence
- h. Hearing and determination
- i. Further appeal or review

79. N.Y.—*People ex rel. Relmar Operating Corp. v. Mills*, 65 N.Y.S.2d 194.

80. Iowa.—*Cedar Rapids, etc., R. Co. v. Redmond*, 94 N.W. 1906, 120 Iowa 601.

81. Mass.—*Old Colony R. Co. v. Board of Assessors of Quincy*, 26 N.E.2d 313, 305 Mass. 509.

82. N.Y.—*People v. Purdy*, 179 N.Y.S. 944, 190 App.Div. 957.

Defective jurat may be waived

N.Y.—*People ex rel. Fifth Avenue and 37th Street Corporation v. Miller*, 26 N.Y.S.2d 219, 261 App.Div. 550, affirmed 36 N.E.2d 682, 286 N.Y. 628.

83. N.Y.—*In re Household Realty Corporation*, 286 N.Y.S. 413, 158 Misc. 667.

84. N.J.—*Van Riper v. North Plainfield Tp.*, 43 N.J.Law 349.

N.Y.—*Donner-Hanna Coke Corp. v. Buffalo*, 209 N.Y.S. 62, 212 App.Div. 338, affirmed 150 N.E. 541, 241 N.Y. 530.

Relief against collection of illegal tax

The remedy provided by statute in event of wrongful assessment of property in city is not an alternative to an appeal from the board of relief, and a judgment under the statute is not directed to bringing about a change in the assessment list, but

the statute is intended to afford relief against the collection of an illegal tax.—*Borough of Fenwick v. Town of Old Saybrook*, 47 A.2d 849, 133 Conn. 22.

Fraud or substantial error

The statutory procedure for review of assessments is confined to cases of fraud or substantial error in the assessments.—*Cooper Union for Advancement of Science and Art v. City of New York*, 71 N.Y.S.2d 204, 272 App.Div. 438, appeal and reargument denied 74 N.Y.S.2d 404, 272 App.Div. 1004, affirmed 81 N.E.2d 108, 298 N.Y. 578.

85. N.Y.—*People ex rel. Staten Island Rapid Transit Ry. Co. v. Taylor*, 287 N.Y.S. 456, 247 App.Div. 405.

86. N.Y.—*People ex rel. Staten Island Rapid Transit Ry. Co. v. Taylor*, supra.

87. N.Y.—*London Terrace v. City of New York*, 36 N.Y.S.2d 847.

88. N.Y.—*London Terrace v. City of New York*, supra.

89. U.S.—*Parsons v. Detroit & Canada Tunnel Co.*, D.C.Mich., 15 F. Supp. 986.

90. Tex.—*Board of Equalization of City of Fort Worth v. McDonald*, 129 S.W.2d 1135, 133 Tex. 521.

Liability on different appeals

Where trial as held in district

a. In General

Various remedies, depending on the provisions of the statutes, are available to review or correct assessments, including appeal, certiorari, and injunction; and under some statutes the particular remedies are exclusive.

Where a statute or charter provides for an application to a court for relief in certain cases involving a municipal tax assessment, the remedy so provided is available where the case falls within the terms of the statute or charter,⁸⁴ and such procedure may be exclusive⁸⁵ so that provisions of general statutes do not apply.⁸⁶ It has been held that the municipality, under the grant by the legislature of the taxing power, may restrict the taxpayer to a particular method of judicial review of his tax liability,⁸⁷ provided such restriction does not substantially deprive the taxpayer of his right to relief.⁸⁸ In a proper case, as where property is in the hands of a bankruptcy receiver, the federal courts may determine the validity of a municipal assessment.⁸⁹ General rules have been applied in determining liability for costs in judicial proceedings for the review of municipal assessments.⁹⁰

Appeal. While it is otherwise in some jurisdictions,⁹¹ it is generally held that the decisions of the board of equalization or review are subject to review by the courts on appeal,⁹² at least in cer-

court in taxpayer's proceeding to review tax valuations of city board of equalization was induced by provision of city charter making court's judgment final, and was influenced by exceptions urged by board, board was required to pay costs incurred in court of civil appeals and district court, and taxpayer was required to pay costs incurred before the commission of appeals, which determined that charter provision was invalid.—*Board of Equalization of City of Fort Worth v. McDonald*, supra.

Consolidated action

Separate orders sustaining writ in consolidated certiorari proceedings to review tax assessments of a town and village were affirmed with one bill of costs and disbursements, payable by appellant town and village jointly.—*People ex rel. Larchmont Manor Park Soc. v. Smith*, 51 N.Y.S.2d 686, 268 App.Div. 997, affirmed 63 N.E.2d 116, 294 N.Y. 920, motion denied 65 N.E.2d 567, 295 N.Y. 746.

91. Alaska.—*Ballaine v. Seward*, 5 Alaska 734.

92. Neb.—*Eppley Hotels Co. v. City of Lincoln*, 293 N.W. 234, 138 Neb. 347.

Pa.—*City of Philadelphia v. Dougherty*, 34 A.2d 918, 153 Pa.Super. 554.

44 C.J. p 1335 note 62.

tain cases.⁹³ In some jurisdictions, under statutes so providing, judgments of, or proceedings before, a county board of taxation may be appealed to the state board of tax appeals.⁹⁴ It has been held that the refusal of an assessment board to reconsider its former final decision is not reviewable on appeal.⁹⁵ Provision is made in some states for trial of the cause anew on appeal.⁹⁶ On a single appeal from assessments on different parcels, the entire assessment is reviewed.⁹⁷

Certiorari. Unless another adequate remedy is provided by statute,⁹⁸ certiorari lies to review the decision of the board,⁹⁹ or to review and cancel an illegal assessment,¹ in respect of jurisdictional questions,² but not in respect of other matters,³ such as discretionary acts of the board.⁴ Under some statutes the procedure for review of assessments is limited exclusively to the writ of certiorari;⁵ and,

under a provision to that effect, the proceeding to review an assessment by writ of certiorari is in form a special proceeding,⁶ although in some respects it resembles an action in the sense that it is a proceeding to review de novo.⁷ In so far as tax statutes regulate the practice and use of the writ of certiorari in tax cases, the provisions thereof are exclusive and override the provisions of general statutes relating to the writ;⁸ but as to matters with respect to which the taxing statutes are silent the general statutes are effective.⁹ Certiorari is also the proper remedy, in the absence of special equities or acts ultra vires, to attack the apportionment of tax liens by a municipal taxing body.¹⁰

Injunction. In a proper case a taxpayer may institute proceedings to restrain an illegal assessment.¹¹ Relief by injunction may be granted to the

Adequacy of exemption

Pa.—Wynnefield United Presbyterian Church v. City of Philadelphia, 35 A.2d 276, 348 Pa. 252.

Invalidity of charter provision

Invalidity of provision of charter of home-rule city making district court's judgment final in reviewing tax valuations of city board of equalization did not destroy taxpayer's right to appeal to district court for revision of board's action under court's general equitable jurisdiction.—Board of Equalization of City of Fort Worth v. McDonald, 129 S. W.2d 1135, 133 Tex. 521.

Limitations on right

Conn.—General Realty Imp. Co. v. City of New Haven, 50 A.2d 59, 133 Conn. 238.

93. Md.—Joesting v. Baltimore, 55 A. 456, 97 Md. 589.

Erroneous valuation

Neb.—Nebraska State Building Corporation v. City of Lincoln, 290 N. W. 421, 137 Neb. 535.
44 C.J. p 1335 note 64 [a].

94. N.J.—Borough of Oradell v. State Board of Tax Appeals, 13 A. 2d 479, 125 N.J.Law 37.

No determination by county board

If county board of taxation makes no determination whatever on taxpayer's appeal from local assessment, taxpayer has right of review of assessment before state board of tax appeals.—Toone v. City of Camden, 22 A.2d 351, 19 N.J.Misc. 600.

95. Pa.—First Baptist Church of Pittsburgh v. City of Pittsburgh, 20 A.2d 209, 341 Pa. 568, 134 A.L. R. 1169.

96. Miss.—Whittle v. Hattiesburg, 96 So. 741, 132 Miss. 808.

Pa.—Appeal of Stevens, 18 Pa.Dist. & Co. 698—Appeal of Eldredge, Com.Pl., 57 Montg.Co. 261, 33 Mun.

L.R. 43—Appeal of Phipp, Com. Pl., 86 Pittsb.Leg.J. 161.

97. Miss.—Redmond v. Jackson, 108 So. 444, 143 Miss. 114.

98. Cal.—Rickard v. Santa Barbara, 192 P. 726, 49 Cal.App. 58.
44 C.J. p 1335 note 70.

99. Iowa.—Collins v. Davis, 10 N. W. 643, 57 Iowa 256.

N.Y.—People v. Odell, 114 N.Y.S. 199, 129 App Div. 475.

1. N.Y.—People ex rel. Buffalo & Fort Erie Public Bridge Authority v. Davis, 296 N.Y.S. 787, 163 Misc. 192, motion denied 12 N.E.2d 564, 276 N.Y. 534, affirmed 14 N.E.2d 74, 277 N.Y. 292.

2. Wis.—State v. Willcuts, 122 N.W. 1048, 140 Wis. 448.
44 C.J. p 1335 note 72.

3. Iowa.—Polk County v. Des Moines, 30 N.W. 614, 70 Iowa 351.
Wis.—State v. Willcuts, 128 N.W. 97, 143 Wis. 449.

4. Iowa.—Polk County v. Des Moines, 30 N.W. 614, 70 Iowa 351.

Valuation; right to hearing de novo
Statutes providing for review of actions of boards and commissions by the courts were held not to provide for judicial review by certiorari of assessment of property for taxation made by municipal board of equalization with hearing de novo on question of valuation.—Anderson v. City of Memphis, 72 S.W.2d 1059, 167 Tenn. 648.

5. N.Y.—People ex rel. Staten Island Rapid Transit Ry. Co. v. Taylor, 287 N.Y.S. 456, 247 App.Div. 405.

Order of certiorari distinguished from writ

N.Y.—People ex rel. Staten Island Rapid Transit Ry. Co. v. Taylor, supra.

6. N.Y.—People ex rel. Michael J. Adrian Corporation v. Sexton, 295 N.Y.S. 542, 251 App.Div. 181.

7. N.Y.—People ex rel. Michael J. Adrian Corporation v. Sexton, supra.

8. N.Y.—People ex rel. Michael J. Adrian Corporation v. Sexton, supra—People ex rel. New York Cent. R. Co. v. Block, 164 N.Y.S. 962, 178 App Div. 251—People ex rel. Wheeler v. Neafsey, 255 N.Y.S. 477, 142 Misc. 692.

9. N.Y.—People ex rel. Michael J. Adrian Corporation v. Sexton, 295 N.Y.S. 542, 251 App.Div. 181—People ex rel. New York Cent. R. Co. v. Block, 164 N.Y.S. 962, 178 App. Div. 251—People ex rel. Wheeler v. Neafsey, 255 N.Y.S. 477, 142 Misc. 692.

10. N.J.—Luckenbach Terminals v. Township of North Bergen, 6 A.2d 548, 125 N.J.Eq. 562, affirmed Luckenbach Terminals v. North Bergen Tp., Hudson County, 11 A.2d 46, 127 N.J.Eq. 93, appeal dismissed Luckenbach Terminals v. Township of North Bergen in Hudson County, 61 S.Ct. 13, 311 U.S. 608, 85 L.Ed. 385.

11. Fla.—Rio Vista Hotel & Improvement Co. v. Belle Mead Development Corporation, 182 So. 417, 132 Fla. 88, certiorari denied 59 S.Ct. 251, 305 U.S. 655, 83 L.Ed. 424, rehearing denied 59 S.Ct. 364, 305 U.S. 676, 83 L.Ed. 438.
44 C.J. p 1335 note 77.

Injunction against:

Sale for taxes see infra § 2094.

Wrongful collection of tax see infra § 2108.

Taxpayer's action to restrain levy and collection of entire tax see infra § 2145.

taxpayer where he has no statutory remedy to correct an illegal or excessive assessment;¹² but where a remedy at law under the statute exists an injunction will not be granted.¹³

Other remedies. In addition to the foregoing remedies, other remedies held to be available to a taxpayer for the review and correction of assessments include an action to review, reduce, or abate an assessment,¹⁴ and an action to cancel or vacate an assessment.¹⁵

b. Persons Entitled to Relief

In order to be entitled to relief, a taxpayer must show an interest in the property taxed and that he was aggrieved by the assessment; and the municipal corporation may also appeal from an adverse decision.

A taxpayer, in order to bring himself within the terms of a statute allowing persons aggrieved to appeal or petition for a writ of certiorari, must show an interest in the property taxed¹⁶ and that he was aggrieved by the assessment,¹⁷ that is, either that he was not liable for the tax at all¹⁸ or that the amount of the tax was excessive.¹⁹ Mere proof of illegality of the tax apart from its rela-

tion to the objecting taxpayer is not sufficient.²⁰ A taxpayer who establishes that his property has been taxed at more than its full value is aggrieved and entitled to redress,²¹ since it will be presumed that the assessing officers, in the performance of their duties, complied with the statutes and did not similarly overvalue other properties in the municipality.²² Payment of a tax, when proved, establishes the right of the person who paid the tax to resist a reassessment to cure an alleged irregularity in the original assessment.²³

Appeal by municipality. The municipality ordinarily may appeal from an adverse decision of a tax review board.²⁴

c. Limitations and Laches

Proceedings to review or correct assessments must be brought within the time limited by statute, if any; and apart from statute the right to bring such proceedings may be barred by laches or unreasonable delay.

An appeal from an assessment board to the courts must be taken within the period prescribed by statute;²⁵ and the rule also applies to certiorari proceedings.²⁶ So also, an action to review or reduce

12. Md.—Joesting v. Baltimore, 55 A. 456, 97 Md. 589.

44 C.J. p 1335 note 78.

13. Md.—Wannenwetch v. Baltimore, 81 A. 3, 115 Md. 446.

14. Fla.—Rio Vista Hotel & Improvement Co. v. Belle Mead Development Corporation, 182 So. 417, 132 Fla. 88, certiorari denied 59 S.Ct. 251, 305 U.S. 655, 83 L.Ed. 424, rehearing denied 59 S.Ct. 364, 305 U.S. 676, 83 L.Ed. 438.

Wis.—Burling v. Village of Green Lake, 20 N.W.2d 717, 248 Wis. 103.

Court held to have jurisdiction

Fla.—City of Tampa v. Wiley, 188 So. 134, 137 Fla. 126.

Statutory restrictions

Personal property tax dispute between taxpayer and city is governed by statute prohibiting abatement of principal sum of any taxes unless governing body of city is satisfied that market value of property against which taxes were levied is less than such principal sum, or that taxes are illegal, or that proceedings taken to levy or enforce them are contrary to law.—Consolidated Cigar Corp. v. Brunner, 42 A.2d 631, 133 N.J.Law 77—New Jersey Bell Tel. Co. v. City of Newark, 42 A.2d 629, 136 N.J.Eq. 479.

15. Fla.—Rio Vista Hotel & Improvement Co. v. Belle Mead Development Corporation, 182 So. 417, 132 Fla. 88, certiorari denied 59 S.Ct. 251, 305 U.S. 655, 83 L.Ed. 424, rehearing denied 59 S.Ct. 364, 305 U.S. 676, 83 L.Ed. 438.

16. N.Y.—People v. O'Donnel, 124 N.Y.S. 36, 139 App.Div. 83, affirmed 93 N.E. 1129, 200 N.Y. 519.

Pa.—Appeal of Secretary of Banking, Com.Pl., 29 Erie 61.

44 C.J. p 1335 note 81.

Grantee held "aggrieved owner"

Conn.—General Realty Imp. Co. v. City of New Haven, 50 A.2d 59, 133 Conn. 238.

17. N.Y.—People ex rel. Bingham Operating Corporation v. Eyrich, 40 N.Y.S.2d 33, 265 App.Div. 562, appeal denied 41 N.Y.S.2d 959.

Property owner held aggrieved

N.J.—Corrado v. City of Hoboken, 25 A.2d 287, 20 N.J.Law 134.

N.Y.—People ex rel. Bingham Operating Corporation v. Eyrich, 40 N.Y.S.2d 33, 265 App.Div. 562, appeal denied 41 N.Y.S.2d 959.

18. N.J.—Saunders v. Morris, 2 A. 666, 48 N.J.Law 99.

44 C.J. p 1335 note 82.

19. Ill.—People ex rel. Gill v. Hamilton, 9 N.E.2d 243, 366 Ill. 455.

N.J.—Saunders v. Morris, 2 A. 666, 48 N.J.Law 99.

44 C.J. p 1335 note 82.

20. N.J.—Saunders v. Morris, supra.

44 C.J. p 1335 note 84.

21. N.Y.—People ex rel. Union Bag & Paper Corporation v. Fitzgerald, 2 N.Y.S.2d 290, 166 Misc. 237.

22. N.Y.—People ex rel. Union Bag & Paper Corporation v. Fitzgerald, supra.

23. Va.—American Tobacco Co. v. Richmond, 99 S.E. 777, 125 Va. 29.

24. Mass.—City of Revere v. Revere Const. Co., 189 N.E. 73, 285 Mass. 243.

Appeal by both parties

Where taxpayer appealed to the state board of tax appeals, praying reduction in assessment of realty for taxes by city and a further reduction in assessment of building in addition to that granted by the county board of taxation, the city could on its own behalf appeal praying restoration of the original building valuation.—Colonial Life Ins. Co. of America v. Jersey City, 11 A.2d 14, 18 N.J.Misc. 60.

25. Pa.—First Baptist Church of Pittsburgh v. City of Pittsburgh, 20 A.2d 209, 341 Pa. 568, 134 A.L.R. 1169—In re Reading Trust Co.'s Assessment, 17 A.2d 625, 143 Pa. Super. 277—In re Assessment of Property of Stover, Com.Pl., 36 Berks Co.L.J. 191—In re Assessment of Property of Reading Trust Co., Com.Pl., 32 Berks Co. L.J. 249.

When statute begins to run

Pa.—In re Reading Trust Co.'s Assessment, 17 A.2d 625, 143 Pa. Super. 277.

Tax law amendment held applicable
N.Y.—Application of Port Chester Central Corporation, 23 N.Y.S.2d 236, 260 App.Div. 944, appeal denied 25 N.Y.S.2d 996, 261 App.Div. 828.

26. N.Y.—People v. Dimond, 106 N.Y.S. 832, 122 App.Div. 459.

an assessment or abate the tax may not be begun after the time limited by statute,²⁷ even though the assessments are grossly excessive,²⁸ and conditions precedent have been complied with,²⁹ unless the delay is due to the act of the assessor.³⁰ An action to cancel or vacate an assessment must also be brought within the time limited by statute, if any,³¹ although where the taxpayer has not been given the opportunities required by law the action lies even after the expiration of the time prescribed for bringing it.³²

In accordance with the provisions of general statutes of limitations, if a proceeding, begun within the statutory period, is terminated for a reason other than that specified in the statute, a new proceeding can be commenced notwithstanding the expiration of the statutory period.³³ Where the taxpayer is itself a municipality, it is not chargeable with the laches of its official in attacking the assessment on its property within the boundaries of another municipality.³⁴ In the absence of statutory provisions to the contrary, or laches, or special circumstances creating an estoppel, a taxpayer may

question the validity of an assessment at any time prior to the issuance of a tax deed.³⁵

Laches; delay. Apart from statutes of limitation, the right to institute various legal and equitable remedies to have an assessment declared invalid may be barred by laches or unreasonable delay;³⁶ and the rule applies to the remedy of certiorari,³⁷ and to an action to reduce an assessment.³⁸ Proceedings to restrain an illegal assessment come too late if delayed until the tax has been assessed and expenditure begun.³⁹

d. Conditions Precedent; Notice

It is an essential condition to judicial review of municipal assessments that the taxpayer must have complied with statutes relating to the original making of the assessment and must have sought revision of the assessment by a board of equalization or review. Notice of the review proceeding must be given to the municipal corporation or the board.

It has been held that a taxpayer may not seek a judicial review or correction of assessments unless he has complied with statutes relating to the making of the assessment by the municipal assessor⁴⁰ and that certiorari should not be allowed

When statute begins to run

The statute begins to run from the date of confirmation of the assessment roll—*People v. Woodbury*, 117 N.Y.S. 676, 133 App.Div. 503, affirmed 94 N.E. 1098, 201 N.Y. 532.

When proceeding "begun"

N.Y.—*People ex rel. Sheffield Farms Co. v. Lilly*, 67 N.E.2d 579, 295 N.Y. 354, conformed to 63 N.Y.S.2d 92, 270 App.Div. 1052, affirmed 71 N.E.2d 771, 296 N.Y. 798, reargument denied 72 N.E.2d 611, 296 N.Y. 876—*People ex rel. Northester Corporation v. Miller*, 42 N.E.2d 469, 288 N.Y. 163, reargument denied 44 N.E.2d 420, 289 N.Y. 634.

Applicability of new or old charter

Where a new charter is adopted, setting out new dates for the filing of writs of certiorari to review assessments, the applicability of the new charter to assessments for the current year and other years depends on the terms of the charter.—*People ex rel. Kaydel Realty Co. v. Miller*, 7 N.Y.S.2d 983, 255 App.Div. 449, affirmed *People ex rel. Vandalia Realty Corp. v. Miller*, 20 N.E.2d 1016, 280 N.Y. 652.

27. Fla.—*Rio Vista Hotel & Improvement Co. v. Belle Mead Development Corporation*, 182 So. 417, 132 Fla. 88, certiorari denied 59 S.Ct. 251, 305 U.S. 655, 83 L.Ed. 424, rehearing denied 59 S.Ct. 364, 305 U.S. 676, 83 L.Ed. 438.

28. Fla.—*Rio Vista Hotel & Improvement Co. v. Belle Mead Development Corporation*, supra.

29. Fla.—*Rio Vista Hotel & Im-*

provement Co. v. Belle Mead Development Corporation, supra.

30. Fla.—*Rio Vista Hotel & Improvement Co. v. Belle Mead Development Corporation*, supra.

31. Fla.—*Rio Vista Hotel & Improvement Co. v. Belle Mead Development Corporation*, supra.

32. Fla.—*Rio Vista Hotel & Improvement Co. v. Belle Mead Development Corporation*, supra.

33. N.Y.—*People ex rel. Lehigh Valley Ry. Co. v. Clover*, 21 N.Y. S.2d 961, 174 Misc. 888.

Dismissal for failure to serve necessary party

N.Y.—*People ex rel. Lehigh Valley Ry. Co. v. Clover*, supra.

34. N.J.—*Jersey City v. Huber*, 101 A. 378, 90 N.J.Law 692.

35. Fla.—*Rio Vista Hotel & Improvement Co. v. Belle Mead Development Corporation*, 182 So. 417, 132 Fla. 88, certiorari denied 59 S.Ct. 251, 305 U.S. 655, 83 L.Ed. 424, rehearing denied 59 S.Ct. 364, 305 U.S. 676, 83 L.Ed. 438.

36. Fla.—*Rio Vista Hotel & Improvement Co. v. Belle Mead Development Corporation*, supra.

Remedies held barred

Where property owners failed to avail themselves of the opportunities offered by law of protesting valuations fixed on their property by the taxing authorities of the city and allowed the authorities to proceed to making up of tax rolls without resorting to the remedy provided by law and permitted several

years to elapse during which affairs of city were conducted on presumption that finality had attached to acts of board of equalization and expenditures had been made in such reliance, property owners could not challenge validity of tax assessments on ground that assessment of property was wrong in that taxing authorities disregarded rental value of property.—*Mississippi Valley Life Ins. Co. v. City of El Paso, Tex.* Civ.App. 131 S.W.2d 191.

37. N.Y.—*Donner-Hanna Coke Corp. v. Buffalo*, 209 N.Y.S. 62, 212 App. Div. 338, affirmed 150 N.E. 541, 241 N.Y. 530.

38. Fla.—*Rio Vista Hotel & Improvement Co. v. Belle Mead Development Corporation*, 182 So. 417, 132 Fla. 88, certiorari denied 59 S.Ct. 251, 305 U.S. 655, 83 L.Ed. 424, rehearing denied 59 S.Ct. 364, 305 U.S. 676, 83 L.Ed. 438.

Delay held not necessarily unreasonable

An action for reduction of municipal taxes assessed for past five years is not necessarily unreasonable or barred by laches.—*Rio Vista Hotel & Improvement Co. v. Belle Mead Development Corporation*, supra.

39. Fla.—*Rio Vista Hotel & Improvement Co. v. Belle Mead Development Corporation*, supra.

40. U.S.—*In re Eldredge Brewing Co.*, D.C.N.H., 32 F.Supp. 604, affirmed, C.C.A., *Eldredge Brewing Co. v. City of Portsmouth*, 118 F. 2d 410.

in tax cases except on payment of the taxes conceded to be due.⁴¹ A taxpayer cannot claim inequality of assessments, or relief therefrom, in a court of law unless he has first sought a revision by a board of equalization or review,⁴² the law imposing on him the duty of taking the initiative in bringing the matter to a hearing.⁴³ He cannot escape the operation of this rule by claiming that the board was not regularly appointed,⁴⁴ especially where a statute provides that, when the taxpayer complains of his assessment, a board shall then be chosen if none has been elected theretofore.⁴⁵ The rule does not apply, however, if no relief of a substantial and definite kind can be had by application to the board.⁴⁶ Thus, where a provision authorizing an appeal to the board of review is invalid, application to the board is not a prerequisite to the maintenance of certiorari proceedings to review a tax assessment;⁴⁷ and, where it is not mandatory on the city council to hear taxpayers' objections, application to the council is not a condition precedent to the right to a writ of certiorari.⁴⁸ Also, under some statutes the rule does not apply to cases of fraud, gross injustice, or mistake.⁴⁹

Notice. Where an appeal is taken from a decision of a board of review, it is essential to the

jurisdiction of the court that a notice of appeal conforming to the statutory requirements be served⁵⁰ within the time prescribed⁵¹ and on the officer designated⁵² by statute. Notice should also be given of the hearing on appeal from the assessment⁵³ unless such notice is waived.⁵⁴ It has been held that certiorari should not be allowed in tax cases except on notice to the municipality;⁵⁵ but it has also been held that notice of the initial application of a taxpayer for certiorari is not required to be given to the municipal authorities.⁵⁶

e. Parties

The omission of necessary parties to an action or proceeding to review an assessment is a fatal defect.

Where necessary parties are not made parties to an action or proceeding for a judicial review of an assessment the procedure is fatally defective;⁵⁷ but in a proper case the court may permit an amendment to bring in a necessary party⁵⁸ unless the time for beginning the proceeding under the statute of limitations has expired.⁵⁹ Where assessments are attacked as discriminatory, other persons whose property was allegedly undervalued are necessary parties;⁶⁰ and failure to make such persons

Filing of inventory

U.S.—In re Eldredge Brewing Co., D.C.N.H., 32 F.Supp. 604, affirmed, C.C.A., Eldredge Brewing Co. v. City of Portsmouth, 118 F.2d 410.

41. N.J.—Point Breeze Ferry & Improvement Co. v. Jersey City, 143 A. 545, 5 N.J.Misc. 974, affirmed 148 A. 753, 106 N.J.Law 589.

42. Fla.—City of Orlando v. Giles, 40 So. 834, 51 Fla. 422.

44 C.J. p 1335 note 91.

Failure to file written statement as immaterial

(1) Where a written statement setting out grievances is not required for review by the board of review, the failure to file such statement does not preclude a taxpayer from seeking relief from an assessment by certiorari against the assessor.—People ex rel. Hermax Realty Corporation v. Barker, 24 N.Y.S. 2d 498, 260 App.Div. 1036.

(2) Necessity of written statement for review by board of review see supra § 2056 c.

43. N.Y.—People v. O'Donnel, 117 N.Y.S. 488, 133 App.Div. 237, affirmed 91 N.E. 1119, 197 N.Y. 582.—People v. Feitner, 72 N.Y.S. 641, 65 App.Div. 224.

44. Ky.—Woolley v. Louisville, 71 S.W. 893, 114 Ky. 556, 24 Ky.L. 1357—Fonda v. Louisville, 49 S.W. 785, 20 Ky.L. 1652.

45. Ky.—Woolley v. Louisville, 71

S.W. 893, 114 Ky. 556, 24 Ky.L. 1357—Fonda v. Louisville, 49 S.W. 785, 20 Ky.L. 1652.

46. La.—Marx v. Board of Assessors, 3 La.A. (Orleans) 346.

44 C.J. p 1336 note 96.

47. N.Y.—People ex rel. Powott Corporation v. Woodworth, 15 N.Y.S.2d 985, 172 Misc. 791.

48. N.Y.—People ex rel. Powott Corporation v. Woodworth, supra

49. Neb.—Wead v. Omaha, 102 N.W. 675, 73 Neb. 321.

50. Iowa.—Hawkeye Lumber Co. v. Oskaloosa Bd. of Review, 143 N.W. 563, 161 Iowa 504.

Effect of appearance

Where notice of appeal from tax assessment was insufficient because not properly addressed, appearance by members of reviewing board was ineffective to confer jurisdiction.—Midwestern Realty Co. v. City of Des Moines, 231 N.W. 459, 210 Iowa 942.

51. Iowa.—Hawkeye Lumber Co. v. Oskaloosa Bd. of Review, 143 N.W. 563, 161 Iowa 504.

44 C.J. p 1336 note 98.

52. Iowa.—Hawkeye Lumber Co. v. Oskaloosa Bd. of Review, supra.

44 C.J. p 1336 note 99.

Mayor as presiding officer of board
Service by taxpayer on town mayor of notice of appeal from decision of local board of review overruling

taxpayer's objections to valuation placed on his property by the assessor was sufficient, where it appeared by taxpayer's verified petition that mayor was presiding officer of the board.—Fuller v. Board of Review of Town of Rolfe, 2 N.W.2d 758, 231 Iowa 1015.

53. Pa.—Appeal of Hart, 199 A. 225, 131 Pa.Super. 104.

54. Pa.—Appeal of Hart, supra.

Notice held waived

Pa.—Appeal of Hart, supra.

55. N.J.—Point Breeze Ferry & Improvement Co. v. Jersey City, 143 A. 545, 5 N.J.Misc. 974, affirmed 148 A. 753, 106 N.J.Law 589.

56. N.Y.—People ex rel. Lehigh Valley Ry. Co. v. Clover, 19 N.Y.S.2d 865, 174 Misc. 44.

57. N.J.—Household Finance Corporation v. State Board of Tax Appeals, 196 A. 219, 119 N.J.Law 230. N.Y.—People ex rel. Lehigh Valley Ry. Co. v. Clover, 19 N.Y.S.2d 865, 174 Misc. 44.

Lessors held not necessary parties
Minn.—International Harvester Co. v. State, 274 N.W. 217, 200 Minn. 242.

58. N.Y.—People ex rel. Lehigh Valley Ry. Co. v. Clover, 19 N.Y.S.2d 865, 174 Misc. 44.

59. N.Y.—People ex rel. Lehigh Valley Ry. Co. v. Clover, supra.

60. N.J.—Household Finance Corpo-

parties renders the procedure fatally defective.⁶¹ A number of appeals from municipal assessments by different owners of property may properly be heard together by the court.⁶²

Municipal officers or boards. Municipal officers who participated in the making of the assessment are necessary parties to the proceeding for review of the assessment;⁶³ and, where the tax rolls were confirmed by the city council, the council is a necessary party to the proceedings.⁶⁴ On the other hand, officers who do not participate in making assessments are not necessary parties to a certiorari proceeding;⁶⁵ and, where no application to the board of assessment review was made or required, it is unnecessary to join the board as a party to certiorari proceedings to review tax assessments.⁶⁶

Real party in interest. Where a statute requires actions to be in the name of the real party in interest, in an action to invalidate an increased assessment the city itself must be made a party;⁶⁷ and it is insufficient to bring an action against the municipal officials, whether as individuals or officers.⁶⁸

f. Pleadings

Rules governing pleadings in civil actions generally

apply to pleadings in actions or proceedings to review assessments in the absence of statutes specifically relating thereto.

Except in so far as there may be statutes specifically relating thereto, which must be complied with,⁶⁹ rules governing pleadings in civil actions generally have been applied to pleadings in actions or proceedings to review assessments.⁷⁰ Where required, the application or pleading must be in writing under oath.⁷¹ There must be a compliance with statutory requirements as to service of a petition of appeal.⁷²

In a petition in certiorari proceedings to review tax assessments, the allegations and claims should be definite;⁷³ and it must clearly specify the value of the property in issue⁷⁴ in so far as the owner is able to do so.⁷⁵

The petition must contain or express the fact that the relator is or will be injured by the assessment;⁷⁶ but, while such express allegation must appear where the ground of objection is inequality in assessment,⁷⁷ it need not appear where the petition is based on overvaluation, since injury is presumed in such case.⁷⁸ It must properly state the objections filed with the assessor,⁷⁹ and that the grounds for the petition were properly presented

ration v. State Board of Tax Appeals, 196 A. 219, 119 N.J.Law 230.

61. N.J.—Household Finance Corporation v. State Board of Tax Appeals, *supra*.

62. Pa.—Appeal of Stevens, 18 Pa. Dist. & Co. 698.

63. N.Y.—People ex rel. Lehigh Valley Ry. Co. v. Clover, 19 N.Y. S.2d 865, 174 Misc. 44.

64. N.Y.—People ex rel. Powott Corporation v. Woodworth, 15 N.Y.S.2d 985, 172 Misc. 791.

65. N.Y.—People ex rel. Powott Corporation v. Woodworth, *supra*.

66. N.Y.—People ex rel. Powott Corporation v. Woodworth, *supra*.

67. Ky.—Buckner v. Clay, 206 S.W. 2d 827, 306 Ky. 194.

68. Ky.—Buckner v. Clay, *supra*.

69. N.J.—Household Finance Corporation v. State Board of Tax Appeals, 196 A. 219, 119 N.J.Law 230.

70. N.Y.—People ex rel. Powott Corporation v. Woodworth, 15 N.Y.S.2d 985, 172 Misc. 791.

Benefit of intendments

Petition for writ of certiorari to review assessment of city tax was a pleading and relator was entitled to benefit of every reasonable and fair intendment.—People ex rel. Powott Corporation v. Woodworth, *supra*.

Petition construed as a whole
N.Y.—People ex rel. Powott Corporation v. Woodworth, *supra*.

Allegations erroneously stricken

In taxpayer's proceeding to review findings of city board of equalization in valuing his property for tax purposes, court erroneously struck out some of allegations of taxpayer's petition invoking jurisdiction of court.—Board of Equalization of City of Fort Worth v. McDonald, 129 S.W.2d 1135, 133 Tex. 521.

71. N.Y.—People ex rel. Fifth Avenue and 37th Street Corporation v. Miller, 26 N.Y.S.2d 219, 261 App. Div. 550, affirmed 36 N.E.2d 682, 286 N.Y. 628.

Defective jurat not fatal

N.Y.—People ex rel. Fifth Avenue and 37th Street Corporation v. Miller, *supra*.

72. N.J.—Borough of Oradell v. State Board of Tax Appeals, 8 A. 2d 100, 123 N.J.Law 86, reversed on other grounds 13 A.2d 479, 125 N.J.Law 37.

Service held sufficient

N.J.—Fairmount Investment Corporation v. State Board of Tax Appeals, 4 A.2d 37, 122 N.J.Law 106.

73. N.Y.—People ex rel. Tierney v. Wilkins, 27 N.Y.S.2d 558, 261 App. Div. 728.

Petition held sufficient

N.Y.—People ex rel. Brooklyn Un-

ion Gas Co. v. Miller, 1 N.Y.S.2d 246, 253 App. Div. 162.

Review of number of assessments together

Original petition and amended petition in certiorari proceeding to review assessments by a town on many parcels of realty grouping all parcels together and alleging a total overvaluation without any statement of excess to be distributed to each parcel was insufficient, since the validity of one assessment is completely independent of the validity of any others.—People ex rel. Tierney v. Wilkins, 27 N.Y.S.2d 558, 261 App. Div. 728.

74. Petition held sufficient

N.Y.—People ex rel. Brooklyn Union Gas Co. v. Miller, 1 N.Y.S.2d 246, 253 App. Div. 162.

75. N.Y.—People ex rel. Brooklyn Union Gas Co. v. Miller, *supra*.

76. N.Y.—People ex rel. Powott Corporation v. Woodworth, 15 N.Y.S.2d 985, 172 Misc. 791.

77. N.Y.—People ex rel. Powott Corporation v. Woodworth, *supra*.

78. N.Y.—People ex rel. Powott Corporation v. Woodworth, *supra*.

79. Petition held sufficient

N.Y.—People ex rel. MacCracken v. Miller, 50 N.E.2d 542, 291 N.Y. 55 —People ex rel. Powott Corporation v. Woodworth, 15 N.Y.S.2d 985, 172 Misc. 791.

to the assessing officer.⁸⁰ Under a charter making inequality of assessments of real estate a basis for correction, the petition must allege inequality between the valuation of the property and the valuation of other pieces of real estate in the municipality.⁸¹

An amendment of a pleading in an action or proceeding to review a municipal assessment may be allowed in a proper case;⁸² but if the application to amend is untimely made an amendment cannot be allowed except for extraordinary cause.⁸³ Defects in pleadings that are not jurisdictional may be waived by proceeding to hear the case on the merits.⁸⁴

The writ of certiorari should take up the last judgment in the case⁸⁵ and should command that the return include all material data and the statement of the reasons for, and the methods adopted in arriving at, the amount of the assessment.⁸⁶ It is not necessary that the writ enumerate the names of the members of the city council where statute does not require service on each member,⁸⁷ but the writ should be properly served.⁸⁸ The municipality should make a return at the time and place specified;⁸⁹ and, where review of the decision of a tribu-

nal ostensibly charged with the duty of reviewing the assessment is sought, the tribunal should make the return and proceed with the review, and save any special questions as to validity until after the final order is granted.⁹⁰

g. Evidence

General rules of evidence have been applied with respect to presumptions and burden of proof, and the admissibility and weight and sufficiency of evidence, in actions or proceedings to review or correct a municipal assessment of property for taxation.

In general, presumptions which would obtain in civil proceedings generally obtain in proceedings to review or correct an assessment;⁹¹ and, in accordance with general rules, the burden is on plaintiff to prove his material allegations,⁹² and the municipality has the burden of establishing matters of defense.⁹³ In states where a complaint is necessary to give jurisdiction to a board of review, no presumption of the existence of a complaint in a particular case arises from the recital in the record on certiorari that the board heard complaints.⁹⁴

Regularity and validity of assessment. There is a presumption in favor of the regularity, validity, and correctness of the assessment to be reviewed;⁹⁵

Tenn.—Cox v. City of Bristol, 187 S.W.2d 637, 28 Tenn.App. 136.

80. Petition held sufficient

N.Y.—People ex rel. Powott Corporation v. Woodworth, 15 N.Y.S.2d 985, 172 Misc. 791.

81. N.Y.—People v. Purdy, 178 N.Y.S. 769.

44 C.J. p 1336 note 4.

82. N.Y.—People ex rel. Tierney v. Wilkins, 27 N.Y.S.2d 558, 261 App. Div. 728—People ex rel. Bingham Operating Corporation v. Eyrich, 38 N.Y.S.2d 326, 179 Misc. 197, affirmed 40 N.Y.S.2d 33, 265 App. Div. 562, appeal denied 41 N.Y.S.2d 959, 266 App.Div. 803.

Pa.—Appeal of Hart, 199 A. 225, 131 Pa.Super. 104.

83. N.J.—Fairmount Hospital v. Jersey City, 11 A.2d 408, 18 N.J. Misc. 136.

84. N.Y.—People ex rel. Fifth Avenue and 37th Street Corporation v. Miller, 26 N.Y.S.2d 219, 261 App. Div. 550, affirmed 36 N.E.2d 682, 286 N.Y. 628.

Defective jurat on pleading

N.Y.—People ex rel. Fifth Avenue and 37th Street Corporation v. Miller, supra.

85. N.J.—Borough of Oradell v. State Board of Tax Appeals, 8 A.2d 100, 123 N.J.Law 86, reversed on other grounds 13 A.2d 479, 125 N.J.Law 37.

86. N.Y.—People ex rel. Behrer-Na-

son Co. v. Miller, 3 N.Y.S.2d 843, 254 App.Div. 696.

Deputy commissioner's reports

N.Y.—People ex rel. Behrer-Nason Co. v. Miller, supra.

87. N.Y.—People ex rel. Powott Corporation v. Woodworth, 15 N.Y.S.2d 985, 172 Misc. 791.

88. N.Y.—People ex rel. City of Watertown v. Gilmore, 2 N.Y.S.2d 388, 166 Misc. 323.

Certified copies of writ not required
N.Y.—People ex rel. City of Watertown v. Gilmore, 2 N.Y.S.2d 388, 166 Misc. 323.

89. N.Y.—People ex rel. Bensen v. Lewis, 1 N.Y.S.2d 495, 253 App. Div. 773.

Ex parte extension of time or change of place

It has been held that an extension of time or change of place for making the return should not be allowed ex parte.—People ex rel. Bensen v. Lewis, supra.

90. N.Y.—People ex rel. Corner Operating Co. v. Weise, 278 N.Y.S. 228, 243 App.Div. 818.

91. Miss.—Stewart v. Mayor and Aldermen of City of Vicksburg, 13 So.2d 40, 195 Miss. 189, followed in 13 So.2d 44, three cases, suggestion of error overruled 13 So.2d 648, 195 Miss. 189.

Correction of insufficient description
It is presumed that any insufficiency of description of property

would have been readily corrected if such insufficiency had been called to attention of mayor and board—Stewart v. Mayor and Aldermen of City of Vicksburg, supra.

92. Conn.—Thaw v. Town of Fairfield, 43 A.2d 65, 132 Conn. 173, 160 A.L.R. 679.

93. Pa.—In re Reading Trust Co.'s Assessment, 17 A.2d 625, 143 Pa. Super. 277.

Appeal not timely taken

Pa.—In re Reading Trust Co.'s Assessment, supra.

94. Cal.—Rickard v. Santa Barbara, 192 P. 726, 49 Cal.App. 58.

95. Iowa.—Trustees of Flynn's Estate v. Board of Review of City of Des Moines, 286 N.W. 483, 226 Iowa 1353.

N.J.—Harborside Warehouse Co. v. Jersey City, 25 A.2d 291, 128 N.J. Law 263, affirmed 28 A.2d 91, 129 N.J.Law 62, certiorari denied 63 S. Ct. 763, four cases, 318 U.S. 789, 87 L.Ed. 1140—City of Plainfield v. State Board of Tax Appeals, 20 A.2d 651, 127 N.J.Law 5—City of Plainfield v. State Board of Tax Appeals, 20 A.2d 517, 126 N.J.Law 577—City of Plainfield v. State Board of Tax Appeals, 19 A.2d 815, 126 N.J.Law 407—Colonial Life Ins. Co. of America v. State Board of Tax Appeals, 18 A.2d 625, 126 N.J.Law 126—General Motors Corporation v. State Board of Tax Appeals, 16 A.2d 632, 125 N.J.Law

and the person challenging the assessment has the burden of overcoming that presumption and establishing that the valuation was improper in that it was excessive or unjust or inequitable or not uniform in comparison with other real estate in the district.⁹⁶ Where the appeal is from the action of the board of equalization increasing the assessment, the burden rests on the city to bring forward proof sufficient to sustain the finding of the board.⁹⁷ However, where the presumption in favor of the regularity and validity of an assessment has been overcome by the evidence it ceases to exist,⁹⁸

and the municipality has the burden of producing evidence as to the actual value of the property;⁹⁹ and the court must determine the value of the property from the evidence.¹ While a municipal assessor is presumed to have performed his duty and assessed the land at its full value,² an assessment will be reduced where the taxpayer establishes by sufficient evidence that assessments throughout the tax district were generally made at a per cent of actual value.³

Admissibility and weight and sufficiency. Rules governing the admissibility⁴ and the weight and

574—*American Ins. Co. v. City of Newark*, 15 A.2d 119, 18 N.J.Misc. 516.

N.Y.—*Leary v. City of New York*, 7 N.E.2d 256, 273 N.Y. 342—*People ex rel. Union Bag & Paper Corporation v. Fitzgerald*, 2 N.Y.S.2d 290, 166 Misc. 237.

Pa.—*Appeal of Ritter*, 24 A.2d 470, 147 Pa.Super. 236.

Wis.—*Buildings Development Co. v. City of Milwaukee*, 274 N.W. 298, 225 Wis. 357.

44 C.J. p 1386 note 7.

Nature and effect of presumption

In proceeding to review assessment, the presumption in favor of the assessment did not take the place of proof and would vanish completely when taxpayer presented any evidence to challenge the city's figures, and amounted in effect merely to shifting of the burden of proof and of coming forward with it in the first instance.—*People ex rel. Hotel St. George Corporation v. Lilly*, 45 N.Y.S.2d 599, reversed on other grounds 49 N.Y.S.2d 374, 268 App. Div. 830, reversed on other grounds 60 N.E.2d 30, 293 N.Y. 898.

Assessment as prima facie evidence

(1) In proceeding for reduction of tax assessment, introduction of assessment record established prima facie the validity of the assessment.—*Appeal of Carnegie*, 53 A.2d 425, 357 Pa. 138—*Liebman v. Board of Revision of Taxes*, 48 A.2d 866, 355 Pa. 42—*Appeal of Stevens*, 18 Pa. Dist. & Co. 698—*Appeal of Eldredge*, Com.Pl., 57 Montg.Co. 261, 33 Mun. L.R. 43—*Appeal of Phipp*, Com.Pl., 86 Pittsb.Leg.J. 161.

(2) The record of assessment made by proper officers, and approved by board of revision of taxes, is prima facie evidence on appeal to the court of common pleas of the value of the assessed property, and it will be conclusive unless evidence to rebut it establishes a different value to the satisfaction of the court.—*Chatfield v. Board of Revision of Taxes*, 29 A.2d 655, 346 Pa. 159.

Violation of law

Court could not assume that city

tax assessor would violate his oath of office, and law, in sinister pursuit of unlawful purpose.—*State v. Martin*, Tex.Civ.App., 51 S.W.2d 815.

98. Iowa.—*Trustees of Flynn's Estate v. Board of Review of City of Des Moines*, 286 N.W. 483, 226 Iowa 1353.

N.J.—*Harborside Warehouse Co. v. Jersey City*, 25 A.2d 291, 128 N.J. Law 263, affirmed 28 A.2d 91, 129 N.J. Law 62, certiorari denied 63 S. Ct. 763, four cases, 318 U.S. 769, 87 L.Ed. 1140—*City of Plainfield v. State Board of Tax Appeals*, 20 A.2d 651, 127 N.J. Law 5—*City of Plainfield v. State Board of Tax Appeals*, 20 A.2d 517, 126 N.J. Law 577—*City of Plainfield v. State Board of Tax Appeals*, 19 A.2d 815, 126 N.J. Law 407—*Colonial Life Ins. Co. of America v. State Board of Tax Appeals*, 18 A.2d 625, 126 N.J. Law 126—*General Motors Corporation v. State Board of Tax Appeals*, 16 A.2d 632, 125 N.J. Law 574—*American Ins. Co. v. City of Newark*, 15 A.2d 119, 18 N.J.Misc. 516.

N.Y.—*People ex rel. Union Bag & Paper Corporation v. Fitzgerald*, 2 N.Y.S.2d 290, 166 Misc. 237—*People ex rel. Bray v. Golder*, 83 N.Y. S.2d 186.

Pa.—*Appeal of City of Allentown*, 24 A.2d 109, 147 Pa.Super. 385—*Appeal of Hart*, 199 A. 225, 131 Pa. Super. 104—*Appeal of Stevens*, 18 Pa. Dist. & Co. 698—*Appeal of Eldredge*, Com.Pl., 57 Montg.Co. 261, 33 Mun.L.R. 43—*Appeal of Phipp*, Com.Pl., 86 Pittsb.Leg.J. 161.

Credible substitute

On appeal from city's assessment, taxpayer must show that city's figures were incorrect and offer credible substitute.—*General Electric Co. v. City of Erie*, 168 A. 534, 110 Pa.Super. 206.

97. Miss.—*Whittle v. Hattiesburg*, 96 So. 741, 132 Miss. 808.

98. N.Y.—*People ex rel. Hotel St. George Corporation v. Lilly*, 45 N.Y.S.2d 599, reversed on other grounds 49 N.Y.S.2d 374, 268 App. Div. 830, reversed on other

grounds 60 N.E.2d 30, 293 N.Y. 898.

Pa.—*Appeal of Ritter*, 24 A.2d 470, 147 Pa.Super. 236.

99. N.Y.—*People ex rel. Hotel St. George Corporation v. Lilly*, 45 N.Y.S.2d 599, reversed on other grounds 49 N.Y.S.2d 374, 268 App. Div. 830, reversed on other grounds 60 N.E.2d 30, 293 N.Y. 898.

Pa.—*Appeal of Ritter*, 24 A.2d 470, 147 Pa.Super. 236.

1. Pa.—*Appeal of Ritter*, 24 A. 470, 147 Pa.Super. 236.

2. Pa.—*Appeal of City of Allentown*, 24 A.2d 109, 147 Pa.Super. 385.

3. Pa.—*Appeal of City of Allentown*, supra.

4. Conn.—*Thaw v. Town of Fairfield*, 43 A.2d 65, 132 Conn. 173, 160 A.L.R. 679.

Evidence held admissible

Mass.—*City of Revere v. Revere Const. Co.*, 189 N.E. 73, 285 Mass. 243.

N.J.—*City of Plainfield v. State Board of Tax Appeals*, 19 A.2d 815, 126 N.J. Law 407—*Jersey City v. Harborside Warehouse Co.*, 17 A.2d 572, 19 N.J.Misc. 222, certiorari dismissed *Harborside Warehouse Co. v. Jersey City*, 25 A.2d 291, 128 N.J. Law 263, affirmed 28 A.2d 91, 129 N.J. Law 62, certiorari denied 63 S.Ct. 763, four cases, 318 U.S. 769, 87 L.Ed. 1140—*Commercial Casualty Ins. Co. v. City of Newark*, 12 A.2d 156, 18 N.J.Misc. 233.

N.Y.—*People ex rel. Burke-Meyer Realty Corporation v. Sexton*, 4 N.Y.S.2d 759, 254 App.Div. 781—*People ex rel. Pennsylvania Tunnel & Terminal R. Co. v. Miller*, 26 N.Y.S.2d 232—*People ex rel. Guaranty Trust Co. of New York v. Cook*, 18 N.Y.S.2d 965, affirmed *People ex rel. Longken, Inc. v. Dooley*, 27 N.Y.S.2d 999, 261 App. Div. 993.

Pa.—*Appeal of John Wanamaker*, Philadelphia, 63 A.2d 349.

Evidence held inadmissible

Conn.—*Thaw v. Town of Fairfield*,

sufficiency⁵ of evidence in civil actions generally | have been applied in actions or proceedings to re-

43 A.2d 65, 132 Conn. 173, 160 A.L.R. 679.

N.Y.—Jarl Co. v. Village of Croton-on-Hudson, 285 N.Y.S. 271, 148 Misc. 150, 153, affirmed 283 N.Y.S. 956, 238 App.Div. 865, affirmed 138 N.E. 60, 262 N.Y. 551—People ex rel. Mortgage Commission v. Miller, 6 N.Y.S.2d 677.

Pa.—Appeal of John Wanamaker, Philadelphia, 63 A.2d 349—Appeal of Schwartz, 26 A.2d 300, 344 Pa. 471—Appeal by Borough of Millbourne, 198 A. 49, 329 Pa. 321.

5. Conn.—Thaw v. Town of Fairfield, 43 A.2d 65, 132 Conn. 173, 160 A.L.R. 679.

N.J.—Hackensack Water Co. v. State Board of Tax Appeals, 7 A.2d 628, 122 N.J.Law 596—Colonial Life Ins. Co. of America v. Jersey City, 11 A.2d 14, 18 N.J.Misc. 60.

N.Y.—People ex rel. Home Owners' Loan Corporation v. Hascy, 37 N.Y.S.2d 538, 265 App.Div. 834—People ex rel. Owens v. Schmiedel, 34 N.Y.S.2d 493, 264 App.Div. 742, affirmed 50 N.E.2d 298, 290 N.Y. 900—People ex rel. Pennsylvania Tunnel & Terminal R. Co. v. Miller, 26 N.Y.S.2d 232.

Pa.—Appeal of John Wanamaker, Philadelphia, 63 A.2d 349—Appeal of Ritter, 24 A.2d 470, 147 Pa. Super. 236—General Electric Co. v. City of Erie, 168 A. 534, 110 Pa. Super. 206—Weihe v. City of Connelville, Com.Pl., 6 Fay.L.J. 93.

Evidence held sufficient

(1) To establish value of particular property.

Ky.—Board of Sup'rs of Somerset v. Farmers Nat. Bank of Somerset, 168 S.W.2d 371, 293 Ky. 157.

N.J.—Jersey City v. Seaboard Terminal & Refrigeration Co., 17 A.2d 577, 19 N.J.Misc. 178—Jersey City v. Harborside Warehouse Co., 17 A.2d 572, 19 N.J.Misc. 222, certiorari dismissed Harborside Warehouse Co. v. Jersey City, 25 A.2d 291, 128 N.J.Law 263, affirmed 28 A.2d 91, 129 N.J.Law 62, certiorari denied 63 S.Ct. 763, four cases, 318 U.S. 769, 87 L.Ed. 1140.

N.Y.—People ex rel. City Bank Farmers Trust Co. v. Miller, 28 N.Y.S.2d 42, 262 App.Div. 817.

R.I.—Ashton v. Tax Assessors of Town of Jamestown, 198 A. 786, 60 R.I. 388.

(2) To support findings or conclusion as to value or assessment of property in issue.

Fla.—Holman v. City of Fort Pierce, 19 So.2d 58, 154 Fla. 743—Harvey Building Corporation v. Hannon, 191 So. 784, 140 Fla. 399.

Miss.—Stewart v. Mayor and Aldermen of City of Vicksburg, 13 So.2d 40, 195 Miss. 189, followed in 13 So.2d 44, three cases, suggestion

of error overruled 13 So.2d 648, 195 Miss. 189.

N.J.—Harborside Warehouse Co. v. Jersey City, 25 A.2d 291, 128 N.J.Law 263, affirmed 28 A.2d 91, 129 N.J.Law 62, certiorari denied 63 S.Ct. 763, four cases, 318 U.S. 769, 87 L.Ed. 1140—City of Plainfield v. State Board of Tax Appeals, 20 A.2d 517, 126 N.J.Law 577.

N.Y.—Rice v. Commissioner of Assessment and Taxation, 8 N.Y.S.2d 760, 256 App.Div. 860.

Pa.—Appeal of John Wanamaker, Philadelphia, 63 A.2d 349—Appeal of City of Allentown, 24 A.2d 109, 147 Pa.Super. 385—Appeal of Hart, 199 A. 225, 131 Pa.Super. 104—Appeal of Snyder, Com.Pl., 21 Lehigh L.J. 351.

Wis.—Buildings Development Co. v. City of Milwaukee, 274 N.W. 298, 225 Wis. 357.

(3) To warrant reduction of assessed valuation.

Iowa.—Call v. Board of Review for Sioux City, 290 N.W. 109, 227 Iowa 1116.

N.J.—Colonial Life Ins. Co. of America v. State Board of Tax Appeals, 18 A.2d 625, 126 N.J.Law 126—New Jersey Bell Telephone Co. v. City of Camden, 4 A.2d 705, 122 N.J.Law 270.

N.Y.—People ex rel. Bingham Operating Corp. v. Eyrich, 62 N.Y.S.2d 923, 270 App.Div. 1063—People ex rel. Mutual Life Ins. Co. of N. Y. v. Miller, 52 N.Y.S.2d 387, 268 App.Div. 1030—People ex rel. Home Owners' Loan Corporation v. Hascy, 37 N.Y.S.2d 538, 265 App.Div. 834—People ex rel. Heller v. Miller, 20 N.Y.S.2d 51, 259 App.Div. 517—People ex rel. Manhattan Square Beroesford v. Sexton, 17 N.Y.S.2d 585, 258 App.Div. 611, reversed on other grounds 29 N.E.2d 654, 284 N.Y. 145, motion granted 31 N.E.2d 204, 284 N.Y. 737—People ex rel. Sumberg Realty Co. v. Byrne, 14 N.Y.S.2d 707, 258 App.Div. 761—People ex rel. Albany City Co. v. Fahrenkopf, 2 N.Y.S.2d 877, 254 App.Div. 604—People ex rel. Kitchen v. Dicker, 76 N.Y.S.2d 725—People ex rel. Pennsylvania Tunnel & Terminal R. Co. v. Miller, 26 N.Y.S.2d 232—People ex rel. Guaranty Trust Co. of New York v. Cook, 18 N.Y.S.2d 965, affirmed People ex rel. Longken, Inc. v. Dooley, 27 N.Y.S.2d 999, 261 App.Div. 993.

Pa.—Appeal of Ritter, 24 A.2d 470, 147 Pa.Super. 236—Appeal of City of Allentown, 24 A.2d 109, 147 Pa. Super. 385—Appeal of Seyfert, 54 Pa.Dist. & Co. 339, 37 Berks Co. L.J. 275—In re Assessment of Property of Reading Trust Co., Com.Pl., 36 Berks Co.L.J. 211—

In re Assessment of Property of Reading Trust Co., Com.Pl., 32 Berks Co.L.J. 249—Reed Mfg. Co. v. City of Erie, Com.Pl., 20 Erie Co. 308—Continental Rubber Works v. City of Erie, Com.Pl., 20 Erie Co. 305—Appeal of Baldwin, Com.Pl., 20 Erie Co. 38—Appeal of Allen Electric Co., Com.Pl., 19 Lehigh L.J. 96, 32 Mun.L.R. 109—In re Appeal from Assessment of Real Estate, Com.Pl., 33 Luz.Leg.Reg. 90—In re Assessment and Valuation of Myers' Estate, Com.Pl., 32 Luz.Leg.Reg. 335—Appeal of Phipp, Com.Pl., 36 Pittsb.Leg.J. 161.

(4) To warrant vacating or setting aside assessment.

N.J.—Tide Water Associated Oil Co. v. Jersey City, 11 A.2d 416, 18 N.J.Misc. 137.

Wis.—State ex rel. Farmer & Merchants State Bank v. Schanke, 19 N.W.2d 264, 247 Wis. 182—State ex rel. Kenosha Office Bldg. Co. v. Herrmann, 14 N.W.2d 157, 245 Wis. 253.

(5) As to other matters.

U.S.—In re Eldredge Brewing Co., D.C.N.H. 32 F.Supp. 604, affirmed C.C.A., Eldredge Brewing Co. v. City of Portsmouth, 118 F.2d 410. Conn.—Portland Silk Co. v. City of Middletown, 4 A.2d 422, 125 Conn. 172.

Miss.—City of Clarksdale v. Fitzhugh, 185 So. 587, 184 Miss. 174.

N.J.—City of Plainfield v. State Board of Tax Appeals, 19 A.2d 815, 126 N.J.Law 407.

N.Y.—People ex rel. Bray v. Golder, 33 N.Y.S.2d 186.

Pa.—In re Reading Trust Co.'s Assessment, 17 A.2d 625, 143 Pa. Super. 277—Appeals of Garbart, Com.Pl., 28 Wash. Co. 19.

Tex.—Burson v. City of Silvertown, Civ.App., 138 S.W.2d 921, error dismissed, judgment correct

Evidence held insufficient

(1) In general.

Fla.—Poland v. City of Pahokee, 25 So.2d 271, 157 Fla. 179.

Pa.—Appeal by Borough of Millbourne, 198 A. 49, 329 Pa. 321—Appeal of City of Allentown, 24 A.2d 109, 147 Pa.Super. 385.

(2) To establish ground for revaluation of realty in question for tax purposes.—Appeal of City of Allentown, 24 A.2d 109, 147 Pa.Super. 385.

(3) To rebut presumption in favor of assessment.

Iowa.—Call v. Board of Review for Sioux City, 290 N.W. 109, 227 Iowa 1116.

N.J.—Colonial Life Ins. Co. of America v. State Board of Tax Appeals, 18 A.2d 625, 126 N.J.Law 126.

view a municipal assessment. Thus, conclusive proof is not required, but a mere preponderance of the credible evidence is sufficient.⁶ The actual value of the property is conclusive as to the assessed value unless the taxpayer's testimony is sufficient to establish that a ratio of assessed value to actual value was applied generally throughout the taxing district.⁷ In determining the appraised value of property, such value must be fixed by the opinion of competent witnesses as to what the property is worth in the market at a fair sale;⁸ and the most cogent evidence of the value of improvements is expert opinion as to the extent to which the presence of the improvements have increased the selling value of the realty over the selling value of the realty were it vacant.⁹

h. Hearing and Determination

The scope of review and the relief granted may depend on the terms of a statute authorizing the proceeding or may be governed by rules relating to civil actions and proceedings generally.

In the absence of statutes providing otherwise, general rules apply in proceedings for injunctive or other relief against the assessment of allegedly il-

legal taxes.¹⁰ In reviewing assessments as to the value of improvements only, the crucial issue is the extent to which the presence of the improvements increased the selling value of the realty over the selling value of the realty were it vacant.¹¹ Under a statute so providing, only the total assessment can be reviewed,¹² but it has been held that this does not preclude a review by the court of the land and building values fixed by the tax commission.¹³ The issue on appeal has been held to be the true and actual value of the property on the taxing date,¹⁴ and the taxpayer has been held not entitled to relief on the ground that the properties of other taxpayers were assessed at too low a rate.¹⁵ However, it has also been held that the court may and should properly consider the value and assessment of other realty in the same district as the property in issue,¹⁶ and the fact that the tax assessed against a taxpayer's property was based on a valuation in excess of its true valuation will not bar him from showing that other property in the city was assessed, on the average, at less than its true value,¹⁷ since the court must determine the issue of equality, and the amount of the abatement to be allowed, by comparing the ratio between plaintiff's

N.Y.—People ex rel. Smith v. Loening, 28 N.Y.S.2d 1010, 262 App.Div. 913, reargument denied 30 N.Y.S.2d 1011, 262 App.Div. 1023.

Pa.—Appeals of Garbart, Com.Pl., 28 Wash.Co. 19—Appeal of Forrest, Com.Pl., 27 Wash.Co. 222—In re Berman Appeal from Tax Assessment, Com.Pl., 27 Wash.Co. 174.

(4) To show that assessment was erroneous.

Iowa.—Trustees of Flynn's Estate v. Board of Review of City of Des Moines, Polk County, 278 N.W. 342, superseded on other grounds Trustees of Flynn's Estate v. Board of Review of City of Des Moines, 286 N.W. 483, 226 Iowa 1353.

N.J.—General Motors Corporation v. State Board of Tax Appeals, 16 A.2d 632, 125 N.J.Law 574—Jersey City v. Seaboard Terminal & Refrigeration Co., 17 A.2d 577, 19 N.J.Misc. 178.

N.Y.—People ex rel. Del Bello v. Lennox, 87 N.Y.S.2d 760, 275 App. Div. 787—People ex rel. Happiness Candy Stores v. Sexton, 38 N.Y.S.2d 221, 265 App.Div. 885.

Pa.—General Electric Co. v. City of Erie, 168 A. 534, 110 Pa.Super. 206—Appeal of Knapp, Com.Pl., 96 Pittsb.Leg.J. 239.

Wis.—State ex rel. Collins v. Brown, 275 N.W. 455, 225 Wis. 593.

(5) To sustain taxpayer's burden of proof.

Iowa.—Appeal of Dubuque-Wisconsin Bridge Co., 25 N.W.2d 827, 287 Iowa 1314.

N.J.—Hackensack Water Co. v. State Board of Tax Appeals, 7 A.2d 628, 122 N.J.Law 596.

6. N.Y.—People ex rel. Home Owners' Loan Corporation v. Hassey, 37 N.Y.S.2d 538, 265 App.Div. 834.

7. Pa.—Appeal of City of Allentown, 24 A.2d 109, 147 Pa.Super. 385.

8. Pa.—Appeal by Borough of Millbourne, 198 A. 49, 329 Pa. 321.

9. N.J.—Jersey City v. Harborside Warehouse Co., 17 A.2d 572, 19 N.J.Misc. 222, certiorari dismissed Harborside Warehouse Co. v. Jersey City, 25 A.2d 291, 128 N.J.Law 263, affirmed 28 A.2d 91, 129 N.J.Law 62, certiorari denied 63 S.Ct. 763, four cases, 318 U.S. 769, 87 L.Ed. 1140.

10. Mo.—Nolting v. City of Overland, 192 S.W.2d 863, 354 Mo. 960.

Statute codifying equitable principle

Where a statute authorizing appeals to the court by persons wrongfully assessed merely codifies an equitable principle, it gives to the court all the authority it had under its general equitable powers.—General Realty Imp. Co. v. City of New Haven, 50 A.2d 59, 133 Conn. 238.

11. N.J.—Jersey City v. Seaboard Terminal & Refrigeration Co., 17 A.2d 577, 19 N.J.Misc. 178—Jersey City v. Harborside Warehouse Co., 17 A.2d 572, 19 N.J.Misc. 222, certiorari dismissed Harborside Ware-

house Co. v. Jersey City, 25 A.2d 291, 128 N.J. 263, affirmed 28 A.2d 91, 129 N.J.L. 62, certiorari denied 63 S.Ct. 763, four cases, 318 U.S. 769, 87 L.Ed. 1140.

12. N.Y.—People ex rel. MacKay v. McGregor, 65 N.Y.S.2d 228, 271 App.Div. 798.

Determination of land value held unnecessary

N.Y.—People ex rel. MacKay v. McGregor, supra.

13. N.Y.—People ex rel. 36 East 72nd St. Corp. v. Lilly, 66 N.Y.S.2d 546, 271 App.Div. 865.

14. Conn.—Thaw v. Town of Fairfield, 43 A.2d 65, 132 Conn. 173, 160 A.L.R. 679.

Court has duty to determine issue of value where evidence regarding value is conflicting.—Liebman v. Board of Revision of Taxes, 48 A.2d 866, 355 Pa. 42.

Value in other years immaterial
Conn.—Thaw v. Town of Fairfield, 43 A.2d 65, 132 Conn. 173, 160 A.L.R. 679.

15. Conn.—Thaw v. Town of Fairfield, supra.

Pa.—Weihe v. City of Connellsville, Com.Pl., 6 Fay.L.J. 93.

16. Pa.—Appeal of Hart, 199 A. 225, 131 Pa.Super. 104—In re Assessment of Property of Reading Trust Co., Com.Pl., 32 Berks Co. L.J. 249.

17. N.H.—Rollins v. City of Dover, 44 A.2d 113, 93 N.H. 448.

true and assessed valuation with the ratio between the true and assessed value of all other property in the taxing district.¹⁸

The courts are reluctant to and will not interfere with the determination of the assessing officers of the municipality where the action of the officers is compatible with an honest effort to adopt valuations not relatively unjust or unequal;¹⁹ and it has been held that the court cannot disturb findings or an assessment in the absence of a prejudicial error of law.²⁰ Under some provisions a court is without power to set aside an assessment for an irregularity or defect in form or illegality in assessing or levying it,²¹ and it has been held not within the power of the court to correct mere errors of judgment.²² Matters which, although assigned as error, are not argued, may be considered as abandoned.²³

Where the action is tried before a jury, the jury should be limited to the determination of the taxable value of the property in issue,²⁴ and it is not the duty of the jury to find expressly for either

the municipality or the taxpayer.²⁵ Where issues are submitted to a jury, the court should properly instruct the jury as to such issues.²⁶

Submission to referee. Where a proceeding to review an assessment is referred by the court to a referee, the referee's report is merely advisory,²⁷ but should not be lightly disregarded;²⁸ and where the record is free from error and the referee's valuation is supported by the evidence it will be confirmed by the court.²⁹

Determination and disposition of cause. In coming to its conclusion the court should consider the effect of its decision on other assessments in the community,³⁰ and should give due and equal consideration to the rights of both the owner and the municipality³¹ and take into consideration the testimony given by both sides.³² Where the court must determine the value of the property, either to correct an assessment or to determine its propriety, it is required to give effect to the rules respecting the methods of, and factors in, evaluating property.³³

18. N.H.—Rollins v. City of Dover, *supra*.

19. Mich.—22 Charlotte, Inc., v. City of Detroit, 293 N.W. 647, 294 Mich. 275.

N.J.—Colonial Life Ins. Co. of America v. State Board of Tax Appeals, 18 A.2d 625, 126 N.J.Law 126.

Pa.—Weihe v. City of Connellsville, Com.Pl., 6 Pay.L.J. 93.

20. Md.—Chesapeake & Potomac Telephone Co. of Baltimore City v. State Tax Commission, 148 A. 832, 158 Md. 512.

Mass.—Assessors of Boston v. Boston Elevated Ry. Co., 70 N.E.2d 812, 320 Mass. 588.

Pa.—Appeal of Purselle's Assessment, Com.Pl., 37 Berks Co.L.J. 49.

Finding held not error of law

• Finding of appellate tax board that corporation seeking exemption from local taxes as a public charity had not sustained the burden of proof could not be treated as an error of law by the court.—Jacob's Pillow Dance Festival v. Assessors of Becket, 69 N.E.2d 463, 320 Mass. 311.

21. N.J.—P. J. Ritter Co. v. Mayor of City of Bridgeton, 50 A.2d 1, 135 N.J.Law 22, affirmed 59 A.2d 422, 137 N.J.Law 279—Becker v. Mayor and Council of Borough of Little Ferry, 19 A.2d 657, 126 N.J. Law 338.

22. Md.—Chesapeake & Potomac Telephone Co. of Baltimore City v. State Tax Commission, 148 A. 832, 158 Md. 512.

23. N.J.—Hardman Motor Co. v.

State Board of Tax Appeals, 194 A. 870, 119 N.J.Law 164.

24. Miss.—Lavecchia v. Mayor and Aldermen of City of Vicksburg, 20 So.2d 831, 197 Miss. 860.

Two thirds of fair, full value

Where it was admitted that property in defendant city was assessed for municipal tax purpose at two thirds of value, question which should have been submitted to jury was what was two thirds of fair, full worth and market value of taxpayer's property, such value to be equal and uniform with that of other like property in defendant city.—Lavecchia v. Mayor and Aldermen of City of Vicksburg, *supra*.

25. Miss.—Lavecchia v. Mayor and Aldermen of City of Vicksburg, *supra*.

Verdict for city should state value of property, but such failure has been held not to render the verdict invalid.—Stewart v. Mayor and Aldermen of City of Vicksburg, 13 So. 2d 40, 195 Miss. 189, followed in 13 So.2d 44, three cases, suggestion of error overruled 13 So.2d 648, 195 Miss. 189.

26. Miss.—City of Clarksdale v. Stuart, 185 So. 588, 184 Miss. 179.

Instruction held proper

In proceeding involving value of realty as basis for municipal taxes, instruction that in finding true value of property jury could consider price that owner would be willing to accept and would expect to receive for it if he were disposed to sell it to another able and willing to buy was proper.—City of Clarks-

dale v. Fitzhugh, 185 So. 587, 184 Miss. 174.

Instruction held erroneous

In proceeding to review action of city tax authorities in increasing assessments on taxpayer's property, instruction that, in event jury should find in favor of defendant city, jury should fix assessment at a certain amount, constituted prejudicial error to taxpayer, since finding of any value in excess of amount returned by taxpayer, although less than amount fixed by taxing authorities, would have been a verdict for city.—Lavecchia v. Mayor and Aldermen of City of Vicksburg, 20 So.2d 831, 197 Miss. 860.

27. N.Y.—People ex rel. Temple Bar Corporation v. Murray, 40 N.Y.S. 2d 709.

28. N.Y.—People ex rel. Temple Bar Corporation v. Murray, *supra*.

29. N.Y.—People ex rel. Temple Bar Corporation v. Murray, *supra*.

Evidence held to support referee's valuation

N.Y.—People ex rel. Temple Bar Corporation v. Murray, *supra*.

30. Pa.—Appeal of Secretary of Banking, 49 A.2d 337, 355 Pa. 226.

31. R.I.—Ashton v. Tax Assessors of Town of Jamestown, 198 A. 786, 60 R.I. 388.

32. Pa.—Felin v. City of Philadelphia, 47 A.2d 227, 354 Pa. 317.

Need not average expert's figures
Pa.—Felin v. City of Philadelphia, *supra*.

33. N.Y.—People ex rel. Parklin Op-

The nature of the relief that may be awarded in a proceeding to review municipal assessments depends on the statute and the nature of the proceeding.³⁴ Thus in a certiorari proceeding the court may be limited to setting the assessment aside or determining that it is valid or invalid,³⁵ and may not itself proceed to fix the assessment,³⁶ even on proof of fraud.³⁷ However, a court having plenary jurisdiction in reviewing an assessment may deal with any phase of the matter and render such judgment in the premises as it may think proper,³⁸ regardless of the relief asked.³⁹ The court ordinarily will not invalidate assessments where the record does not contain in its entirety the matters on which appellant bases his grounds for invalidation.⁴⁰ It has also been held that the findings of fact made by a board of tax appeals are final where the evidence heard by the board is not reported to

the court.⁴¹ While the court will not reverse the decision of the tax review board for error which is not substantial or not prejudicial to appellant,⁴² an assessment will be reduced, or modified, or set aside where there is clear and convincing proof that it is erroneous,⁴³ but the value of property cannot be fixed below the amount demanded by the taxpayer in his protest,⁴⁴ and the findings of the court must conform to the pleadings and proof.⁴⁵

Dismissal, withdrawal, or abandonment. Whether an appeal should be dismissed may depend on whether the evidence shows that a question of law is involved,⁴⁶ and the court may dismiss an appeal where it finds that the assessor's valuation was correct.⁴⁷ A proceeding to review an assessment may also be dismissed for failure to prosecute it within a specified period.⁴⁸ Where a writ of cer-

erating Corporation v. Miller, 38 N.E.2d 465, 287 N.Y. 126—People ex rel. Manhattan Square Beresford v. Sexton, 29 N.E.2d 654, 284 N.Y. 145, motion granted 31 N.E.2d 204, 284 N.Y. 737.

Pa.—WFIL Broadcasting Co. v. City of Philadelphia, 56 A.2d 75, 358 Pa. 208—Liebman v. Board of Revision of Taxes, 48 A.2d 866, 355 Pa. 42—Appeal of Ritter, 19 Lehigh L.J. 60, affirmed 24 A.2d 470, 147 Pa.Super. 236.

Wis.—Buildings Development Co. v. City of Milwaukee, 274 N.W. 298, 225 Wis. 357.

Methods of, and factors in, evaluating property for municipal tax purposes see *supra* § 2049 c.

34. Conn.—Borough of Fenwick v. Town of Old Saybrook, 47 A.2d 849, 133 Conn. 22.

Judgment that taxes are not justly due

Under statute providing remedy when property in city is wrongfully assessed, the relief available under plaintiff's general prayer for relief would be a judgment that the taxes based on the assessment in question are not justly due.—Borough of Fenwick v. Town of Old Saybrook, *supra*.

35. Tenn.—Cox v. City of Bristol, 187 S.W.2d 637, 28 Tenn.App. 136.

Wis.—State ex rel. Kenosha Office Bldg. Co. v. Herrmann, 14 N.W.2d 157, 245 Wis. 253, rehearing denied 14 N.W.2d 910, 245 Wis. 253.

36. Tenn.—Cox v. City of Bristol, 187 S.W.2d 637, 28 Tenn.App. 136.

Wis.—State ex rel. Kenosha Office Bldg. Co. v. Herrmann, 14 N.W.2d 157, 245 Wis. 253, rehearing denied 14 N.W.2d 910, 245 Wis. 253.

37. Tenn.—Cox v. City of Bristol, 187 S.W.2d 637, 28 Tenn.App. 136.

38. Fla.—City of Tampa v. Wiley, 188 So. 134, 137 Fla. 126.

Court may revise immoderate valuation

N.J.—Colonial Life Ins. Co. of America v. State Board of Tax Appeals, 18 A.2d 625, 126 N.J.Law 126.

Partial error; correct total

On petition by taxpayer for abatement of taxes by city, taxpayer was entitled only to such relief as justice required, and if the whole tax assessed did not exceed the sum which taxpayer ought to pay, taxpayer was not entitled to abatement because part of the tax might be erroneously assessed.—Trustees of Phillips Exeter Academy v. Exeter, 27 A.2d 569, 90 N.H. 472.

Supplemental assessment after service of return

Court obtained jurisdiction on service of return, and where referee considered both original assessment and supplemental assessment made by city tax commission after service of return, it could not be urged for first time on motion to confirm referee's report that court was deprived of jurisdiction by failure of property owners to make application for reduction of supplemental assessment and obtain writ of certiorari directed to such assessment.—People ex rel. Lockwood v. Miller, 36 N.E.2d 665, 286 N.Y. 466.

39. N.J.—Corrado v. City of Hoboken, 25 A.2d 287, 20 N.J.Law 134.

40. Iowa.—Trustees of Flynn's Estate v. Board of Review of City of Des Moines, Polk County, 278 N.W. 342, superseded on other grounds Trustees of Flynn's Estate v. Board of Review of City of Des Moines, 286 N.W. 483, 226 Iowa 1353.

41. Mass.—City of Revere v. Revere

Const. Co., 189 N.E. 73, 285 Mass. 243.

42. Mass.—City of Revere v. Revere Const. Co., *supra*.

Rulings on evidence which were discretionary, related to inconsequential matters, or did not adversely affect substantial rights of parties to tax abatement proceedings were not reversible error.—City of Revere v. Revere Const. Co., *supra*.

43. Neb.—Nebraska State Building Corporation v. City of Lincoln, 290 N.W. 421, 137 Neb. 535.

Pa.—In re Appeal from Assessment of Real Estate, Com.Pl., 33 Luz. Leg.Reg. 90—Appeal of Gulf Bldg., Com.Pl., 87 Pittsb.Leg.J. 590.

Wis.—State ex rel. Kenosha Office Bldg. Co. v. Herrmann, 14 N.W.2d 157, 245 Wis. 253, rehearing denied 14 N.W.2d 910, 245 Wis. 253.

Wrong principles in fixing value
Tex.—Simkins v. City of Corsicana, Civ.App., 86 S.W.2d 792.

44. N.Y.—People ex rel. MacKay v. McGregor, 65 N.Y.S.2d 228, 271 App.Div. 798.

45. Tenn.—Cox v. City of Bristol, 187 S.W.2d 637, 28 Tenn.App. 136.

Finding held supported by pleadings
Tenn.—Cox v. City of Bristol, *supra*.

46. Md.—Chesapeake & Potomac Telephone Co. of Baltimore City v. State Tax Commission, 148 A. 832, 158 Md. 512.

Evidence held not to show legal question

Md.—Chesapeake & Potomac Telephone Co. of Baltimore City v. State Tax Commission, *supra*.

47. Pa.—Liebman v. Board of Revision of Taxes, 48 A.2d 866, 355 Pa. 42.

48. Me.—S. D. Warren Co. v. Frits, 25 A.2d 645, 138 Me. 279.

tiorari is not directed to the last judgment in the case, it may be dismissed.⁴⁹ Under a charter provision to that effect, an appeal pending at the end of the tax year will be dismissed unless the taxpayer pays the taxes,⁵⁰ but if the assessment is reduced on appeal the municipality must refund the excess by warrant on the city;⁵¹ and in a proper case the court will compel the issuance of such warrant.⁵² Where the municipality withdrew its appeal to the state board of tax appeals with the consent and concurrence of the county board, the jurisdiction of the state board over the subject matter of the appeal was concluded, and it could not and would not thereafter entertain an application to set aside the withdrawal and reinstate the appeal.⁵³

Operation and effect of judgment. The operation and effect of a judgment awarded in a statutory proceeding relating to municipal assessments may depend on the terms and the purpose of the statute;⁵⁴ but rules governing the effect of judgments in civil actions generally have also been applied.⁵⁵ Thus, the decision of a constitutional court fixing an assessed valuation is final and a conclusive judgment unless it is superseded on appeal,⁵⁶ and it cannot be collaterally attacked.⁵⁷ In some jurisdictions where the court has once confirmed

a report of the board it cannot subsequently modify or amend the order of confirmation;⁵⁸ but before confirmation the court may send an erroneous report back for readjustment to the commissioners for adjustment.⁵⁹ Under some conditions a judgment on an appeal from an assessment for a previous year may be res judicata as to the value of property on appeal from a subsequent assessment.⁶⁰

Where jurisdictional requisites are absent, as where statutory requirements as to the service of the petition of appeal are not complied with, the judgment is a nullity.⁶¹ A finding that a board of equalization acted illegally in approving an assessment does not reinstate a former valid assessment for a prior year,⁶² but the court should remand the proceedings for a proper hearing before the board.⁶³

I. Further Appeal or Review

General rules of appellate procedure and review apply in appeals from judgments or orders in actions or proceedings to review municipal assessments.

Rules governing appellate procedure and review in civil actions generally have been applied in appeals from judgments or orders in actions or proceedings to review municipal assessments.⁶⁴ Under constitutional provisions and general laws to that

Delay caused by municipality

Certiorari by owner of realty to review tax assessments was not barred by delay because not brought to trial promptly, where delay was caused by the tax commission.—*People ex rel. Seventy-Fourth Street Apartments Corp. v. Chambers*, 71 N.Y.S.2d 536, 272 App.Div. 900.

49. N.J.—*Borough of Oradell v. State Board of Tax Appeals*, 8 A. 2d 100, 123 N.J.Law 86, reversed on other grounds 13 A.2d 479, 125 N.J.Law 37.

50. Tex.—*Board of Equalization of City of Fort Worth v. McDonald*, Civ.App., 113 S.W.2d 306, reversed on other grounds 129 S.W.2d 1135, 133 Tex. 521.

51. Tex.—*Board of Equalization of City of Fort Worth v. McDonald*, supra.

52. Tex.—*Board of Equalization of City of Fort Worth v. McDonald*, supra.

53. N.J.—*City of New Brunswick v. Upsilon Chapter of Delta Phi Fraternity of Rutgers University*, 11 A.2d 430, 18 N.J.Misc. 147.

Withdrawal based on mistake of law
Where city withdrew its appeals to the state board of tax appeals because it believed that college fraternities were exempt from taxation under the statute, but thereafter

the supreme court, by way of dictum, indicated that the statute did not exempt college fraternities, the board, even if it had the power, would not, in its discretion, grant city's motion to reinstate its appeals.—*City of New Brunswick v. Upsilon Chapter of Delta Phi Fraternity of Rutgers University*, supra.

54. Conn.—*State ex rel. Waterbury Corrugated Container Co. v. Kilduff*, 25 A.2d 62, 128 Conn. 647.

Effect on grand list

The statute providing a remedy when property is wrongfully assessed for a city tax is directed to relief against collection of an illegal tax and a judgment granting relief under the statute does not affect the grand list as in the case of an appeal from the action of a board of relief but precludes the collection of the tax or some part of it based on the list.—*State ex rel. Waterbury Corrugated Container Co. v. Kilduff*, supra.

55. Ky.—*Board of Supervisors, City of Somerset, v. Pinnell*, 166 S.W.2d 882, 292 Ky. 364.

56. Ky.—*Board of Supervisors, City of Somerset, v. Pinnell*, supra.

57. Pa.—*Pittsburgh Junction R. Co. v. City of Pittsburgh*, 42 A.2d 829, 352 Pa. 317.

58. N.J.—*Rutherford v. Meginnis*, 60 A. 1125, 72 N.J.Law 444.

59. N.J.—*Mackie v. Donohue*, 111 A. 730, 92 N.J.Eq. 149.

60. Conn.—*Cohn v. City and Town of Hartford*, 25 A.2d 69, 128 Conn. 669.

61. N.J.—*Borough of Oradell v. State Board of Tax Appeals*, 8 A. 2d 100, 123 N.J.Law 86, reversed on other grounds 13 A.2d 479, 125 N.J.Law 37.

62. Tenn.—*Cox v. City of Bristol*, 187 S.W.2d 637, 28 Tenn.App. 136.

63. Tenn.—*Cox v. City of Bristol*, supra.

Taxpayer's right without further application

Tenn.—*Cox v. City of Bristol*, supra.

64. Conn.—*Eltington v. Town and City of Stamford*, 34 A.2d 878, 130 Conn. 418.

Iowa.—*Trustees of Flynn's Estate v. Board of Review of City of Des Moines, Polk County*, 278 N.W. 342, superseded on other grounds *Trustees of Flynn's Estate v. Board of Review of City of Des Moines*, 286 N.W. 483, 226 Iowa 1353.

Matters not raised in trial court

Conn.—*Eltington v. Town and City of Stamford*, 34 A.2d 878, 130 Conn. 418.

effect, an appeal may be taken from a judicial review of municipal tax assessments;⁶⁵ and a charter provision that the findings of the district court in reviewing the valuation placed on property shall be final has been held to be unconstitutional,⁶⁶ and may be attacked by the municipality involved.⁶⁷ A municipality which was not a party of record in the proceeding in the lower court has no standing to appeal therefrom.⁶⁸ The order of the lower court denying reargument of the case has been held not to be appealable;⁶⁹ but a default judgment may be appealed.⁷⁰

Presumptions on appeal. Presumptions obtaining on appeals in civil actions generally have been held to obtain on appeals from actions or proceedings to review municipal assessments.⁷¹ The presumption in favor of the original assessment continues in the absence of competent rebutting testimony.⁷²

Scope and extent of review. In some jurisdic-

tions it has been held that appeals from a lower court decision reviewing municipal assessments are triable de novo,⁷³ although weight should be accorded the judgment of the lower court.⁷⁴ In other jurisdictions, while such appeals are not de novo,⁷⁵ and the appellate court may be required to confine itself to the facts disclosed in the record,⁷⁶ it has been held not limited to an inspection of the record,⁷⁷ but may review the decision of the lower court on the basis of the weight of the evidence.⁷⁸ It has accordingly been held that the weight of the evidence is before the appellate court;⁷⁹ but, since the weight of the evidence is basically a question for the trial court,⁸⁰ the trial court's findings of fact are entitled to great weight and will not be set aside, or its decision reversed or modified, except for clear error,⁸¹ and where the judgment or order or findings of the lower court as to questions of fact are supported by the evidence they are conclusive on appeal.⁸²

Court divided on separate affirming opinions

In certiorari proceedings judgments of state courts were affirmed by the supreme court on appeal where two justices announced separate opinions for affirmance in each of which three justices concurred, and one justice dissented.—*Newark Fire Ins. Co. v. State Board of Tax Appeals*, N.J., 59 S.Ct. 918, 307 U.S. 313, 616, 83 L.Ed. 1312.—*Universal Ins. Co. v. State Board of Tax Appeals*, 59 S.Ct. 918, 307 U.S. 313, 616, 83 L.Ed. 1312.

Affirmance by equally divided court *Miss.—Lavecchia v. Mayor and Aldermen of City of Vicksburg*, 20 So.2d 831, 197 Miss. 860.

Bill of exceptions not required

Where the question of the jurisdiction of the lower court is raised by the petition for writ of error, a bill of exceptions or motion for new trial is not necessary in order to secure a review of such question.—*Cox v. City of Bristol*, 187 S.W.2d 637, 28 Tenn.App. 136.

65. Tex.—Board of Equalization of City of Fort Worth v. McDonald, 129 S.W.2d 1135, 133 Tex. 521.

66. Tex.—Board of Equalization of City of Fort Worth v. McDonald, supra.

67. Tex.—Board of Equalization of City of Fort Worth v. McDonald, supra.

68. Pa.—Appeal of Alloy Metal Wire Co., 198 A. 448, 329 Pa. 429.

69. N.Y.—People ex rel. Rockefeller v. Carney, 300 N.Y.S. 649, 253 App. Div. 734.

70. Ky.—Board of Supervisors, City of Somerset, v. Pinnell, 166 S.W. 2d 882, 292 Ky. 364.

71. Ky.—Board of Supervisors, City of Somerset, v. Pinnell, supra.

72. Pa.—Chatfield v. Board of Revision of Taxes, 29 A.2d 685, 346 Pa. 159.

Presumption held not rebutted

Iowa.—Appeal of Dubuque-Wisconsin Bridge Co., 25 N.W.2d 327, 237 Iowa 1314.

73. Iowa.—Appeal of Dubuque-Wisconsin Bridge Co., supra.

74. Iowa.—Appeal of Dubuque-Wisconsin Bridge Co., supra.

75. Pa.—Vollmer v. City of Philadelphia, 38 A.2d 266, 350 Pa. 223—Appeals of Matson, 33 A.2d 464, 152 Pa.Super. 424.

76. N.Y.—People ex rel. City Bank Farmers Trust Co. v. Miller, 28 N.Y.S.2d 42, 262 App.Div. 817.

77. Pa.—Appeals of Matson, 33 A.2d 464, 152 Pa.Super. 424.

Matter not alleged in answer

On appeal by city to circuit court from judgment of quarterly court reducing assessment on realty for purpose of taxation, fact that answer of taxpayer did not allege any inequality of assessment did not preclude introduction of evidence in circuit court concerning inequality of assessment, since pleadings on part of taxpayer were not necessary.—*City of Lexington v. Cooke*, 218 S.W. 2d 58, 309 Ky. 518.

78. Pa.—Appeals of Matson, 33 A.2d 464, 152 Pa.Super. 424.

79. Pa.—Felin v. City of Philadelphia, 47 A.2d 227, 354 Pa. 317—Vollmer v. City of Philadelphia, 38 A.2d 266, 350 Pa. 223—Chatfield v. Board of Revision of Taxes, 29 A. 2d 685, 346 Pa. 159—Appeal of Herold, 54 A.2d 98, 161 Pa.Super.

221—In re Phinney, 53 A.2d 889, 161 Pa.Super. 101—Appeal of Rohrbach, 40 A.2d 142, 156 Pa.Super. 283—Appeal of Valvoline Oil Co., 27 A.2d 715, 149 Pa.Super. 161—Appeal of Hart, 199 A. 225, 131 Pa. Super. 104.

80. Pa.—Appeal of Hunter, 25 A. 2d 709, 344 Pa. 280.

Credibility of witnesses is for the trial court to determine.—*Thaw v. Town of Fairfield*, 43 A.2d 65, 132 Conn 173, 160 A.L.R. 679.

81. Miss.—City of Jackson v. Dixie Greyhound Lines, 4 So.2d 721, 192 Miss. 133.

Pa.—In re Nos. 1340 to 1348, Inc., Chestnut Street, 64 A.2d 769, 361 Pa. 231—Appeal of Carnegie, 53 A.2d 425, 357 Pa. 138—Appeal of Secretary of Banking, 49 A.2d 337, 355 Pa. 226—Chatfield v. Board of Revision of Taxes, 29 A.2d 685, 346 Pa. 159—Appeal of Herold, 54 A.2d 98, 161 Pa.Super. 221—Appeal of Valvoline Oil Co., 27 A.2d 715, 149 Pa.Super. 161—In re Reading Trust Co's Assessment, 17 A.2d 625, 143 Pa.Super. 277—Appeal of Hart, 199 A. 225, 131 Pa.Super. 104.

Finding held "finding of fact" within rule

Finding that assessment of taxpayer's business realty at a designated value was uniform with other similar property throughout the city affirmed by the court en banc had all the weight of a finding of fact by the court.—*Appeal of Schwartz*, 36 A. 2d 300, 344 Pa. 471.

82. Fla.—Harvey Building Corporation v. Hannon, 191 So. 784, 140 Fla. 399.

N.Y.—People ex rel. Sheffield Farms Co. v. Lilly, 67 N.E.2d 579, 295 N.Y. 354, conformed to 63 N.Y.S.

Where the lower court's judgment or order, however, was not based on competent evidence⁸³ or sufficient evidence⁸⁴ it cannot be permitted to stand; and the court may modify the decision of the lower court by reducing or increasing the valuation.⁸⁵ So also, where the conclusions of the court below are in part based on improper or impractical considerations, or conversely, where the court fails to give any weight or due weight to a practical consideration relevant to the issue, it is the duty of the appellate court to reverse or appropriately modify its decree.⁸⁶ In general, however, the appellate court cannot substitute its judgment for that of the

lower court as to assessment values,⁸⁷ and it will not reverse for error which is immaterial or unsubstantial or not prejudicial.⁸⁸

Disposition of case. In a proper case the appellate court may remit the case to the lower court for entry of a judgment therein in accordance with the determination of the appellate court,⁸⁹ or may order a new trial,⁹⁰ or may reverse,⁹¹ or affirm,⁹² the judgment of the lower court, or may reverse the judgment or order of an intermediate appellate court and affirm that of the trial court,⁹³ or may itself enter a modified judgment or order.⁹⁴

92, 270 App.Div. 1052, affirmed 71 N.E.2d 771, 296 N.Y. 798, reargument denied 72 N.E.2d 611, 296 N.Y. 876—People ex rel. MacCracken v. Miller, 50 N.E.2d 542, 291 N.Y. 55—People ex rel. Zone v. Byrne, 10 N.Y.S.2d 726, 256 App.Div. 1025—People ex rel. Hagy v. Fahrenkopf, 3 N.Y.S.2d 196, 254 App.Div. 623, affirmed 17 N.E.2d 455, 279 N.Y. 597—People ex rel. Winthrop Avenue Co. v. Fahrenkopf, 3 N.Y.S.2d 171, 254 App.Div. 607—People ex rel. Woollard v. Fahrenkopf, 3 N.Y.S.2d 169, 254 App.Div. 607, affirmed 17 N.E.2d 455, 279 N.Y. 598.

Pa.—North American Bldg. Corporation v. City of Philadelphia, 17 A.2d 842, 341 Pa. 152—Appeal of Herold, 54 A.2d 98, 161 Pa.Super. 221—In re Phinney, 53 A.2d 889, 161 Pa.Super. 101—Appeal of McConomy, 40 A.2d 99, 156 Pa.Super. 264.

Findings supported by some evidence
The appellate court will not review findings of fact which are supported by some evidence.—Pennsylvania R. Co. v. State Bd. of Taxes, etc., 119 A. 99, 125 A. 921, 98 N.J. Law 288.

Evidence held to sustain judgment, order, or finding
Fla.—Frazier v. Adams, 7 So.2d 122, 150 Fla. 168.

Ky.—Board of Sup'rs of City of Frankfort v. State Nat. Bank of Frankfort, 189 S.W.2d 942, 300 Ky. 620.

N.Y.—Standard Oil Co. of New York v. Goldfogle, 8 N.Y.S.2d 571, 255 App.Div. 1022, reargument denied 11 N.Y.S.2d 368, 256 App.Div. 989, affirmed 24 N.E.2d 986, 282 N.Y. 566.

Pa.—In re Nos. 1340, to 1348, Inc., Chestnut St., 64 A.2d 769, 361 Pa. 231—Felín v. City of Philadelphia, 47 A.2d 227, 354 Pa. 317—Appeal of Schwartz, 28 A.2d 300, 344 Pa. 471—Appeal of Herold, 54 A.2d 98, 161 Pa.Super. 221—In re Phinney, 53 A.2d 889, 161 Pa.Super. 101—Appeal of City of Allentown, 24 A.2d 109, 147 Pa.Super. 385.

83. Pa.—Appeal of Carnegie, 53 A.2d 425, 357 Pa. 138—Vollmer v. City of Philadelphia, 38 A.2d 266, 350 Pa. 223—Chatfield v. Board of Revision of Taxes, 29 A.2d 685, 346 Pa. 159.

84. N.Y.—People ex rel. Sheffield Farms Co. v. Lilly, 59 N.Y.S.2d 679, 270 App.Div. 812, affirmed 67 N.E.2d 579, 295 N.Y. 354, opinion conformed to 63 N.Y.S.2d 92, 270 App.Div. 1052, affirmed 71 N.E.2d 771, 296 N.Y. 798, reargument denied 72 N.E.2d 611, 296 N.Y. 876.

Pa.—Vollmer v. City of Philadelphia, 38 A.2d 266, 350 Pa. 223.

Evidence held insufficient

N.Y.—People ex rel. Owens v. Schmiedel, 34 N.Y.S.2d 493, 264 App.Div. 742, affirmed 50 N.E.2d 298, 290 N.Y. 900—People ex rel. City Bank Farmers Trust Co. v. Miller, 28 N.Y.S.2d 42, 262 App.Div. 817.

Pa.—Chatfield v. Board of Revision of Taxes, 29 A.2d 685, 346 Pa. 159.

85. Pa.—Appeal of Herold, 54 A.2d 98, 161 Pa.Super. 221.

Valuation reduced

Pa.—Appeal of Rohrbach, 40 A.2d 142, 156 Pa.Super. 283.

86. N.Y.—In re Davis, 3 N.Y.S.2d 289, 254 App.Div. 636.

Pa.—Vollmer v. City of Philadelphia, 38 A.2d 266, 350 Pa. 223.

87. Pa.—Appeal of Herold, 54 A.2d 98, 161 Pa.Super. 221.

Judgment of referee

N.Y.—People ex rel. East River Sav. Bank v. Pattison, 3 N.Y.S.2d 972, 254 App.Div. 742.

88. N.Y.—Standard Oil Co. of New York v. Goldfogle, 8 N.Y.S.2d 571, 255 App.Div. 1022, reargument denied 11 N.Y.S.2d 368, 256 App.Div. 989, affirmed 24 N.E.2d 986, 282 N.Y. 566.

89. Iowa.—Lincoln Joint Stock Land Bank v. Board of Review of Sioux City, 290 N.W. 94, 227 Iowa 1136.

R.I.—Ashton v. Tax Assessors of Town of Jamestown, 198 A. 786, 60 R.I. 388.

Different valuations for city and county

Where appeals from city and county tax assessments were heard together, and higher valuation was placed on building for county purposes than for city purposes, case would be sent back to court for equalization of valuations.—Appeal of Hunter, 25 A.2d 709, 344 Pa. 280—Appeal of Valvoline Oil Co., 37 A.2d 715, 149 Pa.Super. 161.

Remission for resettlement

N.Y.—People ex rel. Sheffield Farms Co. v. Lilly, 67 N.E.2d 579, 295 N.Y. 354, conformed to 63 N.Y.S.2d 92, 270 App.Div. 1052, affirmed 71 N.E.2d 771, 296 N.Y. 798, reargument denied 72 N.E.2d 611, 296 N.Y. 876.

90. Pa.—Vollmer v. City of Philadelphia, 38 A.2d 266, 350 Pa. 223.

91. Pa.—Vollmer v. City of Philadelphia, supra.

92. N.Y.—People ex rel. City Bank Farmers Trust Co. v. Miller, 47 N.Y.S.2d 179, 267 App.Div. 894, affirmed 60 N.E.2d 838, 294 N.Y. 677—People ex rel. Winterkamp v. Gelder, 31 N.Y.S.2d 506, 263 App.Div. 795, affirmed 41 N.E.2d 925, 288 N.Y. 510—People ex rel. Winterkamp v. Matt, 31 N.Y.S.2d 507, 263 App.Div. 795, affirmed 41 N.E.2d 925, 288 N.Y. 510—People ex rel. Gedney Farm Golf Club v. Weise, 292 N.Y.S. 718, 249 App.Div. 863.

Judgment will be affirmed where lower court did not appear on the record to have adopted a wrong theory of valuation.—People ex rel. 277 Park Ave. Corporation v. Miller, 33 N.E.2d 561, 285 N.Y. 621.

93. N.Y.—People ex rel. Borough Housing Corporation v. Sexton, 34 N.E.2d 908, 285 N.Y. 754.

94. Fla.—McCaskill v. City of Homestead, 36 So.2d 272.
N.Y.—People ex rel. Feldman v. Murray, 79 N.Y.S.2d 264, 274 App.Div. 794—People ex rel. Morgan Apartments v. Miller, 45 N.Y.S.2d 99, 267 App.Div. 752—People ex

4. LIEN FOR TAXES

§ 2058. In General

- a. General considerations
- b. Validity

a. General Considerations

Municipal taxes are liens on the property on which they are assessed where, and only where, they are expressly made so by constitutional, statutory, or charter provision, or by act of the municipal corporation pursuant to authority delegated by the legislature.

Municipal taxes are liens on the property on which they are assessed where, and only where, they are expressly made so by constitutional, statutory, or charter provision,⁹⁵ or by act of the municipal corporation pursuant to authority delegated by the legislature.⁹⁶ In the latter case the act of the municipality in creating the lien must be within the scope of its authority,⁹⁷ and, where such authority is not delegated to it by either statute or charter, an ordinance enacted by it attempting to create a lien for municipal taxes is ineffective.⁹⁸ Where the legislature has entered the taxing field by statutory enactment and has plainly spoken its will with reference to tax liens to which municipalities are entitled, it has been held that the intention of the legislature is that the lien thus created should be exclusive,⁹⁹ and that the fact that the

statute does not expressly prohibit municipalities from extending tax liens does not authorize them to encumber property not so encumbered by the statute.¹

Statutes creating a lien for municipal taxes must conform to constitutional requirements,² and, wherever possible, will be construed as not having retroactive effect.³ A general tax statute has been held to apply to city taxes when construed with other statutes expressly referring to municipal taxes and with them forming a part of a taxation scheme applicable both to state and municipal taxes;⁴ but a statutory provision creating a lien for county taxes has been held not to operate as creating a lien for municipal taxes merely because other provisions of the statute are equally applicable to county and municipal taxes.⁵ A constitutional grant of power to municipalities to assess and collect taxes for municipal purposes does not impliedly create a lien on the property subject to the tax.⁶

The amounts for which municipal tax liens exist, under the provisions of some statutes, are the accrued amounts of validated taxes only as shown on the validated tax assessment rolls.⁷ Penalties,⁸ interest,⁹ and attorney's fees for collection of the

rel. *Wenfield Realty Corporation v. Miller*, 44 N.Y.S.2d 805, 266 App. Div. 997—*People ex rel. Puternal Realty Corporation v. Sexton*, 44 N.Y.S.2d 734, 266 App. Div. 995.

Recommittal to referee held unnecessary

N.Y.—*People ex rel. Rockefeller v. Carney*, 300 N.Y.S. 649, 253 App. Div. 734.

Evidence held to require modification

(1) In general.—*People ex rel. Maurian Realty Corporation v. Sexton*, 58 N.Y.S.2d 108, 269 App. Div. 968—*People ex rel. Bank for Sav. in City of New York v. Miller*, 52 N.Y.S.2d 665, 268 App. Div. 1031.

(2) By increase in valuations.—*People ex rel. Four Park Ave. Corp. v. Lilly*, 52 N.Y.S.2d 664, 268 App. Div. 1033, affirmed 62 N.E.2d 245, 294 N.Y. 824.

(3) By reduction in valuations.—*People ex rel. Seventy-Fourth Street Apartments Corp. v. Chambers*, 71 N.Y.S.2d 536, 272 App. Div. 900—*People ex rel. Wasserman v. Lilly*, 52 N.Y.S.2d 722, 268 App. Div. 1033—*People ex rel. 455 East Fifty-Seventh St. Corp. v. Miller*, 52 N.Y.S.2d 561, 268 App. Div. 1031—*People ex rel. 373 Park Avenue Corp. v. Lilly*, 52 N.Y.S.2d 479, 268 App. Div. 1029.

95. U.S.—*U. S. v. City of Greenville*, C.C.A.S.C., 118 F.2d 963.

N.M.—*Patten v. Corbin*, 82 P.2d 789, 42 N.M. 561, followed in *Town of Silver City v. North*, 82 P.2d 792, 42 N.M. 567.

Pa.—*City of Scranton v. Friedman*, Com.Pl., 47 Lack Jur. 221, 38 Mun. L.R. 87—*Hazleton City School Dist. v. Mans' Estate*, Com.Pl., 38 Luz Leg. Reg. 118.

S.C.—*Grier v. City Council of City of Spartanburg*, 26 S.E.2d 690, 203 S.C. 203—*Charleston Heights Co. v. City Council of Charleston*, 136 S.E. 393, 138 S.C. 187.

Tenn.—*Pope v. Knoxville Industrial Bank*, 121 S.W.2d 530, 173 Tenn. 461.

Tex.—*Lubbock Independent School Dist. v. Owens*, Civ.App., 217 S.W.2d 186, error refused—*Texas Land & Cattle Co. v. City of Fort Worth*, Civ.App., 73 S.W.2d 860, error refused, appeal dismissed 55 S.Ct. 653, 295 U.S. 716, 79 L.Ed. 1672, rehearing denied 55 S.Ct. 913, 295 U.S. 769, 79 L.Ed. 1710.

44 C.J. p 1336 note 15.

96. U.S.—*In re Robertson*, D.C.Tex., 20 F.Supp. 270.

44 C.J. p 1336 note 16.

97. U.S.—*In re Brannon*, D.C.Tex., 53 F.2d 401, reversed on other grounds, C.C.A., 62 F.2d 959, certiorari denied *Ryan v. City of Dallas*, 53 S.Ct. 692, 289 U.S. 742, 77 L.Ed.

1489—*In re Robertson*, D.C.Tex., 20 F.Supp. 270.

98. N.M.—*Patten v. Corbin*, 82 P.2d 789, 42 N.M. 561, followed in *Town of Silver City v. North*, 82 P.2d 792, 42 N.M. 567.

99. Tex.—*City of Lubbock v. South Plains Hardware Co.*, Civ.App., 111 S.W.2d 343.

1. Tex.—*City of Lubbock v. South Plains Hardware Co.*, supra.

2. Pa.—*Pittsburgh v. Hughes*, 13 Pa.Co. 535

44 C.J. p 1337 note 18.

3. Tex.—*Brummer v. Galveston*, 76 S.W. 428, 97 Tex. 93.

4. La.—*Stewart's Succ.*, 6 So. 587, 41 La. Ann. 127.

5. Tex.—*People's Nat. Bank v. Ennis*, Civ.App., 50 S.W. 632.

6. S.C.—*Charleston Heights Co. v. Charleston*, 136 S.E. 393, 138 S.C. 187.

44 C.J. p 1336 note 17.

7. Fla.—*Parker v. Town of Callahan*, 156 So. 334, 115 Fla. 266, amended on other grounds 157 So. 662, 117 Fla. 270.

8. N.Y.—*Getman v. Niferopoulos*, 11 N.E.2d 713, 276 N.Y. 161.

9. N.Y.—*Getman v. Niferopoulos*, supra.

Pa.—*Borough of Homestead v. De-*

tax,¹⁰ when imposed by virtue of statute or charter, have been held part of a municipal tax lien.

Repeal of statute. General legislation with reference to the creation and vesting of a lien for city taxes is not impliedly repealed by a charter subsequently granted, where the provisions of the charter are consistent with the general law,¹¹ and, a fortiori, there is no repeal where the provisions of the two statutes with reference to the tax lien are identical¹² or where the later law in terms stipulates that it shall not repeal the earlier statute,¹³ but where the provisions of the later law are substituted for, and are inconsistent with, the earlier statute, a repeal of the earlier statute is implied.¹⁴

b. Validity

While a failure to comply with the directory provisions of a statute will not prevent a municipal corporation from acquiring a valid tax lien, substantial compliance with mandatory statutory or charter provisions is necessary.

While a failure to comply with the directory provisions of a statute will not prevent a municipal corporation from acquiring a valid tax lien,¹⁵ substantial compliance with mandatory statutory or charter provisions is necessary.¹⁶ Thus it has been held that provisions relating to the recording¹⁷ and cer-

tification¹⁸ of unpaid taxes are essential to the validity of the lien. Also the failure to publish a required notice by the tax assessor,¹⁹ as well as the failure of the proper officer to sign the lien²⁰ unless such defect is cured by a validating act,²¹ have been held fatal to the validity of the lien. Where by virtue of its charter a municipal corporation has the power to levy taxes by ordinance, taxes attempted to be levied by it by resolution will not support a lien.²² In the absence of a statute providing otherwise, the simple lodgment of executions for taxes with a sheriff has been held not to give a municipal corporation a lien therefor.²³

On the other hand, it has been held that it is not fatal to the validity of the lien that property not belonging to the owner was included in the assessment,²⁴ that the lien was included with other tax liens of doubtful validity in the same instrument of transfer,²⁵ that there was a reduction of the assessed valuations subsequent to the sale of the lien,²⁶ that the amount of the tax was incorrectly tabulated,²⁷ that the description of the property did not designate the map on which it is shown,²⁸ that the tax collector failed properly to certify the amount of the tax for any year to the treasurer,²⁹ or that the city had committed a trespass on the land.³⁰

fense Plant Corp., 52 A.2d 581, 356 Pa. 500.

Right to interest on taxes due see *infra* § 2067.

10. Pa.—Borough of Homestead v. Defense Plant Corp., *supra*.

11. Mo.—State v. Shepherd, 74 Mo. 310.

44 C.J. p 1337 note 23.

12. Pa.—Barclay v. Leas, 9 Pa.Co. 314.

13. Pa.—Carnac v. Beatty, 5 Phila. 129.

14. Pa.—Philadelphia v. Congers, 24 A. 675, 150 Pa. 35.

44 C.J. p 1337 note 28.

15. Fla.—City of Leesburg v. Certain Lands, 18 So.2d 676, 154 Fla. 550.

16. U.S.—U. S. v. City of Buffalo, C.C.A.N.Y., 54 F.2d 471, certiorari denied City of Buffalo v. U. S., 52 S.Ct. 406, 285 U.S. 550, 76 L.Ed. 940.

N.Y.—Epstein v. City of New York, 289 N.Y.S. 526, 160 Misc. 90.

N.C.—Town of Wake Forest v. Holding, 178 S.E. 594, 207 N.C. 808.

Pa.—Borough of Olyphant v. Murphy, 48 Lack.Jur. 235, 62 York Leg. Rec. 15—City of Scranton v. Friedman, 47 Lack.Jur. 221, 38 Mun.L.R. 87—Miners Sav. Bank of Pittston v. City of Pittston, Com.Pl., 38

Luz.Leg.Reg. 343—Plymouth Excavating Co. v. Luzerne Co. Com'rs, Com.Pl., 37 Luz.Leg.Reg. 424—Hazleton City School Dist. v. Hazleton Silk Co., Com.Pl., 34 Luz.Leg.Reg. 301—Fidelity-Philadelphia Trust Co. v. Woodbury, Com.Pl., 58 Montg.Co. 242.

44 C.J. p 1337 note 27.

Compliance held sufficient

Fla.—City of Leesburg v. Certain Lands, 18 So.2d 676, 154 Fla. 550.

Pa.—Erie County v. City of Erie, Com.Pl., 23 Erie Co. 426—Hazleton City School Dist. v. Mans' Estate, Com.Pl., 38 Luz.Leg.Reg. 113.

17. Pa.—Pennsylvania Trust Co. v. Jones, 35 Pa.Super. 53.

18. Pa.—Reading City v. Krause, 31 A. 366, 167 Pa. 23.

19. U.S.—U. S. v. City of Buffalo, C.C.A.N.Y., 54 F.2d 471, certiorari denied City of Buffalo v. U. S., 52 S.Ct. 406, 285 U.S. 550, 76 L.Ed. 940.

20. Pa.—School Dist. of Homestead v. Marish, 45 Pa.Dist. & Co. 362, 34 Mun.L.R. 31, 90 Pittsb.Leg.J. 451.

Signing by agent

Where a municipal corporation may properly authorize a state bank and trust company to sign and file a certificate of tax lien on realty, a

certificate of tax lien so signed and filed has been held not invalid.—Town of Windsor v. Bedortha, 24 A. 2d 474, 128 Conn. 551.

21. Pa.—School Dist. of Homestead v. Marish, 45 Pa.Dist. & Co. 362, 34 Mun.L.R. 31, 90 Pittsb.Leg.J. 451.

22. Fla.—Certain Lots Upon Which Taxes are Delinquent v. Town of Monticello, 31 So.2d 905, 159 Fla. 134.

23. S.C.—Charleston Heights Co. v. City Council of Charleston, 136 S.E. 393, 138 S.C. 187.

24. N.Y.—New York v. Appelby, 154 N.Y.S. 85, 168 App.Div. 503, affirmed 113 N.E. 797, 219 N.Y. 76.

25. N.Y.—New York v. Appelby, *supra*.

26. N.Y.—City of New York v. 952 Fifth Avenue Corporation, 47 N.Y. S.2d 419, 181 Misc. 705.

27. N.Y.—New York v. Appelby, 154 N.Y.S.2d 85, 168 App.Div. 503, affirmed 113 N.E. 797, 219 N.Y. 76.

28. N.Y.—New York v. Appelby, *supra*.

29. U.S.—U. S. v. Five Acres of Land, D.C.Mass., 51 F.Supp. 117.

30. N.Y.—New York v. Appelby, 154 N.Y.S. 85, 168 App.Div. 503, affirmed 113 N.E. 797, 219 N.Y. 76.

Under some statutory provisions a municipal corporation is not required to adopt an ordinance providing for a lien to secure payment of taxes lawfully levied by it.³¹ The lien has been held not dependent for its existence on the issuance of a distress warrant, where innocent holders are not involved.³²

§ 2059. Property and Estates Covered

What property and estates are covered by liens acquired by reason of unpaid municipal taxes on realty or personally depend on statutory and charter provisions.

Where the legislature specifies to what extent municipal corporations may be entitled to liens for taxes, the fact that it does not go further and prohibit a municipality from extending the liens so created does not confer authority on a municipality to encumber with liens property not encumbered by the legislative enactment,³³ and it will be presumed that the municipal authorities, in passing an ordinance providing for liens for taxes, did not intend to transcend the provisions of such an enactment.³⁴ Under some statutory and charter provisions a lien for the whole amount of municipal taxes due from a delinquent taxpayer may attach to all,³⁵ or any part,³⁶ of the property on which the taxes were levied, or may attach to all the realty of a taxpayer situated within the municipality in which the tax list is made and placed in the hands

of the proper officer for collection.³⁷ Under some statutory provisions the governing body of a municipal corporation may, by resolution, apportion among subdivisions of a parcel of realty municipal tax liens against the parcel,³⁸ and under such a statute the failure of the tax collector to enter the apportionment on the tax duplicate does not nullify the apportionment.³⁹

A municipal corporation may not acquire a lien on personal property for taxes assessed on realty⁴⁰ in the absence of a provision authorizing such a lien.⁴¹ Under some provisions a municipality has a lien on personal property only where the assessment was specifically made on such property,⁴² and a municipality has been held to have no lien on land for the amount of tax assessments including with the land the personal property thereon.⁴³ The general assets of a nonresident taxpayer's estate have been held not subject to liens of taxes of a municipality assessed on certain of his lots prior to his death.⁴⁴

A provision that real estate shall be "responsible" for taxes on personal property, when owned by the same person, does not create a lien on the realty for personal property taxes but only evidences a legislative intent that ultimate satisfaction of the tax is not confined solely to the personal property.⁴⁵ Under some provisions taxes assessed

31. Tex.—Zachary v. City of Uvalde, Com.App., 42 S.W.2d 417.

32. Tenn.—Pope v. Knoxville Industrial Bank, 121 S.W.2d 530, 173 Tenn. 461.

33. Tex.—City of Lubbock v. South Plains Hardware Co., Civ.App., 111 S.W.2d 343.

34. Tex.—City of Lubbock v. South Plains Hardware Co., supra.

Ordinance susceptible of two interpretations will be given that construction which will harmonize with the legislative enactment in preference to one which would destroy the ordinance.—City of Lubbock v. South Plains Hardware Co., supra.

35. Ky.—Paducah v. Kahn, 8 Ky. Op. 35.

36. Mich.—Crawford v. Koch, 135 N. W. 339, 169 Mich. 372.

37. N.C.—Guilford County v. Estates Administration, 197 S.E. 535, 213 N.C. 763.

38. N.J.—Town of Irvington v. Olle-mar, 16 A.2d 563, 128 N.J.Eq. 402, affirmed Irvington Nat. Bank v. Geiger, 24 A.2d 368, 131 N.J.Eq. 189.

What constitutes apportionment by resolution

Where board of commissioners of town, after a commissioner had pre-

sented, "for final consummation" an apportionment of municipal tax liens among subdivisions of a parcel of realty, passed the motion that the apportionment "be ratified and confirmed by the Board", the apportionment was held made by resolution.—Town of Irvington v. Olle-mar, supra.

39. N.J.—Town of Irvington v. Olle-mar, supra.

40. Mass.—City of Chelsea v. Richard T. Green Co., 65 N.E.2d 11, 319 Mass. 162.

Proceeds of personalty

A municipality has been held to have no lien for delinquent taxes due on realty against the proceeds of a fire insurance policy covering a structure thereon, in the absence of a contractual relationship between the owner and the city requiring the owner to devote part of such proceeds to the payment of taxes.—Shelton v. Providence Washington Ins. Co., Tex.Civ.App., 131 S.W.2d 330.

41. No lien on personalty

(1) A statute making taxes a lien on "property" has been construed in connection with other provisions in the same statute relating exclusively to real estate to be restricted to liens on real estate and not to give a lien on personal estate.—Daugh-

drill v. Crosby, 35 Ala. 345—44 C.J. p 1337 note 36.

(2) A lien on personalty for "taxes due and assessed thereon," in the terms of a statute, has been held to restrict the lien to the identical property on which the assessment was made.—Bird v. Richmond, Va., 240 F. 545, affirmed 39 S.Ct. 186, 249 U.S. 174, 63 L.Ed. 543—44 C.J. p 1337 note 37.

42. U.S.—U. S. v. Waddill, Holland & Flinn, Va., 65 S.Ct. 304, 323 U.S. 353, 89 L.Ed. 298.

43. Mass.—City of Chelsea v. Richard T. Green Co., 65 N.E.2d 11, 319 Mass. 162.

Property held realty for tax purposes

A marine railway cradle, rollers, chains, sheaves, and hoisting machinery, including engine and winch, were held parts of realty, on which railway was located, for purpose of taxation, so that city's tax assessments on such realty including cradle and machinery, and lien for amount of such assessments were valid.—City of Chelsea v. Richard T. Green Co., supra.

44. N.Y.—In re Wyatt's Estate, 66 N.Y.S.2d 667.

45. Fla.—City of St. Petersburg v. Fiore, 33 So.2d 852.

against buildings erected and owned on the taxing date by a lessee for years have been held to create a lien against the realty of the lessor,⁴⁶ and a lien may attach to the estate of the remainderman for taxes properly assessed against the life tenant,⁴⁷ but under other provisions taxes assessed on realty against a life tenant give rise to a lien which extends only to the life estate and not to the estate of the remainderman.⁴⁸

Property belonging to a sovereign government. A municipal corporation may not acquire a tax lien on property belonging to a sovereign government without its consent,⁴⁹ and provisions in a municipal tax lien act have recognized this immunity,⁵⁰ although not automatically including property of an instrumentality of government among the immunized properties excepted from the purview of the lien act.⁵¹ Where a sovereign government takes title to property which at the time is not encumbered by a municipal tax lien, it may not thereafter be encumbered by such a tax lien.⁵² Where part of a parcel of land is conveyed to the state for high-

way purposes, an apportionment of municipal tax arrears between the portion so conveyed and the remaining portion may be made under some statutes.⁵³

§ 2060. Accrual and Duration

a. Accrual

b. Continuance and duration

a. Accrual

Statutory or charter provisions control as to when a municipal tax lien accrues.

Under different statutory and charter provisions, it has variously been held that the lien of a municipal tax attaches when it is assessed⁵⁴ or imposed;⁵⁵ when the tax duplicate or assessment roll and the warrants for collection come into the hands of the receiver or collector of taxes;⁵⁶ on confirmation of the assessment roll by the common council and delivery of the confirmed roll to the city clerk;⁵⁷ when the tax becomes due;⁵⁸ on a fixed date each

46. N.Y.—Becker v. Mayor and Council of Borough of Little Ferry, 19 A.2d 657, 126 N.J.Law 338.

47. R.I.—Madden v. Chernick, 7 A.2d 269, 63 R.I. 100.
Va.—Powers v. Richmond, 94 S.E. 803, 122 Va. 328.

48. Ala.—Gunter v. Townsend, 79 So. 644, 202 Ala. 160.
Va.—Lowery v. City of Norfolk, 19 S.E.2d 684, 179 Va. 495.

Manner of assessment

The rule is applicable whether the assessment is made correctly in the name of the tenant for life or whether the assessment was made incorrectly in the name of the estate of one creating the life estate and the remainder.—Stark v. City of Norfolk, 32 S.E.2d 59, 183 Va. 282.

49. Pa.—Borough of Homestead v. Defense Plant Corp., 52 A.2d 581, 356 Pa. 500.

50. Pa.—Borough of Homestead v. Defense Plant Corp., supra.

51. Pa.—Borough of Homestead v. Defense Plant Corp., supra.

Reason for rule

Under statutory rule of construction that legislature does not intend to violate constitution or to effect an absurd result, municipal lien act would not be construed to mean that tax lawfully levied and assessed against taxable governmental instrumentality is not lienable while like assessments against all other taxables of the same district are lienable.—Borough of Homestead v. Defense Plant Corp., supra.

Property subject to lien

(1) The phrase "property of the United States" in such an enactment embraces only such property of the United States as has not been laid open by the sovereign to local taxation.—Borough of Homestead v. Defense Plant Corp., supra.

(2) The land, buildings, machinery and equipment of federal defense plant corporation whose property was expressly subjected by federal statute to local taxation was "property owned by instrumentality of United States" and was not "property owned by United States" within statute confining liens on tax and municipal claims to all real estate other than "property owned by United States," and the fact that the United States owned all stock of reconstruction finance corporation which owned federal defense corporation did not exempt property of defense plant corporation from lien of borough tax.—Borough of Homestead v. Defense Plant Corp., supra.

52. N.Y.—U. S. v. City of Buffalo, C.C.A.N.Y., 54 F.2d 471, certiorari denied City of Buffalo v. U. S., 52 S.Ct. 406, 285 U.S. 550, 76 L.Ed. 949.

53. N.J.—Olbis v. City Council of City of Clifton, 7 A.2d 424, 123 N.J.Law 45.

Purpose of statute providing that when part of parcel of land has been taken for the opening, widening, or extension of a street in a municipality, all taxes, which shall be liens on the whole parcel of land from which

part has been taken, shall be equitably apportioned between the parcel so taken and the balance that shall remain, is to facilitate public improvements of streets in a municipality by enabling the governmental authority to secure title to needed land at its fair value, freed of all such municipal liens; and fact that wife of landowner, in response to letter of municipal director of finance, stated that they could not satisfy tax liens against their property at present, but that property would no doubt be taken over by the state for highway purposes, and requested a postponement of foreclosure proceedings until they were sure whether state would take their property, did not estop landowner to complain of method of apportionment by municipality of tax liens on part of land taken over by state and part retained by owners.—Olbis v. City Council of City of Clifton, supra.

54. Mich.—Crawford v. Koch, 135 N.W. 329, 169 Mich. 372.
44 C.J. p 1337 note 43.

55. S.C.—Charleston Heights Co. v. City Council of Charleston, 136 S.E. 393, 138 S.C. 187.

56. Mich.—Eaton v. Chesebrough, 46 N.W. 365, 82 Mich. 214.
N.J.—Hohenstatt v. Bridgeton, 40 A. 649, 62 N.J.Law 169.

57. N.Y.—Getman v. Niferopoulos, 11 N.E.2d 713, 276 N.Y. 161.

58. U.S.—Magruder v. Supplee, Md., 62 S.Ct. 1162, 316 U.S. 294, 86 L.Ed. 1555.

44 C.J. p 1337 note 45.

year;⁵⁹ or at the time of the first notice for collection of the tax.⁶⁰

Under the provisions of other statutes or charters it has been held that a municipality does not acquire a lien for taxes until the assessment roll is filed in the mortgage office, after which it operates as a lien from a stated date of the current year;⁶¹ and that the property assessed is not subject to lien prior to the institution of appropriate proceedings to enforce the collection of the tax.⁶² In the absence of a statutory provision to the contrary, a personal property tax has been held not to become a lien on the personalty prior to distraint or levy thereon.⁶³

b. Continuance and Duration

The duration of a municipal tax lien is generally fixed by statutory or charter provisions for a number of years unless sooner discharged.

The duration of the lien for municipal taxes is generally fixed by statutes or charter provisions at a certain number of years, and, for that period of time, the lien continues⁶⁴ unless, as discussed infra § 2063, it is sooner discharged. After the lapse of the statutory period, the lien does not exist⁶⁵ unless its life is extended⁶⁶ by bringing an action within the statutory period to enforce it and prosecuting the action through to judgment, in which case the

judgment will be effective and constitute a lien for such a period of time as is prescribed by the statutes of the particular jurisdiction.⁶⁷ In the absence of statutory limitations, the lien continues until the tax is paid⁶⁸ or until the lien is foreclosed,⁶⁹ unaffected by later inconsistent legislation which by its own terms is made inapplicable thereto;⁷⁰ and under the express provisions of some statutes and charters taxes constitute a lien until paid⁷¹ or released,⁷² subject to a restriction, where such exists, that the lien shall be kept alive by bills of revivor at intervals named in the statute.⁷³ Under some statutory provisions the lien of a municipal tax continues until the tax is collected if the realty remains the property of the person "to whom it is assessed."⁷⁴ Certification of unpaid taxes by the city treasurer to the city solicitor, although provided for in the statute, is not a condition precedent to the continuance of the lien therefor where the same statute also provides that the lien shall continue until the tax is paid.⁷⁵

Under some statutory provisions, when a municipality purchases or takes realty for payment of taxes, the lien of the municipality on such realty for all taxes assessed subsequently to the assessment for the payment of which the estate was purchased or taken continues,⁷⁶ at least as long

59. U.S.—*U. S. v. Certain Lands in Jackson County, Mo.*, 69 F. Supp. 565.

N.J.—*Town of Irvington v. Ollemer*, 16 A.2d 563, 128 N.J.Eq. 402, affirmed 24 A.2d 368, 131 N.J.Eq. 189.

44 C.J. p 1337 note 46.

60. N.Y.—*City of Beacon v. Asher Bernstein Realty Corp.*, 57 N.Y.S.2d 659, 185 Misc. 262, motion denied 60 N.Y.S.2d 616, 270 App.Div. 852.

61. U.S.—*Carondelet Bldg. Co. v. Fontenot*, C.C.A.La., 111 F.2d 267.

La.—*Charles Wirth Realty & Investment Co., Inc. v. Tropical Clothing & Mfg. Co., Inc.* (Bondholders' Protective Committee, Intervener), App., 160 So. 455.

62. Conn.—*River Feldspar & Milling Co. v. Phelps*, 184 A. 373, 121 Conn. 246.

63. R.I.—*Bugbee v. Stoller-Hilgers Silk Mills*, 119 A. 760, 45 R.I. 56.

64. S.C.—*Home Building & Loan Ass'n v. City of Spartanburg*, 194 S.E. 143, 185 S.C. 353.

44 C.J. p 1338 note 50.

65. S.C.—*Grier v. City Council of City of Spartanburg*, 26 S.E.2d 690, 203 S.C. 203—*Home Building & Loan Ass'n v. City of Spartanburg*, 194 S.E. 143, 185 S.C. 353—*Charleston Heights Co. v. Charleston*, 136 S.E. 393, 138 S.C. 187.

66. Va.—*Powers v. Richmond*, 94 S. E. 803, 122 Va. 328.

Interruption of period of lien

Where by a constitutional provision tax liens lapse after a stated time, an enactment interrupting such period and suspending the right to collect the taxes has been held to have the effect of extending the liens for at least the same amount of time as was taken away from the taxing authorities by the enactment.—*State ex rel. Tulane Homestead Ass'n v. Montgomery*, 171 So. 28, 185 La. 777.

67. Pa.—*Philadelphia v. Congers*, 24 A. 675, 150 Pa. 35—*Philadelphia v. Kates*, 24 A. 673, 150 Pa. 30—*Pittston v. Mangan Estate*, Com. Pl., 39 Luz.Leg.Reg. 417—*Borough of Parnassus v. McCowan*, Com. Pl., 25 West.Co.L.J. 62.

Lien held not extended

Pa.—*City of Erie v. A Piece of Land*, Com.Pl., 27 Erie Co. 14—*City of Scranton v. Friedman*, 47 Lack. Jur. 221, 38 Mun.L.R. 87—*City of Scranton v. Hoffman*, Com.Pl., 45 Lack.Lur. 183, 38 Mun.L.R. 60—*Borough of Dunmore v. Quinn*, Com.Pl., 41 Lack.Lur. 16—*City of Bethlehem v. Kurtz*, Com.Pl., 21 Lehigh Leg.J. 52—*Miners Sav. Bank of Pittston v. City of Pittston*, Com.Pl., 38 Luz.Leg.Reg. 343.

68. Tex.—*City of San Angelo v.*

Deutsch, 91 S.W.2d 308, 126 Tex. 532.

Va.—*Powers v. Richmond*, 94 S.E. 803, 122 Va. 328.

69. Tex.—*City of San Angelo v. Deutsch*, 91 S.W.2d 308, 126 Tex. 532.

70. Va.—*Powell v. Richmond*, 26 S. E. 389, 94 Va. 79.

71. Fla.—*City of Sanford v. Dial*, 142 So. 233, 104 Fla. 1.

N.Y.—*City of Beacon v. Asher Bernstein Realty Corp.*, 57 N.Y.S.2d 659, 185 Misc. 262, motion denied 60 N.Y.S.2d 616, 270 App.Div. 852.

N.C.—*Gulford County v. Estates Administration*, 197 S.E. 535, 213 N.C. 763.

Pa.—*Luzerne County v. Jones*, Com. Pl., 34 Luz.Leg.Reg. 200.

44 C.J. p 1338 note 64.

72. Fla.—*City of Sanford v. Dial*, 142 So. 233, 104 Fla. 1.

73. Pa.—*Brooke v. Kaufman*, 6 Pa. Dist. 513.

74. Del.—*Boyd v. Dillman*, 197 A. 830, 9 W.W.Harr. 231—*Welch v. Campellone*, 189 A. 451, 8 W.W.Harr. 152.

75. Pa.—*Chester v. Sinex*, 10 Pa. Dist. 620.

76. U.S.—*Richard T. Green Co. v. City of Chelsea*, C.C.A.Mass., 149 F.2d 927, certiorari denied 66 S. Ct. 54, 326 U.S. 741, 90 L.Ed. 443.

as did the lien for which the land was taken or purchased,⁷⁷ and failure properly to certify subsequent taxes does not invalidate the lien for those taxes.⁷⁸ Where registered land is sold by a city collector for nonpayment of taxes and the collector purchases the land for the city for the amount of the tax, it has been held that the proper recording or filing of a disclaimer and release of the tax title gives effect to a continuance of the tax lien.⁷⁹ A statute declaring all liens for a stated year and the years prior thereto on which no foreclosure proceedings have been instituted to be barred and uncollectable has been held to be within the power of the legislature to enact.⁸⁰

A municipality may be permitted by statute to revive or reinstate its liens for taxes previously lost because of its inaction or failure to take proper action,⁸¹ and such a statute is in the nature of a validating statute and must be restricted to taxes that have lost their liens at the date when the statute takes effect,⁸² and it may not be extended to taxes the liens of which are thereafter lost by inaction or neglect.⁸³ A statute extending a lien beyond the period stipulated in a charter has been held not subject to a constitutional restriction on statutes continuing or reviving taxes and providing that such a statute must specifically state the tax and not merely refer to the law under which the tax was imposed.⁸⁴

A statutory amendment extending the lien for taxes on realty to a stated time has been held not a retroactive law.⁸⁵ Where an enactment relating to liens for taxes in any way broadens the effect of a reassessment on lands that have been alienated, it should not be construed retroactively to apply to reassessments, made after it takes effect,

of taxes originally assessed before its passage.⁸⁶ Under some statutes there may be no lien on realty for taxes reassessed more than a stated time after the tax originally assessed was committed to the collector if the land was alienated before the reassessment.⁸⁷ A statutory provision that a lien for taxes shall terminate at the expiration of a given time from a fixed date in the year of assessment if the estate in the meantime has been alienated and the instrument alienating it is recorded has been held applicable only in fixing the duration of the lien once it arises, not in determining whether a lien is created by a reassessment of alienated land.⁸⁸

§ 2061. Priorities

- a. In general
- b. Lien of mortgage on realty
- c. Lien of special assessment

a. In General

Frequently the priority of municipal tax liens is established by statutory or charter provisions, and under some statutory provisions all legally assessed municipal taxes constitute first liens on the property assessed.

The priority of a municipal tax lien is often established by express statutory or charter provisions,⁸⁹ and statutes establishing the priority of such liens have been held to include taxes provided by a subsequent statute for the support of municipal corporations which are not ad valorem or based on property.⁹⁰ Liens or encumbrances already on the property when the tax is levied are entitled to priority over the tax lien under a statute providing that the tax execution shall bind the property only from the date thereof,⁹¹ or under a statute providing, in the case of taxes on personal property, that they "shall be and remain a lien thereon until

Mass.—City of Chicopee v. Manset Realty Corp., 66 N.E.2d 364, 319 Mass. 434.

77. Mass.—City of Chicopee v. Manset Realty Corp., *supra*.

78. U.S.—Richard T. Green Co. v. City of Chelsea, C.C.A.Mass., 149 F.2d 927, certiorari denied 66 S.Ct. 54, 326 U.S. 741, 90 L.Ed. 443.

79. Mass.—City of Quincy v. Wilson, 25 N.E.2d 369, 305 Mass. 229.

80. N.C.—City of Raleigh v. Jordan, 9 S.E.2d 507, 218 N.C. 55.

81. Pa.—Petition of Miller, 28 A.2d 257, 149 Pa.Super. 142—City of Scranton v. Friedman, 47 Lack. Jur. 221, 38 Mun.L.R. 87.

82. Pa.—Petition of Miller, 28 A.2d 257, 149 Pa.Super. 142—City of Scranton v. Friedman, 47 Lack. Jur. 221, 38 Mun.L.R. 87.

83. Pa.—Petition of Miller, 28 A.2d 257, 149 Pa.Super. 142.

84. Va.—Powers v. Richmond, 94 S.E. 803, 122 Va. 328.

85. N.H.—Bourque v. Adams, 40 A.2d 582, 93 N.H. 257.

86. Mass.—City of Worcester v. Bennett, 38 N.E.2d 647, 310 Mass. 400.

87. Mass.—City of Worcester v. Bennett, *supra*.

Alienation of land within statute
Mass.—City of Worcester v. Bennett, *supra*.

Lien held not acquired by reassessment

Mass.—City of Worcester v. Bennett, *supra*.

88. Mass.—City of Worcester v. Bennett, *supra*.

89. Ariz.—Home Owner's Loan Cor-

poration v. City of Phoenix, 77 P.2d 818, 51 Ariz. 455.

Del.—Welch v. Campellone, 189 A.451, 8 W.W.Harr. 152.

S.C.—Grier v. City Council of City of Spartanburg, 26 S.E.2d 690, 203 S.C. 203.

Tenn.—Pope v. Knoxville Industrial Bank, 121 S.W.2d 530, 173 Tenn. 461.

Tex.—Lowe v. City of Munday, Civ. App., 148 S.W.2d 937, 939.

44 C.J. p 1338 note 88.

Cities of first class have been held included in statute giving tax judgment obtained by city priority over other liens.—Associated Holding Co. v. Carrigg, 65 S.W.2d 1059, 228 Mo. App. 208.

90. Ga.—Atlanta Trust Co. v. Atlanta Realty Corporation, 170 S.E.791, 177 Ga. 581.

91. Ga.—Doane v. Chittenden, 25 Ga. 103.

paid, and no transfer of the personal property assessed shall operate to divest or destroy such lien,"⁹² and some charter provisions are construed to accord a priority over other liens only to real property tax liens, and not to personal property tax liens.⁹³

Under some statutory provisions all legally assessed municipal taxes constitute first liens prior to all other liens on the property assessed, except such other liens as also constitute first liens.⁹⁴ In passing on questions of priority between the liens of taxes imposed by different municipalities, the court must ascertain and follow the legislative mandate which fixes such priority, rather than construe statutes to insure the collection of all taxes wherever possible.⁹⁵ Depending on the provisions of the statutes, there is no preference between liens of current taxation of different municipalities on the same piece of property,⁹⁶ regardless of the year for which the taxes were imposed,⁹⁷ or municipal tax liens may take precedence in the inverse order of the time when they become liens,⁹⁸ the last

lien taking priority over the prior liens,⁹⁹ or the liens may have priority in chronological order,¹ and an enactment changing the latter rule has been held not retroactive.² It is the year of the levy, and not the year of the tax sale, which controls.³

The question of the priority of the city's tax lien does not arise in the distribution of the proceeds of the property after its sale on foreclosure where the city still retains its lien against the land in the hands of the foreclosure purchaser,⁴ as it does when it has not been made a party to the foreclosure proceedings.⁵ A municipal tax lien has been held entitled to preference over the lien of a common-law judgment in receivership proceedings.⁶

b. Lien of Mortgage on Realty

Under some statutory provisions municipal real estate taxes are liens paramount to any mortgage on the realty.

Statutory provisions control as to the relative priority of a lien for municipal taxes and a lien of a mortgage on the property involved.⁷ Under

⁹² Mich.—Lucking v. Ballantyne, 94 N.W. 8, 132 Mich. 584.

⁴⁴ C.J. p 1338 note 74.

⁹³ N.J.—Macknet v. Newark, 42 N. J. Law 38.

⁹⁴ U.S.—City of Winston-Salem v. Powell Paving Co. of North Carolina, D.C.N.C., 7 F.Supp. 424.

Fla.—Bice v. Haines City, 195 So. 919, 142 Fla. 371—Tax Securities Corporation v. Security Inv. Corporation, 155 So. 752, 115 Fla. 536—Allison Realty Co. v. Graves Inv. Co., 155 So. 745, 115 Fla. 48, followed in Moore v. Allen, 155 So. 752, 115 Fla. 187.

N.C.—Guliford County v. Estates Administration, 197 S.E. 535, 213 N.C. 763.

Pa.—In re Peplinski's Estate, 39 A. 2d 271, 155 Pa.Super. 564—In re Davidson's Estate, 42 Pa.Dist. & Co. 595—Hanover Nat. Bank v. City of Wilkes-Barre, Com.Pl., 38 Luz.Leg.Reg. 301.

Tenn.—Obion County, for Use and Benefit of North Fork Drainage Dist. No. 2, v. Massengill, 151 S. W.2d 156, 177 Tenn. 477.

⁹⁵ N.Y.—City of Rochester v. Bonded Municipal Corporation, 10 N.Y.S.2d 524, 256 App.Div. 462—Town of Greenburgh v. Rodas, 33 N.Y.S.2d 693, 178 Misc. 224.

Priority of lien for county taxes see Counties § 285 b.

Lien of certificate of purchase

Under the statute the lien of a certificate of purchase of a lot at a sale for delinquent general city taxes assessed for a given year is junior to liens for all other general tax bills held by the city taxing authori-

ties whether for taxes assessed before or after the year in which the statute was enacted.—Collector of Revenue of Jackson County v. Parcels of Land Encumbered with Delinquent Tax Liens, 205 S.W.2d 563, 356 Mo. 1133.

Jurisdiction to determine relative priority

Mo.—Collector of Revenue of Jackson County v. Parcels of Land Encumbered with Delinquent Tax Liens, supra.

⁹⁶ Fla.—Tax Securities Corporation v. Security Inv. Corporation, 155 So. 752, 115 Fla. 536—City of Tampa v. Barbee, 155 So. 751, 115 Fla. 46—Allison Realty Co. v. Graves Inv. Co., 155 So. 745, 115 Fla. 48, followed in Moore v. Allen, 155 So. 752, 115 Fla. 187.

N.Y.—Field v. Stalica, 27 N.Y.S.2d 618, 262 App.Div. 23, appeal denied In re Wiltsie's Estate, 29 N.Y.S.2d 954, 262 App.Div. 953, reversed on other grounds Field v. Stalica, 48 N.E.2d 317, 290 N.Y. 181, motion denied 50 N.E.2d 101, 290 N.Y. 764, conformed to 44 N.Y.S.2d 896, 181 Misc. 970.

Tex.—Lubbock Independent School Dist. v. Owens, Civ.App., 217 S.W. 2d 186, error refused.

⁹⁷ Fla.—Tax Securities Corporation v. Security Inv. Corporation, 155 So. 752, 115 Fla. 536.

⁹⁸ N.J.—North Bergen Tp., Hudson County v. Usher, 60 A.2d 809, 142 N.J.Eq. 479.

N.Y.—Town of Greenburgh v. Rodas, 33 N.Y.S.2d 693, 178 Misc. 224—Village of Babylon v. South Shore

Thrift Corporation, 22 N.Y.S.2d 668, 174 Misc. 738.

⁹⁹ N.Y.—Town of Eastchester v. Fairfield Junior Corp., 79 N.Y.S.2d 166, 190 Misc. 715—Town of Greenburgh v. Rodas, 33 N.Y.S.2d 693, 178 Misc. 224—Village of Babylon v. South Shore Thrift Corporation, 22 N.Y.S.2d 668, 174 Misc. 738.

Pa.—In re Compromise of Taxes, Andrews Land Corp., Com.Pl., 28 Erie Co. 324, 60 York Leg.Rec. 10.

¹ N.Y.—Field v. Stalica, 48 N.E.2d 317, 290 N.Y. 181—Field v. Stalica, 44 N.Y.S.2d 896, 181 Misc. 970, conforming to 48 N.E.2d 317, 290 N.Y. 181, motion denied 50 N.E.2d 101, 290 N.Y. 764.

² N.Y.—Field v. Stalica, 48 N.E.2d 317, 290 N.Y. 181—Field v. Stalica, 44 N.Y.S.2d 896, 181 Misc. 970, conforming to 48 N.E.2d 317, 290 N.Y. 181, motion denied Field v. Stalica, 50 N.E.2d 101, 290 N.Y. 764.

³ N.Y.—Town of Eastchester v. Fairfield Junior Corp., 79 N.Y.S.2d 166, 190 Misc. 715.

Effect of in rem tax foreclosure proceeding

The fact that an in rem tax foreclosure proceeding is involved does not take case out of tax act as to matters affecting priorities between tax liens.—Town of Eastchester v. Fairfield Junior Corp., supra.

⁴ S.C.—Smith v. Gatewood, 3 S.C. 333.

⁵ S.C.—Smith v. Gatewood, supra.

⁶ Ga.—Wofford Oil Co. v. City of Atlanta, 188 S.E. 691, 183 Ga. 492.

⁷ U.S.—U. S. v. A Certain Parcel of

some provisions municipal real estate taxes are liens paramount to any mortgage on the realty⁸ although executed⁹ and recorded¹⁰ before the tax was levied; but such provisions do not apply to mortgages made to the state or its representatives¹¹ or to a mortgage given prior to the passage of the act¹² unless the law as existing before the passage of the act gave priority to the tax lien.¹³ Under some charter provisions the fact that a certified assessment roll was not filed within a stated time after the making of the original assessment roll does not destroy the lien as against the rights of a subsequent mortgagee of the premises.¹⁴

In the absence of specific statutory authority therefor, it has been held that land may not be burdened with a lien for personal property taxes as against a prior mortgage thereon.¹⁵ Under some statutory provisions the lien of a municipality on realty for personal property taxes which attached prior to the recording of a mortgage on the realty is superior to the mortgage lien,¹⁶ but the lien of a municipality on realty for personal property taxes attaching after the recording of a mortgage on the realty is inferior to the mortgage lien,¹⁷ and this is true notwithstanding the charter and ordinances of the municipality are in conflict with the statutory provisions enacted by the state legislature.¹⁸

c. Lien of Special Assessment

Ordinarily, the lien of a special assessment is not of

equal dignity with, and is subordinate to that of a general tax for the support of the municipal government.

Although in the absence of constitutional restrictions, the legislature may determine the respective priority of liens for general municipal taxes and special assessments,¹⁹ and statutes providing that special assessments shall be on a parity with general tax liens have been held not unconstitutional,²⁰ ordinarily the lien of a special assessment is subordinate to that of a general tax for the conduct of the municipal government,²¹ and a provision that the lien of a special assessment shall constitute a lien on property of the same nature and to the same extent as a lien for general taxes²² or that special assessments should be a lien superior to all other liens,²³ does not make them of the same dignity as a lien for general taxes. Thus in the absence of any statutory provision with reference thereto, a general tax lien subsequent in point of time is given priority over a prior special tax bill for public improvements.²⁴

§ 2062. Rights of Subsequent Purchaser

When a municipal tax lien is fixed, it is superior to the rights of subsequent purchasers with notice, or chargeable with notice, thereof.

When a municipal tax lien is fixed, it is superior to the rights of subsequent purchasers with notice, or chargeable with notice, thereof.²⁵ Since a purchaser is bound to protect himself by a search to

Land With Buildings Thereon Known as Hotel Buckminster, in City of Boston, D.C.Mass., 59 F. Supp. 65, appeal dismissed, C.C.A., John Hancock Mut. Life Ins. Co. v. Thompson, 147 F.2d 761.

Ga.—Bank of Tupelo v. Collier, 14 S.E.2d 59, 191 Ga. 852.

Pa.—City of Bethlehem v. Borso, Com.Pl., 31 North.Co. 283.

8. U.S.—U. S. v. A Certain Parcel of Land With Buildings Thereon Known as Hotel Buckminster, in City of Boston, D.C.Mass., 59 F. Supp. 65, appeal dismissed, C.C.A., John Hancock Mut. Life Ins. Co. v. Thompson, 147 F.2d 761.

Mass.—Wiggin v. Lowell Five Cent Sav. Bank, 13 N.E.2d 433, 299 Mass. 518.

9. Ind.—Baldwin v. Moroney, 91 N. E. 2, 173 Ind. 574, 30 L.R.A., N.S., 761.

41 C.J. p 523 note 76—44 C.J. p 1338 note 69.

10. N.Y.—Security Building & Loan Ass'n v. City of Oswego, 18 N.Y. S.2d 511, 259 App.Div. 42, affirmed Security Building & Loan Ass'n v. Carey, 36 N.E.2d 690, 286 N.Y. 646.

11. N.J.—Jersey City v. Foster, 32

N.J.Eq. 825—Public School Trustees v. Trenton, 30 N.J.Eq. 667.

12. Pa.—Gibbons v. Cochran, 32 Pa. Super. 185.

44 C.J. p 1338 note 71.

13. Pa.—Haspel v. O'Brien, 67 A. 123, 218 Pa. 146, 11 Ann.Cas. 470.

14. N.Y.—Getman v. Niferopulos, 11 N.E.2d 713, 276 N.Y. 161.

15. Fla.—City of Marianna v. Russ, 154 So. 317, 114 Fla. 624.

16. Ariz.—Home Owners' Loan Corporation v. City of Phoenix, 77 P. 2d 818, 51 Ariz. 455.

17. Ariz.—Home Owners' Loan Corporation v. City of Phoenix, supra.

18. Ariz.—Home Owners' Loan Corporation v. City of Phoenix, supra.

19. Ga.—Steele v. City of Waycross, 10 S.E.2d 867, 190 Ga. 816.

Lien of improvement bonds

Under some statutory provisions, the lien of municipal improvement bonds payable through assessments against realty is coequal with that of ad valorem taxes.—Runnells v. Citizens' Nat. Bank of Wooster, Ohio, 11 P.2d 173, 157 Okl. 94.

20. N.M.—Waltom v. City of Portales, 81 P.2d 58, 43 N.M. 433.

21. U.S.—U. S. v. Land in City of St. Louis, Mo., Parcel No. 1, D.C. Mo., 57 F.Supp. 601.

Fla.—City of Tampa v. Barbee, 155 So. 751, 115 Fla. 46—Allison Realty Co. v. Graves Inv. Co., 155 So. 745, 115 Fla. 48, followed in Moore v. Allen, 155 So. 752, 115 Fla. 187—City of Tampa v. Lee, 151 So. 816, 112 Fla. 668.

Idaho.—Bosworth v. Anderson, 280 P. 227, 47 Idaho 697, 45 A.L.R. 1372.

Mo.—Associated Holding Co. v. Carrigg, 65 S.W.2d 1059, 228 Mo.App. 208.

22. Fla.—City of Miami v. Lee, 151 So. 317, 112 Fla. 441—City of Tampa v. Lee, 151 So. 816, 112 Fla. 668.

23. U.S.—City of Winston-Salem v. Powell Paving Co. of North Carolina, D.C.N.C., 7 F.Supp. 424.

N.C.—Town of Saluda v. Polk County, 176 S.E. 298, 207 N.C. 180.

24. Mo.—Associated Holding Co. v. Carrigg, 65 S.W.2d 1059, 228 Mo. App. 208.

44 C.J. p 1338 note 76.

25. Ky.—Ohio Valley Banking, etc.,

ascertain whether or not the taxes have been paid,²⁶ he has been held chargeable with constructive notice of a lien for delinquent taxes,²⁷ so that, as against such a lien, the principle of innocent purchaser for value has been held inapplicable.²⁸ Furthermore, under a statute permitting an assessment of omitted property, a purchaser has been held chargeable with notice that the land has not been assessed if such is the fact and he is not thereafter an innocent purchaser as against the lien for taxes for years during which taxes were not assessed against the land but should have been so assessed.²⁹ It has been held that the lien of taxes assessed against land by a city prior to proceedings by the state and county to foreclose county and state tax liens thereon become permanent when title to the property vests in the state as a result of the foreclosure sale to the state so that one purchasing the land from the state takes it subject to the liens of the city for taxes.³⁰ If a municipal tax lien accrues of record before the new owner of the property involved registers his title, such owner has been held not entitled to the protection of the registry acts.³¹

Statutory requirements as to the recording of the lien ordinarily must be complied with in order to make it enforceable as against the rights of a subsequent purchaser without actual notice thereof;³² one of the objects of registry acts is to insure notice to a registered owner of property of municipal tax claims against his property.³³ A statute providing that a person acquiring for valuable consideration an interest in land covered by an official tax search

shall hold his interest free from any municipal lien not shown on that search is intended to provide that the certification as to outstanding liens is one on which an intending purchaser may act with safety.³⁴ However, one taking title to property in partial reliance on a municipal certificate of tax search, under such a statute, attesting the existence of no municipal liens against the property as of a given date does not take the property free of a municipal lien for taxes which were not a lien at the date of the certificate.³⁵ Where a tax lien is defective for the want of a properly named owner of the realty and the real owner is never brought on the record, the lien and all the revivals thereof have been held void as against a subsequent purchaser for value of the land.³⁶ A statute authorizing municipalities to revive lost tax liens by filing a suggestion of default within a stated time after the date of the statute does not authorize the revival of a lien against a purchaser who acquired title to the property at a time when no lien existed.³⁷

§ 2063. Assignment and Discharge

- a. Assignment
- b. Discharge

a. Assignment

Tax liens ordinarily may be assigned, and the rights acquired by one to whom such liens are assigned are fixed by statute.

Unless municipal tax liens are authorized to be assigned by statute they are incapable of assignment,³⁸ but such liens ordinarily are assignable,³⁹

Co. v. Henderson, 201 S.W. 497, 180 Ky. 17.

44 C.J. p 1339 note 80.

Purchase giving purchase-money mortgage

Where a purchase-money mortgage expressly mentions the mortgagee's appeal to test the validity of a municipal tax lien and the mortgagee agrees to accept a reduction in the purchase price if the city taxes should be adjudged a valid lien against the mortgaged property, the mortgagor does not take title without notice of the lien.—City of Philadelphia v. L. Tanner & Co., 30 A.2d 216, 151 Pa.Super. 177.

26. Ky.—Ohio Valley Banking, etc., Co. v. Henderson, 201 S.W. 497, 180 Ky. 17.

44 C.J. p 1339 note 81.

27. Ky.—Taylor v. City of La Grange, 90 S.W.2d 357, 262 Ky. 383.

28. Ky.—Taylor v. City of La Grange, supra.

Tex.—Texas Bank & Trust Co. v.

Bankers' Life Co., Civ.App., 43 S.W.2d 631, error refused.

29. Tex.—City of San Antonio v. Terrill, Civ.App., 202 S.W. 361.

30. Tex.—Lubbock Independent School Dist. v. Owens, Civ.App., 217 S.W.2d 186, error refused.

31. Pa.—City of Philadelphia v. L. Tanner & Co., 30 A.2d 216, 151 Pa. Super. 177.

32. Pa.—Apollo Borough v. Clepper, 44 Pa.Super. 396.—City of Scranton v. Friedman, 47 Lack.Jur. 221, 38 Mun.L.R. 87.

44 C.J. p 1339 note 82.

33. Pa.—City of Philadelphia v. L. Tanner & Co., 30 A.2d 216, 151 Pa. Super. 177.—City of Scranton v. Friedman, 47 Lack.Jur. 221, 38 Mun.L.R. 87.

34. N.J.—Go-Lit Realty Co. of New Jersey v. Jersey City, 1 A.2d 262, 120 N.J.Law 592.

Notice of appeal and claim for unpaid taxes

Under the statute, where certain realty taxes were reduced by county

tax board and assessment, as reduced, was corrected on official tax books and was paid, taxing authority appealed to state board of tax appeals, and purchaser was not apprised of appeal and claim for unpaid taxes by official tax search, unpaid taxes during period covered by tax search did not constitute lien as against purchaser.—Go-Lit Realty Co. of New Jersey v. Jersey City, supra.

35. N.J.—Kuvlin v. City of Newark, 28 A.2d 271, 129 N.J.Law 115.

36. Pa.—City of Scranton v. Mancavage, 60 Pa.Dist. & Co. 523, 49 Lack.Jur. 17.—Borough of Olyphant v. Murphy, Com.Pl., 48 Lack.Jur. 235, 62 York Leg.Rec. 15.—City of Scranton v. Friedman, 47 Lack.Jur. 221, 38 Mun.L.R. 87.

37. Pa.—Borough of Braddock v. Spatz, 48 Pa.Dist. & Co. 212, 91 Pittsb.Leg.J. 829.

38. Utah.—Anson v. Ellison, 140 P.2d 653, 104 Utah 576.

39. N.Y.—Gautier v. Ditmar, 47 N.

and a statute permitting and providing for assignment is constitutional.⁴⁰ The test of an effective assignment is whether the municipality has divested itself of the right to enforce or test the validity of the lien,⁴¹ and the lien is not lost by combining it with other invalid liens in a joint transfer of all.⁴² A taxpayer's default, after making several payments under a contract with a municipality for the payment of delinquent taxes in installments, has been held to afford the municipality a legal basis for a sale of the lien,⁴³ but only for the unpaid balance of such taxes together with any interest and penalties.⁴⁴

The rights acquired by the holder of a municipal tax lien arise solely out of, and are fixed by, statute.⁴⁵ It has been held that one to whom a tax lien is transferred by a municipality is entitled to all of the rights that the municipality had at the time of the transfer,⁴⁶ including the status of the lien as to priority,⁴⁷ and a transfer of the lien has been held to act as an assignment of an unpaid installment of interest due thereon.⁴⁸ It has been held that the right or interest acquired by the possessor of a transfer of the lien is not an estate,⁴⁹ but a mere right to satisfy the lien.⁵⁰

Ordinarily the rule of caveat emptor applies to an assignment or transfer of the lien if the assignment is consummated, even though the transfer

proves to be utterly worthless,⁵¹ but where the assignment never is consummated the rule of implied warranty applies.⁵² Thus, where a purported transfer of the lien is void because the statute permitting the municipality to sell is unconstitutional, the purchaser of the lien may be entitled to recover the amount paid to the municipality for the transfer of the lien,⁵³ although the payment was voluntarily made under a mutual mistake of law, without fraud or misrepresentation.⁵⁴ However, where a municipality makes an invalid attempt to transfer liens to private individuals, warranting that it has the power to make the transfers, one subsequently purchasing the liens from such individuals may not be entitled to recover from the municipality the moneys paid to it,⁵⁵ in the absence of a showing that the original purchasers assigned the cause of action to him.⁵⁶ One purchasing a supposed lien at a sale inadvertently held by a municipality after it has canceled the lien acquires nothing,⁵⁷ and he may be entitled only to receive back his deposit.⁵⁸

b. Discharge

The lien may be discharged by payment or other methods depending on statutory provisions.

The payment of taxes according to the description of the property on the tax roll has been held to discharge the lien therefor,⁵⁹ where the descrip-

E. 464, 204 N.Y. 20, Ann.Cas.1913C 960.

Sale of lien as method of collecting tax see *infra* § 2095.

40. N.Y.—Gautier v. Ditmar, *supra*. 44 C.J. p 1339 note 86.

41. N.Y.—County Securities v. Warwick Properties, 24 N.Y.S.2d 971, 176 Misc. 272, affirmed 33 N.Y.S.2d 825, 263 App.Div. 964, appeal denied 34 N.Y.S.2d 520, 263 App.Div. 1008, affirmed 46 N.E.2d 844, 289 N.Y. 774.

42. N.Y.—New York v. Appleby, 113 N.E. 797, 219 N.Y. 76.

43. N.Y.—MacMurray v. City of Long Beach, 54 N.E.2d 828, 292 N.Y. 286.

44. N.Y.—MacMurray v. City of Long Beach, *supra*.

45. N.J.—Taylor v. Morris, 61 A.2d 758.

Purchase omitting special assessment lien

Legal effect of transaction under which purchaser of tax lien from city purported only to purchase lien for annual taxes, and did not purport to purchase special assessment lien which was inadvertently omitted from advertisement of tax sale, was to postpone lien of the install-

ments due under the special assessment, to transfer of tax lien acquired by purchaser, and right of city to receive installments of special assessments was subordinated to right of purchaser of tax lien.—Mt. Vernon Trust Co. v. Lynn, 5 N.Y.S.2d 156, 167 Misc. 333, affirmed 3 N.Y.S.2d 210, 254 App.Div. 680.

46. N.Y.—Village of Babylon v. South Shore Thrift Corporation, 22 N.Y.S.2d 668, 174 Misc. 738.

47. N.Y.—Village of Babylon v. South Shore Thrift Corporation, *supra*.

Priority with respect to water rents
N.Y.—Rupersam Realty Corporation v. Larpe Realty Corporation, 3 N.Y.S.2d 840, 253 App.Div. 695.

48. N.Y.—Levine v. Jonkheer Realty Corporation, 17 N.Y.S.2d 926.

49. N.Y.—Hyman v. Fischer, 52 N.Y.S.2d 553, 184 Misc. 90—County Securities v. Warwick Properties, 24 N.Y.S.2d 971, 176 Misc. 272, affirmed 33 N.Y.S.2d 825, 263 App.Div. 964, appeal denied 34 N.Y.S.2d 520, 263 App.Div. 1008, affirmed 46 N.E.2d 844, 289 N.Y. 774.

50. N.Y.—Hyman v. Fischer, 52 N.Y.S.2d 553, 184 Misc. 90.

51. N.Y.—County Securities v. War-

wick Properties, 24 N.Y.S.2d 971, 176 Misc. 272, affirmed 33 N.Y.S.2d 825, 263 App.Div. 964, appeal denied 34 N.Y.S.2d 520, 263 App.Div. 1008, affirmed 46 N.E.2d 844, 289 N.Y. 774.

52. N.Y.—County Securities v. Warwick Properties, *supra*.

53. N.Y.—County Securities v. Warwick Properties, *supra*.

54. N.Y.—County Securities v. Warwick Properties, *supra*.

55. N.Y.—Sigma Corporation v. City of Mt. Vernon, 34 N.Y.S.2d 31.

56. N.Y.—Sigma Corporation v. City of Mt. Vernon, *supra*.

57. N.Y.—Bakker v. City of New York, 68 N.Y.S.2d 24, affirmed 72 N.Y.S.2d 405, 272 App.Div. 876, appeal and reargument denied 74 N.Y.S.2d 404, 272 App.Div. 1004.

58. N.Y.—Bakker v. City of New York, *supra*.

Reason for rule

At the sale he bought nothing, for there was nothing to sell; a mistake occurred, the legal effect of which was that it was nudum pactum.—Bakker v. City of New York, *supra*.

59. Fla.—Southwest Enterprises v. Frasse, 152 So. 175, 113 Fla. 770.

tion is not wholly void for indefiniteness.⁶⁰ Also the lien may be discharged by the municipal authorities settling with the owner of the land and accepting a reduced amount from him;⁶¹ by an abatement of the tax;⁶² by the abatement or dismissal of an action to enforce the lien;⁶³ by the gross negligence of the municipality in prosecuting such action;⁶⁴ or by its negligence in permitting a confusion of goods so that the property on which the lien exists cannot be separated from other property belonging to the owner.⁶⁵

In the absence of some law expressly limiting the time within which to enforce the lien or to collect the tax, the lien is not lost by the failure of officers to take the steps prescribed for collection,⁶⁶ or by a failure to collect by the institution of the prescribed proceedings,⁶⁷ or by the recovery of a personal judgment against the taxpayer,⁶⁸ or by the institution of proceedings and the conduct therein of a void sale,⁶⁹ since an irregular or defective tax sale does not destroy the lien.⁷⁰ When a municipality becomes the owner of a transfer of a tax lien it has been held that the taxes are not thereby paid or discharged,⁷¹ and that the taxes are not merged in the transfer of the lien.⁷²

Where the possessor of a transfer of a tax lien later purchases the premises involved such interest is not merged in the fee,⁷³ and the fact that the liens are bid in by the municipality which acquires title to the property by condemnation has been held not to constitute a merger of the liens in the title

so acquired so as to discharge the liens.⁷⁴ Also tax liens may not be merged in the fee or canceled where a municipality bids in at a tax sale the assessed property for which no other bids are made, where neither payment in redemption nor a referee's deed in foreclosure has been made.⁷⁵

A lien which attached prior to the enactment of a statute transferring the property involved to another municipality survives such transfer,⁷⁶ notwithstanding the first municipality divided the lien into annual installments and suspended the lien while the installments were paid,⁷⁷ and although such municipality lost jurisdiction to assess the property after such transfer.⁷⁸ While it has been held that a sale of the property under legal process does not divest a municipality of its lien for taxes,⁷⁹ and that a judicial sale of the property for less than the amount necessary to pay all taxes due does not operate to divest the municipality of its lien, but that the lien for the unpaid balance continues,⁸⁰ it has also been held that in such a case the lien does not continue⁸¹ unless it is so provided by a valid statute.⁸² Thus a tax lien for unpaid taxes for a specified year is divested by a judicial sale subsequently held where the purchase price is sufficient to pay the costs of the sale and the taxes in question.⁸³ Participation in the proceeds of a foreclosure sale of the lien of a tax deed for unpaid state, county, and district taxes may discharge the lien of a municipal tax certificate for unpaid municipal taxes.⁸⁴

60. Fla.—Southwest Enterprises v. Frasse, *supra*.

61. U.S.—Lyon v. District of Columbia, 19 Ct.Cl. 649.

44 C.J. p 1339 note 88.

62. Mass.—City of Lowell v. Marden & Murphy, 74 N.E.2d 666, 321 Mass. 597, certiorari denied 68 S. Ct. 364, 332 U.S. 850, 92 L.Ed. 420.

63. Ky.—Louisville v. Burke, 87 S. W. 269, 27 Ky.L. 896.

64. Ky.—Louisville v. Burke, *supra*.

65. Tex.—Ft. Worth v. Boulware, 62 S.W. 928, 26 Tex.Civ.App. 76.

66. N.Y.—Getman v. Niferopoulos, 11 N.E.2d 713, 276 N.Y. 161.

67. N.Y.—Getman v. Niferopoulos, *supra*.

68. N.Y.—Getman v. Niferopoulos, *supra*.

69. N.Y.—Getman v. Niferopoulos, *supra*.

70. N.Y.—Getman v. Niferopoulos, *supra*.

71. N.Y.—City of New York v. Idlewild Beach Co., 43 N.Y.S.2d 567, 182 Misc. 205, affirmed 50 N.Y.S.2d 341, 182 Misc. 213.

72. N.Y.—City of New York v. Idlewild Beach Co., *supra*.

73. N.Y.—Hyman v. Fischer, 52 N.Y.S.2d 553, 184 Misc. 90.

74. N.Y.—City of New York v. Idlewild Beach Co., 43 N.Y.S.2d 567, 182 Misc. 205, affirmed 50 N.Y.S.2d 341, 182 Misc. 213.

75. N.Y.—In re Wyatt's Estate, 66 N.Y.S.2d 667.

76. N.Y.—Leary v. City of New York, 7 N.E.2d 256, 273 N.Y. 342.

77. N.Y.—Leary v. City of New York, *supra*.

78. N.Y.—Leary v. City of New York, *supra*.

79. Ga.—Miller v. Jennings, 147 S. E. 32, 168 Ga. 101.

Sheriff's sale under execution on judgment

Lien of city for taxes was held not divested by sheriff's sale to third person under execution on judgment by vendor for balance of purchase money, and purchaser at tax sale acquired good title.—Miller v. Jennings, *supra*.

80. Ga.—Empire Cotton Oil Co. v. Park, 95 S.E. 216, 147 Ga. 618.

81. Pa.—Hopkins v. Rettinger, 79 A. 255, 230 Pa. 192.
44 C.J. p 1339 note 93.

82. Pa.—Johnstown v. Dibert, 88 Pa.Super. 117.

83. Pa.—In re Davidson's Estate, 42 Pa.Dist. & Co. 595.

84. Fla.—Allison Realty Co. v. Graves Inv. Co., 155 So. 745, 115 Fla. 48, followed in Moore v. Allen, 155 So. 752, 115 Fla. 187.

and a statute permitting and providing for assignment is constitutional.⁴⁰ The test of an effective assignment is whether the municipality has divested itself of the right to enforce or test the validity of the lien,⁴¹ and the lien is not lost by combining it with other invalid liens in a joint transfer of all.⁴² A taxpayer's default, after making several payments under a contract with a municipality for the payment of delinquent taxes in installments, has been held to afford the municipality a legal basis for a sale of the lien,⁴³ but only for the unpaid balance of such taxes together with any interest and penalties.⁴⁴

The rights acquired by the holder of a municipal tax lien arise solely out of, and are fixed by, statute.⁴⁵ It has been held that one to whom a tax lien is transferred by a municipality is entitled to all of the rights that the municipality had at the time of the transfer,⁴⁶ including the status of the lien as to priority,⁴⁷ and a transfer of the lien has been held to act as an assignment of an unpaid installment of interest due thereon.⁴⁸ It has been held that the right or interest acquired by the possessor of a transfer of the lien is not an estate,⁴⁹ but a mere right to satisfy the lien.⁵⁰

Ordinarily the rule of caveat emptor applies to an assignment or transfer of the lien if the assignment is consummated, even though the transfer

proves to be utterly worthless,⁵¹ but where the assignment never is consummated the rule of implied warranty applies.⁵² Thus, where a purported transfer of the lien is void because the statute permitting the municipality to sell is unconstitutional, the purchaser of the lien may be entitled to recover the amount paid to the municipality for the transfer of the lien,⁵³ although the payment was voluntarily made under a mutual mistake of law, without fraud or misrepresentation.⁵⁴ However, where a municipality makes an invalid attempt to transfer liens to private individuals, warranting that it has the power to make the transfers, one subsequently purchasing the liens from such individuals may not be entitled to recover from the municipality the moneys paid to it,⁵⁵ in the absence of a showing that the original purchasers assigned the cause of action to him.⁵⁶ One purchasing a supposed lien at a sale inadvertently held by a municipality after it has canceled the lien acquires nothing,⁵⁷ and he may be entitled only to receive back his deposit.⁵⁸

b. Discharge

The lien may be discharged by payment or other methods depending on statutory provisions.

The payment of taxes according to the description of the property on the tax roll has been held to discharge the lien therefor,⁵⁹ where the descrip-

E. 464, 204 N.Y. 20, Ann.Cas.1913C 960.

Sale of lien as method of collecting tax see infra § 2095.

40. N.Y.—Gautier v. Ditmar, supra. 44 C.J. p 1339 note 86.

41. N.Y.—County Securities v. Warwick Properties, 24 N.Y.S.2d 971, 176 Misc. 272, affirmed 33 N.Y.S.2d 825, 263 App.Div. 964, appeal denied 34 N.Y.S.2d 520, 263 App.Div. 1008, affirmed 46 N.E.2d 844, 289 N.Y. 774.

42. N.Y.—New York v. Appleby, 113 N.E. 797, 219 N.Y. 76.

43. N.Y.—MacMurray v. City of Long Beach, 54 N.E.2d 828, 292 N.Y. 286.

44. N.Y.—MacMurray v. City of Long Beach, supra.

45. N.J.—Taylor v. Morris, 61 A.2d 758.

Purchase omitting special assessment lien

Legal effect of transaction under which purchaser of tax lien from city purported only to purchase lien for annual taxes, and did not purport to purchase special assessment lien which was inadvertently omitted from advertisement of tax sale, was to postpone lien of the install-

ments due under the special assessment, to transfer of tax lien acquired by purchaser, and right of city to receive installments of special assessments was subordinated to right of purchaser of tax lien.—Mt. Vernon Trust Co. v. Lynn, 5 N.Y.S.2d 156, 167 Misc. 333, affirmed 3 N.Y.S.2d 210, 254 App.Div. 680.

46. N.Y.—Village of Babylon v. South Shore Thrift Corporation, 22 N.Y.S.2d 668, 174 Misc. 738.

47. N.Y.—Village of Babylon v. South Shore Thrift Corporation, supra.

Priority with respect to water rents
N.Y.—Rupersam Realty Corporation v. Larpe Realty Corporation, 3 N.Y.S.2d 840, 253 App.Div. 695.

48. N.Y.—Levine v. Jonkheer Realty Corporation, 17 N.Y.S.2d 926.

49. N.Y.—Hyman v. Fischer, 53 N.Y.S.2d 553, 184 Misc. 90—County Securities v. Warwick Properties, 24 N.Y.S.2d 971, 176 Misc. 272, affirmed 33 N.Y.S.2d 825, 263 App.Div. 964, appeal denied 34 N.Y.S.2d 520, 263 App.Div. 1008, affirmed 46 N.E.2d 844, 289 N.Y. 774.

50. N.Y.—Hyman v. Fischer, 53 N.Y.S.2d 553, 184 Misc. 90.

51. N.Y.—County Securities v. War-

wick Properties, 24 N.Y.S.2d 971, 176 Misc. 272, affirmed 33 N.Y.S.2d 825, 263 App.Div. 964, appeal denied 34 N.Y.S.2d 520, 263 App.Div. 1008, affirmed 46 N.E.2d 844, 289 N.Y. 774.

52. N.Y.—County Securities v. Warwick Properties, supra.

53. N.Y.—County Securities v. Warwick Properties, supra.

54. N.Y.—County Securities v. Warwick Properties, supra.

55. N.Y.—Sigma Corporation v. City of Mt. Vernon, 34 N.Y.S.2d 31.

56. N.Y.—Sigma Corporation v. City of Mt. Vernon, supra.

57. N.Y.—Bakker v. City of New York, 68 N.Y.S.2d 24, affirmed 72 N.Y.S.2d 405, 272 App.Div. 876, appeal and reargument denied 74 N.Y.S.2d 404, 272 App.Div. 1004.

58. N.Y.—Bakker v. City of New York, supra.

Reason for rule

At the sale he bought nothing, for there was nothing to sell; a mistake occurred, the legal effect of which was that it was nudum pactum.—Bakker v. City of New York, supra.

59. Fla.—Southwest Enterprises v. Frasse, 152 So. 175, 113 Fla. 770.

tion is not wholly void for indefiniteness.⁶⁰ Also the lien may be discharged by the municipal authorities settling with the owner of the land and accepting a reduced amount from him;⁶¹ by an abatement of the tax;⁶² by the abatement or dismissal of an action to enforce the lien;⁶³ by the gross negligence of the municipality in prosecuting such action;⁶⁴ or by its negligence in permitting a confusion of goods so that the property on which the lien exists cannot be separated from other property belonging to the owner.⁶⁵

In the absence of some law expressly limiting the time within which to enforce the lien or to collect the tax, the lien is not lost by the failure of officers to take the steps prescribed for collection,⁶⁶ or by a failure to collect by the institution of the prescribed proceedings,⁶⁷ or by the recovery of a personal judgment against the taxpayer,⁶⁸ or by the institution of proceedings and the conduct therein of a void sale,⁶⁹ since an irregular or defective tax sale does not destroy the lien.⁷⁰ When a municipality becomes the owner of a transfer of a tax lien it has been held that the taxes are not thereby paid or discharged,⁷¹ and that the taxes are not merged in the transfer of the lien.⁷²

Where the possessor of a transfer of a tax lien later purchases the premises involved such interest is not merged in the fee,⁷³ and the fact that the liens are bid in by the municipality which acquires title to the property by condemnation has been held not to constitute a merger of the liens in the title

so acquired so as to discharge the liens.⁷⁴ Also tax liens may not be merged in the fee or canceled where a municipality bids in at a tax sale the assessed property for which no other bids are made, where neither payment in redemption nor a referee's deed in foreclosure has been made.⁷⁵

A lien which attached prior to the enactment of a statute transferring the property involved to another municipality survives such transfer,⁷⁶ notwithstanding the first municipality divided the lien into annual installments and suspended the lien while the installments were paid,⁷⁷ and although such municipality lost jurisdiction to assess the property after such transfer.⁷⁸ While it has been held that a sale of the property under legal process does not divest a municipality of its lien for taxes,⁷⁹ and that a judicial sale of the property for less than the amount necessary to pay all taxes due does not operate to divest the municipality of its lien, but that the lien for the unpaid balance continues,⁸⁰ it has also been held that in such a case the lien does not continue⁸¹ unless it is so provided by a valid statute.⁸² Thus a tax lien for unpaid taxes for a specified year is divested by a judicial sale subsequently held where the purchase price is sufficient to pay the costs of the sale and the taxes in question.⁸³ Participation in the proceeds of a foreclosure sale of the lien of a tax deed for unpaid state, county, and district taxes may discharge the lien of a municipal tax certificate for unpaid municipal taxes.⁸⁴

60. Fla.—*Southwest Enterprises v. Frasse*, *supra*.

61. U.S.—*Lyon v. District of Columbia*, 19 Ct.Cl. 649.
44 C.J. p 1339 note 88.

62. Mass.—*City of Lowell v. Marden & Murphy*, 74 N.E.2d 666, 321 Mass. 597, certiorari denied 68 S. Ct. 354, 332 U.S. 850, 92 L.Ed. 420.

63. Ky.—*Louisville v. Burke*, 87 S. W. 269, 27 Ky.L. 896.

64. Ky.—*Louisville v. Burke*, *supra*.

65. Tex.—*Ft. Worth v. Boulware*, 62 S.W. 928, 26 Tex.Civ.App. 76.

66. N.Y.—*Getman v. Niferopulos*, 11 N.E.2d 713, 276 N.Y. 161.

67. N.Y.—*Getman v. Niferopulos*, *supra*.

68. N.Y.—*Getman v. Niferopulos*, *supra*.

69. N.Y.—*Getman v. Niferopulos*, *supra*.

70. N.Y.—*Getman v. Niferopulos*, *supra*.

71. N.Y.—*City of New York v. Idlewild Beach Co.*, 43 N.Y.S.2d 567, 182 Misc. 205, affirmed 50 N.Y.S.2d 341, 182 Misc. 213.

72. N.Y.—*City of New York v. Idlewild Beach Co.*, *supra*.

73. N.Y.—*Hyman v. Fischer*, 52 N.Y.S.2d 553, 184 Misc. 90.

74. N.Y.—*City of New York v. Idlewild Beach Co.*, 43 N.Y.S.2d 567, 182 Misc. 205, affirmed 50 N.Y.S.2d 341, 182 Misc. 213.

75. N.Y.—*In re Wyatt's Estate*, 66 N.Y.S.2d 687.

76. N.Y.—*Leary v. City of New York*, 7 N.E.2d 256, 273 N.Y. 342.

77. N.Y.—*Leary v. City of New York*, *supra*.

78. N.Y.—*Leary v. City of New York*, *supra*.

79. Ga.—*Miller v. Jennings*, 147 S. E. 32, 168 Ga. 101.

Sheriff's sale under execution on judgment

Lien of city for taxes was held not divested by sheriff's sale to third person under execution on judgment by vendor for balance of purchase money, and purchaser at tax sale acquired good title.—*Miller v. Jennings*, *supra*.

80. Ga.—*Empire Cotton Oil Co. v. Park*, 95 S.E. 216, 147 Ga. 618.

81. Pa.—*Hopkins v. Rettinger*, 79 A. 255, 230 Pa. 192.
44 C.J. p 1339 note 93.

82. Pa.—*Johnstown v. Dibert*, 88 Pa.Super. 117.

83. Pa.—*In re Davidson's Estate*, 42 Pa.Dist. & Co. 595.

84. Fla.—*Allison Realty Co. v. Graves Inv. Co.*, 155 So. 745, 115 Fla. 48, followed in *Moore v. Allen*, 155 So. 752, 115 Fla. 187.

5. PAYMENT AND REFUNDING OR RECOVERY OF TAXES PAID

§ 2064. Payment

The primary liability to pay taxes assessed by a municipal corporation is on the person assessed. However, a person having an interest in the property assessed, who in good faith is obliged to pay the taxes thereon to protect his own interest, is subrogated to the rights of the municipal corporation.

The primary liability to pay the taxes assessed by a municipal corporation is on the person assessed.⁸⁵ In the absence of a lawful levy or assessment there is no duty to pay the tax,⁸⁶ and the fact that others in the municipality had paid the tax would not require persons who had not done so to pay it.⁸⁷ Statutes sometimes provide for the apportionment of municipal taxes among the subdivisions or parcels of the real estate assessed,⁸⁸ while other statutes provide for the proportionate payment of municipal taxes by owners and lienholders.⁸⁹ A tax certificate or receipt is not conclusive of payment unless made so by statute.⁹⁰

Subrogation. A lienor or other person having an interest in property, who in good faith is obliged to pay the taxes thereon to protect his own interest,

may be subrogated to the rights of the municipality,⁹¹ and is entitled to reimbursement for the amount so paid from the person who should have made such payment,⁹² but the rule is otherwise where the person making the payment knows, or is chargeable with knowledge, that he has no interest in the property.⁹³ Subrogation has been denied to a person who has by an honest mistake paid the taxes of another, where such a payment by virtue of statutory provisions has deprived the other person of the right to apply for cancellation of the taxes so paid.⁹⁴

Partial payment. The law ordinarily intends that taxes shall be paid in full at one time, and, unless it is otherwise provided by statute, a taxpayer cannot tender or pay a part only of his municipal tax liability.⁹⁵ However, where taxes are separable, a taxpayer has the right to pay the amount of any one tax listed against him.⁹⁶

Abatement. In some jurisdictions by virtue of statute, a municipal corporation has the right to

85. Mass.—Boston Five Cents Sav. Bank v. City of Boston, 61 N.E.2d 124, 318 Mass. 183.

86. Fla.—Certain Lots Upon Which Taxes Are Delinquent v. Town of Monticello, 31 So.2d 905, 159 Fla. 134.

Pa.—In re Curtis' Estate, 3 A.2d 980, 134 Pa.Super. 364, affirmed 6 A.2d 283, 335 Pa. 414.

87. Fla.—Certain Lots Upon Which Taxes Are Delinquent v. Town of Monticello, 31 So.2d 905, 159 Fla. 134.

88. N.J.—Morris, etc., Dredging Co. v. Bayonne, 67 A. 20, 75 N.J.Law 59.

Apportionment in event of condemnation

The provision of city charter that, in case of city's acquisition of property by condemnation, proportionate share of tax due on next succeeding installment date is to be due when title to property vests in city indicates public policy that, in event of condemnation, taxes are to be apportioned as of date of vesting of title.—Berri v. City of New York, 16 N.Y.S.2d 86, affirmed 16 N.Y.S.2d 1015, determination affirmed 19 N.Y. S.2d 347, 259 App.Div. 453.

89. Ga.—Wofford Oil Co. v. City of Atlanta, 188 S.E. 691, 182 Ga. 492.

Offers within statute

Alleged offer of holder of judgment against insolvent corporation to pay corporation's city taxes from fund in court derived from sale of its property in receivership proceed-

ing was not such an offer as was contemplated by statute providing for proportionate payment of taxes by owners and lienholders.—Wofford Oil Co. v. City of Atlanta, supra.

90. Tex.—City of San Angelo v. Deutsch, 91 S.W.2d 308, 126 Tex. 532.

Correction of erroneous entry on tax book

Where a city solicitor has begun proceedings on a lien filed for delinquent taxes, and the delinquent taxpayer pays him the taxes due, but, by an error on the part either of the assistant city solicitor or the receiver of taxes, in no way chargeable to the taxpayer, the payment is erroneously credited to another property, the taxpayer is entitled in equitable proceedings to compel the correction of the city's books to show payment of the taxes on his property, but the court will not in such a proceeding direct the striking off of the erroneous entry of payment on the other property.—Germantown Trust Co. v. Willard, 38 Pa.Dist. & Co. 277.

91. Miss.—Atlantic Life Ins. Co. v. Klotz, 181 So. 519, 182 Miss. 243.

Pa.—Wood v. U. S. Nat. Building & Loan Ass'n, 160 A. 244, 105 Pa. Super. 184.

92. Pa.—Wood v. U. S. Nat. Building & Loan Ass'n, supra.—In re Chester County Trust Co., Com.Pl., 29 Del.Co. 178.

Right of mortgagee to recover municipal taxes paid see Mortgages § 325.

93. N.J.—Hildreth v. Vineland Trust Co., 145 A. 625, 104 N.J.Eq. 317.

94. N.Y.—Roma Holding Corporation v. Stemmler, 31 N.Y.S.2d 509.

95. Pa.—Viscount v. Rodgers, 21 Pa.Dist. & Co. 162.

Invalid separation

Where entire property consisting of steel mill, and including land, building machinery, and equipment, was assessed as a whole, and land and buildings were not separately assessed, and there was no valid separation of borough tax liability through competent municipal action, delinquent taxpayer was liable for interest and attorney's commission on entire amount of tax, and not merely on as much of tax as was based on assessed valuation of lands and buildings, which portion the taxpayer handed to the borough.—Borough of Homestead v. Defense Plant Corp., 52 A.2d 581, 356 Pa. 500.

Credit for payment under levy by de facto officers

N.C.—Kennedy v. Town of Wilkesboro, 199 S.E. 35, 214 N.C. 271.

In condemnation proceedings, where municipality was vested with title to land, taxes thereon would be computed to the date of the payment of taxes.—In re Public Park, Borough of Queens, 34 N.Y.S.2d 944, 264 App.Div. 785.

96. Or.—American Surety Co. of New York v. Multnomah County, 138 P.2d 597, 171 Or. 287, 148 A.L.R. 926.

abate taxes, where the person against whom the taxes are assessed is poor and unable to pay.⁹⁷ Under such a statute, it has been held that a municipality could abate the taxes of a person after his death in favor of his surviving family,⁹⁸ since the death of applicant while the application was pending does not deprive the municipality of the power to abate, where the statute does not require action only on petition.⁹⁹

§ 2065. — Time

Municipal taxes are due and payable at the time fixed by statute, charter, or ordinance, and until then there is no obligation to pay.

Taxes are due and payable at the time fixed by statute, charter, or ordinance,¹ and until then there is no obligation to pay.² The date when taxes are due is not advanced by the granting of an option to the taxpayer under the statute to pay them before the statutory date.³ Municipal power to provide for the levy and collection of local taxes includes power to provide that such taxes shall become due at a different time from the general taxes;⁴ but any discretion granted to the city authorities in this respect can be exercised only within the limits imposed by statute or charter.⁵ Statutes providing for payment of all taxes in the state in equal semiannual installments apply to city as well as to state taxes.⁶

Necessity of determination by statute, charter, or ordinance. Some provision, either in the charter or in a statute or ordinance, fixing the date when

taxes become due, is a necessary condition precedent to the bringing of an action by the municipality for their recovery.⁷ Where no time is fixed by statute or charter, the tax does not become delinquent until the council has determined by ordinance the date when it shall be paid.⁸ In some jurisdictions the time when the taxes shall become payable must be determined at the time the tax levy is made.⁹

Postponement. A delay in filing the assessment roll beyond the date fixed by statute as the date when taxes shall become due and payable operates as a postponement of the due date to the day when the roll is filed,¹⁰ and a taxpayer is entitled to a reasonable time thereafter for payment without incurring penalties.¹¹

§ 2066. — Medium

Municipal taxes are generally required to be paid in money, although it is sometimes provided that payment may be made in other specified property.

Municipal taxes are generally required to be paid in money,¹² although it is sometimes provided that payment may be made in other ways.¹³ A provision in a city charter directing that taxes shall be payable only in current money of the United States has been construed to permit payment by check, where the check has been accepted by the bank on which it is drawn and a transfer of funds in accordance therewith made,¹⁴ although in an action under the same charter provision it has been held that, where the drawee bank pays its own taxes by

97. Conn.—City of Bridgeport v. First Nat. Bank & Trust Co., 7 A.2d 839, 125 Conn. 623, 123 A.L.R. 595.

98. Conn.—City of Bridgeport v. First Nat. Bank & Trust Co., supra.

99. Conn.—City of Bridgeport v. First Nat. Bank & Trust Co., supra.

1. U.S.—Supplee v. Magruder, D.C. Md., 36 F.Supp. 722, affirmed, C.C.A., Magruder v. Supplee, 123 F.2d 399, certiorari granted 62 S. Ct. 907, 315 U.S. 794, 86 L.Ed. 1196, reversed on other grounds 62 S.Ct. 1162, 316 U.S. 394, 86 L.Ed. 1555—Carondelet Bldg. Co. v. Fontenot, D.C.La., 28 F.Supp. 656, reversed on other grounds, C.C.A., 111 F.2d 267.

Ala.—Johnson v. State ex rel. City of Birmingham, 17 So.2d 662, 245 Ala. 499.

N.J.—K. S. Realty Co. v. Ostroff, 135 A. 869, 100 N.J.Eq. 128, affirmed 135 A. 931, 104 N.J.Eq. 771.

44 C.J. p 1339 note 96.

2. Md.—Bamberger v. Baltimore City, 94 A. 8, 125 Md. 431.

Pendency of appeal from assessment
Unseparated taxes are no less due and payable because of the pendency of an appeal from the assessment.—Borough of Homestead v. Defense Plant Corp., 52 A.2d 581, 356 Pa. 500.

3. Colo.—Hendricks v. Julesburg, 132 P. 61, 55 Colo. 59.

4. Tex.—Eustis v. Henrietta, Civ. App., 37 S.W. 632.

5. Ga.—Brunswick v. Finney, 54 Ga. 317.
44 C.J. p 1340 note 1.

6. Mont.—Thomas v. Missoula, 226 P. 213, 70 Mont. 478.

7. Cal.—Dixon v. Mayes, 13 P. 471, 72 Cal. 166.
44 C.J. p 1340 note 5.

8. Cal.—Dixon v. Mayes, supra.

9. Me.—Rockland v. Rockland Water Co., 19 A. 163, 82 Me. 188.

10. R.I.—Rives v. Taylor, 113 A. 113, 43 R.I. 426.

11. R.I.—Rives v. Taylor, supra.

12. Fla.—Haines City v. Certain Lands Upon Which Taxes and Special Assessments Are Delinquent, 178 So. 143, 130 Fla. 379.

Tex.—City of San Angelo v. Deutsch, 91 S.W.2d 308, 126 Tex. 532.
44 C.J. p 1340 note 12.

13. La.—New Orleans v. Jackson, 33 La. Ann. 1038.

Tex.—Houston v. Stewart, Civ. App., 90 S.W. 49.

Working out taxes

Statute requiring that provision be made for taxpayers to work out such taxes if they so elect does not affect a resolution levying taxes without such a provision which is enacted under the authority of a later statute.—White Sulphur Springs v. Pierce, 53 P. 103, 21 Mont. 130.

14. Tex.—El Paso v. Two Republics L. Ins. Co., Civ. App., 278 S.W. 231.

44 C.J. p 1340 note 15.

a cashier's check, and, on the city depositing it at the bank, credits the city therewith under an agreement that payment thereof would not be demanded, the transaction does not constitute a payment within the meaning of the charter.¹⁵ However, where a check is actually paid, the taxpayer's liability is discharged.¹⁶

Surrender or cancellation of claims against city.

Except where it is otherwise provided, the municipality cannot be compelled to accept as payment of taxes due to it a cancellation of a debt it owes to the taxpayer.¹⁷ Even where the taxpayer is entitled to deductions of certain items of city indebtedness to him within limits fixed by the statute, he is not entitled to deductions of items outside the statutory limits.¹⁸ Where a remission of taxes is agreed on as the consideration for services rendered or supplies furnished to the municipality, as discussed supra § 2013, such an agreement, if valid, is enforceable by setting off the value of the service against the annual tax as it accrues.¹⁹ Under some statutes a municipality may extinguish and settle a judgment against it by offsetting taxes due from the judgment creditor.²⁰

City warrants, bonds, or other evidences of debt.

A city cannot be compelled to receive in payment of taxes its own warrants or certificates of indebtedness, where it never has been authorized by

law to issue corporate obligations to circulate as money,²¹ certificates of city indebtedness which are void as having been issued in excess of the constitutional limitation of indebtedness,²² or city notes issued during the Civil War as a part of the Confederate currency.²³ However, city warrants are receivable for city taxes under a statute authorizing it,²⁴ and, in the absence of statutory restriction, it is not necessary that the warrants should have been issued on account of debts incurred during the year for which the taxes were assessed.²⁵ Furthermore, an injunction will not be granted to restrain a city from receiving city scrip where it appears that, unless such scrip is taken, the taxes cannot be collected.²⁶ The privilege conferred on particular persons to pay taxes in judgments or evidences of debt against the city does not enable other persons to claim the same privilege;²⁷ and, when the privilege is given of paying in coupons, warrants, or scrip, it must be exercised before the time for payment has passed.²⁸

Generally, municipal bonds cannot be used as a set-off against municipal taxes unless the law permits and the contracting parties consent.²⁹ Hence, an ordinance, even if authorized by statute, directing municipal officers to accept for taxes bonds and past-due coupons of the city in lieu of money is invalid where it changes the law requiring the payment of taxes in money, which was in effect at the

15. U.S.—El Paso City Nat. Bank v. El Paso, C.C.A.Tex., 10 F.2d 308. 44 C.J. p 1340 note 16.

16. Mich.—C. N. Ray Corporation v. Williams, 238 N.W. 215, 255 Mich. 564.

Officer issuing receipt for check received for taxes should state on receipt's face that its validity depends on payment of check.—City of Erie v. Piece of Land, 162 A. 445, 308 Pa. 454.

What constitutes payment

Under a statute providing that a check tendered for taxes shall not constitute payment unless "it shall be paid on presentation," there is a valid payment when the check is deposited by the city treasurer, credited to his account, and charged to the account of the taxpayer, where there are sufficient funds in the latter's account to pay it.—C. N. Ray Corporation v. Williams, 238 N.W. 215, 255 Mich. 564.

Repayment

City treasurer had burden of showing justification for repaying bank amount of tax check credited to him.—C. N. Ray Corporation v. Williams, supra.

17. S.C.—Trenholm v. Charleston, 16 Am.R. 732, 3 S.C. 347.

Tex.—Wagner v. Porter, Civ.App. 56 S.W. 560.

18. N.Y.—New York City Interborough R. Co. v. Moynahan, 134 N.Y. S. 17, 148 App.Div. 908, affirmed 99 N.E. 1110, 206 N.Y. 652. 44 C.J. p 1341 note 21.

19. Va.—Richmond v. Virginia R., etc., Co., 98 S.E. 691, 124 Va. 529. 44 C.J. p 1341 note 23.

20. N.J.—Francis Realty Co. v. City of Newark, 199 A. 912, 16 N.J.Misc. 328.

Tax refund

Such a statute is inapplicable to a tax refund resulting from a determination of a tax review board reducing a real estate assessment, since such a determination is not a judgment recovered by the taxpayer; nor does a city have the right to set off a realty tax refund for one year against a succeeding year's taxes since the realty tax is not a debt of the owner of the realty.—Francis Realty Co. v. City of Newark, supra.

21. Ark.—Lindsey v. Rottaken, 32 Ark. 619.

22. Ill.—Fuller v. Chicago, 89 Ill. 282.

23. Va.—Miller v. Lynchburg, 20 Gratt. 330, 61 Va. 330.

24. S.D.—Western Town-Lot Co. v. Lane, 65 N.W. 17, 7 S.D. 599.

25. S.D.—Western Town-Lot Co. v. Lane, supra.

26. U.S.—Ranger v. New Orleans, C.C.La., 20 F.Cas.No.11,564, 2 Woods 128, reversed on other grounds 98 U.S. 381, 25 L.Ed. 225.

27. La.—Jones v. Shreveport, 23 La. Ann. 835.

28. Tex.—Bummel v. Houston, 2 S.W. 740, 68 Tex. 10.

29. U.S.—Harris v. City of Miami, Fla., D.C.Fla., 6 F.Supp. 305. Fla.—Haines City v. Certain Lands Upon Which Taxes and Special Assessments Are Delinquent, 178 So. 143, 130 Fla. 379.

Statute strictly construed

Statute providing for payment of taxes levied for payment of interest and for sinking funds on bonds or other past-due obligations of taxing district by acceptance of such bonds of past-due obligations is inapplicable as to refunding bonds issued under general refunding statute.—State v. City of Orlando, 170 So. 887, 126 Fla. 251, 127 Fla. 280.

Coupons held proper payment

Fla.—Hunt v. State ex rel. Dundee Citrus Growers Ass'n, 163 So. 83, 120 Fla. 753, 100 A.L.R. 1336.

date of the contract.³⁰ However, a statute authorizing the issuance of bonds with a provision that such bonds and coupons attached thereto may be tendered in payment of municipal taxes is not invalid, under a constitutional provision prohibiting a surrender or suspension of the power of taxation.³¹

Power to take security for payment. Public policy does not forbid a municipality to take the taxpayer's note and mortgage for his delinquent taxes;³² and, in the absence of charter restrictions, a city to which land is struck off at a tax sale in default of other bidders has the power to surrender the certificates of sale to the taxpayer, and to take from him a mortgage to secure the payment of the delinquent taxes.³³

Payment out of proceeds of judicial or execution sale. Municipal taxes are not payable out of sales of land to satisfy a debt,³⁴ except where it is otherwise provided by statute,³⁵ and a statute making it the duty of a sheriff selling property under a levy to ascertain the amount of taxes due and pay them over to the tax collector has been held to apply only to state and county taxes, and not to be extended by construction to taxes due to, and collectable by, a municipal corporation.³⁶

§ 2067. — Interest

Interest is not recoverable on delinquent taxes due a

municipal corporation unless it is expressly so provided by statute, charter, or ordinance.

Interest is not recoverable on delinquent taxes due a municipal corporation unless it is expressly so provided by statute, charter, or ordinance.³⁷ Where the municipal charter itself creates a liability for interest on unpaid city taxes, no ordinance is necessary to make such provision operative.³⁸ The enactment of an ordinance imposing interest for continued delinquency in the payment of municipal taxes is an enactment legislative in character and governmental in function,³⁹ and constitutes a special or specific provision of law within the saving clause of a statute relating to interest on delinquent tax assessments.⁴⁰

Interest on taxes does not begin to run until after a default in making payment,⁴¹ and, under some statutes, the city council must fix a definite time for payment before it can require payment of interest;⁴² but taxes payable in installments carry interest from the date of assessment where the statute makes that provision.⁴³ If a taxpayer tenders as much of a tax as is valid, and keeps his tender good, he is thereby relieved from the payment of interest subsequently accruing.⁴⁴ Interest on delinquent taxes which continue to be an obligation after the government or a political subdivision has taken title to the taxed property on condemnation continues to accrue until the taxes are paid.⁴⁵ It has been held that the interest imposed becomes part of the taxes and are collectable as such,⁴⁶

30. U.S.—Keefe v. City of St Petersburg, D.C.Fla., 5 F.Supp. 132

31. Mich.—Harsha v. City of Detroit, 246 N.W. 849, 261 Mich. 586, 90 A.L.R. 853.

32. N.Y.—Buffalo v. Balcom, 32 N. E. 7, 134 N.Y. 532—Clark v. Locke, 9 N.Y.S. 918.

No bar to foreclosure

Fact that mortgage was given to secure payment of notes covering real and personal property taxes due municipality was no defense or bar to foreclosure by assignee.—Dintenfuss v. Whilat Film Corporation, 154 A. 546, 108 N.J.Eq. 195.

33. N.Y.—Buffalo v. Balcom, 32 N. E. 7, 134 N.Y. 532.

34. Pa.—South Chester v. Broomall, 1 Del.Co. 58.

35. N.J.—Collins v. Kiederling, 97 A. 948, 87 N.J.Eq. 12.
35 C.J. p 66 note 98 [a].

36. Ala.—State v. Vincent, 78 Ala. 233—Holding v. Thomas, 62 Ala. 4.

37. Me.—Inhabitants of Athens v. Whittier, 118 A. 897, 122 Me. 86.
Penalty for nonpayment of municipal taxes see *infra* § 2115.

38. Tex.—Joy v. City of Terrell, Civ.App., 143 S.W.2d 704, error dismissed, judgment correct—Nalle v. Austin, Civ.App., 93 S.W. 141.

39. Va.—Southern Ry. Co. v. City of Danville, 7 S.E.2d 896, 175 Va. 300.

Recording of votes

Ky.—City of Richmond v. Goodloe, 153 S.W.2d 921, 287 Ky. 379.

40. Va.—Southern Ry. Co. v. City of Danville, 7 S.E.2d 896, 175 Va. 300.

Computation

Va.—Southern Ry. Co. v. City of Danville, *supra*.

41. Tex.—Galveston, etc., R. Co. v. Galveston, 74 S.W. 537, 96 Tex. 520.

44 C.J. p 1341 note 35.

Appeal from excessive assessment

Under statutes providing for interest on delinquent municipal tax payments, legislature did not intend that taxpayers were to be considered delinquent during pendency of litigation in which substantial reductions were obtained, especially in view of earlier statute allowing appeals from excessive assessments but lacking

any provision for a refund.—Phipps v. Kirk, 5 A.2d 143, 333 Pa. 478.

Omitted assessments

City is entitled to interest on omitted tax assessments against bridge within boundaries of city from time assessments were made and payment demanded.—Ironton & Russell Bridge Co. v. City of Russell, 91 S.W.2d 1, 262 Ky 778.

42. Mass.—Kelly v. O'Rourke, 122 N.E. 169, 232 Mass. 168.

43. N.J.—King v. Marvin, 17 A. 162, 51 N.J.Law 298—Hoboken Land, etc., Co. v. Marvin, 17 A. 158, 51 N.J.Law 285

44. Tex.—Board of Equalization of City of Fort Worth v. McDonald, 129 S.W.2d 1135, 133 Tex. 521.

45. U.S.—U. S. v. 53¼ Acres of Land, More or Less in Borough of Brooklyn, Kings County, N. Y., D.C.N.Y., 46 F.Supp. 875.

N.Y.—In re Public Parks at Rockaway Beach, City of New York, 41 N.E.2d 454, 288 N.Y. 51—Kew Gardens Estates v. City of New York, 85 N.Y.S.2d 508.

46. Pa.—Pennsylvania Co. for Insurances on Lives and Granting

and that a municipality is entitled to the interest which has accrued on taxes on realty sold in execution on foreclosure proceedings after a federal court, which had appointed a receiver for the realty owner, had relinquished its control,⁴⁷ notwithstanding the federal rule that interest for nonpayment of taxes was not allowable on claims against funds in the hands of a receiver, since such rule is inapplicable to a distribution of funds by a state court.⁴⁸

Rate. The rate of interest depends on statutes, charters, or ordinances and their construction.⁴⁹ Under some statutes the rate of interest which shall accrue on taxes after they become payable must be determined by the council at the time the tax levy is made.⁵⁰ Some charter provisions fixing the rate of interest have been upheld as not in conflict with constitutional provisions relating to rates of interest.⁵¹ The legislature may enact statutes reducing the rate of interest on delinquent taxes which shall operate retrospectively,⁵² in which event the statute in force at the time of collection and enforcement of the tax, and not the earlier statute, must control in computing interest.⁵³

Abatement. Statutes abating interest on municipal taxes are to be strictly construed,⁵⁴ and a taxpayer who seeks an abatement must point to clear and unmistakable warrant to support his claim.⁵⁵ However, a taxpayer on complying with the conditions specified in such a statute is entitled to an abatement of interest.⁵⁶

§ 2068. Refunding of Taxes Paid

In the absence of statute, a municipal corporation has no power to refund taxes.

In the absence of statute, a municipal corporation has no power to refund taxes.⁵⁷ A state has power to authorize the refund of municipal taxes paid,⁵⁸ and a statute providing for refunds has been held valid,⁵⁹ even though it imposes duties retroactively on municipalities,⁶⁰ and does not limit the time in which suit may be instituted for the refund.⁶¹ The legislature may enact a statute making a refunding of illegal or excessive taxes obligatory on the city,⁶² and such a provision may be construed as mandatory, even though permissive in form,⁶³ and as establishing the city's obligation to

Annuities v. Barker, 190 A. 193, 124 Pa.Super. 557.

47. Pa.—Pennsylvania Co. for Insurances on Lives and Granting Annuities v. Barker, *supra*.

48. Pa.—Pennsylvania Co. for Insurances on Lives and Granting Annuities v. Barker, *supra*.

49. Pa.—Speck v. Phillips, 51 A.2d 399, 160 Pa.Super. 365.

Legal rate

Pa.—Borough of Homestead v. Defense Plant Corp., 52 A.2d 581, 356 Pa. 500—Speck v. Phillips, 51 A.2d 399, 160 Pa.Super. 365.

50. Me.—Rockland v. Rockland Water Co., 19 A. 163, 82 Me. 188.

51. Tex.—Galveston, etc., R. Co. v. Galveston, 74 S.W. 537, 96 Tex. 520.

44 C.J. p 1341 note 39.

52. Fla.—City of Marianna v. Russ, 154 So. 217, 114 Fla. 624.

53. Fla.—City of Marianna v. Russ, *supra*.

54. Pa.—Land Title Bank & Trust Co. v. Marshall, 34 A.2d 71, 348 Pa. 105.

Purpose of act

The primary purpose of act which abates, under certain circumstances, interest on certain city taxes is to encourage prompt payment not only of back taxes but also of current taxes, the advantage or benefit to taxpayer being only incidental to main object.—Braun, for Use of Fisher, to Use of Louik, v. De Rosa, 194 A. 514, 128 Pa.Super. 313.

55. Pa.—Land Title Bank & Trust Co. v. Marshall, 34 A.2d 71, 348 Pa. 105.

Remission by court

By statute chancellor is given discretion to dismiss tax suit due to laches or failure to prosecute within three years from date of filing the suit, and properly exercised his discretion in remitting interest where city could have proceeded, but allowed suit to remain in court for years.—State, for Use of City of Chattanooga, v. Bayless, 209 S.W.2d 504.

56. Pa.—Land Title Bank & Trust Co. v. Marshall, 34 A.2d 71, 348 Pa. 105.

57. N.Y.—Troy Union R. Co. v. City of Troy, 238 N.Y.S. 577, 227 App. Div. 351, affirmed 171 N.E. 798, 253 N.Y. 597.

Agreement

(1) City is unauthorized to remit taxes in return for landowners' dismissing quo warranto proceeding against city.—St. Lucie Estates v. Ashley, 141 So. 788, 105 Fla. 534.

(2) Taxes agreed to be refunded by city to railroad under contract not providing for payment in money or services to city, and not based on consideration, could not be recovered. Furthermore, since basic principle of taxation is equality, city could assert defense of ultra vires in action to recover taxes agreed to be refunded by city on property unlawfully exempted from taxes to injury of other property.—Troy Union R. Co. v. City of Troy, 238 N.Y.S. 577,

227 App.Div. 351, affirmed 171 N.E. 798, 253 N.Y. 597.

58. Wash.—State v. Whittlesey, 50 P. 119, 17 Wash. 447.

61 C.J. p 1342 note 51 [a].

Mandamus to compel refund of taxes paid see Mandamus § 187.

Agreement to refund

(1) An agreement by a municipal corporation to refund the amount received in payment of a void tax may be enforceable.—Conkling v. Springfield, 24 N.E. 67, 132 Ill. 420.

(2) A city ordinance acknowledging the illegality of certain taxes, directing the issuance of certificates of payment of such taxes, and attempting to make such certificates receivable for city taxes contrary to the statute, which provides in what kind of funds taxes shall be paid, does not constitute an agreement to refund such illegal taxes.—Conkling v. Springfield, *supra*.

59. Pa.—Longacre Park Heating Co. v. Delaware County, 50 A.2d 706, 160 Pa.Super. 252.

60. Pa.—Longacre Park Heating Co. v. Delaware County, *supra*.

61. Pa.—Longacre Park Heating Co. v. Delaware County, *supra*.

62. Cal.—Los Angeles County v. Superior Court in and for Los Angeles County, 113 P.2d 10, 17 Cal. 2d 707.

Ind.—Indianapolis v. Ritzinger, 56 N.E. 141, 24 Ind.App. 65.

44 C.J. p 1342 note 51.

63. Mich.—Blanchard v. City of Detroit, 235 N.W. 230, 253 Mich. 491.

44 C.J. p 1342 note 52.

refund regardless of whether or not the payment of the tax was voluntary.⁶⁴

Furthermore, the legislature may enact a statute making a refunding of taxes paid erroneously, or by inadvertence, discretionary with the municipality,⁶⁵ or obligatory on the municipality.⁶⁶ A statute granting to city councils a power to refund taxes erroneously assessed is not impliedly repealed by a subsequent statute taking away the power to correct erroneous assessments from the city council and vesting it in other officers.⁶⁷ Illegal taxes cannot be recovered back after the enactment of a statute curing the illegality.⁶⁸ The fact that after payment the boundaries of the town which levied the tax were changed and a part thereof annexed to a city did not relieve the town of its obligation to refund its proportion of the tax.⁶⁹

The grounds for refunding are governed by the statute, and in order to be entitled to a refund the taxpayer must bring himself within its terms.⁷⁰ The person who pays the tax ordinarily is entitled to the refund.⁷¹ Thus a vendor who paid the tax and then sold the property was entitled to a refund where the assessment was subsequently reduced by the municipality,⁷² but a vendor who sells the property and makes an adjustment in the price

is not entitled to the refund when the assessments are reduced, where the assessments are paid by a subsequent purchaser who purchased under a similar adjustment allowance.⁷³ In some jurisdictions by statute, a municipality is given the right to credit any refund, due to a tax reduction granted by virtue of an appeal, on any unpaid taxes due or to become due thereon in the ensuing years, provided there has been no change of ownership of the property assessed in the interim.⁷⁴

Conditions precedent. Certain statutes have been construed to make the right to a refund dependent on performance of certain conditions precedent,⁷⁵ as, for example, the making of a protest at the time of payment,⁷⁶ or a claim for refund,⁷⁷ within a specified time,⁷⁸ and giving the city authorities a reasonable opportunity to act on the claim before taking further steps to enforce it.⁷⁹

Proceedings. Statutes vary as to the proceedings for a refund of illegal, excessive or erroneous taxes.⁸⁰ Under some statutes, the remedy on the refusal by the municipality to refund taxes, paid in error, is an action in assumpsit.⁸¹ In some jurisdictions, where the payment is of an excessive amount, the only remedy is by an application under the statute for an abatement,⁸² while in oth-

64. Va.—Clifton Forge v. McDaniel, 130 S.E. 414, 143 Va. 325.

65. Pa.—Longacre Park Heating Co. v. Delaware County, 50 A.2d 706, 160 Pa.Super. 252.—Casey v. School Dist. of City of Scranton, Com.Pl., 44 Lack.Jur. 121.

66. Pa.—Longacre Park Heating Co. v. Delaware County, 50 A.2d 706, 160 Pa.Super. 252.

Effect of independent reimbursement

The fact that foreign insurance corporation's trustee was reimbursed for portion of taxes erroneously paid city by trustee on moneys and securities held for such corporation's policyholders' benefit, as required by trust indentures authorizing issuance of corporation bonds on which taxes were imposed, gave city no right to require corresponding reduction in amount of tax refund.—Girard Trust Co. v. City and County of Philadelphia, 59 A.2d 124, 359 Pa. 319.

67. Ind.—Leonard v. Indianapolis, 36 N.E. 725, 9 Ind.App. 262, 44 C.J. p 1342 note 54.

68. La.—Hyde v. New Orleans, 11 La.Ann., 191.

69. N.Y.—People v. Matthias, 81 N.Y.S. 1105, 84 App.Div. 122.

70. Pa.—Grine v. Turner, Com.Pl., 30 West.Co.L.J. 203.

S.C.—Bomar v. City of Spartanburg, 187 S.E. 921, 181 S.C. 453.

Change in assessment for state and county taxes did not impliedly change municipal taxes, so as to require refund thereof, because all taxes were made under one assessment.—City of Columbia v. Peurifoy, 146 S.E. 93, 148 S.C. 349.

71. N.Y.—In re Sixth Ave. Elevated R. R. in City of New York, 55 N.Y. S.2d 236.

72. N.Y.—In re Sixth Ave. Elevated R. R. in City of New York, supra.

73. N.Y.—In re Calamus Ave., 28 N.Y.S.2d 146.

74. N.J.—Manhattan Life Ins. Co. v. Jersey City, 35 A.2d 628, 22 N.J. Misc. 66.

Credit not allowed

N.J.—Binder Realty Corporation v. City of Newark, 22 A.2d 359, 19 N.J.Misc. 624.

75. Wis.—Fox Valley Canning Co. v. Village of Hortonville, 242 N.W. 142, 207 Wis. 502.

76. Wis.—Fox Valley Canning Co. v. Village of Hortonville, supra, 44 C.J. p 1342 note 56.

77. Neb.—McClay v. Lincoln, 49 N.W. 282, 32 Neb. 412.

Wis.—Fox Valley Canning Co. v. Village of Hortonville, 242 N.W. 142, 207 Wis. 502.

44 C.J. p 1342 note 56 [a].

78. Okl.—City of Okmulgee v. Jones, 293 P. 1053, 146 Okl. 116.

79. Wis.—Fox Valley Canning Co. v. Village of Hortonville, 242 N.W. 142, 207 Wis. 502.

44 C.J. p 1342 note 57.

80. N.Y.—Moon v. Bloomer, 50 N.Y. S.2d 531, 183 Misc. 62.

Pa.—Park v. Board of Education of School Dist. of Pittsburgh, 47 A.2d 222, 354 Pa. 236.—Longacre Park Heating Co. v. Delaware County, 50 A.2d 706, 160 Pa.Super. 252.

81. Pa.—Longacre Park Heating Co. v. Delaware County, supra.

82. Mass.—Boston Five Cents Sav. Bank v. City of Boston, 61 N.E.2d 124, 318 Mass. 183.

44 C.J. p 1342 note 59.

Validity of tax

Where public trustees of electric railway paid taxes to city although property was tax exempt, their act of payment did not disclose an administrative practice indicating that taxes were due city, and, even if such practice were established to have been uniform and long continued, practice, when shown to have been unauthorized by law was not affirmative evidence of validity of tax.—Assessors of Boston v. Boston Elevated Ry. Co., 70 N.E.2d 812, 320 Mass. 538.

er jurisdictions, on appeal or certiorari to review an assessment, a refund of excessive tax payments may be directed.⁸³ Under other statutes an application may be made to an administrative board of a municipality for the remission or reduction of taxes paid, under protest,⁸⁴ and the order of such a board is that of a statutory tribunal acting within its statutory jurisdiction,⁸⁵ and has the effect of an order of the court.⁸⁶ If the facts are found for the petitioner on a proceeding for a refund, he is entitled to an order for the restoration of the entire tax paid, if none of it was due, or as much of it as was in excess of the sum rightly chargeable⁸⁷ with interest⁸⁸ from the time of payment,⁸⁹ together with costs of the appeal.⁹⁰ Un-

der some statutes, a taxpayer is entitled to interest after a determination of the amount of a refund only from the date of an application for an audit,⁹¹ and under such a statute to start the running of interest the demand must be sufficiently specific to meet statutory requirements.⁹² It has been held that the service on the city officials of the final order in the certiorari proceedings was a sufficient demand,⁹³ but the service of such a final order has been held insufficient so as to start the running of interest under some local administrative regulations governing an application for audit and allowance.⁹⁴

Review. In the absence of statute providing therefor, a denial of a refund is not subject to ju-

83. N.J.—*St. Mary's Church, Gloucester, v. Mayor and Common Council of Gloucester*, 7 A.2d 857, 123 N.J.Law 6.

Pa.—*Park v. Board of Education of School Dist. of Pittsburgh*, 47 A. 2d 222, 354 Pa. 236.

Proper forum

N.Y.—*People ex rel. Emigrant Industrial Sav. Bank v. Miller*, 18 N.Y.S.2d 192, 173 Misc. 538, modified on other grounds *People ex rel. Emigrant Industrial Sav. Bank v. Sexton*, 20 N.Y.S.2d 41, 259 App. Div. 566, affirmed 29 N.E.2d 469, 284 N.Y. 57.

Estoppel not shown

N.Y.—*People ex rel. Oswego Falls Corporation v. Foster*, 295 N.Y.S. 891, 251 App.Div. 65, motion denied 298 N.Y.S. 742, 251 App.Div. 879, affirmed 15 N.E.2d 433, 278 N.Y. 494.—*People ex rel. Hunter Arms Co. v. Foster*, 288 N.Y.S. 295, 247 App.Div. 619.

Refund of penalties

N.Y.—*Moon v. Bloomer*, 50 N.Y.S.2d 531, 183 Misc. 62.

84. N.Y.—*People v. Craig*, 140 N.E. 209, 286 N.Y. 100.

85. N.Y.—*People v. Craig*, *supra*.

86. N.Y.—*People v. Craig*, *supra*.

Duty of comptroller

Comptroller is under duty to refund payment of taxes remitted by the commissioners, and provision giving comptroller express authority to refund excess taxes when there has been a clerical error does not lessen duty of comptroller to refund amount collected under an excessive assessment after it has been remitted by the commissioner.—*People v. Craig*, *supra*.

87. N.Y.—*People ex rel. Borough Housing Corporation v. Sexton*, 23 N.Y.S.2d 575, 260 App.Div. 956, reversed on other grounds 34 N.E. 2d 908, 285 N.Y. 754.

Effect of apportionment by city

Where county determined amount

of tax to be levied in city for state and county purposes, and certified that sum to city clerk who extended tax and spread on assessment roll, city was required to refund entire amount of excessive tax, including part of excessive tax apportioned for state and county purposes.—*People ex rel. Oswego Falls Corporation v. Foster*, 295 N.Y.S. 891, 251 App. Div. 65, motion denied 298 N.Y.S. 742, 251 App.Div. 879, affirmed 15 N.E.2d 433, 278 N.Y. 494.

88. Mass.—*Assessors of Boston v. Boston Elevated Ry. Co.*, 70 N.E. 2d 812, 320 Mass. 588—*Assessors of Boston v. Metropolitan Life Ins. Co.*, 70 N.E.2d 806, 320 Mass. 559—*Assessors of Boston v. Boston, R. B. & L. R. Co.*, 66 N.E.2d 36, 319 Mass. 378.

N.Y.—*People ex rel. Borough Housing Corporation v. Sexton*, 23 N.Y.S.2d 575, 260 App.Div. 956, reversed on other grounds 34 N.E.2d 908, 285 N.Y. 754.

Legal rate

N.Y.—*People ex rel. Atlantic Gulf & Pacific Co. v. Miller*, 17 N.Y.S.2d 202, 173 Misc. 397.

Loss of interest by delay

Where statute gives court power to order such taxes returned as it shall deem just, city, in view of delay of owner, was required only to return amount of tax against railroad property without interest and costs.—*Consumers' Coal & Ice Co. v. City of Bayonne*, 149 A. 632, 106 N.J.Law 289.

Refund agreement

Where resolution of city council provided that certain taxes were to be refunded, and nothing further, and evidence failed to establish alleged agreement between assistant corporation counsel and taxpayer's attorney that interest would be paid as part of settlement, provision in compromise order for payment of interest which was consented to by mistake was stricken in interest of

justice.—*Crennan v. Brennan*, 39 N.Y.S.2d 393, 265 App.Div. 1013.

89. Mass.—*Assessors of Boston v. Boston Elevated Ry. Co.*, 70 N.E. 2d 812, 320 Mass. 588—*Assessors of Boston v. Metropolitan Life Ins. Co.*, 70 N.E.2d 806, 320 Mass. 559—*Assessors of Boston v. Boston, R. B. & L. R. Co.*, 66 N.E.2d 36, 319 Mass. 378.

N.Y.—*People ex rel. Borough Housing Corporation v. Sexton*, 23 N.Y.S.2d 575, 260 App.Div. 956, reversed on other grounds 34 N.E.2d 908, 285 N.Y. 754.

R.I.—*Ashton v. Tax Assessors of Town of Jamestown*, 198 A. 786, 60 R.I. 388.

90. Mass.—*Assessors of Boston v. Boston Elevated Ry. Co.*, 70 N.E. 2d 812, 320 Mass. 588—*Assessors of Boston v. Metropolitan Life Ins. Co.*, 70 N.E.2d 806, 320 Mass. 559—*Assessors of Boston v. Boston, R. B. & L. R. Co.*, 66 N.E.2d 36, 319 Mass. 378.

91. N.Y.—270 Park Ave. Corp. v. McGoldrick, 61 N.Y.S.2d 202.

92. N.Y.—*People ex rel. Park Ave. Corp. v. Sexton*, 59 N.Y.S.2d 606, affirmed 52 N.Y.S.2d 574, 263 App. Div. 975, appeal denied 53 N.Y.S. 2d 307, 268 App.Div. 1039, affirmed 64 N.Y.S.2d 287, 295 N.Y. 589.

Parties

Motion for order directing commissioners to compute and pay over interest on tax refunds was not objectionable on ground that proper fiscal officers of city were not made parties thereto.—*People ex rel. Park Ave. Corp. v. Sexton*, *supra*.

93. N.Y.—*Longken, Inc. v. Ornstein*, 36 N.Y.S.2d 533, affirmed in re Longken, Inc., 35 N.Y.S.2d 271, 264 App.Div. 733, appeal denied 36 N.Y.S.2d 239, 264 App.Div. 780.

94. N.Y.—*People ex rel. Ottley Estate Corp. v. Lilly*, 36 N.Y.S.2d 433, 274 App.Div. 619.

dicial review by certiorari⁹⁵ or appeal.⁹⁶ Furthermore, where statutory provisions provide for a review but limit it to cases where taxes were originally paid under protest, a petition for review which fails to allege a payment under protest is insufficient.⁹⁷

§ 2069. Recovery of Taxes Paid

- a. In general
- b. Voluntary or involuntary payment; protest
- c. Proceedings

a. In General

Subject to some exceptions, municipal taxes which have been illegally and wrongfully assessed and collected may be recovered.

A tax payment may not be retained by a municipal corporation under circumstances making the retention of the payment unconscionable,⁹⁸ and, subject to some exceptions and in the absence of an estoppel,⁹⁹ municipal taxes which have been ille-

gally and wrongfully assessed and collected may be recovered,¹ as where the municipal corporation had no power to levy or collect the particular tax or to assess the particular property.² Money paid to a municipality for taxes for the second half of a year is recoverable where the municipality acquired title to the property in condemnation proceedings commenced subsequent to the payment of taxes and concluded during the first half of the year,³ and the municipality may not avoid liability in such a case on the grounds that the payment was voluntary, since the payment was not voluntarily made with knowledge of the city's plans.⁴

An action to recover a tax paid has been allowed in some jurisdictions where the tax, although justly due, has been enlarged by an unauthorized increase or an excessive valuation,⁵ or whenever, through error, it has raised them in excess of the amount needed and authorized by the properly constituted authorities,⁶ but not where the tax levy simply yields a surplus,⁷ and recovery has been

95. N.Y.—Parmelee Motor Fuel Co. v. McGoldrick, 56 N.Y.S.2d 490, 185 Misc. 965, affirmed *In re Parmelee Motor Fuel Co.*, 54 N.Y.S.2d 376, 269 App.Div. 683.

96. Pa.—*In re Seidl*, 18 A.2d 524, 143 Pa.Super. 539.

97. N.Y.—Parmelee Motor Fuel Co. v. McGoldrick, 56 N.Y.S.2d 490, 185 Misc. 965, affirmed *In re Parmelee Motor Fuel Co.*, 54 N.Y.S.2d 376, 269 App.Div. 683.

98. N.Y.—Berri v. City of New York, 16 N.Y.S.2d 86, affirmed 16 N.Y.S.2d 1015, determination affirmed 19 N.Y.S.2d 347, 259 App.Div. 453.

Arbitrary classification

The notion that a tax payment which the payee may not in good conscience retain is recoverable only if it falls strictly within an arbitrary classification, that is, where moneys were paid under coercion, duress, fraud, or under mistake of fact, is not in accord with views which seem likely to commend themselves to present day courts.—*Berri v. City of New York*, *supra*.

Absence of benefit

Plaintiff was not entitled to recover taxes paid for benefit of fire protection district on ground that plaintiff could receive no benefits from organization of district because of topography of territory and existence of practically uninhabited area, between plaintiff's property and populous section of district.—*Midwick Country Club v. Los Angeles County*, 53 P.2d 1006, 11 Cal.App.3d 317.

99. Okl.—*Lowden v. Hooper*, 112 P.2d 172, 188 Okl. 595.

No estoppel

(1) Where a person has no property in a municipality liable to assessment, his failure to appear before a board of review does not estop him from contesting the validity of the assessment in an action to recover taxes paid under protest.—*Rice v. Muskegon*, 114 N.W. 661, 150 Mich. 679.

(2) In suit to recover taxes paid, the action of the cashier of the national bank in giving to the officers of the city for taxation against the bank a number of the shares of its stock, taxable under the laws of the state to the stockholders, does not estop a receiver subsequently appointed for the bank, but before the tax is paid, from setting up the mistake.—*Wilmington v. Ricaud*, N.C., 90 F. 214, 32 C.C.A. 580.

1. N.Y.—*Miller v. City of Onelda*, 275 N.Y.S. 157, 153 Misc. 438.

Double payment

Where a city accepted several payments from taxpayer, under contract providing for payment of delinquent taxes in installments, and thereafter, in violation of agreement to credit payments against tax liens, collected the entire amount of the lien from the sale thereof to a third person, the city was not entitled to retain payments made by taxpayer.—*MacMurray v. City of Long Beach*, 54 N.E.2d 828, 292 N.Y. 286.

2. Ill.—*People ex rel. Nelson v. Ridge Country Club*, 76 N.E.2d 461, 399 Ill. 46.

N.Y.—*Bandler v. Village of Kensington*, 297 N.Y.S. 134, 251 App.Div. 890.—*Miller v. City of Onelda*, 275 N.Y.S. 157, 153 Misc. 438.

Okl.—*Chickasha Cotton Oil Co. v. Rogers*, 16 P.2d 112, 160 Okl. 164.

Exempt property

Mass.—*Middlesex County v. City of Waltham*, 180 N.E. 318, 278 Mass. 514.

3. N.Y.—*Berri v. City of New York*, 19 N.Y.S.2d 347, 259 App.Div. 453.

4. N.Y.—*Berri v. City of New York*, 16 N.Y.S.2d 86, affirmed 16 N.Y.S.2d 1015, affirmed 19 N.Y.S.2d 347, 259 App.Div. 453.

5. Mich.—*Hudson Motor Car Co. v. City of Detroit*, 275 N.W. 770, 282 Mich. 69, 113 A.L.R. 1472.

Determination of valuation

(1) A taxpayer was not precluded from recovering taxes paid to city under protest on ground that state tax commission's valuation of property involved came too late, since time within which such valuation must be made is not mandatory but directory.—*Hudson Motor Car Co. v. City of Detroit*, *supra*.

(2) In actions to recover municipal taxes paid under protest claiming excessive valuation, future income reasonably to be anticipated, as well as present income, was required to be considered in determining sale value of properties assessed.—*Buildings Development Co. v. City of Milwaukee*, 274 N.W. 298, 225 Wis. 357.

6. Cal.—*Madary v. Fresno*, 128 P. 340, 20 Cal.App. 91.

44 C.J. p 1342 note 64.

7. Cal.—*Rancho Santa Anita v. City of Arcadia*, 125 P.2d 475, 20 Cal.2d 319.

Mere error of judgment

It has been held that mere errors of judgment in making the valua-

denied in the case of an overvaluation made in the exercise of lawful authority, especially where no complaint was made to the officers within the time prescribed by law.⁸

Effect of paying over or distributing money. Although it has been held that an action may be maintained against a municipal corporation for the recovery of taxes illegally exacted only while the fund so raised remains in the possession of the municipal corporation,⁹ it has been held that an action against a municipality to recover taxes illegally assessed cannot be defeated because the money had been mingled with the general funds of the municipality and expended by it,¹⁰ and that a city against which an action is brought for the repayment of a tax on real estate paid by its former owner by mistake and in ignorance of the fact that title to the property had passed to the city cannot escape liability on the ground that the money had been paid over to the state, so that the city could not get a credit or repayment thereof.¹¹ Distribution of the taxes collected after an appeal has been taken from the assessment will not prevent recovery.¹²

tion will not warrant a recovery, in the absence of fraud or unfairness on the part of the assessors.—*Southern California Telephone Co. v. Los Angeles County*, 113 P.2d 773, 45 Cal. App.2d 111.

8. Ky.—*Grayson County Nat. Bank v. Leitchfield*, 114 S.W. 289, 61 C.J. p 982 note 82 [a].

9. Vt.—*Meacham v. Town of Newport*, 40 A. 729, 70 Vt. 264.

Before distribution

Where the whole amount of tax illegally collected and paid under protest, including shares of state and county, was still in town's possession when suit was brought to recover it, the town was liable for the whole sum.—*Champlain Realty Co. v. Town of Brattleboro*, 121 A. 580, 97 Vt. 28.

10. Conn.—*Bridgeport Hydraulic Co. v. City of Bridgeport*, 130 A. 164, 103 Conn. 249, 61 C.J. p 984 note 12.

11. N.Y.—*Lesster v. New York*, 53 N.Y.S. 934, 33 App.Div. 256, affirmed 55 N.E. 1097, 161 N.Y. 628, 61 C.J. p 984 note 13.

12. N.Y.—*Ocean Grove Cam Meeting Ass'n v. Borough of Bradley Beach*, 103 A. 812, 91 N.J.Law 364, affirmed 106 A. 892, 93 N.J.Law 249, 61 C.J. p 985 note 19 [a].

13. Cal.—*Flynn v. City and County of San Francisco*, 115 P.2d 3, 18 Cal.2d 210.

Ga.—*Darby v. City of Vidalia*, 149 S.E. 223, 168 Ga. 842.

Ky.—*Iron-ton & Russell Bridge Co. v. City of Russell*, 91 S.W.2d 1, 262 Ky. 778.

La.—*Central Savings Bank & Trust Co. v. City of Monroe*, 194 So. 767, 194 La. 743—*Triangle Oil Co. v. City of New Orleans*, App., 5 So.2d 558.

N.J.—*Manhattan Life Ins. Co. v. Jersey City*, 35 A.2d 628, 22 N.J.Misc. 66.

N.Y.—*Manufacturers' & Traders' Trust Co. v. City of Buffalo*, 194 N.E. 841, 266 N.Y. 319—*Title Guarantee & Trust Co. v. City of New York*, 38 N.Y.S.2d 715, 265 App. Div. 304, affirmed 50 N.E.2d 301, 290 N.Y. 910—*Goldberg v. City of New York*, 20 N.Y.S.2d 801, 260 App.Div. 61, appeal denied 23 N.Y. S.2d 204, 260 App.Div. 849, affirmed 34 N.E.2d 386, 285 N.Y. 705—*County Securities v. Warwick Properties*, 24 N.Y.S.2d 971, 176 Misc. 272, affirmed 33 N.Y.S.2d 825, 263 App.Div. 964, appeal denied 34 N.Y.S.2d 520, 263 App.Div. 1008, affirmed 46 N.E.2d 844, 289 N.Y. 774—*McCann v. Village of Lindenhurst*, 18 N.Y.S.2d 952, 174 Misc. 14.

Pa.—*Girard Trust Co. v. City and County of Philadelphia*, 59 A.2d 124, 359 Pa. 819.

S.C.—*City of Columbia v. Peurifoy*, 146 S.E. 93, 148 S.C. 849.

Tex.—*Rainey v. City of Tyler*, Civ.

b. Voluntary or Involuntary Payment; Protest

- (1) In general
- (2) Duress or compulsion
- (3) Mistake of law or fact
- (4) Payment under protest

(1) In General

As a general rule, and in the absence of statute otherwise providing, the payment of a wrongful or illegal municipal tax by a person voluntarily and without compulsion cannot be recovered back in an action at law.

It is a well settled general rule that, if a wrongful or illegal municipal tax is paid voluntarily and without compulsion, it cannot be recovered back in an action at law,¹³ unless there is some constitutional or statutory provision expressly or impliedly giving him such right.¹⁴ A payment is voluntary in the sense that no action lies to recover back the amount in all cases where there is no compulsion or duress, or any immediate and urgent necessity therefor.¹⁵ The character of the payment as being voluntary or involuntary is to be determined from the terms of the ordinance under which the tax is imposed, the circumstances attendant on payment, and the consequences which would follow nonpayment.¹⁶ Hence, a payment

App., 213 S.W.2d 57, error refused, no reversible error. 44 C.J. p 1342 note 66.

Lessees paying taxes voluntarily, no obligation to do so existing, cannot recover amount paid.—*Stoneman v. City of Boston*, 160 N.E. 788, 263 Mass. 255.

Tax on intangibles

Mich.—*General Discount Corporation v. City of Detroit*, 11 N.W.2d 203, 306 Mich. 458.

Set-off

Where there was no right of action to recover local taxes paid under protest, there was no right to set off those taxes against claim for other local taxes filed by city in separate proceeding.—*In re Bush Terminal Co.*, C.C.A.N.Y., 93 F.2d 661.

Sufficiency of municipal funds to cover reimbursement is immaterial. La.—*Central Savings Bank & Trust Co. v. City of Monroe*, 194 So. 767, 194 La. 743.

14. Ala.—*L. W. Richardson & Co. v. Town of Hamilton*, 28 So.2d 924, 248 Ala. 585.

15. Fla.—*North Miami v. Seaway Corporation*, 9 So.2d 705, 151 Fla. 301.

Intention

Whether payment of a tax under an excessive assessment was voluntary is a question of intention.—*People v. Craig*, 140 N.E. 209, 236 N.Y. 100.

16. Cal.—*Flynn v. City and County*

made in pursuance of a bargain or compromise between a taxpayer and a municipality is voluntary,¹⁷ as is a payment made in advance of the day when it became due for the purpose of securing a rebate,¹⁸ or a discount,¹⁹ or when it was made with knowledge that the land was owned by, and assessed to, another, and for the purpose of acquiring title by adverse possession against him.²⁰

Payment by agent. A payment of illegal or excessive taxes in behalf of a principal by an agent acting without authority is, as to the principal, an involuntary payment and can be recovered back.²¹

(2) Duress or Compulsion

Where the payment of an illegal or excessive municipal tax is made under duress or compulsion, the payment is not voluntary and the amount may be recovered.

Where the payment of an illegal or excessive municipal tax is made under duress or compulsion, the payment is not voluntary and the amount may be recovered,²² but only to the extent of the illegal exaction.²³ A payment is held to be under duress or compulsion when it was made to remove the lien of an assessment regular on its face, which, if al-

lowed to remain, would subject the property to risk of sale,²⁴ or when made to a collector who may without suit enforce payment by levy and sale, or summary distraint,²⁵ or when it is made to prevent an illegal tax from becoming a cloud on title.²⁶ A payment has been held not compulsory, however, merely because it was made to redeem tax certificates outstanding against the property,²⁷ or because the collector holds a warrant for collection,²⁸ or because of mere threats of a levy on land,²⁹ but there must be an immediate and urgent necessity for payment to release the person or property from detention or prevent immediate seizure thereof.³⁰ Although it has been held in some jurisdictions that a payment is not made under duress or compulsion when made merely to escape penalties,³¹ it has been held otherwise if payment is made to avoid heavy, drastic, or onerous penalties.³²

(3) Mistake of Law or Fact

Generally, municipal taxes voluntarily paid under a mistake of law, with full knowledge of the facts, cannot be recovered back, but taxes paid under a mistake of fact are ordinarily recoverable.

It is a general rule that municipal taxes vol-

of San Francisco, 115 P.2d 3, 18 Cal.2d 210.

17. Fla.—North Miami v. Seaway Corporation, 9 So.2d 705, 151 Fla. 301.

N.Y.—Manufacturers' & Traders' Trust Co. v. City of Buffalo, 194 N.E. 841, 266 N.Y. 319.

Tex.—Ostrum v. City of San Antonio, 71 S.W. 304, 30 Tex.Civ.App. 462.

18. Kan.—Atchison, etc., R. Co. v. Humboldt, 123 P. 727, 87 Kan. 1, 41 L.R.A., N.S., 175.

N.Y.—Van Pelt v. New York, 155 N.Y.S. 9, 91 Misc. 550.

19. Fla.—North Miami v. Seaway Corporation, 9 So.2d 705, 151 Fla. 301.

20. Wash.—Childs v. Spokane County, 170 P. 145, 100 Wash. 64.

21. N.Y.—Aetna Ins. Co. v. New York, 40 N.Y.S. 120, 7 App.Div. 145, affirmed 47 N.E. 593, 153 N.Y. 331.

22. Tex.—Rainey v. City of Tyler, Civ.App., 213 S.W.2d 57, error refused, no reversible error.

44 C.J. p 1342 note 69.

Test

Where, by reason of the peculiar facts, a reasonably prudent man finds that, in order to preserve his property or protect his business interests, it is necessary to make a payment of municipal taxes which he does not owe and which in equity and good conscience the receiver should not retain, the payment may be re-

covered.—Flynn v. City and County of San Francisco, 115 P.2d 3, 18 Cal.2d 210.

Existence of other remedy

Payment of municipal taxes made without availing one's self of an immediate and adequate remedy to resist payment is not made under compulsion.—Darby v. City of Vidalia, 149 S.E. 223, 168 Ga. 842.

23. Mich.—Fletcher Paper Co. v. Alpena, 125 N.W. 405, 160 Mich. 462.

24. N.Y.—Corporate Properties v. City of New York, 22 N.Y.S.2d 539, 175 Misc. 806, affirmed 28 N.Y.S.2d 710, 262 App.Div. 722, appeal denied 29 N.Y.S.2d 145, 262 App.Div. 846—Effel Realty Corporation v. City of New York, 299 N.Y.S. 373, 165 Misc. 176, affirmed 11 N.Y.S.2d 250, 256 App.Div. 972, appeal granted 12 N.Y.S.2d 362, 257 App.Div. 806, affirmed 24 N.E.2d 978, 282 N.Y. 541.

Wis.—Valley Canning Co. v. Village of Hortonville, 242 N.W. 142, 207 Wis. 502.

44 C.J. p 1343 note 71.

Lien on intangibles

The mere existence of a lien under city charter against foreign corporation's intangibles did not constitute "duress" sufficient to render payment of tax involuntary, so as to warrant recovery of tax, notwithstanding payment was made without protest.—General Discount Corporation v. City of Detroit, 11 N.W.2d 203, 306 Mich. 458.

25. U.S.—City of Franklin v. Coleman Bros. Corp., C.C.A.N.H., 152 F.2d 527, certiorari denied 66 S.Ct. 1026, 328 U.S. 844, 90 L.Ed. 1618.

44 C.J. p 1343 note 72.

26. Ala.—North Miami v. Seaway Corporations, 9 So.2d 705, 151 Ala. 301.

Utah.—Raleigh v. Salt Lake City, 53 P. 974, 17 Utah 130.

27. Wash.—Childs v. Spokane County, 170 P. 145, 100 Wash. 64.

28. Ill.—Chicago v. Fidelity Sav. Bank, 11 Ill.App. 165.

Me.—Smith v. Readfield, 27 Me. 145.

29. Ga.—Darby v. City of Vidalia, 149 S.E. 223, 168 Ga. 842.

30. Ga.—Darby v. City of Vidalia, supra.

31. Va.—Phillips v. Portsmouth, 78 S.E. 651, 115 Va. 180.

44 C.J. p 1343 note 73.

32. U.S.—City of Franklin v. Coleman Bros. Corp., C.C.A.N.H., 152 F.2d 527, certiorari denied 66 S.Ct. 1026, 328 U.S. 844, 90 L.Ed. 1618.

Fla.—North Miami v. Seaway Corporation, 9 So.2d 705, 151 Fla. 301.

N.Y.—Goldberg v. City of New York, 20 N.Y.S.2d 801, 260 App.Div. 61, appeal denied 23 N.Y.S.2d 204, 260 App.Div. 849, affirmed 34 N.E.2d 386, 285 N.Y. 705.

Tex.—San Antonio v. Grayburg Oil Co., Civ.App., 259 S.W. 985.

untarily paid under a mistake of law, with full knowledge of all the facts, cannot be recovered back,³³ unless recovery is expressly or impliedly authorized by statute.³⁴ In some jurisdictions, however, recovery is not barred where mistake in payment of taxes is one of law,³⁵ unless payment is continued over a period of years indicating an intent to pay independently of any question of illegality in the tax,³⁶ or unless the property is necessarily benefited by the improvement for which the tax was levied;³⁷ but even in these jurisdictions taxes are not recoverable back where they were paid by the taxpayer voluntarily and with knowledge of his rights.³⁸ A mistake of a taxpayer due to his ignorance of the law of another state is regarded as a mistake of fact, not barring recovery.³⁹

Payments made because of a mistake of fact are ordinarily recoverable,⁴⁰ unless recovery is barred

by the failure of the taxpayer to pursue other available remedies for the correction of the error,⁴¹ or by the voluntary character of the payment.⁴² Recovery has been allowed where the tax was paid in ignorance of the fact that the property was exempt,⁴³ or that the statute authorizing the tax had not been complied with.⁴⁴ This rule is particularly applicable if the mistake is that of the taxing officers,⁴⁵ although it is otherwise where the mistake is made by the taxpayer himself and is the result of his neglect of some legal duty, or where the facts which should have shown the mistake were within his possession or within his reach.⁴⁶ Hence, where the payment is voluntary, the right to a recovery of the municipal taxes paid depends on a showing of such a mistake of fact and lack of knowledge or means of knowledge as would permit recovery notwithstanding such payment.⁴⁷

33. Fla.—North Miami v. Seaway Corporation, 9 So.2d 705, 151 Fla. 301.

N.Y.—Goldberg v. City of New York, 30 N.Y.S.2d 801, 260 App.Div. 61, appeal denied 23 N.Y.S.2d 204, 260 App.Div. 849, affirmed 34 N.E.2d 886, 285 N.Y. 705—Corporate Properties v. City of New York, 22 N.Y.S.2d 539, 175 Misc. 306, affirmed 38 N.Y.S.2d 710, 262 App.Div. 722, appeal denied 29 N.Y.S.2d 145, 262 App.Div. 846—Gubin v. City of New York, 269 N.Y.S. 46, 150 Misc. 182, reversed on other grounds 276 N.Y.S. 515, 154 Misc. 547.
44 C.J. p 1343 note 87.

Disputed facts

A taxpayer cannot be charged with knowledge of disputed facts, which ultimately must be decided by court, so as to bar his recovery of amount of illegal municipal tax as paid under mistake of law.—Effel Realty Corp. v. City of New York, 299 N.Y. S. 373, 185 Misc. 176, affirmed 11 N.Y.S.2d 250, 256 App.Div. 972, appeal granted 12 N.Y.S.2d 862, 257 App.Div. 806, affirmed 24 N.E.2d 978, 282 N.Y. 541.

Absence of knowledge

The payment of an illegal tax or assessment to a municipality is not "voluntary" so as to preclude recovery back if it is made without actual or constructive notice of its illegality.—County Securities v. Warwick Properties, 24 N.Y.S.2d 971, 176 Misc. 272, affirmed 33 N.Y.S.2d 826, 263 App.Div. 964, appeal denied 34 N.Y.S.2d 520, 263 App.Div. 1008, affirmed 46 N.E.2d 844, 289 N.Y. 774.

Ignorance of fact that statute is unconstitutional is ignorance of law as respects right to recover tax paid under such statute.—Prescott v. Memphis, 285 S.W. 587, 154 Tenn. 462, 48 A.L.R. 1378.

34. Pa.—Longacre Park Heating Co. v. Delaware County, 50 A.2d 706, 160 Pa.Super. 252.

Statute relating to county tax

A statute allowing a recovery of an illegal county tax paid under mistake of law does not apply to an action brought for the recovery of a municipal tax.—Baltimore City v. Harvey, 84 A. 487, 118 Md. 275.

35. Ky.—Newport v. Ringo, 10 S.W. 2, 87 Ky. 635, 10 Ky.L. 1046.
44 C.J. p 1343 note 89.

36. Ky.—Hubbard v. Hickman, 4 Bush 204, 96 Am.D. 297.
44 C.J. p 1343 note 90.

37. Ky.—Henderson v. Breckinridge, 11 Ky.Op. 315.

38. Ky.—Henderson v. Breckinridge, supra.

39. N.Y.—Aetna Ins. Co. v. New York, 40 N.Y.S. 120, 7 App.Div. 145, affirmed 47 N.E. 593, 153 N.Y. 831.

40. Fla.—North Miami v. Seaway Corporation, 9 So.2d 705, 151 Fla. 301.
44 C.J. p 1343 note 82.

Assessments void on face

Payment of village taxes, based on assessments which were void on their face because assessed descriptions failed to identify property, did not constitute a "mistake of fact" justifying recovery of voluntary payment, since a taxpayer is as much bound to inform himself of what tax records show or fail to show as are public authorities.—McCann v. Village of Lindenhurst, 18 N.Y.S.2d 952, 174 Misc. 14.

Exceptional cases

Recovery of municipal taxes paid by mistake must of necessity be confined to extreme and exceptional cases.—Bridgeport Screw Co. v. City

of Bridgeport, 7 A.2d 649, 125 Conn. 593.

Plaintiff was not estopped to recover taxes paid on real property assessed to her by mistake because owner of land assessed reimbursed her for paying tax in certain year and in consideration thereof plaintiff executed general release to such owner, since nothing which plaintiff did without consent of city can affect whatever rights city has against true owner.—Miller v. City of Oneida, 275 N.Y.S. 157, 153 Misc. 438.

41. Pa.—Patterson v. Philadelphia, 5 Pa.Co. 626.

42. Pa.—Patterson v. Philadelphia, supra.

43. N.Y.—Barney v. New York, 29 N.Y.S. 175, 73 Hun 337, affirmed 41 N.E. 88, 146 N.Y. 364.

44. Conn.—Bridgeport Hydraulic Co. v. Bridgeport, 130 A. 164, 103 Conn. 249.

44 C.J. p 1343 note 86.

45. Conn.—Bridgeport Screw Co. v. City of Bridgeport, 7 A.2d 649, 125 Conn. 593.

46. Conn.—Bridgeport Screw Co. v. City of Bridgeport, supra.

Negligence of city's agent

In view of notice on tax bill that verification of its accuracy depended on taxpayer, fact that clerk in city tax collector's office in making out tax bill recited incorrect block in describing property did not establish negligence on part of city's agent, so as to entitle taxpayer to recover the payment made with intent to cover taxes on taxpayer's property.—M. S. H. Realty Corp. v. City of New York, 70 N.Y.S.2d 154, 188 Misc. 1039.

47. Conn.—Bridgeport Screw Co. v. City of Bridgeport, 7 A.2d 649, 125 Conn. 593.

Thus, the voluntary payment of taxes under over-assessments caused by an error in the description in the tax lists furnished by the taxpayer to the municipality, which were carried over into the tax roll, may not be recovered,⁴⁸ especially where the taxpayer had acquiesced in the construction placed on the description by the municipal authorities.⁴⁹

(4) Payment under Protest

Generally, in the absence of a statute providing for protest, a protest at the time of the payment of the municipal tax will not save the payment from being voluntary, if it was not made under duress or compulsion.

In the absence of statute, where a municipal tax is paid involuntarily or under compulsion or duress, protest is unnecessary to warrant recovery,⁵⁰ and a protest made at the time of the payment of the municipal tax will not save the payment from being voluntary, in the sense which forbids its recovery back, if it was not made under duress or compulsion.⁵¹ Thus, where at the time payment is made the receiver of taxes could not institute proceedings to enforce it, the payment is voluntary, even though made under protest.⁵² The absence of a protest, however, has evidential value, tending to show the voluntary character of the payment.⁵³

Independently of statute there are cases which hold in general terms that taxes paid under protest may be recovered back on showing that they were illegal provided the defect was not caused by the taxpayer's own neglect,⁵⁴ and, under statutes in

some jurisdictions, illegal taxes may be recovered back when their payment was accompanied by a formal protest.⁵⁵ Such statutes are distinct from, and in derogation of, the common-law rule as to voluntary payments,⁵⁶ their effect being to make payment of an invalid tax under protest involuntary, irrespective of any question of compulsion or duress within the rules of the common law.⁵⁷ Where a statute requires a written protest, specifying the grounds, a protest must substantially comply with the statute.⁵⁸ Furthermore, it has been held that, where a voluntary payment is made under protest pursuant to statute, the taxpayer is limited to the grounds of invalidity set forth in the protest, and may recover only if the tax is shown to be illegal for the reason set forth in the protest,⁵⁹ but, where the payment under protest is involuntary, such limitation has been held inapplicable.⁶⁰

c. Proceedings

In the absence of statute providing a particular remedy, the proper remedy for the recovery of municipal taxes paid is an action at law in the form of *assumpsit* as for money had and received.

Unless the alleged illegality does not affect the tax but merely the proceedings to collect it,⁶¹ in the absence of statutes providing a particular remedy, the proper remedy for the recovery of municipal taxes paid is an action at law in the form of *assumpsit* as for money had and received,⁶²

48. Conn.—Bridgeport Screw Co. v. City of Bridgeport, *supra*.

49. Conn.—Bridgeport Screw Co. v. City of Bridgeport, *supra*.

50. Mich.—General Discount Corporation v. City of Detroit, 11 N.W.2d 203, 306 Mich. 458.

51. U.S.—City of Franklin v. Coleman Bros. Corp., C.C.A.N.H., 152 F.2d 527, certiorari denied 66 S.Ct. 1026, 328 U.S. 844, 90 L.Ed. 1618.

Fla.—North Miami v. Seaway Corporation, 9 So.2d 705, 151 Fla. 301.
La.—A. Sulka & Co. v. City of New Orleans, 23 So.2d 224, 208 La. 585.

Pa.—Wilson v. School Dist. of Philadelphia, 195 A. 90, 328 Pa. 225, 113 A.L.R. 1401.

44 C.J. p 1343 note 77.

52. N.Y.—U. S. Trust Co. v. New York, 28 N.Y.S. 344, 77 Hun 182, affirmed 39 N.E. 383, 144 N.Y. 488.
44 C.J. p 1343 note 78.

53. N.Y.—Goldberg v. City of New York, 30 N.Y.S.2d 801, 260 App. Div. 61, appeal denied 23 N.Y.S.2d 204, 260 App.Div. 849, affirmed 34 N.E.2d 386, 285 N.Y. 705.

Wash.—Childs v. Spokane County, 170 P. 145, 100 Wash. 64.

Pendency of certiorari to review assessment is equivalent of protest.
—People v. Craig, 140 N.E. 209, 236 N.Y. 100.

54. R.I.—Bishop v. Tax Assessors of City of Newport, 133 A. 342, 47 R.I. 351.
61 C.J. p 992 note 85.

Overpayment

A city should make refund of any overpayment of taxes made by taxpayer under protest.—Board of Equalization of City of Fort Worth v. McDonald, 129 S.W.2d 1135, 133 Tex. 521.

55. S.C.—Fourth Nat. Bank v. City of Greenville, 74 S.E. 126, 91 S.C. 81.

Statute held not invalid

Vt.—Richford Sav. Bank & Trust Co. v. Thomas, 17 A.2d 239, 111 Vt. 393.

56. Mich.—General Discount Corporation v. City of Detroit, 11 N.W. 2d 203, 306 Mich. 458.

57. Mich.—General Discount Corporation v. City of Detroit, *supra*.

58. Mich.—Paul v. City of Detroit, 28 N.W.2d 904, 318 Mich. 545.

Protest held sufficient

Neb.—Thomson v. City of Chadron, 16 N.W.2d 447, 145 Neb. 316.

Protest held insufficient

R.I.—Albro v. Kettelle, 107 A. 198, 42 R.I. 270.

61 C.J. p 996 note 9 [a].

59. Mich.—Hudson Motor Car Co. v. City of Detroit, 275 N.W. 770, 282 Mich. 69.

60. Mich.—Hudson Motor Car Co. v. City of Detroit, *supra*.

Involuntary payment

As respects whether taxpayer seeking to recover municipal taxes paid was limited to grounds of invalidity set forth in protest, taxes collected were involuntary exactions where taxes were paid after demand made by collecting officer armed with warrant authorizing him to levy and collect taxes.—Hudson Motor Car Co. v. City of Detroit, *supra*.

61. Conn.—Goddard v. Seymour, 30 Conn. 394.

44 C.J. p 1368 note 59.

62. N.Y.—Title Guarantee & Trust Co. v. City of New York, 38 N.Y.S. 2d 715, 265 App.Div. 304, affirmed 50 N.E.2d 301, 290 N.Y. 910.—Eiffel Realty Corporation v. City of New

and not a proceeding in equity.⁶³ Where the payment is of an excessive amount, it has been held that an action at law for the recovery of the excess cannot be maintained,⁶⁴ but, where the assessment is wholly void for want of jurisdiction, an action at law may be maintained to recover the illegal tax,⁶⁵ notwithstanding an existing remedy by petition for abatement of the tax.⁶⁶ It has been held that a taxpayer is not limited to administrative remedies set forth in local laws.⁶⁷

In order to maintain an action for the recovery of municipal taxes paid, plaintiff must comply with all conditions precedent fixed by statute.⁶⁸ In jurisdictions where the statute requires that the payment be made under protest as a condition precedent to recovery, it is held that a property owner is not entitled to recover a tax paid under protest in the absence of proof that he made application to the board of equalization for relief from the excessive assessment.⁶⁹ However, where the legality of a tax is attacked on the ground that the city had no jurisdiction over the property, it is not necessary that the taxpayer should exhaust his administrative remedies before bringing action to recover taxes paid.⁷⁰

Whether the claim must be presented to the municipality before action is brought depends on the

terms of the particular statutes or charter provisions. Under some statutes, presentation of the claim before suit is required⁷¹ but, under other statutes, presentation of a claim is not necessary,⁷² especially where the city does not have its own complete taxing system,⁷³ and in such a case the municipality may not enlarge or alter the statutory provisions by interpolating therein its charter requirements as to claims generally.⁷⁴ However, even in those jurisdictions where the statute does not require presentation of a claim as a condition precedent to the action, if the municipality has a complete taxing system of its own, including provisions as to refunds, presentation of a claim under charter requirement has been held a condition precedent to the action,⁷⁵ and any ordinance which dispenses with such a requirement or enlarges the time for presentation of the claim as required by the charter is void.⁷⁶ Under a charter provision that the council shall audit and allow "all accounts chargeable against the city," the claim must be audited and allowed before action can be brought.⁷⁷ Where the action is regarded as one ex delicto, rather than one ex contractu, it falls within provisions requiring presentation of the claim where the action is for a tort,⁷⁸ but not provisions requiring presentation where the action is on contract.⁷⁹ Money paid to the city after an

York, 299 N.Y.S. 373, 165 Misc. 176, affirmed 11 N.Y.S.2d 250, 256 App. Div. 972, appeal granted 12 N.Y.S.2d 362, 257 App. Div. 806, affirmed 24 N.E.2d 978, 282 N.Y. 541—Berri v. City of New York, 16 N.Y.S.2d 86, affirmed 16 N.Y.S.2d 1015, affirmed 19 N.Y.S.2d 347, 259 App. Div. 453.

44 C.J. p 1368 notes 51, 58.

63. Mich.—Paul v. City of Detroit, 28 N.W.2d 904, 318 Mich. 545.

64. Mass.—Watson v. Princeton, 4 Metc. 599.

Erroneous assessment

Remedy of taxpayer for erroneous assessment is by applying to equalization board, and then appealing to courts for recovery of taxes paid, and statutory remedy for recovery of illegal municipal taxes, where no appeal is given, cannot be resorted to in order to correct erroneous assessment.—Daniel v. Stucky, 257 P. 776, 118 Okl. 150.

Choice of remedy precluding action

Where assessment was appealed from local board and only remedy was review by court, property owners could not maintain action against taxing municipality to recover allegedly excessive and unlawful tax.—Burling v. Village of Green Lake, 20 N.W.2d 717, 248 Wis. 103.

65. U.S.—City of Franklin v. Cole-

man Bros. Corp., C.C.A.N.H., 152 F.2d 527, certiorari denied 66 S.Ct. 1026, 328 U.S. 844, 90 L.Ed. 1618.

66. U.S.—City of Franklin v. Coleman Bros. Corp., supra.

67. N.Y.—Title Guarantee & Trust Co. v. City of New York, 38 N.Y.S.2d 715, 265 App. Div. 304, affirmed 50 N.E.2d 301, 290 N.Y. 910.

Wis.—Village Canning Co. v. Village of Hortonville, 242 N.W. 142, 207 Wis. 502.

Cumulative remedy

The fact that the administrative remedy for the refund and recovery of municipal taxes paid expressly requires the filing of a verified claim and the judicial remedy does not require the filing of a claim is indicative of a legislative intent to afford a distinct and cumulative remedy for the recovery of a municipal tax without filing a prior claim by making payment under protest and bringing suit within six months thereafter.—Brill v. Los Angeles County, 108 P.2d 443, 16 Cal.2d 726.

68. Ala.—City of Birmingham v. Jones, 153 So. 213, 228 Ala. 160.

La.—A. Sulka & Co. v. City of New Orleans, 23 So.2d 224, 208 La. 585.

69. Cal.—Luce v. San Diego, 245 P. 198, 198 Cal. 405.

70. Mich.—Grallick v. Traverse City, 204 N.W. 718, 231 Mich. 699.

71. R.I.—Albro v. Kettelle, 107 A. 870—Fish v. Higbee, 47 A. 212, 22 R.I. 223.

Wis.—Wright v. Merrimack, 9 N.W. 390, 52 Wis. 466.

72. Cal.—Southern California Telephone Co. v. Los Angeles County, 113 P.2d 773, 45 Cal.App.2d 111.

73. Cal.—Brill v. Los Angeles County, 108 P.2d 443, 16 Cal.2d 726.

Charter requirement as to claims suspended

Cal.—Brill v. Los Angeles County, supra.

74. Cal.—Brill v. Los Angeles County, supra.

75. Cal.—Farmers, etc., Bank v. Los Angeles, 91 P. 795, 151 Cal. 655.

Waiver of condition

Cal.—First Trust & Savings Bank of Pasadena v. City of Pasadena, 130 P.2d 702, 21 Cal.2d 220.

76. Cal.—First Trust & Savings Bank of Pasadena v. City of Pasadena, supra.

77. Mich.—Mead v. Lansing, 28 N.W. 444, 56 Mich. 601.

78. Wis.—Flieth v. Wausau, 67 N.W. 731, 93 Wis. 446.

79. Wis.—Bradley v. Eau Claire, 14 N.W. 10, 56 Wis. 168—Ruggles v. Fond du Lac, 10 N.W. 565, 58 Wis. 436.

unlawful distress may be recovered back from the municipality without previous demand therefor.⁸⁰

Time to sue, limitations, and laches. An action for the recovery of the tax will be barred if not brought within the time fixed by the statutes of limitations applicable thereto.⁸¹ It has been held that a statute providing that no action to recover back a tax shall be maintained unless commenced within a stated time after payment of the tax is not a mere statute of limitations affecting the remedy,⁸² but a statute establishing a condition precedent to the maintenance of an action to recover back the tax;⁸³ and, under such a statute, if the action is not brought within the stated time, it cannot be maintained, even though the tax was levied under an unconstitutional statute.⁸⁴ A statute stipulating that an action to recover back "a tax" must be brought within a stated time is held to apply to municipal taxes.⁸⁵

The taxpayer's action is unaffected, however, by limitations contained in a statute relating to state taxes, in the absence of a provision making it applicable to city taxes;⁸⁶ by limitations contained in general statutes as against limitations contained in a later special act relating particularly to de-

fendant city;⁸⁷ or by limitations contained in a statute applicable to actions against the collector, where the taxpayer has elected to bring his action against the city.⁸⁸ Charter provisions requiring all actions on any contractual liability, express or implied, to be begun within a specified time after the accrual of the cause of action,⁸⁹ or within a specified time after the refusal of the claim by the city council,⁹⁰ have been held inapplicable to actions for the recovery of tax moneys collected under a void assessment. Furthermore, it has been held that the limitations of a local law as to a refund of an erroneously or illegally collected tax are inapplicable to an action for money had and received to recover a tax on the ground that the tax was void in part because of unconstitutionality.⁹¹ A failure of the taxpayer to seek his remedy for a period of time sufficient under the circumstances to constitute laches bars recovery.⁹² A lapse of time, short of the statute of limitations, has been held not to bar recovery on the ground of laches.⁹³

Parties. In some jurisdictions, the taxpayer may sue either the officer who illegally collected the money or the municipality which illegally received it;⁹⁴ but in other jurisdictions, he can sue the city

80. N.Y.—Teall v. Syracuse, 24 N.E. 450, 120 N.Y. 184.

81. La.—A. Sulka & Co. v. City of New Orleans, 23 So.2d 224, 208 La. 585.

Mich.—Paul v. City of Detroit, 28 N. W.2d 904, 318 Mich. 545.

S.C.—Weathers v. City of Laurens, 197 S.E. 317, 187 S.C. 297.

44 C.J. p 1368 note 76.

Computation of period

Where a city accepts a check in payment of a tax and enters the taxes as paid on that date, the statute of limitations against an action for the recovery of such payment begins to run from that date and not from the date on which the check is cashed.—New York Second Nat. Bank v. New York, 107 N.E. 1039, 213 N.Y. 457.

Amendment of statute

Rights of property owner paying delinquent city real estate taxes under protest are governed by the statute prescribing period for the enforcement by city of tax liens before its amendment, where taxes were assessed and became in arrears before enactment of amendment, and period of limitation prescribed by unamended statute had expired before amendment.—Forwood v. City of Louisville, 140 S.W.2d 1048, 283 Ky. 208.

82. Mass.—Wheatland v. Boston, 88 N.E. 769, 202 Mass. 258.

83. Mass.—Wheatland v. Boston, supra.

84. Mass.—Wheatland v. Boston, supra.

85. Mass.—Wheatland v. Boston, supra.

S.C.—Weathers v. City of Laurens, 197 S.E. 317, 187 S.C. 297.

86. Tenn.—Little Rock, etc., R. Co. v. Williams, 46 S.W. 448, 101 Tenn. 146.

87. Ala.—Birmingham v. Doster-Northingham Drug Co., 98 So. 475, 207 Ala. 542.

88. Utah.—Raleigh v. Salt Lake City, 53 P. 974, 17 Utah 130.

89. N.Y.—National City Bank of New Rochelle v. Westchester County, 198 N.E. 372, 268 N.Y. 496.

90. N.Y.—Miller v. City of Oneida, 275 N.Y.S. 157, 153 Misc. 438.

Barred claim

City charter provision limiting time for bringing action to six months after refusal of common council to allow claim does not permit plaintiff to profit by delay in presenting claim, and permit her to sue on claim otherwise barred by general limitation statute.—Miller v. City of Oneida, supra.

91. N.Y.—New York Rapid Transit Corporation v. City of New York, 9 N.E.2d 558, 275 N.Y. 258, followed in Brooklyn & Queens

Transit Corporation v. City of New York, 11 N.E.2d 293, 275 N.Y. 454, certified question answered 296 N.Y.S. 1022, 251 App.Div. 798, affirmed New York Rapid Transit Corporation v. City of New York, 58 S.Ct. 721, 303 U.S. 573, 82 L.Ed. 1024, rehearing denied 58 S.Ct. 939, 304 U.S. 588, 82 L.Ed. 1548, and Brooklyn & Queens Transit Corporation v. City of New York, 58 S.Ct. 939, 304 U.S. 588, 82 L.Ed. 1548.

92. U.S.—Risley v. Utica, C.C.N.Y., 179 F. 875.

93. U.S.—City of Franklin v. Coleman Bros. Corp., C.C.A.N.H., 152 F.2d 527, certiorari denied 66 S.Ct. 1026, 328 U.S. 844, 90 L.Ed. 1618.

Laches and estoppel inapplicable

Pa.—Girard Trust Co. v. City and County of Philadelphia, 59 A.2d 124, 359 Pa. 319.

94. Utah.—Raleigh v. Salt Lake City, 53 P. 974, 17 Utah 130.

Treasurer

It has been held that the payor under protest to a town collector of taxes illegally assessed can recover them from the treasurer of the town, although there is no record to show that moneys were ever paid over to the treasurer, both collector and treasurer being agents of the town.—Albro v. Kettelle, 107 A. 198, 42 R.I. 270—61 C.J. p 1001 note 83 [c].

only.⁹⁵ Suit for the refunding of a city tax cannot be maintained against a county,⁹⁶ unless, by virtue of statute, the right of the city to appear and defend is delegated to the county.⁹⁷ It has been held that a town cannot be sued for taxes collected by it for county and state purposes,⁹⁸ unless the statutes so provide.⁹⁹ Where a tax is irregular, but not void, and payment is made under duress to the collector, who pays the money into the town treasury, an action for recovery of the amount cannot be maintained against the town;¹ nor can the taxpayer recover it from the collector in an action of assumpsit;² and, although the tax is illegal and void, an action cannot be maintained against the town to recover back the tax or that portion thereof paid to the town officers, where the town has no treasurer and the officers to whom such tax can be paid do not represent it in receiving the money, but the money received by them is expended in the performance of official duty.³ It has been held that one or more taxpayers may sue for the benefit of themselves and of all others similarly situated to recover the entire fund accumu-

lated for the collection of an illegal municipal tax.⁴

Pleading. The petition or complaint must distinctly allege the facts relied on as rendering the tax illegal or its exaction unlawful.⁵ The performance of all conditions precedent to the maintenance of the action must be alleged, such as compliance with the presentation of claims as required by statute.⁶

Evidence. General rules of evidence have been held applicable to actions for the recovery of municipal taxes paid,⁷ in respect of presumptions and inferences of facts,⁸ and in respect of the weight and sufficiency of the evidence.⁹ The burden of proof is on the taxpayer to show the illegality of the tax,¹⁰ and, in an action for money had and received, he must show that the receipt by the person collecting the tax was in law a receipt by the city.¹¹

Amount recoverable. Recovery is limited to the amount of the tax illegally exacted.¹² In some jurisdictions it is held that a taxpayer entitled to recover back illegal or excessive taxes is entitled

95. R.I.—*Fish v. Higbee*, 47 A. 212, 22 R.I. 223.

44 C.J. p 1368 note 54.

96. N.Y.—*Merchants' Nat. Bank v. New York County*, 3 Hun 156, 5 Thomps. & C. 393, affirmed 62 N.Y. 629.

97. Cal.—*Los Angeles County v. Superior Court in and for Los Angeles County*, 112 P.2d 10, 17 Cal. 2d 707.

Effect of ordinance

A city ordinance, requiring that all suits for refund of city taxes be brought against city and defended by city attorney and revoking prior transfer of city's taxing power or function to county, did not withdraw statutory delegation to county of right to defend suits for refunds with respect to tax collections and tax years prior to effective date of ordinance.—*Los Angeles County v. Superior Court in and for Los Angeles County*, supra.

98. Wis.—*Matheson v. Mazomanie*, 20 Wis. 191.

61 C.J. p 1002 note 89.

99. Wis.—*Matteson v. Rosendale*, 37 Wis. 254.

1. Me.—*Foss v. Whitehouse*, 48 A. 109, 94 Me. 491.

2. Me.—*Foss v. Whitehouse*, supra.

3. N.Y.—*Rochester v. Rush*, 80 N.Y. 302.

61 C.J. p 1002 note 94.

4. Ky.—*Corbin Brick Co. v. City of Somerset*, 132 S.W.2d 922, 280 Ky. 208.

5. Okl.—*Kansas City Southern Ry. Co. v. Wood*, 259 P. 262, 126 Okl. 275.

Petition or complaint held sufficient
N.Y.—*MacMurray v. City of Long Beach*, 54 N.E.2d 828, 292 N.Y. 286.

Pleadings held sufficient

Wis.—*Stott Briquet Co. v. City of Superior*, 297 N.W. 354, 237 Wis. 451.

Petition held insufficient

N.Y.—*Corporate Properties v. City of New York*, 22 N.Y.S.2d 589, 175 Misc. 306, affirmed 28 N.Y.S.2d 710, 262 App.Div. 722, appeal denied 29 N.Y.S.2d 145, 262 App.Div. 846.

6. Cal.—*First Trust & Savings Bank of Pasadena v. City of Pasadena*, 130 P.2d 702, 21 Cal.2d 220.

7. Conn.—*Bridgeport Screw Co. v. City of Bridgeport*, 7 A.2d 649, 125 Conn. 593.

8. Wis.—*Stott Briquet Co. v. City of Superior*, 297 N.W. 354, 237 Wis. 451—*Buildings Development Co. v. City of Milwaukee*, 274 N.W. 298, 225 Wis. 357.

Annexation proceedings

Okl.—*Missouri-Kansas-Texas R. Co. v. Maltsberger*, 116 P.2d 977, 189 Okl. 363.

Voluntary payment

Municipal tax payments are presumed voluntary unless the contrary is made to appear.—*North Miami v. Seaway Corporation*, 9 So.2d 705, 151 Fla. 301.

9. U.S.—*Coleman Bros. Corp. v. City of Franklin*, D.C.N.H., 58 F.

Supp. 551, affirmed in part and reversed in part, C.C.A., *City of Franklin v. Coleman Bros. Corp.*, 152 F.2d 527, certiorari denied 66 S.Ct. 1026.

Evidence held sufficient

(1) Generally.—*Midwick Country Club v. Los Angeles County*, 53 P.2d 1006, 11 Cal.2d 217.

(2) To show involuntary payment.—*Coleman Bros. Corp. v. City of Franklin*, D.C.N.H., 58 F.Supp. 551, affirmed in part and reversed in part, C.C.A., *City of Franklin v. Coleman Bros. Corp.*, 152 F.2d 527, certiorari denied 66 S.Ct. 1026.

10. Mont.—*Glendive First Nat. Bank v. Dawson County*, 240 P. 981, 74 Mont. 439.

N.Y.—*Lancaster Sea Beach Impr. Co. v. New York*, 146 N.Y.S. 734, 161 App.Div. 469, affirmed 108 N.E. 90, 214 N.Y. 1.

11. Ill.—*Chicago v. Fidelity Sav. Bank*, 11 Ill.App. 165.

12. Philippines.—*Roxas v. Rafferty*, 87 Philippine 957.

Utah.—*Raleigh v. Salt Lake City*, 53 P. 974, 17 Utah 130.

Accrued interest and penalties

Settlement whereby county credited village with taxpayer's delinquent taxes unlawfully assessed by village constituted collection by village entitling taxpayer to recover from village taxes, but not penalties and accrued interest, paid county under protest.—*Fox Valley Canning Co. v. Village of Hortonville*, 242 N.W. 142, 207 Wis. 502.

to interest on the amount paid, even though a statute does not expressly so provide,¹³ and, when interest is recoverable, it runs from the time of payment,¹⁴ or from the time of demand for repayment where there is no obligation to repay until demand.¹⁵ Thus, under a statute providing for an abatement of a tax by assessors in cases where a

taxpayer has been overrated, interest begins to run not from the abatement,¹⁶ but from the time a demand is made for the return of the money.¹⁷

Costs of distress. Costs of a distress are not recoverable where part of the tax collected by the distress was lawful.¹⁸

6. COLLECTION AND ENFORCEMENT

a. In General

§ 2070. In General

The collection of taxes by municipal corporations ordinarily is regulated by statute or constitutional provision, and a statute recognizing the power of a city to levy taxes has been held to contemplate the power to make all reasonable provisions for the collection thereof.

The collection of taxes by municipal corporations ordinarily is regulated by statute or constitutional provision,¹⁹ with respect to both the authority to enforce their collection²⁰ and the manner of collection, as discussed *infra* § 2074. The general law prevails if a charter provision relating to the collection of taxes is not self-executing and no ordinance in execution of such provision has been passed.²¹ A statute recognizing the power of a city to levy taxes has been held to contemplate the power to make all reasonable provisions for their collection.²² The liability for taxes assessed by a

municipality is imposed wholly by operation of law and an exemption against the collection of such taxes does not exist.²³ However, where land is sold to the state for delinquent state and county taxes, the city, during the period title to the land is in the state, may not enforce its lien against the land for taxes due and unpaid at the time of sale to the state.²⁴

The authority to collect may be extended specifically by statute to back taxes, the collection of which through some irregularity has been defeated,²⁵ but it also may be provided that tax liens for certain past years be barred and uncollectable, where no proceedings for foreclosure have been instituted,²⁶ and the effect of such a provision is to preclude the collection of taxes for such years under what-

13. U.S.—*City of Franklin v. Coleman Bros. Corp.*, C.C.A.N.H., 152 F.2d 527, certiorari denied 66 S. Ct. 1026, 328 U.S. 844, 90 L.Ed. 1618.

Philippines.—*Roxas v. Rafferty*, 37 Philippine 957.

14. U.S.—*City of Franklin v. Coleman Bros. Corp.*, C.C.A.N.H., 152 F.2d 527, certiorari denied 66 S.Ct. 1026, 328 U.S. 844, 90 L.Ed. 1618.

15. N.Y.—*Miller v. City of Oneida*, 275 N.Y.S. 157, 153 Misc. 438.

Pa.—*Girard Trust Co. v. City and County of Philadelphia*, 59 A.2d 124, 359 Pa. 319.

16. Mass.—*Boott Cotton Mills v. Lowell*, 34 N.E. 367, 159 Mass. 383.

17. Mass.—*Boott Cotton Mills v. Lowell*, *supra*.

18. Mass.—*Torrey v. Millbury*, 21 Pick. 64.

44 C.J. p 1369 note 94.

19. La.—*McCall v. Blouin*, 138 So. 528, 18 La.App. 717.

Pa.—*Speck v. Phillips*, 51 A.2d 399, 160 Pa.Super. 365.

Statute held not repealed

Pa.—*City of Erie v. A Piece of Land Fronting on Southeast Corner of Eighth and Peach Streets*, 14 A.2d 428, 339 Pa. 321.

Statutes held retroactive

N.Y.—*Carodix Corporation v. Comiskey*, 39 N.Y.S.2d 732, 265 App.Div. 450, affirmed 52 N.E.2d 957, 291 N. Y. 737.

Pa.—*Speck v. Phillips*, 51 A.2d 399, 160 Pa.Super. 365.

20. Fla.—*Henderson v. Town of Lake Placid*, 181 So. 177, 132 Fla. 190.

Ill.—*People ex rel. Gill v. 110 South Dearborn St. Corporation*, 2 N. E.2d 68, 363 Ill. 286.

Mo.—*State ex rel. Steed v. Nolte*, 138 S.W.2d 1016, 345 Mo. 1103.

Pa.—*In re Curtis' Estate*, 6 A.2d 283, 335 Pa. 414—*Speck v. Phillips*, 51 A.2d 399, 160 Pa.Super. 365—*Petition of Pittsburgh School Dist.*, Com.Pl., 90 Pittsb.Leg.J. 462.

44 C.J. p 1344 note 97.

Credit against tax

Under a statute which provides that, where two municipalities enact a similar tax on earnings under its provisions, the municipality of residence has priority in the collection of the tax, and the tax so collected may be used as a credit against a similar tax imposed by the municipality of nonresidence, an ordinance adopted under the provisions of the act need not specifically incorporate such a provision.—

Bloom v. City of Scranton, 64 Pa. Dist. & Co. 358.

21. Cal.—*Keyes v. San Francisco*, 173 P. 475, 177 Cal. 313.

44 C.J. p 1344 note 3.

Method of collection provided by general laws or special charters see *infra* § 2074.

22. Mich.—*City of Detroit v. Safety Inv. Corporation*, 285 N.W. 42, 288 Mich. 511.

23. Pa.—*Fell v. Johnston*, 36 A.2d 227, 154 Pa.Super. 470.

24. Tex.—*Lubbock Independent School Dist. v. Owens*, Civ.App., 217 S.W.2d 186, error refused.

25. Ill.—*Fairfield v. People*, 94 Ill. 244.

26. N.C.—*City of Raleigh v. Jordan*, 9 S.E.2d 507, 218 N.C. 55.

The term "held," as used in statute declaring all tax liens held by municipalities for certain year and the years prior thereto, whether evidenced by original tax certificates, or tax sales certificates, and on which no foreclosure proceedings have been instituted, to be barred and uncollectable, cannot be limited to the physical holding of a tangible thing, but is sufficiently comprehensive to include rights appertaining.—*City of Raleigh v. Jordan*, *supra*.

ever guise attempted.²⁷ Moratorium laws have been held not to apply to a municipal lien for taxes,²⁸ and, even if municipal officers enter into an agreement with a property owner to delay the enforcement of tax claims pursuant to a plan for liquidation of the property on which the taxes had become liens, such act by the officers has been held to be ultra vires.²⁹ However, taxes that have been levied may not be enforced until the time for payment fixed by the statute has arrived.³⁰ In this respect the statute may permit the holder of a transfer of tax lien to accelerate the maturity of the lien, for the purpose of enforcement thereof, on default, for a specified time, of payment of a tax or assessment on the land due after the date mentioned in the advertisement of sale of the tax lien.³¹

In the collection of taxes a municipal corporation is discharging a governmental function.³² A municipality, by assessing and adjudicating property to it for a certain year's taxes is not estopped to claim a previous year's taxes,³³ and a city government does not lose its right to taxes justly owing on one parcel of property by reason of failure of its officers to assess other property that is likewise taxable.³⁴ The attempt by a collector to collect taxes several years after they become due does not affect his right to collect them.³⁵ In the absence of legislative authority, a court receiver has no authority to enforce the collection of taxes.³⁶

Dissolved corporation; change of charter. Where a municipal corporation has been dissolved, its offices and officers also become defunct, and no taxes can be thereafter collected by them.³⁷ However, taxes levied for any special public purpose may be collected by the agency succeeding to that function,³⁸ and those pledged to secure any municipal obligation may be collected in equity³⁹ and applied to the obligation.⁴⁰ A municipal corporation operating under a new charter may collect taxes due under its former charter.⁴¹

§ 2071. Collectors and Deputies

- a. In general
- b. Term of office; removal
- c. Powers, duties, and liabilities
- d. Bonds
- e. Compensation

a. In General

Statutes or charter provisions usually provide for the office of tax collector or receiver, and the officers designated to collect taxes are the only persons who can act as collectors. A collector should be appointed or elected in the manner provided by law.

Charter or statutory provisions usually provide for the office of tax collector⁴² or receiver,⁴³ and, while the governing body of the municipal corporation may have authority, in a proper case, to terminate or abolish the office or position,⁴⁴ it may

27. N.C.—City of Raleigh v. Jordan, supra.

28. Miss.—Atlantic Life Ins. Co. v. Klotz, 181 So. 519, 182 Miss. 243.

29. N.J.—Town of Secaucus v. Eichmann, 34 A.2d 888, 134 N.J.Eq. 253.

30. Md.—Bamberger v. Baltimore City, 94 A. 8, 125 Md. 481.

44 C.J. p 1344 note 5.

When taxes delinquent

Under a statute so providing, taxes are not delinquent until after the end of the calendar year in which they are assessed and collection thereof may not be enforced until that time, although certain penalties for delay may attach during the year.—Swenson v. City of Philadelphia, 18 Pa.Dist. & Co. 192.

31. N.Y.—Safe Collateral Corporation v. Yonkers Home Liquidators, 2 N.Y.S.2d 95, 167 Misc. 132.

32. Tex.—State v. City of San Antonio, 209 S.W.2d 756—City of San Antonio v. Earnest, 188 S.W.2d 775, 144 Tex. 82—City of San Angelo v. Deutsch, 81 S.W.2d 398, 126 Tex. 532.

33. La.—State ex rel. McGregor v. Diamond, App., 167 So. 760.

34. Tex.—Sam Bassett Lumber Co.

v. City of Houston, 198 S.W.2d 879, 145 Tex. 492.

35. Fla.—Rio Vista Hotel & Improvement Co. v. Belle Mead Development Corporation, 182 So. 417, 132 Fla. 88, certiorari denied 59 S.Ct. 251, 305 U.S. 655, 83 L.Ed. 424, rehearing denied 59 S.Ct. 364, 305 U.S. 676, 83 L.Ed. 438.

Revival

Under some statutes tax liens may be revived within each period of five years, either before or after judgment, by a suggestion of nonpayment and averment of default.—City of Philadelphia, to Use of, v. Brummer, 54 Pa.Dist. & Co. 688.

36. Fla.—Harvey v. City of St. Petersburg, 189 So. 861, 138 Fla. 597, certiorari denied 60 S.Ct. 181, 308 U.S. 596, 84 L.Ed. 499.

37. N.C.—Lilly v. Taylor, 88 N.C. 489.

38. U.S.—Mt. Pleasant v. Beckwith, Wis., 100 U.S. 514, 25 L.Ed. 699.

39. U.S.—Amy v. Shelby County Taxing Dist., Tenn., 5 S.Ct. 835, 114 U.S. 387, 29 L.Ed. 172—Meriwether v. Garrett, Tenn., 102 U.S. 472, 26 L.Ed. 197.

40. U.S.—Amy v. Shelby County Taxing Dist., Tenn., 5 S.Ct. 835, 114 U.S. 387, 29 L.Ed. 172—Meri-

wether v. Garrett, Tenn., 102 U.S. 472, 26 L.Ed. 197.

41. S.C.—Milster v. Spartanburg, 46 S.E. 539, 68 S.C. 26.

43 C.J. p 169 note 64.

42. Mass.—McGah v. Quigley, 22 N.E.2d 192, 303 Mass. 598.

Single office

When, pursuant to a statute authorizing cities to add collection of city accounts to duties of city tax collector, a city council voted to "proceed to the election of a city collector" and petitioner was elected, the council elected petitioner to single office of "city collector" which is commonly referred to as "collector of taxes."—McGah v. Quigley, supra.

43. N.J.—Mattia v. City of Newark, 196 A. 202, 119 N.J.Law 268.

Statute creating office held not amended

Pa.—Stewart v. Hadley, 193 A. 41, 327 Pa. 66.

44. Ala.—Chambers v. City of Montgomery, 177 So. 155, 235 Ala. 59.

Office held not abolished

The office of city tax receiver, fixed for a term of three years under charter and ordinance, continued notwithstanding adoption by city of

not abolish the office as a subterfuge to effect the removal of the incumbent prior to the expiration of his lawful term.⁴⁵ A party appointed as acting receiver of taxes holds, until discharged, either a position or a mere employment, although there is no ordinance creating the office.⁴⁶ Where charter or statutory provisions designate the officers to collect municipal taxes, such officers are the only persons who can act as collectors,⁴⁷ but a special tax must be collected by the regular collector where, although the appointment of a special collector is authorized by statute, no appointment has been made.⁴⁸

A collector should be appointed or elected in the manner provided by law,⁴⁹ but an irregularity in the election of a collector does not affect the validity of the tax⁵⁰ or the obligation of the taxpayer to pay it.⁵¹ Where the constitution provides that

a municipality shall collect state revenues as though it were a county, the general statutes of the state, and not the charter of the municipality, control the election of a collector of revenue for the municipality, and one who is elected to the office at both state and city elections is legally elected at the former and not at the latter.⁵² A sale by a municipality to the lowest bidder of the right of collecting taxes, without any provisions as to his qualifications for the office of collector or any other election, has been held to be void.⁵³ A person performing the duties of city tax collector for several years with the acquiescence of the governing body of the city is a de facto officer.⁵⁴ The terms of the statute determine whether the office of collector is within the classified civil service.⁵⁵

Collection by county officers. Under some statutes,⁵⁶ although not under others,⁵⁷ the duty of

commission government, delegation of tax receiver's duties to director of revenue and finance, and fact that acting receiver of taxes was selected by board of commissioners for many years.—*Mattia v. City of Newark*, 196 A. 2d 119 N.J.Law 268.

45. N.J.—*Mattia v. City of Newark*, 6 A.2d 662, 122 N.J.Law 557.

46. N.J.—*Pellecchia v. Mattia*, 193 A. 910, 118 N.J.Law 512.

47. Mo.—*State ex rel. Steed v. Nolte*, 138 S.W.2d 1016, 345 Mo. 1103. 44 C.J. p 1344 note 12.

Single collector

It is policy of law to have borough and other local taxes collected by single tax collector.—*School Dist. of Borough of Olyphant v. American Surety Co. of New York*, 184 A. 758, 322 Pa. 22.

Effect of amendment

An act purporting to amend city charter act and to abolish office and department of receiver of taxes in cities of first class, providing for transfer of books, papers, records, and documents to department of city controller and supplies, materials, and equipment to board of revision of taxes, and empowering city treasurer to "receive" taxes, does not authorize treasurer or board of revision to "collect" taxes.—*Stewart v. Hadley*, 193 A. 41, 327 Pa. 66.

Treasurer

A municipal wage tax ordinance adopted under the provisions of statute is not invalid because it imposes the duty of collecting the tax on the municipal treasurer, although under the relevant local legislation there has hitherto been a single tax collector and a single tax collection system for the municipality.—*Bloom v. City of Scranton*, 64 Pa. Dist. & Co. 358.

48. N.C.—*Webb v. Beaufort*, 88 N. C. 496.

49. Ky.—*Fidelity & Deposit Co. of Maryland v. Commonwealth, for Use of City of Jackson*, 67 S.W.2d 719, 252 Ky. 476.

Selection by commissioners

Law contemplates that commissioners of city will exercise discretion and good judgment in selecting from their number those best qualified to serve city as tax collector.—*Frith v. State ex rel. Kinsaul*, 28 So. 2d 255, 158 Fla. 175.

Resolution or ordinance

(1) Fact that act of borough council appointing tax collector to fill vacancy was in form of a motion instead of a resolution did not render the appointment void.—*Commonwealth v. Bitner*, 144 A. 733, 294 Pa. 549.

(2) Entry, under ordinances of city, that certain person was nominated for office of tax collector, and showing vote thereon, was sufficient to show appointment to city office.—*Fidelity & Deposit Co. of Maryland v. Commonwealth, for Use of City of Jackson*, 67 S.W.2d 719, 252 Ky. 476.

Person held entitled to office

Mass.—*McGah v. Quigley*, 22 N.E.2d 192, 303 Mass. 598.

Office held not vacant

Pa.—*Commonwealth v. Bitner*, 144 A. 733, 294 Pa. 549.

Promotional examination held required

Cal.—*Allen v. McKinley*, 117 P.2d 342, 18 Cal.2d 697.

50. Me.—*Rockland v. Farnsworth*, 89 A. 65, 111 Me. 315.

51. Me.—*Rockland v. Farnsworth*, supra.

52. Mo.—*State v. Koeln*, 193 S.W. 748, 370 Mo. 174.

53. Mass.—*Spencer v. Jones*, 6 Gray 502.

54. Tex.—*Germany v. State*, 3 S.W. 2d 798, 109 Tex.Cr. 180.

Fact that person acted as city secretary and city tax collector at same time did not divest him of character of tax collector de facto.—*Germany v. State*, supra.

55. Conn.—*State ex rel. McNamara v. Civil Service Commission of City of Bridgeport*, 24 A.2d 846, 128 Conn. 585.

Executive position or office

Although assistant city tax collector had general charge of office and its personnel and performed many duties in which she was required to use her judgment and discretion, but all final decisions were made by the collector, position of assistant tax collector was not an executive position or office within civil service act placing executive offices or positions in the unclassified service, but was in the classified service.—*State ex rel. McNamara v. Civil Service Commission of City of Bridgeport*, supra.

56. Ala.—*Hamilton v. City of Birmingham*, 185 So. 164, 237 Ala. 8. Cal.—*City of Fullerton v. Orange County*, 35 P.2d 397, 140 Cal.App. 464.

Transfer of duties

Where city charter provided that city taxes should be collected by city collector, the constitution did not prohibit the legislature from transferring the duties of the collection of city taxes and other duties as to taxes from the city officials to the county officials.—*Bagley v. Gilbert*, 122 P.2d 227, 63 Idaho 494.

57. Mo.—*State ex rel. Steed v. Nolte*, 138 S.W.2d 1016, 345 Mo. 1103.

collecting taxes for municipalities of certain classes is imposed on county officers; but a statute requiring the county to collect unpaid municipal taxes has been held invalid as taking from municipal officers the constitutional right and duty to collect municipal taxes.⁵⁸ County officers when collecting taxes for a municipality are *ex officio* officers of the municipality, and, while not losing their identity as county officers, they become agents of the municipality to collect taxes for it.⁵⁹

b. Term of Office; Removal

A tax collector or similar official ordinarily is entitled to hold his office or position for the time fixed by statute or charter provision, but where no definite term is prescribed a person appointed as collector by the governing body of the municipal corporation is entitled to hold the office only at the will of the governing body. A collector may be removed only on the grounds and in the manner authorized by statute.

A tax collector or similar official ordinarily is entitled to hold his office or position for the time fixed by statute or charter provision,⁶⁰ but where no definite term is prescribed by statute a person appointed as collector by the governing body of the municipal corporation is entitled to hold the office only at the will of the governing body,⁶¹ even though such body by resolution specified that the appointment was for a definite term of years.⁶² A receiver of taxes of a city is a public officer and not a private employee, and where the charter pro-

vides that he may be removed at pleasure, his appointment for a period of five years does not constitute an irrevocable contract which will prevent his removal during such time.⁶³ The term of office of a deputy receiver is coterminous with that of the receiver whose deputy he is.⁶⁴ Where there is no ordinance creating the office of acting receiver of taxes, no particular term attaches thereto, with respect to a claim of unlawful discharge from office,⁶⁵ and an acting receiver may be summarily removed on appointment and qualification of a receiver, since the appointment of an acting receiver is a temporary one, the occasion for which ends when a receiver is appointed.⁶⁶

Statutes frequently govern the matter of removal of a collector from his office or position,⁶⁷ and in such case a collector may be removed in the manner, and on the grounds, authorized by the statute,⁶⁸ but only where so authorized.⁶⁹ In this respect the city council is not governed by general law restricting the causes for removal where a charter provision specifically applies.⁷⁰ A tax collector is a municipal officer within the purview of a statute authorizing the removal of a municipal officer for failure to comply with any reasonable direction in statutory provisions for the sale of realty to enforce tax liens;⁷¹ and a collector of delinquent taxes of a city is an officer within the meaning of a constitutional provision permitting the removal

58. N.Y.—*Village of Kenmore v. Erie County*, 235 N.Y.S. 713, 134 Misc. 482, affirmed 169 N.E. 637, 252 N.Y. 437.

59. Cal.—*City of Fullerton v. Orange County*, 35 P.2d 397, 140 Cal.App. 464.
Idaho.—*Bagley v. Gilbert*, 122 P.2d 227, 63 Idaho 494.

60. Pa.—*Commonwealth v. Bitner*, 144 A. 733, 294 Pa. 549.

Extension of incumbency

(1) In general.—*McCarthy v. Roberson*, 8 A.2d 115, 123 N.J.Law 132.

(2) Statute extending incumbency of present tax collectors of boroughs was held not to violate constitution.—*Commonwealth v. Bitner*, 144 A. 733, 294 Pa. 549.

(3) Where elected borough tax collector died before qualifying, collector appointed to fill vacancy held over, so that no vacancy existed to which new appointment could be made.—*Commonwealth v. Lomas*, 153 A. 124, 302 Pa. 97, 74 A.L.R. 481.

Repeal of prior statute

N.J.—*Bircsak v. Novak*, 10 A.2d 156, 123 N.J.Law 538.

61. Ala.—*Chambers v. City of Montgomery*, 177 So. 155, 235 Ala. 59.

62. N.C.—*Kinsland v. Mackey*, 8 S. E.2d 598, 217 N.C. 508.

Action of prior commissioners

Tax collector appointed by commissioners could be removed at pleasure by commissioners, although prior commissioners attempted to fix definite terms.—*Sproles v. Mauney*, 38 S.W.2d 969, 239 Ky. 138.

63. N.J.—*Uffert v. Vogt*, 47 A. 225, 65 N.J.Law 377, affirmed 48 A. 574, 65 N.J.Law 621.

64. N.J.—*Sperry v. Barber*, 71 A. 64, 77 N.J.Law 54.

65. N.J.—*Pellecchia v. Mattia*, 193 A. 910, 118 N.J.Law 512.

66. N.J.—*Pellecchia v. Mattia*, 1 A. 2d 28, 121 N.J.Law 21.

67. Pa.—*In re Marshall*, 62 A.2d 30, 360 Pa. 304.

Receiver held municipal officer within statute

Pa.—*In re Marshall*, *supra*.

68. Pa.—*In re Marshall*, *supra*.

69. Mass.—*McKenna v. White*, 192 N.E. 84, 287 Mass. 495.

Grounds for removal not shown

Pa.—*Commonwealth v. Nowak*, 22 Pa.Dist. & Co. 690.

Statement of reasons

(1) Council of city which in re-

moving city tax collector recited that cause of removal was "for the good of the service," was held not to have complied with statute requiring giving of reason or reasons for removal since phrase "for the good of the service" was inadequate statement of reason or reasons for removal.—*McKenna v. White*, 192 N.E. 84, 287 Mass. 495.

(2) A receiver of taxes for city who was removed from office before expiration of his three-year term, without written charges having been preferred, was entitled to his office notwithstanding term of director of revenue and finance who appointed such tax receiver had expired.—*Mattia v. City of Newark*, 196 A. 202, 119 N.J.Law 268.

70. Mass.—*McKenna v. White*, 192 N.E. 84, 287 Mass. 495.

71. N.J.—*Finnegan v. Miller*, 38 A. 2d 854, 132 N.J.Law 192.

Nature

The statute is essentially a remedial measure to insure diligence and efficiency in administration of the tax laws.—*Finnegan v. Miller*, *supra*.

Statute held valid

N.J.—*Finnegan v. Miller*, *supra*.

of appointed officers at the pleasure of the appointing power.⁷³

c. Powers, Duties, and Liabilities

- (1) In general
- (2) Payment over and accounting

(1) In General

The powers and duties of a tax collector are fixed by the terms of the statute under which he acts, and his jurisdiction is limited to the boundaries of the municipal corporation for which he is appointed or elected.

The powers and duties of a tax collector are fixed by the terms of the statute under which he acts,⁷³ and his jurisdiction is limited to the boundaries of the municipal corporation for which he is appointed or elected.⁷⁴ He is a subordinate ministerial officer,⁷⁵ having no discretionary power to determine the legality of the tax,⁷⁶ but merely a duty to collect the taxes⁷⁷ as they are certified in the assessment roll.⁷⁸ His authority to collect back taxes has been held not to be adversely affected by the fact that the tax bill therefor describes the taxes other than those for the general fund merely as

special taxes and sewer taxes.⁷⁹ Under some statutes the authority of the collector to collect is extended for a fixed period beyond the time when his term of office expires,⁸⁰ and during the period of his extended authority he may certify delinquent real estate to the city solicitor.⁸¹ Under a statute so providing, the collector must have a warrant in due form of law before he can proceed with his duties as collector,⁸² but in the absence of such a statute a special and formal warrant or other precept, directing the collector to proceed with the collection of taxes and to enforce their payment, is not required.⁸³

Place and time of business. The city council may by ordinance require the office of the tax collector to be located in the municipal building and the business of his office to be transacted there;⁸⁴ but the council has no authority to impose requirements as to the days and hours of the collector's attendance at his office beyond those permitted by statute.⁸⁵

Duty to furnish certificates as to tax liens. Under some statutes a duty is imposed on a municipal receiver of taxes to furnish certificates as to tax liens

72. Pa.—Houseman v. Commonwealth, 100 Pa. 222.

73. N.J.—Harrington Co. v. Horster, 108 A. 150, 89 N.J. Eq. 270.
Pa.—Commonwealth ex rel. v. Schwing, 48 Pa. Dist. & Co. 251, 35 Mun. L.R. 154, 91 Pittsb. Leg. J. 505
—In re Wilson Borough Tax Lien, Com. Pl., 28 North. Co. 215.

Additional duties

Statute permitting city to provide by ordinance that collector of taxes shall collect, under title of city collector, all accounts due city, merely added new duties to existing office of collector of taxes to be performed by the incumbent of that office under designation of "city collector."—McGah v. Quigley, 22 N.E.2d 192, 303 Mass. 598.

Necessity of demand

Per capita and occupation taxes levied and assessed for certain year against employee were not delinquent on last day of year within meaning of act defining the rights, powers, and duties of collectors of municipal taxes, and providing for the collection of such taxes from employers of delinquent taxables, where no previous demand had been made on the employee for the payment thereof.—Martin v. Danko, 18 A.2d 324, 143 Pa. Super. 106.

Protection of bondholders

Provision of statute that when city council orders suits to foreclose delinquent improvement assessment liens, tax collector shall be relieved of further duty with respect to such assessments, simply indicates that

he has no duty as far as foreclosure proceedings are concerned, but does not render inapplicable provisions of such act as to tax sales of delinquent properties and levy of taxes to pay for such properties purchased by city or negative such officer's authority and obligation to act under such provisions when demanded for bondholders' protection.—Wulff-Hansen & Co. v. Silvers, 131 P.2d 373, 21 Cal.2d 253.

74. Cal.—Mason v. Johnson, 51 Cal. 612.

44 C.J. p 1344 note 19.

75. Ky.—Bankers' Surety Co. v. Newport, 172 S.W. 940, 162 Ky. 473.

Wash.—State v. Turner, 193 P. 715, 113 Wash. 214.

76. Wash.—State v. Turner, supra.

77. Pa.—Commonwealth ex rel. v. Schwing, 48 Pa. Dist. & Co. 251, 35 Mun. L.R. 154, 91 Pittsb. Leg. J. 505.

Lack of assistance

The treasurer of a city of the third class will not be exonerated of any obligation to attempt to collect personal taxes because the city failed to furnish him with adequate assistance where it has cured the defect prior to hearing.—Commonwealth ex rel. v. Schwing, supra.

78. Wash.—State v. Turner, 193 P. 715, 113 Wash. 214.

79. Mo.—State v. Continental Zinc Co., 197 S.W. 112, 272 Mo. 43.

44 C.J. p 1344 note 23.

80. Del.—Wilmington v. Barsky, 90 A. 217, 28 Del. 30.

81. Del.—Wilmington v. Barsky, supra.

82. Del.—Banks v. Talley, 194 A. 362, 8 W.W. Harr. 512.

Fla.—Rio Vista Hotel & Improvement Co. v. Belle Mead Development Corporation, 182 So. 417, 132 Fla. 88, certiorari denied 59 S.Ct. 251, 305 U.S. 655, 83 L.Ed. 424, rehearing denied 59 S.Ct. 364, 305 U.S. 676, 83 L.Ed. 438.

Properties improperly included

The command contained in a warrant to collect taxes delivered to one of the collectors of the tax district in the city would be ineffective and invalid as to exempt property or properties illegally assessed which were included in the list; warrants which included land divided by boundary line between the two districts, without distinguishing part subject to tax in each district, was invalid as to property which was not contained within the tax district.—Banks v. Talley, 194 A. 362, 8 W.W. Harr., Del., 512.

83. Fla.—Rio Vista Hotel & Improvement Co. v. Belle Mead Development Corporation, 182 So. 417, 132 Fla. 88, certiorari denied 59 S.Ct. 251, 305 U.S. 655, 83 L.Ed. 424, rehearing denied 59 S.Ct. 364, 305 U.S. 676, 83 L.Ed. 438.

84. N.J.—Hewitt v. Mayor and Borough Council of Seaside Park County of Ocean, 44 A.2d 782, 133 N.J. Law 467.

85. N.J.—Hewitt v. Mayor and Borough Council of Seaside Park County of Ocean, supra.

in order to make available, to one wishing to know, the exact state of the official record so that such person may act on the information received.⁸⁸ A person receiving an incorrect or false certificate as to liens from an officer required, as receiver of taxes, to furnish such information may recover damages suffered as a result of the error.⁸⁷

Refund of taxes. If the collector of taxes binds himself personally to refund a tax on a condition stated in his agreement, he becomes liable therefor under his contract on fulfillment of the condition.⁸⁸ The fact that he signed the contract as "collector" does not affect the personal nature of his undertaking⁸⁹ or liability.⁹⁰

A receiver of rents and income, appointed under a statute dealing with the receivership of property to enforce the collection of delinquent municipal taxes, has the duty to collect rents and pay them to the municipality in reduction of unpaid taxes.⁹¹ The receiver owes to the owner of the premises a fiduciary duty to use reasonable efforts to collect from the tenant the rent as it accrues,⁹² and he may be liable to the owner for damages resulting from his negligence or intentional omission to at-

tempt to collect such rent;⁹³ but the city is not liable for such damages.⁹⁴ In order to hold the receiver liable for damage resulting from his failure to perform his duty to collect the rents and apply them to unpaid taxes, the owner must show actual damages caused thereby,⁹⁵ and such damage is not shown unless the owner proves that, as a result of the receiver's failure to use reasonable efforts to collect the rent, he has thereby been compelled to pay a greater price to redeem the premises from the tax lien than he would have had to pay had the receiver performed his duty, or that he would have been able to redeem at a lower figure but has been unable to redeem at the higher figure.⁹⁶ In the absence of proof of actual damage from the receiver's neglect, the owner is entitled to a decree for nominal damages and costs.⁹⁷

(2) Payment Over and Accounting

The collector must pay over or account for taxes collected, and suit may be brought against him to enforce such duty, or he may be held criminally liable for misapplying municipal funds.

The collector must pay over or account for taxes collected,⁹⁸ and suit may be brought against him

88. Pa.—City of Philadelphia, to Use of Land Title Bank & Trust Co. v. Brenner, 10 A.2d 802, 138 Pa.Super. 454.

87. Pa.—City of Philadelphia, to Use of Land Title Bank & Trust Co. v. Brenner, *supra*.

Reliance; notice

Where a title company, after application was made to it by a mortgagee for a locality claim search to ascertain what liens, if any, were prior to mortgage, applied to receiver of taxes for a tax certificate, and certificate erroneously failed to show existence of certain tax liens, fact that company had on its books a record of lien for such taxes was not actual notice to company of the lien when company was acting for mortgagee; fact that company's clerks would have found that the taxes were unpaid if clerks had examined company's plant record was not conclusive as to whether company relied upon certificate; conclusion that company relied on certificate was warranted, notwithstanding company had its own plant record, which was not examined.—City of Philadelphia, to Use of Land Title Bank & Trust Co. v. Brenner, *supra*.

88. Mass.—Rogers v. French, 101 N.E. 988, 214 Mass. 337.

89. Mass.—Rogers v. French, *supra*.

90. Mass.—Rogers v. French, *supra*.

91. N.J.—Ballard v. Park Place

Land Co., 20 A.2d 439, 129 N.J.Eq. 597.

92. N.J.—Ballard v. Park Place Land Co., 12 A.2d 247, 127 N.J.Eq. 192, modified on other grounds 20 A.2d 439, 129 N.J.Eq. 597.

93. N.J.—Ballard v. Park Place Land Co., 20 A.2d 439, 129 N.J.Eq. 597.

Advice of counsel

The fact that receiver in omitting to perform his duty to use reasonable efforts to collect from tenant the rent as it accrued, acted on the advice of counsel representing the city, would not excuse receiver from liability to owner of the premises.—Ballard v. Park Place Land Co., 12 A.2d 247, 127 N.J.Eq. 192, modified on other grounds 20 A.2d 439, 129 N.J.Eq. 597.

94. N.J.—Ballard v. Park Place Land Co., 12 A.2d 247, 127 N.J.Eq. 192, modified on other grounds 20 A.2d 439, 129 N.J.Eq. 597.

95. N.J.—Ballard v. Park Place Land Co., 20 A.2d 439, 129 N.J.Eq. 597.

96. N.J.—Ballard v. Park Place Land Co., 20 A.2d 439, 129 N.J.Eq. 597.

97. N.J.—Ballard v. Park Place Land Co., 20 A.2d 439, 129 N.J.Eq. 597.

98. N.J.—Township of Neptune v. Sweet, 160 A. 209, 100 N.J.Misc. 615.

Pa.—Commonwealth ex rel. Borough

of Pen Argyl v. Florot, Com.Pl., 30 North.Co. 140.

44 C.J. p 1344 note 28.

Estoppel of city

City commission, having recognized authority of city secretary to act as tax collector, was not precluded from holding him responsible as collector because of failure to pass ordinance consolidating the two offices.—Germany v. State, 3 S.W.2d 798, 109 Tex.Cr. 180.

Application to loan

Where municipal tax collector borrowed money to cover uncollected taxes charged in duplicates, he could retain amount of loan from taxes subsequently collected on duplicates, and apply sums retained to payment of loan.—American Surety Co. of New York v. First Nat. Bank, C.C.A. Pa., 96 F.2d 813.

Interest

The official report of a town collector required under the law and his bond to collect and pay the money over to the town treasurer, which shows the amount collected and paid out, is a settlement of his account with the town, and the balance shown and not properly accounted for is chargeable with interest from the date of the report under a statute providing that creditors shall be allowed interest on money due in the settlement of account from the day of liquidating accounts and ascertaining the balance.—Cicero v. Hall, 88 N.E. 476, 240 Ill. 160.

to enforce such duty,⁹⁹ or he may be held criminally liable for misapplying municipal funds.¹ Some statutes are construed to provide an exclusive remedy against the collector for his failure to collect or account for taxes.² No liability attaches to the collector with respect to as much of the taxes as are in excess of the legal limit and which he has not collected.³ The city is estopped to claim that the collector was responsible for taxes which he failed to collect where it appears that such failure was due to acts for which the city itself was responsible,⁴ and, where the city council has by formal action exonerated the treasurer from his failure to collect certain delinquent taxes, it cannot subsequently revoke its action.⁵ The account may be opened on grounds of bad faith or fraud.⁶ A clerk or deputy is not liable to the municipality but only to his principal.⁷

The collector's duty to pay into the treasury monthly all moneys belonging to the city which come into his hands is not performed by his placing of the city's funds on time deposit in a bank, where such practice is not authorized by statute.⁸ On the other hand, the council may have statutory authority to require the collector to deposit in designated

banking institutions all moneys received by him, and this carries with it implied authority to require that deposits be made with such frequency as is incident to sound business practice.⁹ It has been held that a collector depositing city funds in a bank is liable for the loss of such funds through the insolvency of the bank, since he is an insurer of the safety of public funds in his custody, even though the loss occurred through no fault of his own.¹⁰ A collector who collects state and county taxes as well as municipal taxes must issue separate receipts and keep separate books for the municipal taxes.¹¹

d. Bonds

A collector or receiver of taxes may be required to give a bond with sureties conditioned for the faithful performance of his duty or to secure his due accounting for the money collected, and, in a proper case, suit may be brought against the collector and his sureties to enforce liability on the bond.

It is frequently required by law that a collector or receiver of taxes shall give a bond with sureties conditioned for the faithful performance of his duty or to secure his due accounting for the money collected,¹² but a municipal council has been held

99. Pa.—*City of Erie v. Phillips*, 187 A. 203, 323 Pa. 557.

Right to commissions

First step toward city's recovery of commissions claimed by city treasurer on collections of delinquent taxes is action by city comptroller who, in deciding, acts in quasi-judicial capacity, and whose report is prima facie evidence and conclusive until overthrown by countervailing proof.—*City of Erie v. Phillips*, supra.

Sufficiency of complaint

In town's action against former mayor and aldermen thereof to recover sum, for which mayor, as tax collector, was alleged to have wrongfully and fraudulently failed to account, complaint, not alleging, directly or impliedly, that other defendants acted corruptly or maliciously, stated no cause of action against them for negligent failure to perform official or governmental duties involving exercise of judgment and discretion.—*Town of Old Fort v. Harmon*, 13 S.E.2d 423, 219 N.C. 241.

1. Tex.—*Germany v. State*, 3 S.W. 2d 798, 109 Tex.Cr. 180.

State must establish beyond reasonable doubt that accused, charged with misapplying city funds, held office of tax collector as charged in indictment.—*Germany v. State*, supra.

2. Pa.—*Pittsburgh v. Grenet*, 86 A. 462, 238 Pa. 567.

44 C.J. p 1345 note 34.

3. Ky.—*Harper v. Catlettsburg*, 102 S.W. 294, 31 Ky.L. 293.

4. Ky.—*Columbus v. Kerr*, 141 S.W. 394, 145 Ky. 815.

5. Pa.—*Commonwealth ex rel. v. Schwing*, 48 Pa.Dist. & Co. 251, 35 Mun.L.R. 154, 91 Pittsb.Leg.J. 505.

6. Tenn.—*Nashville v. Knight*, 12 Lea 700.

7. Ky.—*Snapp v. Commonwealth*, 82 Ky. 173.

8. Mo.—*City of Maryville v. Farmers' Trust Co. of Maryville*, 45 S.W.2d 103, 226 Mo.App. 641.

9. N.J.—*Hewitt v. Mayor and Borough Council of Seaside Park County of Ocean*, 44 A.2d 782, 133 N.J.Law 467.

Daily deposit

N.J.—*Hewitt v. Mayor and Borough Council of Seaside Park County of Ocean*, supra.

10. Mo.—*City of Fayette v. Silvey*, App., 290 S.W. 1019.

11. Ala.—*City of Opp v. Brogden*, 181 So. 752, 236 Ala. 180.

12. Mass.—*McGah v. Quigley*, 22 N.E.2d 192, 303 Mass. 598.

Legislative purpose

(1) Statutory changes, providing for approval of, and fixing of minimum amount of, bond of city collector by commissioner of corporations and taxation, that municipal

officers should furnish a surety company as surety, that bond should be given before commitment to collector of taxes, and that selectmen or mayor and aldermen could declare the office of tax collector vacant on failure to give bond, disclosed a legislative purpose to standardize form and security of collectors' bonds, to remove in a large measure such matters from local control, and to provide that only one bond should be given.—*McGah v. Quigley*, supra.

(2) Statute requiring tax collector to give bond is intended for protection of the city and is of no concern to taxpayer.—*City of Lowell v. Marden & Murphy*, 74 N.E.2d 666, 321 Mass. 597, certiorari denied 68 S.Ct. 354, 332 U.S. 850, 92 L.Ed. 420.

Holding over

Under statute authorizing cities of fourth class to appoint tax collector to hold office for two years from appointment and until successor is appointed and qualified, where city permitted collector to hold over and execute bond annually, bond was binding on surety.—*Fidelity & Deposit Co. of Maryland v. Commonwealth, for Use of City of Jackson*, 67 S.W.2d 719, 252 Ky. 476.

Liability for premium

(1) City was bound by law to pay premium on bond given by city treasurer who was also tax collector, but was not bound to pay whatever premium the treasurer fixed in his application.—*National Surety*

to have no authority to require by ordinance that assistants employed by the collector at his own expense and liability be bonded on bonds approved and held by the municipality but paid for by the tax collector.¹³ Where the collector holds, also, another office for which the statute prescribes the giving of a bond, it has been held that he must give a separate bond for each office,¹⁴ and in such case a default by the collector subjects to liability only the sureties on the particular bond which has been breached;¹⁵ but, where a single bond is given by a person acting as tax collector for the city as well as for other governmental units, the bond is executed for the benefit of all such units.¹⁶

The bond must be in the form required by statute or ordinance,¹⁷ but where the collector assumed duties on the faith of a bond with the surety's knowledge, and the bond was left with the proper custodian, the collector and his surety may be estopped to dispute the regularity or validity of the

bond or its due approval or acceptance.¹⁸ The qualifications of the surety on a collector's bond are determined by the charter or statute,¹⁹ and a city ordinance inconsistent therewith is void.²⁰ The sureties on the collector's bond are liable to the city for any default of the collector in the collection of the taxes or his accounting therefor to the city;²¹ and the collector may be liable to the city on his bond for taxes legally committed and uncollected.²² A bond given under some statutes, however, limits the liability of the surety to the ordinary liability of a surety on a fidelity bond,²³ in which case the surety is not liable for negligent but honest failure of the collector to collect or pay over taxes.²⁴ A collector's bond does not create a lien on land of the sureties where the statute under which the bond was executed makes no provision therefor.²⁵

Suit may be brought by the city against the collector and his sureties to enforce liability on the

Corporation v. City of Allentown, D. C.Pa., 32 F.Supp. 700.

(2) The city, the county, and the school district of the city, which had protection of bond given by city treasurer, who was tax collector for the city, county, and school district taxes within the city, were each under an implied obligation to pay one third of the premium, representing the fair and reasonable value of the protection afforded them.—*National Surety Corporation v. City of Allentown*, supra.

13. N.J.—*Hewitt v. Mayor and Borough Council of Seaside Park County of Ocean*, 44 A.2d 782, 133 N.J.Law 467.

14. Miss.—*Coker v. Wilkinson*, 106 So. 886, 142 Miss. 1.

Pa.—*In re Hoffman*, 13 Pa.Dist. & Co. 206, 21 Mun.L.R. 187, 45 Montg.Co. 158.

15. Ky.—*Alves v. Henderson*, 8 Ky. Op. 451.

16. U.S.—*National Surety Corporation v. City of Allentown*, D.C.Pa., 32 F.Supp. 700.

17. Mass.—*McGah v. Quigley*, 22 N. E.2d 192, 303 Mass. 598.

Ordinance requirements held inconsistent with statutory requirements.—*McGah v. Quigley*, supra.

Approval of form

Tax collector was not disqualified because his bonds were approved by commissioner of corporations and taxation and by city council, although statute provided for giving bond in form approved by commissioner and in sum fixed by mayor and aldermen, as city council possesses powers of mayor and aldermen.—*City of Lowell v. Marden &*

Murphy, 74 N.E.2d 866, 321 Mass. 597, certiorari denied 68 S.Ct. 354, 332 U.S. 850, 92 L.Ed. 420.

Common-law bond

City collector's bond, although running to state instead of to city, was good as common-law bond.—*State ex rel. and to Use of City of Maplewood v. Southern Surety Co.*, 19 S.W.2d 691, 323 Mo. 150.

18. Ky.—*Fidelity & Deposit Co. of Maryland v. Commonwealth*, for Use of City of Jackson, 67 S.W.2d 719, 252 Ky. 476.

19. Del.—*State v. Sayers*, 77 A. 965, 23 Del. 258.

20. Del.—*State v. Sayers*, supra, 44 C.J. p 1345 note 40.

21. Ky.—*City of Middlesboro v. American Sur. Co. of N. Y.*, 211 S.W.2d 670, 306 Ky. 367—*Delker v. Owensboro*, 61 S.W. 362, 22 Ky.L. 1777.

Collections during year

Where city tax collector's bond referred to appointment for term beginning January 1, and ending December 31, surety was liable for collector's failure to account for any money collected during the year, although tax books were delivered to collector on July 1, and bond did not come to council's attention until October 5.—*Fidelity & Deposit Co. of Maryland v. Commonwealth*, for Use of City of Jackson, 67 S.W.2d 719, 252 Ky. 476.

Delay

The allowance of delay by municipal authorities to a tax collector for the making of his settlement will not discharge his sureties.—*City of Natchitoches v. Redmond*, 28 La. App. 274—*Clements v. Blossat*, 26 La. Ann. 248.

Impossibility of showing source of funds

Where funds collected by a defaulting city collector from the city and from improvement districts are jointly deposited in his name as collector, and it is impossible to show from what source the funds came, further than that they were collections for the benefit of the city and the districts in order to determine the shortage to each, it is proper to divide the joint fund pro rata, in accordance with the amounts due to each.—*Ætna Casualty, etc., Co. v. North Little Rock*, 248 S.W. 294, 157 Ark. 291.

Liability not assumed

Mayor and council of city had power to limit responsibility of surety on official bond of city treasurer so as not to include any liability for failure by subordinate officer to collect taxes; representation to bonding company that city clerk and treasurer did not have duty of collecting taxes amounted to rescission, in so far as bonding company was concerned, of any such duty theretofore conferred on city clerk and treasurer.—*Mason v. Williams*, 9 S.E.2d 537, 194 S.C. 290.

Surety held discharged

Mass.—*Johnson v. Mills*, 10 Cush. 503.

22. Me.—*City of Biddeford v. Cleary*, 167 A. 694, 132 Me. 116.

23. U.S.—*National Surety Corporation v. City of Allentown*, D.C.Pa., 32 F.Supp. 700.

24. U.S.—*National Surety Corporation v. City of Allentown*, supra.

25. N.Y.—*Mt. Vernon v. Brett*, 86 N.E. 6, 193 N.Y. 276.

bond,²⁶ within the time limited by law,²⁷ but, where the bond is given to protect the state against possible default in the payment of certain taxes over to the state treasurer, the city cannot sue thereon for the collector's default with respect to such taxes.²⁸ An action in assumpsit may be brought on the official bond of a receiver of taxes against the receiver and his surety for damages claimed to have been suffered by plaintiff by reason of an error in a certificate of search issued by the receiver with reference to the existence of certain tax liens;²⁹ but it has also been held that a stranger to the collector's bond cannot sue or require the obligee to sue on the bond for injury resulting from the collector's breach of duty in furnishing a statement of taxes which are a lien on the property.³⁰

e. Compensation

The amount of a tax collector's fees or other compensation is determined by the statute under which he acts, or, under statutory authority, by an ordinance of the municipal council; and he is not entitled to compensation in addition to that provided by law.

The amount of a tax collector's fees or other compensation is determined by the statute under which he acts,³¹ or, under statutory authority, by an ordinance of the municipal council;³² and he is not entitled to compensation in addition to that provided by law.³³ Under some statutes the fees of the collector are payable by the city out of its own funds³⁴ and not from taxes collected for special purposes;³⁵ but, where it is provided by ordinance that the collector's remuneration should be a per

26. N.Y.—Warren v. Phillips, 30 Barb. 646.

Pa.—The Mutual Life Ins. Co. of New York v. Scott, 24 Pa. Dist. & Co. 260, 29 Luz. Leg. Reg. 423, 7 Som. Co. Leg. J. 327.

Evidence, trial, and judgment

Ill.—Village of Lombard v. Anderson, 280 Ill. App. 283.

Md.—Lynn v. Cumberland, 26 A. 1001, 77 Md. 449.

N.J.—Borough of Eatontown v. Etina Casualty & Surety Co., 156 A. 15, 9 N.J. Misc. 890.

Pa.—Commonwealth ex rel. Borough of Pen Argyl v. Florot, 30 North. Co. 143.

Excess compensation

Where board of town auditors authorized payment to town collector of excess compensation for an allowance for expenses, and the collector received the payment in good faith, a suit on the collector's bond for use of the town for an accounting of such allowances was barred on the ground that the equities were with the collector.—People, for Use of Town of New Trier, v. Hale, 52 N.E. 2d 308, 320 Ill. App. 645.

27. Ill.—People, for Use of Town of New Trier, v. Hale, supra.

Suit held barred

Suit was not maintainable on bonds of town collector for an accounting for excessive fees allegedly retained from collected funds, where suit was brought more than three years after collector's satisfaction from the county collector was recorded; suit was barred by laches by lapse of five years' limitation period, notwithstanding retained funds were undistributed tax money.—People, for Use of Town of New Trier, v. Hale, supra.

28. Tex.—House v. Dallas, 74 S.W. 901, 96 Tex. 594.

29. Pa.—City of Philadelphia, to Use of Land Title Bank & Trust

Co. v. Brenner, 10 A.2d 802, 138 Pa. Super. 454.

Nature and scope of liability

Action is for a violation of a condition of official bond, and, if it appears that receiver has failed correctly to show condition of record to one asking for a certificate, person receiving false or incorrect certificate may recover damages suffered by him within limits of penalty of bond, unless liability of receiver is removed or extenuated in consequence of peculiar circumstances attending transaction.—City of Philadelphia, to Use of Land Title Bank & Trust Co. v. Brenner, supra.

Evidence

Burden was on use-plaintiff to show that mortgagee, who had applied to use-plaintiff for a locality claim search to ascertain what liens, if any, were prior to mortgage and thereafter foreclosed mortgage and bought mortgaged land, lost title to the land by reason of proceedings subsequently brought and prosecuted to recover taxes not shown in certificate issued by receiver; where use-plaintiff offered evidence showing a settlement with mortgagee, and produced evidence showing title to have been in mortgagee and details of proceedings enforcing tax liens, use-plaintiff made a prima facie case.—City of Philadelphia, to Use of Land Title Bank & Trust Co. v. Brenner, supra.

Defect in proceedings

Recovery in such action could not be defeated on theory that real estate description used in proceedings to enforce tax lien was defective where alleged defect was merely a slight ambiguity as to one boundary.—City of Philadelphia, to Use of Land Title Bank & Trust Co. v. Brenner, supra.

30. Mass.—Graton v. City of Cambridge, 156 N.E. 431, 259 Mass. 310.

31. Pa.—Sleppy v. County Commis-

sioners, Com Pl., 40 Luz. Leg. Reg. 143—In re Ordinance No. 218 of Borough of Westmont, Quar. Sess., 37 Mun. L. R. 298.

Va.—Commonwealth v. Rose, 168 S. E. 356, 160 Va. 177.

44 C.J. p 1345 note 45.

Commission

Under provisions of city charter that chief of police shall proceed to collect taxes on issuance of warrant directed to him and shall be entitled to collect commissions of specified per cent on all sums collected by him which shall be added to the taxes, the specified per cent allowed the chief of police is commission to be paid to the chief of police for making collection.—Munkwitz Realty & Investment Co. v. Diederich Schaefer Co., 286 N.W. 30, 231 Wis. 504.

32. Ala.—Chambers v. City of Montgomery, 177 So. 155, 235 Ala. 59.

Pa.—In re Ordinance No. 218 of Borough of Westmont, Quar. Sess., 37 Mun. L. R. 298.

44 C.J. p 1345 note 46.

33. Ind.—Kerr v. Register, 85 N.E. 790, 42 Ind. App. 375.

Extra services

A clerk in the tax collector's office was not entitled to compensation for extra services rendered pursuant to an alleged oral agreement between the mayor and a councilman that either of them might employ additional help in their respective departments, in absence of a contract for such extra services entered on the minutes or showing that payments were approved and allowed by an order of the city council.—Chinn v. City of Biloxi, 183 So. 375, 183 Miss. 27.

34. Ky.—Winchester v. Winchester Bd. of Education, 208 S.W. 492, 182 Ky. 313.

35. Ky.—Winchester v. Winchester Bd. of Education, supra.

cent of the moneys paid into the city treasury, he is entitled to no compensation if no money has been turned into the city treasury as a result of his efforts.³⁶ A marshal, in his capacity as collector, is not entitled to the fees earned by his successor in office,³⁷ even though the latter was illegally elected.³⁸

A defaulting tax collector has been held not to forfeit the right to commissions on taxes actually paid over by the collector because of his embezzlement of other taxes received;³⁹ but where a collector is guilty of misappropriating funds the municipality may offset its claim for such defalcation against the collector's claim for fees earned during his last term of office, regardless whether the funds were misappropriated during such or a prior term of office.⁴⁰

§ 2072. Contracts for Collection

In the absence of statutory or charter prohibition, a municipal corporation may make a contract with any person for the collection of any of its taxes, but it may not provide for compensation in an amount greater than that permitted by law or employ the collection device of contingent compensation where the statute requires compensation by fees only.

Where, under charter or statute, it is the duty of a particular municipal officer to collect taxes, a contract made with any other person to collect them has been held ultra vires;⁴¹ but in the absence of statutory or charter prohibition a municipal cor-

poration may make a contract with any person for the collection of any of its taxes,⁴² and is liable for a breach thereof,⁴³ although it may not provide for compensation in an amount greater than that permitted by statute or charter provision.⁴⁴ A municipal corporation having full charter power to provide for the collection of taxes may utilize banks as collection agencies⁴⁵ and adopt some reasonable and convenient method of remittance by such banks.⁴⁶

It has been held that a municipal corporation may employ a special attorney to enforce the payment of delinquent taxes for a stated commission on taxes collected;⁴⁷ but it has also been held that a municipal corporation may not, in the absence of statutory authority therefor, employ the collection device of contingent fees or compensation for services employed in the collection of public revenue,⁴⁸ and may not enter into a contract of employment with an attorney as a private practitioner to foreclose tax sale certificates on behalf of the municipality for a contingent attorney's fee from the proceeds of the sales.⁴⁹ A contract which is invalid by reason of the fixing of compensation as a per cent of the taxes recovered gives the attorney no right to recover damages on an alleged breach of the contract;⁵⁰ nor can the attorney recover on quantum meruit an amount in excess of the amount which could by express contract be authorized or legally paid by the governing body of the municipality.⁵¹ A contract for the collection of taxes must

36. Ala.—Chambers v. City of Montgomery, 177 So. 155, 235 Ala. 59.

37. Miss.—Coker v. Wilkinson, 106 So. 886, 142 Miss. 1.

38. Miss.—Coker v. Wilkinson, supra.

39. Pa.—Pentrack v. Brownstown Borough, 18 Pa. Dist. & Co. 127.

40. Tex.—First Nat. Bank v. Dupuy, Civ. App., 133 S.W.2d 238, error dismissed, judgment correct.

41. Ind.—Ft. Wayne v. Lehr, 88 Ind. 62.

42. La.—Gurley v. New Orleans, 5 So. 659, 41 La. Ann. 75.

Contracts for search of secreted and omitted property see supra § 2050.

43. Fla.—Godard v. Campbell, 196 So. 814, 143 Fla. 419.

Tex.—Bell v. Mansfield Independent School Dist., 124 S.W.2d 866, affirmed, 129 S.W.2d 629, 133 Tex. 403—City of South Houston v. Dabney, 120 S.W.2d 436, 132 Tex. 96—McCullum v. City of Richardson, Civ. App., 121 S.W.2d 423, error dismissed.

44 C.J. p 1345 note 54.

43. La.—Lafferranderie v. New Orleans, 3 La. 246.

44 C.J. p 1345 note 55.

44. Tex.—Dodson v. City of Del Rio, Civ. App., 172 S.W.2d 125, error refused.

45. Md.—Ghingher v. Mayor and City Council of Baltimore, 168 A. 125, 165 Md. 324.

46. Md.—Ghingher v. Mayor and City Council of Baltimore, supra.

Remittance by cashier's check Md.—Ghingher v. Mayor and City Council of Baltimore, supra.

47. Fla.—Godard v. Campbell, 196 So. 814, 143 Fla. 419.

48. Neb.—Darnell v. City of Broken Bow, 299 N.W. 274, 139 Neb. 844, 136 A.L.R. 101.

In Texas

(1) It has been held that statute authorizing cities to employ attorneys to collect delinquent taxes contemplates compensation by fees only, and does not authorize contract whereby attorney should receive a per cent of the taxes collected.—City of South Houston v. Dabney, 120 S.W.2d 436, 132 Tex. 96—

Dodson v. City of Del Rio, Civ. App., 172 S.W.2d 125, error refused.

(2) It has been held, however, that even if a contract providing for compensation on a percentage basis were invalid, a delinquent taxpayer could not defeat the payment of his taxes on the ground that the city exceeded its authority in allowing such compensation where the governing body of the city authorized the suit to be brought.—McCullum v. City of Richardson, Civ. App., 121 S.W.2d 423, error dismissed.

(3) A contract of employment of an attorney to collect taxes at a stipulated fee of a certain per cent of the amount collected was held not to violate a statute limiting the compensation payable to attorneys for the collection of state and county taxes.—McCullum v. City of Richardson, supra.

49. Neb.—Darnell v. City of Broken Bow, 299 N.W. 274, 139 Neb. 844, 136 A.L.R. 101.

50. Tex.—City of South Houston v. Dabney, 120 S.W.2d 436, 132 Tex. 96.

51. Tex.—Dodson v. City of Del

comply with statutory requirements as to the execution of municipal contracts generally,⁵³ and it may not be claimed that these requirements are inapplicable and that the contract is one governed by statutes dealing with the authority of the mayor to appoint an accountant to audit the books and accounts⁵³ or dealing with the duties and compensation of county tax assessors and collectors.⁵⁴

§ 2073. Compromise and Adjustment

The state legislature may not, in violation of a constitutional provision, release taxes owing to a municipal corporation or authorize the municipality to compromise a claim for taxes due it; but in the absence of a constitutional prohibition a municipal corporation may be authorized by statute to effect such a compromise, although its officers may not act in this respect except in conformity with the statute.

Ordinarily the state legislature may not, in violation of a constitutional provision, release assessments of taxes owing to a municipal corporation,⁵⁵ and, where the constitution of the state prohibits the legislature from authorizing a municipality to

release or extinguish in whole or in part the indebtedness or liability of any person or corporation to the municipality, the municipality has no power to compromise a claim for taxes.⁵⁶ So the municipality cannot release the property from liability for taxes in whole or in part even after it has passed to another than the original taxpayer,⁵⁷ and it will not be bound by an agreement negotiated by the city attorney with the taxpayer that the suit involving the right of the city to collect the tax shall abide the result of another suit to which the city is not a party and over which it has no control.⁵⁸ Even after a compromise has been made and the taxpayer has made a payment thereunder, the municipality may sue for the taxes,⁵⁹ without first paying back to the taxpayer the amount received under the void compromise agreement,⁶⁰ since it is sufficient to credit the amount paid on the taxes due.⁶¹ Also, a municipal corporation forbidden by its charter to compromise municipal taxes may not ratify an unauthorized compromise made by another.⁶²

Rio, Civ.App., 172 S.W.2d 125, error refused.

Statutory schedule

Where attorney fees which city could pay for collection of delinquent taxes were fixed in statutory schedule, there was no implied contract for payment of larger sum, since municipality must have power to enter into contract before it can be bound on implied contract to pay reasonable value of services rendered in reliance on an express contract which is void for some irregularity.—*Dodson v. City of Del Rio*, Tex.Civ.App., 172 S.W.2d 125, error refused.

52. Ala.—*Council v. City of Dothan*, 181 So. 293, 236 Ala. 166.

Issue for court

In certiorari proceeding to review resolutions of city authorizing contract whereby attorney was engaged to take necessary legal action to liquidate tax lien certificates held by city for stated compensation for each certificate, court was only concerned with legality of contract and not with fact that other cities had allegedly paid considerably less for similar work.—*Boscia v. City of Garfield*, 25 A.3d 251, 128 N.J.Law 267.

Mere authorization; rescission

Where resolution of councilmen of borough was a mere authorization to mayor and borough clerk to execute a contract with attorney for liquidation of tax title liens and agreement itself prepared by attorney contemplated formal execution of contract before binding obligations were to arise, no binding contract arose on part of borough notwith-

standing contract was executed by attorney and signed by borough clerk in attestation and by councilmen as witnesses and tax sale certificates were delivered to attorney, where mayor refused to sign; in such case subsequent resolution rescinding resolution authorizing agreement was valid.—*Samuel v. Borough of South Plainfield*, 54 A.2d 717, 136 N.J.Law 187.

53. Ala.—*Council v. City of Dothan*, 181 So. 293, 236 Ala. 166.

54. Ala.—*Council v. City of Dothan*, supra.

55. La.—*State ex rel. Tulane Home- stead Ass'n v. Montgomery*, 171 So. 28, 185 La. 777—*State ex rel. Salomon v. City of New Orleans*, App., 174 So. 692.

12 C.J. p 756 note 83.

Adjustment of valuation by agreement see supra § 2049.

Compromise of:

Amount required to redeem see infra § 2102.

Suits by city generally see infra § 2197.

Taxes generally see the C.J.S. title Taxation § 630, also 61 C.J. p 973 note 56—p 974 note 69—6.

"Indebtedness" or "obligations"

(1) Constitutional provision declaring that legislature shall have no power to release or extinguish "indebtedness" or "obligations" of any corporation or individual to the state, or any parish or municipal corporation thereof, includes taxes.—*State ex rel. Huggett v. Montgomery*, La.App., 167 So. 147.

(2) Statute authorizing sale of property adjudicated to state for un-

paid taxes for sum not less than value of property as fixed in assessment under which it was adjudicated to state was not violative of constitutional provision prohibiting legislature from extinguishing debts due municipality even though purchaser from state acquires property free of assessments for taxes due the city.—*Peters v. Twogood*, La. App., 167 So. 206, rehearing denied and amended 167 So. 841.

56. Ky.—*Clark County Nat. Bank v. Winchester*, 197 S.W. 1077, 177 Ky. 532.

44 C.J. p 1345 note 57.

Taxes held not released

Fact that order allowing claim against municipality required payment of taxes out of claim money did not make it unconstitutional as release of taxes to individual.—*Williams v. Tompkins*, Tex.Civ.App., 42 S.W.2d 106, reversed on other grounds *Tompkins v. Williams*, Com. App., 62 S.W.2d 70.

57. Ky.—*Middlesboro Town, etc., Co. v. Middlesboro*, 110 S.W. 355, 33 Ky.L. 469, rehearing denied 111 S.W. 335, 33 Ky.L. 961.

44 C.J. p 1345 note 58.

58. Ky.—*Frankfort v. Frankfort Deposit Bank*, 60 S.W. 19, 22 Ky. L. 1384, 57 S.W. 787, 108 Ky. 766, 22 Ky.L. 466.

59. Ky.—*Louisville v. Louisville R. Co.*, 68 S.W. 840, 24 Ky.L. 538.

60. Ky.—*Louisville v. Louisville R. Co.*, supra.

61. Ky.—*Louisville v. Louisville R. Co.*, supra.

62. Mo.—*Kansas City v. Hannibal, etc., R. Co.*, 81 Mo. 285.

Some statutes, however, have been held to authorize a compromise of taxes by the municipality,⁶³ or they may provide for an abatement of taxes in favor of taxpayers in default.⁶⁴ Also, in the absence of a constitutional prohibition, and independently of statutory provisions, it has been held in some jurisdictions that a municipality may compromise a claim for taxes,⁶⁵ as by accepting a deed of land for a road;⁶⁶ but in other jurisdictions it is held that a municipal corporation has no power to compromise⁶⁷ or remit⁶⁸ taxes in the absence of a statute granting such power. So state⁶⁹ or municipal⁷⁰ officers, or attorneys retained by a city to collect taxes by suit,⁷¹ may not remit, abate, settle, or compromise taxes due the municipality, except in conformity with statute. In the absence of an authorizing statute, a claim for city taxes cannot be compromised by a county court.⁷²

Adjustment of back taxes. Under some statutes providing for the appointment by the court of commissioners to adjust taxes in arrears, the making of an application for the appointment is discretionary

with the municipal authorities,⁷³ and, where an order of appointment has been annulled on the application of the municipal authorities, the order of annulment will not be disturbed by a higher court.⁷⁴ Sometimes such a statute is so worded and construed as to apply only on arrearages which had accrued prior to the date of the approval of the act,⁷⁵ and not to authorize the adjustment of unpaid taxes subsequently accruing;⁷⁶ and so a supplemental act merely extending the authority of the board has been construed in the same way to give it power to deal with taxes in arrears up to the date of its enactment,⁷⁷ but not to invest the commissioners with a prospective jurisdiction to deal independently with future arrearages.⁷⁸ The vacation by the court of its order confirming an award of commissioners of adjustment, and the substitution therefor of a final order with the consent of the parties and based on a settlement agreement in which a gross amount for a series of years was substituted for the award, cannot be questioned by the municipality in an equity action brought by the taxpayer to restrain the collection of the tax.⁷⁹

b. Methods of Collection

§ 2074. In General

- a. General principles
- b. Particular methods

a. General Principles

Questions relating to the manner of collecting municipal taxes depend almost entirely on statutory or charter provisions or ordinances enacted under authority con-

ferred by charter or statute; and, within limits imposed by such provisions, a municipal corporation generally may enforce collection by the adoption of such means as will render effective the exercise of the power of enforcement.

Questions relating to the manner of collecting municipal taxes depend almost entirely on statutory or charter provisions⁸⁰ or ordinances enacted under

63. Pa.—In re Weible's Tax Compromise, 48 Pa. Dist. & Co. 213, 2 Lawrence L.J. 140.

64. Pa.—Fidelity Trust Co. v. Kirk, 25 A.2d 825, 344 Pa. 455.

Statute held valid

Pa.—Fidelity Trust Co. v. Kirk, supra.

65. Tex.—San Antonio v. San Antonio R. Co., 54 S.W. 281, 22 Tex. Civ.App. 148.

66. Tex.—Ostrum v. San Antonio, 71 S.W. 304, 30 Tex. Civ.App. 462.

67. Mo.—State v. Hannibal, etc., R. Co., 75 Mo. 208.

68. Tenn.—Graham v. Spivey, 133 S.W.2d 460, 175 Tenn. 145.

69. U.S.—Lawrence Print Works v. Lynch, D.C. Mass., 52 F.Supp. 615, affirmed, C.C.A., 146 F.2d 996.

Before issuance of warrant

Letter of state commissioner of taxation given before tax warrant had been issued was invalid as an authority to abate taxes.—Lawrence Print Works v. Lynch, supra.

70. Me.—Inhabitants of Town of

Frankfort v. Waldo Lumber Co., 145 A. 241, 128 Me. 1.

Pa.—In re Compromise and Settlement of City Tax Claims against Property of Lasczewski, Com.Pl., 29 Erie Co. 349.—In re Compromise of Taxes, Andrews Land Corp., Com.Pl., 28 Erie Co. 324, 60 York Leg Rec. 10.—In re Compromise of Delinquent Taxes on Lot of Ground and Bldg. thereon, in Borough of Scottdale, Com.Pl., 28 West.Co.L.J. 61.

Mayor

U.S.—Lawrence Print Works v. Lynch, D.C. Mass., 52 F.Supp. 615, affirmed, C.C.A., 146 F.2d 996.

71. Me.—Inhabitants of Town of Frankfort v. Waldo Lumber Co., 145 A. 241, 128 Me. 1.

72. Mo.—Kansas City v. Hannibal, etc., R. Co., 81 Mo. 285.

73. N.J.—Voorhees v. North Wildwood, 81 A. 264, 80 N.J. Law 81.

74. N.J.—Voorhees v. North Wildwood, supra.

75. N.J.—Voorhees v. North Wildwood, supra.

76. N.J.—Voorhees v. North Wildwood, supra.

77. N.J.—Jersey City v. Speer, 72 A. 448, 78 N.J. Law 34, affirmed 76 A. 1037, 79 N.J. Law 598.

78. N.J.—Jersey City v. Speer, supra.

79. N.J.—Erie El. Co. v. Jersey City, 90 A. 8, 83 N.J. Eq. 71, affirmed 92 A. 599, 84 N.J. Eq. 176.

80. Ky.—Craig v. City of Lexington, 93 S.W.2d 852, 263 Ky. 798.

N.Y.—Mount Vernon Trust Co. v. City of Mount Vernon, 12 N.Y.S. 2d 120, affirmed 39 N.Y.S.2d 416, 265 App. Div. 940.

Pa.—City of Philadelphia v. Sley System Garages, 39 Pa. Dist. & Co. 461.

Legislative function

The enactment of a law or ordinance fixing the method of enforcement is a legislative function.—Southern Ry. Co. v. City of Danville, 7 S.E.2d 896, 175 Va. 300.

Statute held valid

Fla.—City of Coral Gables v. Certain

authority conferred by charter or statute.⁸¹ Where a municipal corporation has been granted express power to enforce taxes, it has the implied power to enforce collection by the adoption of such means as will render the exercise of the power effective.⁸² A statute or charter provision providing certain methods of collecting taxes does not preclude the adoption of other methods not inconsistent therewith where the statutory remedy is by its terms cumulative,⁸³ but it has been held that a municipality is without power to change by local law the method of collecting taxes established by the legislature,⁸⁴ and that, where a statute specifies certain methods of collection, a municipality cannot by ordinance provide a new method, not provided by law, to collect delinquent taxes.⁸⁵

Where it is so provided by constitutional or statutory provision, municipalities have the right to enforce collection of their taxes in the same manner as the state⁸⁶ or county,⁸⁷ and the state or county method prevails if the statute so provides,⁸⁸ in which case changes made in the state method apply

also to the collection of municipal taxes.⁸⁹ Unless otherwise provided by constitution or statute, however, the method of enforcing municipal taxes may vary from the procedure provided for the enforcement of state and county taxes,⁹⁰ and such differences in procedure are valid when the tax is legal and the procedure adopted by the municipality does not deny due process or equal protection of the laws.⁹¹ The collection of municipal taxes does not follow the method used in collecting state or county taxes where a different method of collecting municipal taxes is provided.⁹² Where a statute or charter provides several remedies for the enforcement of delinquent taxes and such remedies are cumulative and consistent, the municipality has an option, although not technically an election, between such remedies unless contract rights are involved,⁹³ and it is not required to adopt one statutory method of collection rather than another.⁹⁴ A municipality is not limited in the collection of taxes to statutory remedies; equitable relief may be invoked if a proper basis for it is established.⁹⁵ In any case, where persons have made it impossible for the city

Lands Upon Which Taxes Are Delinquent, 149 So. 36, 110 Fla. 189.

Application to villages

Under statute making article governing collection of taxes applicable to cities or towns, the word "towns" should be read in the broad sense as including villages, since every village is situated in a town and is territorially part of the town although having a separate government.—*Village of Massapequa Park v. Massapequa Park Villa Sites*, 15 N.E.2d 177, 278 N.Y. 28.

81. N.Y.—*In re City of New Rochelle*, 46 N.Y.S.2d 645, 182 Misc. 176, affirmed 49 N.Y.S.2d 673, 268 App.Div. 182, affirmed 60 N.E.2d 838, 294 N.Y. 678, certiorari denied *Echo Bay Waterfront Corp. v. City of New Rochelle*, 66 S.Ct. 24, 326 U.S. 720, 90 L.Ed. 426.

Pa.—*City of Philadelphia v. Westinghouse Elec. & Mfg. Co.*, 55 Pa. Dist. & Co. 343.—*City of Philadelphia v. Sley System Garages*, 39 Pa. Dist. & Co. 461.
44 C.J. p 1346 note 79.

82. Fla.—*Ranger Realty Co. v. Miller*, 136 So. 546, 102 Fla. 378.

Withholding license

City ordinance prohibiting issuance of license to anyone failing to pay city personal tax for preceding year was not void on ground that it provided a method of collecting taxes not authorized by statute, where statute specifically provided that the method of collection therein fixed should not impair other methods of collection.—*Hammitt v. Kansas City*, 173 S.W.2d 70, 351 Mo. 192.

83. Mo.—*Hammitt v. Kansas City*, supra.

84. N.Y.—*County Securities, Inc. v. Seacord*, 15 N.E.2d 179, 278 N.Y. 34.—*Mount Vernon Trust Co. v. City of Mount Vernon*, 12 N.Y.S.2d 120, affirmed 39 N.Y.S.2d 416, 265 App.Div. 940.

85. N.J.—*E. E. Leach, Inc. v. James*, 22 A.2d 573, 127 N.J.Law 318.

86. La.—*State ex rel. Westover Realty Co. v. City of New Orleans*, 182 So. 329, 190 La. 208.—*Conservative Homestead Ass'n v. Flynn*, 150 So. 564, 178 La. 17.

87. Cal.—*Los Angeles County v. Superior Court in and for Los Angeles County*, 112 P.2d 10, 17 Cal. 2d 707.

Incidents of tax system

A city adopting tax system of county, officers of which assumed city tax functions, must be held to have accepted such system charged with all incidents created by valid statutory and constitutional provisions applicable to county collection of taxes.—*Los Angeles County v. Superior Court in and for Los Angeles County*, supra.

88. S.C.—*Grier v. City Council of City of Spartanburg*, 26 S.E.2d 690, 203 S.C. 203.

44 C.J. p 1346 note 81.
Applicability of state and county tax systems in general see supra § 2031.

89. N.C.—*Wilmington v. Sprunt*, 19 S.E. 348, 114 N.C. 310.

44 C.J. p 1346 note 82.

90. Fla.—*Ranger Realty Co. v. Miller*, 136 So. 546, 102 Fla. 378.

Statute held inapplicable

Statute relating to delinquent state and county taxes was held not to apply to municipal taxes and certificates.—*State ex rel. Dofnos Corporation v. Lehman*, 131 So. 333, 100 Fla. 1401.

91. Fla.—*Ranger Realty Co. v. Miller*, 136 So. 546, 102 Fla. 378.

92. Tex.—*Dill v. Rising Star, Com. App.*, 269 S.W. 769.

"Principles for state taxation"

The mechanics of collecting authorized tax levies by a city are not of the principles established for state taxation within constitutional provision that all property shall be taxed on "the principles established for state taxation," where no other organic provisions are violated.—*Rio Vista Hotel & Improvement Co. v. Belle Mead Development Corporation*, 182 So. 417, 132 Fla. 88, certiorari denied 59 S.Ct. 251, 305 U.S. 655, 83 L.Ed. 424, rehearing denied 59 S.Ct. 364, 305 U.S. 676, 83 L.Ed. 438.

93. Fla.—*State ex rel. Van Ingen v. Panama City*, 171 So. 760, 126 Fla. 776.

94. Va.—*Pollard & Bagby v. City of Richmond*, 24 S.E.2d 564, 181 Va. 181.

95. N.J.—*City of Newark v. Jos. Hollander, Inc.*, 42 A.2d 872, 136 N.J.Eq. 589, affirmed 46 A.2d 786, 138 N.J.Eq. 112.

to pursue its statutory remedy for the collection of taxes, they may be equitably estopped to assert that the city is limited to such remedy.⁹⁶ A court of chancery has been held to have general jurisdiction over proceedings for the collection of taxes by municipalities,⁹⁷ and a charter provision authorizing the city to elect to enforce its tax lien on realty in a court of equity adds nothing to the power of the city, since a city has a right under general law to proceed in equity or at law.⁹⁸

General laws and special statutes. Under some constitutional requirements methods of collection must conform to the general laws,⁹⁹ even though the municipality has a home-rule or freeholders' charter adopted under authority of law;¹ but in the absence of a constitutional requirement that the collection of taxes must conform to the general laws a method prescribed by a special statute or charter will exclude methods under the general law.²

Repeal of statutes. Methods of collecting municipal taxes adopted in an earlier charter or statute are not abrogated by the enactment of later statutes where the later statutes do not deal with municipal taxes,³ or, if they deal with municipal taxes, they do so in a way not inconsistent with the provisions of the earlier statute,⁴ or they preserve the provisions of the prior law either expressly or by fair implication.⁵ Even where the provisions conflict, those contained in a special city charter will prevail over a general law subsequently enacted in the absence of any express repealing clause.⁶ An earlier special charter is repealed, however, by a subsequently enacted general law which in terms provides for repeal of the charter at the election of the city, and the city so elects,⁷ in which case the city may proceed to the collection of back taxes

according to the method provided in the general law.⁸

b. Particular Methods

(1) In general

(2) Receivership or sequestration

(1) In General

Collection of taxes due a municipal corporation may be enforced, under various statutes, by the withholding of money payable by the municipality to the tax debtor or by the withholding by an employer of taxes payable by his employee.

In addition to the ordinary modes of collection of taxes discussed *infra* §§ 2075-2099, collection may be enforced, under a statute so providing, by the withholding of payment by the municipal treasurer of any money payable to a person whose taxes are due and unpaid, whether or not they are secured by a tax title held by the municipal corporation.⁹ Also, an ordinance may require that an employer withhold and return taxes on employees' earnings,¹⁰ without payment of compensation to the employer for such service;¹¹ and an employer corporation present and subject to the jurisdiction of the city council may be required to collect a wage tax at the source from residents of the city even though they are employed and are paid by the corporation outside the city.¹² The city may proceed to attach land to fix a lien for taxes assessed against realty,¹³ but a statute furnishing a summary remedy for the collection of taxes by a collector on personality has been held to negative the right of the mayor of the city to enforce the collection of taxes by the institution of an attachment proceeding.¹⁴ Also, a city has been held without authority to provide for the collection of a sales tax by the enforcement of a mechanics' lien therefor.¹⁵ A city has been held not entitled to maintain a credi-

96. N.J.—City of Newark v. Jos. Hollander, Inc., *supra*.

97. Mich.—City of Detroit v. Safety Inv. Corporation, 285 N.W. 42, 288 Mich. 511.

98. Va.—Lowery v. City of Norfolk, 19 S.E.2d 684, 179 Va. 495.

99. Okl.—Sapulpa v. Land, 223 P. 640, 101 Okl. 22.

1. Okl.—Sapulpa v. Land, *supra*.

44 C.J. p 1346 note 85.

2. Tex.—O'Connor v. Laredo, Civ. App., 167 S.W. 1091.

3. Mo.—Kansas City v. Payne, 71 Mo. 159.

Pa.—Ruth's Appeal, 10 Wkly.N.C. 498.

4. La.—Bond v. Hiestand, 20 La. Ann. 189.

5. Tenn.—Goodbar v. Memphis, 81 S.W. 1061, 113 Tenn. 20.

Tex.—Galveston, etc., R. Co. v. Galveston, 74 S.W. 537, 96 Tex. 520.

6. N.J.—Stonington Sav. Bank v. Davis, 14 N.J.Eq. 286.

7. Mo.—State v. Tufts, 15 S.W. 954.

8. Mo.—State v. Tufts, *supra*.

9. Mass.—Boston Five Cents Sav. Bank v. City of Boston, 61 N.E.2d 124, 318 Mass. 183.

10. Pa.—Bloom v. City of Scranton, 64 Pa.Dist. & Co. 358—City of Philadelphia v. Westinghouse Elec. & Mfg. Co., 55 Pa.Dist. & Co. 343.

11. Pa.—Bloom v. City of Scranton, 64 Pa.Dist. & Co. 358.

12. Pa.—City of Philadelphia v. Westinghouse Elec. & Mfg. Co., 55 Pa.Dist. & Co. 343.

13. Tenn.—Cox v. City of Bristol, 191 S.W.2d 160, 183 Tenn. 82.

Description of land

Court properly sustained attachment by city to fix a lien for taxes assessed against realty, although description of realty levied on did not appear in officer's return several years after levy, where landowner in answer to cross bill on which levy was made did not assail validity of attachment but in effect admitted its validity, and clerk and master's docket contained complete description entered at time of attachment. —Cox v. City of Bristol, *supra*.

14. Tex.—Black v. Baker, 111 S.W. 2d 706, 130 Tex. 454.

15. N.Y.—In re Thomas J. Waters & Sons, 2 N.Y.S.2d 595, 166 Misc. 783.

tor's bill to enforce the collection of personal property taxes assessed against a corporation where the corporation had not been dissolved nor did it intend to effect a dissolution.¹⁶ A tax on the gross receipts from all transactions involved in a certain business may not be enforced by a suit to enjoin the operation of the business by an operator who has refused to pay the tax.¹⁷

(2) Receivership or Sequestration

The collection of taxes may sometimes be enforced by a receivership or sequestration of the tax debtor's property for the application of the rents and profits to the tax indebtedness, but settled equitable principles govern the appointment of a receiver for this purpose.

Under some statutes a city, on ex parte application, may secure the immediate appointment of its treasurer as receiver of the property affected by a tax lien.¹⁸ Such a statute should not be construed as repealing settled equitable principles governing the appointment of a receiver, or as depriving owners and mortgagees of substantive property rights, or as limiting the jurisdiction of a court to apply such principles and to protect such rights,¹⁹ and accordingly the city has no absolute right to the appointment of its treasurer as receiver.²⁰ The ownership of a valid tax lien is essential to the city's right to enforce collection of taxes due in this manner.²¹

Where the city treasurer is appointed receiver of business property as a method to enforce the payment of tax liens held by the city, the city is entitled to compel the owner to pay the receiver the reasonable rental value of the premises occupied by the owner in the conduct of its business;²² but the court should not fix the rent or occupation charge for the premises on affidavits submitted by the city without a hearing thereon,²³ and the taxpayer occupying the premises may not be compelled to pay occupation rent for the period before the appointment of the receiver.²⁴ The receiver has power to apply moneys received not only in payment of unpaid taxes for which the city held the lien, but also in payment of subsequently accruing taxes,²⁵ and he may apply the rents to the satisfaction of unpaid taxes rather than to interest due the city.²⁶ After the city has sold its lien the owner of the realty is entitled to an order directing the receiver to turn over to him the realty before the receiver's account is settled and he is formally discharged, where the rents are in arrears and have not been collected.²⁷

Under some statutes a sequestrator may be appointed to collect rents in aid of the municipal lien for taxes,²⁸ and, in the distribution of rents collected by such sequestrator, the only items which

16. N.J.—City of Bayonne v. East Coast Shipyards, 44 A.2d 405, 137 N.J.Eq. 165.

17. Pa.—City of Philadelphia v. Sley System Garages, 39 Pa.Dist. & Co. 461.

18. N.Y.—In re 801-815 East New York Avenue, Borough of Brooklyn, City of New York, 48 N.E.2d 502, 290 N.Y. 236.

Statute held valid

N.Y.—In re 801-815 East New York Ave., Borough of Brooklyn, City of New York, supra.

Policy of statute giving to city an additional remedy for collection of its unpaid real estate taxes through appointment of the city treasurer as receiver of the property whenever the city is the owner or holder of a transfer of tax lien, is to insure the collection of all taxes.—In re Block 7516, Section 22, Lot 1117, Borough of Brooklyn, City of New York, 61 N.Y.S.2d 161.

Order held not invalid

Contention that city treasurer, appointed receiver of rents and profits of realty on which city held tax lien, operated hotel business on realty, using for that purpose personal property in no way subject to tax lien and taking profits derived from such business and use of such personalty, if established, would merely

show that receiver was going beyond authority of order but would not render order appointing receiver invalid.—City of New York v. Darlington, 30 N.Y.S.2d 10, 177 Misc. 87.

19. N.Y.—City of New York v. Darlington, supra.

Property not in custodia legis

The appointment of trustees for bondholders under statute did not place trust estate in custodia legis for plenary administration so as to preclude the city, which had previously become owner of separate transfers of tax liens affecting the same property, from obtaining the appointment of receiver of rents, issues, and profits for satisfaction of its lien.—Application of City of New York for Rents, etc., from Section 7, Block 2078, Lots 24-28, 33, 34, Borough of Brooklyn, 39 N.Y.S.2d 25, 179 Misc. 371.

20. N.Y.—City of New York v. Darlington, 30 N.Y.S.2d 10, 177 Misc. 87.

21. N.Y.—City of New York v. Darlington, supra.

Prima facie case

The city collector's books made out a prima facie case as to ownership by city of a valid tax lien essential to city's right to appointment of its treasurer as receiver.—

City of New York v. Darlington, supra.

Fact questions regarding validity of tax lien on realty and transfer thereof to city, so as to entitle city to appointment of its treasurer as receiver, should not be determined on affidavits on motion to vacate ex parte order appointing such receiver.—City of New York v. Darlington, supra.

22. N.Y.—In re Section 12, Block 3714, Borough of Brooklyn, City of New York, 48 N.Y.S.2d 154, 183 Misc. 84.

23. N.Y.—In re Section 12, Block 3714, Borough of Brooklyn, City of New York, supra.

24. N.Y.—In re Section 12, Block 3714, Borough of Brooklyn, City of New York, supra.

25. N.Y.—In re Block 7516, Section 22, Lot 1117, Borough of Brooklyn, City of New York, 61 N.Y.S.2d 161.

26. N.Y.—City of New York v. 952 Fifth Avenue Corporation, 47 N.Y.S.2d 419, 181 Misc. 705.

27. N.Y.—In re Block 7516, Section 22, Lot 1117, Borough of Brooklyn, City of New York, 61 N.Y.S.2d 161.

28. Pa.—City of Philadelphia v. Midrealty Co., 51 Pa.Dist. & Co.

may be deducted before applying the balance to the payment of municipal taxes against the property are those contracted by the sequestrator in the proper exercise of his enumerated powers;²⁹ all other charges on the property, especially those resulting from contracts by persons other than the sequestrator and accumulations on encumbrances and liens, are specifically deferred to the lien of municipal taxes.³⁰ As long as an adjudication on the account of a sequestrator of rents is within the control of the court it may correct any error therein, without regard to the means by which such error is brought to its attention or to the technical right of a substituted sequestrator to file exceptions to the adjudication.³¹

Discovery. An assessment by a city in compliance with a tax statute, and the issuance of executions on such assessments, and the seizure and sale of the property, constitute a "proceeding" within the meaning of another statute giving a court of equity jurisdiction in a proper case to decree a discovery if ancillary to some other proceeding.³²

378—Petition of Pittsburgh School Dist., Com.Pl., 90 Pittsb.Leg.J. 462.

29. Pa.—City of Philadelphia v. Midrealty Co., 51 Pa.Dist. & Co. 378.

30. Pa.—City of Philadelphia v. Midrealty Co., supra.

31. Pa.—City of Philadelphia v. Midrealty Co., supra.

32. Ga.—Coca-Cola Co. v. Atlanta, 110 S.E. 730, 152 Ga. 558, 23 A.L.R. 1339, certiorari denied 42 S.Ct. 585, 259 U.S. 581, 66 L.Ed. 1074, error dismissed 43 S.Ct. 166, 260 U.S. 760, 67 L.Ed. 501.

33. S.C.—Rothrock v. Oakman, 10 S.E.2d 345, 195 S.C. 123—State ex rel. Daniel v. Textile Hall Corporation, 194 S.E. 66, 185 S.C. 406. Tex.—McCollum v. City of Richardson, Civ.App., 121 S.W.2d 423, error dismissed.

44 C.J. p 1344 note 2.

Action to foreclose lien against land see infra § 2087.

Provision held valid

City charter provision authorizing suit for collection of taxes was held not in conflict with constitution or state law.—Moody-Seagraves Co. v. City of Galveston, Tex.Civ.App., 43 S.W.2d 967, error refused.

Failure to certify delinquency

Where the municipal official charged with the duty of collecting delinquent taxes fails to act before a certain date by certifying delinquencies to the trustee for action by the delinquent tax attorney of the

county, and suit has been instituted to collect delinquent state and county taxes, the municipality has the right to institute suit for the recovery of delinquent municipal taxes.—State v. Delinquent Taxpayers, 167 S.W.2d 690, 26 Tenn.App. 62.

34. Tex.—Henrietta v. Eustis, 26 S.W. 619, 87 Tex. 14.
44 C.J. p 1347 note 8.

35. Ky.—Planters Bank & Trust Co. of Hopkinsville v. City of Hopkinsville, 159 S.W.2d 25, 289 Ky. 451—Rains v. City of Lexington, 145 S.W.2d 516, 284 Ky. 609—Craig v. City of Lexington, 93 S.W.2d 852, 263 Ky. 798.

Me.—City of Eastport v. Jonah, 187 A. 471, 134 Me. 428.

N.Y.—City of Buffalo v. Giesecke, 295 N.Y.S. 528, 162 Misc. 409.

Pa.—Murney v. Rudderow, 196 A. 553, 129 Pa.Super. 368.

S.C.—Rothrock v. Oakman, 10 S.E.2d 345, 195 S.C. 123.

Tenn.—State v. Rowan, 106 S.W.2d 861, 171 Tenn. 612.

44 C.J. p 1347 note 6.

Provision held valid

Provision in charter imposing personal liability for taxes on personal property is severable from, and not rendered invalid by, unconstitutional provision contained in same section but different paragraph authorizing taxpayer to plead four-year statute of limitations in suit brought by city for taxes.—Sam Bassett Lumber Co. v. City of Houston, Civ.App., 194 S.W.

§ 2075. Actions for Unpaid Taxes

a. In general

b. Persons liable to suit

a. In General

A municipal corporation may enforce the collection of taxes by action or suit in the courts where the power to sue has been conferred by statute or charter, and it may in such case recover a personal judgment.

As a general rule a municipal corporation may enforce the collection of taxes by action or suit in the courts where the power to sue has been conferred by statute or charter,³³ and, where legislative provisions give a remedy by action and also other remedies, such remedies are generally held to be cumulative.³⁴ So a municipality may sue for recovery of a personal judgment for unpaid taxes under authority conferred by statute or charter,³⁵ and, where the charter gives the city council power to determine the method of collecting taxes, the remedy by suit may be provided by ordinance.³⁶ Under some statutes, however, a personal judgment for real estate taxes may be obtained only against a landowner residing within the municipality in which the property is assessed,³⁷

2d 114, reversed on other grounds 198 S.W.2d 879, 145 Tex. 492.

Tax as "debt"

Statutory provisions for collection of taxes for the city by action of debt against person assessed, or against some other person owning land, or by attachment against non-resident owner, merely relate to procedure for collection of tax and do not change character of tax or make the tax a "debt" within the ordinary meaning of that term.—Boyd v. Dillman, 197 A. 830, 9 W.W.Harr. Del., 231.

Purpose of tax

Statute imposing personal liability for taxes assessed by municipality, uses word "municipality" as meaning that tax is for municipal purposes.—Vanzandt v. Town of Braxton, 14 So.2d 222, 194 Miss. 863.

Suit by another

City may bring action to enforce collection of taxes, or may be made party to action by another lien claimant and be required to come in and assert lien.—Wood's Ex'x v. City of Middlesboro, 90 S.W.2d 1018, 262 Ky. 627.

36. Wyo.—Albany Mut. Bldg. Assoc. v. Laramie, 65 P. 1011, 10 Wyo. 54.

37. N.Y.—Village of Massapequa Park v. Massapequa Park Villa Sites, 15 N.E.2d 177, 278 N.Y. 28—Village of Lynbrook v. Otto, 194 N.E. 766, 266 N.Y. 808.

Trustee, a domestic banking cor-

whose name is correctly entered on the assessment rolls of the city,³⁸ and not against a nonresident.³⁹ A city may be entitled to maintain an action to collect taxes which had become a lien subsequent to taxes for which a tax sale was had and tax sale certificates theretofore issued.⁴⁰

Independently of statute, there is some conflict of authority as to whether taxes may be enforced by a personal action. On the theory that a tax is not a debt in the ordinary sense, it has been held that no action can be maintained for its collection, in the absence of statutory provision therefor,⁴¹ and that, where other remedies but no action to recover a personal judgment are provided for by statute, the statutory remedies are exclusive.⁴² Some decisions, however, hold that the rule against recovery by personal action in the absence of statutory authorization applies only where the statute provides other remedies,⁴³ and that if a statute makes no provision of any kind for collection, a remedy by personal action is implied,⁴⁴ the right of action in such case belonging to the people of the state,⁴⁵ and not to the city.⁴⁶ According to other decisions a city, independently of statute, may bring suit to recover a personal judgment for a tax

due to it the same as in the case of any other debt owing to the municipality,⁴⁷ and other remedies, even though they are the only remedies expressly granted by statute, are not exclusive.⁴⁸ The right of a municipality to maintain a separate suit for delinquent taxes due it must be challenged in such suit, and may not be determined in a suit by the state to collect state and county taxes wherein the municipality is not a party.⁴⁹

b. Persons Liable to Suit

An action for unpaid municipal taxes should be brought against the person who is directly and primarily liable for the payment of the tax.

An action for unpaid municipal taxes, where it is a proper method of enforcing collection, should be brought against the person who is directly and primarily liable for the payment of the tax.⁵⁰ Ordinarily there is no personal liability to a municipal corporation for unpaid taxes on realty resting on anybody other than the registered or real owner,⁵¹ and a mortgagee in possession, as such, is not personally liable to the municipality for payment of taxes.⁵² When the real owner of property sets up an irresponsible party merely to hold title and retains the beneficial interest for himself, the mu-

poration with its principal offices in city, was a resident of the city within meaning of section of tax law providing that if owner of realty is a resident of tax district in which realty is assessed, and his name is correctly entered on assessment roll, he shall be personally liable for tax.—In re Martin's Will, 66 N.Y.S.2d 679, 187 Misc. 980.

38. N.Y.—In re Martin's Will, 66 N.Y.S.2d 679, 187 Misc. 980.

Trustee was sufficiently named on assessment rolls of city, so as to make it personally liable for taxes assessed against realty where trustee's name was given with the statement that it was trustee for deceased testatrix, although there was no reference to testatrix' estate or to the names of the beneficiaries under the trust set up under the testatrix' will.—In re Martin's Will, 66 N.Y.S.2d 679, 187 Misc. 980.

39. N.Y.—Village of Massapequa Park v. Massapequa Park Villa Sites, 15 N.E.2d 177, 278 N.Y. 28.

40. N.Y.—City of Beacon v. Asher Bernstein Realty Corp., 57 N.Y.S.2d 659, 185 Misc. 262, motion denied 60 N.Y.S.2d 616, 270 App.Div. 852.

41. Mich.—Schaefer v. Woodmere Cemetery Ass'n, 239 N.W. 300, 256 Mich. 332.

N.Y.—Village of Massapequa Park v. Massapequa Park Villa Sites, 15 N.E.2d 177, 278 N.Y. 28.

44 C.J. p 1344 note 1, p 1347 note 10.

Deficiency after sale

Under the statute providing for the raising of revenue for city purposes, and for the collection of taxes therein, a tax is not a debt, and hence estate of insane person was not chargeable with tax deficiencies remaining after application of full proceeds of sale of lands taxed to payment of delinquent taxes.—In re Schwartz, Del.Ch., 45 A.2d 461.

42. N.Y.—Rochester v. Gleichauf, 82 N.Y.S. 750, 40 Misc. 446.

44 C.J. p 1347 note 11.

43. N.Y.—Sisson v. Kodziesen, 183 N.Y.S. 493, 111 Misc. 446.

44. N.Y.—Sisson v. Kodziesen, supra.

45. N.Y.—Sisson v. Kodziesen, supra.

46. N.Y.—Sisson v. Kodziesen, supra.

47. Tex.—Joy v. City of Terrell, Civ. App., 143 S.W.2d 704, error dismissed, judgment correct.

44 C.J. p 1347 note 16.

48. Md.—Baltimore v. Howard, 6 Harr. & J. 383.

44 C.J. p 1347 note 17.

49. Tenn.—State v. Southern Lumber Mfg. Co., 57 S.W.2d 454, 165 Tenn. 671.

50. Pa.—Fassitt v. North Tioga Building & Loan Ass'n, 2 A.2d 499, 133 Pa.Super. 146.

Retention of title

Where lot was sold to city for delinquent taxes but no certificate of sale was ever recorded, the original owner retained title and was personally liable to city for taxes against property assessed in such original owner's name subsequent to the tax sale.—City of Richmond v. Monument Ave. Development Corp., 34 S.E.2d 223, 184 Va. 152.

Stipulation pour autrui

The assumption of a municipal tax in a contract of sale is not a stipulation pour autrui for the city's benefit so as to enable city to recover against party making the assumption rather than against the tax debtor.—Homestead Assoc. v. Garland, 31 So. 892, 107 La. 476.

51. Pa.—Fassitt v. North Tioga Building & Loan Ass'n, 2 A.2d 499, 133 Pa.Super. 146.

52. Pa.—Fassitt v. North Tioga Building & Loan Ass'n, supra.

Possession on condition broken

A mortgagee who, on condition broken, takes possession of premises, pursuant to provisions of mortgage, does not thereby become either real or registered owner of premises, with respect to mortgagee's liability for city taxes; mortgagee sustains no trust relation to either city or prior mortgage holder, with respect to mortgagee's liability for city taxes.—Fassitt v. North Tioga Building & Loan Ass'n, supra.

municipality, or one subrogated to its rights, may sue the real or beneficial owner to collect any tax levied;⁵³ but where a person has transferred real estate to another and retained no beneficial interest for himself he is not liable to the municipality for taxes accruing after the transfer.⁵⁴

An owner of realty on which a tax has been assessed has been held not personally liable therefor for the years during which the land was owned by another;⁵⁵ but it has also been held that, although as between the seller and buyer the seller may be liable for taxes, every person who becomes the owner of property on which taxes have not been paid is personally liable therefor to the municipality, and personal judgment may be recovered against him.⁵⁶ In a proceeding to determine the owner of the proceeds of a fire insurance policy on a dwelling house which burned, it has been held that the court may not order the owner of the dwelling to pay part of the proceeds to satisfy the claim for delinquent taxes of a city which intervened in the proceeding.⁵⁷ A purchaser of land at a trustee's sale has been held not liable to the city for unpaid taxes where the trustee failed to apply the proceeds of the sale to the payment of taxes as required by law, since the trustee in such case acted as agent for the city in collecting taxes.⁵⁸

§ 2076. — Conditions Precedent

There must be a compliance with conditions precedent fixed by statute or ordinance before bringing suit to recover municipal taxes.

There must be a compliance with conditions precedent fixed by statute or ordinance before bringing suit to recover municipal taxes.⁵⁹ So a return by the tax collector of "no property found"⁶⁰ or the giving of notice that the taxes are due and demanding their payment⁶¹ may be a condition precedent to suit; but a demand or notice is not neces-

sary where the statute requiring it is not applicable to the particular case.⁶² A resolution is usually sufficient as a basis for the institution of the action,⁶³ and it is not required that authority to bring suit should be given by the county treasurer to the municipal officer⁶⁴ or that the city attorney should have been directed to file suit;⁶⁵ but it has also been held that compliance with a statutory provision authorizing the mayor and treasurer of the city to which the tax is due to direct the commencement of the action is a condition precedent to the maintenance of the action.⁶⁶

Under particular statutory and charter provisions, it has been held not to be a condition precedent to the bringing of the action that the lists should have been prepared,⁶⁷ that verified claims for taxes should have been put in the city attorney's hands by the tax collector,⁶⁸ or that money received by the city under a void compromise agreement for the payment of the taxes should be returned to the taxpayer before bringing suit for the balance, as discussed supra § 2073. Efforts to collect the tax by distress are not, in some jurisdictions, a condition precedent in an action to recover the tax,⁶⁹ nor is it necessary that the tax collector should have exhausted the powers of a sheriff given him by statute in order that the city may institute an action to recover the tax.⁷⁰ All errors in the assessment which are fatal to the maintenance of an action for the recovery of the tax must be corrected before action is brought.⁷¹

§ 2077. — Time to Sue and Limitations

A suit to collect unpaid municipal taxes may not be brought before the time fixed by statute, but such a suit must be brought within the time limited by statute.

Under some statutes a suit to collect unpaid municipal taxes may not be brought before a specified

53. Pa.—*Starling v. West Erie Avenue Building & Loan Ass'n*, 3 A.2d 387, 333 Pa. 124.

54. Pa.—*Starling v. West Erie Avenue Building & Loan Ass'n*, supra.

55. N.Y.—*Village of Massapequa Park v. Massapequa Park Villa Sites*, 299 N.Y.S. 370, 164 Misc. 172, affirmed 300 N.Y.S. 1041, 253 App. Div. 764, reversed on other grounds 15 N.E.2d 177, 278 N.Y. 28.

56. Ky.—*Craig v. City of Lexington*, 93 S.W.2d 552, 263 Ky. 798.

57. Tex.—*Shelton v. Providence Washington Ins. Co.*, Civ.App., 121 S.W.2d 330.

58. Va.—*Broun v. City of Roanoke*, 1 S.E.2d 279, 172 Va. 227.

59. Me.—*City of Eastport v. Jonah*, 187 A. 471, 134 Me. 428.

60. Ky.—*Frankfort v. Frankfort Safety Vault, etc., Co.*, 74 S.W. 676, 115 Ky. 660, 25 Ky.L. 46.

61. Minn.—*St. Anthony Falls Water Power Co. v. Greely*, 11 Minn. 321, 44 C.J. p 1347 note 21.

62. Ky.—*Jetts Bros. Distilling Co. v. Carrolton*, 199 S.W. 37, 173 Ky. 561.

44 C.J. p 1348 note 22.

63. Tex.—*Dallas Title, etc., Co. v. Oak Cliff*, 27 S.W. 1036, 3 Tex.Civ. App. 217.

64. Mich.—*Wayne v. Goldsmith*, 104 N.W. 689, 141 Mich. 528, 3 L.R.A., N.S., 1126.

65. Tex.—*Brummer v. Galveston*, 76 S.W. 428, 97 Tex. 93.

66. Me.—*City of Eastport v. Jonah*, 187 A. 471, 134 Me. 428.

67. Tex.—*Brummer v. Galveston*, 76 S.W. 428, 97 Tex. 93.

68. Tex.—*McCrary v. Comanche*, Civ.App., 34 S.W. 679.

69. Tenn.—*State, for Use of City of Chattanooga v. Bayless*, App., 209 S.W.2d 504.

44 C.J. p 1348 note 29.
Distraint as condition precedent to sale of land see infra § 2097.

70. Ky.—*Ludlow v. Ludlow*, 153 S.W. 783, 152 Ky. 545.

71. Ky.—*Frankfort v. Gordon*, 201 S.W. 472, 180 Ky. 128.

44 C.J. p 1348 note 31.

day of the year in which they were assessed⁷² or before the day fixed on which they become delinquent.⁷³ In some jurisdictions a personal action by a municipal corporation to recover taxes cannot be barred by prescription, lapse of time, or application of statutes of limitation.⁷⁴ In other jurisdictions the time for bringing suit may be limited either by special statutory or charter provision or by general statutes held applicable thereto;⁷⁵ such provisions, however, do not affect suits pending at the time the legislation is enacted⁷⁶ or the institution of suits for taxes due prior thereto.⁷⁷ An action to recover taxes may be within the terms of a statute of limitations applicable to statutory actions⁷⁸ or to actions for the recovery of state and county taxes;⁷⁹ but an action to recover taxes due on forfeited property is not an action on a judgment within the meaning of a statute limiting actions on judgments, since the forfeiture of the land is a forfeiture in fact and not by judgment in law.⁸⁰

The period of limitations may begin to run from a particular day, fixed by statute, after the taxes have been levied.⁸¹ The tax for each year is considered as a separate cause of action in making the computation of the statutory period.⁸² Tender of the amount of taxes that could have been barred by the statute of limitations is an acknowledgment of liability therefor preventing the operation of the statute.⁸³ Where an action to recover the tax has been begun within the statutory period against the life tenant and vested remaindermen in the property taxed, the statute does not begin to run against one not joined as a party who holds a contingent remainder therein until his interest has

become vested.⁸⁴

§ 2078. — Right of Action and Defenses

- a. Right to sue
- b. Defenses
- c. Set-off and counterclaim

a. Right to Sue

Where the statute so provides, and the authority of the officer is established, an action for unpaid taxes is properly brought by the municipal treasurer or attorney, or by written direction from the mayor and the treasurer.

Where the statute so provides, and the authority of the officer is established,⁸⁵ an action for unpaid taxes is properly brought by the municipal treasurer⁸⁶ or attorney⁸⁷ in the name of the city, as discussed *infra* § 2079. Under a statute providing that the action may be brought in the name of the city on relation of the city solicitor or any other authorized agent, it may be brought on relation of any authorized agent of the city,⁸⁸ even though he is not an officer named in the statute⁸⁹ and the statute elsewhere authorizes the city solicitor to begin suit for the city.⁹⁰

Under some statutes the right to bring suit to collect taxes in the name of the municipality may be conferred only by written direction from the mayor and the treasurer;⁹¹ but notwithstanding the statute the governing body of the municipality may have power to direct a city official to bring suit against tax collectors who are delinquent on their commitments,⁹² although in such case, the order of the council should specify whether the action shall be commenced against the collector individ-

72. Ky.—Graves v. Georgetown, 166 S.W. 969, 159 Ky. 139.

44 C.J. p 1348 note 33.

73. Tex.—City of Cisco v. Walling, Civ.App., 176 S.W.2d 363.

74. La.—State ex rel. McGregor v. Diamond, App., 167 So. 760.

44 C.J. p 1348 note 34.

Taxes and privileges

City taxes are imprescriptible, although privileges securing them may be extinguished by prescription.—State ex rel. McGregor v. Diamond, La.App., 167 So. 760—44 C.J. p 1348 note 34 [a].

75. Tex.—San Antonio v. Johnson, Civ.App., 186 S.W. 866.

44 C.J. p 1348 note 35.

76. Tex.—Houston v. Stewart, 90 S.W. 49, 40 Tex.Civ.App. 499.

77. Tex.—Houston v. Stewart, *supra*.

78. Ky.—Muir v. Bardstown, 87 S.W. 1096, 120 Ky. 739, 27 Ky.L. 1150.

79. S.C.—Grier v. City Council of

Spartanburg, 26 S.E.2d 690, 203 S.C. 203.

80. Ill.—Greenwood v. La Salle, 26 N.E. 1089, 137 Ill. 225.

81. Ky.—Chatterson v. Louisville, 140 S.W. 647, 145 Ky. 485.

82. Tex.—Young v. Marshall, Civ.App., 199 S.W. 1180.

83. Ky.—Thornton's Unknown Heirs and Devises v. Dayton, 288 S.W. 310, 216 Ky. 543.

84. Ky.—Davie v. Louisville, 188 S.W. 911, 171 Ky. 663.

85. Tex.—O'Connor v. Laredo, Civ.App., 167 S.W. 1091.

City manager and treasurer

Under charter providing that city manager should be responsible to city council for administration of all departments, city manager was held not to have succeeded to powers formerly exercised by mayor, and hence manager was without power, together with city treasurer, to di-

rect commencement of action to recover taxes.—City of Eastport v. Jonah, 187 A. 471, 134 Me. 428.

86. Mich.—Wayne v. Goldsmith, 104 N.W. 689, 141 Mich. 528, 3 L.R.A., N.S., 1126.

87. Tex.—O'Connor v. Laredo, Civ.App., 167 S.W. 1091.

88. Ky.—Purcell v. Lexington, 216 S.W. 599, 186 Ky. 381.

44 C.J. p 1349 note 53.

89. Ky.—Purcell v. Lexington, *supra*.

90. Ky.—Purcell v. Lexington, *supra*.

91. Me.—City of Biddeford v. Cleary, 167 A. 694, 132 Me. 118.

Order of common council of city, relating to collection of unpaid taxes, was insufficient to confer authority on city treasurer to institute actions in name of city.—City of Biddeford v. Cleary, *supra*.

92. Me.—City of Biddeford v. Cleary, *supra*.

ually or on his bond, with a joinder of his surety.⁹³ The direction of the mayor and treasurer to sue for taxes must contain specific authority to institute the action and state the names of the parties to be sued.⁹⁴ Where the action is brought to recover back taxes for several years, a written direction is sufficient if it names specifically the delinquent taxpayer⁹⁵ and recites the years for which taxes remain unpaid;⁹⁶ it is not necessary that there should be a separate written direction for each year's taxes.⁹⁷ The sending of the direction to the city solicitor is sufficient.⁹⁸

b. Defenses

- (1) In general
- (2) Invalidity of tax and irregularities
- (3) Equitable defenses
- (4) Estoppel to urge defense

(1) In General

In an action to recover unpaid municipal taxes, the taxpayer may raise such defenses as will preclude the enforcement of the tax against him; but it is not a defense that the taxpayer is not benefited by the tax, or that it is being, or will be, improperly expended or applied.

In an action to recover unpaid municipal taxes, the taxpayer may raise such defenses as will preclude the enforcement of the tax against him.⁹⁹ It is no defense, however, that the taxpayer is not benefited by the tax¹ or that it is being, or will be, improperly expended or applied.² In an action to recover a tax levied to pay a judgment against the municipal corporation, the taxpayer cannot set up in defense that the municipality has already paid the judgment,³ nor can the fact that belligerent occupation of a city has ceased be set up in defense of an action to recover a tax levied by the military authority.⁴

Payment of an amount based on the taxpayer's valuation of his property is no bar to the collection of the remainder of his tax on the valuation properly fixed by the assessors,⁵ nor can the payment of delinquent taxes by the tax collector to the city be set up as a defense by the taxpayer in a suit by the tax collector against him to recover the amount advanced.⁶

(2) Invalidity of Tax and Irregularities

In an action to recover unpaid municipal taxes, irregularities or overvaluations in the assessment are not available as defenses, where the defendant has not availed himself of the statutory procedure for correcting the errors; but ordinarily it is a defense that the municipal corporation had no authority to levy the tax, or that there had not been a compliance with some mandatory statutory provisions.

Irregularities or overvaluations in the assessment are not available as defenses, in an action to recover unpaid municipal taxes, where defendant has not availed himself of the statutory procedure for correcting the errors⁷ or, under a statute so restricting defenses, where there is an absence of evidence warranting an injunction.⁸ It is no defense that the bonds for which the tax was levied were irregularly issued,⁹ that the municipality levying the taxes was not a corporation de jure,¹⁰ that there were irregularities in the appointment or proceedings of the board of review,¹¹ that the description of the property taxed was not made as directed by statute,¹² or that the collector was a collector de facto.¹³ Also, a delinquent taxpayer may not defeat payment of his taxes on the ground that the municipality exceeded its authority in allowing an attorney, employed to collect taxes, a fee greater than that permitted by law.¹⁴ It is a defense, on the other hand, that the municipal corporation had no authority to levy the tax¹⁵ or that there had not been a compliance with some mandatory statutory

93. Me.—City of Biddeford v. Cleary, *supra*.

94. Me.—City of Biddeford v. Cleary, *supra*.

95. Me.—Rockland v. Farnsworth, 89 A. 65, 111 Me. 315.

96. Me.—Rockland v. Farnsworth, *supra*.

97. Me.—Rockland v. Farnsworth, *supra*.

98. Me.—Rockland v. Farnsworth, *supra*.

99. Tex.—Howth v. French Independent School Dist., Civ.App., 115 S.W.2d 1036, affirmed French Independent School Dist. of Jefferson County v. Howth, 134 S.W.2d 1036, 134 Tex. 211.

1. U.S.—Gold Hill v. Caledonia Sil-

ver Min. Co., C.C.Nev., 10 F.Cas. No.5,512, 5 Sawy. 575.

2. Ill.—Baltimore, etc., R. Co. v. People, 66 N.E. 148, 200 Ill. 541. 44 C.J. p 1349 note 63.

3. Mo.—State v. Hamilton, 7 S.W. 583, 94 Mo. 544.

4. Tenn.—Rutledge v. Fogg, 3 Coldw. 554, 91 Am.D. 299.

5. Ga.—Vanduzer v. Irvin, 75 S.E. 649, 138 Ga. 524.

6. N.C.—Berry v. Davis, 73 S.E. 900, 158 N.C. 170.

7. Tex.—Hickson v. City of Van Alstyne, Civ.App., 195 S.W.2d 571. 44 C.J. p 1349 note 69.

Collateral attack on assessments
Tex.—Hickson v. City of Van Alstyne, *supra*.

8. Pa.—Erie v. Reed, 6 A. 679, 113 Pa. 468.

9. Tex.—Tyler v. Tyler Bldg., etc., Assoc., 81 S.W. 2, 98 Tex. 69.

10. Ill.—People v. Pederson, 77 N.E. 251, 220 Ill. 554.

11. Ky.—Southern Warehouse, etc., Co. v. Mechanics' Trust Co., 56 S.W. 162, 21 Ky.L. 1734.

12. Me.—Inhabitants of Town of Milo v. Milo Water Co., 163 A. 163, 131 Me. 372.

13. Me.—Rockland v. Farnsworth, 89 A. 65, 111 Me. 315.

14. Tex.—McCollum v. City of Richardson, Civ.App., 121 S.W.2d 423, error dismissed.

15. Pa.—City of Philadelphia v. Rottner, 90 Pa.Super. 262.

Tex.—Conklin v. El Paso, Civ.App., 44 S.W. 879.

provision;¹⁶ and, where the lack of compliance affects the legality of the levy so that there is no legal levy in existence, a statute limiting the defenses in actions for delinquent taxes does not apply.¹⁷ It is also a defense that the assessment list issued to the collector and on which suit was brought included property in part outside of his district.¹⁸ A defense that taxes are in excess of a statutory limitation is good if they are shown not to be within the terms of a validating statute.¹⁹ It has been held that, where a determination of an alleged invalidity of a tax involves complicated questions of fact and law, the taxpayer should contest the point, by bringing a bill in equity to redress the alleged grievance in the imposition of the tax,²⁰ and not by motion to vacate an order for his examination.²¹ Also, it has been held that, where the validity of the tax depends on the population of the city, the taxpayer cannot raise the question whether the city had the requisite number of inhabitants except by a quo warranto proceeding.²²

(3) Equitable Defenses

Some statutes allow equitable defenses in actions to recover a municipal tax.

Some statutes allow equitable defenses in actions to recover a municipal tax,²³ and under such a statute defendant may show that the tax commissioner representing the municipality had wrongfully refused him permission to inspect the assessment roll and had later informed him that there was no tax against him.²⁴ Also, where the action is brought against a purchaser of the land subject to tax, a certificate of a city officer that he had made a search and found no unpaid tax against the land may be set up in defense where the officer was authorized by statute or charter to make the search,²⁵ but not otherwise.²⁶ Similarly, such a certificate may estop the city to attempt to collect the tax as against a mortgagee of the property who forebore the institution of foreclosure proceedings in reli-

ance on the certificate.²⁷ It cannot, however, be shown in defense of an action to recover taxes based on a valid assessment that an officer of the city had previously without authority made another assessment of the same property which the city had repudiated.²⁸ A municipality may not be estopped to assert its tax lien against realty because of a mortgage foreclosure action to which it was not a party.²⁹

Agreement between taxpayer and city attorney. In an action to recover judgment for a tax, based on what the taxpayer regarded as an overvaluation in the assessment but which he was contesting on the ground of exemption, an agreement entered into between the city attorney and the taxpayer that, if the claim of exemption was ultimately overruled by the appellate court, the taxpayer might have an opportunity to file a supplemental statement on the valuation, is a valid equitable defense, in whole or in part, to the extent of allowing the taxpayer opportunity to show the alleged overvaluation.³⁰

Delay by city in prosecuting an action once commenced for so long a time as to raise a presumption of abandonment will have the effect of dissolving the lis pendens in the interest of a purchaser of the property without notice where the circumstances are such as to constitute an estoppel against the city,³¹ but, where the title to the property continues in the person against whom it was assessed and against whom the action was brought, he has no equity entitling him to set up the delay of the city in prosecuting the action as a defense.³²

(4) Estoppel to Urge Defense

In an action to recover unpaid municipal taxes, the taxpayer may be estopped to deny the validity of the tax.

In an action to recover unpaid municipal taxes, the taxpayer may be estopped to deny the validity

16. Tex.—Masterson v. Hedley, Civ. App., 265 S.W. 406.

44 C.J. p 1349 note 77.

17. Tex.—Masterson v. Hedley, supra.

18. Del.—Banks v. Talley, 194 A. 362, 8 W.W.Harr. 512.

19. Wash.—Northern Pac. R. Co. v. Snohomish County, 172 P. 878, 101 Wash. 686.

44 C.J. p 1349 note 79.

20. N.Y.—In re Beauty Spring Water Co., 91 N.E. 1101, 198 N.Y. 413.

21. N.Y.—In re Beauty Spring Water Co., supra.

22. Tex.—Tyler v. Tyler Bldg., etc., Assoc., 81 S.W. 2, 98 Tex. 69—Tyler v. Tyler Bldg., etc., Assoc., Civ. App., 82 S.W. 1066, reversed on other grounds 86 S.W. 750, 99 Tex. 6.

23. N.Y.—New York v. Halsey, 116 N.Y.S. 947, 132 App.Div. 192.

24. N.Y.—New York v. Halsey, supra.

25. N.J.—Elizabeth v. Shirley, 35 N. J.Eq. 515.

Pa.—Philadelphia v. Anderson, 21 A. 976, 142 Pa. 357, 12 L.R.A. 751.

26. N.J.—Matter of Adjustment Comrs., 10 N.J.L.J. 144.

27. Pa.—Antanoff v. Zolyan, 158 A. 636, 104 Pa.Super. 102.

28. Ky.—Jetts Bros. Distilling Co. v. Carrollton, 199 S.W. 37, 178 Ky. 561.

29. Ky.—Taylor v. City of La Grange, 90 S.W.2d 357, 262 Ky. 383.

30. N.Y.—New York v. W. W. Hodgkinson Corp., 218 N.Y.S. 217, 218 App.Div. 116.

31. Ky.—Seibert v. Louisville, 101 S.W. 325, 125 Ky. 292, 30 Ky.L. 1317.

32. Ky.—Louisville v. Sonne, 146 S.W. 739, 148 Ky. 394.

of the tax,³³ as where it appears that he knew that the work, for which the tax was levied, was going on and remained silent about it;³⁴ but unless it appears that defendant's silence was with knowledge he is not estopped thereby.³⁵ Payment of taxes in past years does not estop the taxpayer to set up the defense that the property is not taxable;³⁶ nor does the making of a tax return for a particular year affect the right of the taxpayer making it to later assert in defense of an action for taxes for such year that he was not liable therefor.³⁷ So the reduction of the assessment, where it is not shown that the taxpayer asked for the reduction or that he appeared before the board of review, does not estop him to question the validity of the assessment roll.³⁸

Inconsistent defenses. A taxpayer's defense, denying removal from the city since the assessment, is not inconsistent with his defense of nonresidence in the city, where the latter defense raises a question of the validity of the tax, and the former merely the right to recover in a particular form of action.³⁹

c. Set-Off and Counterclaim

A taxpayer cannot set off, or counterclaim for, obligations due to him from the municipal corporation in an action brought against him to recover a tax.

A taxpayer cannot set off, or counterclaim for, obligations due to him from the municipal corporation, in an action brought against him to recover a tax,⁴⁰ even though municipal officers have agreed

with the taxpayer that it may be done,⁴¹ and even though the statute grants to the municipality a right to collect the tax in an action "as upon contract."⁴² So, in a suit to recover delinquent taxes, the taxpayer is not entitled to set off the amount of taxes paid to the municipality in previous years under an erroneous assessment.⁴³

§ 2079. — Parties and Process

- a. Parties
- b. Process

a. Parties

Generally a municipal corporation may sue to recover unpaid taxes in its own name, and persons charged with liability for the tax are necessary parties to the suit.

Generally a municipal corporation may sue to recover unpaid taxes in its own name;⁴⁴ but under some statutory provisions suit must be brought in the name of the state,⁴⁵ at least in certain cases.⁴⁶ It has also been held that a collector charged with the duty of collecting all delinquent taxes in the behalf of the municipality has the capacity to prosecute in his own name a suit against the taxpayer for past-due taxes.⁴⁷

Persons charged with liability for a tax are necessary parties to a suit to enforce collection of the tax.⁴⁸ In the case of real estate the proper party defendant is the present record owner of the property,⁴⁹ rather than former owners,⁵⁰ but in an action to recover delinquent taxes not assessed until after defendant bought the land under a war-

33. Mo.—State v. Mastin, 15 S.W. 529, 103 Mo. 503.
44 C.J. p 1350 note 91.

34. Iowa.—Johnson v. Kessler, 41 N.W. 57, 76 Iowa 411—Lamb v. Burlington, etc., R. Co., 39 Iowa 333.

35. Iowa.—Truesdell v. Green, 10 N.W. 630, 57 Iowa 215.

36. Iowa.—Deiman v. Ft. Madison, 30 Iowa 542.
Mo.—Cameron v. Stephenson, 69 Mo. 372.

37. Ga.—Bibb Nat. Bank v. Macon, 97 S.E. 72, 148 Ga. 478.

38. N.Y.—New York v. Vanderveer, 86 N.Y.S. 659, 91 App.Div. 303.

39. Mass.—Crapo v. Stetson, 8 Metc. 393.
44 C.J. p 1350 note 97.

40. Ky.—City of Irvine v. Wallace, 71 S.W.2d 974, 254 Ky. 564.

Tenn.—Southern Ry. Co. v. City of Elizabethton, 10 Tenn.App. 119.
Tex.—State v. Humble Oil & Refining Co., 169 S.W.2d 707, 141 Tex. 40—

Wedgworth v. Davenport, Civ.App., 170 S.W.2d 789.

44 C.J. p 1350 note 99.

Payment of tax by surrender or cancellation of claim against city see supra § 2066.

Damages from negligence of, or breach of duty by, city director of revenue and finance as ex officio rent receiver in failing to collect rent for mortgaged property cannot be set off against taxes due city thereon by mortgagee purchasing property at foreclosure sale.—Brunner v. Morrison, 196 A. 716, 123 N.J.Eq. 224.

41. Ala.—Enterprise v. Rawls, 86 So. 374, 204 Ala. 528.

42. N.Y.—Charlotte v. Keon, 100 N. E. 1116, 207 N.Y. 346, 46 L.R.A., N.S., 135, Ann.Cas.1914C 338, rehearing denied 101 N.E. 1124, 208 N.Y. 524.

44 C.J. p 1350 note 2.

43. Ky.—Ironton & Russell Bridge Co. v. City of Russell, 91 S.W.2d 1, 262 Ky. 778.

44. Mich.—St. Joseph v. Vail, 100 N. W. 388, 137 Mich. 276.

44 C.J. p 1350 note 4.

Suit for portion of taxes

Under statute dealing with suits for taxes on forfeited realty or delinquent personalty, where recovery is sought for a portion of the taxes only, the municipal corporation to which that portion of the tax is due must sue therefor in its own name. —School Dist. No. 88 v. Kooper, 43 N.E.2d 542, 380 Ill. 68.

45. Mo.—State v. Lewis, 165 S.W. 327, 256 Mo. 121.

44 C.J. p 1350 note 5.

46. Mo.—St. Joseph v. Kansas City, etc., R. Co., 24 S.W. 467, 118 Mo. 671.

47. S.C.—Rothrock v. Oakman, 10 S. E.2d 345, 195 S.C. 123.

48. Conn.—Walsh v. Jenks, 62 A.2d 773, 135 Conn. 210.

49. Mo.—State v. Bartlett, 125 S.W. 839, 147 Mo.App. 133.

50. Ky.—Middlesboro v. Coal, etc., Bank, 110 S.W. 355, 33 Ky.L. 469, rehearing denied 111 S.W. 385, 33 Ky.L. 961.

ranty deed it has been held proper to permit the answer to make the warrantors parties in the absence of affirmative showing of delay by so doing.⁵¹ A person claiming ownership after suit brought may properly be joined by supplemental petition.⁵² It is not necessary to join a husband as tenant by curtesy in an action against the wife as record owner to whom the land was assessed.⁵³ A taxpayer may, in an action against him for taxes to pay bonds, impeach the validity of the bonds without making bondholders parties.⁵⁴

b. Process

Some statutes permit advertisement in lieu of citation in an action to recover unpaid taxes.

The general rules relating to process and service thereof are applicable in suits to recover unpaid taxes except as modified by particular statutes or charter provisions.⁵⁵ Under some statutes advertisement in lieu of citation is permissible,⁵⁶ but there must be definiteness and certainty as to the persons addressed in the publication of notice.⁵⁷ An action in assumpsit to recover taxes, interest, and penalties may be instituted by *capias ad respondendum* as well as by summons.⁵⁸

§ 2080. — Pleading

a. Petition or complaint

51. Tex.—City of San Antonio v. Terrill, Civ.App., 202 S.W.2d 361, error refused.

52. Ky.—Thornton's Unknown Heirs, etc. v. Dayton, 288 S.W. 310, 216 Ky. 543.

53. Ky.—Louisville v. Sonne, 146 S.W. 739, 148 Ky. 394.

54. Tex.—Tyler v. Tyler Bldg., etc., Assoc., Civ.App., 82 S.W. 1066, reversed on other grounds 86 S.W. 750, 99 Tex. 6.

55. La.—New Orleans v. De St. Rome, 28 La. Ann. 17.

56. La.—New Orleans v. De St. Rome, supra.

44 C.J. p 1351 note 15.

57. La.—New Orleans v. De St. Rome, supra.

44 C.J. p 1351 note 16.

58. Pa.—City of Philadelphia v. Cline, 44 A.2d 610, 158 Pa. Super. 179, certiorari denied Barnes v. City of Philadelphia, 66 S.Ct. 1120, 328 U.S. 848, 90 L.Ed. 1621.

59. Ky.—City of Lexington v. Security Trust Co., 144 S.W.2d 524, 284 Ky. 282.

S.C.—State ex rel. Daniel v. Textile Hall Corporation, 194 S.E. 66, 185 S.C. 406.

Personalty

City seeking to recover delinquent

taxes had burden to allege each item of personalty assessed, amount of taxes assessed against it, and year of such assessment, in order to give taxpayer opportunity to prove that he did not own personalty at the time.—City of Lewisville v. Merritt, Tex.Civ.App., 123 S.W.2d 470.

Allegations of location

Where a complaint in a suit by a city to foreclose a lien for taxes failed to allege that the property was in the county at the time of the commencement of the suit, it was error to overrule a plea of privilege, defendant being a nonresident.—Wilson v. City of Belton, Tex.Civ.App., 206 S.W. 366.

Complaint held sufficient

N.J.—City of Newark v. Jos. Holander, Inc., 42 A.2d 872, 138 N.J. Eq. 539, affirmed 46 A.2d 786, 138 N.J.Eq. 112.

60. S.C.—State ex rel. Daniel v. Textile Hall Corporation, 194 S.E. 66, 185 S.C. 406.

Tex.—Town of Pleasanton v. Vance, Civ.App., 4 S.W.2d 247.

44 C.J. p 1351 note 19.

Tax ordinance for year for which taxes are claimed need not be set out in complaint in *haec verba*.—Rothrock v. Oakman, 10 S.E.2d 345, 195 S.C. 132.

b. Plea or answer

c. Issues, proof, and variance

a. Petition or Complaint

The complaint or petition in an action to recover unpaid municipal taxes must state the facts necessary to show a cause of action, but a complaint is sufficient if it meets the statutory requirements.

The complaint or petition in an action to recover unpaid municipal taxes must state the facts necessary to show a cause of action,⁵⁹ as, for example, the imposition of the tax according to law,⁶⁰ the amount of the tax claimed to be due,⁶¹ nonpayment of the tax,⁶² and the situs and description of the property taxed.⁶³ A mere statement of the amount due is not sufficient.⁶⁴ A complaint is sufficient if it meets the statutory requirements.⁶⁵ In some jurisdictions the facts constituting the levy need not be set out,⁶⁶ and a petition to recover special taxes to pay bonded indebtedness, where the ordinances making the levy are alleged, need not allege the existence or nature of the debt.⁶⁷ Where the tax bill is *prima facie* evidence of the correctness thereof and that all proper steps were taken, as discussed *infra* § 2081, the petition need not allege the publication of the ordinance levying the tax,⁶⁸ and it is necessary and sufficient to allege the facts which the statute makes *prima facie* evidence of the right to recover.⁶⁹

61. Tex.—Town of Pleasanton v. Vance, Civ.App., 4 S.W.2d 247.

62. Ky.—Frankfort v. Frankfort Safety Vault, etc., Co., 74 S.W. 676, 115 Ky. 660, 25 Ky.L. 46.

63. Tex.—O'Connor v. Laredo, Civ. App., 167 S.W. 1091.

44 C.J. p 1351 note 21.

64. Ky.—Robinson v. Caldwell, 6 Ky.Op. 184.

65. Cal.—Los Angeles v. Glassell, 87 P. 241, 4 Cal.App. 43.

Vt.—Montpelier v. Central Vermont R. Co., 93 A. 1047, 89 Vt. 36.

The purpose of statute pertaining to contents of petition to recover delinquent taxes is to simplify tax petitions.—Sam Bassett Lumber Co. v. City of Houston, Civ.App., 194 S.W.2d 114, reversed on other grounds, 198 S.W.2d 879, 145 Tex. 492.

66. Tex.—Galveston, etc., R. Co. v. Galveston, 74 S.W. 537, 96 Tex. 520.

44 C.J. p 1351 note 24.

67. Tex.—San Antonio v. Berry, 48 S.W. 496, 92 Tex. 319.

44 C.J. p 1351 note 25.

68. Ky.—Shuck v. Lebanon, 53 S.W. 655, 107 Ky. 252, 21 Ky.L. 969.

69. Ky.—Shuck v. Lebanon, supra, 44 C.J. p 1351 note 26.

Facts within judicial notice. It is not necessary to allege a fact of which the court will take judicial notice,⁷⁰ as, for example, the incorporation of the municipality.⁷¹

Amended or supplemental pleading. An amendment of the complaint will be allowed for the purpose of giving a more accurate description of the property,⁷² and, where taxes accrue and are payable after the filing of the original petition, a supplemental petition is proper.⁷³

b. Plea or Answer

The defendant in a suit to recover unpaid municipal taxes must sufficiently state his defenses by answer, and affirmative defenses must be specially pleaded.

Defendant in a suit to recover unpaid municipal taxes must sufficiently state his defenses by answer.⁷⁴ Affirmative defenses must be specially pleaded,⁷⁵ and under some statutes the particular grounds on which defendant claims the tax is invalid must be set forth.⁷⁶ While a denial of knowledge or information sufficient to form a belief as to certain allegations in the complaint may be proper in some instances,⁷⁷ it may be improper in other instances,⁷⁸ as where it relates to matters of public record.⁷⁹ A plea in abatement that the state and county are necessary parties, in order that their respective tax liens may be marshaled, is properly overruled where it does not appear that the state and county taxes are unpaid.⁸⁰

c. Issues, Proof, and Variance

In an action to recover unpaid municipal taxes, es-

sential averments of the complaint which are put in issue by the answer must be proved; and allegations of invalidity of the tax must be supported by proof sufficient to establish the defense.

General rules as to issues, proof, and variance apply in an action to recover unpaid municipal taxes.⁸¹ Essential averments of the complaint which are put in issue by the answer must be proved;⁸² and, if there is no evidence to show any delinquent tax against defendant, the municipal corporation cannot recover.⁸³ However, matters which are not a condition precedent to the validity of the assessment need not be proved.⁸⁴ Allegations of invalidity of the tax must be supported by proof sufficient to establish the defense.⁸⁵ The use made of property is admissible as bearing on the issue whether or not it is within the meaning of an exemption statute.⁸⁶

§ 2081. — Evidence

- a. Presumptions and burden of proof
- b. Admissibility
- c. Weight and sufficiency

a. Presumptions and Burden of Proof

In an action to recover unpaid taxes, certain presumptions will be indulged in favor of the validity of the tax and the authority of the municipal officer to begin the action. The plaintiff has the burden of proving the material allegations of his complaint while the defendant has the burden of proving the defenses raised by his answer.

In an action for collection of taxes, certain presumptions will be indulged in favor of the validity

Making of levy

The statute providing that an assessment shall be prima facie evidence of levy and of every other fact necessary to entitle city to judgment for taxes gives the assessment evidentiary value only and does not eliminate necessity for alleging in pleading for recovery of taxes that levy has been made.—*City of Lexington v. Security Trust Co.*, 144 S.W.2d 524, 284 Ky. 282.

70. N.D.—*Page v. Farmery*, 150 N.W. 471, 29 N.D. 209.

71. N.D.—*Page v. Farmery*, *supra*.

72. Ky.—*Ludlow v. Ludlow*, 153 S.W. 783, 152 Ky. 545.
44 C.J. p 1351 note 32.

73. Ky.—*Thornton's Unknown Heirs*, etc. v. Dayton, 288 S.W. 310, 216 Ky. 543.

74. Mo.—*State ex rel. Hutton v. Gilliom*, App., 49 S.W.2d 198.

Answer held insufficient

Mo.—*State ex rel. Hutton v. Gilliom*, *supra*.

Willingness to make return

Where, in action by city to recover

personal property taxes, assessed against defendant on his failure to make return within ten days after notice to do so had been mailed to him, defendant files affidavit of defense alleging that he did not receive notice and further averring that he is willing to make proper return and that such return would "reflect taxable valuation" of certain round figure, rule for judgment for want of sufficient affidavit of defense will be discharged as to that portion of tax allegedly due which exceeds tax payable on round figure, but summary judgment will be entered against defendant for tax payable on that figure, together with proper penalties and interest.—*City of Philadelphia v. Kolb*, 30 Pa.Dist. & Co. 229.

75. Tex.—*Garza v. San Antonio*, Civ. App., 214 S.W. 488.
44 C.J. p 1351 note 35.

76. Vt.—*Montpelier v. Central Vermont R. Co.*, 93 A. 1047, 89 Vt. 36.

77. N.Y.—*New York v. Vanderveer*, 86 N.Y.S. 659, 91 App.Div. 303.

78. Ky.—*Greer v. Covington*, 2 S.W. 323, 83 Ky. 410.
44 C.J. p 1351 note 38.

79. N.Y.—*New York v. Matthews*, 72 N.E. 629, 180 N.Y. 41.
44 C.J. p 1351 note 39.

80. Tex.—*Bennison v. Galveston*, 78 S.W. 1089, 34 Tex.Civ.App. 382.

81. Tex.—*Rachford v. City of Port Neches*, Civ.App., 96 S.W.2d 167, error refused.

Material variance not shown

Tex.—*City of West University Place v. Home Mortg. Co.*, Civ.App., 72 S.W.2d 361.

82. N.Y.—*New York v. Vanderveer*, 86 N.Y.S. 659, 91 App.Div. 303.

83. Ill.—*People v. Chicago*, etc., R. Co., 73 N.E. 339, 214 Ill. 25.

84. Mich.—*City of Detroit v. Gray*, 22 N.W.2d 771, 314 Mich. 516.

85. Tex.—*Berry v. San Antonio*, Civ. App., 46 S.W. 273.
44 C.J. p 1352 note 43.

86. Warehouse used by church
Miss.—*Gunter v. Jackson*, 94 So. 842, 120 Miss. 686, 27 A.L.R. 1043.

of the tax,⁸⁷ and the authority of the municipal officer to begin the action.⁸⁸ However, a statute providing that an assessment roll shall be presumptive evidence of the contents thereof does not apply where an irregularity appears on the face of the roll;⁸⁹ and, where there is delay in taking action to collect the tax, amounting to laches, and a loss of part of the assessment roll, no presumption will be indulged favorable to the regularity of the proceedings beyond what appears on the face of the record.⁹⁰ After the lapse of twenty years, there is a presumption of payment in the absence of other proof of delinquency than the assessment.⁹¹

As in other actions, plaintiff in a suit to recover unpaid taxes has the burden of proving the material allegations of his complaint,⁹² while defendant has the burden of proving the defenses raised by his answer.⁹³ Ordinarily the burden of proof is on defendant where he relies on the invalidity of, or defects in, the tax,⁹⁴ or on the invalidity of the debts for which the tax was levied,⁹⁵ or on its payment.⁹⁶ Where, however, there is a presumption of payment arising from lapse of time, the burden shifts to plaintiff to prove the fact of nonpayment.⁹⁷

b. Admissibility

A municipal corporation seeking to recover delinquent taxes is entitled to establish the amount of taxes due by any method fixed by law as sufficient; assessment rolls, when duly authenticated and identified, are admissible to

show the making of the assessment on which the tax for a particular year was levied, but not to prove the levy.

A municipal corporation seeking to recover delinquent taxes is entitled to establish the amount of taxes due, if any, by the taxpayer, by any method fixed by law as sufficient.⁹⁸ When duly authenticated⁹⁹ and identified,¹ assessment rolls are admissible to show the making of the assessment on which the tax for a particular year was levied,³ but not to prove the levy.³ Where an appropriation is a condition precedent to a tax levy, an appropriation ordinance is admissible to prove the appropriation.⁴ The fact that an assessor failed to make an assessment on personal property of defendant in the city after a particular date cannot be shown in evidence against the collector to show a change of domicile at that time.⁵ An objection to the introduction in evidence of the certificate or tax bill sued on that it was not such as the law contemplated is too general.⁶

c. Weight and Sufficiency

Generally, by charter or statutory provisions, the municipal corporation makes out a prima facie case by introducing the tax roll or a certified statement of delinquent taxes in evidence; but, where the proceedings are not in rem and the defendant's ownership is put in issue, a prima facie case of ownership independent of the tax roll must be made out.

General rules as to the weight and sufficiency of evidence apply in an action to recover unpaid taxes.⁷ Generally, by charter or statutory provi-

87. Mo.—Village of Beverly Hills v. Schultzer, 130 S.W.2d 532, 344 Mo. 1098.

44 C.J. p 1352 note 46.

88. Tex.—O'Connor v. Laredo, Civ. App., 167 S.W. 1091.

89. N.Y.—Alliter v. St. Johnsville, 114 N.Y.S. 355, 130 App Div. 297.

44 C.J. p 1352 note 48.

90. N.D.—Martin v. Burleigh County, 165 N.W. 520, 38 N.D. 373.

91. Tex.—Leake v. Dallas, Civ.App., 197 S.W. 472.

92. Tex.—Lewisville v. Merritt, Civ. App., 123 S.W.2d 470.

93. Ill.—People ex rel. McWard v. Wabash R. Co., 70 N.E.2d 36, 395 Ill. 243.

94. Tex.—Adams v. Royse City, Civ. App., 61 S.W.2d 853, error refused.

44 C.J. p 1352 note 51.

Revenue from outside sources

Taxpayer objecting to village tax levied for general corporate purposes on ground that no consideration was given to revenues receivable by villages from sources other than taxation in making the levies had burden of proving the amount of revenue receivable by the villages from sources other than taxation, and,

where such proof was not made, the objection would not be considered.—People ex rel. McWard v. Wabash R. Co., 70 N.E.2d 36, 395 Ill. 243.

95. Tex.—Wright v. San Antonio, Civ.App., 50 S.W. 406.

96. Tex.—Leake v. Dallas, Civ.App., 197 S.W. 472.

97. Tex.—Leake v. Dallas, supra.

98. Tex.—City of Lewisville v. Merritt, Civ.App., 123 S.W.2d 470.

99. Cal.—Escondido v. Wohlford, 94 P. 232, 153 Cal. 40.

Absence of certification

City tax roll, although not certified to by assessor-collector, was sufficiently authenticated by testimony of city secretary and assessor on the witness stand as to be admissible.—Joy v. City of Terrell, Tex. Civ.App., 143 S.W.2d 704, error dismissed, judgment correct.

1. Cal.—Escondido v. Wohlford, 94 P. 232, 153 Cal. 40.

2. Cal.—Escondido v. Wohlford, supra.

3. Tex.—Earle v. Henrietta, 43 S.W. 15, 91 Tex. 301.

4. Ill.—People v. Chicago, etc., R. Co., 118 N.E. 439, 282 Ill. 206.

5. Mass.—Lowell Tax Collector v. Hanchett, 134 N.E. 355, 240 Mass. 557.

6. Mo.—St. Joseph v. Pitt, 83 S.W. 544, 109 Mo.App. 635.

7. Tex.—City of Cisco v. Walling, Civ.App., 176 S.W.2d 363.

Evidence held sufficient

(1) To support finding or determination generally.—City of Philadelphia v. Rottner, 90 Pa.Super. 262.

(2) To authorize judgment denying city a recovery.—City of Cisco v. Walling, Tex.Civ.App., 176 S.W.2d 363.

(3) To show that levies of taxes for principal and interest on unsold bonds did not constitute abuse of discretion.—People ex rel. Nash v. Westminster Bldg. Corporation, 197 N.E. 573, 361 Ill. 153.

(4) To show that item extended for tax "loss and cost" and included in levy for city bonds and interest was excessive.—People ex rel. Nash v. Northwestern Mut. Life Ins. Co. of Milwaukee, 197 N.E. 758, 361 Ill. 248.

Evidence held insufficient

Ky.—Moss v. Board of Councilmen of

sions, the municipal corporation makes out a prima facie case by introducing the tax roll or a certified statement of delinquent taxes in evidence,⁸ and any error in the certificate is cured by the production of the original assessments, if they sustain the certificate;⁹ but, where the proceedings are not in rem and defendant's ownership is put in issue, a prima facie case of ownership independent of the tax roll must be made out,¹⁰ and the tax roll alone does not establish the fact of ownership.¹¹

A delinquent tax roll which did not describe personalty has been held insufficient to establish the existence of a tax lien on personalty, although admitted without objection.¹² In the absence of charter or statutory provisions, the delinquent list is not prima facie evidence of the correctness of the prior proceedings,¹³ and the establishment of a valid assessment roll is necessary.¹⁴ Where a valid assessment roll has been once established by proof, it has been held that it has the force of a judgment for plaintiff,¹⁵ and that it is conclusive on defendant¹⁶ and not open to collateral attack.¹⁷

§ 2082. — Trial, Judgment, Execution, and Review

On the trial of an action to recover unpaid municipal taxes, questions of law are for the court while questions of fact are for the jury. A personal judgment may be had for the amount of the taxes properly due, together with interest where a statute authorizes it, and the judgment is conclusive on all issues which the court was required to inquire into on the trial.

Where an appropriation is a condition precedent to a tax levy, and the appropriation ordinance is admissible in evidence, but proof of the appropriation ordinance has been inadvertently omitted, the case should be reopened to admit it,¹⁸ especially where the levy ordinance, containing a reference to the appropriation ordinance, has already been admitted in evidence.¹⁹ Questions of fact are for the determination of the jury,²⁰ but the court need not submit to the jury the question of construction of the defendant taxpayer's written rendition.²¹

Judgment. Where an action by the municipality to recover unpaid taxes is authorized, a personal judgment for the amount of the tax may be rendered,²² in addition to any authorized judgment for foreclosure of the lien on the property.²³ In a joint action against numerous delinquents, a general judgment against all is permissible.²⁴ Where a part of the taxes was unauthorized, recovery may be had only for the authorized taxes.²⁵ Where a judgment inadvertently entered by default is void, it does not affect the validity of a judgment properly rendered at a subsequent time.²⁶ The judgment must correspond with the pleadings²⁷ and proof,²⁸ but, asking for excessive relief, as where a lien is sought, will not prevent recovery as in an ordinary action.²⁹ Where a city recovered judgment against the mortgagor of property for taxes due thereon, the mortgagor who became the purchaser of the property at a judicial sale is not en-

City of Frankfort, 21 S.W.2d 813, 231 Ky. 470.

8. Tex.—Joy v. City of Terrell, Civ. App., 143 S.W.2d 704, error dismissed, judgment correct—City of Raymondville v. Harding, Civ.App., 40 S.W.2d 888, affirmed, Harding v. City of Raymondville, Com.App., 58 S.W.2d 55.

44 C.J. p 1352 note 65.

9. Mo.—State v. Edwards, 63 S.W. 388, 162 Mo. 660.

10. Mo.—State v. Bartlett, 125 S.W. 839, 147 Mo.App. 133.

11. Mo.—State v. Bartlett, *supra*.

12. Tex.—City of Lewisville v. Merritt, Civ.App., 123 S.W.2d 470.

13. Cal.—Los Angeles v. Los Angeles City Waterworks Co., 49 Cal. 638.

14. N.Y.—New York v. Vanderveer, 86 N.Y.S. 659, 91 App.Div. 303—New York v. Streeter, 86 N.Y.S. 665, 91 App.Div. 206, affirmed 72 N.E. 631, 180 N.Y. 607.

44 C.J. p 1352 note 70.

15. N.Y.—New York v. Vanderveer, 86 N.Y.S. 659, 91 App.Div. 303.

16. N.Y.—New York v. Vanderveer, *supra*.

17. N.Y.—New York v. Vanderveer, *supra*.

18. Ill.—People v. Chicago, etc., R. Co., 118 N.E. 439, 282 Ill. 206.

19. Ill.—People v. Chicago, etc., R. Co., *supra*.

20. Tex.—Tekell v. City of Cleburne, Civ.App., 176 S.W.2d 588, error refused—Simkins v. City of Corsicana, Civ.App., 86 S.W.2d 792.

21. Tex.—Pfeiffer v. City of San Antonio, Civ.App., 195 S.W. 932, error refused.

22. Ky.—Planters Bank & Trust Co. of Hopkinsville v. City of Hopkinsville, 159 S.W.2d 25, 289 Ky. 451.

44 C.J. p 1353 note 79.

Lump sum

In action for delinquent taxes, personal judgment against defendant in lump sum was held supported by authorities.—Rachford v. City of Port Neches, Tex.Civ.App., 46 S.W. 2d 1057, followed in Dearing v. City of Port Neches, 46 S.W.2d 1062, error refused.

23. Tex.—Henrietta v. Eustis, 36 S.

W. 619, 87 Tex. 14—Berry v. San Antonio, Civ.App., 46 S.W. 273.

24. La.—New Orleans v. Rawlins, 26 La. Ann. 470.

25. Tex.—City of Dallas v. Gulf, C. & S. F. Ry. Co., Civ.App., 1 S.W. 2d 497, reversed on other grounds Gulf, C. & S. F. Ry. Co. v. City of Dallas, 16 S.W.2d 292.

44 C.J. p 1353 note 82.

Reduction of Liability

In suit by city against dissolved corporation for taxes, defendants' liability to city would be reduced to extent of city's assessment for support of fire department, where the tax levied for support of fire department was unauthorized by the charter.—Joy v. City of Terrell, Tex.Civ. App., 143 S.W.2d 704, error dismissed, judgment correct.

26. La.—New Orleans v. Ker, 26 La. Ann. 491.

27. Ky.—Fonda v. Louisville, 49 S.W. 785, 30 Ky.L. 1652.

28. Ky.—Fonda v. Louisville, *supra*.

29. Mo.—Jefferson v. McCarty, 74 Mo. 55.

titled to have the tax judgment satisfied out of the purchase money.³⁰

Interest on judgment. Judgments for taxes do not bear interest in the absence of statutory authorization.³¹ Generally, however, under the statutes, the judgment bears interest from its date,³² unless penalties have been imposed under a statute which also provides that, where penalties are imposed, recovery of interest shall not be allowed.³³ Interest in excess of the statutory rate will not be allowed as a penalty in the absence of power of the city under the statute to impose penalties, as discussed *infra* § 2115.

Conclusiveness of judgment. The judgment is conclusive on the question of regularity of the assessment,³⁴ and all issues which the court was required to inquire into on the trial.³⁵

Setting aside judgment. Proceedings to set aside a judgment for taxes will not be allowed where the party seeking to set aside the judgment has been guilty of laches.³⁶

Appeal. The acceptance of taxes by a clerk according to a judgment reducing their amount, in ignorance of the fact that an appeal had been taken from the judgment, is not such an assent to the judgment by the municipality as to authorize a dismissal of the appeal.³⁷ The appellate court will not consider matters not proper for determination on the record before it.³⁸ Where the appellate court determines that certain property is not taxable as personalty but only as realty, it need not determine the further question whether, if the property were personalty, it is exempt from taxation.³⁹

Execution. An execution sale under a judgment

in favor of a city for taxes does not divest the title of the owner where he was not a party to the suit in which the sale was made and the sale was made after the return day of the writ had expired, and the constable failed to return it and retain a copy as required by law.⁴⁰

§ 2083. — Costs and Fees

Costs and fees are taxable and recoverable in proceedings to collect municipal taxes when and to the extent that they are fixed by statute or by ordinance under legislative authorization.

Costs and fees are taxable and recoverable in proceedings to collect municipal taxes when and to the extent that they are fixed by statute⁴¹ or by ordinance under legislative authorization.⁴² Where, under the statute, costs are to be taxed as may be deemed just and reasonable, a plaintiff who prevails on numerous frivolous questions raised may be awarded full costs,⁴³ even though only a part of the taxes sued for are recovered.⁴⁴ Where constitutional and statutory provisions permit the payment of taxes and interest in scrip or other evidence of the indebtedness of the municipality, but omit all reference to costs, the latter must be paid in cash.⁴⁵ Usually attorney's fees are not allowable,⁴⁶ but in some jurisdictions such an allowance is made.⁴⁷

§ 2084. Sale, Lease, or Taking of Land

As a general rule, under the various statutes, municipal taxes may be enforced by a sale of the land liable for the tax.

The sale of land for unpaid municipal taxes is a mode of enforcement of payment of the tax,⁴⁸ which is usually provided for and regulated by statutory or charter provisions.⁴⁹ Such provisions

30. Ky.—Wood's Ex'x v. City of Middlesboro, 90 S.W.2d 1018, 262 Ky. 627.

31. Mo.—Simmons Hardware Co. v. St. Louis, 192 S.W. 394, 44 C.J. p 1353 note 88.

Interest on municipal taxes generally see *supra* § 2067.

32. Ky.—Greer v. Covington, 2 S.W. 323, 83 Ky. 410.

La.—New Orleans v. Fisk, 14 La. Ann. 862.

33. Ga.—Palmer v. Phinizy, 107 S. E. 852, 151 Ga. 589—Burkhart v. Fitzgerald, 73 S.E. 583, 137 Ga. 366.

34. Tex.—Harris v. Mayfield, Civ. App., 244 S.W. 857.

35. Tex.—Harris v. Mayfield, *supra*.

36. Pa.—Philadelphia v. Wallace, 22 Pa.Co. 123.

37. La.—Serrill v. New Orleans, 27 La. Ann. 599.

38. Tenn.—City of Bristol v. Delinquent Taxpayers, 168 S.W.2d 782, 179 Tenn. 604.

39. Tex.—City of Texarkana v. Texas & P. Ry. Co., Civ.App., 198 S.W. 804.

40. La.—Jacobshagen v. Moylan, 26 La. Ann. 735.

Summary execution see *infra* § 2098.

41. Pa.—Philadelphia v. Milligan, 23 A. 454, 147 Pa. 338.

44 C.J. p 1353 note 2.

42. Mass.—Cheever v. Merritt, 5 Allen 563.

Mo.—Cape Girardeau v. Riley, 72 Mo. 220.

43. Vt.—Montpelier v. Central Vermont R. Co., 93 A. 1047, 89 Vt. 36.

44. Vt.—Montpelier v. Central Vermont R. Co., *supra*.

45. La.—New Orleans v. Jackson, 23 La. Ann. 1038.

46. Mo.—Cape Girardeau v. Riley, 72 Mo. 220.

47. Tex.—Teat v. Perry, Civ.App., 216 S.W. 650.

48. N.Y.—City of Beacon v. Asher Bernstein Realty Corp., 57 N.Y.S. 2d 659, 185 Misc. 262, motion denied 60 N.Y.S.2d 616, 270 App.Div. 852.

Sale of taxpayer's property generally see *infra* § 2096.

49. La.—McCall v. Blouin, 128 So. 528, 18 La.App. 717.

Mo.—City of St. Louis v. Koch, App., 156 S.W.2d 1.

Duration of lien

A provision in the act relating to collection of taxes for city that lien of city taxes continue until tax was collected if realty remained property of person assessed referred to a sale on a judgment and execution thereon in an action of debt as pro-

are determinative of the municipal power and duty to conduct a tax sale, as discussed *infra* § 2085, or to take title to the property without a sale, *infra* § 2090. As a general rule, a sale may be had only for such taxes as the land is liable for.⁵⁰ Under some provisions, the property is to be sold to discharge the specified unpaid tax advertised with interest and expenses computed to the time of sale, and the sale does not discharge all taxes against the property then due, whether or not included in the advertised amount due and unpaid.⁵¹ So, the sale by the municipality of property for taxes of any year does not discharge the taxes for any other year.⁵² The property of an incompetent may be subject to sale.⁵³

Before there can be a valid sale for taxes, there must have been a valid assessment of the tax,⁵⁴ and a valid lien on the property;⁵⁵ and a sale may be void if the execution includes taxes the lien of which has expired,⁵⁶ or penalties for certain years

for which no penalty had been legally provided.⁵⁷ It is sometimes a condition precedent to the sale of land that an attempt first be made to collect the tax from the personal property of the taxpayer, as discussed *infra* § 2096.

§ 2085. — Power and Duty to Sell

Real property may be sold for unpaid municipal taxes only where the power has been conferred on the municipal corporation either expressly or by necessary implication, and then always subject to the statutory limitations thereon, and the authority conferred on the municipal corporation may make the sale mandatory and not discretionary.

A municipal corporation has no authority, apart from that conferred by statute, to sell real property for unpaid municipal taxes;⁵⁸ but such a sale may be made where power has been conferred on the municipality either expressly or by necessary implication,⁵⁹ subject always to the statutory limitations thereon.⁶⁰ Under some statutes, the au-

vided for by prior provisions of the act.—*Boyd v. Dillman*, 197 A. 830, 9 W.W.Harr., Del., 231.

50. N.J.—*Becker v. Mayor and Council of Borough of Little Ferry*, 14 A.2d 493, 125 N.J.Law 141, affirmed 19 A.2d 657, 126 N.J.Law 338.

S.C.—*Home Building & Loan Ass'n v. City of Spartanburg*, 194 S.E. 143, 185 S.C. 853.

Tenant's personalty tax

A borough could not impose a tenant's unpaid personalty tax as a lien on the realty, and could not sell such realty on nonpayment of the tax.—*Becker v. Mayor and Council of Borough of Little Ferry*, 14 A.2d 493, 125 N.J.Law 141, affirmed 19 A.2d 657, 126 N.J.Law 338.

Validated taxes

Fla.—*Parker v. Town of Callahan*, 156 So. 334, 115 Fla. 266, amended 157 So. 662, 117 Fla. 270.

51. N.Y.—*City of Beacon v. Asher Bernstein Realty Corp.*, 57 N.Y.S. 2d 659, 185 Misc. 262, motion denied 60 N.Y.S.2d 616, 270 App.Div. 852.

52. N.Y.—*City of Beacon v. Asher Bernstein Realty Corp.*, *supra*.

53. Pa.—*Third Nat. Bank of Scranton v. City of Scranton*, 27 Pa. Dist. & Co. 543, 37 Lack.Jur. 42.

54. Colo.—*Reagan v. Dick*, 293 P. 333, 88 Colo. 122.

Fla.—*Klich v. Miami Land & Development Co.*, 191 So. 41, 139 Fla. 794.—*Pierson v. Long*, 137 So. 232, 103 Fla. 383.

La.—*McCall v. Blouin*, 138 So. 528, 18 La.App. 717.—*Meredith v. Tubre*, 126 So. 902, 10 La.App. 369.

Tenn.—*Glass v. White*, 5 Sneed 475, 44 C.J. p 1354 note 26 [d].

Assessment to "unknown"

Tax sales made under assessments of taxes to "unknown" are void where the identical property was covered by other assessments under a different description and such assessments were paid by the owner against whom the taxes were charged.—*Pratt v. Dalgarn*, 116 So. 585, 166 La. 35.

55. Mass.—*City of Worcester v. Bennett*, 38 N.E.2d 647, 310 Mass. 400.—*Shruhan v. Reverse*, 9 N.E.2d 411, 298 Mass. 12.

Pa.—*In re Property of Hazard, Com. Pl.*, 37 Luz.Leg.Reg. 217.

56. S.C.—*De Pass v. City of Spartanburg*, 1 S.E.2d 904, 190 S.C. 22.—*Home Building & Loan Ass'n v. City of Spartanburg*, 194 S.E. 143, 185 S.C. 353.

57. S.C.—*De Pass v. City of Spartanburg*, 1 S.E.2d 904, 190 S.C. 22.—*Home Building & Loan Ass'n v. City of Spartanburg*, 194 S.E. 143, 185 S.C. 353.

58. Ky.—*Johnston v. Louisville*, 11 Bush 527.

N.Y.—*Wilcox v. Rochester*, 7 N.Y.S. 187, 54 Hun 72, affirmed 29 N.E. 99, 129 N.Y. 247.

59. Fla.—*McDonald Mortgage & Realty Co. v. Tax Securities Corporation*, 151 So. 896, 112 Fla. 622. La.—*State v. New Orleans*, 38 So. 475, 112 La. 408.

Mo.—*Gilmore v. Hibbs*, 152 S.W.2d 26, 347 Mo. 1072.

N.C.—*Wilkinson v. Boomer*, 7 S.E.2d 491, 217 N.C. 217.

Pa.—*Appeal of Andrews Land Corporation*, 37 A.2d 700, 149 Pa.Super. 212.

S.C.—*Grier v. City Council of City*

of Spartanburg, 26 S.E.2d 690, 203 S.C. 203.

Statutes held valid

(1) In general.—*City of Detroit v. Collateral Liquidation*, 295 N.W. 218, 235 Mich. 440.

(2) The statute providing for the sale of realty where the market value is less than municipal tax claims is not invalid as exempting from taxation or partially exempting from taxation realty sold pursuant to statute, since the statute merely permits the holder of a lien to realize the full value of the security and in no manner gives any benefit to the tax debtor.—*Burkley v. City of Philadelphia*, 15 A.2d 201, 339 Pa. 426.

60. Cal.—*Hosson v. City of Long Beach*, 189 P.2d 787, 83 Cal.App.2d 745.

Del.—*Hill v. Ellis*, 23 A.2d 112, 2 Terry 402.

Ind.—*Millikan v. Lafayette*, 20 N.E. 847, 118 Ind. 323.

N.J.—*Drew v. Flynn*, 84 A. 1061, 83 N.J.Law 1.

N.Y.—*City of Johnstown v. Wells*, 273 N.Y.S. 631, 242 App.Div. 103, affirmed 11 N.E.2d 787, 275 N.Y. 623.—*Sharp v. Johnson*, 4 Hill 92, 40 Am.D. 259.

Pa.—*Sugden v. Rothschild*, 155 A. 864, 304 Pa. 365.—*In re Wilson Borough Tax Lien, Com.Pl.*, 28 North.Co. 215.—*In re Wilson Borough Tax Lien, Com.Pl.*, 28 North.Co. 205.

Wis.—*Knox v. Peterson*, 21 Wis. 247.

44 C.J. p 1354 note 26.

Grounds of invalidity

The statute prescribing that no tax assessment sale or conveyance shall be held invalid except on proof

thority conferred on the municipality may make the sale mandatory and not discretionary.⁶¹ The power to sell is not to be inferred from mere power to levy and collect taxes,⁶² or, in the case of a public service corporation, where the sale would destroy the public use of the property;⁶³ but the power is necessarily implied from charter power to provide for redemption of land sold for taxes,⁶⁴ or from power to collect taxes in the same manner as township officers authorized to sell real estate for unpaid taxes.⁶⁵

In exercising a power delegated to it by the state respecting the foreclosure of tax liens on real estate, a municipal corporation acts as an agency of the state in proceedings to foreclose tax liens against land.⁶⁶ A municipal officer may be authorized to offer property for sale to satisfy a municipal tax lien, although the state purchased the property at a previous sale for state and county taxes,⁶⁷ but it has been held that, where the county has conducted a sale of land for delinquent taxes and county commissioners have taken title thereto as trustees for all other tax levying authorities, the municipality is not authorized subsequently to conduct its own tax sale and take title to the property in competition with the county.⁶⁸ The state board of tax appeals has been held to have no authority to review the validity of a resolution of the city governing body authorizing a tax sale, based on action of the county board of taxation, but may only review the actions or determination of such board.⁶⁹

Estoppel. The municipality may be estopped to

sell because of a compromise made by a city officer and ratified by the municipality,⁷⁰ or because of a certification to a prospective purchaser of the property that all taxes due on the property had been paid.⁷¹

Repeal of statutes. A section in a general law, enacted under a constitutional requirement, giving to cities electing to abandon their charters and reorganize under the general law a right summarily to sell lands for "the total amount of taxes due on the property," has been construed to give the city power to sell the land for taxes accruing prior to the reorganization, as well as since,⁷² and its right to do so is not abridged by other sections of the same law giving the city a right to bring an action for the recovery of such taxes.⁷³ An earlier statute providing a method of collecting back taxes and water rates and for the levy of a tax to include both is not impliedly repealed by a later general statute relating to the collection of taxes generally,⁷⁴ and a sale in fee under the earlier statute is not invalidated by a provision of the later act requiring a sale to the person who will purchase for the shortest term, or in fee where no one will purchase for a shorter term.⁷⁵ While an amendatory act generally operates as a repeal of all inconsistent provisions in the statute which is amended, the right of a city summarily to sell land for taxes under a statute is not affected by a later amendatory act which in terms provides that nothing therein contained should be construed to impair any of the city's rights or remedies under the

that property was not subject to taxation, or that taxes had been paid or property redeemed, was not applicable to municipal taxes—*Henderson v. Boose*, 196 So. 671, 142 Fla. 804.

Sale clear of liens

In a proceeding by city for an order on the sheriff to sell on its judgment for city taxes certain realty clear of liens, statutes relating to the validating of tax liens and statutes relating to judicial sales and the preserving of the lien of mortgages, were not applicable.—*City of Erie v. A Piece of Land Fronting on Southeast Corner of Eighth and Peach Streets*, 14 A.2d 428, 339 Pa. 321.

61. N.J.—*Hugg v. Camden*, 39 N.J. Law 620.

Age of lien

Village which adopted provisions of statute authorizing foreclosure of tax lien by action in rem should proceed to foreclose all tax liens which were at least four years old in manner provided by the statute.—

Boeck v. Incorporated Village of South Floral Park, 19 N.Y.S.2d 946, 174 Misc. 372.

62. Iowa.—*McInerney v. Reed*, 23 Iowa 410—*Ham v. Miller*, 20 Iowa 450.

63. Ky.—*Covington Gas Light Co. v. Covington*, 7 Ky.L. 763, 13 Ky. Op. 1079.

64. Mo.—*St. Louis v. Russell*, 9 Mo. 507.

65. N.J.—*Relistob v. Belmar*, 34 A. 885, 58 N.J.Law 489.

66. Mich.—*City of Detroit v. O'Connor*, 5 N.W.2d 453, 302 Mich. 531.

67. Ala.—*City of Opp v. Brogden*, 181 So. 752, 236 Ala. 180.

La.—*Gamet's Estate v. Lindner*, 106 So. 22, 159 La. 658—*Jones v. Town of Pineville*, App., 200 So. 38—*Touchstone v. Comer*, App., 183 So. 291.

Curative statute

The act providing that improvement district may foreclose on any delinquent lands in district, even though lands may have been for-

feited and sold to state for nonpayment of general taxes, subject to paramount lien of state, is curative and retroactive and validates previous sales of land for improvement district taxes while title thereto was in the state.—*Deniston v. Burroughs*, 190 S.W.2d 623, 209 Ark. 436.

68. Pa.—*Appeal of Andrews Land Corporation*, 27 A.2d 700, 149 Pa. Super. 212.

69. N.J.—*Toone v. City of Camden*, 22 A.2d 351, 19 N.J.Misc. 600.

70. Wis.—*Kneeland v. Gilman*, 24 Wis. 39.

71. La.—*American Homestead Co. v. Zemurray*, 196 So. 13, 195 La. 37.

72. Mo.—*State v. Tufts*, 22 S.W. 91, 15 S.W. 954, 108 Mo. 418.
44 C.J. p 1354 note 37.

73. Mo.—*State v. Tufts*, supra.

74. N.J.—*Title Guarantee Land Co. v. Paterson*, 74 A. 794, 76 N.J.Eq. 539.

75. N.J.—*Title Guarantee Land Co. v. Paterson*, supra.

earlier statute;⁷⁶ but a city charter granting the right to sell is a "special law" within the meaning of a later statute repealing all inconsistent provisions in prior special laws,⁷⁷ and a provision conferring power to sell, when inconsistent with the later provisions, is thereby repealed.⁷⁸

Resale. The city may make a second sale of the same property for the same taxes, where the first sale was made to the city and was probably invalid,⁷⁹ or where the purchaser failed to complete the purchase;⁸⁰ but, where property is once sold in satisfaction of a municipal claim under circumstances making it the duty of the city to discharge its lien for taxes out of the proceeds, it cannot, after failure to do so, have the property sold a second time for the taxes.⁸¹

§ 2086. — Procedure for Sale in General

A statute or charter provision establishing the procedure for the sale of real property for unpaid municipal taxes should be observed in effecting such a sale.

A statute or charter provision establishing the procedure for sale of real property for unpaid municipal taxes ordinarily should be observed in effecting such a sale.⁸² It has been held that statutes fixing the procedure for sale are to be liberally construed in favor of the owner and occupant

of the property,⁸³ but it has also been held that any doubt of the procedure in effect in a past year for the sale of land for taxes will be construed in favor of the legality of the sale.⁸⁴

The procedure to sell land for taxes thereon may be either summary, or by an action to foreclose the lien on the real estate for the unpaid taxes, as discussed *infra* § 2087 a, d. In some jurisdictions the summary mode prescribed by statute or charter is exclusive,⁸⁵ while in other jurisdictions the municipality may proceed in either way.⁸⁶ Sometimes the procedure is by a *scire facias sur municipal claim*, or by an application for judgment of sale without formal pleadings, as discussed *infra* § 2087 b, c. In any case if the proceedings for the sale of realty for city taxes were irregular, the sale may be void,⁸⁷ and a jurisdictional defect in the sale has been held not validated by a curative act legalizing tax sales for unpaid city taxes.⁸⁸ It is sometimes provided, however, that no tax sale shall be invalid because of any irregularity in any proceeding that does not prejudice the property rights of the owner.⁸⁹

Where such a procedure is prescribed by statute, the collector must serve on the taxpayer a statement of the amount of taxes due with a demand for payment, before a sale may be made,⁹⁰ but it has

76. N.J.—Campbell v. Dewick, 20 N. J.Eq. 186.

77. N.J.—Bozarth v. Egg Harbor City, 89 A. 920, 85 N.J.Law 412.

78. N.J.—Bozarth v. Egg Harbor City, *supra*.

79. Tex.—McCrary v. Comanche, Civ.App., 34 S.W. 679.

80. La.—In re Lindner, 38 So. 610, 114 La. 895.

81. Pa.—City v. Lewis, 4 Phila. 135.

82. Mo.—Gilmore v. Hibbs, 153 S. W.2d 26, 347 Mo. 1072.

Pa.—Andrews Realty Co. of New Castle v. City of New Castle, 49 Pa.Dist. & Co. 47, 2 Lawrence L.J. 204.

Ordinance

Where a city is authorized by charter or statutory provision to sell realty for taxes, the city has implied authority to provide by ordinance the manner of effecting a valid sale of realty for taxes authorizedly levied against the realty by the city, notwithstanding the charter neither created nor delegated power to the city to create a lien to secure the taxes.—Patten v. Corbin, 82 P.2d 789, 42 N.M. 561, followed in *Town of Silver City v. North*, 82 P.2d 792, 42 N.M. 567.

Strict compliance

The title of an owner of property cannot be divested by virtue of stat-

utes providing for the public sale of land under certain circumstances for nonpayment of taxes without a strict compliance with all the provisions of the statute.—*Long Island R. Co. v. City of New York*, 64 N.Y.S.2d 391.

Use of state machinery

The statute providing for use of state machinery in sales of lands for municipal taxes and redemption therefrom must be interpreted as referring to adoption of such machinery for purposes of economy and convenience only, without disturbing rules as to separation of such sales from sales for state and county taxes and superiority of state and county over municipal tax liens.—*City of Opp v. Brogden*, 181 So. 752, 236 Ala. 180.

Valuation of property

Pa.—Burkley v. City of Philadelphia, 15 A.2d 201, 339 Pa. 426.

83. N.Y.—*Long Island R. Co. v. City of New York*, 64 N.Y.S.2d 391.

84. U.S.—*Schram v. Safety Inv. Co.*, D.C.Mich., 39 F.Supp. 519.

85. Ky.—*Johnston v. Louisville*, 11 Bush 527.

Mo.—*State ex rel. Steed v. Nolte*, 138 S.W.2d 1016, 345 Mo. 1103.

86. Fla.—*Gautier v. Town of Crescent City*, 189 So. 842, 138 Fla. 578

—*State ex rel. Van Ingen v. Panama City*, 171 So. 760, 126 Fla. 776 —*Milton v. City of Marianna*, 144 So. 400, 107 Fla. 251.

44 C.J. p 1355 note 54.

87. N.Y.—*Getman v. Niferopoulos*, 11 N.E.2d 713, 276 N.Y. 161.

88. N.Y.—*Eckman v. Mell*, 8 N.Y.S.2d 856, 255 App.Div. 925, followed in *Valone v. Ngiala*, 8 N.Y.S.2d 857, 255 App.Div. 926, reargument denied 12 N.Y.S.2d 770, 257 App. Div. 911, and *Olds v. City of Jamestown*, 8 N.Y.S.2d 857, 255 App.Div. 926, reargument denied 10 N.Y.S.2d 217, 256 App.Div. 895, affirmed 20 N.E.2d 756, 280 N.Y. 281. Reargument denied *Eckman v. Mell*, 12 N.Y.S.2d 770, 257 App. Div. 911.

89. Mich.—*Turner v. Hutchinson*, 71 N.W. 514, 113 Mich. 245.

Sale held not defeated

Under such a statute, the fact that the collector used the original tax roll, instead of a copy as required, and that the treasurer failed to verify his statement of uncollected taxes within the time specified does not defeat the tax sale.—*Turner v. Hutchinson*, 71 N.W. 514, 113 Mich. 245.

90. Mass.—*City of Boston v. Boston Port Development Co.*, 30 N.E.2d 896, 308 Mass. 72, 138 A.L.R. 515.

been held that a tax sale is not invalid because of the alleged failure to comply with the statute purporting to give the holder of a mortgage the right to be informed by the proper authorities of the exact amount to be paid for taxes, in the absence of fraud or mistake.⁹¹

It is sometimes required that, prior to sale, a delinquent list must be made up,⁹² and, where the statute so requires, the delinquent list must be recorded.⁹³ The property subject to sale must be sufficiently described in the delinquent list.⁹⁴ However, a sale to the city was not invalid because the delinquent tax list was published after the time required where a subsequent ordinance extended the time for publication.⁹⁵

A valid levy on, or seizure of, the property prior to sale may be essential under some statutes,⁹⁶ and usually it is necessary that there be a valid order of sale.⁹⁷ So a sale made after expiration of the order of sale may be void and, therefore, subject to either collateral or direct attack.⁹⁸

A tax sale has been held not to be void because the minutes of the board of aldermen do not adjudicate necessary jurisdictional facts.⁹⁹

§ 2087. — Particular Remedies, and Proceedings Thereunder

a. Summary sale

b. Application for judgment of sale

c. Scire facias

d. Action to foreclose lien

a. Summary Sale

Under some statutes, a summary sale of land for municipal taxes may be had, but such sale must be in strict compliance with the statutory requirements.

Under some statutes, a summary sale of land for taxes may be had,¹ and in such case the sale and the proceedings therefor must be in strict compliance with the statutory requirements,² as, for example, requirements that a delinquent list shall be made out and returned by the city collector,³ or that an order shall be made by the common council and entered on the records particularly describing the premises to be sold,⁴ or that the owner's name shall be given and published in the proceedings.⁵ However, where the statute so provides, an irregularity, error, or mistake within its terms will not invalidate the sale.⁶

b. Application for Judgment of Sale

Where the statute so provides, a proper remedy for the collection of delinquent municipal taxes is by application for judgment of sale.

Where the statute so provides, a proper remedy for collection of delinquent municipal taxes is by application for judgment of sale.⁷ So, it is sometimes provided that taxes may be enforced by the filing of a praecipe in the office of the prothonotary of the court containing specified details, whereupon a monition is issued to the sheriff stating the amount of the judgment for taxes due with other details, with authority to sell the property therefor.⁸ Such

Demand on former owner

City's demands on former owners for payment of taxes were sufficient even if premises at time of demands were owned by another to whom copies of demand were mailed.—*City of Chicopee v. Manset Realty Corp.*, 66 N.E.2d 364, 319 Mass. 434.

Mailing

Placing of a notice of demand for city taxes in the mail is "prima facie evidence" that notice was received by the addressee; the mailing of demand addressed to company owning land in question in care of its treasurer, who was designated "president" in the address, but to address of a different company of which treasurer was also a director, constituted an irregular service of demand.—*City of Boston v. Boston Port Development Co.*, 30 N.E.2d 896, 308 Mass. 72, 133 A.L.R. 515.

91. S.C.—*Home Building & Loan Ass'n v. City of Spartanburg*, 194 S.E. 139, 185 S.C. 313.

92. Cal.—*Howard v. Judson*, 194 P. 2d 138, 86 Cal.App.2d 128.

64 C.J.S.—55

Review

A resolution of city's governing body listing certain property for sale for delinquent taxes, and based on proceedings before county board of taxation from whose decision an appeal was pending before the state board of tax appeals, was not reviewable directly by certiorari, since board before which appeal was pending was competent to give whatever relief taxpayer was entitled to.—*Toone v. City of Camden*, 11 A.2d 839, 124 N.J.Law 339.

93. W.Va.—*Ritchie Lumber Co. v. Nutter*, 66 S.E. 646, 66 W.Va. 444, 44 C.J. p 1356 note 15 [a].

94. Cal.—*Howard v. Judson*, 194 P. 2d 138, 86 Cal.App.2d 128.

95. Cal.—*Howard v. Judson*, *supra*.

96. S.C.—*De Pass v. City of Spartanburg*, 1 S.E.2d 904, 190 S.C. 22 —*Home Building & Loan Ass'n v. City of Spartanburg*, 194 S.E. 143, 185 S.C. 353.

97. Tex.—*Tudor v. Orr*, Civ.App., 179 S.W.2d 796.

98. Tex.—*Tudor v. Orr*, *supra*.

99. Miss.—*Lear v. Hendrix*, 187 So. 746, 186 Miss. 289.

1. Mo.—*State ex rel. Steed v. Nolte*, 138 S.W.2d 1016, 345 Mo. 1103. Exclusive or optional remedy see *supra* § 2086.

2. Colo.—*Reagan v. Dick*, 293 P. 333, 88 Colo. 122.

44 C.J. p 1355 note 59.

3. W.Va.—*Cooper v. Coleman*, 116 S.E. 158, 91 W.Va. 300.

44 C.J. p 1355 note 60.

4. N.Y.—*Erschler v. Lennox*, 42 N.Y.S. 805, 11 App.Div. 511.

44 C.J. p 1355 note 61.

5. La.—*Carmichael v. Alkin*, 13 La. 205.

44 C.J. p 1355 note 62.

6. W.Va.—*Ritchie Lumber Co. v. Nutter*, 66 S.E. 646, 66 W.Va. 444.

7. Ill.—*Hutchinson v. Self*, 39 N.E. 27, 152 Ill. 542.

8. Del.—*Pottock v. Mellott*, 23 A.2d 843, 2 Terry 361.

Validity of provision for notice

Statute merely requiring posting of notice on property before sale of property for taxes is not invalid.

a proceeding is strictly in rem,⁹ and the word "judgment" is not used in the sense of a final determination by a court of the rights of the parties but is used as an apt legalistic term for the record to be made by the prothonotary as the basis of the selling writ.¹⁰ In such a proceeding, the court exercises a special and limited jurisdiction, and may not exercise powers in excess of those conferred by statute.¹¹

Objections. An objection that the purported tax levy ordinance was not certified by the county clerk is broad enough to allow the point to be raised that it was not a certified copy of the tax levy ordinance.¹² An objection to the general corporate tax of the city for which judgment is sought may not be considered where the record does not contain either the appropriation ordinance or the levy ordinance on which the objection was made.¹³ However, the taxpayer may properly raise an objection as to an alleged overestimate of tax anticipation warrant liabilities constituting part of the city indebtedness for which the tax was imposed for which recovery is sought.¹⁴

Proof. A prima facie case is established by introducing the delinquent tax list and proof of notice of application for judgment.¹⁵ One filing objections to a judgment for a city tax on the grounds of noncompliance with the statute has the burden of proving the objection.¹⁶ Where a taxpayer shows an overestimate of liabilities constituting the

basis of the imposition of the tax, the burden is on the collector to show compensating errors in other items of estimate to show that the taxpayer was not harmed by the overestimate.¹⁷ Proof of the time when an ordinance was filed with the county clerk does not of itself establish the time when it was passed by the city council.¹⁸

Appeal. Where the validity of a city tax is questioned below on the ground that it is excessive and the ordinance is introduced merely for the purpose of showing an excessive rate, the tax cannot be attacked on appeal because the ordinance was defective.¹⁹

c. Scire Facias

A proper remedy for the collection of delinquent taxes is by scire facias sur municipal lien, where the statute so provides.

Where the statute so provides, a proper remedy for the collection of delinquent taxes is by scire facias sur municipal lien.²⁰ Such a proceeding is one in rem.²¹ Judgment should not be granted where the lien of the taxes has expired,²² but it is not a defense to the proceeding that the assessment was erroneous where defendant has not availed himself of the statutory methods for correcting it.²³ It is ordinarily necessary and sufficient that notice of the proceeding be given to the registered owner of the property,²⁴ and notice by posting and advertising may suffice where the registered owner

since general notice and opportunity to be heard with respect to assessment are provided by assessment statute and taxes are imposed each year at stated times and places fixed by law; nor is statute invalid on ground that twenty days allowed between return of sheriff with respect to posting of monition and issuance of writ of venditioni exponas are too short.—Pottock v. Mellott, supra.

Fraecipe held sufficient as to description of property
Del.—Pottock v. Mellott, supra.

9. Del.—Pottock v. Mellott, supra.

10. Del.—Pottock v. Mellott, supra.

Description of property

A sheriff's sale for taxes due the city was not invalid for an insufficient description of the property directed to be sold where the property was described by a statement of the index number of the property in the judgment and monition together with the street and block.—Pottock v. Mellott, supra.

11. Del.—Hill v. Ellis, 23 A.2d 112, 2 Terry 402.

12. Ill.—People v. Kankakee, etc., R. Co., 75 N.E. 1063, 218 Ill. 588.

13. Ill.—People ex rel. Oller v. New York Cent. R. Co., 58 N.E.2d 51, 388 Ill. 382.

Objection to items of appropriation ordinance on which a tax levy was based could not be considered even though relevant portion of appropriation ordinance was contained in record where record did not contain tax levy ordinance.—People ex rel. Oller v. New York Cent. R. Co., supra.

14. Ill.—People ex rel. Schlaeger v. Bunge Bros. Coal Co., 64 N.E.2d 365, 392 Ill. 153.

15. Ill.—People v. Wabash R. Co., 117 N.E. 1048, 281 Ill. 382.

16. Ill.—People v. Wabash R. Co., 100 N.E. 187, 256 Ill. 626.
44 C.J. p 1355 note 68.

17. Ill.—People ex rel. Schlaeger v. Bunge Bros. Coal Co., 64 N.E.2d 365, 392 Ill. 153.

18. Ill.—Keokuk, etc., Bridge Co. v. People, 43 N.E. 691, 161 Ill. 132.
44 C.J. p 1355 note 69.

19. Ill.—Indiana, etc., R. Co. v. People, 66 N.E. 293, 201 Ill. 351.

20. Pa.—City of Philadelphia v.

Sulzer's Estate, 20 A.2d 233, 342 Pa. 37.

44 C.J. p 1355 note 72.

Proceedings held not invalid

Pa.—City of Philadelphia v. Sulzer's Estate, 20 A.2d 233, 342 Pa. 37—City of Philadelphia v. L. Tanner & Co., 30 A.2d 216, 151 Pa.Super. 177.

Notice of lien

Where purchase-money mortgage expressly mentioned mortgagees' original appeal to test validity of municipal tax lien, and mortgagees agreed to accept reduction in purchase price if city taxes should be adjudged valid lien against mortgaged property, mortgagor did not take title without "notice" of lien and subsequent proceedings thereunder.—City of Philadelphia v. L. Tanner & Co., supra.

21. Pa.—City of Philadelphia v. Sulzer's Estate, 20 A.2d 233, 342 Pa. 37.

22. Pa.—Philadelphia v. Rebank, 12 Pa.Co. 526.

23. Pa.—Philadelphia v. Phillips, 65 Pa.Super. 578—Philadelphia v. Phillips, 25 Pa.Dist. 445.

24. Pa.—City of Philadelphia v. Lotter, 32 Pa.Dist. & Co. 189.

is deceased.²⁵ The fact, however, that a corporation which was the registered and assessed owner was not named in the scire facias and was not given notice of the tax proceedings is not available as a defense to the real owner at the time the tax was levied, who was made a party to the record and personally served.²⁶ A mistake in setting forth the name of defendant in the scire facias and the judgment has been held amendable,²⁷ and an owner who raised no objection when the court ordered an amendment of the scire facias on a municipal tax lien to designate the real registered owner may not thereafter, when the owners became mortgagees, raise an objection that the rights of intervening third persons have intervened.²⁸

Opening judgment; satisfaction. The judgment ordering the sale will not be opened except for good cause shown why the taxes should not be paid,²⁹ and only where the taxpayer has asserted his rights promptly and without delay.³⁰ Under the express provisions of statute, on the delivery by the sheriff of a deed for property sold under a tax claim, the judgment on which the sale was had becomes conclusive, and the validity of such a judgment cannot thereafter be impeached on the

ground that certain persons in interest were not notified.³¹ A judgment entered on a scire facias on a claim for one year's taxes must be satisfied on payment of the amount of the judgment and costs, and the city has no standing to demand payment of all delinquent taxes, with penalties, interest, and costs, as a condition precedent to satisfying the judgment.³²

d. Action to Foreclose Lien

- (1) In general
- (2) Defenses
- (3) Parties and process
- (4) Pleading
- (5) Evidence
- (6) Trial, judgment, and review

(1) In General

Under some statutes, a municipal corporation or other holder of a tax lien on real estate may sue to foreclose it, but compliance must be had with conditions precedent and suit must be brought within the time permitted by law.

Under some statutes a municipal corporation may sue to foreclose the lien on real estate for unpaid taxes,³³ and, to the extent that a statute confers

25. Pa.—City of Philadelphia v. Sulzer's Estate, 20 A.2d 232, 342 Pa. 37.

26. Pa.—City of Philadelphia v. Myers, 157 A. 13, 102 Pa.Super. 424.

27. Pa.—City of Philadelphia v. Sulzer's Estate, 20 A.2d 233, 342 Pa. 37.

Remedial statute

The provision in statute relating to municipal claims and tax liens, authorizing amendment of any claim, petition, answer, replication, scire facias, affidavit of defense, or other paper filed of record, is remedial in nature, and should be liberally construed.—City of Philadelphia v. Sulzer's Estate, supra.

Time of amendment; effect

Tax claims can be amended to set forth real name of owner even after time for filing has expired, and such amendment is not equivalent to substituting a new party after time for filing lien has passed, but is a correction in name of person intended to be described.—City of Philadelphia v. Sulzer's Estate, supra.

28. Pa.—City of Philadelphia v. L. Tanner & Co., 30 A.2d 216, 151 Pa. Super. 177.

Where all parties had notice of proceeding by city to foreclose tax lien when purchaser of property involved registered its title, vendors' taking a purchase-money mortgage from purchaser gave vendors no

such intervening rights as would prevent city from amending its proceeding of scire facias to name purchaser as real owner.—City of Philadelphia v. L. Tanner & Co., supra.

29. Pa.—Philadelphia v. Unknown Owner, 20 Pa.Super. 203.

44 C.J. p 1356 note 74.

Procedure for attacking default judgment

Pa.—Borough of Northampton v. Bayout, Com.Pl., 29 North.Co. 22.

Effect of appellate determination

Pa.—City of Philadelphia v. Sulzer's Estate, 20 A.2d 233, 342 Pa. 37.

30. Pa.—Philadelphia v. Wallace, 22 Pa.Co. 123.

44 C.J. p 1356 note 75.

31. Pa.—City of Philadelphia v. Lotter, 32 Pa.Dist. & Co. 169.

32. Pa.—City of Philadelphia v. Stern, 31 Pa.Dist. & Co. 88.

33. Ala.—City of Anniston v. Anniston Office Bldg. Co., 149 So. 93, 227 Ala. 180.

Ky.—Rains v. City of Lexington, 145 S.W.2d 516, 284 Ky. 609.

N.Y.—Boeck v. Incorporated Village of South Floral Park, 19 N.Y.S.2d 946, 174 Misc. 372.

N.C.—Wilkinson v. Boomer, 7 S.E. 2d 491, 217 N.C. 217.

44 C.J. p 1356 note 78.

As optional remedy see supra § 2086.

Other invalid provisions

Municipality held authorized to maintain suit judicially to enforce

tax liens under statute without regard to another invalid statutory provision for collection.—Parker v. Town of Callahan, 156 So. 334, 115 Fla. 266, amended 157 So. 662, 117 Fla. 270.

Jurisdiction held shown

Fla.—Adams v. Adams, 180 So. 516, 132 Fla. 777, followed in Adams v. Dommerich, 180 So. 519, 131 Fla. 782.

Provisions held valid

Mich.—City of Detroit v. Safety Inv. Corporation, 285 N.W. 42, 288 Mich. 511.

N.Y.—City of New Rochelle v. Echo Bay Waterfront Corporation, 49 N. Y.S.2d 673, 268 App.Div. 182, affirmed 60 N.E.2d 838, 294 N.Y. 678, certiorari denied 68 S.Ct. 24, 326 U.S. 720, 90 L.Ed. 426—Carodix Corporation v. Comiskey, 39 N.Y. S.2d 732, 265 App.Div. 450, affirmed 52 N.E.2d 957, 291 N.Y. 737—Boeck v. Incorporated Village of South Floral Park, 19 N.Y.S.2d 946, 174 Misc. 372.

Statute held superseded

Fla.—City of Lakeland v. Chase Nat. Co., 32 So.2d 833, 159 Fla. 783.

Statute held not repealed

N.Y.—Carodix Corporation v. Comiskey, 39 N.Y.S.2d 732, 265 App.Div. 450, affirmed 52 N.E.2d 957, 291 N. Y. 737.

Statutory proceeding in equity

Va.—Pollard & Bagby v. City of Richmond, 24 S.E.2d 564, 181 Va. 181.

a right of action, a private individual holding a tax lien against land may enforce such lien by an action in the nature of foreclosure.³⁴ It has been held that municipal tax liens may be foreclosed in equity even without statutory authority for the proceeding,³⁵ but it has also been held that an action to foreclose such liens may not be maintained in the absence of statutory authority therefor,³⁶ and that a statute setting forth the remedies of a municipality to collect delinquent taxes may deny the right to institute suit for foreclosure.³⁷ The proceeding under these statutes is usually one in rem.³⁸ A municipality may be authorized to prosecute a suit to foreclose several distinct tax liens on different pieces of property,³⁹ but a court of equity may order a separation of the suit if justice requires it.⁴⁰

Conditions precedent. Under some statutes, the return of nulla bona on a distress warrant,⁴¹ or the giving of a notice to redeem,⁴² is a condition precedent to the maintenance of the foreclosure action. It is sometimes provided that, in order to give the court jurisdiction over the proceedings, the city

or town clerk must file with the register a certified list of taxable property, described and designated as required by statute, on which taxes are delinquent within a certain time after the taxes have become delinquent.⁴³ The notice required by statute to be mailed to the landowner a certain time before institution of the suit to foreclose the tax lien has been held not jurisdictional but only directory,⁴⁴ but the intentional omission to give holders of record title the required warning notice of the action may constitute fraud.⁴⁵

Time to sue. The suit must be brought within the time fixed by the statute,⁴⁶ but it may not be instituted prior to the time permitted by law.⁴⁷

Provisional remedies. In an action to foreclose a tax lien, the city may have the right under statute to secure the appointment of the city treasurer as receiver of the rents and profits of the premises to be foreclosed,⁴⁸ and on such appointment, the court has general equity jurisdiction to maintain and preserve the property and income pending foreclosure by fixing a reasonable occupational rent to be paid, even where the occupant is the owner of

34. N.Y.—County Securities v. Warwick Properties, 24 N.Y.S.2d 971, 176 Misc. 272, affirmed 33 N.Y.S.2d 825, 263 App.Div. 964, appeal denied 34 N.Y.S.2d 520, 263 App.Div. 1008, affirmed 46 N.E.2d 844, 289 N.Y. 774.

N.C.—Wilkinson v. Boomer, 7 S.E.2d 491, 217 N.C. 217.

Curing tax defaults

The possessor of a transfer of tax lien seeking foreclosure thereof, even if he became the actual landlord on his wife's purchase of the premises, was under no duty to cure tax defaults for the benefit of defendant lessee.—Hyman v. Fischer, 52 N.Y.S.2d 553, 184 Misc. 90.

Assessment omitted from sale

Where certain special assessments were inadvertently omitted from advertisement of sale of tax liens by the city and the purchaser of the tax lien purported to purchase only the lien for the annual taxes and not for the special assessment, the purchaser in a proper action for the foreclosure of the tax lien might cut off the city's right by making the city a party defendant, or if in the meantime the city should attempt to include the assessment in a later sale for unpaid taxes, by making the purchaser of such tax lien a party defendant.—Mount Vernon Trust Co. v. Lynn, 5 N.Y.S.2d 156, 167 Misc. 333, affirmed 3 N.Y.S.2d 210, 254 App.Div. 680.

55. Fla.—Milton v. City of Marianna, 144 So. 400, 107 Fla. 251.

36. N.Y.—City of Johnstown v.

Wells, 273 N.Y.S. 631, 242 App.Div. 103, affirmed 11 N.E.2d 787, 275 N.Y. 623.

37. Mo.—State ex rel. Steed v. Nolte, 138 S.W.2d 1016, 345 Mo. 1103.

38. Fla.—Harris v. City of Sarasota, 181 So. 366, 132 Fla. 568.
N.Y.—Boeck v. Incorporated Village of South Floral Park, 19 N.Y.S.2d 946, 174 Misc. 372.

39. Fla.—City of Lakeland v. Chase Nat. Co., 32 So.2d 833, 159 Fla. 783.

Suit held not objectionable

Bringing single suit to foreclose city tax liens against five separate parcels of land owned by different persons was held not objectionable because it interfered with administration of justice or prejudiced owners' rights.—Milton v. City of Marianna, 144 So. 400, 107 Fla. 251.

40. Fla.—Milton v. City of Marianna, supra.

41. Fla.—Parker v. Jacksonville, 30 So. 538, 37 Fla. 342.

42. N.Y.—City of Schenectady v. Landon, 6 N.Y.S.2d 925, 255 App.Div. 749.

43. Ala.—Timms v. Scott, 27 So.2d 487, 248 Ala. 286.

44. Fla.—Fleming v. Fleming, 177 So. 607, 130 Fla. 264.

45. Fla.—City of Lakeland v. Chase Nat. Co., 32 So.2d 833, 159 Fla. 783.

46. Mass.—City of Worcester v. Bennett, 38 N.E.2d 647, 310 Mass. 400.

N.Y.—Santasieri v. Crane, 23 N.Y.S.2d 455, 175 Misc. 375.
44 C.J. p 1356 note 79.

47. N.Y.—Safe Collateral Corporation v. Yonkers Home Liquidators, 2 N.Y.S.2d 95, 167 Misc. 132.

Acceleration of maturity

A statute relating to default in payment of tax on lands affected by transfer of tax lien was interpreted to mean that six months' default was necessary to give owner of prior tax lien election to accelerate maturity date thereof for purpose of bringing suit thereon, as against contention that any default that happens within six months after the tax becomes a lien may be basis of election.—Safe Collateral Corporation v. Yonkers Home Liquidators, supra.

Expiration of redemption period

Where village which had accepted provisions of statute relating to foreclosure by action in rem, of tax liens which are at least four years old, proceeded to sell liens which were less than four years old at tax sale as provided by Village Law, village could not foreclose on such property until owner's right of redemption expired.—Boeck v. Incorporated Village of South Floral Park, 19 N.Y.S.2d 946, 174 Misc. 372.

48. N.Y.—City of Long Beach v. Gold, 14 N.Y.S.2d 369, 171 Misc. 658.

the equity.⁴⁹ The holder of a tax lien other than the city who brings suit to foreclose such lien also may be entitled to the appointment of a receiver of the rents of the property where the facts show that plaintiff's security interest may be materially injured or destroyed unless the rents are impounded.⁵⁰ Plaintiff may be entitled to a temporary injunction restraining the owner's commission of waste on the property.⁵¹

(2) Defenses

A taxpayer may raise all proper defenses to an action to foreclose a municipal tax lien against his property, and ordinarily it is a good defense that conditions precedent to the bringing of the suit have not been performed; but it is not a defense that there has been a prior sale of the land for the tax where such prior sale is shown to be void.

A taxpayer may raise all proper defenses to an action to foreclose a municipal tax lien against his property,⁵² and he is not precluded from defending against the suit by reason of his failure to contest the levy and assessment of the taxes by the municipal corporation as invalid because made by resolution instead of by ordinance as required by its charter.⁵³ A tender or payment of the tax is not required in order to permit the taxpayer to defend against the foreclosure, at least where the validity of the entire tax is contested because of the lack of power to impose it.⁵⁴

It is a defense to an action to foreclose a lien for delinquent municipal taxes that conditions precedent to the bringing of the suit have not been performed,⁵⁵ that tax officials arbitrarily and with

intent to fix an excessive valuation on property raised the valuation thereof in violation of law,⁵⁶ or that the suit is brought to foreclose a tax lien for a gross sum assessed against several lots in a block, on the aggregate valuation and assessment of them made by the city authorities, without a return of the lots as one tract or parcel of land by the owner.⁵⁷ The defense that the suit was not brought within the statutory period is available to a mortgagee of the property.⁵⁸ It has been held that the court may decline to foreclose the lien where the descriptions of the parcels of land were so vague, indefinite, and uncertain that the lands attempted to be assessed could not be located by reference to any description or matter appearing on the assessment roll,⁵⁹ but mere insufficiency of the description of the property in the assessment roll has been held not a defense to foreclosure of the tax lien, where taxes are unpaid and the property is not exempt.⁶⁰

It is not a defense that there has been a prior sale of the land for the tax where such prior sale is shown to be void.⁶¹ A defense on a technical ground will not excuse the nonpayment of a tax for a long series of years where the taxpayer neglected to avail himself of a remedy for the correction of the error open to him at any time during such period.⁶² The validity of a foreclosure proceeding authorized by statute is not affected by the failure strictly to comply with provisions of the statute as to filing of a copy of the resolution of the city electing to adopt the terms of the statute prior to commencement of the proceeding.⁶³

49. N.Y.—City of Long Beach v. Gold, 14 N.Y.S.2d 269, 171 Misc. 658.

50. N.Y.—New York Lien Corp. v. Jung, 81 N.Y.S.2d 103.

51. N.Y.—City of White Plains v. Griffen, 8 N.Y.S.2d 32, 169 Misc. 706, affirmed 8 N.Y.S.2d 462, 255 App.Div. 1003.

Limitation of liability

In proceeding for foreclosure of tax liens, court in enjoining owners' removal of top soil from premises incumbered by tax liens would limit municipality's maximum liability in the event that it would be ultimately determined that municipality was not entitled to the injunction.—City of White Plains v. Griffen, supra.

52. Fla.—Certain Lots Upon Which Taxes Are Delinquent v. Town of Monticello, 31 So.2d 905, 159 Fla. 184.

53. Fla.—Certain Lots Upon Which Taxes Are Delinquent v. Town of Monticello, supra.

54. Fla.—Certain Lots Upon Which

Taxes Are Delinquent v. Town of Monticello, supra.

55. Fla.—Parker v. Jacksonville, 20 So. 538, 37 Fla. 342. 44 C.J. p 1356 note 80.

56. Tex.—City of Comanche v. Brightman, Civ.App., 88 S.W.2d 741, error dismissed.

57. Fla.—Parker v. Jacksonville, 20 So. 538, 37 Fla. 342.

58. Ky.—Rissberger v. Louisville, 118 S.W. 319.

59. Fla.—Gautier v. Town of Crescent City, 189 So. 842, 133 Fla. 573—Dixon v. City of Cocoa, 143 So. 748, 106 Fla. 855.

Dimensions shown on map

On foreclosure of a city tax lien, court would not proceed strictly in accordance with dimensions shown on assessment map which showed a fifty-foot frontage, where the actual frontage, by legal title and physical possession, was only forty-six feet, seven inches, so that the result of proceedings strictly in accordance with the dimensions shown on the map would be to include a

strip of land from adjoining lot so as to take in part of the frame structure erected on that lot.—Levine v. Jonkheer Realty Corporation, 17 N. Y.S.2d 926.

60. Fla.—Trust Co. of Florida v. City of Tampa, 138 So. 73, 103 Fla. 628.

61. Tenn.—Edgefield v. Brien, 3 Tenn.Ch. 673.

Tex.—McCrary v. Comanche, Civ. App., 34 S.W. 679.

62. N.Y.—Rudolph Wallach Co. v. Rooney, 164 N.Y.S. 616, 177 App. Div. 640.

44 C.J. p 1356 note 85.

63. N.Y.—Village of Pleasantville v. Gross, 71 N.Y.S.2d 100, 272 App. Div. 932, affirmed 77 N.E.2d 787, 297 N.Y. 767.

Substantial compliance

The filing in county clerk's office of certified copy of adoption by legislative body of tax district electing to adopt statute relating to foreclosure of tax lien by action in rem subsequent to commencement of foreclosure proceeding and before an-

or by the failure of the collecting officer to file a list of delinquent taxes within a certain period after the adoption of the resolution electing to adopt the statute.⁶⁴ A mistaken course of a tax assessor does not deprive a municipality of the right to enforce a tax lien against the realty,⁶⁵ and the fact that the officers and council of the city improperly compromised taxes for certain years is no defense in a suit to foreclose other taxes.⁶⁶

Set-off or counterclaim. Ordinarily, a taxpayer cannot set off or counterclaim for an obligation due to him from the municipality in an action brought against him to foreclose a tax claim against land,⁶⁷ but in some circumstances defendant may counterclaim for damage to his property inflicted by the municipality by the construction of a storm sewer.⁶⁸

(3) Parties and Process

In some instances a suit to foreclose a municipal tax lien should be brought in the name of the state against the present owner of the property. Notice of the action must be given in accordance with statutory or charter requirements.

Where a city charter provides that a tax shall be a lien on the real estate, and afterward a general statute is passed providing that there shall be a lien in favor of the state for city taxes, a suit to enforce the lien for city taxes should be brought in the name of the state.⁶⁹ Where the property has been conveyed subsequent to the accrual of the

tax lien, the suit may be brought against the present owner⁷⁰ without joining former owners as defendants.⁷¹ The failure to bring a tax foreclosure suit against the person in whose name the property was assessed does not invalidate the proceedings where the record discloses that the person in whose name the lands were originally assessed was long since deceased, and that the widow and heirs at law were made parties defendant.⁷²

A mortgagee of the property is a proper party to the action,⁷³ but owners of property adjoining the taxed property and having private easements over it of light, air, and access are not necessary parties.⁷⁴ The wife is not a necessary party to a suit to foreclose a tax lien against her husband's homestead.⁷⁵ The state must be made a party in authorized municipal tax foreclosure proceedings against lands, the fee-simple title of which is vested in the state for public governmental purposes,⁷⁶ but it may not be made such a party in the absence of legislative authority therefor.⁷⁷ The municipal corporation from which plaintiff obtained an assignment of the tax lien sought to be foreclosed is not always a proper party defendant to the suit.⁷⁸

Notice of the action to foreclose a tax lien must be given in accordance with the requirements of statute or charter provision.⁷⁹ Provision is sometimes made for notice by publication,⁸⁰ and it has been held not necessary that the statute obviate by

try of judgment of foreclosure, was a substantial compliance with requirement of law that such copy shall be filed prior to commencement of first foreclosure proceeding.—*Village of Pleasantville v. Gross*, supra.

64. N.Y.—*City of New Rochelle v. Closter*, 58 N.Y.S.2d 852, 269 App. Div. 1053, appeal dismissed 68 N.E.2d 451, 296 N.Y. 506.

65. N.J.—*Becker v. Mayor and Council of Borough of Little Ferry*, 14 A.2d 493, 125 N.J.Law 141, affirmed 19 A.2d 657, 126 N.J.Law 338.

66. Fla.—*Aikens v. City of Rockledge*, 182 So. 285, 132 Fla. 874.

67. Fla.—*Aikens v. City of Rockledge*, supra.

68. Fla.—*Baylen St. Wharf Co. v. City of Pensacola*, 39 So.2d 66.

69. Mo.—*State v. Van Every*, 75 Mo. 530.

70. Ky.—*Middlesboro v. Coal, etc., Bank*, 110 S.W. 355, 33 Ky.L. 469, rehearing denied 111 S.W. 335, 33 Ky.L. 961.

71. Ky.—*Middlesboro v. Coal, etc., Bank*, supra.

72. Fla.—*Adams v. Adams*, 180 So. 516, 131 Fla. 777, followed in

Adams v. Dommerich, 180 So. 519, 131 Fla. 782.

73. Fla.—*Haynsworth v. Polk County Building & Loan Ass'n*, 149 So. 615, 111 Fla. 451.

74. N.Y.—*Tax Lien Co. v. Schultze*, 106 N.E. 751, 213 N.Y. 9, L.R.A. 1915D 1115, Ann.Cas.1916C 636.

75. Tex.—*San Antonio v. Berry*, 48 S.W. 496, 92 Tex. 319—*Collins v. Ferguson*, 56 S.W. 225, 22 Tex.Civ. App. 552, error refused.

76. Fla.—*Prince Hall Masonic Bldg. Ass'n v. City of Jacksonville*, 6 So.2d 250, 149 Fla. 109—*Bice v. Haines City*, 195 So. 919, 142 Fla. 871.

77. Fla.—*Prince Hall Masonic Bldg. Ass'n v. City of Jacksonville*, 6 So.2d 250, 149 Fla. 109.

78. N.Y.—*Hessol v. Hathaway*, 30 N.Y.S.2d 600, 177 Misc. 336.

Alternative relief

In action to foreclose tax lien evidenced by certificate sold by village to holder, holder was not entitled to serve a supplemental complaint on the village asking for alternative relief if the tax certificate assignments were void, where there was a failure to allege that claim was filed with the village in compliance with

village law provision.—*Hessol v. Hathaway*, supra.

79. N.Y.—*City of White Plains v. Hadermann*, 72 N.Y.S.2d 155, 272 App.Div. 507, affirmed 75 N.E.2d 634, 297 N.Y. 623.

Posted notice

Where adequate notice was provided for in statute authorizing proceedings in rem for collection of delinquent municipal taxes, fact that notice was also required to be posted at front door of courthouse in county wherein land was located was immaterial.—*Harris v. City of Sarasota*, 181 So. 366, 132 Fla. 568.

80. Tenn.—*Moore v. City of Memphis*, 195 S.W.2d 623, 184 Tenn. 92.

Statute held valid

Fla.—*Reina v. Hope*, 30 So.2d 173, 158 Fla. 771.

Noncompliance

Where publication of notice of summary tax lien foreclosure action by city fixed last day for redemption at less than the required statutory seven weeks from date of first publication, a news item appearing in local newspaper to effect that common council of city had extended time for redemption did not cure the failure to comply with the stat-

special language the necessity of serving resident defendants with summons in chancery.⁸¹

(4) Pleading

It is necessary and sufficient that a petition or complaint in an action to foreclose a lien for delinquent municipal taxes allege the ultimate facts warranting the relief sought; and the defendant's plea or answer must sufficiently state the matter relied on to defeat the enforcement of the lien.

It is as a general rule regarded as necessary and sufficient that a petition or complaint in an action to foreclose a lien for delinquent municipal taxes allege the ultimate facts warranting the relief sought.⁸² The pleading must show a valid levy and assessment,⁸³ describe the land,⁸⁴ and state the name of the owner, if known or ascertainable,⁸⁵ the amount due,⁸⁶ and the nonpayment thereof⁸⁷ after due notice.⁸⁸ Also, it must allege the per-

formance of conditions precedent;⁸⁹ in the case of transfer of the lien, the date of transfer must be alleged;⁹⁰ and, where acceleration of the due date of the lien is relied on, the bill must allege the facts on which the acceleration is based.⁹¹ The city may file a supplemental petition for taxes accruing after the filing of the original petition in a suit brought before the taxes were collectable.⁹²

Defendant's plea or answer must sufficiently state the matter relied on to defeat the enforcement of the tax lien.⁹³ Defenses going to the enforceability of the tax arising out of the manner in which the tax proceedings have been carried out by the tax officers should be asserted by answer rather than by demurrer.⁹⁴ A statute may validly fix a reasonable time within which defendant may answer,⁹⁵ and, on the expiration of the time prescribed by

ute.—*City of White Plains v. Hadermann*, 72 N.Y.S.2d 155, 272 App.Div. 507, affirmed 75 N.E.2d 634, 297 N.Y. 623.

Clerk's certificate

Fact that clerk's certificate concerning mailing of copies of notice to defendants in proceedings in rem to enforce payment of delinquent municipal taxes was defective and insufficient proof, if taken alone, of due mailing, did not, on appeal from order refusing to vacate final decree, show lack of jurisdiction over defendants, where due publication of required sufficient notice to defendants and adequate proof thereof had been made, there was some evidence of due mailing, and no appeal had been taken from final decree.—*Harris v. City of Sarasota*, 181 So. 366, 132 Fla. 568.

81. Fla.—*Harris v. City of Sarasota*, supra.

82. Fla.—*Jackson v. Town of White Springs*, 138 So. 629, 103 Fla. 872.—*Trust Co. of Florida v. City of Tampa*, 138 So. 73, 103 Fla. 628.

Adoption of statute

(1) In action for summary foreclosure of tax liens, plaintiff's pleading need not contain allegation of plaintiff's enactment of resolution adopting statute authorizing such action, in view of form of complaint prescribed by statute.—*City of New Rochelle v. Echo Bay Waterfront Corporation*, 49 N.Y.S.2d 673, 268 App. Div. 182, affirmed 60 N.E.2d 838, 294 N.Y. 678. *Certiorari denied* 46 S.Ct. 24, 326 U.S. 720, 90 L.Ed. 426.—*In re City of New Rochelle*, 36 N.Y.S.2d 886.

(2) Complaint alleging that city authorized its attorneys to institute proceeding to foreclose delinquent tax liens together with proof that governing body of city expressly adopted procedure set forth in gen-

eral statute was sufficient to show that city elected to proceed under general statute.—*Certain Lands on Which Taxes are Delinquent v. City of Stuart*, 188 So. 605, 137 Fla. 784.

Bill or complaint held sufficient

Fla.—*Certain Lands on Which Taxes are Delinquent v. City of Stuart*, supra.—*Jackson v. Town of White Springs*, 138 So. 629, 103 Fla. 872.—*Trust Co. of Florida v. City of Tampa*, 138 So. 73, 103 Fla. 628.

Tex.—*Adams v. Royse City*, Civ.App., 61 S.W.2d 853, error refused.—*Moody-Seagraves Co. v. City of Galveston*, Civ.App., 43 S.W.2d 967, error refused.

83. Fla.—*Parker v. Jacksonville*, 20 So. 538, 37 Fla. 342.

44 C.J. p 1356 note 90.

Ordinance and laws

Bill by municipality to foreclose tax lien should allege with certainty the ordinance and laws under which tax was levied and lien accrued.—*Parker v. Town of Callahan*, 156 So. 334, 115 Fla. 266, amended on other grounds 157 So. 662, 117 Fla. 270.

84. Tex.—*Grace v. Bonham*, 43 S.W. 158, 26 Tex.Civ.App. 161.

44 C.J. p 1356 note 91.

Aid to description

In suit to foreclose tax lien, description of property in assessment roll may be aided by other information appearing therein, or by county records.—*Trust Co. of Florida v. City of Tampa*, 138 So. 73, 103 Fla. 628.

85. Fla.—*Parker v. Jacksonville*, 20 So. 538, 37 Fla. 342.

Lienholders

Where statute authorizing proceedings in rem against land for collection of delinquent municipal taxes specifically required bill to contain name of owner thereof, or person to whom land was last assessed, it was

unnecessary that statute also require bill to contain names of mortgagees or other lienholders.—*Harris v. City of Sarasota*, 181 So. 366, 132 Fla. 568.

86. Fla.—*Parker v. Jacksonville*, 20 So. 538, 37 Fla. 342.

87. Fla.—*Parker v. Jacksonville*, supra.

88. Fla.—*Parker v. Jacksonville*, supra.

89. Ky.—*Dumesnil v. Louisville*, 2 Ky.L. 429, 11 Ky.Op. 180.

44 C.J. p 1356 note 96.

90. N.Y.—*Altman v. Bungay Co.*, 146 N.Y.S. 949, 161 App.Div. 583.

91. N.Y.—*Altman v. Bungay Co.*, supra.

92. Ky.—*Thornton's Unknown Heirs and Devises v. City of Dayton*, 288 S.W. 310, 216 Ky. 543.

93. Fla.—*Certain Lands upon which Taxes and/or Special Assessments are Delinquent v. City of Sebastian*, 176 So. 121, 129 Fla. 233.

Verification held unnecessary

Tex.—*City of Liberty v. Llewellyn*, Civ.App., 15 S.W.2d 713, error dismissed.

Answers held insufficient

Fla.—*Certain Lands on Which Taxes are Delinquent v. City of Stuart*, 188 So. 605, 137 Fla. 784.

N.Y.—*Village of Fleischmanns v. Silberman*, 15 N.Y.S.2d 904.

Counterclaim held sufficient

Fla.—*Baylen St. Wharf Co. v. City of Pensacola*, 39 So.2d 66.

Counterclaim held insufficient

N.Y.—*Village of Fleischmanns v. Silberman*, 15 N.Y.S.2d 904.

94. Fla.—*Trust Co. of Florida v. City of Tampa*, 138 So. 73, 103 Fla. 628.

95. N.Y.—*City of New Rochelle v. Echo Bay Waterfront Corporation*, 49 N.Y.S.2d 673, 268 App.Div. 182,

the statute, the rights of the parties become fixed, and it is improper for the court to relieve the owner of his default in answering.⁹⁶ An answer denying that defendant has any knowledge or information sufficient to form a belief as to the truth of plaintiff's allegation of the assignment of the tax lien to him is sufficient as a general denial of plaintiff's right and title to sue.⁹⁷

Issues, proof, and variance. General rules as to issues, proof, and variance have been applied in actions to foreclose municipal tax liens.⁹⁸ Defenses must be sustained by proof.⁹⁹ Where the city has pleaded the legality of the tax levy, evidence showing the illegality thereof is admissible under a general denial.¹ However, in an action to foreclose a transfer of tax lien purchased by plaintiff whose wife later obtained a deed to the premises, a

general denial of plaintiff's allegations presented no issues, in the absence of proof offered by defendant lessee to overcome the presumptions established by the records.²

(5) Evidence

In an action to foreclose a tax lien, the municipal corporation ordinarily makes out a prima facie case by introducing the tax roll and proof of nonpayment of the tax, and the burden is on the taxpayer to establish the alleged invalidity of the tax, or the absence of liability therefor.

In an action to foreclose a lien on real estate for unpaid municipal taxes, general rules apply as to presumptions,³ admissibility,⁴ and weight and sufficiency⁵ of evidence. Generally the municipality makes out a prima facie case by introducing the tax roll and proof of nonpayment of tax,⁶ and a delin-

affirmed 60 N.E.2d 838, 294 N.Y. 678, certiorari denied 68 S.Ct. 24, 326 U.S. 720, 90 L.Ed. 426.

96. N.Y.—City of Peekskill v. Perry, 72 N.Y.S.2d 351, 272 App.Div. 940.

Extension of time

Statute regarding filing of list of delinquent taxes is in the nature of a statute of limitations and precludes court from extending owner's time to answer in proceeding to foreclose tax liens and from opening his default on his failure to do so within time prescribed.—City of Peekskill v. Perry, supra.

97. N.Y.—Altman v. Bungay Co., 146 N.Y.S. 949, 161 App.Div. 583.

98. Tex.—City of West University Place v. Home Mortg. Co., Civ. App., 72 S.W.2d 361.

Matters not in issue need not be proved.—Rains v. City of Lexington, 145 S.W.2d 516, 284 Ky. 609.

Material variance held not shown. Tex.—City of West University Place v. Home Mortg. Co., Civ. App., 72 S.W.2d 361.

Evidence held admissible under pleadings

Fla.—Grand Lodge Independent Order of Archery of State of Florida v. City of Live Oak, 177 So. 738, 130 Fla. 386, followed in Hopps v. City of Live Oak, 177 So. 742, 130 Fla. 395.

Tex.—City of Comanche v. Brightman, Civ. App., 38 S.W.2d 741, error dismissed.

Evidence held properly excluded

Tex.—Rachford v. City of Port Neches, Civ. App., 96 S.W.2d 167, error refused.

99. Tex.—Howth v. City of Beaumont, Civ. App., 118 S.W.2d 350.

Excessive taxation

In action by city against taxpayer

to recover delinquent taxes, taxpayer was not entitled to reassessment upon ground that omission of substantial amount of taxable personality from tax records had resulted in excessive taxes upon his property, in absence of proof of the alleged excessive taxation.—Howth v. City of Beaumont, supra.

1. Tex.—City of Liberty v. Llewellyn, Civ. App., 15 S.W.2d 713, error dismissed.

2. N.Y.—Hyman v. Fischer, 52 N.Y. S.2d 553, 184 Misc. 90.

3. Tex.—Hickson v. City of Van Alstyne, Civ. App., 135 S.W.2d 571.

Legality of official action

In suit by city to recover delinquent taxes and foreclose a tax lien it was presumed in the absence of any showing to the contrary that the officials of the city having to do with levying and assessing taxes acted legally and fairly in the discharge of their respective duties and that the annual boards of equalization of city discharged the duties imposed upon them by statute, examined and approved the assessments for each of the years involved, and finally approved the assessor's general tax rolls before any demand for payment was made on the taxpayer.—Hickson v. City of Van Alstyne, supra.

4. Tex.—Rachford v. City of Port Neches, Civ. App., 96 S.W.2d 167, error refused.

Evidence held admissible

Tex.—Rachford v. City of Port Neches, supra.

Presumption

In proceeding to foreclose delinquent tax liens, supreme court would assume that, if any evidence had been offered to show that properties were not subject to taxation by city, trial court would have admitted such

evidence and given it due effect.—Certain Lands on Which Taxes are Delinquent v. City of Stuart, 188 So. 605, 137 Fla. 784.

5. Tex.—Exporters & Traders Compress & Warehouse Co. v. City of Marlin, Civ. App., 130 S.W.2d 860, error dismissed, judgment correct.

Evidence held sufficient

Conn.—Town of Windsor v. Bedortha, 24 A.2d 474, 128 Conn. 551. Fla.—City of Leesburg v. Certain Lands, 18 So.2d 676, 154 Fla. 550. Ky.—Thornton's Unknown Heirs and Devises v. City of Dayton, 288 S.W. 310, 216 Ky. 543.

Mo.—Citizens Bank of Springfield v. Wright, App., 122 S.W.2d 409.

Tex.—Exporters & Traders Compress & Warehouse Co. v. City of Marlin, Civ. App., 130 S.W.2d 860, error dismissed, judgment correct.—Moody-Seagraves Co. v. City of Galveston, Civ. App., 43 S.W.2d 967, error refused.

Tax rolls

In city's action for delinquent taxes and to foreclose lien, there was no error on ground that tax rolls were not read or offered in evidence, where collector testified as to the contents of the tax rolls.—Rachford v. City of Port Neches, Tex. Civ. App., 46 S.W.2d 1057, followed in Dearing v. City of Port Neches, 46 S.W.2d 1062, error refused.

6. Tex.—Adams v. Royse City, Civ. App., 61 S.W.2d 853, error refused.

Absence of certification

In city's action to recover delinquent taxes and penalties, delinquent tax roll, which was admitted without objection, established, prima facie, city's right to foreclose its tax lien against realty, although tax roll's correctness was not certified by city's mayor.—City of Lewisville v. Merritt, Tex. Civ. App., 123 S.W.2d 470.

quent tax roll prepared by the city in compliance with law carries with it the presumption that taxes were levied by a duly enacted ordinance.⁷ The burden is on the taxpayer to establish the alleged invalidity of the tax,⁸ that no ordinance was passed levying taxes,⁹ or the absence of liability for the tax.¹⁰ The city's prima facie case made by the tax rolls and proof of the amount of the delinquent tax has been held rebutted by evidence that only certain levies were made.¹¹

(6) Trial, Judgment, and Review

- (a) In general
- (b) Relief granted
- (c) Conclusiveness and effect of judgment; review

(a) In General

The judgment condemning property for sale in payment of taxes must be in the name of the municipal corporation. Such judgment need not set out all the evidence which induced the court to render it, and it is not subject to objection on the ground that it describes the property more fully than it is described in the petition.

General rules as to trial and judgment apply in an action to foreclose a lien against land for unpaid municipal taxes.¹² In such an action, the court has jurisdiction at the time judgment is rendered to pass on the question of the constitutionality of the statute under which the municipal corporation assumed to act in selling and transferring the tax lien to plaintiff,¹³ but, on a bill brought against the estate of a person owing taxes on land subject to a trust deed, the determination of the question whether the municipality under the doctrine of marshaling assets should be required to exhaust its remedy

against the estate before it should have the land sold to pay the taxes is not within the scope of the bill.¹⁴ If it describes the property more fully than it is described in the petition, it is not subject to objection on that ground.¹⁵

The judgment condemning property for sale in payment of taxes must be in the name of the municipal corporation.¹⁶ It is not necessary that it should set out all the evidence which induced the court to render the judgment or decree;¹⁷ nor is it necessary that it should recite in terms that the court was satisfied by the evidence of all facts necessary to support the decree.¹⁸ A judgment of foreclosure is not erroneous for failure to adjudge the value of the property involved as required by statute, where there was no showing that the court was requested by the taxpayer to adjudge the value of the property,¹⁹ and where no prejudice resulted to the owner by reason of the fact that the court would not have been authorized to adjudge the value of the property at an amount less than the judgment.²⁰ The entry of a decree pro confesso against the land is unauthorized where the owner has entered his appearance at the time required.²¹

(b) Relief Granted

Judgment may be rendered only for the amount for which the tax lien may be foreclosed. In a proper case, the judgment may include the costs of the tax collector, interest allowed by statute, and attorney's fees.

Judgment may be rendered only for the amount for which the tax lien may be foreclosed,²² but, where the entire assessment is invalid because of inequalities therein, the court is not authorized to enter judgment for the proper amount of taxes after striking out the excessive portion of the tax.²³

7. Tex.—Adams v. Royse City, Civ. App., 61 S.W.2d 853, error refused.

8. Ill.—People ex rel. Nash v. S. A. Maxwell & Co., 195 N.E. 26, 359 Ill. 570, 98 A.L.R. 494.

Reduction in levy

To entitle taxpayer to claim a reduction in levy for corporate purposes fund and for free text-book fund by reason of uncollected taxes for previous years, taxpayer must prove what, if anything, could be collected from such taxes, and, in absence of contrary showing, court must presume that city council did not consider such uncollected taxes as asset which could be realized on.—People ex rel. Nash v. S. A. Maxwell & Co., supra.

9. Tex.—Adams v. Royse City, Civ. App., 61 S.W.2d 853, error refused.

10. Tex.—Rachford v. City of Port Neches, Civ.App., 46 S.W.2d 1057, followed in Dearing v. City of Port

Neches, 46 S.W.2d 1062, error refused.

11. Tex.—City of Odessa v. Elliott, Civ.App., 47 S.W.2d 866, reversed on other grounds, Com.App., 58 S.W.2d 34.

12. Fla.—Broadwater v. City of Tampa-Shores, 170 So. 657, 126 Fla. 116.

Tex.—Rollison v. Puckett, 198 S.W. 2d 74, 145 Tex. 366.

13. N.Y.—Jahn v. Berzon, 8 N.Y.S.2d 640, 255 App.Div. 1023, appeal granted 10 N.Y.S.2d 679, 256 App. Div. 932, motion granted 21 N.E.2d 694, 280 N.Y. 808.

14. Va.—Pollard & Bagby v. City of Richmond, 24 S.E.2d 564, 181 Va. 181.

15. Ky.—Powell v. Louisville, 52 S.W. 798, 21 Ky.L. 554.

16. Tenn.—Shoalwater v. Armstrong, 9 Humphr. 317.

17. Ala.—Helm v. Griffith, 82 So. 570, 95 So. 548, 17 Ala.App. 122.

18. Ala.—Helm v. Griffith, supra.

19. Tex.—Burson v. City of Silverton, Civ.App., 138 S.W.2d 921, error dismissed, judgment correct.

20. Tex.—Burson v. City of Silverton supra.

21. Fla.—Broadwater v. City of Tampa-Shores, 170 So. 657, 126 Fla. 116.

22. Conn.—Town of Windsor v. Bedortha, 24 A.2d 474, 128 Conn. 551.

Tax erroneously included

In action to foreclose tax liens on realty, trial court, in determining the debt due in each year, properly deducted the amount represented by tax on personal property which had erroneously been included in tax list and certificates of lien.—Town of Windsor v. Bedortha, supra.

23. Fla.—Coombes v. City of Coral Gables, 168 So. 524, 124 Fla. 374.

A provision in a tax foreclosure judgment that it is without prejudice to further claims of litigating taxing units for taxes not enumerated in the judgment has been held a nullity to the extent that it can be considered an effort to abrogate the effect of a statute giving the purchaser at a tax foreclosure sale a title clear of all liens for delinquent taxes due taxing units which are parties to the suit.²⁴ Where foreclosure is sought against several lots of land, it may be required, in some instances, that the decree foreclosing the liens should adjudicate the amount due on each of the lots.²⁵

In a proper case, the judgment may include the costs of the tax collector,²⁶ interest allowed by statute,²⁷ and attorney's fees;²⁸ but it has also been held that a sale of land for taxes is void where it includes costs.²⁹ In any case, the improper inclusion of costs of a former sale as a part of the taxes recoverable under a statute providing for the collection of taxes in arrears can be inquired into only in direct proceedings by certiorari,³⁰ and such inquiry cannot be made in a suit to quiet title against the purchaser from the city.³¹ Where it is impracticable to tax the costs pro rata against various pieces of property on which a tax lien is foreclosed, it is proper to charge the whole amount of costs against all the property,³² thereby making

each bear an equal share of the burden.³³ The statutory charge for the certificate of sale may not be regarded as costs.³⁴

Damages to defendant. In an action to foreclose a transfer of tax lien, plaintiff's recovery will not necessarily terminate defendant lessee's occupancy, and, hence, the lessee is not entitled to damages for permanent improvements installed under the lease.³⁵

(c) Conclusiveness and Effect of Judgment; Review

Where the court in an action to foreclose a municipal tax lien has jurisdiction to determine a particular matter, the fact that it makes an erroneous determination does not affect the validity or binding effect of the judgment or decree, and ordinarily the judgment may not be set aside except by appeal or other appropriate proceedings, and is not subject to collateral attack.

Where the court in an action to foreclose a municipal tax lien has jurisdiction to determine a particular matter,³⁶ the fact that it makes an erroneous determination does not affect the validity³⁷ or binding effect³⁸ of the judgment or decree. So, a decree in a suit to foreclose a tax lien procured under a valid statute and with jurisdiction of the parties and the subject matter may not be set aside except by appeal or other appropriate proceedings,³⁹

24. Tex.—State v. Moak, 207 S.W.2d 894, 146 Tex. 322.

25. Fla.—Robards v. City of Eustis, 170 So. 468, 125 Fla. 740, 127 Fla. 273.

Separate tracts

Where defendant's property was divided into blocks and lots, each block constituted separate tract as regards liability for city taxes.—Rachford v. City of Port Neches, Tex.Civ.App., 46 S.W.2d 1057, followed in Dearing v. City of Port Neches, 46 S.W.2d 1062, error refused.

26. Tex.—Rachford v. City of Port Neches, Civ.App., 46 S.W.2d 1057, followed in Dearing v. City of Port Neches, 46 S.W.2d 1062, error refused.

Judgment in bulk

On court's finding that it was impossible in city's action for delinquent taxes to tax cost pro rata on each tract of land, it was proper to render judgment in bulk against all property.—Rachford v. City of Port Neches, Tex.Civ.App., 46 S.W.2d 1057, followed in Dearing v. City of Port Neches, 46 S.W.2d 1062, error refused.

27. Fla.—City of Marianna v. Russ, 154 So. 817, 114 Fla. 624.

28. Tex.—Rachford v. City of Port Neches, Civ.App., 46 S.W.2d 1057, followed in Dearing v. City of Port

Neches, 46 S.W.2d 1062, error refused.

29. Tex.—Rachford v. City of Port Neches, Civ.App., 46 S.W.2d 1057, followed in Dearing v. City of Port Neches, 46 S.W.2d 1062, error refused.

30. Tex.—May v. Jackson, Civ.App., 73 S.W. 988.

31. N.J.—Devine v. Franks, Ch., 47 A. 228.

32. N.J.—Devine v. Franks, supra.

33. Tex.—Cave v. Houston, 65 Tex. 619.

34. Tex.—Cave v. Houston, supra.

35. Wash.—Gove v. Tacoma, 76 P. 73, 34 Wash. 434.

36. N.Y.—Hyman v. Fischer, 52 N.Y. S.2d 553, 184 Misc. 90.

37. Mich.—Blanchard v. Young, 116 N.W. 189, 152 Mich. 619.

44 C.J. p 1357 note 5.

38. Mich.—Blanchard v. Young, supra.

Judgment in solido

(1) Judgment foreclosing tax lien of city was held not void because rendered in solido against six lots, where judgment recited due service on defendant and was regular on its face.—Newman v. City of El Paso, Tex.Civ.App., 77 S.W.2d 721, error dismissed.

(2) Judgment foreclosing tax lien

of city in solido against six lots was held not void because three of lots constituted defendant's homestead, where homestead character of lots was not apparent on face of petition and judgment.—Newman v. City of El Paso, supra.

39. Mich.—Blanchard v. Young, 116 N.W. 189, 152 Mich. 619.

Waiver

A property owner who failed to appear in action to foreclose tax lien or to raise by pleading or on trial question concerning constitutionality of statute under which city had assumed to act in selling tax lien to plaintiff, and who waited until premises were divided and residences erected thereon and mortgaged and until some parts of improved premises were sold to others apparently for homes, before moving to set aside judgment and proceedings, waived his right to question the constitutionality of statute and became bound by judgment of foreclosure.—Jahn v. Berzon, 8 N.Y.S.2d 640, 255 App.Div. 1028, appeal granted 10 N.Y.S.2d 679, 256 App.Div. 932, motion granted 21 N.E.2d 694, 280 N.Y. 808.

39. Fla.—Adams v. Adams, 180 So. 516, 131 Fla. 777, followed in Adams v. Dommerich, 180 So. 519, 131 Fla. 783.

Restraining or setting aside sale see infra § 2094.

and is not subject to collateral attack;⁴⁰ but a decree which is void or is procured through fraud may be stricken down on collateral attack.⁴¹ The fact that the final decree of foreclosure was not recorded in compliance with provisions of a statute concerning the duty of the clerk of court to keep a judgment lien record does not invalidate subsequent proceedings for the sale of property after failure of the owner to redeem.⁴² The judgment of foreclosure does not operate as an extinguishment of easements of light, air, and access over the property taxed and in favor of owners of adjoining property.⁴³

Under some statutes, a decree of foreclosure may be vacated, in a proper case, in a suit in the nature of a bill of review attacking the validity of the decree.⁴⁴ So, the failure to comply with statutory requirements as to the procedure for foreclosing tax liens may constitute a legal fraud on the rights of the owners who, to the extent that their land is held or claimed by the city by virtue of the foreclosure, are entitled to a cancellation of the foreclosure, without prejudice to the city's liens attempted to be foreclosed.⁴⁵ However, no decree may be entered affecting the rights of innocent

third persons who purchased the land at the foreclosure sale or from the city thereafter until such persons are properly brought into court;⁴⁶ but plaintiffs may apply to the court for leave to bring in additional parties as respects lands claimed by them.⁴⁷ In setting aside a decree pro confesso and final decree in a suit to foreclose a municipal tax lien, the chancellor should exercise discretion with caution,⁴⁸ and, in the absence of sufficient ground shown, the decrees should not be set aside.⁴⁹ A nonresident who owned land in the city may not file a petition to set aside a default entered against him in tax lien foreclosure proceedings after he had been served by publication.⁵⁰

§ 2088. — Notice

- a. In general
- b. Publication
- c. Contents

a. In General

Notice to the owner or agent, as provided for by constitutional, statutory, or charter provisions, is an essential prerequisite to a valid tax sale for delinquent municipal taxes, and strict compliance must be had with the requirements of such provisions.

Recital as to service

Judgment, in suit by city against owner of property for taxes in suit seeking a foreclosure of tax lien on the property, which recited a valid service of process on owners, was not void and subject to collateral attack but voidable only after the term, in a suit brought to set the judgment aside.—*Hendricks v. City of Sherman*, Tex.Civ.App., 220 S.W.2d 189, error refused, no reversible error.

Representation of infant

The fact that an infant defendant was not represented by a guardian in an action to enforce a tax lien on his land does not render the judgment void, but merely erroneous, and it is binding until vacated or reversed.—*Keller v. Wilson*, 14 S.W. 332, 90 Ky. 350, 12 Ky.L. 471.

Cross action

Judgment denying recovery on city's cross action for taxes and foreclosure of tax lien was final where city did not appeal or file cross assignment of error.—*Baker v. Black*, Civ.App., 83 S.W.2d 811, modified on other grounds 111 S.W.2d 706, 130 Tex. 454.

40. Tex.—*Rollison v. Puckett*, 198 S.W.2d 74, 145 Tex. 366.

Presumptions

Where judgment rendered in proceeding by city to foreclose tax lien was attacked collaterally, every reasonable presumption would be in-

duced to uphold such judgment.—*Rollison v. Puckett*, supra.

Ejectment action

Where a proceeding for foreclosure of a municipal tax lien and an ejectment action for such land involves the same subject matter, and the foreclosure proceeding tends to establish a link in the chain of title in the ejectment action, an objection to the competency of the foreclosure is unavailable as a collateral attack.—*Adams v. Adams*, 180 So. 516, 131 Fla. 777, followed in *Adams v. Dommerich*, 180 So. 519, 131 Fla. 782.

41. Fla.—*Adams v. Adams*, 180 So. 516, 131 Fla. 777, followed in *Adams v. Dommerich*, 180 So. 519, 131 Fla. 782.

42. Fla.—*Nassau Realty Co. v. City of Jacksonville*, 198 So. 581, 144 Fla. 754.

43. N.Y.—*Tax Lien Co. v. Schultze*, 106 N.E. 751, 213 N.Y. 9, L.R.A. 1915D 1115, Ann.Cas.1916C 636.

44. Fla.—*Fleming v. Fleming*, 177 So. 607, 130 Fla. 264.

Notice

Allegations of amended bill of complaint, in suit to set aside final decree foreclosing city tax liens, that complainant did not receive notice of foreclosure suit by registered mail or observe notice published in newspaper, were insufficient to show that either provision of statute as to notice was not strictly complied with

or that statutory form of notice was not substantially followed.—*Fleming v. Fleming*, supra.

Want of jurisdiction

Allegations of bill of complaint as to matters transpiring after entry of final decree foreclosing city tax liens are immaterial on question of plaintiff's right to cancellation or rescission of decree for want of jurisdiction.—*Fleming v. Fleming*, supra.

45. Fla.—*City of Lakeland v. Chase Nat. Co.*, 32 So.2d 833, 159 Fla. 783.

46. Fla.—*City of Lakeland v. Chase Nat. Co.*, supra.

47. Fla.—*City of Lakeland v. Chase Nat. Co.*, supra.

48. Fla.—*Certain Lands Upon Which Taxes Are Delinquent v. City of Coronado Beach*, 175 So. 774, 128 Fla. 884.

49. Fla.—*Certain Lands Upon Which Taxes Are Delinquent v. City of Coronado Beach*, supra.

Agent's default

The fact that the agent of owner representing owner at municipal tax lien foreclosure sale did not properly look after owner's interest was not chargeable to purchaser at foreclosure sale so as to entitle owner to set aside final decree.—*Certain Lands Upon Which Taxes Are Delinquent v. City of Coronado Beach*, supra.

50. Mich.—*City of Detroit v. O'Connor*, 5 N.W.2d 453, 302 Mich. 531.

Notice to the owner or agent, as provided for by constitutional, statutory, or charter provisions, either by personal service, by mail, or by advertisement, is an essential prerequisite to a valid tax sale,⁵¹ and there must be a strict compliance with the requirements of such provisions.⁵² It is not necessary, under some statutes, to show that notice by mail was actually received,⁵³ although it must be shown that it was mailed to the owner if that is the method provided.⁵⁴ Where personal service on the owner is required, service on the registered owner is sufficient,⁵⁵ regardless of whether or not he has good title.⁵⁶ Under some statutes,⁵⁷ but not under others,⁵⁸ notice to the mortgagee of the property is required. A certificate of the comptroller of the city that the requisite notice of a tax sale has been served is fatally defective where it is not under seal.⁵⁹

Private sale. While the offering of land at a public sale properly advertised ordinarily is a condition precedent to the right to sell at private sale,⁶⁰

there is no necessity for further notice in connection therewith in the absence of statutory requirements.⁶¹

b. Publication

Some statutes or charter provisions provide for notice by publication of sales for delinquent municipal taxes, and, in such case, the notice must be given as many times, and for as long a period, as is required by law.

Some statutes or charter provisions provide for notice by publication of sales for delinquent municipal taxes.⁶² If posting or publication is required, it must appear that the notice was given under direction of the municipal council,⁶³ as many times,⁶⁴ and for as long a period,⁶⁵ as is required by law; and that, if the publication was in a newspaper, it was in an authorized paper.⁶⁶ However, a statute, providing that "the time, place and manner of the sale of property" for taxes due to municipal corporations shall be the same as that provided by law for sheriff's sales for state and county taxes, has been construed not to apply to the

51. La.—Meredith v. Tubre, 120 So. 902, 10 La.App. 369.

Minn.—Prindle v. Campbell, 9 Minn. 212.

Mo.—Beckwith v. Curd, 148 S.W.2d 800, 347 Mo. 602.

N.Y.—Eckman v. Mell, 8 N.Y.S.2d 856, 255 App.Div. 925, followed in Valone v. Ngiala, 8 N.Y.S.2d 857, 255 App.Div. 926, reargument denied 12 N.Y.S.2d 770, 257 App.Div. 911, and Olds v. City of Jamestown, 8 N.Y.S.2d 857, 255 App.Div. 926, reargument denied 10 N.Y.S.2d 217, 256 App.Div. 895, affirmed 20 N.E.2d 756, 280 N.Y. 281. Reargument denied Eckman v. Mell, 12 N.Y.S.2d 770, 257 App.Div. 911.

Pa.—City of Pittsburgh v. Fort Pitt Chemical Co., Com.Pl., 91 Pittsb. Leg.J. 49, affirmed 29 A.2d 41, 345 Pa. 71.

44 C.J. p 1357 note 16.

Notice of proceeding for judgment or order of sale see supra § 2087.

Curative act

(1) Failure to give notice required by law relating to tax sales by cities is a jurisdictional defect which cannot be overlooked or remedied by a curative statute.—Olds v. City of Jamestown, 20 N.E.2d 756, 280 N.Y. 281.

(2) However, where, while the legality of the publication of notices of sale in a daily newspaper, by the referee, in actions foreclosing tax liens, was in question, a curative act was passed, legalizing publication in such paper, a sale under such notice was valid, and the purchaser cannot be relieved on the ground that the curative act was unconstitutional.—William E. Hedley,

Inc., v. Loomis, 191 N.Y.S. 250, 116 Misc. 605.

Object of notice

Statutory requirements for notice of sale by custodian of property acquired by municipality by foreclosure of tax titles is a mere direction to custodian in order to secure a minimum of advertising, a matter of grace to former owner who might be interested in repurchasing, and affords former owner opportunity to contest validity of deed to municipality.—Parrotta v. Hederson, 53 N.E.2d 97, 315 Mass. 416.

52. Cal.—Hosson v. City of Long Beach, 189 P.2d 787, 83 Cal.App.2d 745.

Mo.—Beckwith v. Curd, 148 S.W.2d 800, 347 Mo. 602.

44 C.J. p 1357 note 17.

Compliance held shown

Cal.—Howard v. Judson, 194 P.2d 138, 86 Cal.App.2d 128.

Del.—Pottock v. Mellott, 22 A.2d 843, 2 Terry 361.

Md.—McMahon v. Crean, 71 A. 995, 109 Md. 652.

Mass.—City of Boston v. Lynch, 23 N.E.2d 466, 304 Mass. 272.

53. Tex.—Ross v. Drouilhet, 80 S.W. 241, 34 Tex.Civ.App. 327.

54. Cal.—Hosson v. City of Long Beach, 189 P.2d 787, 83 Cal.App.2d 745.

Tex.—Ross v. Drouilhet, 80 S.W. 241, 34 Tex.Civ.App. 327.

55. Pa.—Philadelphia v. Merritt, 29 Pa.Super. 433.

56. Pa.—Philadelphia v. Merritt, supra.

57. R.I.—Madden v. Chernick, 7 A.2d 269, 63 R.I. 100.

58. S.C.—Home Building & Loan Ass'n v. City of Spartanburg, 194 S.E. 143, 185 S.C. 353.

59. N.Y.—Clason v. Baldwin, 46 N.E. 322, 152 N.Y. 204.

60. Neb.—Kittle v. Shervin, 7 N.W. 861, 11 Neb. 65.

61. Neb.—Kittle v. Shervin, supra.

62. N.Y.—Olds v. City of Jamestown, 20 N.E.2d 756, 280 N.Y. 281.

Compliance held shown

Cal.—Howard v. Judson, 194 P.2d 138, 86 Cal.App.2d 128.

Publication for nonresident defendants is permitted under some statutes.—West 132 Feet, etc. v. Orlando, 91 So. 369, 80 Fla. 229.

63. Alaska.—In re Delinquent Tax Roll, 4 Alaska 721.

44 C.J. p 1357 note 26.

64. La.—Worman v. Miller, McG. 158.

65. N.Y.—Olds v. City of Jamestown, 20 N.E.2d 756, 280 N.Y. 281. 44 C.J. p 1357 note 28.

Successive weeks

Under charter requiring notice of tax sales to be published once in each week for three successive weeks in city's official paper, a tax sale of real estate was void where only sixteen days elapsed between date of first publication of notice and date of sale.—Olds v. City of Jamestown, supra.

66. Fla.—Drake v. Thomas, 92 So. 878, 84 Fla. 177.

44 C.J. p 1357 note 29.

matter of advertisement,⁶⁷ and under such a construction it is not necessary that the advertisement of sale for municipal taxes should be in the same paper in which the sheriff's sales for state and county taxes were advertised.⁶⁸

Where the record owner is dead, notice must be given by posting or publication as in the case of nonresident owners in the absence of any provision of the statute specifically relating thereto.⁶⁹

Unknown owners. Under statutes requiring personal notice to owners but permitting publication where the owners are unknown, a nonresident owner who has a resident agent known to the municipal authorities as such agent cannot be regarded as an unknown owner, and service of notice must be made personally in such case on the resident agent.⁷⁰

c. Contents

The notice of a municipal tax sale must contain the matter required by statute or ordinance, such as the time and place of the sale, and the amount of the delinquent taxes for which the land is to be sold.

It must appear that the notice of a municipal tax sale contained the matter required by the statute or ordinance.⁷¹ The notice should state with certainty the time and place of sale,⁷² but, under a statute requiring the sale to be held at the city hall, a notice advertising the sale to take place at the city hall is sufficient, without designating any particular room, in the absence of evidence showing that the city hall was so large a building as to make a more definite notice necessary.⁷³ The notice must list all the delinquent taxes for which the land is to be sold.⁷⁴ If the sale is to include lands ordered to be sold in other proceedings but not yet sold, they must be expressly re-

ferred to in the notice as being included in the sale.⁷⁵ A notice setting forth the amount of unpaid taxes is not rendered improper because of the fact that taxes are subsequently reduced as the result of the settlement of pending certiorari proceedings.⁷⁶ A notice of tax sale has been held not incomplete because it does not include unpaid taxes for parcels which are subject to foreclosure pursuant to statutory provisions for foreclosure of tax liens by an action in rem.⁷⁷

Description of property. Under some statutes, the notice must contain a particular and detailed description of the property to be sold,⁷⁸ and there should be no material variance between the description of the land in the pleading and the description in the notice.⁷⁹ Where the description in the notice is ambiguous, applying equally well to two distinct tracts of land, it is too indefinite to constitute a valid notice by publication;⁸⁰ but uncertainty of description of the property in the caption of the notice will not invalidate the sale if a correct description appears in the body of the citation.⁸¹ On the other hand, a provision requiring notice of delinquent tax sales without requiring publication of a description of each parcel is valid,⁸² and the failure to describe separately each parcel of land in the published notice does not invalidate the sale, particularly where personal notice by letter is sent to each owner.⁸³

§ 2089. — Mode and Conduct of Sale or Lease

- a. In general
- b. Matters and proceedings after sale

a. In General

Compliance must be had with all statutory require-

67. Ga.—Scheurman v. Columbus, 31 S.E. 787, 106 Ga. 34.

68. Ga.—Scheurman v. Columbus, supra.

69. Pa.—Jones v. Beale, 86 A. 254, 217 Pa. 182.

70. Ga.—McPhee v. Venable, 77 Ga. 772.

La.—Flanagan v. State Land Dev. Co., 83 So. 39, 145 La. 843.

71. U.S.—Washington v. Pratt, D.C., 8 Wheat. 681, 5 L.Ed. 714.

Order of listing

Under charter, requiring the assessor to return on his assessment book of real property each lot in numerical order described consecutively, and requiring the city treasurer to give notice by publication of a sale for delinquent taxes, which notice shall contain a description the same as in the land tax book, the notice of a tax

sale must give the lots consecutively and in numerical order, and where the assessment was in disregard of the requirements of the charter, and the notice did not give the lots consecutively and in numerical order, the notice was ineffectual, and a sale was void.—Meriwether v. Overly, 129 S.W. 1, 228 Mo. 218.

72. Md.—In re Tax Sale of Lot No. 172, 42 Md. 196.

73. Cal.—Hinds v. Clark, 159 P. 153, 173 Cal. 49.

74. Mo.—Beckwith v. Curd, 148 S.W.2d 800, 347 Mo. 602.

75. Ill.—People v. Chicago Title, etc., Co., 110 N.E. 820, 270 Ill. 591.

76. N.Y.—City of New York v. 952 Fifth Avenue Corporation, 47 N.Y. S.2d 419, 181 Misc. 705.

77. N.Y.—Boeck v. Incorporated Village of South Floral Park, 19 N.Y. S.2d 946, 174 Misc. 372.

78. N.Y.—Ventimiglia v. Elchner, 140 N.Y.S. 395, 155 App Div. 236, motion denied 102 N.E. 1116, 209 N.Y. 514, and reversed on other grounds 107 N.E. 48, 213 N.Y. 147, rehearing denied 108 N.E. 1110, 214 N.Y. 670.

79. Fla.—West 132 Feet, etc. v. Orlando, 91 So. 369, 80 Fla. 229, reheard 86 So. 197, 80 Fla. 233.

80. Fla.—West 132 Feet, etc. v. Orlando, supra.

81. Fla.—West 132 Feet, etc. v. Orlando, 86 So. 197, 80 Fla. 233.

82. U.S.—Schram v. Safety Inv. Co., D.C.Mich., 39 F.Supp. 519.

83. U.S.—Schram v. Safety Inv. Co., supra.

ments with respect to the mode and conduct of a sale for municipal taxes, such as the time and place of sale, and the quantity of land and the estates or interests therein that may be sold.

Compliance must be had with all statutory requirements with respect to the mode and conduct of a sale for municipal taxes.⁸⁴ Ordinarily the sale must be at public auction;⁸⁵ but a statute may dispense with the necessity of a public sale,⁸⁶ and require that the city treasurer bid in for the city all parcels of real estate at a rate sufficient to pay the taxes with accrued charges, as discussed *infra* § 2090. The sale must be held and conducted at the time⁸⁷ and place⁸⁸ fixed by law, and by the officer authorized by law to make the sale;⁸⁹ and it cannot be postponed by a municipal officer other than the one authorized to conduct the sale.⁹⁰ It has been held that a sale of property for city taxes should be made separately from, and not simultaneously with, but subsequent to, a sale thereof for state and county taxes.⁹¹

Ordinarily the municipality is authorized to sell only the land in fee,⁹² but in some jurisdictions a sale of the land to the municipality cannot be for a longer term than a specified number of years, as discussed *infra* § 2090. Under some statutes, in the case of taxes assessed against a life tenant, the sale should be restricted to the interest of such life tenant,⁹³ and the court is without jurisdiction to order the sale of the whole property until the life

estate is exhausted.⁹⁴ However, the interest of the owner of the fee in land on which a lessee erected buildings may be sold because of the nonpayment of taxes assessed against both the land and buildings,⁹⁵ and it is immaterial in such case that the buildings had been previously assessed against the lessee.⁹⁶

The general rule is that only as much of the land of one proprietor may be sold as will bring enough to satisfy his entire delinquency.⁹⁷ Where two or more tracts are occupied together for a single purpose, the separate entities become merged, and the tracts may be valued and assessed in solido and the tax lien fixed and foreclosed on all tracts as one.⁹⁸ The foreclosure of a tax lien embraces all interests in the property, including the rights of the owner and mortgagees in an award for damages for part of the property condemned for public use.⁹⁹ The city may include in the sale other lands ready for sale under other judgments,¹ provided sufficient notice has been given that such lands are to be included in the sale, discussed *supra* § 2088. It is sometimes required that the purchaser at the sale pay all prior city bids for the property for delinquent taxes of previous years, and the failure to do so renders the sale void,² notwithstanding a subsequent payment of the amount due the city for prior taxes by a trustee which was granted a decree of foreclosure of the mortgage on the property sold for taxes.³

84. Cal.—Pacific States Savings & Loan Co. v. Perez, 124 P.2d 184, 51 Cal.App.2d 84.

Necessity and sufficiency of notice of sale see *supra* § 2088.

Possible benefit

The prescribed mode of procedure must be followed in the sale of land for delinquent municipal taxes as far as that procedure is specific and of possible benefit to the owner.—Pacific States Savings & Loan Co. v. Perez, *supra*.

Sale held valid

Mich.—Smelley v. Safety Inv. Corp., 17 N.W.2d 868, 310 Mich. 686.

85. Ind.—Stevens v. Williams, 70 Ind. 536.

Mass.—Langley v. Chapin, 134 Mass. 82.

86. N.Y.—City of Syracuse v. Murray, 38 N.Y.S.2d 465, 179 Misc. 244, appeal dismissed 42 N.Y.S.2d 576.

87. Miss.—Hemphill v. Wofford, 173 So. 426, 178 Miss. 687—Johnson v. Lake, 139 So. 455, 162 Miss. 227, 88 A.L.R. 262.

Tex.—Tudor v. Orr, Civ.App., 179 S.W.2d 796.

44 C.J. p 1358 note 42.

Charter requirement

A municipal tax sale was not void because made on the first Monday in March as required by ordinance authorized by charter instead of the first Monday in April as required by statute, since, under statute providing that none of the code chapter sections shall repeal any of the provisions of special municipal charters, ordinance controlled.—Lear v. Hendrix, 187 So. 746, 186 Miss. 286.

Time of sale held proper

Miss.—Tardo v. Sterling, 38 So.2d 911, suggestion of error overruled 39 So.2d 504.

88. Cal.—Hinds v. Clark, 159 P. 153, 173 Cal. 49. *

89. Cal.—McDaniel v. Thomas, 183 S.E. 624, 162 Ga. 592.

Pa.—Sugden v. Rothschild, 155 A. 864, 304 Pa. 365.

44 C.J. p 1358 note 50.

90. Ga.—Montford v. Allen, 36 S.E. 305, 111 Ga. 18.

91. Ala.—City of Opp v. Brogden, 181 So. 752, 236 Ala. 180.

92. N.Y.—Conkie v. Grisson, 52 N.Y. S. 500, 24 Misc. 115.

93. Ky.—Rains v. City of Lexington, 145 S.W.2d 516, 284 Ky. 609.

94. Ky.—Rains v. City of Lexington, *supra*.

95. N.J.—Becker v. Mayor and Council of Borough of Little Ferry, 19 A.2d 657, 126 N.J.Law 338.

96. N.J.—Becker v. Mayor and Council of Borough of Little Ferry, *supra*.

97. Del.—Hill v. Ellis, 23 A.2d 112, 2 Terry 402.

44 C.J. p 1358 note 54.

98. Tex.—City of Edinburg v. Magee, Civ.App., 97 S.W.2d 983.

Homestead

Where taxpayer's lots were used as one parcel for single purpose of homestead, city's assessment of lots as one parcel and foreclosure of tax lien on them in solido was proper.—City of Edinburg v. Magee, Tex.Civ. App., 97 S.W.2d 983.

99. Conn.—Kaufman v. Valente, 162 A. 693, 115 Conn. 428.

1. Ill.—People v. Chicago Title, etc., Co., 110 N.E. 820, 270 Ill. 591.

2. Mich.—Detroit Trust Co. v. Lieberwitz, 266 N.W. 406, 275 Mich. 429.

3. Mich.—Detroit Trust Co. v. Lieberwitz, *supra*.

Who may purchase. Ordinarily the state is not authorized to purchase property at a sale for city taxes.⁴ The right and duty of a municipal corporation to purchase at the sale is discussed infra § 2090.

b. Matters and Proceedings after Sale

Compliance must be had with statutory requirements as to the submission by the official making the tax sale of a report or return of the sale, and as to the rendition by the collector to the municipal clerk of a list of the lands sold; and the proceeds of the sale should be applied in the discharge of the various taxes and costs against the land in the manner specified by law.

Under the terms of some statutes and charter provisions, the official who has made the tax sale is required to submit a report or return of the sale⁵ at the ensuing term of court following the sale, and within the redemption period.⁶ Such a return informs the owner as to what part, if any, of his land has been sold for taxes, and, therefore, what he is required to redeem, and the cost of redemption.⁷ The court is forbidden to approve the return if the owner is ready at the court to redeem the lands sold, in order to afford the landowner an opportunity speedily to redeem his lands at a fixed time and place.⁸ The failure to make such a return as required by law may render the sale void,⁹ but the failure of a city tax collector to for-

ward a copy of his report of city tax sales to the state comptroller as required of the state collector under statute does not invalidate the sale.¹⁰ It may also be required by statute that the collector render a list to the municipal clerk of the lands sold at the sale,¹¹ but where it is provided that the failure to transmit or record a list or a defective list does not render the purchaser's title void, the failure properly to certify such a list does not affect the validity of title acquired at the sale.¹² The execution and delivery of a certificate of sale to the purchaser are discussed infra § 2091.

Disposition of proceeds. The proceeds of the sale should be applied in the discharge of the various taxes and costs against the land in the manner specified by statute or charter provision,¹³ and the beneficial owners of taxes enforced by the city are entitled to a strict accounting of the avails of tax foreclosures prosecuted by the city, on the basis of the integrity of the separate funds involved.¹⁴ It may be required by statute that the proceeds of the sale be applied to pay all taxes, state, county and municipal, which were due and unpaid against the property, and such sums as were necessary to redeem the property from the liens of all back taxes for tax certificates outstanding against the property.¹⁵

4. Ala.—City of Opp v. Brogden, 181 So. 752, 236 Ala. 180.

5. Del.—Hill v. Ellis, 23 A.2d 112, 2 Terry 402.

Md.—Taylor v. Forrest, 54 A. 111, 96 Md. 529.

Pa.—City of Scranton v. O'Malley Mfg. Co., 19 A.2d 269, 341 Pa. 200.

Purpose

(1) The return of sale required to be made in proceedings for sale of lands for unpaid taxes is statutory source of information to which landowner may properly refer, whether he intends to contest validity of proceedings or to redeem his land.—Hill v. Ellis, 23 A.2d 112, 2 Terry, Del., 402.

(2) Charter provision requiring return of sale was not alone for purpose of making a record, or merely for convenience of officer making sale, or simply to promote system and dispatch in conduct of public business, but should be regarded as a recognition of fact that a fixed time and place for making return of sale is of importance to landowner in exercise of his substantial right of redemption.—Hill v. Ellis, supra.

6. Del.—Hill v. Ellis, supra.

Pa.—City of Scranton v. O'Malley Mfg. Co., 19 A.2d 269, 341 Pa. 200.

7. Del.—Hill v. Ellis, 23 A.2d 112, 2 Terry 402.

8. Del.—Hill v. Ellis, supra.

9. Del.—Hill v. Ellis, supra.

10. Fla.—Orlando v. Equitable Bldg. & Loan Ass'n, 33 So. 986, 45 Fla. 507.

11. Miss.—Lear v. Hendrix, 187 So. 746, 186 Miss. 289.

12. Miss.—Lear v. Hendrix, 187 So. 746, 186 Miss. 289.

13. Pa.—Appeal of City of Erie, 46 A.2d 592, 159 Pa.Super. 18—Pennsylvania Trust Co. of Pittsburgh, for Use of Colonial Trust Co. v. Earnest, 194 A. 520, 128 Pa.Super. 331.

Apportionment

(1) Under statute providing for compromise of taxes and municipal claims due on realty purchased by municipality at tax sale, private sale of such realty after expiration of period of redemption and distribution of proceeds of compromise or private sale to respective taxing authorities in proportion to their tax and municipal claims, municipal lien for paving was not entitled to participate in distribution of such proceeds until taxes had been paid in full.—In re Peplinski's Estate, 39 A.2d 271, 155 Pa.Super. 564.

(2) In action to foreclose lien of tax deed based on tax certificate for

unpaid state, county, and district taxes for 1928, lien of prior tax certificate for unpaid city taxes for 1927 on same property was entitled to share ratably or in proper proportion and without priorities in proceeds of foreclosure sale with such tax certificate held by complainant and with the lien held by complainant for state, county, and municipal taxes paid by him for years subsequent to 1927 in order to obtain tax deed covering same property.—Allison Realty Co. v. Graves Inv. Co., 155 So. 745, 115 Fla. 48, followed in Moore v. Allen, 155 So. 752, 115 Fla. 187.

14. Neb.—Darnell v. City of Broken Bow, 299 N.W. 274, 139 Neb. 844, 136 A.L.R. 101.

Separate accounts

Where vacant city lots were sold at tax resale for delinquent ad valorem and special sewer improvement taxes, interest, penalties, and costs for less than amount due, the county treasurer was required under statute to set up a separate account of the ad valorem taxes with interest and penalties and a separate account of the special sewer improvement taxes with interest and penalties.—City of Shawnee v. Epple, 110 P.2d 608, 188 Okl. 463.

15. Fla.—Horn v. City of Miami Beach, 194 So. 620, 142 Fla. 178.

§ 2090. — Purchase or Taking by Municipality and Resale

- a. In general
- b. Title, rights, and remedies

a. In General

A municipal corporation may purchase at a tax sale only where a statute or charter provision authorizes it to do so, and in order for it to make a valid purchase there must be a sufficient compliance with all statutory requirements. Some statutes permit a municipal corporation to take title to land on the taxpayer's failure, within a specified time, to comply with a demand for the payment of taxes due.

A municipal corporation has no power, apart from that conferred by statute, to buy in realty for taxes,¹⁶ but it may purchase at a tax sale if it is expressly authorized to do so,¹⁷ or if, accordingly to some,¹⁸ although not other,¹⁹ decisions, such authority may be implied from the general authority to purchase land for governmental purposes. Under some statutes, in the absence of bids at a

tax sale, the collector has the mandatory duty to adjudicate property to the municipality and to file a deed, unless a legal reason for not so doing appears;²⁰ and under other statutes, where the purchaser at the tax sale fails to make payment within the time required, the municipality is deemed to be the purchaser and tax deeds are made to it.²¹ It may also be required that a public sale be dispensed with, as discussed supra § 2089, and that the city treasurer bid in for the city all parcels of real estate at a rate sufficient to pay the taxes with accrued charges.²² In order for a municipality to make a valid purchase of the property at its tax sale, there must be a sufficient compliance with all statutory requirements with reference to the purchase,²³ such as a proper report and return of the sale,²⁴ the filing of a list of the lands sold,²⁵ the recording and filing of the certificate of sale,²⁶ and the execution, filing, recording, and transmitting to the proper city officer of a deed.²⁷ Under the terms of some statutes a sale to the municipality

Expiration of lien

Where county acquired title to city lot at tax sale in 1937 and sold the property free of taxes in 1944, the 1933 tax claim of the city was entitled to participate in the distribution of the proceeds of sale, notwithstanding city's lien for such taxes had expired, since the county held title as trustee and the interest of the city was an equitable interest entitled to recognition.—Appeal of City of Erie, 46 A.2d 592, 159 Pa. Super. 18.

16. U.S.—Corpus Juris cited in City of Winner, S. D., v. Kelley, C.C.A. S.D., 85 F.2d 955, 958.

Fla.—Adams v. Adams, 180 So. 516, 131 Fla. 777, followed in Adams v. Dommerick, 180 So. 519, 131 Fla. 782.

S.D.—Corpus Juris cited in Grand Lodge of Order of Sons of Herman v. City of Winner, 259 N.W. 278, 280, 63 S.D. 390.

44 C.J. p 1358 note 58.

Where county had conducted sale of land situated in city of third class for delinquent taxes and county commissioners had taken title thereto as trustees for all other tax levying authorities, city of third class was not authorized subsequently to conduct its own tax sale and take title to the property in competition with the county.—Appeal of Andrews Land Corporation, 27 A.2d 700, 149 Pa. Super. 212.

17. U.S.—Corpus Juris cited in City of Winner, S. D. v. Kelley, C.C.A. S.D., 85 F.2d 955, 958.

Pa.—City of Pittsburgh v. Lankisky, Com.Pl., 29 Mun.L.R. 89, 85 Pittsb. Leg.J. 772.

Utah.—Ogden v. Hamer, 42 P. 1113, 12 Utah 337.

18. Fla.—Adams v. Adams, 180 So. 516, 131 Fla. 777, followed in Adams v. Dommerick, 180 So. 519, 131 Fla. 782.

44 C.J. p 1358 note 60.

19. Ill.—Champaign v. Harmon, 98 Ill. 491.

20. La.—State ex rel. McGregor v. Diamond, App., 167 So. 760.

21. Mass.—City of Boston v. Lynch, 23 N.E.2d 466, 304 Mass. 272.

22. N.Y.—City of Syracuse v. Murray, 38 N.Y.S.2d 465, 179 Misc. 244, appeal dismissed 42 N.Y.S.2d 576.

23. Cal.—Hossom v. City of Long Beach, 189 P.2d 787, 83 Cal.App.2d 745.

Sale held regular

N.J.—Becker v. Mayor and Council of Borough of Little Ferry, 14 A.2d 493, 125 N.J.Law 141, affirmed 19 A.2d 657, 126 N.J.Law 328.

24. Fla.—State ex rel. Bouchelle v. Mathas, 26 So.2d 652, 157 Fla. 622.

Pa.—City of Scranton v. O'Malley Mfg. Co., 19 A.2d 269, 341 Pa. 200.

25. Fla.—State ex rel. Bouchelle v. Mathas, 26 So.2d 652, 157 Fla. 622.

26. Va.—City of Richmond v. Monument Ave. Development Corp., 84 S.E.2d 223, 184 Va. 152.

27. Mass.—City of Quincy v. Wilson, 25 N.E.2d 369, 305 Mass. 229. Tax deeds generally see infra §§ 2111-2114.

Necessity of formal deed

(1) Statutory list of land sold for municipal taxes containing descrip-

tion and name of purchaser constituted a conveyance required by ordinance providing that tax collector shall execute conveyances to purchasers at tax sales, and formal deed of conveyance to city which bought land was not necessary.—Lear v. Hendrix, 187 So. 746, 186 Miss. 289.

(2) Where commissioner was appointed to conduct sale of lot to sewer district, and his report was duly made to court and approved, and certificate of purchase was made but deed was not executed, and district did not object to commissioner's failure to have deed approved and delivered, district's title was referable to the decree, and was as effective as though the formalities ordinarily attending a judicial sale had been meticulously complied with.—Daniels v. Newsom, 213 S.W.2d 367, 213 Ark. 736.

Notice of intent

Tax deed taken by city subsequent to expiration of statutory period of redemption and taken in accordance with the city's interpretation of the statute then in effect and in accordance with custom, without giving notice of intent to take tax deed, was voidable under subsequent supreme court holding that notice was essential, but was not void, and gave right of possession to holder under deed from the city and to holder's assignee who stood in the shoes of owner of the fee until challenged.—Phillips v. City and County of Denver, 175 P.2d 805, 115 Colo. 532.

Time for delivery of deed

Statutory provision that amount of tax for which city collector purchases, and charges and expenses of

may be made only for a specified term of years.²⁸ The purchase by a city at a tax sale and the execution of a deed to it may be insufficient to pass title to the property to the city where the taxes for which the sale was made were transferred to the back tax records and carried as delinquent taxes.²⁹

Taking of property by municipality. Under some statutes a municipal corporation may demand the payment of the taxes due, and on the taxpayer's failure to comply with such demand within the time specified the municipality may take title to the land.³⁰ Compliance must be had with the formalities required by law,³¹ such as the proper posting of notice in a public place of the intention to effect the taking,³² but a further provision that no tax title so derived shall be held to be invalid by reason of any errors or irregularities in the proceedings of the collector which are neither substantial nor misleading is not invalid.³³ The city's abatement of taxes for certain years does not preclude a subsequent taking of property for nonpayment of taxes of later years.³⁴ The taking by the city, in a single proceeding and as a single parcel, of two contiguous parcels separately assessed has been held to invalidate the taking as to such parcels.³⁵

b. Title, Rights, and Remedies

- (1) In general
- (2) Tax claims
- (3) Resale or other disposition of property

(1) In General

The title, rights, and remedies acquired by a municipal corporation on the bidding in of property at a tax sale depend on the terms of the statutes or charter provisions relating to such sales and on the existence of rights of redemption afforded the owner.

The title, rights, and remedies acquired by a municipal corporation on the bidding in of property at a tax sale depend on the terms of the statutes or charter provisions relating to such sales and on the existence of rights of redemption afforded the owner.³⁶ The municipality by purchasing at the sale and receiving a tax sale certificate has been held not thereby to acquire full title to the property,³⁷ but to hold such property subject to the owner's right of redemption within the time limited by statute.³⁸ Under some statutes the municipality, as holder of a tax sale certificate, has only a lien on the property for the amount of the purchase money paid, with the right to foreclosure thereof by judicial action,³⁹ and it has been held that if

levy and sale, and cost of recording deed of purchase, shall be allowed collector in settlement, provided he has caused deed to be duly recorded within a designated number of days after purchase and to be delivered to city treasurer, prescribes only time within which deed shall be recorded, rather than time for delivery of deed to treasurer.—*City of Lowell v. Lowell Bldg. Corporation*, 34 N.E. 2d 618, 309 Mass. 165.

Misrecital

Where recital in tax deed to city that five years had elapsed since tax sale was false, the misrecital of the facts nullified the deed.—*Hosson v. City of Long Beach*, 189 P.2d 787, 83 Cal.App.2d 745.

Correction deed

(1) Failure to comply with city ordinances relating to correction of tax deed to city rendered correction deed void by virtue of doctrine that where a particular form of tax deed is prescribed by law, the form becomes substance.—*Hosson v. City of Long Beach*, *supra*.

(2) Correction tax deed to city was not rendered effectual by either tax validation act, or by city ordinance, where such laws became operative subsequent to redemptive efforts of record title holders and both related to deeds executed prior to their effective dates.—*Hosson v. City of Long Beach*, *supra*.

28. N.J.—*In re Elizabeth*, 10 A. 363, 49 N.J.Law 488.

44 C.J. p 1358 note 70.

29. Mo.—*Kansas City v. Tiernan*, 202 S.W.2d 20, 356 Mo. 138.

30. Mass.—*City of Lynn v. Lynn Commercial Realty Co.*, 190 N.E. 538, 286 Mass. 368.

To whom demand sent

Where collector's demand for city taxes described premises, stated to whom they were assessed, and otherwise complied with statute, fact that demand was sent to treasurer of corporate owner in care of such owner, instead of to owner direct, did not invalidate tax title acquired by city.—*City of Lynn v. Lynn Commercial Realty Co.*, *supra*.

31. Mass.—*City of Lowell v. Marden & Murphy*, 74 N.E.2d 666, 321 Mass. 597, certiorari denied 68 S.Ct. 354, 332 U.S. 850, 92 L.Ed. 420.

32. Mass.—*City of Lowell v. Marden & Murphy*, *supra*.

Notice held shown

Mass.—*City of Lowell v. Marden & Murphy*, *supra*.

33. Mass.—*City of Lynn v. Lynn Commercial Realty Co.*, 190 N.E. 538, 286 Mass. 368.

Taxes erroneously included

The error of including taxes for more than fourteen hundred dollars in proceeding by city taking regis-

tered land for nonpayment of taxes was a substantial error, within statute providing that no tax title should be invalidated by reason of errors in proceedings of collector which were neither substantial nor misleading.—*City of Quincy v. Wilson*, 25 N.E.2d 369, 305 Mass. 229.

34. Mass.—*City of Lowell v. Marden & Murphy*, 74 N.E.2d 666, 321 Mass. 597, certiorari denied 68 S.Ct. 354, 332 U.S. 850, 92 L.Ed. 420.

35. Mass.—*City of Lowell v. Marden & Murphy*, *supra*.

36. Mass.—*City of Quincy v. Wilson*, 25 N.E.2d 369, 305 Mass. 229. N.Y.—*City of Beacon v. Asher Bernstein Realty Corp.*, 57 N.Y.S.2d 659, 185 Misc. 262, motion denied 60 N.Y.S.2d 616, 270 App.Div. 852.

37. N.Y.—*City of Rochester v. Rochester Ry. Co.*, 96 N.Y.S. 152, 109 App.Div. 638, modified on other grounds 79 N.E. 1010, 187 N.Y. 216.—*City of Beacon v. Asher Bernstein Realty Corp.*, 57 N.Y.S.2d 659, 185 Misc. 262, motion denied 60 N.Y.S.2d 616, 270 App.Div. 852.

38. N.Y.—*City of Beacon v. Asher Bernstein Realty Corp.*, *supra*. Redemption from sale see *infra* §§ 2100-2105.

39. N.Y.—*City of Schenectady v. Kalteux*, 297 N.Y.S. 628, 251 App. Div. 631, affirmed 11 N.E.2d 780, 275 N.Y. 610.

it wrongfully gains possession of the premises covered by the certificate it is a constructive trustee of the property for the benefit of the owner, and its rights, duties, and liabilities are governed by principles applicable to such a trustee and are analogous to those of an administrator or executor de son tort.⁴⁰

A municipal corporation may, however, become vested with title to the property purchased by it at the tax sale where the right of redemption has been foreclosed or has expired, and where the proceedings are not void and have not been attacked within the time limited therefor by statute.⁴¹ In such case, the municipality does not hold the property as trustee for the former owner,⁴² and its purchase or taking may give it a tax title to the entire estate paramount both to that of mortgagees and to that of the original owner of the equity in the land.⁴³ So it has been held that the municipality as a purchaser takes a new and independent title based on the foreclosure decree with no rights or remedies different from those which would have obtained with respect to a stranger had such a stranger been the purchaser at the foreclosure sale;⁴⁴ but it has also been held that the title acquired by the municipality is not of the same nature as the title vested in a private purchaser, since the object of the purchase is not the acquisition of

the property but rather the collection of the taxes,⁴⁵ and that the municipality is not vested with complete title to the land so as to permit its devotion to public use until it obtains the requisite authority to purchase the land for such public use.⁴⁶

A statute giving the purchaser of the tax title a lien on the property for the amount paid, where the sale is illegal, has no application to a municipality to which the property is struck off for want of a private bidder.⁴⁷ Where the municipality is the plaintiff in the suit to foreclose tax liens and the purchaser at the foreclosure sale, it is not a bona fide purchaser for value without notice of the fraud on the rights of persons resulting from failure to give the required notices of suit.⁴⁸

Waiver or disclaimer of rights. A municipal corporation which acquired its title under a tax foreclosure judgment has the power to waive its rights under the judgment,⁴⁹ but, in order to show a waiver by the municipality of an adjudication of property to it for taxes, it must appear that the owners were in undisturbed corporeal possession and were lured into inaction by the conduct of the municipality.⁵⁰ Under a statute so providing, where the tax deed to the city is invalid by reason of error, omission, or informality, the city officials may disclaim or release the city's tax title,⁵¹

Foreclosure of tax sale certificate see *infra* § 2100.

40. N.J.—Taylor v. Morris, Super. Ch., 61 A.2d 758.

41. N.Y.—City of Utica v. Protte, 36 N.Y.S.2d 79, 178 Misc. 925, affirmed 41 N.E.2d 174, 288 N.Y. 477. Tenn.—Moore v. City of Memphis, 195 S.W.2d 623, 184 Tenn. 92.

Tex.—Rollison v. Puckett, 198 S.W.2d 74, 145 Tex. 366.

Statute held valid

N.Y.—City of New Rochelle v. Echo Bay Waterfront Corporation, 49 N.Y.S.2d 673, 268 App.Div. 182, affirmed 60 N.E.2d 838, 294 N.Y. 678, certiorari denied 68 S.Ct. 24, 326 U.S. 720, 90 L.Ed. 426.

Constitutional preemption

Where owner was not in possession at time unimproved realty was adjudicated to city for delinquent taxes, and had not been in possession or paid taxes thereon, for more than five years following recordation of tax deed, city's title was perfected under constitutional preemption requiring institution of proceedings to annul tax sale within five years, notwithstanding notice of tax sale was not served on owner or that city had not filed suit to confirm title.—City of New Orleans v. Meteye, La. App., 24 So.2d 80.

42. Tenn.—Moore v. City of Memphis, 195 S.W.2d 623, 184 Tenn. 92.

43. Mass.—Gaunt v. Arzooonian, 46 N.E.2d 520, 313 Mass. 38.

Assignment of mortgage

Where mortgagee had no interest in land after decree foreclosing right to redeem from tax sale by city, subsequent assignment and foreclosure of the mortgage and conveyance by the assignee-purchaser to the respondent were of no avail as against grantee to whom city conveyed title.—Gaunt v. Arzooonian, *supra*.

44. Fla.—Smith v. City of Arcadia, 2 So.2d 725, 147 Fla. 375, 135 A.L.R. 1458.

45. Cal.—Hossom v. City of Long Beach, 189 P.2d 787, 83 Cal.App.2d 745.

46. Cal.—Hossom v. City of Long Beach, *supra*.

Operation of enterprise

Ordinance of city attempting to authorize city manager to occupy and possess tax deeded land for public purpose is invalid as an attempt to invest city with power to operate an enterprise not strictly a municipal

affair within purview of constitution and as concerning a state and county affair controlled by statute.—Hossom v. City of Long Beach, *supra*.

47. Miss.—Hodge Ship Bldg. Co. v. Moss Point, 110 So. 227, 144 Miss. 657.

48. Fla.—City of Lakeland v. Chase Nat. Co., 32 So.2d 833, 159 Fla. 783.

49. Tex.—Puckett v. Rollison, Civ. App., 198 S.W.2d 974, reversed on other grounds Rollison v. Puckett, 198 S.W.2d 74, 145 Tex. 366.

50. La.—State ex rel. McGregor v. Diamond, App., 167 So. 760.

51. Mass.—City of Quincy v. Wilson, 25 N.E.2d 369, 305 Mass. 229.

Effect of disclaimer

Where registered land was sold by city collector for nonpayment of taxes and collector purchased the land for city for amount of the tax, the proper recording or filing of disclaimer and release would give effect not only to discharge of tax title which itself has become a sort of lien, but also to a continuance of the tax lien, since recording is made a condition precedent to collection of the unpaid tax, in conformity to law.—City of Quincy v. Wilson, *supra*.

but the failure to record or file the disclaimer as required by law renders it ineffective.⁵²

(2) Tax Claims

Ordinarily when a municipal corporation purchases property at a sale held to satisfy certain tax liens, such liens are extinguished, and the municipality also loses the right to sell the property for any subsequent tax; but claims for taxes for prior years not included in the sale are not extinguished, nor are existing tax liens on the property in favor of the state or the county discharged.

Ordinarily when a municipal corporation purchases property at a sale held to satisfy certain tax liens, such liens are extinguished,⁵³ but the adjudication of the property to the municipality does not extinguish the municipal claim for taxes for prior years not included in the sale.⁵⁴ Where, however, the municipality has taken the property by adjudication or purchase, it loses all right to sell the property for any subsequent tax,⁵⁵ or to receive any payment of such tax,⁵⁶ where there has been no redemption of the property from the tax sale. It has been held that neither the property nor the former owner is obligated for such subsequent tax, since the municipality is the absolute owner of the property,⁵⁷ but it has also been held that, while a sale for such subsequent taxes cannot be made, satisfaction of such taxes may be obtained on redemption or by enforcing a personal liability.⁵⁸ A purchase by, or adjudication of property to, the municipal corporation for unpaid taxes does not preclude the enforcement of taxes subsequently owing where the municipality did not assert ownership or take possession of the property,⁵⁹ or where no cer-

tificate of sale to the municipality was ever recorded, so that the municipality never obtained title;⁶⁰ and the municipality may make another sale of the property for the taxes of subsequent years where the tax deed to it has been declared invalid because of defects in the proceedings.⁶¹

Under a statute providing that a city bidding in property sold for taxes could sue for taxes and that a judgment therefor should have priority over all other liens, the city may not be deprived of the right to bring suit for taxes accruing subsequent to the issuance of a special tax bill by a foreclosure suit brought on such tax bill.⁶² Also, under a statute providing that a city officer should bid in the property sold for taxes where it could not be sold for the amount due, and that such officer could later issue a certificate of purchase to any one paying the amount due, the bidding in of the property by the officer was not equivalent to a purchase by the city so as to give the city the right of a holder of a certificate of purchase inferior to the right of a holder of a special tax bill previously issued against the same land.⁶³ It has been held, however, that a city which purchased land at a sale for general taxes obtained title subject to the lien of a special improvement assessment which under statute was coequal with the lien for general taxes and that its quitclaim deed conveyed only a title subject to the lien of the special assessment.⁶⁴

Federal, state, and county tax claims. When the municipality is authorized to purchase for its own security, it has been held to hold as trustee for itself

52. Mass.—City of Quincy v. Wilson, *supra*.

53. Or.—Hughey v. Cornell, 3 P.2d 781, 137 Or. 589.

Satisfaction of execution

Where city purchased property sold under municipal tax execution for an amount sufficient to pay execution in full and plaintiff purchased a lot subject to the same execution relying on execution sale as having satisfied the execution, city was not entitled to levy on the lot so purchased by plaintiff on theory that the municipal tax execution had not been satisfied because the execution sale was invalid; and the fact that the city passed a resolution purporting to cancel the deed executed pursuant to the sale did not entitle the city to attempt to sell the lot purchased by plaintiff under the same execution where the acts of the city canceling the deed were subsequent to plaintiff's purchase.—Elder v. Chambliss, 28 S.E.2d 176, 195 Ga. 148.

Merger

Where city bought in realty at tax

foreclosure sale in 1941 under a 1939 tax judgment and held title for the state, county, and itself in proportion to the recovery which judgment awarded to each taxing unit, although taxes continued to accrue against property after decree of foreclosure, when the realty was acquired by the taxing units at the judicial sale, their tax liens were merged into the title they acquired.—State v. Moak, 207 S.W.2d 894, 146 Tex. 322.

54. La.—State ex rel. Tulane Homestead Ass'n v. Montgomery, 171 So. 28, 185 La. 777.

55. Cal.—Hosson v. City of Long Beach, 189 P.2d 787, 83 Cal.App.2d 745.

La.—State ex rel. Salomon v. City of New Orleans, App., 174 So. 692.

Mass.—City of Chicopee v. Manset Realty Corp., 66 N.E.2d 364, 319 Mass. 434—Boston Five Cents Sav. Bank v. City of Boston, 61 N.E.2d 124, 318 Mass. 183—City of Boston v. Barry, 53 N.E.2d 686, 315 Mass. 572.

56. La.—State ex rel. Salomon v. City of New Orleans, App., 174 So. 692.

57. La.—State ex rel. McGregor v. Diamond, App., 167 So. 760.

58. Mass.—Boston Five Cents Sav. Bank v. City of Boston, 61 N.E.2d 124, 318 Mass. 183.

59. La.—Untereiner v. City of New Orleans, 120 So. 884, 10 La.App. 667.

60. Va.—City of Richmond v. Monument Ave. Development Corp., 34 S.E.2d 223, 184 Va. 152.

61. Mass.—City of Chicopee v. Manset Realty Corp., 66 N.E.2d 364, 319 Mass. 434.

62. Mo.—State ex rel. Associated Holding Co. v. Shain, 73 S.W.2d 391, 335 Mo. 474.

63. Mo.—State ex rel. Associated Holding Co. v. Shain, 73 S.W.2d 391, 335 Mo. 474.

64. Ga.—Steele v. City of Waycross, 10 S.E.2d 867, 190 Ga. 816.

and other tax levying authorities, such as the state or county.⁶⁵ The purchase by the municipality ordinarily does not obliterate existing tax liens on the property in favor of the federal government, state, or county.⁶⁶ The title vested in the city as the result of the sale has been held not to be absolute but to be subject to defeasance by enforcement of the existing liens for state and county taxes,⁶⁷ and the city must protect its tax sale certificate from subordination to liens under later county tax sales.⁶⁸ In this respect the city has the same right that any other purchaser at the sale would have had to redeem the land from the outstanding liens for delinquent state and county taxes.⁶⁹ It has been held, on the other hand, that the liens for state and county taxes are not affected by the sale only where the state and county were not parties to, and had no notice of, the foreclosure proceedings,⁷⁰ and that if they were parties to the proceeding, the title passing by the sale to the municipality is free and clear of all liens and claims for taxes by such taxing units.⁷¹ So it has been held that where legal title vests in the city by its purchase, tax liens asserted by the state, county, and other governmental units become merged with

such title, and that where the land is thereafter used for a public purpose it cannot be subjected to seizure and sale to satisfy such preëxisting liens or any tax liens created subsequent to its acquisition by the city.⁷² Lands purchased by a city at a municipal tax sale are exempt from subsequent state taxes when,⁷³ and only when,⁷⁴ the title is vested in the city and so remains.

(3) Resale or Other Disposition of Property

A municipal corporation which has bid in realty at a tax sale may be authorized to assign its own interest under such sale to one who will repay the amount of its bid and interest, and where it has acquired title to the realty by foreclosure or expiration of the right of redemption it may sell or rent the property on compliance with all statutory requirements.

Where a municipal corporation has bid in realty at a tax sale for delinquent municipal taxes, it may be authorized by statute to assign its own interest under such sale to one who will repay the amount of its bid and interest.⁷⁵ So also, where a municipality has acquired title to land by purchase at a tax sale, or by a taking of the property for unpaid taxes pursuant to law, and the owner's right of redemption has been foreclosed or has expired, the municipality may sell⁷⁶ or, according to the decisions,

65. La.—In re Lindner, 38 So. 610, 114 La. 895.

Pa.—Appeal of Andrews Land Corporation, 27 A.2d 700, 149 Pa.Super. 212.

66. Cal.—Hosson v. City of Long Beach, 139 P.2d 787, 83 Cal.App.2d 745—Oroville-Wyandotte Irr. Dist. v. Ford, 118 P.2d 340, 47 Cal.App. 2d 531.

Fla.—Smith v. City of Arcadia, 2 So. 2d 725, 147 Fla. 375, 135 A.L.R. 1458.

Order of priority

Tax sales which were made to municipality after death of owner of realty for old tax assessment by municipality and for more recent taxes did not disturb the order of priority of lien of the state for transfer inheritance tax, lien of the United States for estate tax, and municipal tax liens.—Town of Irvington v. Oilemar, 16 A.2d 563, 128 N.J.Eq. 402, affirmed Irvington Nat. Bank v. Geiger, 24 A.2d 368, 131 N.J.Eq. 189.

Merger or subrogation

In suit by city for a decree removing state and county tax deed interest of defendant as a cloud from title acquired by city in suit for foreclosure of municipal tax deeds and tax certificate, on ground that there was a conspiracy to assign the state and county tax certificates to defendant, so as to obtain money through foreclosure of municipal tax deeds and retain the state and county tax certificates with which to

obtain title to the property, court would not extend law of merger or doctrine of subrogation to state and county tax certificates, since they remain first liens until paid.—Horn v. City of Miami Beach, 194 So. 620, 142 Fla. 178.

67. Fla.—Smith v. City of Arcadia, 2 So.2d 725, 147 Fla. 375, 135 A.L.R. 1458.

68. Wis.—Pereles v. Meyer, 251 N. W. 255, 213 Wis. 232.

69. Fla.—Smith v. City of Arcadia, 2 So.2d 725, 147 Fla. 375, 135 A.L.R. 1458.

70. Tex.—State v. City of San Antonio, Civ.App., 206 S.W.2d 111.

71. Tex.—State v. Moak, 207 S.W. 2d 894, 146 Tex. 322.

72. Tex.—City of Manlin v. State, Civ.App., 205 S.W.2d 809.

73. Tex.—State v. City of San Antonio, Civ.App., 206 S.W.2d 111.

"Owned and held"

City by buying in realty at tax sale, became entitled to immediate possession thereof and "owned and held" the realty within meaning of constitutional exemption from taxation of property of cities "owned and held" for public purposes, notwithstanding city failed to obtain actual possession and allowed former owner to remain in possession and derive private benefit from use of the property.—State v. City of San Antonio, supra.

Negligent failure to resell

Failure, if any, of officers of city to make timely sale of lot, title to which had been acquired by tax sale, was negligence in exercise of their principal's governmental function which in no way bound city with reference to liability for state and county taxes accruing after city's acquisition of title.—State v. City of San Antonio, Tex., 209 S.W.2d 756.

74. N.Y.—City of Beacon v. Asher Bernstein Realty Corp., 57 N.Y.S. 2d 659, 185 Misc. 262, motion denied 60 N.Y.S.2d 616, 270 App. Div. 852.

75. U.S.—Bannon v. Burnes, C.C. Mo., 39 F. 892.

76. Fla.—Adams v. Adams, 180 So. 516, 131 Fla. 777, followed in Adams v. Dommerich, 180 So. 519, 131 Fla. 782.

La.—State ex rel. McGregor v. Diamond, App., 167 So. 760.

Mass.—Parrotta v. Hederson, 53 N.E. 2d 97, 315 Mass. 416.

N.Y.—McSweeney v. Bazinet, 55 N.Y. S.2d 558, 269 App.Div. 213, appeal denied 57 N.Y.S.2d 653, 269 App. Div. 912.

Exchange of property for park purposes

N.J.—Fraser v. Teaneck Tp., 64 A.2d 845, 1 N.J. 508.

Lands of low value

(1) The statutes dealing with the sale of lands of low value held by city or town under tax titles are not

the municipality may rent⁷⁷ the property, and in such case it is not required to account to the former owner for the amount received from the sale of the land in excess of the amount paid by the municipality therefor.⁷⁸ Where a statute or charter authorizes either a sale to the municipality itself for a term of years only or to other purchasers in fee, a sale to the municipality for a term of years does not exhaust its power under the statute or charter to sell later to others in fee if at the time of the subsequent sale it still holds the land as purchaser for years.⁷⁹

The assignment or resale by the municipal corporation must conform to statutory requirements;⁸⁰ but a defective sale may sometimes be validated by remedial legislation.⁸¹ Requirements imposed by law with respect to sales of municipal real estate may be inapplicable where a special charter provision governs sales of property acquired by the municipality at a tax sale,⁸² and a city may be empow-

ered to sell the land acquired at the sale in such manner as it may prescribe by order or resolution.⁸³ Under some statutes, the officer authorized to make the sale may waive the terms of the notice of sale and accept such bids as he deems advantageous,⁸⁴ and he is not bound to refuse to sell if he does not obtain a bid within the stated conditions in the notice of sale.⁸⁵ A prospective auction purchaser of realty, having bid under conditions that any bid accepted at the sale was subject to future confirmation by the city, may not contend that such condition did not exist.⁸⁶ A private sale may be proper in some circumstances.⁸⁷ The assignment may be on credit with security in the discretion of the common council.⁸⁸

Sale or assignment of tax certificates. Although the transfer or assignment of tax sale certificates for property purchased by a municipality on a tax sale may sometimes be restricted by law,⁸⁹ ordinarily a city may have the power to sell and assign

unconstitutional for failure to provide direct notice to taxpayer of intended sale thereunder; nor are such statutes invalid because of the fact that methods of foreclosing right of redemption differ according to whether the land taken or purchased by the municipality is or is not, in commissioner's opinion, sufficient to pay charges.—*Napier v. City of Springfield*, 28 N.E.2d 157, 304 Mass. 174.

(2) Under statute commissioner is not limited in exercise of his investigating powers to land of any particular value but may investigate any lands held by a municipality, in determining whether to act under the statute, and if he is of opinion that certain lands are insufficient in value within meaning of statute he has jurisdiction to make affidavit to that effect as basis for sale.—*D'Olimpio v. Jancoterino*, 23 N.E.2d 162, 304 Mass. 300.

77. La.—*State ex rel. McGregor v. Diamond*, App., 167 So. 760.

78. Tenn.—*Moore v. City of Memphis*, 195 S.W.2d 623, 184 Tenn. 92.

79. N.J.—*Devine v. Franks, Ch.*, 47 A. 228.

80. Miss.—*Hemphill v. Wofford*, 173 So. 426, 178 Miss. 687.

N.Y.—*McSweeney v. Bazinet*, 55 N.Y.S.2d 558, 269 App.Div. 213, appeal denied 57 N.Y.S.2d 653, 269 App.Div. 912, affirmed 66 N.E.2d 580, 295 N.Y. 797.

Pa.—*In re Compromise and Settlement of City Tax Claims against Property of Laszcawski*, Com.Pl., 29 Erie Co. 349.

44 C.J. p 1358 notes 67, 68.

Time of sale

Miss.—*Hemphill v. Wofford*, 173 So. 426, 178 Miss. 687.

Payment in bonds

Statutory conditions imposed on municipality's right to accept bonds in payment of the purchase price of tax title liens are for protection of bondholders and the municipality, not for protection of title owner.—*Shay v. Delaware Tp.*, 5 A.2d 53, 122 N.J. Law 313, affirmed 11 A.2d 261, 124 N.J. Law 124.

Approval of court

Pa.—*Petition of City of Erie*, 53 Pa. Dist. & Co. 544.

81. N.J.—*Pamrapau Corporation v. City of Bayonne*, 8 A.2d 908, 126 N.J.Eq. 478, affirmed 12 A.2d 860, 127 N.J.Eq. 340, motion denied 17 A.2d 544, 129 N.J.Eq. 3, affirmed 19 A.2d 877, 129 N.J.Eq. 586, and 21 A.2d 863, 130 N.J.Eq. 240.

82. N.Y.—*McSweeney v. Bazinet*, 55 N.Y.S.2d 558, 269 App.Div. 213, appeal denied 57 N.Y.S.2d 653, 269 App.Div. 912, affirmed 66 N.E.2d 580, 295 N.Y. 797.

Reason for rule

General city law was designed to provide a method of procedure for municipalities that had neglected to provide a method of procedure of their own for the sale and disposition of real property acquired through tax sale.—*Coleman v. Mallery*, 57 N.Y.S.2d 277, 184 Misc. 869.

83. Miss.—*Evans v. City of Jackson*, 30 So.2d 315, 202 Miss. 9.

Validity of resolution

In code provision empowering municipality to sell lands acquired at municipal tax sale in such manner as may be prescribed by order or

resolution which shall be entered on minutes, the publication of such resolution is not necessary and mere entry on the minutes as an order is sufficient; the fact that resolution embraced several tracts of land was immaterial where each particular tract of land was specifically described therein; where ordinance authorized the execution and delivery of deeds to such lands, a deed to land in conformity with the ordinance passed good title although resolution was not passed until three days after the execution and delivery of the deed.—*Evans v. City of Jackson*, supra.

84. Mass.—*Parrotta v. Hederson*, 53 N.E.2d 97, 315 Mass. 416.

85. Mass.—*Parrotta v. Hederson*, supra.

86. Mass.—*Taylor v. City of Haverhill*, 55 N.E.2d 617, 316 Mass. 380.

87. N.Y.—*Coleman v. Mallery*, 57 N.Y.S.2d 277, 184 Misc. 869.

Pa.—*Andrews Realty Co. of New Castle v. City of New Castle*, 49 Pa. Dist. & Co. 47, 2 Lawrence L.J. 204.—*In re Weible's Tax Compromise*, 48 Pa. Dist. & Co. 213, 2 Lawrence L.J. 140.

88. N.Y.—*Buffalo v. Balcom*, 32 N.E. 7, 134 N.Y. 532.

89. Fla.—*State ex rel. Bouchelle v. Mathas*, 26 So.2d 652, 157 Fla. 622.

Intent of statute

Statute relating to tax delinquent property held by municipalities under foreclosure was intended to freeze tax sale certificates in status quo in hands of clerk of circuit court until such time as the municipality holding title to the lands should dispose of such lands; furnishing

such certificates held by it, thereby enabling it to raise money for legitimate purposes.⁹⁰ While a city has been held not to be authorized to sell a certificate held by it subject to redemption during the redemption period at a price less than the full amount of taxes and penalties,⁹¹ the mere inadequacy of consideration for the certificate will not operate to render a contract of sale thereof void where no lack of good faith is involved.⁹² However, a city's assignment of tax certificates for an inadequate consideration and the subsequent exchange of other certificates of equal face value for those certificates so sold and assigned at their face value has been held fraudulent.⁹³ The city may sell tax certificates after expiration of the period for redemption for less than the amount of the taxes and penalties due where it appears that the full amount cannot be obtained by ordinary processes.⁹⁴

§ 2091. — Title, Rights, and Remedies of Purchasers and Other Claimants in General

- a. In general
- b. Certificate of sale
- c. Priority of title and liens
- d. Actions concerning tax title

the circuit court clerk a verified and accurate description of tax delinquent lands to which municipality held title was not a condition precedent to acquisition of or forfeiture of benefits under statute.—*State ex rel. Bouchelle v. Mathas*, supra.

90. Fla.—*Ranger Realty Co. v. Miller*, 136 So. 546, 102 Fla. 378.

Contract of sale

A contract under which city agreed to sell specified tax certificates to corporation and corporation agreed to pay city a specified sum in installments and to pay taxes for designated years was unambiguous, although failing to mention taxes for certain year, and resolution thereafter adopted by city without consideration although purporting to amend contract so as to include certificate for omitted year did not modify rights under the original contract, and resolution could be rescinded by city, neither party having changed its position in the meantime.—*Edwards Realty & Finance Co. v. City of Superior*, 27 N.W.2d 370, 250 Wis. 472.

Contract to procure assignment

N.J.—*Case v. Plainfield Trust Co.*, 1 A.2d 405, 121 N.J.Law 239.

91. Fla.—*Sharrow v. City of Dania*, 180 So. 18, 131 Fla. 641.—*Ranger Realty Co. v. Miller*, 136 So. 546, 102 Fla. 378.

92. Fla.—*Sharrow v. City of Dania*, 180 So. 18, 131 Fla. 641.

93. Fla.—*R. D. Lamar, Inc., v. Ray*, 182 So. 292, 132 Fla. 704.

94. Fla.—*R. D. Lamar, Inc., v. Ray*, supra.—*Ranger Realty Co. v. Miller*, 136 So. 546, 102 Fla. 378.

95. Ky.—*Albert v. Harris*, 8 Ky.Op. 619.

Operation and effect of tax deed see infra § 2113.

Recovery of redemption money see infra § 2105.

Title and rights acquired by municipality purchasing at tax sale see supra § 2090.

96. Colo.—*Reagan v. Dick*, 293 P. 333, 88 Colo. 122.

97. Miss.—*Street v. Columbus*, 23 So. 773, 75 Miss. 822.
44 C.J. p 1358 note 74.

Purchase by wife of owner

Pa.—*Greager v. Bradley*, Com.Pl., 54 Dauph.Co. 359.

98. Miss.—*Street v. Columbus*, 23 So. 773, 75 Miss. 822.
44 C.J. p 1359 note 75.

99. N.Y.—*City of Beacon v. Asher Bernstein Realty Corp.*, 57 N.Y.S. 2d 659, 185 Misc. 262, motion de-

a. In General

The validity of the title of a purchaser at a tax sale rests on the validity of the judgment ordering the sale or of the proceedings prior to sale; and the title taken is subject to statutory limitations and restrictions.

The validity of the title of a purchaser at a tax sale rests upon the validity of the judgment ordering the sale,⁹⁵ or of the tax proceedings prior to the sale;⁹⁶ and the title taken is subject to such limitations and restrictions as may be contained in the governing statute,⁹⁷ unaffected by any provisions to the contrary in an ordinance.⁹⁸ A municipal tax sale ordinarily does not, of itself, operate to transfer full title to the purchaser,⁹⁹ nor does the execution and delivery to him of a certificate of sale so operate, as discussed infra subdivision b of this section; but title vests in the purchaser at the sale only when the tax deed is delivered after termination of the redemption period, as discussed infra § 2111. However, the purchaser of land at a foreclosure conducted pursuant to statute by the city as owner of a certificate of tax sale of an estate for years acquires the premises in fee.¹

The owner of the property may be entitled to remain in possession for the period after the sale in which he is entitled to redeem.² However, a purchaser whose title has been perfected steps into the

nied 60 N.Y.S.2d 616, 270 App.Div. 852.

Pa.—*City of Scranton v. O'Malley Mfg. Co.*, 19 A.2d 269, 341 Pa. 200.

Assignment of lien

A payment made by a purchaser at a tax sale does not constitute payment of the tax but is merely an assignment of the tax lien to the purchaser, and such lien remains after the sale.—*People ex rel. Oakley v. Bleckwenn*, 27 N.E. 376, 126 N.Y. 310, followed in 27 N.E. 378, 126 N.Y. 654.

1. N.Y.—*City of Schenectady v. Kalteux*, 297 N.Y.S. 628, 251 App. Div. 641, affirmed 11 N.E.2d 780, 275 N.Y. 610.

Statute held valid

A statute under which a purchaser of land at foreclosure sale, conducted by city to enforce its lien as holder of a certificate of tax sale of an estate for years, acquired title thereto in fee, was not unconstitutional because original owner of property thus lost the property outright, where he might merely have lost its use for a term of years if city had taken the estate for years to which it was entitled if the property was not redeemed.—*City of Schenectady v. Kalteux*, supra.

2. Tex.—*State v. Moak*, 207 S.W.2d 394, 146 Tex. 322.

position of the owner of the property and acquires his right of possession³ with the same right to pay off an assessment lien at his election.⁴ Where land is sold in its entirety for taxes at a valid sale, without limitations, the sale extinguishes negative limitations in a remote vendor's deed.⁵ The sale operates on the land itself and not merely on the title of the person in whose name it may have been listed for taxation, and any person claiming an interest in the land is bound to protect his interest against forfeiture or sale by paying the tax.⁶ The purchaser acquires title discharged from any common-law right of dower or curtesy or statutory right in the nature of dower or curtesy.⁷ However, a tax sale based on a tax lien on property which was the servient tenement to an existing easement of right of way does not extinguish the easement where the easement was appurtenant to the dominant tenement and a part of it and therefore to that extent separate and apart from the servient tenement.⁸

Property previously sold for state and county taxes. Where a municipality makes a sale of real estate to satisfy taxes although the state has purchased the property at a previous sale for state and county taxes, rights under the later sale remain dormant until the prior sale is released through redemption or otherwise, when the sale for municipal taxes would automatically ripen into a perfect title.⁹ The purchaser of property at a sale for un-

paid city taxes has been held to acquire title, where no redemption has been made, although the property had previously been adjudicated to the state for unpaid state and county taxes of the preceding year.¹⁰

Where a tax sale is void because of jurisdictional defects in the proceedings, no title passes to the purchaser,¹¹ and no rights are acquired by a grantee from such purchaser, at least where he is charged with notice of the proceedings composing his chain of title.¹²

b. Certificate of Sale

Provision is frequently made for the execution and delivery of tax sale certificates to purchasers at tax sales, which are assignable, and the rights and liabilities of the purchaser and other parties resulting from the issuance of such certificates depend on the terms of the statute authorizing their issuance.

Provision is frequently made for the execution and delivery of tax sale certificates to purchasers at tax sales.¹³ The certificate may not provide for the payment of interest in excess of that authorized by the statute.¹⁴ A tax sale certificate is not a negotiable instrument,¹⁵ although it is assignable,¹⁶ and, while the assignee becomes entitled to all the rights acquired by the purchase,¹⁷ he acquires no rights superior to those of his assignor,¹⁸ and the purchaser of such a certificate who acquires the certificate either by purchase at the sale or by subsequent assignment takes under the operation of

3. Ala.—Throckmorton v. City of Tuscumbia, 23 So.2d 550, 247 Ala. 203.

4. Ala.—Throckmorton v. City of Tuscumbia, *supra*.

5. Miss.—City of Jackson v. Ashley, 199 So. 91, 189 Miss. 818.

6. Del.—Pottock v. Mellott, 22 A.2d 843, 2 Terry 361.

7. Del.—Pottock v. Mellott, *supra*.

8. N.J.—Niestat v. Equitable Security Co., 48 A.2d 907, 138 N.J. Eq. 480.

9. Ala.—City of Opp v. Brogden, 181 So. 752, 236 Ala. 180.

La.—Jones v. Town of Pineville, App., 200 So. 38.

10. La.—Touchstone v. Comer, App., 183 So. 291.

11. N.Y.—City of White Plains v. Hadermann, 72 N.Y.S.2d 155, 272 App.Div. 507, affirmed 75 N.E.2d 634, 297 N.Y. 623.

Tex.—Tudor v. Orr, Civ.App., 179 S.W.2d 796.

Retention of title

Where lot was sold to city for delinquent taxes but no certificate of sale was ever recorded, the original owner retained title, subject to lien

of city as purchaser for unpaid taxes and interest thereon and of right to redeem from lien on terms specified in statute and charter.—City of Richmond v. Monument Ave. Development Corp., 34 S.E.2d 223, 184 Va. 152.

Damnum absque injuria

Where purchaser at tax foreclosure sale bought property subject to injunction order which restrained sale until certain date, and city's attorneys conducted sale under honest belief in effect of service of notice of appeal from injunction order, the purchaser's loss at best was damnum absque injuria, which does not give rise to a right against anyone.—City of Buffalo v. Kissinger, 40 N.Y.S.2d 188.

12. Tex.—Tudor v. Orr, Civ.App., 179 S.W.2d 796.

13. Fla.—McDonald Mortgage & Realty Co. v. Tax Securities Corporation, 151 So. 896, 112 Fla. 622.

Improper issuance

City's certificate setting forth that in consideration of payment of 1929 taxes payer was entitled to deed to premises for leasehold of ninety-nine years, unless redeemed within proper time, was improperly issued,

where charter required purchasers of tax titles to pay all prior city bids, and payer failed to bid or pay city's bid for 1928 taxes.—Detroit Trust Co. v. Lieberwitz, 266 N.W. 406, 275 Mich. 429.

Description of property in certificate held sufficient

N.Y.—City of Syracuse v. Murray, 38 N.Y.S.2d 465, 179 Misc. 244, appeal dismissed 42 N.Y.S.2d 576.

14. Fla.—McDonald Mortgage & Realty Co. v. Tax Securities Corporation, 151 So. 896, 112 Fla. 622.

15. Fla.—R. D. Lamar, Inc., v. Ray, 182 So. 292, 132 Fla. 704.

16. Fla.—R. D. Lamar, Inc., v. Ray, *supra*.

Assignment of certificates by municipality purchasing at sale see *supra* § 2090 b (3).

Owner of remainder

Tax sale statute does not preclude owner of remainder in land sold from taking assignment of tax sale certificate.—Di Bologna v. Earl, 23 A.2d 791, 130 N.J. Eq. 571.

17. Fla.—R. D. Lamar, Inc. v. Ray, 182 So. 292, 132 Fla. 704.

18. Fla.—R. D. Lamar, Inc., v. Ray, *supra*.

the rule of caveat emptor.¹⁹ A municipal corporation, for the purpose of performance of the contracts contained in the certificate, may treat the purchaser as the party entitled to the benefit of the certificate until the municipality receives notice of an assignment of the certificate by the purchaser, as required by a statute providing that no assignment of a tax certificate shall have any effect until notice of the assignment shall be filed in the office of the collector of taxes.²⁰

The rights and liabilities of the purchaser and other persons resulting from the issuance of such certificates depend on the terms of the statute authorizing their issuance;²¹ and the relations between the holder of a tax certificate and the municipality, although contractual, extend only within the law which permits them, and the municipality cannot create any liability different from that which the law provides.²² Such a certificate ordinarily does not of itself pass title to the land,²³ or afford a right of entry,²⁴ but constitutes only a lien on the property sold,²⁵ which must be recorded as required by law in order to be given effect as against other liens on the property.²⁶ However, the holder of such a certificate may bring a suit of foreclosure thereon, as discussed *infra* § 2100, and he may be entitled, as a purchaser, or as a successor

to the rights of the purchaser, to a deed passing the title after the owner's right of redemption has been foreclosed or has expired by passage of time, as discussed *infra* § 2111. Under an arrangement whereby a person purchased land at city tax sales taking tax certificates therefor and giving interest-bearing notes to the city, making some cash payments on the notes and being credited for the amount of redemption moneys received, the city is not entitled to recover money received by the purchaser in excess of the interest paid the city.²⁷

If the owner is not allowed the full statutory period for redemption under the recitals of the certificate of sale stating the day on which the purchaser will be entitled to a deed, such certificate is void²⁸ even though it also states correctly the period of redemption²⁹ and under the statute such a statement without naming the day would have been sufficient.³⁰ Also, where the holder of a certificate of sale fails to apply for a tax deed or lease before a certain date, as provided by statute, the certificates may become void so that no claim may be based thereon, and in such case cancellation of the certificates is not warranted.³¹ A tax sale certificate issued on a sale for an invalidly assessed tax is void.³²

19. Fla.—*R. D. Lamar, Inc. v. Ray*, supra.

Record notice

Where assessment under which tax certificate was issued showed the municipality to be the owner of the land, circuit court clerk executing assignment and certificate purchaser were put on record notice that the municipality was the owner of the land.—*State ex rel. Bouchelle v. Mathas*, 26 So.2d 652, 157 Fla. 622.

20. N.Y.—*White v. Brooklyn*, 25 N. E. 248, 122 N.Y. 53.

21. N.Y.—*Yates v. Fagan*, 68 N.Y. S.2d 178, 188 Misc. 496.

Title acquired by municipality receiving certificate on purchase at sale see *supra* § 2090 b.

22. Mich.—*Stiglitz v. City of Detroit*, 214 N.W. 150, 239 Mich. 26.

23. U.S.—*U. S. v. Land in City of St. Louis, Mo.*, Parcel No. 1, D.C. Mo., 57 F.Supp. 601.

Title acquired by purchaser at sale generally see *supra* subdivision a of this section.

24. N.J.—*Abell v. Friedman*, 107 A. 580, 90 N.J.Eq. 339.

25. N.J.—*Abell v. Friedman*, supra. N.Y.—*Kane v. Brooklyn*, 21 N.E. 1053, 114 N.Y. 586.

Invalid deed

Payments made by holder of tax

certificate, together with interest thereon, constituted a lien, although tax deed was invalid.—*Richards v. Sellers*, 285 P. 391, 104 Cal.App. 30.

Merger and subrogation

Where defendants purchased tax sale certificate from city and then through limited partnership association purchased title from owner of fee subject to liens resulting from tax sale and mortgage, a merger of tax estate with the fee did not occur so as to extinguish tax liens, and defendants were entitled to be subrogated to rights of city for sums paid for taxes when tax sale certificate was acquired and for subsequent taxes, for which defendants were entitled to a lien prior to that of mortgage, and defendants were entitled to be subrogated to rights of owner in any surplus moneys, and plaintiffs on redeeming tax sale certificate were entitled to credit for rents collected.—*Barry, Inc. v. Baf. Limited*, N.J.Super.Ch., 65 A.2d 761.

26. N.J.—*Zabriskie v. Phillips*, 15 A. 2d 782, 128 N.J.Eq. 155, affirmed *Zabriskie v. Devoe*, 19 A.2d 626, 129 N.J.Eq. 366.

First mortgage

A tax lien certificate for taxes of borough could not be enforced against a first mortgagee by a second mortgagee who had failed to record the certificate until after he

had obtained an extension of the first mortgage without disclosing the existence of the certificate, and on the strength of the statement that all taxes had been paid.—*Zabriskie v. Phillips*, 15 A.2d 782, 128 N.J.Eq. 155, affirmed *Zabriskie v. Devoe*, 19 A.2d 626, 129 N.J.Eq. 366.

27. Wis.—*City of Milwaukee v. Knox*, 266 N.W. 911, 221 Wis. 335.

Theories on which recovery claimed

Recovery could not be had on theory that sales of certificates were void because not paid for in cash, since even if void, city was entitled only to amount required for redemption by landowners, and city received that amount from partnership; nor was city entitled to recover because arrangement was an illegal one, where city suffered no injury from illegal transaction, receiving more than it would have had transaction been completed in lawful manner.—*City of Milwaukee v. Knox*, supra.

28. Cal.—*Hinds v. Clark*, 159 P. 153, 173 Cal. 49.

29. Cal.—*Hinds v. Clark*, supra.

30. Cal.—*Hinds v. Clark*, supra.

31. N.Y.—*Yates v. Fagan*, 68 N.Y.S. 2d 178, 188 Misc. 496.

32. Fla.—*Klich v. Miami Land & Development Co.*, 191 So. 41, 139 Fla. 794.

Certificate as evidence. It has been held that a certificate of sale is presumptive evidence of the title of the purchaser to the land, and the regularity and validity of all proceedings had with respect to the sale,³³ and that, after a certain period of time, such presumption becomes conclusive except in the case of fraud in the making or procurement of the certificate.³⁴

c. Priority of Title and Liens

- (1) In general
- (2) Tax and assessment liens

(1) In General

A purchaser at a municipal tax sale may become vested with a new and independent title, freed from all prior liens, encumbrances of the former estate, and of every interest carved out of the old fee; but under some circumstances a statute may preserve a prior mortgage lien from destruction by the sale, and the title of the purchaser is inferior to an interest in the property which is not subject to municipal taxation.

Under some statutes a new and independent title becomes vested in the purchaser, freed from all prior liens, encumbrances on the former estate, and of every interest carved out of the old fee, since the fee of the land passes, and the effect of the tax deed is to destroy all prior interests in the estate.³⁵ So, in the absence of a statute providing otherwise, the title of the tax purchaser after the expiration of the period limited for redemption is superior to prior mortgages and encumbrances.³⁶ Under some circumstances, however, a statute may preserve a prior mortgage lien from destruction by a tax sale.³⁷ Under some statutes the sale and ex-

piration of the period for redemption does not divest the lien of a first mortgage recorded prior to assessment of the tax for which the sale is made,³⁸ even after expiration of the period for redemption,³⁹ but the court may be authorized by statute, on notice to the mortgagee, to order a sale clear of liens, in which case the mortgage is discharged by the sale.⁴⁰ Under a statute providing that no sale of real estate for the payment of taxes shall affect the lien of a mortgage unless the mortgagee is given notice of the sale, a sale for taxes which becomes a lien after the recording of a mortgage does not give the purchaser a superior title to the mortgagee without notice.⁴¹ Ordinarily the title of the purchaser is inferior to an interest in the property which is not subject to municipal taxation;⁴² but the purchaser may take title free of the claim of the owner where the property is assessed against a lessee in possession obligated to pay the taxes and having the right, and under some circumstances the duty, to purchase the property.⁴³ A purchaser or his assignee who is under a duty to pay taxes cannot add to or strengthen his title as against other persons interested in the property by the purchase of the land at a tax sale.⁴⁴

(2) Tax and Assessment Liens

Under some statutes the tax purchaser's title is subject to other existing liens for unpaid taxes and local improvement assessments; but under other statutes the purchaser takes title discharged of all liens for taxes and assessments in arrears.

Under some statutes the tax purchaser's title is subject to other existing liens for unpaid taxes,⁴⁵

33. N.J.—Hinchliffe v. Loughlin, 18 A.2d 601, 126 N.J.Law 132, affirmed 22 A.2d 240, 127 N.J.Law 309.

34. N.J.—Hinchliffe v. Loughlin, supra.

35. Del.—Pottock v. Mellott, 22 A. 2d 843, 2 Terry 361.

36. Wash.—Fidelity Securities Co. v. Dickinson, 201 P. 301, 117 Wash. 323.

44 C.J. p 1360 note 38.

Judgment against town

Land in special improvement district that had been taken for taxes and resold to private individuals was no longer subject to the lien of a judgment against town based on improvement district bonds.—State ex rel. Mueller v. Todd, 132 P.2d 154, 114 Mont. 35.

37. Pa.—City of Pittsburgh v. Fort Pitt Chemical Co., 29 A.2d 41, 345 Pa. 471.

38. Pa.—Gordon v. City of Harrisburg, 19 Pa.Dist. & Co. 47, affirmed 171 A. 277, 314 Pa. 70.

39. Pa.—Gordon v. City of Harrisburg, supra.

40. Pa.—City of Pittsburgh v. Fort Pitt Chemical Co., 29 A.2d 41, 345 Pa. 471.

Statute held not repealed

Pa.—City of Pittsburgh v. Fort Pitt Chemical Co., supra—City of Erie v. A Piece of Land Fronting on Southeast Corner of Eighth and Peach Streets, 14 A.2d 428, 339 Pa. 321.

41. N.Y.—Ruyter v. Reid, 24 N.E. 791, 121 N.Y. 498, reargument denied 25 N.E. 377.

42. N.Y.—Hance v. City of New Brunswick, 146 A. 673, 7 N.J.Misc. 610.

Interest of federal government

Municipal tax sale against property held by purchaser from housing corporation, purchaser having equitable title, passed whole property, subject to interest of federal government which could not be divested.

N.J.—Hance v. City of New Brunswick, 146 A. 673, 7 N.J.Misc. 610.

Pa.—City of Philadelphia v. Myers, 157 A. 13, 102 Pa.Super. 424.

43. Ga.—Lowe v. City of Atlanta, 11 S.E.2d 891, 191 Ga. 76.

44. N.C.—Life Ins. Co. of Virginia v. Day, 37 S.E. 158, 127 N.C. 133.

45. Fla.—Bailey v. Averill, 132 So. 848, 133 Fla. 621.

44 C.J. p 1361 note 39.

Payment prior to delivery of deed

Where land which had been offered on two previous sales was sold for delinquent taxes for years 1930 to 1937, inclusive, collector of revenue of city properly refused to deliver tax deeds to holders of certificates of purchase until they paid all prior unpaid general taxes which were not included in the sale, as against contention that taxes constituted superior liens in reverse order of their accrual and that therefore under statute sale for taxes foreclosed the lien of all years prior to the years for which sale was made.—State ex rel. McGhee v. Baumann, 160 S.W. 2d 697, 349 Mo. 232.

and this is the rule at least where a statute in effect provides that a sale on one tax lien shall not discharge a prior lien unless the money arising from such sale shall be sufficient to satisfy both.⁴⁶ Likewise, it has been held that the title taken at the sale is subject to existing liens for assessments for local improvements,⁴⁷ even though the assessment is for the benefit of a contractor, where the statute so provides;⁴⁸ but, if the holders of improvement assessment liens which are inferior to the general tax lien for which the property was sold fail to redeem or attempt to foreclose their liens against the property until long after the deed is issued to the purchaser at the tax sale, such liens are extinguished.⁴⁹ The sale may be subject in some cases to delinquent state and county tax assessment liens,⁵⁰ as where the holders of state and county tax sale certificates are not made parties in the suit to foreclose the municipal tax lien so that the state, county, and municipal liens may be adjudicated,⁵¹ but, where the state and county are parties to a proceeding to foreclose municipal tax liens, the liens of the state and county for taxes have been held to be discharged by the sale.⁵²

Under other statutes the lien of a tax deed as security for the repayment of the purchase price

is paramount to all previous tax liens acquired by municipalities or individuals⁵³ or the purchaser takes title discharged of all liens for taxes and assessments in arrears other than those for which the sale was made.⁵⁴ Where real property was deeded to the state for delinquent county taxes, a purchaser of tax title from the city for subsequent delinquent city taxes has a superior title to the purchaser at the state tax sale under a statutory provision making a state tax deed subject to subsequent taxes levied by a municipality.⁵⁵

d. Actions Concerning Tax Title

- (1) Actions by tax title claimant
- (2) Actions against tax title claimant

(1) Actions by Tax Title Claimant

A tax title claimant ordinarily may bring an action to confirm or establish his title to the property sold or to secure the possession of the premises, and the owner of property bound by a judgment of foreclosure and sale may be precluded from contesting the execution of a writ of assistance on the application of the tax sale purchaser.

A person claiming title to property by reason of a sale for delinquent municipal taxes ordinarily may bring an action to confirm or establish his title⁵⁶ or to secure possession of the premises.⁵⁷

Status of holder

Priority of tax sale certificates properly issued by a municipality is not determined by the status of the holder as a municipality or an individual.—*Village of Babylon v. South Shore Thrift Corporation*, 22 N.Y.S.2d 668, 174 Misc. 738.

46. Pa.—*Townsend v. Prowattain*, 81½ Pa. 139.

47. Miss.—*Seward v. City of Jackson*, 147 So. 781, 165 Miss. 841.—*Seward v. City of Jackson*, 144 So. 686, 165 Miss. 478.

Coequal liens

Under a statute making the lien of a special improvement assessment coequal with the lien of general municipal taxes, the sale of the land to satisfy the general taxes does not extinguish the lien of the special assessment.—*Steele v. City of Waycross*, 10 S.E.2d 867, 190 Ga. 816.

48. Mo.—*Good v. Johnson*, 252 S.W. 368, 299 Mo. 186.

49. U.S.—*U. S. v. Land in City of St. Louis, Mo.*, Parcel No. 1, D.C. Mo., 57 F.Supp. 601.

50. Fla.—*Smith v. City of Arcadia*, 2 So.2d 725, 147 Fla. 375, 135 A.L.R. 1458.—*Bailey v. Averill*, 182 So. 848, 133 Fla. 621.

Statutory policy is that all legally assessed state, county, and municipal taxes which are liens, whether

taxes were assessed for the same or different years, shall be paid or otherwise legally discharged before an indefeasible tax title to the property shall issue.—*Allison Realty Co. v. Graves Inv. Co.*, 155 So. 745, 115 Fla. 48, followed in *Moore v. Allen*, 155 So. 752, 115 Fla. 187.

51. Fla.—*Smith v. City of Arcadia*, 2 So.2d 725, 147 Fla. 375, 135 A.L.R. 1458.

52. Tex.—*State v. Moak*, 207 S.W.2d 894, 146 Tex. 322.

Statute held valid

Tex.—*State v. Moak*, supra.

53. Mass.—*Chadwick v. Cambridge*, 119 S.E. 958, 230 Mass. 580.

54. Tex.—*City of Houston v. Bartlett*, 68 S.W. 730, 29 Tex.Civ.App. 27, error refused.

55. Cal.—*Billings v. Delgado*, 135 P.2d 95, 51 Cal.App.2d 489.

Statute held inapplicable

Where plaintiff in action to quiet title acquired title to real property under sale by city for delinquent taxes for 1933-34, and defendant claimed title under tax sale in 1937 after property had been deeded to state in 1929 for delinquent county taxes for 1928, the 1935 amendment to statute governing tax sales, and providing that deed by tax collector shall convey title to purchaser free of taxes due at time of such sale,

did not apply, and plaintiff taking under last tax sale had superior title.—*Billings v. Delgado*, supra.

56. Miss.—*Evans v. City of Jackson*, 30 So.2d 315, 202 Miss. 9.

Jurisdiction to foreclose liens

In city's action to establish its tax title, wherein city asked, if it did not have title, that state and county tax liens be enforced, and county tax collector also prayed enforcement of county tax liens, but there was no claim that city or that county collector did not have usual charter and statutory remedy to enforce tax liens, court was without jurisdiction in equity to foreclose tax liens and properly left enforcement thereof to remedy at law.—*Kansas City v. Tiernan*, 202 S.W.2d 20, 356 Mo. 138.

Matters reviewable

On petition for registration and confirmation of title to land, trial court, in absence of commissioner as a party, could not review commissioner's decision that lands were of insufficient value to meet taxes, and charges together with expenses of foreclosure, so as to entitle the treasurer to sell the lands under statute dealing with sale of lands of low value held by city or town under tax titles.—*D'Olimpio v. Jancoterino*, 23 N.E.2d 162, 304 Mass. 200.

57. Tex.—*Alderete v. City of El Paso*, Civ.App., 77 S.W.2d 719.

The court which entered the judgment of foreclosure is not deprived of jurisdiction to issue a writ of assistance merely because of the lapse of time after entry of the judgment where the judgment did not provide for a writ of assistance.⁵⁸ If the time for redemption has expired, the purchaser, in order to maintain summary proceedings against an occupant for possession, must generally first obtain a deed in the manner provided by the charter.⁵⁹ A suit to quiet title based on a statutory peremption precluding the contest of a tax title a specified time after the date of the sale is not defeated where defendant owner fails to establish his possession of the premises within the period fixed for peremption.⁶⁰

Where the owner of property was bound by a judgment of foreclosure and sale, he has no right to contest the execution of a writ of assistance on the application of the city which purchased the property at the sale.⁶¹ So, on an application for a writ of assistance by a city which purchased at a tax sale, defendant may not question the due service of citation in the tax suit wherein the foreclosure judgment was obtained where the judgment recited that due service was had, since the recital imported verity;⁶² nor may defendant question the validity of the judgment on the ground that the judgment did not conform to the petition and did not set forth the nature of the city's demand as required by statute.⁶³ However, a property owner who continued in possession of land notwithstanding an alleged tax sale to the city is not

estopped by reason of supposed laches to defend against the city's suit to oust him from possession by setting up irregularities in the tax sale.⁶⁴ In a suit to confirm a tax title against the city and others, the city is not estopped to claim title under a prior adjudication of the property to it for taxes notwithstanding it later sold the property for taxes under an erroneous assessment.⁶⁵

Summary proceedings for possession instituted by the purchaser must be in strict compliance with the statute applicable to such proceedings.⁶⁶ A suit by the tax title claimant to recover possession of the property must be brought within the time limited by law,⁶⁷ but summary proceedings for possession will not be governed, in the matter of time within which the proceedings must be commenced, by the statute of limitations applicable to actions brought against the purchaser to avoid the sale of the property for taxes.⁶⁸ The pleadings in a suit to confirm a tax title must be sufficient to state a cause of action.⁶⁹ Defendant attacking the tax title may by appropriate answer deny the allegations of the bill,⁷⁰ but, where defendant failed to examine the records involving the tax title until after his answer was stricken in the suit, he will not be allowed to interpose an amended answer alleging that complainant's title was defective in that the purported tax sale was not made after public advertisement and to the highest bidder as required by statute.⁷¹ In such a suit general rules apply as to issues, proof, and variance,⁷² and, likewise, gen-

58. Tex.—Alderete v. City of El Paso, *supra*.

59. N.Y.—Gabel v. Williams, 87 N. Y.S. 240, 42 Misc. 475.

60. Owner's possession held not established.

La.—Commercial Securities Co. v. Smith, 126 So. 97, 12 La.App. 499.

61. Fla.—Horne v. City of Ocala, 196 So. 441, 143 Fla. 108, appeal dismissed 61 S.Ct. 28, 311 U.S. 608, 85 L.Ed. 385.

62. Tex.—Alderete v. City of El Paso, Civ.App., 77 S.W.2d 719.

63. Tex.—Alderete v. City of El Paso, *supra*.

64. Pa.—City of Scranton v. O'Malley Mfg. Co., 19 A.2d 269, 341 Pa. 200.

65. La.—McCall v. Blouin, 138 So. 528, 18 La.App. 717.

66. N.Y.—People v. Andrews, 52 N. Y. 445.

67. Ky.—City of Louisville v. Louisville Asphalt Co., 130 S.W.2d 739, 279 Ky. 318.

68. U.S.—Daniels v. Case, C.C.Mo.,

45 F. 843, error dismissed 15 S.Ct. 1038, 159 U.S. 251, 40 L.Ed. 140.

69. Fla.—Sovereign Finance Co. v. Beach, 38 So.2d 831.

Bill framed under statute

In suit to quiet tax title from municipality, motion to dismiss bill of complaint, framed under statutes providing that, where suit is based on tax deed issued by state or municipality, bill need not deraign title beyond issuance of deed, was properly denied.—Sovereign Finance Co. v. Beach, *supra*.

70. Fla.—Horn v. City of Miami Beach, 194 So. 620, 142 Fla. 178.

Conspiracy

In suit by city for a decree removing state and county tax deed interest of defendant as a cloud from title acquired by city in suit for foreclosure of municipal tax deeds and tax certificate, on ground that there was a conspiracy to assign the state and county tax certificates to defendant so as to obtain money through foreclosure of municipal tax deeds and retain the state and county tax certificates with which

to obtain title to the property, defendants would be permitted by appropriate answer to deny allegations of bill, but could not file counterclaim alleging that assignment of certificates was a legitimate business transaction.—Horn v. City of Miami Beach, *supra*.

71. N.J.—Pamrapau Corporation v. City of Bayonne, 8 A.2d 908, 126 N. J.Eq. 478, affirmed 12 A.2d 860, 121 N.J.Eq. 340, motion denied 17 A.2d 544, 129 N.J.Eq. 3, affirmed 19 A.2d 877, 129 N.J.Eq. 586, and 21 A.2d 863, 130 N.J.Eq. 240.

72. N.C.—Edwards v. Benbow, 42 S. E.2d 514, 227 N.C. 466.

Description in deeds

In action to remove a cloud on title to realty to which defendant had once had title but which had been sold under a tax foreclosure suit and conveyed to city which conveyed to plaintiff, plaintiff was not required to show by evidence dehors the deeds that description in the deeds fitted the realty plaintiff claimed, where defendant did not allege or offer evidence of any

eral rules apply as to evidence.⁷³ Where judgment was rendered foreclosing a tax lien on defendant's property, it would be presumed, on application by the city which purchased at the sale for a writ of assistance, that the property owner rendered the lots as one parcel of land, and the property owner may not show by evidence outside the record that the lots were not so rendered.⁷⁴

(2) Actions against Tax Title Claimant

The owner of land sold for taxes, or those who have succeeded to his rights, may, in a proper case, sue to impeach and overturn the tax title, but no recovery may be had where the proceedings leading to the tax deed are not shown to be invalid and there is no merit in the grounds urged as to the invalidity of the tax deed.

The owner of land sold for taxes, or those who have succeeded to his rights, may, in a proper case, impeach and overturn the tax title, as by an action to cancel the deed, or by a bill to quiet title or to remove the cloud from his title, or by any other remedy which may be appropriate to the particular case.⁷⁵ However, a tax title may not be overthrown by suit where the proceedings leading to the tax deed are not shown to be invalid and there is no merit in the grounds urged as to the invalidity of the tax deed.⁷⁶ So it has been held that the former owner of property may not challenge the validity of a tax sale of land or recover the land

sold in the absence of averment that the land was not liable to sale for taxes or that the taxes for which the land was sold had been paid before the sale.⁷⁷ A tax deed may not be canceled on the ground that the tax purchaser did not give notice of his purchase to the tax debtor,⁷⁸ or that the purchaser did not exercise the right of ownership and had never been in physical possession of the property,⁷⁹ or that the purchaser failed to pay taxes due on the property to the state and the parish.⁸⁰

A person seeking to establish the invalidity of a tax title ordinarily must do equity by paying or offering to pay the amount of the delinquent taxes properly chargeable against the property,⁸¹ and in such case it is immaterial that such person was a defendant in the action involving the title to the property where he filed a cross action seeking affirmative relief of cancellation of tax deeds.⁸² Moreover, a party seeking to set aside a voidable tax deed may be required as a condition precedent to recovery to pay all taxes paid by the holder of the deed after the sale of the property.⁸³ The person seeking to remove as a cloud on his title the record of a void municipal tax sale proceeding and the tax deed resulting therefrom need not always be in possession in order to maintain the bill.⁸⁴

Notice; parties; time to sue. Suit may not be

boundaries under which defendant claimed but joined issue with plaintiff on claim of title under plaintiff's description.—*Edwards v. Benbow*, supra.

73. Cal.—*Johnson, Inc. v. Warden*, 173 P.2d 838, 76 Cal.App.2d 697.

Burden of proof

Plaintiff, in quiet title action based on acquisition of title by tax deed from city, in order to show a clear title was required to show that title was legally vested in the state as city's grantor.—*Johnson, Inc. v. Warden*, supra.

Evidence held immaterial

Miss.—*Alvis v. Hicks*, 116 So. 612, 150 Miss. 308.

Sufficiency of evidence

Cal.—*Howard v. Judson*, 194 P.2d 138, 86 Cal.App.2d 128—*Johnson, Inc. v. Warden*, 173 P.2d 838, 76 Cal.App.2d 697.

N.C.—*Edwards v. Benbow*, 42 S.E.2d 514, 227 N.C. 466.

74. Tex.—*Newman v. City of El Paso*, Civ.App., 77 S.W.2d 721, error dismissed.

75. Ala.—*Timms v. Scott*, 27 So.2d 487, 248 Ala. 286.

Ga.—*Martin v. Clark*, 9 S.E.2d 54, 190 Ga. 270.

Mo.—*Robinson v. Burton*, 189 S.W.2d 942.

Setting aside sale see *infra* § 2094.

76. La.—*Baker v. Duson*, App., 189 So. 510.

Notice of nonpayment

(1) An owner of lots, sold by town for tax assessed to his predecessor in title, was not entitled to cancellation of tax deed on ground that he was misled by town's failure to note on bill for following year's tax, assessed to him, that preceding year's tax had not been paid.—*Carbonetta v. Panone*, 18 A.2d 887, 66 R.I. 310.

(2) Where grantor and grantee of lots were given adequate notice of town's sale thereof for unpaid tax assessed to grantor, grantee could not reasonably rely on town treasurer's statement to grantor that grantee owed only tax for following year as ground for cancellation of tax deed.—*Carbonetta v. Panone*, supra.

77. Tenn.—*Moore v. City of Memphis*, 195 S.W.2d 623, 184 Tenn. 92.

78. La.—*Baker v. Duson*, App., 189 So. 510.

79. La.—*Baker v. Duson*, supra.

80. La.—*Baker v. Duson*, supra.

81. Ga.—*Lowe v. City of Atlanta*, 11 S.E.2d 891, 191 Ga. 76.

Inheritance

One who by inheritance succeeded

to interest of original owner of realty would not be heard in equity, when seeking to cancel deeds of purchasers at sales for city taxes, to attack sales on ground that levies were excessive, without paying or offering to pay all unpaid taxes due on the realty during time ownership thereof was in the person from whom the realty was inherited.—*Lowe v. City of Atlanta*, supra.

82. Ga.—*Lowe v. City of Atlanta*, supra.

83. Colo.—*Phillips v. City and County of Denver*, 175 P.2d 805, 115 Colo. 532.

Special assessment

Colo.—*Phillips v. City and County of Denver*, supra.

Interest on taxes

In action to set aside a tax deed from city, the statute relating to actions for recovery of land sold for taxes and recovery of all taxes with interest paid by holder of treasurer's deed was applicable in computing the interest on taxes paid by holder of deed, and not the statute relating to redemption prior to execution of treasurer's deed.—*Phillips v. City and County of Denver*, supra.

84. Ala.—*Timms v. Scott*, 27 So.2d 487, 248 Ala. 286.

brought to cancel a recorded tax lease of realty on mere notice of motion to the municipality, since the tax lessee is entitled to due notice in an appropriate action.⁸⁵ In a suit attacking a tax title, the city or its officers are not necessary parties where the city has no interest to be affected and no relief would run against it.⁸⁶ A suit by the owner of property attacking a tax title must be brought within the time limited by law.⁸⁷ Where a tax sale is void because of jurisdictional defects in the proceedings, the title acquired by the purchaser at such sale is subject to attack, notwithstanding the complaint was not brought within the time allowed by statute for redemption from tax sales.⁸⁸

Pleading. The bill or complaint in a suit attacking a tax title must be sufficient to state a cause of action,⁸⁹ and defendant must affirmatively plead his claim for reimbursement for taxes paid by him.⁹⁰ General rules as to issues, proof, and variance apply.⁹¹ So, in a proceeding challenging the validity of a tax title derived from a tax sale, a question not raised by the reasons offered for reversal, as to whether a tax sale certificate is invalid because it does not contain a true certificate of acknowledgment or state the liens to which it is subject, need not be considered.⁹²

Evidence. Questions as to the admissibility⁹³ and weight and sufficiency⁹⁴ of evidence have been adjudicated. In such a proceeding the burden is on the complaining party to prove allegations of his pleading that the lands were improperly sold at private sale and not at an advertised public auction.⁹⁵

Trial and judgment. General rules of trial apply in an action attacking a tax title,⁹⁶ as with respect to matters properly subject to the trial court's determination.⁹⁷ Where a proceeding to quiet title to a lot which defendant claimed through a quitclaim deed from a municipal corporation was a collateral attack on the decree through which the municipality acquired title to the lot, the court will not consider extrinsic evidence to impeach such decree.⁹⁸ In case of such collateral attack on the decree, the record alone may be considered, but such record may not be amplified with the personal testimony of the person claiming the lot under the quitclaim deed from the municipality.⁹⁹ Where the tax title is not shown to be invalid, the court may refuse to enjoin the purchaser at the sale from taking possession.¹ The judgment for plaintiff in an action attacking the title of the purchaser at the tax sale is properly conditioned on refund by plaintiff to the purchaser of the taxes and other expenses paid by the purchaser,² and ordinarily the purchaser

85. N.Y.—Yates v. Fagan, 68 N.Y. S.2d 178, 188 Misc. 496.

86. Md.—Crocker v. Pitti, 16 A.2d 875, 179 Md. 52.

Assignment not operating on title

In action to quiet title and for injunctive relief by purchaser at foreclosure sale and holder of subsequently executed trust deed against city tax deed purchaser who purchased tax deed through former owner's agent who had full knowledge of rights of purchaser at foreclosure, where only deed in evidence was tax deed executed by city treasurer to purchaser, which deed recited that certificate of purchase was assigned to purchaser, city was not a necessary party defendant, since the certificate of purchase referred to as issued to the city and assigned to the purchaser did not operate on title.—Robinson v. Burton, Mo., 139 S.W.2d 942.

87. Fla.—Klich v. Miami Land & Development Co., 191 So. 41, 139 Fla. 794.

Suit held not barred

Fla.—Klich v. Miami Land & Development Co., supra.

Ky.—Gasho v. Lowe, 139 S.W.2d 427, 282 Ky. 118.

88. N.Y.—Olds v. City of Jamestown, 30 N.E.2d 756, 280 N.Y. 281.

89. La.—Baker v. Duson, App., 189 So. 510.

Pleadings held sufficient

Ky.—Gasho v. Lowe, 139 S.W.2d 427, 282 Ky. 518.

Mo.—Robinson v. Burton, 139 S.W.2d 942.

90. Colo.—Carlson v. McNeill, 162 P.2d 226, 114 Colo. 78.

91. Mo.—Robinson v. Burton, 139 S.W.2d 942.

92. N.J.—Hinchliffe v. Loughlin, 18 A.2d 601, 126 N.J.Law 132, affirmed 22 A.2d 240, 127 N.J.Law 309.

93. Colo.—Carlson v. McNeill, 162 P.2d 226, 114 Colo. 78.

94. Colo.—Carlson v. McNeill, supra.

Evidence held sufficient

Ark.—Daniels v. Newsom, 213 S.W.2d 367, 213 Ark. 736.

Ga.—Gormley v. Brazil, 187 S.E. 62, 182 Ga. 883.

Mo.—Krahenbuhl v. Clay, 139 S.W.2d 970, 346 Mo. 111, 129 A.L.R. 1344.

R.I.—Carbonetta v. Panone, 18 A.2d 887, 66 R.I. 310.

Evidence held insufficient

Colo.—Carlson v. McNeill, 162 P.2d 226, 114 Colo. 78.

Md.—Gill v. Sommer, 60 A.2d 683.

95. N.J.—Hinchliffe v. Loughlin, 18 A.2d 601, 126 N.J.Law 132, affirmed 22 A.2d 240, 127 N.J.Law 309.

96. Ga.—Hardin v. Douglas, 147 S.E. 506, 168 Ga. 213.

Instructions

Ga.—Hardin v. Douglas, supra.

97. Mo.—Krahenbuhl v. Clay, 139 S.W.2d 970, 346 Mo. 111, 129 A.L.R. 1344.

98. Ark.—Daniels v. Newsom, 213 S.W.2d 367, 213 Ark. 736.

99. Ark.—Daniels v. Newsom, supra.

1. Ga.—Haden v. Liberty Co., 188 S.E. 29, 183 Ga. 209.

2. Md.—Gill v. Sommer, 60 A.2d 683.

Miss.—O'Flinn v. McInnis, 31 So. 584, 80 Miss. 125.

Amount

The total amount to be paid by owner of property to grantee under void tax deed issued by city as condition of setting aside deed as cloud on title, could not exceed amount paid to city for tax certificate plus five per cent interest thereon, notwithstanding grantee had purchased tax certificate for amount including interest at ten per cent of money paid to city for taxes, and a one hundred dollar assignment fee.—Smith

is entitled to receive compensation for the value, if any, of improvements placed on the land in good faith.³

§ 2092. — Reimbursement of Purchaser of Invalid Title

- a. In general
- b. Recovery against municipal corporation

a. In General

Sales of land for municipal taxes are generally governed by the rule caveat emptor, and defects in the proceeding, even though they may be such as to invalidate the sale, do not give the purchaser any right to recover back the purchase money, but a statute may confer such right of recovery and establish a lien which may be enforced by foreclosure action.

Sales of land for municipal taxes are generally governed by the rule caveat emptor,⁴ and defects in the proceeding, even though they may be such

as to invalidate the sale,⁵ do not give to the purchaser any right to recover back the purchase money in the absence of a statute conferring such right,⁶ and in the absence of evidence of fraud, accident, or mistake.⁷ Likewise, the purchaser may not obtain reimbursement for state, county, and other taxes paid by him as a prerequisite to obtaining a tax deed, where such payment was a voluntary one.⁸ Where a statute or charter so provides, however, a tax purchaser is entitled to be reimbursed for his expenditure,⁹ even though the statutory period prescribed for the duration of the tax lien has expired,¹⁰ except where the action brought by the purchaser is one to foreclose the tax lien, in which case it will be defeated by showing the non-existence of the lien.¹¹

A recovery may be had under such statutes only in cases within their terms and only on the conditions and limitations stipulated therein.¹² Some

v. Switzer, 287 N.W. 416, 290 Mich. 158.

In absence of evidence of payment of taxes, holder of void tax deed cannot complain of failure to make decree quieting title in owner conditional on reimbursing holder for taxes paid.—Scott v. Warden, 296 P. 95, 111 Cal.App. 587.

3. Mo.—Krahenbuhl v. Clay, 139 S. W.2d 970, 346 Mo. 111, 129 A.L.R. 1344.

Measure of recovery

True measure of purchasers' recovery for their improvements on land was not cost of making improvements or their particular value to purchasers, but value of improvements as measured by enhancement in value of land to owners.—Krahenbuhl v. Clay, supra.

4. La.—Lindner v. New Orleans, 40 So. 736, 116 La. 372, 7 Ann.Cas. 919.

44 C.J. p 1359 note 82.

5. Ind.—Logansport v. Humphrey, 84 Ind. 467.

6. Me.—Arnold v. Augusta, 108 A. 332, 118 Me. 399.

44 C.J. p 1359 note 84.

Right to reimbursement:

In action to set aside tax sale see infra § 2094 b.

In action concerning tax title see supra § 2091 a.

Invalid tax deed

The holder of an invalid tax deed is not entitled to be reimbursed for the amount paid in acquiring the tax title, whether such holder is a city or an individual.—People v. Ogden, 195 Ill.App. 563.

No subrogation

A purchaser at a void tax sale,

who is a mere volunteer, and who pays his money on the bid, and receives a certificate, does not thereby become entitled to be subrogated to the right to receive the taxes from the owner of the premises.—Finegan v. New York, 38 N.Y.S. 358, 4 App. Div. 15.

Action by assignee of tax purchaser

Where one buys land from a purchaser thereof at city tax sale and sues to recover it from a third person in possession, if he fails to recover he is not entitled to a lien for the amount which he paid to the original holder of the tax title, although the tax execution may have been a lien on the land.—Maddox v. Arthur, 50 S.E. 668, 122 Ga. 67.

7. Ind.—Indianapolis v. Langsdale, 29 Ind. 486.

Me.—Treat v. Orono, 28 Me. 217.

8. Fla.—Goodwin v. Schmidt, 5 So. 2d 64, 149 Fla. 85.

9. La.—Edmiston v. Tulane Inv. Co., 119 So. 75, 9 La.App. 112.

Mo.—Bingham v. City of Birmingham, 15 S.W. 533, 103 Mo. 345—Phelps v. Brumback, 80 S.W. 678, 107 Mo.App. 16.

44 C.J. p 1359 note 91.

A mortgagee of land, whether in possession before foreclosure or out of possession, who purchases the land at a tax sale, is entitled to have the purchase money repaid to him if the sale should be invalid; but not so a mortgagee who, after the assessment of the tax, became the absolute owner of the premises by purchasing at a sale under a power in his mortgage.—Home Sav. Bank v. Boston, 131 Mass. 277.

10. N.Y.—Cary v. Koerner, 93 N.E. 979, 200 N.Y. 253.

44 C.J. p 1359 note 94.

Defense of title

Possessor of void tax deed bringing suit to quiet title was not entitled to reimbursement for taxes, penalties, and costs as against owner merely defending title, where the statute authorizes reimbursement only in action to quiet title brought by owner against possessor of void tax title.—Scott v. Warden, 296 P. 95, 111 Cal.App. 587.

Fraudulent sales

Charter provision authorizing the setting aside of tax deeds on the ground that the taxes had been paid, or that the property was not subject to taxation, or that the property had been redeemed at the date of the deed, and providing that, on setting aside the deed, the purchaser shall have a lien for all money paid by him, does not include fraudulent sales, and does not give any relief to a purchaser entering into a fraudulent combination of bidders and thereby perpetrating a fraud on the owner, and the owner on obtaining a decree setting aside the tax sale on the ground of fraud is not chargeable with the money paid by the purchaser.—Nichols v. Russell, 123 S.W. 1032, 141 Mo.App. 140.

Extent of property affected

A strip of land only a fraction of an inch wide, sold to a purchaser at a tax sale in consideration of his paying the taxes on certain lots, is too small to enforce his lien on the failure of his title.—Phelps v. Brumback, 80 S.W. 678, 107 Mo.App. 16.

11. Ala.—Helm v. Griffith, 95 So. 548, 19 Ala.App. 1.

44 C.J. p 1359 note 95.

12. Mo.—Russell v. Woerner, 110 S.W. 691, 131 Mo.App. 253.

44 C.J. p 1359 note 90.

statutes allowing recovery have been held not applicable where the purchaser is the municipality itself,¹³ but other such statutes have been held applicable.¹⁴ The extent and amount of the recovery are usually fixed by the statute.¹⁵ Ordinarily the purchaser is entitled to be reimbursed for the amount for which the property sold at the tax sale,¹⁶ exclusive of costs,¹⁷ even though the purchase price exceeds the amount of the taxes covered by the tax lien;¹⁸ but under some provisions, costs may be recovered.¹⁹ The purchaser may, under some provisions, recover the value of improvements placed on the property by him.²⁰ Under a statute providing that the tax purchaser may also recover the amount of taxes accruing after his purchase and paid by him, recovery is conditioned on the actual payment of such taxes by the purchaser.²¹

Lien; enforcement. Under some statutes, where a tax sale is invalid, the purchaser at the sale has a lien on the property for the amount for which he is entitled to reimbursement,²² which may be enforced by foreclosure action,²³ and, in some instances, a personal judgment may be recovered against the successful claimant of the property.²⁴ Such lien may be enforced at any time after the in-

valid sale, but prior to the expiration of the lien by reason of limitation, whether the purchaser is the city²⁵ or an individual.²⁶ The limitation barring recovery in suits to recover the purchase money is not the one applicable to suits to recover land,²⁷ but the shorter period under a statute applicable to suits to satisfy charges on land by selling the premises.²⁸

b. Recovery against Municipal Corporation

A purchaser at a tax sale may be entitled to secure reimbursement from the municipal corporation conducting the sale where an ordinance or statute provides for repayment in cases of illegal sale or failure on other grounds to secure title, and in some instances a recovery may be had independent of any statute providing therefor.

Where an ordinance or statute provides for repayment in cases of illegal sale,²⁹ or failure on other grounds to secure title,³⁰ a recovery may be had against the municipal corporation conducting the sale under a complaint stating facts constituting the illegality, and it is no defense that the indebtedness of the municipality exceeds the constitutional limit.³¹ It has also been held, without reference to statute, that, where the sale is wholly unauthorized and void, plaintiff may recover the amount of his payment,³² but, according to other decisions, no

13. Miss.—Hodge Ship Bldg. Co. v. Moss Point, 110 So. 227, 144 Miss. 657.

44 C. J. p 1359 note 99.

14. Ky.—City of Richmond v. Goodloe, 153 S.W.2d 921, 287 Ky. 379.

15. Ky.—City of Richmond v. Goodloe, *supra*.

16. Wash.—Gove v. City of Tacoma, 67 P. 261, 26 Wash. 474.

44 C. J. p 1359 note 91.

17. Ala.—Ex parte Helm, 95 So. 546, 209 Ala. 1.

18. N.Y.—Cary v. Koerner, 93 N.E. 979, 200 N.Y. 253.

44 C. J. p 1359 note 93.

19. Ky.—City of Richmond v. Goodloe, 153 S.W.2d 921, 287 Ky. 379.

20. La.—Meredith v. Tubre, 120 So. 902, 10 La.App. 369—Edmiston v. Tulane Inv. Co., 119 So. 75, 9 La. App. 112.

21. Mo.—Voights v. Hart, 226 S.W. 248, 285 Mo. 102.

44 C. J. p 1359 note 98.

22. Ky.—Interstate Bond Co. v. Hood, 200 S.W.2d 464, 304 Ky. 274—City of Richmond v. Goodloe, 153 S.W.2d 921, 287 Ky. 379.

Tex.—Scales v. Campbell, 55 S.W. 501, 22 Tex.Civ.App. 505, error refused.

23. Ind.—Burkam v. Kunz, 84 N.E.

766, 41 Ind.App. 655—Holbrook v. Kunz, 83 N.E. 730, 41 Ind.App. 260.

24. Mo.—Phelps v. Brumback, 80 S.W. 678, 107 Mo.App. 16.

25. Ky.—City of Richmond v. Goodloe, 153 S.W.2d 921, 287 Ky. 379.

Suit held not barred

Where sale of realty for delinquent city taxes was not declared invalid prior to litigation instituted to have liens for taxes and interest adjudged against the realty, items for taxes which became in arrears more than five years before the litigation was instituted were not barred by five-year statute of limitations.—City of Richmond v. Goodloe, *supra*.

26. Ky.—City of Richmond v. Goodloe, *supra*.

27. N.Y.—Cary v. Koerner, 93 N.E. 979, 200 N.Y. 253.

28. N.Y.—Cary v. Koerner, *supra*.

29. Ind.—McWhinney v. Indianapolis, 101 Ind. 150.

44 C. J. p 1359 note 1.

Necessity for ouster

It is not necessary to enable a purchaser, who has no claim to the property by reason of some irregularity in the tax sale, to surrender his title and recover from the city the amount paid, that he be ousted or his possession disturbed by the

holder of a paramount title.—Spring v. Cambridge, 85 N.E. 160, 199 Mass. 1.

Deed invalid but not sale

Where the tax sale and all proceedings preliminary thereto were regular and valid, the fact of an irregularity or error in the certificate or deed does not impair the sale, and, therefore, does not give the purchaser a right to recover his money.—Clarke v. New York, 19 N.E. 436, 111 N.Y. 6.

30. Mass.—Spring v. City of Cambridge, 98 N.E. 1027, 212 Mass. 296.

44 C. J. p 1360 note 2.

Proof of illegality

Under statute, providing that certificate given purchaser at tax sale should contain covenant to refund amount paid if title should "prove" invalid, the word "prove" meant "to turn out to be; to be in fact," and duty of repaying, where tax was illegal, was not postponed until proof of illegality was made in court.—Traktman v. City of New York, 149 N.E. 838, 241 N.Y. 221.

31. Wash.—Phelps v. Tacoma, 46 P. 400, 15 Wash. 367.

32. Cal.—Hays v. Hogan, 5 Cal. 241.

Iowa.—Corbin v. City of Davenport, 9 Iowa 239.

right of action exists in the absence of a statutory provision for reimbursement of the purchaser,³³ and a sale which is ineffectual for a cause other than one enumerated in the statute authorizing reimbursement does not entitle the purchaser to recover against the municipality.³⁴ In any case, in order to recover against the municipality, plaintiff must show a compliance with statutory provisions as to the making of a demand for the refund prior to suit,³⁵ and as to filing with the city collector of a statement setting forth the defects in the title and the purchaser's desire to surrender such title.³⁶ Where recovery against the city is sought on the ground of fraud, misrepresentations by the collector and receipt of the purchase money by the city will not justify recovery in the absence of further proof of the city's responsibility for the acts of its collector.³⁷ The failure to give notice of assignment of a certificate of sale is no defense in an action by the assignee against the city to recover because of defects in the proceedings prior to the sale.³⁸ Suit may and should be brought within the time limited by law,³⁹ but the statute of limitations barring recovery in such a suit does not begin to run until the purchaser has knowledge of the illegality.⁴⁰

§ 2093. — Right to Deed

The right of a purchaser at a tax sale to a deed of the property is considered *infra* § 2111.

Examine Pocket Parts for later cases.

§ 2094. — Restraining or Setting Aside Sale

a. Restraining sale

b. Setting aside sale

a. Restraining Sale

A sale for municipal taxes may be enjoined where it is unauthorized or otherwise illegal; but an injunction will not lie where the wronged taxpayer has an adequate remedy at law; nor will it be granted on grounds reviewable in the tax proceedings by methods available to the taxpayer but of which he has not availed himself.

A sale for taxes may be enjoined where it is unauthorized⁴¹ or otherwise illegal;⁴² and the court may, in a proper case, issue a temporary restraining order in a suit to determine the legality of a tax assessment and to enjoin the sale of realty thereunder.⁴³ An injunction will not lie, however, where the wronged taxpayer has an adequate remedy at law;⁴⁴ nor will it be granted on grounds reviewable in the tax proceedings by methods available to the taxpayer but of which he has not availed himself;⁴⁵ but a claimant of land levied on, other than defendant in execution, has no such remedy at law as will bar him from seeking to enjoin the sale.⁴⁶ Also, a sale will not be enjoined on the ground that another action with respect to the same matter is pending where it appears that such action has been abandoned,⁴⁷ although, if the proceedings by action are not abandoned, the jurisdiction of the court therein will be protected by issuing a temporary injunction against proceeding summarily.⁴⁸ It has been held that a court of equity should not enjoin tax sales on the application of one or more individual complainants as to the property of noncomplaining owners not parties to the suit.⁴⁹

Where plaintiff concededly owned the property sought to be sold and objected only to the fact that taxes were irregularly assessed and levied, he must pay or tender that sum which is legal and fair before equitable relief will be granted to him.⁵⁰ The

33. La.—Lindner v. New Orleans, 40 So. 736, 116 La. 372, 7 Ann.Cas. 919.

34. Ind.—McWhinney v. Indianapolis, 98 Ind. 182.

35. Wis.—Stocks v. City of Sheboygan, 42 Wis. 315.

36. Mass.—Rogers v. City of Cambridge, 116 N.E. 556, 227 Mass. 378.

Notice held insufficient

Mass.—Rogers v. City of Cambridge, *supra*.

37. Me.—Treat v. Orono, 26 Me. 217.

38. N.Y.—White v. Brooklyn, 25 N. E. 243, 122 N.Y. 53.

39. N.Y.—Traktman v. City of New York, 149 N.E. 838, 241 N.Y. 221—White v. Brooklyn, 5 N.Y.St. 868.

Wis.—Smith v. City of Janesville, 9 N.W. 789, 52 Wis. 680.

40. Wash.—Gove v. Tacoma, 76 P.

73, 34 Wash. 424—Gove v. Tacoma, 67 P. 261, 26 Wash. 474.

41. Ky.—Middlesboro v. New South Brewing, etc., Co., 56 S.W. 427, 108 Ky. 351, 21 Ky.L. 1782.

44 C.J. p 1361 note 45.

42. Ga.—Wilson v. City of Eatonton, 180 S.E. 227, 180 Ga. 598.

Miss.—City of Jackson v. Belhaven College, 15 So.2d 621, 195 Miss. 734.

44 C.J. p 1361 note 46.

43. Fla.—City of West Palm Beach v. Eppelman, 181 So. 894, 132 Fla. 686.

44. Del.—Catts v. Smyrna, 91 A. 297, 10 Del.Ch. 263.

44 C.J. p 1361 note 47.

45. U.S.—Leary v. Jersey City, N. J., 208 F. 854, 126 C.C.A. 12, affirmed 39 S.Ct. 115, 248 U.S. 328, 53 L.Ed. 271.

Absence of notice

If judgments taken against property owner in tax foreclosure proceedings were without notice to the owners, application for relief should have been by motions in the cause and not by independent action against the commissioner appointed by the court to restrain sale of land under judgment of foreclosure.—Rosser v. Matthews, 6 S.E.2d 849, 217 N.C. 132.

46. Ga.—Wilson v. City of Eatonton, 180 S.E. 227, 180 Ga. 598.

47. La.—Carre v. New Orleans, 6 So. 893, 41 La. Ann. 596.

44 C.J. p 1361 note 49.

48. Ala.—Viney v. Allison, 68 So. 142, 191 Ala. 318.

49. Fla.—City of De Land v. Boyd, 147 So. 575, 109 Fla. 328.

50. Cal.—Charles v. Crescent City, 93 P.2d 129, 14 Cal.2d 234.

bill or complaint should state facts sufficient to warrant the relief sought.⁵¹ Defendant's answer setting up facts establishing the validity of the sale may be sufficient to sustain the dissolution of a temporary restraining order,⁵² but, where defendant does not show ground for dismissal on general demurrer, it has been held that the matter should be brought to trial, and, if the court finds that the proceedings were irregular, it should ascertain the tax legally due, after proper hearing.⁵³ Where authority to make a sale is granted by a charter provision, an action to enjoin the sale on the ground that it is unauthorized may be maintained only by establishing the invalidity of the charter provision.⁵⁴ General rules apply as to the weight and sufficiency of evidence.⁵⁵

Restraint by administrative board. A state board of tax appeals has been held to have no authority directly to restrain a municipal corporation from conducting a tax sale.⁵⁶

b. Setting Aside Sale

In a proper case, an illegal sale of realty for delin-

quent municipal taxes may be set aside at the instance of a person having the requisite interest.

In a proper case, an illegal sale of realty for delinquent municipal taxes may be set aside at the instance of a person having the requisite interest,⁵¹ and, where tax sales certificates have been issued, a bill may be brought in equity for their cancellation.⁵⁸ So, a suit against the city to set aside a tax sale and to enjoin the city authorities from conveying title to the property and from taking any steps toward consummating the sale may be maintained by the property owner where the lien for the taxes had expired.⁵⁹ Also, a purchaser at a tax sale may be entitled to have the sale set aside and to be adjudged a statutory lien for taxes paid on behalf of the former owner where such former owner had personal property subject to distraint sufficient to pay the taxes and the value of the realty sold exceeded the amount necessary to satisfy tax claims.⁶⁰ However, a motion to vacate a sale pursuant to judgment in an action to foreclose a tax lien is addressed to the discretion vested in the court,⁶¹ and a sale will not be set aside in a suit for such relief where proper cause for judicial interference with the sale is not shown.⁶² A statute

51. Fla.—City of De Land v. Boyd, 147 So. 575, 109 Fla. 323.

Particular defects

Bill to enjoin tax sale is insufficient against general demurrer where it fails to show that tax was illegal, that alleged unlawful discrimination was not otherwise remediable by proceedings at law, and that defendants had exhausted statutory remedies, and contains no offer to do equity.—City of De Land v. Boyd, supra.

Petition or complaint held sufficient Cal.—Charles v. Crescent City, 93 P.2d 129, 14 Cal.2d 234.

Fla.—City of West Palm Beach v. Eppelman, 181 So. 894, 132 Fla. 686.

Construction

A petition which prayed for injunction against sale of land by city for taxes without court order and which trial court treated as one for a final or perpetual injunction could not on defendant's appeal from a perpetual injunction be construed as giving plaintiff the right to a temporary injunction.—City of Fort Worth v. Tarlton, Tex.Civ.App., 151 S.W.2d 268.

52. N.C.—Rosser v. Matthews, 6 S.E.2d 849, 217 N.C. 132.

53. Cal.—Charles v. Crescent City, 93 P.2d 129, 14 Cal.2d 234.

54. Ga.—Cochran v. Lanfair, 77 S.E. 95, 139 Ga. 249.

55. Ga.—Dodson Printers' Supply

Co. v. Upham, 175 S.E. 920, 179 Ga. 353.

56. N.J.—Toone v. City of Camden, 22 A.2d 351, 19 N.J.Misc. 600.

57. N.Y.—Shaara Tephila Cong. v. New York, 53 How.Pr. 213.

R.I.—Madden v. Chernick, 7 A.2d 269, 63 R.I. 100.

S.C.—De Pass v. City of Spartanburg, 1 S.E.2d 904, 190 S.C. 22.

Actions attacking tax title generally see supra § 2091 d (2).

Action against officers

An action to have a tax sale declared void, to determine the validity of certain taxes and penalties, and to restrain officers from issuing title to the city, was not barred as an "action against the city" but was maintainable as an action to prevent the officers of the city from doing an unlawful act.—Home Building & Loan Ass'n v. City of Spartanburg, 194 S.E. 143, 185 S.C. 353.

A mortgagee's right to have a city tax sale set aside for alleged invalidity of penalty on taxes for a certain year was controlled by same principles applicable to action by same individual as owner in fee simple of other parcels of land, the sale of which for taxes was challenged on same ground.—Home Building & Loan Ass'n v. City of Spartanburg, 194 S.E. 137, 185 S.C. 355.

Where bidder at sale abandons adjudication and does not take title, he is not estopped to annul subsequent

sale.—Martinez v. New Orleans, La., 4 Orleans App. 124.

Evidence held insufficient

S.C.—Home Building & Loan Ass'n v. City of Spartanburg, 194 S.E. 139, 185 S.C. 313.

Effect of decision

A supreme court decision that taxes need not be paid under protest to permit an action to enjoin city authorities from taking any steps toward consummating tax sale did not deprive city of rights accruing under amendment to statute relating to payment of taxes under protest, in so far as taxes accruing since passage of amendment were concerned.—De Pass v. City of Spartanburg, 1 S.E.2d 904, 190 S.C. 22.

58. Fla.—Dewhurst v. St. Augustine, 107 So. 689.

59. S.C.—De Pass v. City of Spartanburg, 1 S.E.2d 904, 190 S.C. 22.

60. Ky.—Interstate Bond Co. v. Hood, 200 S.W.2d 464, 304 Ky. 274.

61. N.Y.—City of Yonkers v. Mayford Const. Co., 63 N.Y.S.2d 264, 270 App.Div. 1037.

62. Pa.—City of Philadelphia v. Englander, 61 Pa.Dist. & Co. 274.

Tex.—Puls v. Clark, Civ.App., 199 S.W.2d 811, error refused, no reversible error.—Ross v. Drouilhet, 80 S.W. 241, 34 Tex.Civ.App. 327, error refused.

Lack of diligence

A landowner's erroneous belief that he had made arrangements with

permitting the vacation of a tax sale after its confirmation where the taxes were paid or the property was exempt does not authorize the setting aside of such a sale for the balance due because of an erroneous receipt given by the city treasurer.⁶³

The payment of undisputed taxes is not a condition precedent to an action to set aside a tax sale, since the municipality is not thereby restricted from collecting the undisputed taxes;⁶⁴ and this is the rule at least where the tax sale is properly declared invalid on the ground that the lien for certain years had expired before the sale, that certain charges for other years were illegal, and that the sale was made without having made a lawful levy on the land and without having taken possession thereof.⁶⁵ It has also been held that a person seeking to set aside a sale based on an illegal assessment will not be required to pay the assessment where its lien has expired by lapse of time,⁶⁶ and that a charter provision that no sale which shall have been finally confirmed by the council shall be disallowed except where taxes shall have been paid prior to the sale or where the property is exempt from taxation is inapplicable to sales made in contravention of law.⁶⁷ It has been held, however, that certiorari should not be allowed to review a tax sale, except on payment of taxes conceded to be due.⁶⁸ It has also been held that a person seeking to set aside a sale may be required to pay to the purchaser at the sale the amount paid by the purchaser in satisfaction of the tax for which the property was sold, less the expenses of the sale, together with the amount of tax accruing after the purchase which was paid by the purchaser.⁶⁹

attorney to represent him in city's suit for delinquent taxes on his land or plaintiff's failure to notify him of setting of case for trial did not excuse his lack of diligence in failing to protect his interest until he joined his wife in filing suit to vacate tax sale of land nearly two years after rendition of judgment, in absence of allegation of fraud, accident, mistake, or any wrong which prevented him from making defense. —*Puls v Clark*, 199 S.W.2d 811, error refused, no reversible error.

A mortgage assignee who was the registered owner of premises may not have a sheriff's tax sale made in compliance with statute set aside after the expiration of the period allowed for redemption by the owner, notwithstanding the property was worth more than the amount of the bid, where the proceedings were properly advertised and no extrinsic fraud was averred. —*City of Philadelphia v. Brill*, 195 A. 884, 228 Pa. 471.

The municipal council and their agents who made the assessments and attempted to collect the taxes may properly be joined as parties.⁷⁰ In such an action, the passing of final judgment on the ultimate facts without any proof or evidence to sustain such ultimate facts being offered is not error, where defendant elected to stand on a demurrer predicated alone on issues of law and defendants could present any meritorious defense they might have by motion to vacate the judgment.⁷¹ Where no question as to the procedure leading up to and including the sale of land for taxes is raised in a suit by the former owner to set aside the sale, the sale will be presumed to have been conducted in due course and in a legal manner.⁷² Where defendant, in an action to set aside a tax sale, asserts the validity of the sale, he may not claim on appeal that plaintiff is not entitled to equitable relief because the tax sale proceedings have not progressed far enough to be entitled to a presumption of regularity, and, therefore, to constitute a cloud on plaintiff's title.⁷³

§ 2095. Sale of Lien on Land

A municipal corporation may be authorized by statute or charter provision to collect its tax claims by selling, at public auction, its right to receive such taxes and the lien therefor, but, in the absence of an express grant of power, a municipal corporation has no power to make a sale of tax liens.

Sometimes a municipal corporation, instead of itself selling the property, may, under charter or other statutory authorization, sell, at public auction, its right to receive such taxes and the lien therefor,⁷⁴ after due and proper notice of the sale has

63. Mich.—*Petition of Auditor General*, 187 N.W. 527, 217 Mich. 695.

64. S.C.—*De Pass v. City of Spartanburg*, 1 S.E.2d 904, 190 S.C. 22.

65. S.C.—*De Pass v. City of Spartanburg*, supra.

66. N.J.—*Field v. West Orange*, 39 N.J.Eq. 60.

67. Mich.—*Detroit Trust Co. v. Lieberwitz*, 266 N.W. 406, 275 Mich. 429.

68. N.J.—*Point Breeze Ferry & Improvement Co. v. Jersey City*, 143 A. 545, 5 N.J.Misc. 974, affirmed 148 A. 753, 106 N.J.Law 589.

69. R.I.—*McGuigan v. Fitzpatrick*, 199 A. 448, 60 R.I. 490.

70. S.C.—*De Pass v. City of Spartanburg*, 1 S.E.2d 904, 190 S.C. 22.

71. S.C.—*De Pass v. City of Spartanburg*, supra.

72. Tenn.—*Moore v. City of Memphis*, 195 S.W.2d 623, 184 Tenn. 92.

73. N.Y.—*Wilcox v. Rochester*, 29 N.E. 99, 129 N.Y. 247.

74. N.Y.—*Carodix Corporation v. Comiskey*, 39 N.Y.S.2d 732, 265 App.Div. 450, affirmed 52 N.E.2d 957, 291 N.Y. 737.

44 C.J. p 1361 note 53.

Assignment of tax liens generally see supra § 2063.

Enforcement of lien by foreclosure action see supra § 2087.

Statute held valid

(1) In general.—*Carodix Corporation v. Comiskey*, supra.

(2) A statute, enacted prior to, or since enactment of, the City Home Rule Law, and granting to city authority to collect delinquent taxes by sale of tax liens instead of by sale of the property itself, would be constitutional.—*County Securities v. Seacord*, 15 N.E.2d 179, 278 N.Y. 34.

Distrainment not effected

A sale of city's legal lien for real estate taxes without disturbance of the debtor's property ownership does

been given by publication.⁷⁵ The provision applies to back, as well as to current, taxes.⁷⁶ However, in the absence of an express grant of power, a municipal corporation has no power to make a sale of tax liens,⁷⁷ and a local law authorizing the collection of delinquent taxes by sale of tax liens, instead of by the sale of the property as provided by the general tax law and the original city charter, has been held invalid.⁷⁸

Where the sale of tax liens is authorized, the sale should include installments of special assessments accrued prior to the year in which the tax lien on the property is sold, as well as other taxes, and the purchaser should include such taxes in the bid for the lien,⁷⁹ but, where such assessments are inadvertently omitted from the sale, the certificate of the purchaser is construable as including only those annual taxes specifically advertised and sold and for which the aggregate amount is advanced and which are specifically enumerated in the certificate.⁸⁰ Ordinarily the sale does not include items due for the current year.⁸¹ The city itself may purchase the lien where no bid from anyone else is received.⁸² Where a transfer of tax lien is canceled by the city, the purchaser is entitled to interest thereon from the date of purchase,⁸³ and, where in a suit to enforce a transfer of tax lien it is adjudicated that the lien is invalid or defective, plaintiff may seek reimbursement from the city for costs taxed against him in the suit.⁸⁴ Under some statutes plaintiff seeking to maintain an action against the municipality for refund of assessments comprising tax liens transferred to him, on the ground that the assessments were void, must commence action to foreclose the liens within a specified time from the date of the sale of the liens.⁸⁵ This condition precedent to suit applies irrespective of the nature of the defects or invalidity relied on.⁸⁶

The statute of limitations applicable to such a suit is effective irrespective of transfers of the tax liens after the sale.⁸⁷

§ 2096. Sale of Taxpayer's Property Generally

A municipal corporation has no right summarily to sell property for unpaid taxes except where power to do so is delegated by the legislature; and, under some statutes, although not under others, personal property of the taxpayer, if it can be found within the jurisdiction, must be sold for the taxes before the real estate is taken.

A municipal corporation has no right summarily to sell property for unpaid taxes except where power to do so is delegated by the legislature either expressly or by necessary implication,⁸⁸ especially where, in the case of property belonging to public service corporations, a taking of the property by summary process might result in an interruption of the public service.⁸⁹ Under a statute so providing, however, a tax debtor's personal property is subject to sale for the amount of a delinquent tax assessment,⁹⁰ and statutes which authorize summary proceedings for the sale of the taxpayer's property generally for unpaid taxes have been held applicable to taxes delinquent before the statute was passed as well as to those becoming delinquent thereafter.⁹¹ Where a levy on personalty under a warrant for the collection of past-due taxes created no lien for unassessed taxes for the current year, such taxes are improperly included in the sale for the delinquent taxes at least where the sale occurred prior to issuance of the warrant for collection of taxes for the current year.⁹² However, the inclusion of the unmatured taxes in the sale does not invalidate the sale as a whole where bids on separate items of personalty were not obtainable and the property would have been sold as a whole, even though the unmatured taxes had not been included.⁹³ The inadequacy of the sale price

not constitute a "distrainment" of such property.—*Kroell v. New York Ambassador, C.C.A.N.Y.*, 108 F.2d 294.

75. N.Y.—*New York v. Appleby*, 154 N.Y.S. 85, 168 App.Div. 503, affirmed 113 N.E. 797, 219 N.Y. 76.

76. N.Y.—*New York v. Appleby*, 113 N.E. 797, 219 N.Y. 76.

77. N.Y.—*In re Ueck's Estate*, 35 N.E.2d 624, 286 N.Y. 1.

78. N.Y.—*County Securities v. Seacord*, 15 N.E.2d 179, 278 N.Y. 34.

79. N.Y.—*Mount Vernon Trust Co. v. Lynn*, 5 N.Y.S.2d 156, 167 Misc. 333, affirmed 3 N.Y.S.2d 210, 254 App.Div. 680.

80. N.Y.—*Mount Vernon Trust Co. v. Lynn*, supra.

81. N.Y.—*Mount Vernon Trust Co. v. City of Mount Vernon*, 12 N.Y.

S.2d 120, affirmed 39 N.Y.S.2d 416, 265 App.Div. 940.

82. N.Y.—*New York v. Appleby*, 154 N.Y.S. 85, 168 App.Div. 503, affirmed 113 N.E. 797, 219 N.Y. 76.

83. N.Y.—*Kroemer v. City of New York*, 286 N.Y.S. 1, 247 App.Div. 795.

84. N.Y.—*Kroemer v. City of New York*, supra.

85. N.Y.—*Blank v. Village of Ossining*, 16 N.Y.S.2d 879, 258 App. Div. 967.

86. N.Y.—*Blank v. Village of Ossining*, supra.

87. N.Y.—*Blank v. Village of Ossining*, supra.

88. Pa.—*McAfee v. Bumm*, 10 Phila. 157.

44 C.J. p 1361 note 60.

Summary sale of real property for taxes see supra § 2087 a.

89. Ky.—*Covington Gaslight Co. v. Covington*, 2 S.W. 326, 84 Ky. 94, 8 Ky.L. 515.

44 C.J. p 1361 note 61.

90. Mich.—*Gulf Refining Co. v. Perry*, 6 N.W.2d 756, 303 Mich. 487.

Seizure and sale of personal property under distress for taxes see infra § 2097.

91. Iowa.—*Haskel v. Burlington*, 30 Iowa 232.

92. Conn.—*River Feldspar & Milling Co. v. Phelps*, 184 A. 373, 121 Conn. 246.

93. Conn.—*River Feldspar & Milling Co. v. Phelps*, supra.

of personalty sold for delinquent taxes has been held insufficient to invalidate the sale where the value of the personalty was not ascertained by the court and the sale was otherwise legal.⁹⁴ The purchaser of a bankrupt's movables may not complain of an irregularity in a subsequent tax sale of the movables of which one to whom he resold them did not complain.⁹⁵

On a sale of personalty for delinquent taxes, the municipality may not retain the amount in excess of the delinquent taxes, notwithstanding the collector received a warrant a short time after the sale authorizing the collection of taxes unmatured at the time of the sale,⁹⁶ at least where the complaining party was not the owner of the personalty on the assessment date and was not personally liable for the taxes on either the delinquent or unmatured list.⁹⁷ A suit by a creditor of the taxpayer to impress a lien on the surplus from the tax sale is in personam rather than in rem, where no relief can be granted without a determination of the taxpayer's indebtedness to claimant and the exact amount thereof,⁹⁸ and the court will not determine such indebtedness without having obtained jurisdiction of the taxpayer either by service of process within the jurisdiction or by voluntary appearance.⁹⁹

Primary resort as between real and personal property. Under some statutes, personal property of the taxpayer, if it can be found within the jurisdiction, must be sold for the taxes before the real estate is taken,¹ and a tax sale of real property is void where personalty is not first subjected to the tax claim;² but a failure to distrain the personalty does not defeat the liens against the realty for taxes duly levied and assessed against it,³ and the municipality may subsequently proceed against

the realty on a showing that the personalty has been dissipated notwithstanding the mortgagee had purchased the realty at a mortgage foreclosure sale without actual knowledge of the tax lien.⁴ Under other statutes, distraint of the personalty is a concurrent remedy,⁵ but not a condition precedent to sale of the land,⁶ and the city has an election whether to proceed against realty or personalty for unpaid taxes.⁷ So, where the taxes on personalty and realty are a general lien on all the real property of the taxpayer, such real estate may, under some statutes, be sold for taxes on personal property before resorting to such personal property,⁸ but, unless the statute requires it, there is no necessity for proceeding in this way.⁹ A city is under no obligation to exhaust defendant's personalty before selling the real estate, where the sale is made subsequent to the enactment of a law repealing an earlier statute making such procedure necessary.¹⁰

§ 2097. Garnishment and Distress

Collection of municipal taxes may sometimes be enforced by garnishing anyone indebted to the delinquent taxpayer, or by a seizure and sale of personal property under distress for taxes.

In some municipal corporations, collection may be enforced by garnishing anyone indebted to the delinquent taxpayer.¹¹

In some jurisdictions, personal property may be seized by municipal officers under distress for taxes.¹² Where, however, the municipality had not distrained property for the collection of a tax prior to the sale of such property to an innocent purchaser, it may not thereafter distrain the property in the hands of such purchaser.¹³ It is generally provided that, before personal property can be seized and sold for the payment of municipal taxes, there must be a delivery of the tax duplicate and

94. Conn.—River Feldspar & Milling Co. v. Phelps, *supra*.

95. La.—Morgan v. Tolle, 122 So. 594, 168 La. 496.

96. Conn.—River Feldspar & Milling Co. v. Phelps, 184 A. 373, 121 Conn. 246.

97. Conn.—River Feldspar & Milling Co. v. Phelps, *supra*.

98. Mich.—Specialties Distributing Co. v. Whitehead, 21 N.W.2d 926, 313 Mich. 696.

99. Mich.—Specialties Distributing Co. v. Whitehead, *supra*.

1. Ky.—City of Richmond v. Goodloe, 153 S.W.2d 921, 287 Ky. 379—Allin v. City of Harrodsburg, 57 S.W.2d 45, 245 Ky. 360.

N.Y.—City of Johnstown v. Wells, 273 N.Y.S. 631, 242 App.Div. 103,

affirmed 11 N.E.2d 787, 275 N.Y. 623.

Holder of unrecorded chattel mortgage was not entitled to require city collector first to resort to mortgagor's realty to satisfy delinquent city tax lien.—Allin v. City of Harrodsburg, 57 S.W.2d 45, 245 Ky. 360.

2. Ky.—City of Richmond v. Goodloe, 153 S.W.2d 921, 287 Ky. 379.

3. Ky.—City of Richmond v. Goodloe, *supra*—Taylor v. City of La Grange, 90 S.W.2d 357, 262 Ky. 388.

4. Ky.—Taylor v. City of La Grange, *supra*.

5. U.S.—Thompson v. Carroll, D.C., 22 How. 422, 16 L.Ed. 387.

6. U.S.—Thompson v. Carroll, *supra*.

S.C.—Home Building & Loan Ass'n

v. City of Spartanburg, 194 S.E. 139, 185 S.C. 313.

7. Va.—Pollard & Bagby v. City of Richmond, 24 S.E.2d 564, 181 Va. 181.

8. N.J.—State v. Newark, 42 N.J. Law 88.

9. Neb.—Kittle v. Shervin, 7 N.W. 861, 11 Neb. 65.

10. Neb.—Kittle v. Shervin, *supra*.

11. N.C.—Wilmington v. Sprunt, 19 S.E. 348, 114 N.C. 310.

12. Mich.—Gulf Refining Co. v. Perry, 6 N.W.2d 756, 303 Mich. 487.

Sale of personal property for taxes generally see *supra* § 2096.

13. N.J.—R. C. Stanhope, Inc. v. Township of North Bergen, 29 A. 2d 845, 129 N.J. Law 513.

warrant,¹⁴ and, under some charter provisions, it is necessary that delinquent lists shall be sent to the collector at least once a year in order to preserve the right of distress.¹⁵ Under some statutes, the collector may levy on personal property of a tenant on the premises taxed, regardless of the time when the taxes were assessed and notwithstanding the tenant did not occupy the premises at the time of the assessment; but personal property of the tenant cannot be levied on unless it is on the premises for which the taxes are due.¹⁶

§ 2098. Summary Execution or Motion

The collection of taxes may sometimes be enforced by the issuance in the first instance of an execution against the property in general of the taxpayer, and in some jurisdictions a recovery by motion is authorized.

In some jurisdictions an execution against the property in general of the taxpayer may be issued in the first instance,¹⁷ although, under the provisions of the statute, if the owner of the land is known to the city collector and the ownership of the land is not doubtful, an execution in rem against the land cannot legally issue.¹⁸ An execution may be issued under the statute for back taxes as well as for taxes for the current year.¹⁹ A right of a municipality under its charter to proceed by summary execution in collecting its taxes is not lost through the repealing clause of a general law which by its terms does not apply to the provisions of charters inconsistent therewith.²⁰

The execution must be directed against and de-

scribe particular property;²¹ and it cannot issue against an entire tract of land comprising several lots easily separable, where the value of any one of the lots is in excess of the amount of the tax.²² A statute providing that the sheriff should first levy on and sell that part of the property which defendant in fieri facias desires sold has been held not to be applicable to a levy and sale under an execution for city taxes.²³ A levy for taxes on small parcels before a levy on property which is indivisible and of greater value is not required where it does not appear that any small tracts were assessed by the city against the taxpayer, from which the tax could be collected.²⁴ Ordinarily property may not be sold under a tax execution in personam as the property of defendant therein, when defendant has neither title nor possession, nor any right to represent the person who has it, and a sale under these circumstances is void as to the true owner.²⁵ An execution is not invalid as a whole where defendant owes at least a part of the amount claimed therein.²⁶ So, an execution is not invalidated by the fact that it embraces claims not collectable by execution with claims which may be lawfully collected in that way.²⁷ Statutory directions as to the form of the execution should be followed,²⁸ but a failure to do so is not necessarily fatal.²⁹ The failure of the officer levying on land under a tax execution to give the required statutory notice has not been held not to invalidate the levy where the statute is merely directory.³⁰

In some states a tax list delivered to the collec-

14. Ind.—*Wise v. Eastham*, 30 Ind. 133.

15. Ky.—*Covington Gaslight Co. v. Covington*, 2 S.W. 326, 84 Ky. 94, 8 Ky.L. 515.

16. Pa.—*Wolson v. Worrlow*, 12 Pa.Dist. & Co. 507, 19 Del.Co. 168, 21 Mun.L.R. 72.

17. Ga.—*City of Leesburg v. Forrester*, 1 S.E.2d 584, 59 Ga.App. 503.

44 C.J. p 1362 note 68.

Execution:

Arrest of, by affidavit of illegality see *infra* § 2108.

Under judgment see *supra* § 2082.

Purchaser of duplicate tax execution after city had collected taxes by sale under original execution was not entitled to recover amount paid to city in action for money had and received where, at time of purchase of duplicate execution, purchaser knew that lien thereof had been foreclosed.—*Herrington v. City of Dublin*, 188 S.E. 271, 54 Ga.App. 494.

Priority

Where house and lot were levied

on to satisfy city's tax fieri facias, and holder of security deed sold house and lot under power of sale in deed and bought them in, holder had no claim which could prevail in fieri facias proceeding.—*City of Leesburg v. Forrester*, 1 S.E.2d 584, 59 Ga.App. 503.

A general lien on any property of the defaulting taxpayer may be created by a proper and timely levy of unpaid tax executions subject in priority to existing liens.—*Grier v. City Council of City of Spartanburg*, 26 S.E.2d 690, 203 S.C. 203.

18. Ga.—*Justice v. Parnin*, 61 S.E. 1044, 130 Ga. 869.

19. Ga.—*Du Bignon v. Brunswick*, 32 S.E. 102, 106 Ga. 317.

20. Wis.—*Janesville v. Markoe*, 18 Wis. 350.

21. Ga.—*Miller v. Brooks*, 47 S.E. 646, 120 Ga. 232.

22. Ga.—*Stowe v. Birmingham Trust, etc., Co.*, 131 S.E. 44, 161 Ga. 403.

23. Ga.—*City of Leesburg v. For-*

rester, 1 S.E.2d 584, 59 Ga.App. 503.

24. Ga.—*Miller v. Jennings*, 147 S. E. 32, 168 Ga. 101.

25. Ga.—*Martin v. Clark*, 9 S.E.2d 54, 190 Ga. 270.

Heirs

Where executions for municipal taxes were issued against person who had died long before such taxes accrued or could have been assessed, the executions were "in personam," not "in rem," and, hence, the tax sale was void as against heirs of such person who were true owners of the property when the levy was made.—*Martin v. Clark*, *supra*.

26. Ga.—*City of Waycross v. Cottingham*, 4 S.E.2d 67, 60 Ga.App. 463.

27. Ga.—*Montford v. Allen*, 36 S.E. 305, 111 Ga. 18.

28. Ga.—*White v. Forsyth*, 71 S.E. 1073, 136 Ga. 634.

29. Ga.—*White v. Forsyth*, *supra*. 44 C.J. p 1362 note 76.

30. Ga.—*Haden v. Liberty Co.*, 188 S.E. 29, 183 Ga. 209.

tor has the force of a judgment⁸¹ and execution.⁸² In some jurisdictions a recovery by motion has been authorized;⁸³ and, where the tax is against the estate of a decedent, it is sometimes provided that collection may be enforced by presenting to the court a brief statement showing the fact and amount of the delinquency⁸⁴ and the issuance of an order to show cause.⁸⁵ It has been held that the powers conferred on a city treasurer relative to the issuance of warrants for unpaid taxes, filing them as judgments, and issuing execution on them, pertain more to the nature of judicial rather than mere administrative functions, and that the ex-

ercise of such power is reviewable by a court.⁸⁶

§ 2099. Arrest or Fine

Arrest for nonpayment of a tax is not authorized in the absence of an express grant of power by the legislature, but power may be conferred on a municipal corporation to provide for fining a person delinquent in the payment of a street tax.

Arrest for nonpayment of a tax is not authorized except where power so to do is expressly conferred by the legislature.⁸⁷ Power may be conferred on a municipal corporation to enact an ordinance providing for fining a person delinquent in the payment of a street tax.⁸⁸

c. Redemption from Sale

§ 2100. In General

- a. General principles
- b. Notice to redeem and of application for deed
- c. Foreclosure of right of redemption
- d. Foreclosure of tax sale certificates

a. General Principles

Redemption may be made from a municipal tax sale

when authorized by constitutional, statutory, or charter provisions or by ordinances.

The right to redeem from a municipal tax sale has been conferred by various constitutional, statutory, and charter provisions and by ordinances.³⁹ The right exists only as permitted by such provisions,⁴⁰ although it may be conferred by implication as well as expressly.⁴¹ A special statute authorizing redemption from tax sales by a certain city rather

31. N.C.—Wilmington v. Sprunt, 19 S.E. 348, 114 N.C. 310.

32. N.C.—Wilmington v. Sprunt, *supra*.

33. U.S.—Alexander v. Alexandria, D.C., 5 Cranch 1, 3 L.Ed. 19.

Va.—Alexandria v. Hunter, 2 Munf. 228, 16 Va. 228.

34. Ind.—Cullop v. Vincennes, 72 N.E. 166, 34 Ind.App. 667.

35. Ind.—Cullop v. Vincennes, *supra*.

36. N.Y.—Copacabana, Inc., v. Portfollo, 50 N.Y.S.2d 243, 182 Misc. 976.

37. Ga.—McDonald v. Lane, 5 S.E. 628, 80 Ga. 497—Cooper v. Savannah, 4 Ga. 68.

Forfeiture and penalties for nonpayment see *infra* §§ 2115, 2116.

38. Ala.—Ex parte Birmingham, 79 So. 113, 201 Ala. 641.

39. Ala.—City of Opp v. Brogden, 181 So. 752, 236 Ala. 180.

Ariz.—Trigg v. City of Yuma, 130 P.2d 59, 59 Ariz. 480.

Cal.—Assets Reconstruction Corp. v. Munson, 184 P.2d 11, 81 Cal.App.2d 363.

Fla.—Hyland v. Rodney, 195 So. 574, 142 Fla. 319.

Ga.—Forrester v. Lowe, 15 S.E.2d 719, 192 Ga. 469.

Ky.—Forwood v. City of Louisville, 140 S.W.2d 1048, 283 Ky. 208—Interstate Bond Co. v. Home Owners Loan Corporation, 139 S.W.2d 69, 282 Ky. 569.

La.—Scott v. Ratcliff, 119 So. 33, 167 La. 237.

Md.—Shapiro v. National Color Printing Co., 60 A.2d 679.

Mo.—Krahenbuhl v. Clay, 139 S.W.2d 970, 346 Mo. 111, 129 A.L.R. 1344.

N.Y.—City of Beacon v. Asher Bernstein Realty Corp., 57 N.Y.S.2d 659, 185 Misc. 262, motion denied

60 N.Y.S.2d 616, 270 App.Div. 852—Boeck v. Incorporated Village of South Floral Park, 19 N.Y.S.2d 946, 174 Misc. 372.

R.I.—Swanson v. Fielder, 27 A.2d 184, 68 R.I. 214.

Tex.—State v. Moak, 207 S.W.2d 894, 146 Tex. 322—Clark v. Puls, Civ. App., 192 S.W.2d 905, refused, n. r. e.

Va.—City of Richmond v. Monument Ave. Development Corp., 34 S.E.2d 223, 184 Va. 152.

Wis.—State ex rel. Dorst v. Sommers, 291 N.W. 523, 234 Wis. 302. Redemption from:

Sale of land for assessments for public improvements see *supra* § 1646.

Tax sales generally see the C.J.S. title Taxation §§ 841-894, also 61 C.J. p 1241 note 85 et seq.

Validity of provisions

Acts authorizing redemption of properties adjudicated to city for nonpayment of taxes on payment of amount of such taxes were not unconstitutional as extinguishing debts or obligations to city.—State ex rel. Tulane Homestead Ass'n v. Montgomery, 171 So. 28, 185 La. 777.

Right of redemption is substantial right

Del.—Hill v. Ellis, 23 A.2d 112, 3 Terry 402.

Purchase or redemption

(1) Redemption of property was not changed into a "purchase" of the property by a deed headed "quitclaim deed."—Webb v. Williamson, 152 S.W.2d 312, 202 Ark. 763.

(2) Where it was claimed that owner's purchase of lot was a redemption and not a purchase because of the statements in the deed, entire deed was considered in determining its meaning.—Webb v. Williamson, *supra*.

Order directing satisfaction of liens

Where proceedings by which borough took title to realty through tax sale were in rem and not in personam, order with respect to tax liens claimed by borough notwithstanding redemption of the realty by mortgagees should have required satisfaction of such liens instead of striking them off.—Hall v. Borough of McKees Rocks, 48 A.2d 31, 159 Pa.Super. 418.

40. N.Y.—City of New Rochelle v. Echo Bay Waterfront Corporation, 49 N.Y.S.2d 678, 268 App.Div. 182, affirmed 80 N.E.2d 838, 294 N.Y. 678, certiorari denied 86 S.Ct. 24, 326 U.S. 720, 90 L.Ed. 426.

41. Ky.—Johnston v. Louisville, 11 Bush 527.

than a general statute authorizing redemption controls in the case of tax sales by such city.⁴² Some statutes and charter provisions giving the right of redemption relate, or are confined, to redemption from particular tax sales.⁴³

Redemption by operation of law. Redemption may result by operation of law after the lapse of the redemption period.⁴⁴

Injunction to restrain termination of redemption. An injunction to restrain the termination of an owner's right to redeem from a municipal tax sale may be granted in a proper case.⁴⁵

b. Notice to Redeem and of Application for Deed

Various constitutions, statutes, charter provisions, and ordinances permit or require the purchaser at a municipal tax sale, or a municipal officer, to give notice of the right of redemption or of an application for a tax deed.

Under some constitutions, statutes, charter provisions, and ordinances the purchaser at a mu-

nicipal tax sale, or a municipal official, is permitted or required to give notice, usually within a prescribed time, of the right of qualified persons to redeem from the sale or notice of an application for a deed or notice to the effect that, unless the property is redeemed within a certain period of time, a tax deed will be issued.⁴⁶ Until the required notice has been given, the owner of the property retains his right to redeem.⁴⁷ General statutes providing for notice of the expiration of the time for redemption or of application for a deed have been held applicable to cities;⁴⁸ but, where complete provision is made in the charter of a city by special act of the legislature with respect to the notice to redeem, the charter governs rather than a general statute providing for notice to redeem.⁴⁹

Persons entitled to notice; unknown owners. Notice must be given to such persons as are designated by the statutory or charter provisions,⁵⁰ such as the owner⁵¹ or the owner and mortgagee.⁵² Under some statutes notice to redeem must be served on the person in possession and al-

42. Fla.—Burns v. Lucian, 33 So.2d 652.

43. Summary tax sales

Tex.—Clark v. Puls, Civ.App., 192 S.W.2d 905, refused, no reversible error—Fidelity Inv. Co. v. Brown, Civ.App., 274 S.W. 265.

Judicial tax sales

Tex.—Clark v. Puls, Civ.App., 192 S.W.2d 905, refused, no reversible error.

Sales other than under judicial foreclosure

Tex.—Puckett v. Rolison, Civ.App., 193 S.W.2d 974, reversed on other grounds Rolison v. Puckett, 198 S.W.2d 74, 145 Tex. 366.

44. Mass.—Langley v. Chapin, 134 Mass. 82.

44 C.J. p 1362 note 95.

45. Injunction denied

Cal.—Assets Reconstruction Corp. v. Munson, 184 P.2d 11, 81 Cal. App.2d 363.

Conclusiveness of finding of board

In suit to restrain defendant city from terminating plaintiff's right of redemption by notice to redeem, finding of board of supervisors that improvement district is a distressed assessment district as defined by statute is conclusive as to whether district is a distressed assessment district in which right to redeem tax-deeded property could not be terminated until after the statutory date.—Assets Reconstruction Corp. v. Munson, supra.

46. U.S.—Denike v. Rourke, C.C.Ill., 7 F.Cas.No.3,787, 3 Biss. 39.

Mich.—Stiglitz v. City of Detroit, 214 N.W. 150, 239 Mich. 26.

N.J.—Di Bologna v. Earl, 23 A.2d 791, 130 N.J.Eq. 571.

N.Y.—City of Rochester v. Fourteenth Ward Co-op. Bldg. Lot Ass'n, 75 N.E. 692, 183 N.Y. 23—Thomas v. Loomis, 80 N.Y.S.2d 309, 273 App.Div. 680—Esposito v. Antonelli, 299 N.Y.S. 976, 164 Misc. 912—Gabel v. Williams, 87 N.Y.S. 240, 42 Misc. 475—Jackson v. Esty, 7 Wend. 148.

Wis.—Sheffels v. Tabert, 1 N.W. 156, 46 Wis. 439—State v. Hundhausen, 23 Wis. 508.

Notice to redeem:

As condition precedent to foreclosure of municipal tax lien see supra § 2087.

As condition precedent to issuance of tax deed see infra § 2111.

From tax sales generally see the C.J.S. title Taxation §§ 859–871, also 61 C.J. p 1257 note 95 et seq.

In case of sale for payment of assessments for public improvements see supra § 1645.

"Purpose of the law is to apprise the owner or his representative of the fact that his land has been sold for taxes, and to give him an opportunity to redeem it before he shall be barred of all claim thereto."—Crawford v. Liddle, 70 N.W. 97, 99, 101 Iowa 148.

Validity of provision

City ordinance providing for termination of right to redeem land deeded to city for nonpayment of taxes on four months' notice is not invalid, although it permits termination of such right sooner and by a different method than under ordi-

nance in force when land was sold to city, since it provides for adequate notice to taxpayer and fair opportunity to redeem property.—Assets Reconstruction Corp. v. Munson, 184 P.2d 11, 81 Cal.App.2d 363.

Ordinance as superseding prior law

City ordinance providing a new method for terminating right to redeem land deeded to city for nonpayment of taxes, entirely inconsistent with state law prohibiting before designated date, termination of such right as to land deeded to state, repealed by implication provisions of previous ordinance adopting state plan for termination of right to redeem tax-deeded property.—Assets Reconstruction Corp. v. Munson, supra.

47. Iowa.—Crawford v. Liddle, 70 N.W. 97, 101 Iowa 148.

Time for redemption generally see infra § 2103.

48. Iowa.—Crawford v. Liddle, supra. Wis.—State v. Hundhausen, 23 Wis. 508.

49. N.Y.—Esposito v. Antonelli, 299 N.Y.S. 976, 164 Misc. 912.

50. N.J.—Fields v. Kelly, 115 A. 580, 93 N.J.Eq. 380.

51. N.Y.—Rochester v. Fourteenth Ward Co-op. Bldg. Lot Ass'n, 75 N.E. 692, 183 N.Y. 23.

52. N.J.—Fields v. Kelly, 115 A. 580, 93 N.J.Eq. 380. 44 C.J. p 1360 note 24.

so on the person in whose name the land is taxed.⁵³ Under such statutes, where the land is taxed to unknown owners and no person is in possession, no notice is required.⁵⁴ Where a statute requiring service of the notice to redeem on the person in possession and also on the person in whose name the land is taxed is applicable to cities, a notice must be served on the person listed by the county on its books as owner, although the land is assessed as unknown on the books of the city.⁵⁵

Under some statutes provision is made for the publication of a notice to unknown persons requiring them to redeem the lands or to show cause why a deed therefor should not be delivered to the purchaser thereof or his assigns within the time specified in the order.⁵⁶ The proceeding must be in strict compliance with all the requirements of the statute.⁵⁷ Thus, when required by the statute, the petition must describe the property by metes and bounds as well as by lots and block numbers.⁵⁸ Where the owner redeems within the time fixed in the order and published notice, he is not required to show cause why a deed should not be executed and in such case the court is without power to make an order for a deed.⁵⁹ The proceedings may be reviewed by certiorari.⁶⁰

If any person interested, who is entitled to notice to redeem, has not been served with notice and a deed has been given the purchaser, the unnotified person may still be served and, failing to redeem, a supplemental deed may be given the

purchaser.⁶¹

Service of notice. The notice is to be served in such manner as the statutes or charter provisions direct,⁶² such as by publication.⁶³ Where notice by publication is prescribed, personal service of the notice is not necessary.⁶⁴ Proof of service is to be made as directed by statutory or charter regulations.⁶⁵

c. Foreclosure of Right of Redemption

When authorized by statute, an action or suit may be brought to foreclose the right of redemption from a municipal tax sale.

Under some statutory provisions, an action or suit may be brought to foreclose the right of redemption from a municipal tax sale.⁶⁶ It has been held that the proceeding under such provisions is one in rem, unless defendants are personally served or appear;⁶⁷ and it has also been held that the proceeding is, in effect, a suit in strict foreclosure.⁶⁸ Under some statutes the remedy to foreclose the right of redemption exists in addition to the remedy of barring the right by serving a notice to redeem;⁶⁹ under other statutes or charter regulations the city may not maintain an action for foreclosure unless the owner has been actually served with a notice to redeem.⁷⁰

Persons entitled to sue; parties. The proceeding to foreclose must be brought by such person or persons as are authorized by the statute,⁷¹ such as the holder of the tax title⁷² or the assignee of the

53. Iowa.—Crawford v. Liddle, 70 N.W. 97, 101 Iowa 148.

54. Iowa.—Crawford v. Liddle, *supra*.

55. Iowa.—Crawford v. Liddle, 70 N.W. 97, 101 Iowa 148.

56. N.J.—Jacobus v. Cahill, 94 A. 799, 87 N.J.Law 562.

57. N.J.—Jacobus v. Cahill, *supra*.

58. N.J.—Jacobus v. Cahill, 94 A. 799, 87 N.J.Law 562—Nugent v. Scott, 134 A. 94, 4 N.J.Misc. 649, affirmed 135 A. 919, 103 N.J.Law 500.

59. N.J.—Jacobus v. Cahill, 94 A. 799, 87 N.J.Law 562.

60. N.J.—Jacobus v. Cahill, *supra*.

Limitation of action

Writ of certiorari cannot be had after the lapse of the statutory period.—Nugent v. Scott, 134 A. 94, 4 N.J.Misc. 649, affirmed 135 A. 919, 103 N.J.Law 500—Nugent v. Cahill, 133 A. 420, 4 N.J.Misc. 504, affirmed 135 A. 919, 103 N.J.Law 499.

61. N.J.—Fields v. Kelly, 115 A. 580, 92 N.J.Eq. 380.

62. N.Y.—Esposito v. Antonelli, 299 N.Y.S. 976, 164 Misc. 912.

Wis.—Sheftels v. Tabert, 1 N.W. 156, 46 Wis. 439.

63. N.Y.—Esposito v. Antonelli, 299 N.Y.S. 976, 164 Misc. 912.

64. N.Y.—Esposito v. Antonelli, *supra*.

65. Wis.—Sheftels v. Tabert, 1 N.W. 156, 46 Wis. 439.

66. Md.—Shapiro v. National Color Printing Co., 60 A.2d 679.

Mass.—Polep v. Joseph P. Manning Co., 35 N.E.2d 487, 309 Mass. 552—City of Boston v. Lynch, 23 N.E.2d 466, 304 Mass. 272—City of Lynn v. Lynn Commercial Realty Co., 190 N.E. 538, 286 Mass. 368.

N.J.—Di Bologna v. Earl, 23 A.2d 791, 130 N.J.Eq. 571.

Actions to foreclose:

Municipal tax lien see *supra* § 2087.

Municipal tax sale certificate see *infra* subdivision d of this section.

Right of redemption from tax sales generally see the C.J.S. title Taxation §§ 852-858, also 61 C.J. p 1254 note 17 et seq.

History of legislation

Mass.—City of Boston v. Barry, 53 N.E.2d 686, 315 Mass. 572.

Statute held valid

Md.—Shapiro v. National Color Printing Co., 60 A.2d 679.

67. Md.—Shapiro v. National Color Printing Co., *supra*.

68. N.J.—Di Bologna v. Earl, 23 A.2d 791, 130 N.J.Eq. 571.

Only power of municipality is to proceed by strict foreclosure, which results either in acquiring of absolute title by municipality or a redemption of full amount of tax lien, and municipality has no authority to consent to sale for a lesser amount.—City of Garfield v. Feiler, 37 A.2d 201, 135 N.J.Eq. 44.

69. N.J.—Di Bologna v. Earl, 23 A.2d 791, 130 N.J.Eq. 571.

70. N.Y.—Rochester v. Fourteenth Ward Co-Op. Bldg. Lot Ass'n, 75 N.E. 692, 183 N.Y. 23.

71. Mass.—Polep v. Joseph P. Manning Co., 35 N.E.2d 487, 309 Mass. 552.

72. Person holding tax title

One paying city tax collector

tax purchaser.⁷³ Where the municipality becomes a purchaser at the tax sale, it may, when authorized by statute, foreclose the right of redemption.⁷⁴

In such proceeding any person claiming an interest may, as authorized by statute, file an answer and offer to make redemption.⁷⁵ Where defendant merely holds the legal title as trustee, the court may order that the beneficiaries be made parties defendant.⁷⁶ A person who has no right to redeem may not be admitted as a party defendant.⁷⁷

Time to sue. A petition or bill to foreclose may be filed at such time as is permitted by statute.⁷⁸

Notice. Notice of the filing of the petition for foreclosure should be given as directed by the statute.⁷⁹ The failure to notify the owner of the land of the pendency of the petition for foreclosure does not affect the validity of the decree in its application to the mortgagees who were notified and who appeared.⁸⁰

Pleading. General rules of pleading ordinarily are applicable in suits to foreclose the right of redemption.⁸¹ In a proper case an answer may be stricken on motion where such procedure is made available to test the sufficiency of the answer or some part thereof.⁸² It has been held that a counterclaim to foreclose defendant's mortgage may

not be filed in a suit in equity to foreclose the right of redemption.⁸³

Stay of proceeding. Where by answer defendant avers the invalidity of the tax or impugns the legality of the proceedings to sell or the legality of the sale, the court may, when authorized by statute, stay the foreclosure proceedings to enable defendant to obtain a writ of certiorari to review the alleged invalidity or illegality.⁸⁴

Trial or hearing. The trial or hearing is to be conducted in such manner as is prescribed by statute and the rules of practice.⁸⁵

Judgment or decree; costs. Such judgment or decree is to be entered on foreclosure as is authorized by statute and the rules of practice.⁸⁶ A decree may be entered against such defendants who appear and answer, but no personal decree for costs or other money may be entered against a defendant who has not appeared or answered.⁸⁷ The court may permit redemption on payment of such amounts as are required by the statute.⁸⁸

Where the statute so provides, the decree of foreclosure bars the right of redemption and forecloses all prior and subsequent alienations of the lands and encumbrances thereon, except municipal liens,⁸⁹ and the title conveyed by a tax collector's deed or by a taking of the land for taxes is

amount sufficient to redeem land, to which another held tax title as matter of record, and receiving redemption certificate, which was recorded on margin of record of tax deed, could not maintain petition to foreclose rights of redemption on such land, since petitioner failed to show that she was holder of tax title.—*Polep v. Joseph P. Manning Co., supra.*

73. Remainderman may compel assignment of certificate of sale on paying taxes which life tenant failed to pay and foreclose right of redemption under the statute.—*Di Bologna v. Earl, 23 A.2d 791, 130 N.J. Eq. 571.*

74. N.J.—Rustin Co. v. Bowen, 30 A.2d 70, 129 N.J. Law 505.

75. Mass.—City of Boston v. Barry, 53 N.E.2d 686, 315 Mass. 572. Answer indicating intention to redeem

Allegation that defendants were prepared to pay redemption prices together with interest and all taxes and other municipal liens accruing subsequent to sales, together with interest and penalties, and total disbursements of holders of certificates of tax sales, in accordance with statute, amounted to an irrevocable of-

fer to redeem—*Shapiro v. National Color Printing Co., Md., 60 A.2d 679.*

76. N.J.—City of Newark v. Fidelity Union Trust Co., 47 A.2d 320, 137 N.J. Eq. 92.

77. N.J.—Taylor v. Borgfeld, 50 A.2d 654, 139 N.J. Eq. 177. Persons entitled to redeem see *infra* § 2101.

78. After expiration of two years N.J.—*Di Bologna v. Earl, 23 A.2d 791, 130 N.J. Eq. 571.*

79. Mass.—Gaunt v. Arzooonian, 46 N.E.2d 520, 313 Mass. 38.

80. Mass.—Gaunt v. Arzooonian, supra.

81. N.J.—City of Newark v. Fidelity Union Trust Co., 47 A.2d 320, 137 N.J. Eq. 92.

82. Motion denied N.J.—*City of Newark v. Fidelity Union Trust Co., supra.*

83. N.J.—Atlantic City v. Gardner, 199 A. 724, 124 N.J. Eq. 110.

84. Stay to enable mortgagee to obtain writ N.J.—*City of Trenton v. Howell, 26 A.2d 505, 137 N.J. Eq. 51.*

Writ of certiorari denied where application was not made until more than a year after landowners had

filed answer.—*Owen v. Atlantic City, 14 A.2d 464, 125 N.J. Law 145.*

85. Scope of inquiry

In city's proceeding in land court to foreclose right of redemption under tax title, acquired by it for tax assessed on realty for certain year, court could deal with questions of propriety and validity of assessments of unpaid taxes for subsequent years at first hearing, although they technically related to matter of redemption rather than validity of tax title.—*City of Boston v. Quincy Market Cold Storage & Warehouse Co., 45 N.E.2d 959, 312 Mass. 638.*

86. Description of premises in decree held sufficient to identify premises.—*Rustin Co. v. Bowen, 30 A.2d 70, 129 N.J. Law 505.*

87. Appearance by counsel appointed under Soldiers' and Sailors' Civil Relief Act did not warrant personal decree.—*Shapiro v. National Color Printing Co., Md., 60 A.2d 679.*

88. Mass.—City of Boston v. Barry, 53 N.E.2d 686, 315 Mass. 572. N.J.—*Di Bologna v. Earl, 23 A.2d 791, 130 N.J. Eq. 571.* Amount required to redeem generally see *infra* § 2102.

89. N.J.—Rustin Co. v. Bowen, 30 A.2d 70, 129 N.J. Law 505.

absolute after foreclosure of the right of redemption by decree.⁹⁰ The decree of foreclosure is not subject to collateral attack.⁹¹

Sale of property. In a suit to foreclose a right of redemption, in the absence of statutory authority the court may not order the property sold at public auction.⁹² An unauthorized order for the sale of the property may be vacated by the court at any time.⁹³

Review. A judgment or decree in an action to foreclose the right of redemption may be reviewed to the extent that a review is authorized by constitutional or statutory provisions.⁹⁴ An appeal may be taken when authorized by such provisions.⁹⁵ Under some statutes an appeal brings up only questions of law apparent on the record,⁹⁶ and findings of fact cannot be revised and must be accepted as true;⁹⁷ if, on all the facts thus displayed and the reasonable inferences of which they are susceptible, the ultimate finding is justified as matter of law, it must stand.⁹⁸

90. Mass.—Gaunt v. Arzooonian, 46 N.E.2d 520, 313 Mass. 38.

91. N.J.—Rustin Co. v. Bowen, 30 A.2d 70, 129 N.J.Law 505.

92. N.J.—City of Garfield v. Feiler, 37 A.2d 201, 135 N.J.Eq. 44—Atlantic City v. Gardner, 199 A. 724, 124 N.J.Eq. 110.

Authority of counsel for municipality

Implied authority of counsel for municipality to consent extends only to matters of procedure and cannot be extended to matters in which the municipality itself had no power expressly to authorize a sale which would destroy its lien for an amount less than that of the tax.—City of Garfield v. Feiler, 37 A.2d 201, 135 N.J.Eq. 44.

93. N.J.—City of Garfield v. Feiler, *supra*.

94. Mass.—City of Boston v. Quincy Market Cold Storage & Warehouse Co., 45 N.E.2d 959, 312 Mass. 638.

95. Mass.—City of Boston v. Quincy Market Cold Storage & Warehouse Co., *supra*.

Decisions reviewable

In proceeding to foreclose right of redemption under tax title, acquired by city for tax assessed on realty for certain year, matters of validity of such title and of redemption were so far separable as to authorize appeal from land court's decision as to validity of title, although court ordered case to stand for further hearing on matter of redemption.—City of Boston v. Quincy Market Cold Storage & Warehouse Co., *supra*.

d. Foreclosure of Tax Sale Certificates

An action to foreclose a municipal tax sale certificate may be brought when such action is authorized by statute or is maintainable in equity under the general jurisdiction of the court.

Under some statutory provisions an action or suit may be brought to foreclose the lien of a municipal tax sale certificate,⁹⁹ and foreclosure may also be decreed under the general equity powers of a court.¹

Where authorized by statute, municipal tax sale certificates may be foreclosed in the same suit in which foreclosure of state and county tax sale certificates is sought.² A holder of a municipal tax certificate may sue to foreclose the certificate without redeeming or paying outstanding state, county, and drainage tax certificates and omitted and subsequent taxes.³ In order to avoid multiple litigation the holder of a tax sale certificate may bring a foreclosure suit to have all unsatisfied tax liens adjudicated and the title cleared of all matured tax liens, but such procedure is not mandatory.⁴ The

Question whether method of assessment is reasonable is in each case largely a matter of fact for the judge.—City of Boston v. Boston Port Development Co., 30 N.E.2d 896, 308 Mass. 72, 133 A.L.R. 515.

Motion on appeal to add to record

On appeal in proceeding to foreclose rights of redemption in land taken by city for nonpayment of taxes, motion to add to record a transcript of evidence on theory that proceeding was in equity was denied pro forma, where transcript of record was sufficient to enable reviewing court to decide case.—City of Lowell v. Marden & Murphy, 74 N.E.2d 666, 321 Mass. 597, certiorari denied 68 S.Ct. 354, 332 U.S. 850, 92 L.Ed. 420.

96. Mass.—City of Boston v. Boston Port Development Co., 30 N.E.2d 896, 308 Mass. 72, 133 A.L.R. 515.

97. Mass.—City of Boston v. Boston Port Development Co., *supra*.

98. Mass.—City of Boston v. Boston Port Development Co., *supra*.

99. Fla.—McDonald Mortgage & Realty Co. v. Tax Securities Corporation, 151 So. 896, 112 Fla. 622. N.C.—Wilkinson v. Boomer, 7 S.E.2d 491, 217 N.C. 217.

Wis.—City of Milwaukee v. Chicago, M., St. P. & P. Ry. Co., 269 N.W. 688, 223 Wis. 73.

Action to foreclose municipal tax lien see *supra* § 2087.

Purpose of statutes allowing foreclosure of a tax sale certificate is to enable the holder of the certificate to procure a good title to the prop-

erty.—Lee v. Walter-Keogh, Inc., 141 So. 131, 105 Fla. 199.

Applicability of general statute

General statute authorizing foreclosure of tax sale certificates applies to municipal tax sale certificates.—Coral Gables Properties v. Stopler, 155 So. 799, 115 Fla. 231—Southwest Enterprises v. Frasse, 152 So. 175, 113 Fla. 770—Lee v. Walter-Keogh, Inc., 141 So. 131, 105 Fla. 199.

Misnomer of corporate holder of certificate

Under a general statute providing that a misnomer of a corporation in any deed or instrument shall not vitiate it if the corporation shall be therein sufficiently described to ascertain the intent of the parties, the fact that purchaser corporation was, through inadvertence, misnamed in city's tax certificate, did not bar foreclosure by lawful holder of certificate, especially where certificate was made part of record.—Laws v. Ranger Realty Co., 148 So. 583, 110 Fla. 149—Sweet v. Ranger Realty Co., 146 So. 199, 108 Fla. 249.

1. Fla.—Shaw v. Hamm, 183 So. 19, 133 Fla. 722—Lang v. Quaker Realty Corporation, 179 So. 144, 131 Fla. 179.

Jurisdiction of equity to foreclose liens see Equity § 20.

2. Fla.—Lee v. Walter-Keogh, Inc., 141 So. 131, 105 Fla. 199.

3. Fla.—Lang v. Quaker Realty Corporation, 179 So. 144, 131 Fla. 179.

4. Fla.—Riviera Club v. Belle Mead Development Corporation, 194 So. 783, 141 Fla. 538.

proceeding must be brought within such time as may be fixed by statute.⁵

Persons entitled to sue; parties. The assignee of a municipal tax sale certificate may sue to foreclose.⁶ The husband of the owner of the land is a proper party defendant.⁷ A person who has no interest in the land at the time of the foreclosure proceedings is not a necessary party;⁸ and, in the absence of a statutory requirement, other tax lien holders need not be made parties defendant.⁹

Some special statutes enable a municipality to foreclose their own municipally held tax certificates by an action in rem against the tax encumbered land without naming any parties defendant and without serving any persons interested in the land as coequal or superior lienors with formal process of any kind.¹⁰

Intervention. An intervenor is bound by the

pleadings as they are framed at the time of the filing of the petition for intervention and, where he seeks to bring into the cause tax certificates for years not covered by the pleadings, the petition for intervention may be denied.¹¹

Notice. Such notice or process must be served on defendant as is required by statute.¹²

Pleading. General rules of pleading ordinarily apply in suits to foreclose a municipal tax sale certificate.¹³ The portion of an answer setting up inapplicable statutes may be stricken.¹⁴ A mortgagee who is made a party defendant in a suit to foreclose a tax sale certificate on the mortgaged property has a right in his answer to pray for the adjudication of priorities of liens.¹⁵

Defenses. Certain defenses have been urged in suits to foreclose tax sale certificates.¹⁶ In a suit by an assignee of a tax sale certificate it is no de-

5. N.Y.—*Rubin v. Cottle*, 288 N.Y.S. 906, 248 App.Div. 671, modified on other grounds 4 N.E.2d 250, 272 N.Y. 499, and affirmed 7 N.E.2d 684, 273 N.Y. 544—*Cary v. Koerner*, 121 N.Y. 800, reversed on other grounds 124 N.Y.S. 501, 139 App.Div. 811, questions certified 124 N.Y.S. 1112, 140 App.Div. 915, affirmed and certified questions answered 93 N.E. 979, 200 N.Y. 253.

6. Fla.—*Southwest Enterprises v. Frasse*, 152 So. 175, 113 Fla. 770.

Invalid assignment

Where assignment of municipal tax certificate was on its face assignment from individual and neither body of assignment nor method of executing assignment disclosed that individual made assignment as city manager and clerk, assignee was not entitled to foreclose lien.—*McDonald Mortgage & Realty Co. v. Tax Securities Corporation*, 151 So. 896, 112 Fla. 622.

Municipality

Where municipality purchased tax sale certificates, the foreclosure of such certificates by a civil action was clearly within the statutory powers of the municipality.—*Darnell v. City of Broken Bow*, 299 N.W. 274, 139 Neb. 844, 136 A.L.R. 101.

7. Fla.—*Wade v. City of Jacksonville*, 152 So. 197, 113 Fla. 718, appeal dismissed 55 S.Ct. 87, 293 U.S. 518, 79 L.Ed. 632.

8. N.C.—*Russell v. Fulton*, 9 S.E.2d 369, 217 N.C. 701.

9. Fla.—*Tax Securities Corporation v. Security Inv. Corporation*, 155 So. 752, 115 Fla. 536.

State or owner of state or county liens

Foreclosure by city of city tax certificates on certain realty against owner was proper, notwithstanding

failure to make state or owner of state and county tax liens party defendant.—*City of Bradenton v. Northern Inv. Corporation*, 164 So. 136, 121 Fla. 470.

10. Scope of foreclosure

(1) Statute is limited in scope to foreclosure of owner of lands only and those whose claims are derived from, or subordinate to, delinquent owner, and does not apply to those holding tax certificates of equal dignity with claims of municipality.—*City of Miami v. Certain Lands upon which City of Miami Taxes and Liens are Delinquent*, 171 So. 798, 126 Fla. 781.

(2) Municipality was not entitled to extinguish outstanding municipal tax certificates on same land which had been issued to holder for prior unpaid taxes, where state by contract with holder reserved power to encumber taxed property with equal but not superior liens for unpaid subsequently assessed taxes.—*City of Miami v. Certain Lands upon which City of Miami Taxes and Liens are Delinquent*, supra.

11. Fla.—*Riviera Club v. Belle Mead Development Corporation*, 194 So. 783, 141 Fla. 538.

Intervenor was still at liberty to file original bill to have its rights and liabilities determined.—*Riviera Club v. Belle Mead Development Corporation*, supra.

12. N.C.—*Gower v. Town of Clayton*, 199 S.E. 77, 214 N.C. 309, reheard 1 S.E.2d 183, 215 N.C. 82.

13. Allegations of bill

In suit brought under special statute to foreclose municipal tax sale certificate, bill need not allege that other tax liens have been satisfied.—*Tax Securities Corporation v. Securi-*

ty Inv. Corporation, 155 So. 752, 115 Fla. 536.

Allegations in answer

Allegation in answer that part of assessed lot had been converted to highway purposes was no defense to suit to foreclose municipal tax sale certificates where all of lot which was subject to taxation had been assessed.—*Palbicke v. Hanover Nat. Corporation*, 162 So. 694, 120 Fla. 299.

Demurrer to counterclaim held properly sustained.—*City of Milwaukee v. Chicago, M., St. P. & P. Ry. Co.*, 269 N.W. 688, 223 Wis. 73.

14. Fla.—*Rio Vista Hotel & Improvement Co. v. Belle Mead Development Corporation*, 182 So. 417, 132 Fla. 88, certiorari denied 59 S.Ct. 251, 305 U.S. 655, 83 L.Ed. 424, rehearing denied 59 S.Ct. 364, 305 U.S. 676, 83 L.Ed. 438.

15. Fla.—*Lang v. Quaker Realty Corporation*, 179 So. 144, 131 Fla. 179.

Answer as counterclaim

In a suit to foreclose municipal tax certificates, the claim of a mortgagee, who answers and prays an adjudication of priority of liens, is not a counterclaim within the chancery rule requiring service of a copy of a counterclaim on the opponent.—*Lang v. Quaker Realty Corporation*, supra.

16. Double taxation

Warehouse company which was located on realty owned by railroad, and which had been erroneously assessed by state for tax and had in good faith paid amount into state treasury was not relieved from foreclosure of tax certificates for tax rightfully assessed and levied by city, on ground that property was unlawfully subject to double tax-

fense that the city assigned the certificate for an insufficient consideration.¹⁷ The property owner may be precluded by laches¹⁸ or estoppel¹⁹ from asserting that the tax was invalid.

Judgment or decree. Such judgment or decree is to be entered on foreclosure as is authorized by statute and the rules of practice.²⁰ Where a purchaser acquires the tax sale certificate from the municipality for less than its face value and rests foreclosure of the certificate on the inherent jurisdiction of equity to foreclose liens, he is entitled to recover no more than the sum paid for the certificates, with interest.²¹ A judgment foreclosing a tax sale certificate in an action in which the owner of the land was made a party is binding not only on such owner, but also on the owner's

successor in title.²² However, the judgment or decree is not binding on a party who was not properly served with process or notice.²³

Sale of property. Under statutory authorization the court may order the sale of the property on foreclosure of a municipal tax sale certificate.²⁴ The court in its decree may, and is under the duty to, fix the terms and conditions of the sale.²⁵ The court will confirm the sale where it has been properly conducted.²⁶ If there are sufficient funds produced at the sale to pay off the lien evidenced by the tax sale certificate and leave a balance, a mortgagee party defendant is entitled to have such balance applied on the payment of the indebtedness on the mortgage.²⁷ A foreclosure sale of property predicated only on the lien of a municipal tax sale

tion.—City of Milwaukee v. Chicago, M., St. P. & P. Ry. Co., 269 N.W. 688, 223 Wis. 73.

Irregularities in assessments held insufficient as a defense, particularly in view of curative act.—Jones v. City of Arcadia, 3 So.2d 338, 147 Fla. 571, certiorari denied 62 S.Ct. 300, 314 U.S. 688, 86 L.Ed. 550, rehearing denied 62 S.Ct. 410, 314 U.S. 715, 86 L.Ed. 569, and 62 S.Ct. 478, 314 U.S. 716, 86 L.Ed. 570.

17. Fla.—Southwest Enterprises v. Frasse, 152 So. 175, 113 Fla. 770.

18. Fla.—Rio Vista Hotel & Improvement Co. v. Belle Mead Development Corporation, 182 So. 417, 132 Fla. 88, certiorari denied 59 S.Ct. 251, 305 U.S. 655, 83 L.Ed. 424, rehearing denied 59 S.Ct. 364, 305 U.S. 676, 83 L.Ed. 438.

19. Fla.—Lang v. Quaker Realty Corporation, 179 So. 144, 131 Fla. 179.

20. Fla.—Coombes v. Wheeler, 179 So. 785, 131 Fla. 593.

Priority of city tax liens

In suit to foreclose lien of tax sale certificates for unpaid city taxes, decree which gave priority to city tax liens over city tax liens for prior years was error.—Coral Gables Properties v. Stopler, 155 So. 799, 115 Fla. 231.

21. Fla.—Shaw v. Hamm, 183 So. 19, 133 Fla. 722—Smith v. Lindsay, 182 So. 910, 133 Fla. 306—Lang v. Quaker Realty Corporation, 179 So. 144, 131 Fla. 179.

Such interest does not mean penalties fixed by statute, but is implied rate of eight per cent per annum.—General Properties Co. v. Rellim Inv. Co., 9 So.2d 295, 151 Fla. 136.

If amount to redeem is fixed by contract or statute, equity will not deviate therefrom.—General Properties Co. v. Rellim Inv. Co., supra.

Bill for discovery of consideration paid

Where bill for discovery of consideration paid for municipal tax certificates by holder for purpose of determining whether property owner would desire to redeem them if they should be held valid tax liens did not affirmatively disclose full character of the certificates, bill was insufficient to enable court to pass on owner's right to redeem at less than face of certificates with interest and penalties.—General Properties Co. v. Rellim Inv. Co., supra.

Change in ownership of title to land subject to lien of municipal tax certificates did not affect holder's right to foreclose lien in amount paid for municipal tax certificates.—Smith v. Lindsay, 182 So. 910, 133 Fla. 306.

22. N.C.—Russell v. Fulton, 9 S.E.2d 369, 217 N.C. 701.

Fact that successor had no knowledge of foreclosure proceedings was immaterial, since the foreclosure proceeding is a matter of public record.—Russell v. Fulton, supra.

Administrators of deceased mortgagee

N.J.—City of Trenton v. Howell, 27 A.2d 609, 132 N.J.Eq. 125.

23. N.C.—Gower v. Town of Clayton, 199 S.E. 77, 214 N.C. 309, reheard 1 S.E.2d 133, 215 N.C. 82.

Bondholder

Okl.—Runnells v. Citizens' Nat. Bank of Wooster, Ohio, 11 P.2d 173, 157 Okl. 94.

24. Fla.—Coombes v. Wheeler, 179 So. 785, 131 Fla. 593.

Right to possession

Where town in 1935 instituted action for foreclosure of tax sales certificates for taxes listed in name of deceased former owner's estate, and summons, without any alias or pluries summons having been issued in meantime, was served on one heir in 1938 after person in possession

had acquired interest of all heirs, town by purchasing premises at tax sale acquired no such clear right to possession of premises as entitled town to writ of assistance to obtain possession, and person in possession was entitled to injunction to restrain execution of writ.—Gower v. Town of Clayton, 199 S.E. 77, 214 N.C. 309, reheard 1 S.E.2d 133, 215 N.C. 82.

25. Sale to highest and best bidder Fla.—Coombes v. Wheeler, 179 So. 785, 131 Fla. 593.

Consistency of provisions in decree

Where one paragraph of final decree foreclosing municipal tax sale certificates provided only that land be sold at auction for cash, and another paragraph provided that purchaser must pay amount in cash upon confirmation of sale, decree was not erroneous as comprising inconsistent provisions, since second paragraph was merely explanatory of when cash payment was to be made.—Coombes v. Wheeler, supra.

Confirmation before bid paid

Where final decree foreclosing municipal tax sale certificates provided that property should be sold for cash to be paid on confirmation of sale, and notice of sale stated that property would be sold for cash but did not state when cash must be paid, confirmation of sale before amount of bid had been paid was not error.—Coombes v. Wheeler, supra.

27. Fla.—Lang v. Quaker Realty Corporation, 179 So. 144, 131 Fla. 179.

Rights of first mortgagee

(1) A provision in first mortgage of numerous lots that mortgagee would release any lot from lien on payment of five hundred dollars, but need not if mortgage was in default at time of request for release, left mortgagee under no obligation to accept one thousand dollars out of surplus proceeds of sale of two lots under tax sale certificates and to re-

certificate is subject to all unsatisfied liens for state, county, and municipal taxes, without regard to the year for which the taxes are due.²⁸ Where the city forecloses its tax certificates and takes title to the realty after final judgment and sale, the city tax lien is thereby extinguished and is no bar to foreclosure proceedings by the owner of county and state tax certificates on the same realty who had not been made a party to the foreclosure action by the city.²⁹

Costs and attorney's fees. Such costs may be allowed as are authorized by statute.³⁰ Attorney's fees may not be allowed³¹ unless authorized by statute.³²

§ 2101. Persons Entitled to Redeem

Redemption from a municipal tax sale may be made by such persons as are designated by statute.

Such persons as are designated by statute may redeem from a municipal tax sale.³³ As a general rule, under the statutes, the right to redeem belongs to the owner of the land,³⁴ or, after his

death, to his heir at law,³⁵ or to anyone having an interest in the land, whose right to redeem has not been foreclosed.³⁶ A statute restricting the right of redemption to owners has been construed to include tax purchasers when considered with respect to prior tax sales, and any tax purchaser is entitled to redeem from prior tax sales.³⁷

Occupant. An occupant of the land within a statute allowing redemption by such occupant must be a lawful occupant who has a lawful right or interest in the land.³⁸

§ 2102. Amount Required to Redeem

Such amount must be paid to redeem from a municipal tax sale as is required by statutory or charter provisions or by ordinance.

The amount required to be paid to redeem from a municipal tax sale is generally prescribed by statute or charter provision, or by ordinance,³⁹ and such amount must be paid as is required by such provisions.⁴⁰ Under such provisions, the amount

lease such lots from mortgage lien, and mortgagee could claim the entire surplus.—*Coombes v. Wheeler*, 179 So. 785, 131 Fla. 593.

(2) In proceeding for distribution of surplus moneys arising from sale under foreclosure of municipal tax sale certificates, the doctrine of marshaling assets was inapplicable and entire surplus was properly paid to first mortgagee, especially where both first and second mortgagees had other property to which to look to payment of their respective liens.—*Coombes v. Wheeler*, supra.

28. Fla.—*Lang v. Quaker Realty Corporation*, 179 So. 144, 131 Fla. 179.—*City of Bradenton v. Lee*, 162 So. 139, 120 Fla. 100.—*Tax Securities Corporation v. Security Inv. Corporation*, 155 So. 752, 115 Fla. 536.

29. Fla.—*City of Bradenton v. Northern Inv. Corporation*, 164 So. 136, 121 Fla. 470.

30. Expenses in procuring abstract of title and photostat copies of exhibit used were not allowable in final decree in suit by assignee of certificate.—*Southwest Enterprises v. Frasse*, 152 So. 175, 113 Fla. 770.

31. Fla.—*Tax Securities Corporation v. Security Inv. Corporation*, 155 So. 752, 115 Fla. 536.

32. Fla.—*Semi-Tropical Land Co. v. City of Jacksonville*, 162 So. 692, 120 Fla. 425.

N.J.—*Borough of Leonia v. Irving Trust Co.*, 177 A. 842, 118 N.J.Eq. 94.

33. Mass.—*Gaunt v. Arzooonian*, 46 N.E.2d 520, 313 Mass. 38.

N.J.—*Taylor v. Borgfeld*, 50 A.2d 654, 139 N.J.Eq. 177.—*City of Garfield v. Feler*, 37 A.2d 201, 135 N.J.Eq. 44.

Tex.—*State v. Moak*, 207 S.W.2d 894, 146 Tex. 322.

Joint owner see *infra* § 2102.

34. Mo.—*St. Louis v. Gorman*, 29 Mo. 593, 77 Am.D. 586.

Stranger without interest in the land has no right to redeem.—*St. Louis v. Gorman*, supra—44 C.J. p 1362 note 4.

Merer squatter or trespasser on land sold is not given the right by statute to obtain from a bona fide purchaser an assignment of tax sale certificate.—*Taylor v. Borgfeld*, 50 A.2d 654, 139 N.J.Eq. 177.

35. Ky.—*Louisville v. Hughes*, 97 S. W. 1096, 30 Ky.L. 231.

Property subject to descent and distribution generally see *Descent and Distribution* § 8.

36. Tex.—*Blair v. Guaranty Sav. Loan, etc., Co.*, 118 S.W. 608, 54 Tex.Civ.App. 443.

37. Mass.—*Rogers v. Lynn*, 86 N.E. 889, 200 Mass. 354.

38. N.J.—*Taylor v. Borgfeld*, 50 A.2d 654, 139 N.J.Eq. 177.

Tenant in possession

Township had no right to grant to a third person possession of apparently abandoned realty either before or after sale of such realty to municipality for unpaid taxes, while tax sale certificate to municipality remained unrecorded, and one occupying premises under such unauthorized grant from the township was a

mere trespasser and not an occupant entitled under statute to redeem from tax sale and obtain from bona fide purchaser an assignment of tax sale certificate.—*Taylor v. Borgfeld*, supra.

39. Ala.—*City of Opp v. Brogden*, 181 So. 752, 236 Ala. 180.

Mo.—*Krahenbuhl v. Clay*, 139 S.W.2d 970, 346 Mo. 111, 129 A.L.R. 1344.

N.J.—*Becker v. Mayor and Council of Borough of Little Ferry*, 14 A.2d 493, 125 N.J.Law 141, affirmed 19 A.2d 657, 126 N.J.Law 338.

Pa.—*City of Philadelphia v. Rutherford*, 62 A.2d 122, 163 Pa.Super. 476, 44 C.J. p 1363 note 7.

Statute held valid

Cal.—*Higbee v. Los Angeles County*, 117 P.2d 933, 47 Cal.App.2d 281.

La.—*State ex rel. McGregor v. Diamond, App.*, 167 So. 760.

Redemption of part of property

Amendatory statute, providing that, on application to redeem part of parcel of land from tax sale, county treasurer may ascertain, by affidavits or actual view, true proportion of taxes chargeable to such part, did not repeal previous customary method of ascertaining proper division by securing opinion of assessor or clerk of local municipal unit.—*State ex rel. Dorst v. Sommers*, 291 N.W. 523, 234 Wis. 302.

Statute held superseded

La.—*State ex rel. McGregor v. Diamond, App.*, 167 So. 760.

40. Ala.—*City of Opp v. Brogden*, 181 So. 752, 236 Ala. 180.—*Kimble v. Fowler*, 131 So. 440, 222 Ala. 178.

required has been held to include the amount of the claim of the city for taxes,⁴¹ usually all the taxes for which the property was sold and after-accrued taxes,⁴² unless, as to after-accrued taxes, other provision is made by statute,⁴³ penalties,⁴⁴ and costs,⁴⁵ including the expenses incurred by the

Neb.—City of Plattsmouth v. Hazzard, 271 N.W. 801, 132 Neb. 284.

N.Y.—City of Beacon v. Asher Bernstein Realty Corp., 57 N.Y.S.2d 659, 185 Misc. 262, motion denied 60 N.Y.S.2d 616, 270 App.Div. 852.

Pa.—Appeal of Andrews Land Corporation, 27 A.2d 700, 149 Pa.Super. 212.

Cost of improvements and title insurance

Under statute requiring on redemption the payment of "the insurance upon the property, and other charges and necessary expenses of the property, actually paid, less rents or other income therefrom, and a sum equal to interest at the rate of ten per centum thereon, from the time of each of such payments," purchaser was not entitled to expense of title insurance or to improvements made in order that premises might be rented profitably, and, since the premises were unrentable without such improvements, no credit would be allowed to redeemer therefor, but purchaser was entitled to sum expended to comply with order of the fire marshal.—City of Philadelphia v. Rutherford, 62 A.2d 122, 163 Pa.Super. 476.

41. Tex.—Blair v. Guaranty Sav. Loan, etc., Co., 118 S.W. 608, 54 Tex.Civ.App. 443.

42. Mass.—City of Boston v. Quincy Market Cold Storage & Warehouse Co., 45 N.E.2d 959, 312 Mass. 638.

N.C.—Gower v. Town of Clayton, 1 S.E.2d 133, 215 N.C. 82.

44 C.J. p 1363 note 9.

Amount of bid

Redemption from statutory tax lien foreclosure by city cannot be made by paying amount of bid, but may be made only by paying full amount of taxes due with interest.—City of Plattsmouth v. Hazzard, 271 N.W. 801, 132 Neb. 284.

Failure of purchaser to obtain certificate of sale

(1) Where lot was sold to city for delinquent taxes but no certificate of sale was ever recorded, the original owner retained title, subject to lien of city as purchaser for unpaid taxes and interest thereon and of right to redeem from lien on terms specified in statute and charter; hence original owner was personally liable to city for taxes against property assessed in such original owner's name subsequent to the tax sale.—City of Richmond v. Monument Ave. Development Corp., 34 S.E.2d 223, 184 Va. 152.

(2) Statute authorizing commonwealth to sell realty purchased by it

for delinquent taxes, and providing that on resale the lien of all former taxes shall be canceled, although amount realized from resale is insufficient to pay amount required to redeem, was inapplicable in city's action to recover personal judgment for taxes from previous owner of lots purchased by city at tax sale, where no certificate of sale to city was ever recorded, so that city had never obtained title.—City of Richmond v. Monument Ave. Development Corp., supra.

Certification of subsequent taxes

(1) Under some statutes where the city has purchased or taken the property, redemption may be made by payment only of the amount of the tax for which the estate was purchased or taken "and of such subsequent taxes as shall have been so certified, together with costs and interest."—Boston Five Cents Sav. Bank v. City of Boston, 61 N.E.2d 124, 318 Mass. 183.

(2) Purpose of requiring certification of taxes for subsequent years on or before a particular day under statute is to fix time when responsibility of collector ends and that of treasurer begins.—Boston Five Cents Sav. Bank v. City of Boston, supra—City of Boston v. Barry, 53 N.E.2d 686, 315 Mass. 572.

(3) Statutory provision fixing time for certification of subsequent taxes is merely directory and compliance with it is not essential to validity of certification.—Boston Five Cents Sav. Bank v. City of Boston, supra—City of Boston v. Barry, supra.

(4) Certifications held timely.—City of Chelsea v. Richard T. Green Co., 60 N.E.2d 351, 318 Mass. 85.

(5) Statutory direction for form of certification of subsequent taxes is merely directory.—City of Boston v. Barry, supra.

Lands adjudicated to state or subdivision

(1) In some jurisdictions statutes have provided that the owners or persons interested may redeem property adjudicated to the state or any of its subdivisions by payment of the amount of actual taxes for which the land was adjudicated to the state or any of its political subdivisions.—State ex rel. Hodge v. Grace, 184 So. 527, 191 La. 15—State ex rel. Tulane Homestead Ass'n v. Montgomery, 171 So. 28, 185 La. 777—State ex rel. Salomon v. City of New Orleans, La.App., 174 So. 492.

(2) Such statutes have been held valid.—State ex rel. Tulane Homestead Ass'n v. Montgomery, supra—

State ex rel. McGregor v. Diamond, La.App., 167 So. 760.

(3) Purpose of legislation was to relieve property owners distressed because of economic conditions.—State ex rel. Tulane Homestead Ass'n v. Montgomery, supra.

(4) On redemption of property under redemption statutes, taxes accruing while property stood under adjudication to city, but not taxes accruing prior to adjudication, were eliminated as debts against the property.—State ex rel. Salomon v. City of New Orleans, supra.

(5) Fisc of municipality should not be interfered with lightly, and court will not do so in interpreting acts governing redemption of properties adjudicated to city for nonpayment of taxes, in absence of clear unambiguous expression of legislative will to such effect, particularly where it would involve acts in serious constitutional question.—State ex rel. Tulane Homestead Ass'n v. Montgomery, supra.

(6) Purchaser who redeemed realty by paying tax levy for nonpayment of which realty had been adjudicated to city was not entitled to cancellation of tax liens existing at time of adjudication which were not prescribed, as against contention that such taxes were extinguished by confusion when city became adjudicatee at tax sale.—State ex rel. Phoenix Homestead Ass'n v. City of New Orleans, 169 So. 825.

44. N.C.—Gower v. Town of Clayton, 1 S.E.2d 133, 215 N.C. 82.
44 C.J. p 1363 note 10.

Applicability of statute to mortgagee

(1) Where holder of mortgage lien was merely asserting his mortgage lien and was not seeking to redeem property involved from municipal tax sale, the statute relating to penalties and penal interest in case of redemption from tax sale did not apply.—Interstate Bond Co. v. Home Owners Loan Corporation, 139 S.W.2d 69, 282 Ky. 569.

(2) Where purchaser at municipal tax sale was required to and did pay penalties of ten per cent on taxes subsequently falling due before receiving tax deed, mortgagee asserting his mortgage had no greater rights than the owner and purchaser was entitled to lien for such penalties.—Interstate Bond Co. v. Home Owners Loan Corporation, supra.

45. N.C.—Gower v. Town of Clayton, 1 S.E.2d 133, 215 N.C. 82.
Tex.—Blair v. Guaranty Sav. Loan, etc., Co., 118 S.W. 608, 54 Tex.Civ. App. 443.

purchaser in proceedings to perfect title,⁴⁶ but not including the costs of the tax suit⁴⁷ or the costs of the sale.⁴⁸ To this should be added interest,⁴⁹ computed on the total amount of the various items from the date of the sale to the tax purchaser to the time when the owner made the tender and offered to redeem.⁵⁰ A former owner seeking to redeem from a tax purchaser rightfully in possession under the statute is not entitled to deduct from the total amount of these items a charge for rental during the time that the tax purchaser was in possession.⁵¹

A joint owner may, in some municipalities, redeem his undivided interest by payment of his proportionate share of the whole amount necessary to redeem.⁵²

Compromise. A municipality has the power to make a compromise by which it receives a lump sum from the delinquent taxpayer to effect a redemption,⁵³ and the council may not subsequently forbid the execution of a conveyance to the person redeeming.⁵⁴

Recovery of overpayment. An alleged overpay-

ment made in redeeming land sold at a municipal tax sale may not be recovered where the payment was voluntary.⁵⁵

§ 2103. Time for Redemption

Redemption from a municipal tax sale must be made within such time as is prescribed by statutes, charter provisions, or ordinances.

The right of redemption from a municipal tax sale ordinarily must be exercised within the time prescribed by the constitution, statute, charter, or ordinance.⁵⁶ A special statute authorizing redemption from a tax sale by a certain city within a prescribed time rather than a general statute authorizing redemption controls in the case of a tax sale by such city.⁵⁷ A charter provision is void which allows a longer period of time for redemption than is permitted by the express terms of the state constitution.⁵⁸

Under particular statutory or charter provisions or ordinances redemption may be made before the date of the sale;⁵⁹ before the issuance or execution of a deed;⁶⁰ before foreclosure of the right of redemption by suit;⁶¹ within a certain period of

46. N.J.—Devine v. Franks, Ch., 47 A. 228.

47. Tex.—Blair v. Guaranty Sav. Loan, etc., Co., 118 S.W. 608, 54 Tex.Civ.App. 443.

48. Tex.—Blair v. Guaranty Sav. Loan, etc., Co., supra.

49. Neb.—City of Plattsmouth v. Hazzard, 271 N.W. 801, 132 Neb. 284.

44 C.J. p 1363 note 15.

50. Tex.—Blair v. Guaranty Sav. Loan, etc., Co., 118 S.W. 608, 54 Tex.Civ.App. 443.

51. Tex.—Blair v. Guaranty Sav. Loan, etc., Co., supra.

52. Mich.—People v. Detroit, 8 Mich. 14, 77 Am.D. 433.

53. Iowa.—Hintrager v. Richter, 52 N.W. 188, 85 Iowa 222.

Compromise of tax claims generally see supra § 2073.

54. Iowa.—Hintrager v. Richter, supra.

55. **Payment under duress**

The fact that owner of land sold for delinquent municipal taxes neglected to make redemption by paying the correct amount required therefor to tax collector as provided by statute and then, in order to effect redemption so that he could comply with contract to sell land, had to pay amount exacted by holder of tax sale certificate, did not constitute such payment a payment under duress so as to entitle landowner to recover back an alleged overpayment, notwithstanding payment was made

under protest.—Margolis v. Interboro Holding Corporation, 18 A.2d 28, 125 N.J.Law 614.

Payment under protest

Where owner of land sold for delinquent municipal taxes paid under protest amount demanded by holder of tax sale certificate, without seeking appropriate remedy to test validity of demand because immediate redemption was necessary in order to fulfill owner's contract to sell the land, such payment was a voluntary payment for which there could be no recovery.—Margolis v. Interboro Holding Corporation, supra.

56. Ariz.—Trigg v. City of Yuma, 130 P.2d 59, 59 Ariz. 480.

Del.—Hill v. Ellis, 23 A.2d 112, 2 Terry 402.

Fla.—Burns v. Lucian, 33 So.2d 652.

Ga.—Forrester v. Lowe, 15 S.E.2d 719, 192 Ga. 469.

La.—Scott v. Ratcliff, 119 So. 33, 167 La. 237.

N.J.—Jacobus v. Cahill, 94 A. 799, 87 N.J.Law 562.

N.Y.—City of Beacon v. Asher Bernstein Realty Corp., 57 N.Y.S.2d 659, 185 Misc. 262, motion denied 60 N.Y.S.2d 616, 270 App.Div. 852—Boeck v. Incorporated Village of South Floral Park, 19 N.Y.S.2d 946, 174 Misc. 372.

Pa.—Appeal of Andrews Land Corporation, 27 A.2d 700, 149 Pa.Super. 212.

Tex.—Rollison v. Puckett, 198 S.W.2d 74, 145 Tex. 366.

Time for issuance of tax deed see infra § 2111 a.

Statute held valid

N.Y.—City of New Rochelle v. Echo Bay Waterfront Corporation, 49 N.Y.S.2d 673, 268 App.Div. 182, affirmed 60 N.E.2d 838, 294 N.Y. 678, certiorari denied 66 S.Ct. 24, 326 U.S. 720, 90 L.Ed. 426.

Statute held applicable to county and state taxes

Ala.—Timms v. Scott, 27 So.2d 487, 248 Ala. 286.

Void tax sale

The statute limiting the time for redemption after tax sales was not applicable where tax sale by municipality was void.—Olds v. City of Jamestown, 20 N.E.2d 756, 280 N.Y. 281.

57. Fla.—Burns v. Lucian, 33 So. 2d 652.

58. La.—Scott v. Ratcliff, 119 So. 33, 167 La. 237.

59. Fla.—Burns v. Lucian, 33 So.2d 652.

60. Fla.—Banks v. Shaw, 198 So. 341, 144 Fla. 550.

44 C.J. p 1363 note 24.

Deed to city

Cal.—Hosson v. City of Long Beach, 189 P.2d 787, 83 Cal.App.2d 745.

61. Md.—Shapiro v. National Color Printing Co., 60 A.2d 679.

Suit to foreclose right of redemption see supra § 2100 c.

In land court after two years

Mass.—City of Boston v. Barry, 53 N.E.2d 686, 315 Mass. 573—Gaunt v. Arzooonian, 46 N.E.2d 520, 313 Mass. 38.

time from the day of sale⁶² or after the sale and the deposit of the deed with a designated city official, such as the mayor;⁶³ or, where the mortgagee of the property has a right to redeem, within a certain time after he has received actual notice of the sale.⁶⁴ Statutory and charter regulations sometimes expressly prescribe the time within which redemption may be made by persons under disability⁶⁵ or by remaindermen.⁶⁶ Under some statutes the owner of realty sold to the town or city at a tax sale is entitled to redeem within a certain number of days after notification in writing that the town or city has had an offer approved by the town or the city council and mayor of the city for the purchase of the realty.⁶⁷

Redemption after expiration of time. After the time for redemption has expired, the right to redeem ordinarily is gone,⁶⁸ and it has been held that there is no power even in a court of equity thereafter to authorize a redemption of the property.⁶⁹

Extension of period of redemption. The tax purchaser is entitled to have his contract protected

against a subsequent extension of the period of redemption by statute,⁷⁰ and for this reason a charter amendment extending the time of redemption will not be given retroactive effect as against the contract rights of purchasers at tax sales held before the amendment went into effect.⁷¹

§ 2104. Procedure

Redemption from a municipal tax sale must be made in the mode prescribed by statute, although in a proper case a bill in equity to redeem will lie.

Where the law does not require any particular form of procedure in order to assert the right to redeem from a municipal tax sale, any transaction by which the purchaser under the tax sale and the owner of the property accomplish this purpose will be sufficient.⁷² Where the procedure is prescribed by statutory regulations, redemption must be made in the mode prescribed.⁷³ Payment must be made to the person designated by the statute,⁷⁴ although it has been held that, where the statute designates a public officer as the person to receive the money, a tender or payment to the purchaser himself will

62. Computation of time

The time limited for redemption begins to run from the date the deed is filed and not from the date of sale.—*West v. Duncan*, C.C.Miss., 42 F. 430.

63. U.S.—*Berthold v. Hoskins*, C.C.Miss., 38 F. 772.

64. Mass.—*Hawks v. Davis*, 69 N.E. 1072, 185 Mass. 119.
44 C.J. p 1363 note 26.

65. U.S.—*Mockbee v. Upperman*, D.C., 17 F.Cas.No.9,687, 5 Cranch C.C. 635.

Miss.—*Alvis v. Hicks*, 116 So. 612, 150 Miss. 306.

66. Applicability of general statute to municipal tax sales

N.C.—*Tiddy v. Graves*, 37 S.E. 513, 127 N.C. 502.

44 C.J. p 1363 note 28.

67. Where offer is by owner

(1) Former owner's offer to redeem realty more than a year after town's purchase thereof at tax sale by paying all taxes, interest and charges due the town was not governed by statute providing for redemption within a designated number of days after notice to person to whom property was last assessed of receipt of an offer approved by town council to purchase such realty, where no such offer to purchase had been made by any third person, and hence tax collector's failure to conform to provisions of such statute would not cast a cloud on the title acquired through such redemption.—*Swanson v. Fielder*, 27 A.2d 184, 68 R.I. 214.

(2) Where former owner's offer to redeem realty more than a year after town's purchase thereof at tax sale by paying all taxes, interest and charges due the town was accepted and town treasurer executed and delivered to former owner quitclaim deed of town's rights, title, and interest in the realty, a cloud upon the title thus acquired might reasonably result from the absence of any action by town council approving, authorizing or ratifying execution and delivery of such deed.—*Swanson v. Fielder*, supra.

68. Ga.—*Forrester v. Lowe*, 15 S.E. 2d 719, 192 Ga. 469.

N.Y.—*City of Peekskill v. Perry*, 72 N.Y.S.2d 351, 272 App.Div. 940.

Tex.—*State v. Moak*, 207 S.W.2d 894, 146 Tex. 322.
44 C.J. p 1363 note 34.

69. Ga.—*Montford v. Allen*, 36 S.E. 305, 111 Ga. 18.

70. Mich.—*Rott v. Steffens*, 201 N.W. 227, 229 Mich. 241, 250, 38 A.L.R. 224.

71. Mich.—*Rott v. Steffens*, supra.
44 C.J. p 1363 note 33.
Impairment of obligation of contract see Constitutional Law § 296.

72. Tex.—*Bente v. Sullivan*, 115 S.W. 350, 52 Tex.Civ.App. 454.
44 C.J. p 1363 note 38.

Mandamus with respect to redemption from tax sales see Mandamus § 193.

Effect of quitclaim deed

Where mortgagees, undertaking to redeem realty title to which had been

aken by borough through tax sale for costs, paid requested amount and borough accepted its share thereof and joined in quitclaim deed to mortgagees, such deed extinguished or transferred borough's equitable interests in realty which were substituted for tax liens.—*Hall v. Borough of McKees Rocks*, 48 A.2d 31, 159 Pa. Super. 418.

73. Ala.—*Bracely v. Noble*, 77 So. 368, 201 Ala. 74.

N.Y.—*City of New Rochelle v. Echo Bay Waterfront Corporation*, 49 N.Y.S.2d 673, 268 App.Div. 182, affirmed 60 N.E.2d 838, 291 N.Y. 678, certiorari denied 66 S.Ct. 24, 326 U.S. 720, 90 L.Ed. 426.

Certificate of redemption

Under statute permitting redemption of property which has been adjudicated to the state or any of its political subdivisions as long as title thereto is in the state or any of its political subdivisions, and requiring the register of the state land office or the governing authority of such political subdivision to execute and deliver a certificate of redemption, if lands have been adjudicated to a political subdivision and the transaction is with the political subdivision and all requisites and formalities of the act have been complied with, the proper authority of the political subdivision must execute and deliver the certificate of redemption.—*State ex rel. Hodge v. Grace*, 184 So. 527, 181 La. 15.

74. Ala.—*Bracely v. Noble*, 77 So. 368, 201 Ala. 74.
44 C.J. p 1364 note 40.

be a sufficient compliance with the law, at least in equity.⁷⁵

Where a lawful tender is made by the owner within the redemption period and is rejected, title to the property is nevertheless revested in the owner.⁷⁶

Action to redeem. Where the statutes do not furnish a complete and adequate remedy for the redemption of land from a municipal tax sale, a bill in equity to redeem will lie.⁷⁷ In a suit in equity to redeem land from a void municipal tax sale, complainant must do equity by payment to the purchaser or those standing in the purchaser's rights of all just claims for taxes which in equity and good conscience should be paid;⁷⁸ but in such

a suit possession of the land at the time of its commencement is immaterial.⁷⁹ A statute limiting the period of redemption from municipal tax sales does not bar a bill in equity seeking redemption after the period prescribed where the tax sale was void.⁸⁰

The petition, bill, or complaint must allege all the facts necessary to warrant the granting of the relief prayed.⁸¹ Where a tender of payment is alleged, the complaint should show a tender of the amount due,⁸² including all items which are fixed and certain⁸³ and an offer to pay such sums as may be found due in respect of such items as are uncertain and subject to dispute.⁸⁴ Where the redemptioner admits that stated amounts had been paid for the property at the sale, but fails to allege in the petition or bill payment or tender of such amounts

75. Void tax deed

Where lot was sold for taxes, and defective certificate of purchase and void tax deed, which purchasers and city treasurer at first considered valid, were issued, owners could redeem by tendering amount of taxes directly to tax sale purchasers and by depositing such amount with clerk of court for benefit of purchasers refusing the tender, and were not required to pay such amount to city treasurer as required by ordinances relating to redemption prior to issuance of tax deed, and subsequent issuance of new certificate and deed did not destroy validity of such redemption.—*Krahenbuhl v. Clay*, 139 S.W.2d 970, 346 Mo. 111, 129 A.L.R. 1344.

76. Cal.—*Hosson v. City of Long Beach*, 189 P.2d 787, 83 Cal.App.2d 745.

Correction tax deed to city, even if legal, was ineffective, where its execution followed offers of payment of delinquent taxes together with penalty and costs by record title holders, since refusal of such offers cleared land of the tax lien and effected redemption.—*Hosson v. City of Long Beach*, supra.

77. Ala.—*Bains Bros. Inv. Co. v. Purdie*, 60 So. 920, 180 Ala. 333. 44 C.J. p 1364 note 39.

Action to foreclose right of redemption see supra § 2100 c.

Refusal of purchaser to accept tender

When redemptioner chooses to redeem from tax purchaser directly and such purchaser refuses to accept a tender of payment, bill in equity will lie to redeem.—*Kimble v. Fowler*, 131 So. 440, 222 Ala. 178—*Bains Bros. Inv. Co. v. Purdie*, 60 So. 920, 180 Ala. 333.

Redemption by mortgagee

Suits by mortgagees to redeem mortgaged property from foreclosed tax liens lie almost wholly within

realm of sound judicial discretion.—*Haynsworth v. Polk County Building & Loan Ass'n*, 149 So. 615, 111 Fla. 451.

Effect of statute declaring sales not void

Code section, the caption of which was "tax sales not void because of irregularities," did not affect right of redemption from a municipal tax sale, where the section's implicit language contradicted the caption by recognizing that such tax sale or assessment might be invalidated in case of an ineffective court proceeding instituted under the statute to effectuate a tax sale.—*Timms v. Scott*, 27 So.2d 487, 248 Ala. 286.

78. Ala.—*Timms v. Scott*, supra.

Amount paid for tax sale certificate, etc.

In suit by property owner to cancel admittedly void municipal tax deed and to redeem, where defendant had acquired municipal tax sale certificates and paid subsequent municipal taxes for a sum equal to only a small fractional part of the face of the certificates and subsequent taxes, property owner was entitled in equity to redeem and to have defendant's lien canceled on payment by property owner of an amount equal only to the amount which defendant actually paid for the certificates and the subsequent taxes, plus interest.—*Banks v. Shaw*, 198 So. 341, 144 Fla. 550.

79. Ala.—*Timms v. Scott*, 27 So.2d 487, 248 Ala. 286.

80. Ala.—*Timms v. Scott*, supra.

81. Ala.—*Kimble v. Fowler*, 131 So. 440, 222 Ala. 178.

Ga.—*Forrester v. Lowe*, 15 S.E.2d 719, 192 Ga. 469.

Foreclosed tax lien

Mortgagee's bill seeking right to redeem mortgaged property from tax lien foreclosed by city stated good equitable cause, although having ef-

fect of impeaching tax lien foreclosure decree entered over six months previously.—*Haynsworth v. Polk County Building & Loan Ass'n*, 149 So. 615, 111 Fla. 451.

82. Ala.—*Kimble v. Fowler*, 131 So. 440, 222 Ala. 178—*Bains Bros. Inv. Co. v. Purdie*, 60 So. 920, 180 Ala. 333.

Excuse for failure

When complainant alleges a demand on defendant purchaser for a statement of the amount necessary to redeem and a failure to comply with it, that fact does not excuse a failure to tender the amount of fixed charges known to complainant or ascertainable from the city records; neither does that fact excuse a tender of the lawful charges, in the absence of allegations that they were unknown to complainant and that he could not by due diligence ascertain them without a disclosure by the purchaser.—*Kimble v. Fowler*, 131 So. 440, 222 Ala. 178.

Failure to make deposit

In action to quiet title and for injunctive relief by purchaser at foreclosure sale and holder of subsequently executed trust deed against city tax deed purchaser, where purchaser alleged that he offered to redeem and reimburse and pay all sums disbursed on behalf of tax deed purchaser in the payment of taxes, interest, and penalties, and renewed offer in petition, failure to make deposit, if any, did not render petition demurrable.—*Robinson v. Burton*, Mo., 139 S.W.2d 942.

Question of fact

Mo.—*Robinson v. Burton*, supra.

83. Ala.—*Kimble v. Fowler*, 131 So. 440, 222 Ala. 178—*Bains Bros. Inv. Co. v. Purdie*, 60 So. 920, 180 Ala. 333.

84. Ala.—*Kimble v. Fowler*, 131 So. 440, 222 Ala. 178—*Bains Bros. Inv. Co. v. Purdie*, 60 So. 920, 180 Ala. 333.

before filing the suit, the petition or bill is demurrable.⁸⁵

In a suit to redeem in which the city filed a cross bill claiming title by virtue of tax sales to it, the city on introducing the list of lands sold to it makes out, under permissive statute, a prima facie case that the sales to the city were valid,⁸⁶ and the party claiming that the city violated a statute regarding the fixing of the place for tax sales has the burden of proving such contention.⁸⁷

§ 2105. Right of Tax Purchaser to Redemption Money

Where property is redeemed from a municipal tax sale, the tax purchaser is entitled to the redemption money.

Where property is redeemed from a municipal tax

sale, the tax purchaser is entitled to the redemption money,⁸⁸ and may maintain an action for its recovery,⁸⁹ provided he brings it against the person who is under statutory obligation to pay it over to him.⁹⁰

Where, under the statute, the duty to pay rests on the city collector, an action for recovery of the money cannot be maintained against the city;⁹¹ but if the duty, by the terms of the statute, rests on the municipality, action may be maintained against the city;⁹² and where the statute provides that the city shall make payment to the tax purchaser or his assigns, a payment made to the tax purchaser after he has assigned the certificate to another is no defense to an action brought by the assignee against the city.⁹³

d. Remedies for Wrongful Collection of Tax

§ 2106. Injunction

- a. In general
- b. Grounds and defenses
- c. Proceedings and relief

a. In General

In the absence of constitutional or statutory prohibitions, the collection of municipal taxes may be enjoined by the courts in proper cases.

In the absence of constitutional or statutory prohibitions, courts may enjoin the collection of municipal taxes in proper cases;⁹⁴ and some statutes authorize suits to enjoin the collection of municipal taxes in certain cases.⁹⁵ A municipal corporation cannot by ordinance deprive the courts of this pow-

er⁹⁶ or in any way limit or affect it by a contract with a taxpayer which the municipality had no statutory power to make.⁹⁷

Preliminary injunction. In a proper case the court may issue a preliminary or interlocutory injunction.⁹⁸ The court may properly grant an interlocutory injunction where there is conflicting evidence on the issues involved.⁹⁹

b. Grounds and Defenses

- (1) In general
- (2) Existence of other remedies
- (3) Conduct of complainant as affecting right

85. Ga.—Forrester v. Lowe, 15 S.E. 2d 719, 192 Ga. 469.

86. Miss.—Alvis v. Hicks, 116 So. 612, 150 Miss. 306.

87. Miss.—Alvis v. Hicks, supra.

88. Wash.—Bidwell v. Tacoma, 67 P. 259, 26 Wash. 518.

Title and rights of tax purchaser generally see supra § 2091.

89. Wash.—Bidwell v. Tacoma, supra.

90. Wash.—Bidwell v. Tacoma, supra.

91. N.Y.—Onderdonk v. Brooklyn, 31 Barb. 505.

44 C.J. p 1364 note 48.

92. Wash.—Bidwell v. Tacoma, 67 P. 259, 26 Wash. 518.

93. Wash.—Bidwell v. Tacoma, supra.

94. U.S.—City of Detroit v. Detroit & Canada Tunnel Co., C.C.A.Mich., 92 F.2d 833.

D.C.—Maryland & Virginia Milk Products Ass'n v. Hazen, 85 F.2d

302, 66 App.D.C. 136, certiorari denied 57 S.Ct. 29, 299 U.S. 566, 81 L.Ed. 417.

Ga.—Scott v. Mayor and Council of Mount Airy, 198 S.E. 693, 186 Ga. 652—Dodson Printers' Supply Co. v. Upham, 175 S.E. 920, 179 Ga. 353.

S.C.—Home Building & Loan Ass'n v. City of Spartanburg, 194 S.E. 143, 185 S.C. 353.

Grounds for injunctive relief see infra subdivision b of this section.

Injunction to restrain:

Collection of:

Taxes generally see the C.J.S. title Taxation §§ 717-728, also 61 C.J. p 1070 note 53 et seq.

Entire municipal tax in representative action by taxpayer see infra § 2145.

Enforcement of special assessments for public improvements see supra §§ 1528-1540.

Levy and assessment of municipal taxes see supra § 2057.

Sale of land for municipal taxes see supra § 2094.

Statutory prohibition held inapplicable to city taxes

Ga.—Elder v. Atlanta-Southern Dental College, 189 S.E. 254, 183 Ga. 634—Wilson v. City of Eatonton, 180 S.E. 227, 180 Ga. 598.

95. Kan.—Wellman v. City of Burr Oak, 262 P. 607, 124 Kan. 780.

96. S.C.—Vesta Mills v. Charleston, 38 S.E. 226, 60 S.C. 1.

44 C.J. p 1364 note 56.

97. Ga.—Augusta Factory v. Augusta, 10 S.E. 359, 88 Ga. 734.

98. Ga.—Rome v. Crozier, 68 S.E. 480, 134 Ga. 717.

Preliminary injunction held properly refused

Ga.—Jones v. City of Fairburn, 198 S.E. 216, 186 Ga. 493.

99. Ga.—Rome v. Crozier, 68 S.E. 480, 134 Ga. 717.

44 C.J. p 1364 note 55.

(1) In General

An injunction will lie to restrain the collection of a municipal tax where the tax is illegal or the levy is excessive, fraudulently imposed, or otherwise invalid.

Where the legal remedy is shown to be inadequate, as considered *infra* subdivision b (2) of this section, or where the municipal corporation has refused the taxpayer an opportunity to avail himself of it,¹ in the absence of a statutory prohibition an injunction will issue to enjoin the collection of a municipal tax on the ground of its illegality,² as where the property is exempt,³ or otherwise not liable,⁴ or belongs to another person,⁵ or where the levy is excessive,⁶ fraudulently imposed,⁷ unjustly discriminatory,⁸ or otherwise invalid.⁹ An injunction has been granted where the officer was proceeding to collect the tax under an ordinance before it became operative by due promulgation.¹⁰

On the other hand, the collection of a tax properly levied will not be enjoined;¹¹ nor will an injunction

ordinarily be granted at the suit of a taxpayer merely because of irregularity in the proceedings of the taxing officers,¹² especially where such irregularities may be corrected under order of the court in the same¹³ or other¹⁴ proceedings. An injunction will not be granted because of the failure to enforce the tax against other persons¹⁵ or because the land was so situated as not to receive the benefit of the taxes.¹⁶ A creditor of a municipality is not entitled to an injunction against the collection of his municipal taxes on the ground that the municipality is indebted to him, and has in its treasury a fund which could not be applied otherwise than by paying his debt, and which it refuses to pay until after the creditor discharges the claim against him for taxes.¹⁷ The enforcement of the collection of a tax by the officers of a municipality who are only *de facto* officers will not be enjoined;¹⁸ and the collection of city taxes by the officers duly authorized to enforce collection will not be restrained be-

1. Md.—*Havre de Grace v. Lewis*, 96 A. 515, 127 Md. 367.

2. Fla.—*City of Coral Gables v. Fluvia Corporation*, 185 So. 621, 135 Fla. 544.

Miss.—*City of Jackson v. Belhaven College*, 15 So.2d 621, 195 Miss. 734.

N.C.—*Reynolds v. City of Asheville*, 154 S.E. 85, 199 N.C. 212, followed in *Gilkey v. City of Asheville*, 154 S.E. 93, 199 N.C. 218.

Pa.—*Carey v. Borough of Larksville*, 38 Pa. Dist. & Co. 505, 33 Luz. Leg. Reg. 403, 31 Mun. L.R. 182.

S.C.—*Home Building & Loan Ass'n v. City of Spartanburg*, 194 S.E. 143, 185 S.C. 353.

44 C.J. p 1364 note 60.

3. Pa.—*Pittsburgh, etc., R. Co. v. Stowe Tp.*, 97 A. 197, 252 Pa. 149.

44 C.J. p 1364 note 61.

4. Fla.—*Certain Lands Upon Which Town of Lake Placid Taxes are Delinquent v. Town of Lake Placid*, 31 So.2d 249, 159 Fla. 180—*Riviera Club v. City of Armond*, 2 So.2d 721, 147 Fla. 401.

44 C.J. p 1364 note 62.

5. Ga.—*Folds v. City of Carrollton*, 21 S.E.2d 653, 194 Ga. 280.

Agreement to pay taxes on another's property

Where plaintiff had paid all taxes assessed by city against his property, he could enjoin the levy, on his property, of tax execution representing taxes on property conveyed to his wife, notwithstanding an agreement made with his wife and upheld by the court in a prior suit that he would pay the taxes thereon, as the wife alone could sue for breach of such agreement, and she was not a party to the action.—*Folds v. City of Carrollton*, *supra*.

6. Pa.—*James v. Pittsburgh*, 23 Pa. Dist. 637.

W.Va.—*Tygart's Valley Bank v. Philippi*, 18 S.E. 489, 38 W.Va. 219.

Arbitrariness

The fact that taxpayer was left in the dark as to how actual assessment by assessing officers of city was arrived at did not show arbitrariness on the part of the officers, so as to authorize intervention by a court of equity, since the determination of the weight to be given each factor is not arbitrariness except in the sense in which many honest and sensible judgments are so.—22 *Charlotte, Inc., v. City of Detroit*, 293 N.W. 647, 294 Mich. 275.

7. Del.—*National Tube Co. v. Shearer, Ch.*, 62 A. 1093.

What constitutes fraud

Fact that local assessing and tax collecting officers of city refused to accept recommended values made by state geologist as to valuations on property of mining corporation, and placed a valuation thereof above that recommended by geologist, did not show fraud which would entitle mining corporation to maintain suit to enjoin collection of taxes.—*Sunday Lake Iron Co. v. City of Wakefield*, 35 N.W.2d 470, 323 Mich. 497.

8. Fla.—*Graham v. West Tampa*, 71 So. 926, 71 Fla. 605.

44 C.J. p 1364 note 65.

9. Ga.—*Tarpley v. Carr*, 51 S.E.2d 638.

44 C.J. p 1364 note 66.

10. La.—*Soniat v. Krotz Springs*, 109 So. 840, 161 La. 1066.

11. Ind.—*Martin v. Ortlieb*, 1 N.E. 2d 1000, 210 Ind. 199.

Mich.—*Sunday Lake Iron Co. v. City of Wakefield*, 35 N.W.2d 470, 323

Mich. 497—22 *Charlotte, Inc., v. City of Detroit*, 293 N.W. 647, 294 Mich. 275.

Mo.—*Missouri Power & Light Co. v. City of Pattonsburg*, 125 S.W.2d 20, 343 Mo. 1128.

44 C.J. p 1365 note 68.

Fact that city mistakenly credited certain amount on taxes on mortgaged realty did not entitle mortgagee to have tax lien canceled and to inhibit city from collecting the taxes erroneously credited, where mortgagee, even though it deferred foreclosure of mortgage, in part because of reliance on the city's books, was not prejudiced, and no equity of the mortgagee was deferred or diminished—*Franklin Sav. Bank in City of New York v. City of New York*, 39 N.Y.S.2d 649, 179 Misc. 774.

12. Ga.—*Thomas v. Blakely*, 81 S.E. 218, 141 Ga. 488.

44 C.J. p 1365 note 69.

13. Ky.—*Levi v. Louisville*, 30 S.W. 973, 97 Ky. 394, 16 Ky.L. 872, 28 L.R.A. 480.

44 C.J. p 1365 note 70.

14. Iowa.—*Strohm v. Iowa City*, 47 Iowa 42.

44 C.J. p 1365 note 71.

15. Ga.—*Augusta Factory v. Augusta*, 10 S.E. 359, 83 Ga. 734.

Mo.—*Page v. St. Louis*, 20 Mo. 136.

16. Ga.—*Linton v. Athens*, 53 Ga. 588.

44 C.J. p 1365 note 74.

17. Ga.—*Kent v. Mayor and Council of Alamo*, 18 S.E.2d 769, 193 Ga. 445—*Cartersville Water-Works Co. v. Cartersville*, 16 S.E. 70, 89 Ga. 689.

18. Ga.—*Cochran v. Knott*, 139 S.E. 818, 165 Ga. 109.

cause there exists no city treasurer to receive the taxes collected.¹⁹

Statutory grounds. Some statutes authorize actions to restrain the collection of municipal taxes on certain grounds²⁰ and have the effect of limiting actions for injunctive relief to the grounds prescribed.²¹

Property outside, or illegally annexed to, city. The collection of city taxes on property outside the boundaries or jurisdiction of the city may be restrained by injunction.²² In some jurisdictions it has been held that an owner of lands annexed to a city by charter or statute may enjoin the collection of city taxes on the lands on the ground of the unconstitutionality of the act.²³ Where land is wholly unsuited for municipal purposes and so conditioned and situated that it can receive no benefit by being incorporated into the municipality, so as to make taxation of such lands violate organic property rights, the collection of taxes on the land for municipal purposes may be enjoined where there is no adequate remedy at law and the land owner has not lost by waiver, acquiescence, or otherwise his right to resist the unlawful taxation of his land.²⁴ In other jurisdictions, however, it has been held that an owner of land cannot enjoin the collection of taxes levied by a city on the ground that the property taxed has been illegally annexed to the city,²⁵ especially where the taxpayer has for a long time acquiesced in the validity of the annexation proceedings.²⁶

Pendency of other suits. Where the validity of

the tax is being contested in a pending suit, its collection will be enjoined until a decision is had;²⁷ and the pendency of another suit to restrain collection, brought against the same defendant and relating to the same tax, but instituted by another taxpayer in his individual capacity, is not ground for abating the present suit even though plaintiff in the present suit contributed toward the expense of conducting the other suit.²⁸

Partial invalidity. The collection of that portion of a municipal tax which is illegal may be enjoined;²⁹ and executions issued for a bulk sum covering taxes partly legal and partly illegal will be enjoined where no separation of the legal taxes from the illegal has been made.³⁰

Railroad aid tax. The collection of a railroad aid tax may be enjoined because of false representations as to the road.³¹ A tax to pay bonds issued for railroad aid may be enjoined where irregularly issued,³² but not where there is no valid legal defense to the payment of the bonds in the hands of the holders.³³ An injunction will not be granted against the collection of a tax to pay bonds ordered issued to one corporation but actually issued to its successor with which the old company had consolidated, where in all other respects the issue was regular;³⁴ and an injunction against collection of a tax in aid of a railroad serving a particular town will not be granted on the ground that since the vote for the tax a narrow gauge road has been constructed, in the absence of evidence that such construction is not fully adequate to meet the town's requirements.³⁵

19. Tex.—Jones v. City of Uvalde, Civ.App., 57 S.W.2d 1129, error dismissed.

20. Kan.—Wellman v. City of Burr Oak, 262 P. 607, 124 Kan. 780.

21. **Illegal tax**

Statute limits landowner's privilege to enjoining tax in itself illegal or creation of burden or levy of tax that will be illegal.—Wellman v. City of Burr Oak, *supra*.

22. Ky.—Standard Oil Co. v. City of Barbourville, 120 S.W.2d 397, 274 Ky. 742.

Neb.—Hemple v. Hastings, 113 N.W. 187, 79 Neb. 723.

Property held within jurisdiction of city

Mont.—Ogle v. Town of Ronan, 117 P.2d 257, 112 Mont. 394.

23. Tex.—City of Waco v. Higginson, Civ.App., 226 S.W. 1084, reversed on other grounds, Com.App., 243 S.W. 1078.

Collateral attack on annexation proceedings generally see *supra* § 66.

24. Fla.—Riviera Club v. City of Ormond, 2 So.2d 721, 147 Fla. 401—A. M. Klemm & Son v. City of Winter Haven, 192 So. 652, 141 Fla. 60, appeal dismissed 60 S.Ct. 810, 309 U.S. 638, 84 L.Ed. 993, rehearing denied 60 S.Ct. 897, 310 U.S. 656, 84 L.Ed. 1420—City of Winter Haven v. A. M. Klemm & Son, 192 So. 646, 141 Fla. 75—State ex rel. Harrington v. City of Pompano, 188 So. 610, 136 Fla. 730—Martha Bright Farms v. Broward County Port Authority, 158 So. 70, 117 Fla. 361, appeal dismissed Martha Bright Farms v. Davis, 55 S.Ct. 209, 293 U.S. 531, 79 L.Ed. 640.

Unbenefitted rural land

Fla.—City of South Miami v. State ex rel. Landis, 192 So. 624, 140 Fla. 740—City of Sarasota v. Skillin, 178 So. 837, 130 Fla. 724—State ex rel. Attorney General v. City of Avon Park, 149 So. 409, 108 Fla. 641, rehearing denied State ex rel. Davis v. City of Avon Park, 151 So. 701, 117 Fla. 556, modified on other grounds 158 So. 159, 117 Fla. 565, 98 A.L.R. 230.

25. Kan.—Gardner v. Benn, 105 P. 435, 81 Kan. 442, 905.

44 C.J. p 1365 note 79.

26. Ind.—Logansport v. La Rose, 99 Ind. 117—Worley v. Harris, 82 Ind. 493.

27. Ala.—Vinemont v. Allison, 68 So. 142, 191 Ala. 316.

28. Ala.—Davis v. Petrinoich, 21 So. 344, 112 Ala. 654, 36 L.R.A. 615.

29. Ga.—City of Moultrie v. Moultrie Banking Co., 171 S.E. 131, 177 Ga. 714.

Ill.—Dollashon v. Whittaker, 58 N.E. 301, 187 Ill. 84.

30. Ga.—Burkhart v. Fitzgerald, 73 S.E. 583, 137 Ga. 366.

31. Iowa.—Curry v. Decatur County, 15 N.W. 602, 61 Iowa 71.

32. N.Y.—Hills v. Peekskill Sav. Bank, 26 Hun 161.

33. Ind.—Wilkinson v. Peru, 61 Ind. 1.

34. Ind.—Mt. Vernon v. Hovey, 52 Ind. 563.

35. Iowa.—Meader v. Lowry, 45 Iowa 684.

(2) Existence of Other Remedies

An injunction will not lie to restrain the collection of a municipal tax where the taxpayer has an adequate remedy at law.

An injunction to restrain the collection of a municipal tax will be granted where complainant's right is clear and the injury imminent,³⁶ and the remedy at law inadequate for his protection.³⁷ The failure of a taxpayer to protest or appeal to the assessment board will not deprive him of injunctive relief to restrain the collection of municipal taxes on property outside the boundaries or jurisdiction of the city.³⁸

Conversely, an injunction will not be granted where there is an adequate remedy at law³⁹ or by proceedings before a board to review the assessment.⁴⁰

(3) Conduct of Complainant as Affecting Right

In a suit to restrain the collection of a municipal tax, the complainant must do equity, and in some juris-

dictions he is required to pay, or to offer to pay, as much of the tax as is admitted to be legal.

In a suit to restrain the collection of a municipal tax, complainant is required to do equity.⁴¹ The unexplained failure of complainant to comply with his undertaking in a contract for exemption can be set up as a defense to his suit for an injunction based on the exemption.⁴²

Where it is asserted that no part of the alleged assessment is a legal tax, plaintiff is not required to pay, or tender payment of, any sum of money for taxes;⁴³ where plaintiff's claim that the whole tax is illegal is made in good faith and on plausible grounds, relief will not be refused merely because it was ultimately found that a part of the tax was legal.⁴⁴ Payment, or an offer to make payment, of as much of the tax as is admitted to be legal is, however, a condition precedent in some jurisdictions to an action to enjoin the collection of the illegal part;⁴⁵ and failure on the part of the taxpayer to offer payment of as much of the tax as is legally due is a defense in his suit to enjoin the collection of the illegal part of the tax⁴⁶ and the suit may be

36. U.S.—Leary v. Jersey City, N.J., 189 F. 419, affirmed 208 F. 854, 126 C.C.A. 12, affirmed 39 S.Ct. 115, 248 U.S. 328, 63 L.Ed. 271.

37. Ga.—Folds v. City of Carrollton, 21 S.E.2d 663, 194 Ga. 280—Scott v. Mayor and Council of Mount Airy, 198 S.E. 693, 186 Ga. 652.

44 C.J. p 1366 note 93.

38. Neb.—Sioux City Bridge Co. v. Dakota County, 84 N.W. 607, 61 Neb. 75.

44 C.J. p 1366 note 77.

City ousted of jurisdiction over lands
Failure of owners of rural lands which it was sought to include in city but from which city was ousted of jurisdiction to apply to municipal board of equalization for tax adjustment did not bar relief in suit to enjoin collection of ad valorem taxes on such lands for servicing outstanding municipal bonds.—Smith v. City of Winter Haven, 18 So.2d 4, 154 Fla. 439.

39. Ga.—Scott v. Mayor and Council of Mount Airy, 198 S.E. 693, 186 Ga. 652—City of Nashville v. Lanier Motor Co., 189 S.E. 532, 183 Ga. 742.

44 C.J. p 1366 note 94.

Admission of illegality

Ga.—Scott v. Mayor and Council of Mount Airy, 198 S.E. 693, 186 Ga. 652—Social Circle Cotton Mill Co. v. City of Social Circle, 136 S.E. 432, 183 Ga. 465.

Appeal to courts from assessment

Pa.—Wynnefield United Presbyterian Church v. City of Philadelphia, 35 A.2d 276, 348 Pa. 352.

Payment under protest and recovery
D.C.—Maryland & Virginia Milk Products Ass'n v. Hazen, 85 F.2d 302, 66 App.D.C. 136, certiorari denied 57 S.Ct. 29, 299 U.S. 566, 81 L.Ed. 417.

Mich.—Sunday Lake Iron Co. v. City of Wakefield, 35 N.W.2d 470, 323 Mich. 497—Congregation Ben Jacob v. City of Detroit, 1 N.W.2d 26, 299 Mich. 652.

40. Iowa.—Macklot v. Davenport, 17 Iowa 379.

Pa.—Davison v. Erie, 118 A. 429, 274 Pa. 523.

41. Fla.—City of Fort Myers v. Heitman, 4 So.2d 871, 148 Fla. 432, rehearing denied 5 So.2d 410, 149 Fla. 203.

Ga.—Clisby v. City of Macon, 13 S.E.2d 772, 191 Ga. 749.

42. Md.—Havre de Grace Real Estate, etc., Co. v. Havre de Grace, 61 A. 662, 102 Md. 33.

43. Fla.—City of Coral Gables v. Fluvia Corporation, 185 So. 621, 135 Fla. 544.

44. Minn.—Fairley v. Duluth, 185 N.W. 390, 150 Minn. 374, 32 A.L.R. 1258.

45. Ga.—Kent v. Mayor and Council of Alamo, 18 S.E.2d 769, 193 Ga. 445—Clisby v. City of Macon, 13 S.E.2d 772, 191 Ga. 749—Pierce Trading Co. v. City of Blackshear, 186 S.E. 721, 183 Ga. 649—People's Credit Clothing Co. v. City of Atlanta, 180 S.E. 873, 173 Ga. 653—Picquet v. City Council of Augusta, 64 Ga. 254.

44 C.J. p 1366 note 87.

Under some constitutions and statutes it is expressly required that payment be made of as much of the tax as is legal.—City of Fort Myers v. Heitman, 4 So.2d 871, 148 Fla. 432, rehearing denied 5 So.2d 410, 149 Fla. 203—Buchanan v. City of Tampa, 184 So. 104, 134 Fla. 618.

Effect of subsequent payment

The failure to have paid, or to have made an offer to pay, is not cured by subsequent payment of the amount admitted to be due.—Clisby v. City of Macon, 13 S.E.2d 772, 191 Ga. 749.

Sufficiency of tender

An offer by a taxpayer to pay all ad valorem taxes due to a municipality after credits are allowed him on a city warrant is not sufficient to constitute a tender.—Kent v. Mayor and Council of Alamo, 18 S.E.2d 769, 193 Ga. 445.

46. Ala.—Mobile v. Waring, 41 Ala. 139.

N.D.—Douglas v. Fargo, 101 N.W. 919, 13 N.D. 467.

Ascertainment of amount legally due

A petition by mutual building and loan association for injunction to restrain enforcement of tax execution by city, alleging that portion of execution represented taxes on capital of association loaned to members, which was exempt, and that remainder had not been paid, because association could not ascertain, and taxing authorities refused to ascertain, exact amount of taxes legally due, did not authorize injunction, in view of fact that city contended total

dismissed.⁴⁷ However, it has also been held that, in a suit to enjoin the collection of an allegedly invalid part of city taxes, the failure to pay that portion of the tax which admittedly is due does not necessitate the dismissal of the suit, but the court may grant the relief which it deems proper, conditioned on payment of such taxes within a stipulated period.⁴⁸

Acquiescence, estoppel, and laches. Complainant may be denied an injunction to restrain the collection of a municipal tax by reason of laches or estoppel.⁴⁹ In the case of an injunction to restrain the collection of a railroad tax on the ground of false representations as to the road, estoppel by acquiescence in the execution of the work cannot be set up as a defense against complainant taxpayers where it appears that they served notice of their intention to contest the tax before any work had been done.⁵⁰

c. Proceedings and Relief

- (1) In general
- (2) Persons entitled to sue and parties
- (3) Pleading
- (4) Evidence
- (5) Hearing, decree, and relief

(1) In General

The general rules governing the proceedings and relief in injunction suits ordinarily apply in suits to enjoin the collection of municipal taxes.

amount of execution was legally due, and ascertainment of amount for which association contended was mere matter of mathematical calculation.—*Elder v. Home Building & Loan Ass'n*, 194 S.E. 745, 185 Ga. 258.

47. Ga.—*Clisby v. City of Macon*, 13 S.E.2d 772, 191 Ga. 749.

48. Fla.—*City of Fort Myers v. Heltman*, 5 So.2d 410, 149 Fla. 203. S.C.—*Home Building & Loan Ass'n v. City of Spartanburg*, 194 S.E. 143, 185 S.C. 353.

Equity will consider that done which should have been done, and on payment of taxes found to be legally due, equitable relief will be granted.—*City of Fort Myers v. Heltman*, 5 So.2d 410, 149 Fla. 203.

49. Fla.—*Haines City Heights v. Haines City*, 172 So. 484, 127 Fla. 86.

Laches held not shown

U.S.—*Morin v. City of Stuart*, C.C.A. Fla., 111 F.2d 773, 129 A.L.R. 250. Fla.—*City of Fort Myers v. Heltman*, 5 So.2d 410, 149 Fla. 203.

50. Iowa.—*Curry v. Decatur County*, 15 N.W. 603, 61 Iowa 71.

The general rules governing the proceedings and relief in injunction suits and in suits to restrain the collection of taxes, as considered in the C.J.S. titles Injunctions §§ 162-223 and Taxation § 728, also 61 C.J. p 1092 note 93 et seq, ordinarily are applicable in suits to enjoin the collection of municipal taxes.⁵¹ The suit must be instituted within such time as may be fixed by statute.⁵²

(2) Persons Entitled to Sue and Parties

The persons whose property interests are involved in the collection of a municipal tax are the proper parties plaintiff in an action brought to enjoin the collection.

The persons whose property interests are involved in the collection of a municipal tax are the proper parties plaintiff in an action brought to enjoin the collection⁵³ even though some one else other than the property owner is obligated by contract to pay the tax.⁵⁴ The municipality⁵⁵ or state⁵⁶ is not a proper party plaintiff. The action may be brought by the taxpayer in his own name⁵⁷ or on behalf of all others similarly situated,⁵⁸ and it may be proper to allow all interested citizens other than the original plaintiff to be made parties plaintiff;⁵⁹ but taxpayers cannot join as plaintiffs where their interests are separate and distinct.⁶⁰

Parties defendant. The municipality is a proper party defendant,⁶¹ and the officers of the municipality alleged to have made the invalid assessment and to be attempting to enforce collection of the tax are

51. Ky.—*City of Hickman v. Helm*, 94 S.W.2d 665, 264 Ky. 266.

52. Ga.—*Consolidated Distributors v. City of Atlanta*, 20 S.E.2d 421, 193 Ga. 853, certiorari denied 63 S.Ct. 61, 317 U.S. 662, 87 L.Ed. 532.

53. Ark.—*Arkansas-Missouri Power Corp. v. City of Rector*, 217 S.W. 2d 335.

44 C.J. p 1366 note 4

Foreign corporation which was a taxpayer on property in city, and which would be subject to tax if it were imposed, was entitled to maintain suit in equity to enjoin collection thereof.—*Arkansas-Missouri Power Corp. v. City of Rector*, supra.

54. La.—*Soniat v. Krotz Springs*, 109 So. 840, 161 La. 1066.

55. Ill.—*Nunda v. Crystal Lake*, 79 Ill. 311.

44 C.J. p 1366 note 6.

Tax by other municipality

(1) The taxpayer, and not the municipality, is the proper party plaintiff in an action to enjoin the collection of a tax levied by another municipality.—*Nunda v. Crystal Lake*, supra.

(2) Village was not real party in interest in action to restrain collec-

tion by park district of taxes from property within village.—*Village of Kensington v. Town of North Hempstead*, 258 N.Y.S. 355, 236 App.Div. 340, affirmed 185 N.E. 94, 261 N.Y. 260.

56. Kan.—*State v. Shufford*, 94 P. 137, 77 Kan. 263.

44 C.J. p 1366 note 7.

57. N.C.—*London v. Wilmington*, 78 N.C. 109.

44 C.J. p 1366 note 8.

58. Minn.—*Fairley v. Duluth*, 185 N.W. 390, 150 Minn. 374, 32 A.L.R. 1258.

N.C.—*London v. Wilmington*, 78 N.C. 109.

Representative action to restrain collection of entire tax see *infra* § 2145.

59. N.C.—*Cobb v. Elizabeth City*, 75 N.C. 1.

60. Iowa.—*Lewis v. Eshleman*, 11 N.W. 617, 57 Iowa 633.

61. Ga.—*Gelders v. Fitzgerald*, 69 S.E. 569, 135 Ga. 400.

S.C.—*Corpus Juris* quoted in *De Pass v. City of Spartanburg*, 1 S.E.2d 904, 190 S.C. 22.

properly joined as parties defendant;⁶² but it has been held that the municipality itself need not be made a party by name where the mayor and members of the council are made defendants, and appear and answer in their official capacity as well as individuals,⁶³ unless the property rights of the municipality would be affected by the decree.⁶⁴

Persons to whom the taxes are to be ultimately paid are not necessary parties, where they have no vested interest in the tax levied.⁶⁵ If such interest exists, they are necessary parties,⁶⁶ but if they have not been joined the suit should be continued, rather than dismissed.⁶⁷

In an action to enjoin the collection of taxes to pay bonds, the bondholders are necessary parties,⁶⁸ unless the bonds are clearly shown to be void.⁶⁹

(3) Pleading

In a suit to restrain the collection of municipal taxes, the complaint must be definite and certain and must set forth the facts entitling the complainant to relief.

The general rules governing pleading in injunc-

tion suits and in suits to restrain the collection of taxes, as considered in the C.J.S. titles Injunctions §§ 181-188, and Taxation § 728, also 61 C.J. p. 1094 note 43 et seq, ordinarily apply in suits to enjoin the collection of municipal taxes.⁷⁰ The allegations of the complaint, petition, or bill must be definite and certain,⁷¹ and must set forth the facts entitling complainant to relief,⁷² and, if the ordinance on which the tax is based is involved, the bill must have a copy of the ordinance annexed thereto.⁷³ Mere informalities do not make the complaint demurrable.⁷⁴ Matters of defense need not be alleged in the bill or complaint.⁷⁵

A general demurrer on the ground that no cause of action is stated has been held not to be sufficient to raise the defense of a bar by a statute of limitations, although the petition shows on its face that the suit is barred by the statute of limitations, but defendant must take advantage of the statute of limitations by demurrer expressly invoking such defense.⁷⁶

62. Ga.—Gelders v. Fitzgerald, 69 S.E. 569, 135 Ga. 400.

S.C.—De Pass v. City of Spartanburg, 1 S.E.2d 904, 190 S.C. 22.

63. S.C.—De Pass v. City of Spartanburg, supra.

Va.—Campbell v. Bryant, 52 S.E. 638, 104 Va. 509.

64. Ga.—White v. Forsyth, 71 S.E. 1073, 136 Ga. 434.

S.C.—De Pass v. City of Spartanburg, 1 S.E.2d 904, 190 S.C. 22.

65. Ill.—Leitch v. Wentworth, 71 Ill. 146.

66. Ill.—Howell v. Peoria, 90 Ill. 104.

67. Ill.—Howell v. Peoria, supra.

68. Tex.—Board v. Texas, etc., R. Co., 46 Tex. 316.

44 C.J. p 1367 note 20.

Intervention

In corporation's suit to enjoin city officials from enforcing ad valorem taxation of plaintiff's industrial plant for payment of city bonds, issued before adoption of constitutional provision under which plaintiff claimed tax exemption, a holder of such bonds should have been allowed to intervene as defendant, since he had direct interest in performance of bond contract by means in force when contract was made, in absence of law making him secure by other adequate and certain means.—American Can Co. v. City of Tampa, 14 So.2d 203, 152 Fla. 798.

69. Ill.—Edwards v. People, 88 Ill. 340.

70. Fla.—City of Winter Haven v. A. M. Klemm & Son, 192 So. 646, 141 Fla. 75.

Pleading construed

Fla.—City of Fort Myers v. Heitman, 5 So.2d 410, 149 Fla. 203.

71. Ala.—Albertville v. Rains, 18 So. 255, 107 Ala. 691.

72. Fla.—A. M. Klemm & Son v. City of Winter Haven, 192 So. 652, 141 Fla. 60, appeal dismissed 60 S.Ct. 810, 309 U.S. 638, 84 L.Ed. 993, rehearing denied 60 S.Ct. 897, 310 U.S. 656, 84 L.Ed. 1420.—City of Winter Haven v. A. M. Klemm & Son, 192 So. 646, 141 Fla. 75. 44 C.J. p 1367 note 24.

Allegations held sufficient

Ga.—Elder v. Atlanta-Southern Dental College, 189 S.E. 254, 183 Ga. 634.

Ky.—City of Hickman v. Helm, 94 S.W.2d 665, 264 Ky. 266.—Illinois Cent. R. Co. v. City of Louisville, 60 S.W.2d 603, 249 Ky. 219.

44 C.J. p 1367 note 24 [b] [c].

Allegations held insufficient

Fla.—Buchanan v. City of Tampa, 184 So. 104, 134 Fla. 618.

Ga.—National Linen Service Corporation v. City of Gainesville, 174 S.E. 621, 178 Ga. 772.—Cochran v. Knott, 139 S.E. 818, 165 Ga. 109.

N.J.—New Jersey Bell Tel. Co. v. City of Newark, 42 A.2d 623, 136 N.J.Eq. 479.

Tenn.—King v. City of Bristol, 4 S.W.2d 343, 156 Tenn. 643.

Absence of municipal benefits

Fla.—A. M. Klemm & Son v. City of Winter Haven, 192 So. 652, 141 Fla. 60, appeal dismissed 60 S.Ct. 810, 309 U.S. 638, 84 L.Ed. 993, rehearing denied 60 S.Ct. 897, 310 U.S. 656, 84 L.Ed. 1420.

Payment of tax

(1) In action to enjoin collection

of municipal taxes, it was not sufficient to allege that plaintiffs offered and stood ready to pay amount admitted to be due.—Clisby v. City of Macon, 13 S.E.2d 772, 191 Ga. 749.

(2) In action to enjoin sale of a city lot under municipal tax execution, where petition alleged that the execution had been satisfied by previous sale of other property to the city under same execution and for an amount sufficient to pay execution in full, and that plaintiff purchased lot in question relying on such facts, petition was not subject to demurrer on ground that it failed to allege that taxes had been paid by plaintiff or any one else, or that she had offered to pay them.—Elder v. Chambliss, 23 S.E.2d 176, 195 Ga. 148.

Temporary injunction

An ex parte temporary injunction restraining city from suing for and collecting taxes upon plaintiffs' property at an assessed valuation in excess of specified amount was required to be supported by pleaded affirmative facts as distinguished from mere legal conclusions.—City of Beaumont v. Night, Tex.Civ.App., 145 S.W.2d 222.

73. La.—Soniat v. White, 99 So. 223, 155 La. 290.

74. Mo.—Winkler v. Halstead, 36 Mo.App. 25.

75. Ky.—City of Hickman v. Helm, 94 S.W.2d 665, 264 Ky. 266.

76. Ga.—Consolidated Distributors v. City of Atlanta, 20 S.E.2d 421, 193 Ga. 853, certiorari denied 63 S.Ct. 61, 317 U.S. 662, 87 L.Ed. 532.

Amendment of pleadings. In a proper case the court may permit the filing of amended pleadings.⁷⁷

(4) Evidence

The general rules governing evidence in injunction suits and in suits to enjoin the collection of taxes ordinarily apply in suits to restrain the collection of municipal taxes.

The general rules governing evidence in suits for injunctions and in suits to enjoin the collection of taxes, as considered in the C.J.S. titles Injunctions §§ 189-192, and Taxation § 728, also 61 C.J. p 1097 note 95 et seq, usually are applicable in suits to restrain the collection of municipal taxes.⁷⁸ Accordingly, the burden is on the municipality to prove that a tax in excess of the statutory limit has been duly authorized,⁷⁹ although if the tax is for a purpose which may or may not be within the statutory restriction there is a presumption in favor of its legality.⁸⁰ A presumption that taxes have been paid, arising from laches in collecting them,⁸¹ may be overcome by a finding of commissioners of adjustment, having jurisdiction over the subject, that the taxes had not been paid.⁸²

The general rules are applicable with respect to the admissibility⁸³ and the weight and sufficiency⁸⁴ of the evidence. Suing the municipality in its corporate name on the ground that it had forfeited its charter before the taxes were levied is not an admission of the legal existence of the municipality.⁸⁵

Temporary injunction. On a rule to show cause why a preliminary injunction against the collection

of municipal taxes should not issue, the court may admit the minutes of the meeting of the city council to show that the ordinance levying the tax conformed with statutory requirements, and thereby complainant's right to a preliminary injunction may be disproved.⁸⁶

(5) Hearing, Decree, and Relief

The general rules governing the hearing, decree, and relief granted in injunction suits and in suits to restrain the collection of taxes ordinarily are applicable in suits to enjoin the collection of municipal taxes.

In suits to restrain the collection of municipal taxes the general rules regulating the hearing, decree, and relief given in injunction suits and in suits to enjoin the collection of taxes, as considered in the C.J.S. titles Injunctions §§ 199-223 and Taxation § 728, also 61 C.J. p 100 note 47 et seq, ordinarily are applicable.⁸⁷ The decree should not give complainant any relief further than that to which he is entitled.⁸⁸ A court of equity should not, on a bill for injunction to restrain the collection of taxes on application of one or more individual complainants who are parties to the suit, enjoin the collection of taxes as to noncomplaining property owners who are not parties to the suit.⁸⁹ An injunction restraining the collection of municipal taxes on land incorporated into the municipality which is unsuited for municipal purposes and which receives no benefit from its inclusion in the municipality does not change the boundary lines of the municipality, but it restrains the collection of municipal taxes while

77. Fla.—City of Winter Haven v. A. M. Klemm & Son, 192 So. 646, 141 Fla. 75.

78. Mont.—Ogle v. Town of Ronan, 117 P.2d 257, 112 Mont. 394.

79. Kan.—Atchison, etc., R. Co. v. Kansas City, 140 P. 1040, 92 Kan. 300.

80. Kan.—Atchison, etc., R. Co. v. Kansas City, supra.

81. U.S.—Leary v. Jersey City, N.J., 189 F. 419, affirmed 208 F. 854, 126 C.C.A. 12, affirmed 39 S.Ct. 116, 248 U.S. 328, 63 L.Ed. 271.

82. U.S.—Leary v. Jersey City, supra.

83. Evidence held admissible
Ga.—Elder v. Atlanta-Southern Dental College, 189 S.E. 254, 183 Ga. 634.

Evidence held inadmissible
Mont.—Ogle v. Town of Ronan, 117 P.2d 257, 112 Mont. 394.

84. Evidence held sufficient
Ga.—Elder v. Atlanta-Southern Dental College, 189 S.E. 254, 183 Ga. 634.

Ky.—Standard Oil Co. v. City of

Barbourville, 120 S.W.2d 397, 274 Ky. 742.

Tex.—Exporters & Traders Compress & Warehouse Co. v. City of Marlin, Civ.App., 130 S.W.2d 860, error dismissed, judgment correct.

85. W.Va.—Hornbrook v. Elm Grove, 21 S.E. 851, 40 W.Va. 543, 28 L.R.A. 416.

86. La.—Soniat v. White, 96 So. 19, 153 La. 424.

87. Ky.—City of Hickman v. Helm, 94 S.W.2d 665, 264 Ky. 266—Owensboro Waterworks Co. v. Owensboro, 74 S.W. 685, 24 Ky.L. 2530, rehearing denied 75 S.W. 268, 25 Ky.L. 434.

New assessment or reassessment

(1) Decree restraining municipal taxing authorities from fixing any higher valuations than those federal court itself had established as basis for its injunction restraining collection of taxes originally assessed constituted error, since decree should have left taxing authorities free to make new assessment.—City of Detroit v. Detroit & Canada Tunnel Co., C.C.A.Mich., 92 F.2d 833.

(2) In suit to enjoin the collection of municipal taxes because of error of tax assessments as made on the tax rolls, no reassessments or actual corrections of assessments were necessary.—City of Fort Myers v. Heitman, 5 So.2d 410, 149 Fla. 203.

Excessive valuation

Court would not be authorized to set aside assessment made by city merely because the value of the property as found by jury was less than that found by the board of equalization, especially in view of jury's finding that the board did not act arbitrarily in fixing the value.—Exporters & Traders Compress & Warehouse Co. v. City of Marlin, Tex.Civ.App., 130 S.W.2d 860, error dismissed, judgment correct.

Verdict held not to require judgment for taxpayer

Tex.—Exporters & Traders Compress & Warehouse Co. v. City of Marlin, supra.

88. Ky.—City of Hickman v. Helm, 94 S.W.2d 665, 264 Ky. 266.

89. Fla.—City of De Land v. Boyd, 147 So. 575, 109 Fla. 328.

the land receives no benefit by reason of its inclusion within the municipality.⁹⁰

Temporary injunction. Where complainant secures an order to show cause, based on an original summons and defective complaint and an affidavit, why an injunction pendente lite restraining defendant municipality from collecting taxes should not be granted, and before the return day of the order to show cause complainant serves an amended complaint abandoning the theory of the original complaint and completely changing his theory of action, the court cannot consider the amended complaint in passing on the motion, but is required to deny the motion without prejudice to a new or further application.⁹¹ Relief obtainable only by final judgment may not be secured by a temporary injunction.⁹²

§ 2107. Action to Cancel Tax Levy

An action to cancel the tax levy may be brought in some jurisdictions to prevent the collection of a municipal tax.

In some jurisdictions an action to cancel the tax levy may be brought to prevent the collection of

a municipal tax.⁹³ In such action it is not necessary to join the collector of taxes⁹⁴ or the person or corporation who, under the terms of the levy ordinance, is to receive the tax money when collected.⁹⁵ Where such action is brought under a statute providing for the determination of claims to real property and requiring that there shall be an apparent lien against the property to give the court jurisdiction, it cannot be maintained where it is established by the record that the tax lien has been discharged by lapse of time.⁹⁶

§ 2108. Affidavit of Illegality

Under some statutes and charter provisions, an affidavit of illegality may be filed to prevent the collection of an illegal municipal tax.

Some statutes and charter provisions afford a remedy for preventing the collection of illegal municipal taxes, by filing an affidavit of illegality with the officer to whom is intrusted the enforcement of an execution, and the duty is on such officer to return the execution with the affidavit of illegality to the proper court for trial.⁹⁷ If the officer fails or refuses to return the execution and affidavit to

90. Fla.—Riviera Club v. City of Ormond, 2 So.2d 721, 147 Fla. 401.—City of Winter Haven v. A. M. Klemm & Son, 192 So. 646, 141 Fla. 75.

91. N.Y.—Schmitt v. Incorporated Village of Saltaire, 84 N.Y.S.2d 151.

92. Tex.—City of Beaumont v. Night, Civ.App., 145 S.W.2d 222.

93. Mo.—Regan Land Co. v. City of Carthage, 108 S.W. 589, 129 Mo. App. 628.

Courts should not hesitate to strike down illegal system of taxation simply because it has been successfully resorted to for a long period and has produced revenue for the city.—Weiskopf v. City of Saratoga Spring, 279 N.Y.S. 878, 244 App. Div. 417, reversed on other grounds 200 N.E. 33, 269 N.Y. 634.

Notice of claim and limitation of actions

Statute barring actions against villages unless claim was filed within six months after cause of action accrued and action was commenced within year thereof did not bar action of equitable nature to cancel assessment, tax lien, and tax sale.—Ravensdale Holding Co. v. Village of Hastings on Hudson, 281 N.Y.S. 913, 156 Misc. 777.

Instructions

Tex.—West Texas Hotel Co. v. City of El Paso, Civ.App., 83 S.W.2d 772, error dismissed.

Questions held for jury

Tex.—West Texas Hotel Co. v. City of El Paso, supra.

Costs

Costs of suit to cancel lien of taxes assessed against land by home-rule city and remove the cloud of such liens on plaintiff's title to the land were not chargeable against city.—Lubbock Independent School Dist. v. Owens, Tex.Civ.App., 217 S.W.2d 186, error refused.

94. Mo.—Regan Land Co. v. Carthage, 108 S.W. 589, 129 Mo. App. 628. 44 C.J. p 1367 note 38.

95. Mo.—Regan Land Co. v. Carthage, supra.

96. N.Y.—Hall v. Lockport, 153 N.Y.S. 298, 90 Misc. 429. 44 C.J. p 1367 note 41.

97. Ga.—Vanduzer v. Irvin, 75 S.E. 649, 138 Ga. 524.—Social Circle Cotton Mill Co. v. City of Social Circle, 136 S.E. 432, 163 Ga. 465. Execution under judgment see supra § 2082.

Relief against execution by way of affidavit of illegality generally see Executions §§ 147-150.

Summary execution see supra § 2098.

Construction of provisions

A town charter permitting an affidavit of illegality to be filed with respect to an execution issued by the town, and tried under the rules governing illegalities to justice court *feri facias*, is remedial in nature as affording taxpayers a simpler and less expensive remedy than a suit for injunction, and hence will be liberally and reasonably construed so as not to render provision meaning-

less or futile, or so as to defeat the purpose thereof.—Scott v. Mayor and Council of Mount Airy, 198 S.E. 693, 186 Ga. 652.

Persons entitled to remedy

Contest of municipal tax execution by affidavit of illegality is not available to claimant of land levied on, but only to defendant in execution.—Wilson v. City of Eatonton, 180 S.E. 227, 180 Ga. 598.

Court to which papers returned

(1) There being no general statute as to the filing and return of affidavits of illegality to tax executions, and no authority for the officer issuing such an execution to hear and determine the controversy, where a municipal charter authorizes an affidavit of illegality, the levying officer must return the papers to the proper court specified in the charter provision.—Scott v. Mayor and Council of Mount Airy, 198 S.E. 693, 186 Ga. 652.

(2) A town charter permitting an affidavit of illegality to be filed with respect to an execution issued by the town, and tried under the rules governing illegalities to justice court *feri facias*, does not require that the papers be returned for trial before the mayor and council, but requires that the justice court with territorial jurisdiction over the town shall be deemed to have jurisdiction of such affidavits of illegality at least to the maximum sum of justice-court jurisdiction under the constitution.—Scott v. Mayor and Council of Mount Airy, supra.

court for trial, the taxpayer is entitled to a writ of mandamus compelling him to do so;⁹⁸ but in such case, if the affidavit of illegality attacks only a part of the tax, and fails to allege facts from which it may be inferred what part of the tax is illegal, the officer's refusal to file the execution and affidavit in court is justified.⁹⁹ The remedy by affidavit of illegality is purely statutory,¹ and, where the statute granting it applies only to the arrest of executions based on judgments of courts, the remedy is not available in the case of an execution issued ex parte by a city clerk.²

§ 2109. Actions for Recovery of Property

Property seized for municipal taxes levied without authority may be replevied.

Where there is want of authority to levy municipal taxes, property seized for such taxes may be replevied,³ and previous payment of a similar tax will not defeat the action.⁴

§ 2110. Action for Damages

An action to recover damages for malicious prosecution may be maintained against municipal officers who are guilty of malicious acts in the collection of municipal taxes.

An action to recover damages for malicious prosecution may be maintained against municipal officers who are guilty of malicious acts in the collection of municipal taxes,⁵ but not in the absence of proof of malice.⁶ An action cannot be maintained against a municipality to recover damages for malicious prosecution of a suit to recover taxes in the absence of allegations of facts showing want of probable cause.⁷

7. TAX DEEDS AND LEASES

§ 2111. In General

The purchaser at a municipal tax sale is entitled to a tax deed at such time and under such conditions as are prescribed by statutory or charter provisions or by ordinance.

Provision is usually made by statute, charter, or ordinance for the execution and delivery of a tax deed to the purchaser at a municipal tax sale.⁸

When a tax deed is thus authorized, the purchaser at the tax sale is entitled to a deed at the proper time and after he has fulfilled the necessary conditions precedent.⁹

98. Ga.—Vanduzer v. Irvin, 75 S.E. 649, 138 Ga. 524.

Mandamus to public boards and officers generally see Mandamus §§ 118-210.

99. Ga.—Vanduzer v. Irvin, 75 S.E. 649, 138 Ga. 524.

1. Ga.—Cook v. Colquitt, 116 S.E. 37, 29 Ga.App. 494.

2. Ga.—Cook v. Colquitt, supra.

3. Iowa.—Buell v. Ball, 20 Iowa 282.

Recovery of:

Penalty paid under protest see infra § 2115 d.

Purchase price by municipal tax purchaser see supra § 2092.

Replevin to recover property seized for taxes generally see the C.J.S. title Taxation § 733, also 61 C.J. p 1104 note 22 et seq.

Right to refund or recovery of municipal tax paid see supra §§ 2068, 2069.

4. Iowa.—Buell v. Ball, supra.

5. Ga.—Gould v. Atlanta, 60 Ga. 164.

44 C.J. p 1369 note 2.

Liability of:

Public officers for malicious prosecution generally see Malicious Prosecution § 62.

Tax collector see supra § 2071.

6. Ky.—Wilson v. Helm, 4 Ky.Op. 64.

7. Mo.—Brown v. Cape Girardeau,

2 S.W. 302, 90 Mo. 377, 59 Am R. 28.

Liability of municipality with respect to levy and collection of taxes generally see supra § 779.

8. Iowa.—Crawford v. Little, 70 N.W. 97, 101 Iowa 148.

Ky.—Interstate Bond Co. v. Williams, 162 S.W.2d 770, 290 Ky. 850—Johnson v. Louisville, 11 Bush 527.

Mich.—Stiglitz v. City of Detroit, 214 N.W. 150, 239 Mich. 26.

Miss.—Lear v. Hendrix, 187 So. 746, 186 Miss. 289.

Mo.—Beckwith v. Curd, 148 S.W.2d 800, 347 Mo. 602.

N.Y.—Gabel v. Williams, 87 N.Y.S. 240, 42 Misc. 475.

Wis.—Sheftels v. Tabert, 1 N.W. 156, 46 Wis. 439.

Deeds to:

Lands sold for special assessments for public improvements see supra § 1647.

Purchasers at tax sales generally see the C.J.S. title Taxation §§ 919-965, also 61 C.J. p 1331 note 56 et seq.

Execution, filing, recording, and transmitting to proper city officer of deed on purchase by municipality see supra § 2090.

Municipal tax sale certificates see supra §§ 2090, 2091.

Deed is for the purpose of conveying to the purchaser the property sold at the tax sale.—Howe v. Bar- to, 41 P. 908, 12 Wash. 627.

Applicability of general statutes

(1) Some statutes applicable to tax deeds for state and county taxes have been held inapplicable to tax deeds for municipal taxes.

Fla.—Henderson v. Boose, 196 So. 671, 142 Fla. 804.

Wis.—Sheftels v. Tabert, 1 N.W. 156, 46 Wis. 439.

44 C.J. p 1369 note 11.

(2) Other statutes governing state and county tax deeds have been held applicable to municipal tax deeds.

U.S.—Denike v. Rourke, C.C.Ill., 7 F.Cas.No.3,787, 3 Biss. 39.

Iowa.—Crawford v. Liddle, 70 N.W. 97, 101 Iowa 148.

(3) Applicability of state and county tax systems to municipalities generally see supra § 2031.

Sale to municipality

In view of fact that charter of the city expressly grants the city the power to make tax sales to itself, without prescribing any method by which it should authenticate such sales, city could use the same method by tax deed as in the case of individual purchasers.—Hawkins v. City of West Point, 27 So.2d 549, 200 Miss. 616.

9. Mich.—Stiglitz v. City of Detroit, 214 N.W. 150, 239 Mich. 26.

Compelling issuance of deed

Where the purchaser at a tax sale is entitled to a tax deed, the city may be compelled through its offi-

Where the statute so provides, a tax lease for a term exceeding three years is equivalent to a conveyance.¹⁰

Necessity for deed. A municipal tax sale does not, of itself, ordinarily operate to transfer title to the purchaser, as considered supra § 2091, but usually the execution and delivery of a tax deed are necessary to vest title in the purchaser.¹¹ It has been held, however, under some provisions, that a statutory tax list made by the city clerk and filed in his office showing a purchase of the property by the city is sufficient to convey title to the city without a formal deed of conveyance to the city.¹²

Authority to execute and deliver. A municipal tax deed must be executed and delivered by the particular officer having authority under the statute or charter to do so,¹³ such as the city comptroller.¹⁴ In performing such duty the municipal officer acts in a governmental capacity.¹⁵

Conditions precedent. The purchaser at a municipal tax sale must comply with the statute, charter, or ordinance imposing conditions precedent to the issuance of a tax deed.¹⁶ Where the purchaser fails to comply with the conditions on which the title would vest, the deed is ineffectual and invalid.¹⁷ Thus under particular provisions as a condition precedent the purchaser must serve a notice to redeem or of an application for a deed,¹⁸ pay the city

taxes due on the property for previous years,¹⁹ or pay the taxes assessed against the property after the assessment of the tax for which the property was sold,²⁰ or pay the taxes on the land accruing after the sale and prior to the delivery of the deed.²¹

Time of issuance; laches. A municipal tax deed may be issued at such time as is fixed by the statutes or charter provisions or ordinances²² and a deed issued prior to the expiration of the time prescribed is premature.²³ Thus under particular provisions the deed may not be issued until after the expiration of the period of redemption²⁴ or following the expiration of a certain number of days after service of a notice to redeem or of an application for a deed.²⁵ The charter provision governing the time of issuance of a tax deed in existence at the time of the tax sale controls rather than a charter provision enacted after the tax sale has been held and before application for the deed has been made.²⁶

A statute providing for a postponement of the purchaser's right to a deed for a stated term of years, if during the redemption period he allows the land to be again sold for taxes, applies to municipal, as well as to state and county, taxes.²⁷ The purchaser at the tax sale may lose his right to a deed by lapse of time during which other persons continue in open, adverse, and hostile possession.²⁸

cers to comply with the law requiring it to execute and deliver a deed to him.—*Stiglitz v. City of Detroit*, supra—44 C.J. p 1360 note 7.

Damages for refusal to issue deed

The purchaser cannot, in the absence of statute, recover damages from the municipality for the failure or refusal of one of its officers to execute and deliver a deed.—*Stiglitz v. City of Detroit*, supra.

10. **Ten thousand-year tax lease** is equivalent to a conveyance.—*Yates v. Fagan*, 68 N.Y.S.2d 178, 188 Misc. 496.

11. Ark.—*Webb v. Williamson*, 152 S.W.2d 312, 202 Ark. 763.

Fla.—*Bailey v. Averill*, 182 So. 848, 133 Fla. 621.

Miss.—*City of Jackson v. Ashley*, 199 So. 91, 189 Miss. 818.

N.Y.—*Gabel v. Williams*, 87 N.Y.S. 240, 42 Misc. 475.

Pa.—*City of Scranton v. O'Malley Mfg. Co.*, 19 A.2d 269, 341 Pa. 200.

Necessity for deed:

Generally see the C.J.S. title *Taxation* §§ 919, 920, also 61 C.J. p 1331 note 57 et seq.

To recover possession of property see supra § 2091.

Municipal tax sale certificate as vesting title in purchaser see supra § 2091.

12. Miss.—*Lear v. Hendrix*, 187 So. 746, 186 Miss. 289.

13. Mich.—*Stiglitz v. City of Detroit*, 214 N.W. 150, 239 Mich. 26. 44 C.J. p 1370 note 19.

14. Mich.—*Stiglitz v. City of Detroit*, supra.

15. Mich.—*Stiglitz v. City of Detroit*, supra.

16. Mich.—*Stiglitz v. City of Detroit*, supra.

17. Ky.—*Interstate Bond Co. v. Williams*, 162 S.W.2d 770, 290 Ky. 850.

Mich.—*Smith v. Switzer*, 287 N.W. 416, 290 Mich. 158.

18. Iowa.—*Crawford v. Liddle*, 70 N.W. 97, 101 Iowa 148.

N.Y.—*Thomas v. Loomis*, 80 N.Y.S. 2d 309, 273 App.Div. 680.

Notice to redeem or of application for deed generally see supra § 2100 b.

19. Mich.—*Smith v. Switzer*, 287 N.W. 416, 290 Mich. 158.

20. Ky.—*Interstate Bond Co. v. Williams*, 162 S.W.3d 770, 290 Ky. 850.

21. U.S.—*Denike v. Rourke*, C.C.Ill., 7 F.Cas.No.3,787, 3 Biss. 39.

22. Ariz.—*Trigg v. City of Yuma*, 130 P.2d 59, 59 Ariz. 480.

23. Ariz.—*Trigg v. City of Yuma*, supra.

24. Ariz.—*Trigg v. City of Yuma*, supra.

Ky.—*Forwood v. City of Louisville*, 140 S.W.2d 1048, 283 Ky. 208.

Mich.—*Stiglitz v. City of Detroit*, 214 N.W. 150, 239 Mich. 26.

Time for redemption see supra § 2103.

25. Iowa.—*Crawford v. Liddle*, 70 N.W. 97, 101 Iowa 148.

Mich.—*Stiglitz v. City of Detroit*, 214 N.W. 150, 239 Mich. 26.

N.J.—*Fields v. Kelly*, 115 A. 580, 93 N.J.Eq. 380.

Notice to redeem or of application for deed see supra § 2100 b.

26. Mich.—*Stiglitz v. City of Detroit*, 214 N.W. 150, 239 Mich. 26.

—*Rott v. Steffens*, 201 N.W. 227, 229 Mich. 241, 38 A.L.R. 224.

27. U.S.—*Denike v. Rourke*, C.C.Ill., 7 F.Cas.No.3,787, 3 Biss. 39.

44 C.J. p 1360 note 10.

28. Twenty years

Tax purchaser must apply for deed within twenty years to prevent

Injunction against issuance of deed. In a proper case an injunction may be granted to restrain the execution or delivery of a municipal tax deed.²⁹ Thus an injunction may be granted where the tax sale is invalid.³⁰ In order to sustain such a suit it is not necessary that plaintiff be the owner of the fee, but ownership of any such interest in the property as would entitle a person to redeem from a valid tax sale is sufficient.³¹

The maxim that a person who seeks equity must do, or be prepared to do, equity applies in suits to restrain the issuance of a tax deed.³² Plaintiff in such a suit must tender to the tax purchaser or his transferee the amount paid to the city by the purchaser.³³ The failure to pay to the city undisputed taxes prior to bringing the suit does not bar the suit where the court may grant relief conditioned on payment of such taxes.³⁴

An injunction restraining the issuance of a tax

deed does not restrict the city in any manner in the collection of taxes justly owing.³⁵

Recording of deed. Some statutes require the recording of municipal tax deeds.³⁶ Such statutory provisions are mandatory³⁷ and in the absence of recording no title passes to the purchaser.³⁸ Under some statutes where the collector fails to record or file a tax deed he has a right to disclaim and release the title by an instrument under his hand and seal, duly recorded in the registry of deeds.³⁹

Prior proceedings as affecting deed. A municipal tax deed may be invalid because of defects in the proceedings preliminary to its execution and delivery.⁴⁰ A tax deed may be invalid where the tax assessment on which the deed is predicated is wholly unauthorized by any law, even though the invalidity does not appear on the face of the deed.⁴¹ A tax deed is invalid where the land sold is not

the operation against him, if he offers no explanation for the delay, of a conclusive presumption that the owner has paid the tax and redeemed the land—*Fields v. Kelly*, 115 A. 580, 93 N.J.Eq. 380.

29. S.C.—*Home Building & Loan Ass'n v. City of Spartanburg*, 194 S.E. 143, 185 S.C. 353.

Injunction against issuance of tax deed generally see the C.J.S. title Taxation § 926, also 61 C.J. p 1338 note 48 et seq.

30. S.C.—*Home Building & Loan Ass'n v. City of Spartanburg*, supra.

31. S.C.—*Home Building & Loan Ass'n v. City of Spartanburg*, supra.

Status of owner as mortgagee

(1) Property owner was not barred from maintaining action to enjoin city officials from issuing deed pursuant to an illegal tax sale because his status at time of sale was that of mortgagee.—*Home Building & Loan Ass'n v. City of Spartanburg*, supra.

(2) Property owner was not barred from maintaining action to enjoin city officials from issuing tax deed pursuant to an illegal tax sale, because mortgagor from whom owner acquired title subsequent to tax sale made no complaint as to validity of taxes or expiration of tax lien prior to tax sale, since mortgagor could take no position to detriment of owner as real party affected thereby.—*Home Building & Loan Ass'n v. City of Spartanburg*, supra.

32. Mich.—*Detroit Trust Co. v. Lieberwitz*, 266 N.W. 406, 275 Mich. 429.

33. Mich.—*Detroit Trust Co. v. Lieberwitz*, supra.

34. S.C.—*Home Building & Loan Ass'n v. City of Spartanburg*, 194 S.E. 143, 185 S.C. 353.

35. S.C.—*Home Building & Loan Ass'n v. City of Spartanburg*, supra.

36. Mass.—*City of Quincy v. Wilson*, 25 N.E.2d 369, 305 Mass. 229—*Powers v. Radding*, 113 N.E. 782, 225 Mass. 110.

Time for recording

Statutory provision that amount of tax for which city collector purchases, and charges and expenses of levy and sale, and cost of recording deed of purchase, shall be allowed collector in settlement, provided he has caused deed to be duly recorded within a designated number of days after purchase and to be delivered to city treasurer, prescribes only time within which deed shall be recorded, rather than time for delivery of deed to treasurer.—*City of Lowell v. Lowell Bldg. Corporation*, 34 N.E.2d 618, 309 Mass. 165.

37. Mass.—*Powers v. Radding*, 113 N.E. 782, 225 Mass. 110.

38. Mass.—*Powers v. Radding*, supra.

Effect of recording disclaimer or release

Where registered land was sold by city collector for nonpayment of taxes and collector purchased the land for city for amount of the tax, the proper recording or filing of disclaimer and release of tax title would give effect to discharge of tax title which itself has become a sort of lien.—*City of Quincy v. Wilson*, 25 N.E.2d 369, 305 Mass. 229.

40. Colo.—*Reagan v. Dick*, 393 P. 333, 88 Colo. 122.

Delinquent list

A deed not based on a delinquent list made out, reported, approved, transmitted, and recorded in the office of the clerk of the county court pursuant to the laws and ordinances governing such proceedings is void.—*Cooper v. Coleman*, 116 S.E. 158, 92 W.Va. 300—44 C.J. p 1360 note 15.

Validity as determined by charter or general law

(1) Provisions of city charter regarding duty of tax assessor with reference to preparation and equalization of assessment roll took precedence over general law of state requiring original and two copies of assessment roll to be made, and hence tax deed which was issued by city for nonpayment of municipal taxes after assessment which did not conform to general law, but which was made according to requirements of charter, was valid.—*Broward v. Garrison Inv. Corporation*, 163 So. 212, 121 Fla. 45.

(2) Where the procedure in the sale of lands for taxes is specifically provided for by charter provisions which, although enacted subsequently to the sale, are a continuation of similar charter provisions enacted prior to the sale, the validity of the deed will depend on its conformity to charter requirements and not on the general statute, where the two are inconsistent.—*Sheffels v. Tabert*, 1 N.W. 156, 46 Wis. 439.

41. Fla.—*Klich v. Miami Land & Development Co.*, 191 So. 41, 139 Fla. 794.

Irregularity

A tax deed, issued by town in full compliance with requirements of valid special charter act, will not be held invalid merely because of tax

subject to the tax,⁴² as where the land is situated outside the territorial limits of the municipality⁴³ or is exempt.⁴⁴ A tax deed is invalid where the return made by the municipal officer of the tax sale is fatally defective⁴⁵ or where the required notice to redeem or notice of application for the deed was not given.⁴⁶ Where a purchaser of tax leases from a city obtained a lease or leases covering all of the years for which the land had been bid in by the city, all of the leases bearing the same date, it is no objection to the validity thereof that, inasmuch as the city had bid in the land, it was not authorized to tax it thereafter.⁴⁷

In some jurisdictions defects or irregularities in the prior proceedings are rendered innocuous by curative statutes so as to validate municipal tax deeds.⁴⁸ General curative statutes sustaining tax deeds have been held to be applicable to municipal tax deeds as well as to deeds based on sales for state taxes.⁴⁹ However, a statute providing that no tax conveyance shall be held invalid except on proof that the property was not subject to taxation, or that the taxes had been paid before the sale, or that the property had been redeemed prior to the execution and delivery of the deed, has been held to be inapplicable to a municipal tax conveyance.⁵⁰

§ 2112. Form and Contents

A municipal tax deed must be in such form and con-

tain such recitals as are required by statutory or charter provisions.

A municipal tax deed must comply, in so far as form and contents are concerned, with statutory or charter requirements,⁵¹ as, for example, with respect to the recitals therein concerning the exposure of the land for sale at a sale "publicly held,"⁵² a demand for payment of the tax,⁵³ the sale of lots separately and not as a single tract,⁵⁴ and the offering of all the delinquent property for sale before the sale of any of it to the city for taxes.⁵⁵

The deed should run in the name of the municipality, and not in the name of the state.⁵⁶

§ 2113. Operation and Effect

Where the contents of a municipal tax deed are prescribed by statute, the recitals of the deed are not covenants of warranty.

The general rules governing the construction, operation, and effect of tax deeds ordinarily are applicable to municipal tax deeds.⁵⁷ Where the statute provides what a municipal tax deed shall contain, the recitals therein are not covenants of warranty and do not estop the municipality issuing the conveyance.⁵⁸ A tax deed conveys no title where the tax is illegal and void⁵⁹ or where the proceedings do not conform to mandatory provisions of the

commission's unintentional error in listing another than owner of lands conveyed as owner thereof on assessment roll, such error constituting merely immaterial irregularity, which will not vitiate subsequent proceedings.—*Sovereign Finance Co. v. Beach*, Fla., 38 So.2d 831.

42. Fla.—*Klich v. Miami Land & Development Co.*, 191 So. 41, 139 Fla. 794.

Property subject to municipal taxes see supra §§ 2000-2029.

43. Fla.—*Beaty v. Inlet Beach*, 9 So. 2d 735, 151 Fla. 495, motion denied and modified on other grounds 10 So.2d 807, 152 Fla. 276—*Klich v. Miami Land & Development Co.*, 191 So. 41, 139 Fla. 794.

44. N.Y.—*Budd v. Franco*, 185 N.Y. S. 797, 194 App.Div. 803. 44 C.J. p 1370 note 33 [a].

45. Pa.—*City of Scranton v. O'Malley Mfg. Co.*, 19 A.2d 269, 341 Pa. 200.

46. Iowa.—*Crawford v. Liddle*, 70 N.W. 97, 101 Iowa 148.

Notice to redeem or of application for deed see supra § 2100 b.

47. Mich.—*Sherman v. Fisher*, 101 N. W. 572, 138 Mich. 391.

48. W.Va.—*Hogan v. Piggott*, 56 S. E. 189, 60 W.Va. 541.

49. W.Va.—*Hogan v. Piggott*, supra. 44 C.J. p 1370 note 15.

50. Fla.—*Henderson v. Boose*, 196 So. 671, 142 Fla. 804.

51. Mo.—*Hartmann v. Owens*, 240 S. W. 113, 293 Mo. 508. 44 C.J. p 1370 note 21.

Form and contents of tax deeds generally see the C.J.S. title Taxation §§ 928-945, also 61 C.J. p 1340 note 97 et seq.

Deeds held sufficient

Fla.—*Sovereign Finance Co. v. Beach*, 38 So.2d 831.

Mo.—*Beckwith v. Curd*, 148 S.W.2d 800, 347 Mo. 602.

Description of property

(1) Description in deed which can be made certain will be deemed sufficient.—*Hardin v. Douglas*, 147 S.E. 506, 168 Ga. 213.

(2) Description in deed is sufficient, if sufficiently definite to enable levying officer to ascertain property.—*Hardin v. Douglas*, supra.

(3) Description held sufficient.—*Hardin v. Douglas*, supra.

52. U.S.—*Daniels v. Case*, C.C.Mo. 45 F. 843, error dismissed 15 S.Ct. 1038, 159 U.S. 251, 40 L.Ed. 140.

Recital held sufficient

Mass.—*City of Boston v. Lynch*, 23 N.E.2d 466, 304 Mass. 272.

54. Mo.—*Hartmann v. Owens*, 240 S. W. 113, 293 Mo. 508—*Voights v. Hart*, 226 S.W. 248, 285 Mo. 102.

55. Mo.—*Hartmann v. Owens*, 240 S. W. 113, 293 Mo. 508.

56. Fla.—*Stieff v. Hartwell*, 17 So. 899, 35 Fla. 606.

44 C.J. p 1370 note 26.

57. N.Y.—*Vangellow v. City of Rochester*, 71 N.Y.S.2d 672, 190 Misc. 128.

Construction and operation of tax deeds generally see the C.J.S. title Taxation §§ 951-956, also 61 C.J. p 1365 note 43 et seq.

Restrictive covenant

Where portion of plaintiffs' realty was conveyed to plaintiffs by city after a tax foreclosure after official street map of city became effective, official map requiring a ten-foot setback line for new building was binding on plaintiffs as a private contract irrespective of whether official act was valid as to other of plaintiffs' property.—*Vangellow v. City of Rochester*, supra.

58. N.Y.—*Bell v. New York*, 73 N.Y. S. 298, 66 App.Div. 578.

44 C.J. p 1370 note 29.

59. Ky.—*Gasho v. Lowe*, 139 S.W.2d 437, 282 Ky. 518.

44 C.J. p 1370 note 33.

statute;⁶⁰ but, where the attack on the title is delayed for a long period of years by those having actual knowledge or who are chargeable with knowledge of the facts serving as a basis for the attack, such persons are estopped to assert the invalidity of the title.⁶¹

Tax leases. There is no implied warranty of the validity of a tax lease on an agreement to assign it.⁶² Where tax leases are purchased from a city, the title of the purchaser thereunder vests from the date of the lease.⁶³

§ 2114. Tax Deeds as Evidence

Under various statutory or charter provisions or ordinances, municipal tax deeds have been made prima facie or conclusive evidence of the existence of certain facts.

In the absence of statutory or charter provisions to the contrary, a municipal tax deed is not sufficient evidence of the validity of the sale,⁶⁴ and the party relying thereon must show that there was a compliance with all the necessary prerequisites to a legal sale.⁶⁵

Prima facie evidence. By statute, charter provisions, or ordinances,⁶⁶ the tax deeds of some municipalities are prima facie evidence of the regularity of the proceedings,⁶⁷ or of the regularity of the

proceedings before the sale,⁶⁸ or of the regularity of the proceedings and of all notices required by law for redemption,⁶⁹ and, under some statutes, are even presumptive evidence of possession in the grantee.⁷⁰ However, under some statutes declaring that tax deeds shall be prima facie evidence of the regularity of the assessment, equalization, and levy, it has been held that a deed is not prima facie evidence of the existence of the ordinance authorizing the tax;⁷¹ and a tax deed is not prima facie evidence of the levy of the tax under a statute making the deed prima facie evidence of several particular matters without including the levy.⁷² Statutes making state tax deeds prima facie evidence have been held not to apply to municipal tax deeds,⁷³ even though other statutes provide that municipal tax deeds "shall be received in like manner, and shall have the same force and effect, when recorded, as State tax deeds."⁷⁴

Statutes making municipal tax deeds prima facie evidence do not preclude proof of their invalidity.⁷⁵ The party claiming that a tax deed regular on its face is invalid has the burden of overcoming its prima facie validity by proof of matters showing or tending to show such fatal defects in the statutes or proceedings on which the tax deed was based as would vitiate the instrument.⁷⁶ The prima facie

60. W.Va.—Cooper v. Coleman, 116 S.E. 158, 92 W.Va. 300.

44 C.J. p 1370 note 34.
Prior proceedings as affecting validity of municipal tax deed see supra § 2111.

61. N.J.—Mackie v. Donohue, 111 A. 780, 92 N.J.Eq. 149.

62. N.Y.—Bensel v. Gray, 62 N.Y. 632.

63. Mich.—Sherman v. Fisher, 101 N.W. 572, 138 Mich. 391.

64. Ala.—Collins v. Robinson, 33 Ala. 91.

Tax deeds as evidence generally see the C.J.S. title Taxation §§ 957-965, also 61 C.J. p 1369 note 18 et seq.

65. Mo.—Nelson v. Goebel, 17 Mo. 161.

44 C.J. p 1370 note 40.

Sufficient evidence

Where a purchaser at a sale for municipal taxes interposed a claim to the levy of another *ieri facias* on the same property, after showing the ordinances of the city authorizing the assessment, levy, and collection of taxes and the issuing of executions against defaulting taxpayers, the tax *ieri facias* and deed made thereunder could be introduced without laying further foundation therefor.—Verdery v. Dotterer, 69 Ga. 194.

66. Power of municipality

(1) A city in adopting a freeholders' charter may provide that a tax deed shall be prima facie evidence of the regularity of the tax proceedings.—Howe v. Barto, 41 P. 908, 12 Wash. 627.

(2) However, it has been held that a municipality is without power to declare that the tax deed shall be evidence of a compliance with the prerequisites of the ordinance providing for tax sales.—Fitch v. Pinckard, 5 Ill. 69.

67. Fla.—Sovereign Finance Co. v. Beach, 38 So.2d 831—City of Orlando v. Equitable Bldg. & Loan Ass'n, 33 So. 986, 45 Fla. 507.

Ky.—Gasho v. Lowe, 139 S.W.2d 437, 282 Ky. 518.

Miss.—Johnson v. Lake, 139 So. 455, 162 Miss. 227, 88 A.L.R. 262.

Mo.—Beckwith v. Curd, 148 S.W.2d 800, 347 Mo. 602.

N.Y.—Lamb v. Connolly, 25 N.E. 1042, 122 N.Y. 531.

44 C.J. p 1370 note 48.

68. N.Y.—Rhynus v. Shaffer, 39 N.Y.S.2d 599, 180 Misc. 116, affirmed 39 N.Y.S.2d 621, 265 App.Div. 961.

69. N.Y.—Thomas v. Loomis, 80 N.Y.S.2d 309, 273 App.Div. 680.

70. N.J.—Mackie v. Donohue, 111 A. 780, 92 N.J.Eq. 149.

71. Cal.—Metteer v. Smith, 105 P.

735, 156 Cal. 572—Carpenter v. Shinnars, 41 P. 473, 108 Cal. 359.

72. Tex.—Earle v. Henrietta, 43 S.W. 15, 91 Tex. 301.

73. Mo.—Stierlin v. Daley, 37 Mo. 483.

74. Mo.—Stierlin v. Daley, supra.
44 C.J. p 1371 note 48.

75. Ky.—Gasho v. Lowe, 139 S.W.2d 437, 282 Ky. 518.

Mo.—Beckwith v. Curd, 148 S.W.2d 800, 347 Mo. 602.
44 C.J. p 1371 note 51.

76. Fla.—Sovereign Finance Co. v. Beach, 38 So.2d 831.

Iowa.—McNamara v. Estes, 22 Iowa 246.

By positive evidence

Mo.—Beckwith v. Curd, 148 S.W.2d 800, 347 Mo. 602.

Proceedings prior to sale

Under charter providing that the conveyance shall be conclusive evidence that the sale and subsequent proceedings were regular and presumptive evidence that all prior proceedings were regular and according to law, a party contesting the validity of a deed has the burden to establish the invalidity of proceedings prior to the sale.—Rhynus v. Shaffer, 39 N.Y.S.2d 599, 180 Misc. 116, affirmed 39 N.Y.S.2d 621, 265 App.Div. 961.

validity of the deed is not overcome by the fact that the land was unintentionally assessed in the name of a person other than the owner.⁷⁷

Where the deed on its face shows noncompliance with statutory or charter provisions in its execution, a statutory or charter provision making tax deeds prima facie evidence does not apply;⁷⁸ and in such case, where the tax deed shows on its face that the tax sale was not made on the day regularly fixed, the person claiming under the deed has the burden of proving that the sale

was postponed.⁷⁹

Conclusive evidence. Statutes and charter provisions sometimes make the tax deed conclusive evidence of the existence of some facts,⁸⁰ such as the fact that the tax sale and proceedings subsequent thereto were regular.⁸¹ However, a charter provision that a tax deed shall be conclusive evidence that the sale was conducted in the manner required by law does not relieve the purchaser from the necessity of proving the existence of a law regulating the sale.⁸²

8. PENALTIES AND FORFEITURES

§ 2115. Penalties

- a. In general
- b. Statutory provisions
- c. Remission or abatement
- d. Liability, collection, and recovery back
- e. Amount recoverable

a. In General

The imposition of a penalty for delinquency in the payment of municipal taxes is employed to enforce their collection and to induce promptness in payment. It has been held that a municipal corporation cannot prescribe a penalty unless express authority is conferred by statutory or charter provision.

The imposition of a penalty for delinquency in the payment of municipal taxes is a measure employed to enforce their collection⁸³ as well as to induce prompt payment and to discourage delay.⁸⁴

The penalty pertains to the remedy and is no part of the tax when it is levied,⁸⁵ although, as considered infra subdivision d of this section and infra § 2118, when incurred it may become a part of the tax as to collection and disposition.

A penalty is to be distinguished from other matters,⁸⁶ such as a commission for collecting the tax⁸⁷ and interest.⁸⁸

Power to impose penalty. In the absence of express statutory or charter authority, it has been held that a municipal corporation cannot prescribe a penalty for neglect to pay taxes promptly,⁸⁹ especially where a statute granting the power is superseded by another statute omitting all reference to it,⁹⁰ and that, even where the charter of another city has been applied to it by the legis-

Presumption held rebutted

Ky.—Gasho v. Lowe, 139 S.W.2d 437, 282 Ky. 518.

N.Y.—Rhynus v. Shaffer, 39 N.Y.S.2d 599, 180 Misc. 116, affirmed 39 N.Y.S.2d 621, 265 App.Div. 961.

77. Fla.—Sovereign Finance Co. v. Beach, 38 So.2d 831.

Good faith of assessor will be presumed until overcome by proof from the complaining party.—Sovereign Finance Co. v. Beach, supra.

78. Miss.—Johnson v. Lake, 139 So. 455, 162 Miss. 227, 88 A.L.R. 262. Mo.—Voights v. Hart, 226 S.W. 248, 285 Mo. 102.

79. Miss.—Johnson v. Lake, 139 So. 455, 162 Miss. 227, 88 A.L.R. 262.

80. N.Y.—Rhynus v. Shaffer, 39 N.Y.S.2d 599, 180 Misc. 116, affirmed 39 N.Y.S.2d 621, 265 App.Div. 961.

Tex.—Earle v. City of Henrietta, 43 S.W. 15, 91 Tex. 301.

After expiration of one year

Charter provision that every conveyance of land sold for taxes shall be attested by city clerk, etc., and shall be presumptive evidence that all proceedings prior thereto and all notices required by law for redemp-

tion thereof were regular and in accordance with law relating thereto, and that after one year from date of such conveyance such presumption shall be conclusive, was at most a statute of limitations sufficient to bar, after one year, any right arising from the defect to which the presumption of regularity by the terms of the provision applied.—Thomas v. Loomis, 80 N.Y.S.2d 309, 273 App.Div. 680.

81. N.Y.—Rhynus v. Shaffer, 39 N.Y.S.2d 599, 180 Misc. 116, affirmed 39 N.Y.S.2d 621, 265 App.Div. 961.

82. Ill.—Holbrook v. Dickinson, 46 Ill. 285.

44 C.J. p 1871 note 54.

83. Va.—Southern Ry. Co. v. City of Danville, 7 S.E.2d 896, 175 Va. 300. Arrest or fine see supra § 2099.

Penalties:

Generally see the C.J.S. title Penalties § 1 et seq. also 25 C.J. p 1178 note 5 et seq.

For nonpayment of assessment for public improvements see supra § 1579.

84. Pa.—Pennsylvania Co. for Insurance on Lives and Granting

Annuities v. Barker, 190 A. 193, 124 Pa.Super. 557.

Va.—Southern Ry. Co. v. City of Danville, 7 S.E.2d 896, 175 Va. 300.

85. Iowa.—Tobin v. Hartsborn, 29 N.W. 764, 69 Iowa 648.

86. Wis.—Munkwitz Realty & Investment Co. v. Diederich Schaefer Co., 286 N.W. 30, 231 Wis. 504.

87. Wis.—Munkwitz Realty & Investment Co. v. Diederich Schaefer Co., supra.

Compensation of collectors generally see supra § 2071.

88. Pa.—Grossman v. Natcher, 36 Pa.Dist. & Co. 337, 31 Mun.L.R. 65, 87 Pittsb.Leg.J. 487.

Interest on taxes see supra § 2067.

89. Tenn.—Burns v. City of Nashville, 221 S.W. 828, 142 Tenn. 541. 44 C.J. p 1371 note 62.

Disposition of penalties collected see infra § 2118.

Power to impose:

Fines see supra § 2099.

Penalties for delay in payment of taxes generally see the C.J.S. title Taxation § 1021, also 61 C.J. p 1482 note 3 et seq.

90. Alaska.—Nome v. Orland, 4

lature, "so far as applicable," the court will not look to such adopted charter to see whether a penalty can be imposed.⁹¹ On the other hand, it has also been held that the power may be implied,⁹² as where the city is granted power to prescribe by ordinance the method of enforcement.⁹³

b. Statutory Provisions

Under various statutes, charters, and ordinances a penalty is imposed for the nonpayment of an overdue municipal tax.

By statute, charter, or ordinance a penalty may be imposed for the nonpayment of an overdue municipal tax,⁹⁴ and the recovery will follow the law applicable to state and county taxes where the statute so stipulates.⁹⁵ The enactment of an ordinance fixing a penalty is an enactment legislative in character and governmental in function.⁹⁶ A statute authorizing a city council to impose a tax by ordinance published a certain number of days and authorizing the council to provide for the payment of a penalty permits the council to impose a penalty by whatever method it desires without any publication.⁹⁷ Where a municipal charter provides for a penalty on taxes not paid within a designated time, its terms are mandatory and self-operative and a similar provision in an annual tax ordinance is unnecessary.⁹⁸ Where the statute empowers the municipality to impose a penalty for nonpayment of taxes, an ordinance providing that any person failing to make payment of taxes shall be subject to a penalty as provided by law does not prescribe a penalty.⁹⁹

Alaska 478—Valdez v. Fish, 4 Alaska 427.

91. Ky.—Price v. Bellevue, 1 Ky.L. 276.

92. Colo.—Denver City R. Co. v. Denver, 41 P. 826, 21 Colo. 350, 52 Am.S.R. 239, 29 L.R.A. 608.

44 C.J. p 1371 note. 65.

Delegation of power to city to tax includes not only authority to collect the tax but also power to provide penalties for its nonpayment—In re Curtis' Estate, 6 A.2d 283, 335 Pa. 414.

93. Nev.—Virginia v. Chollar-Potosi Gold, etc., Co., 2 Nev. 86.

94. Pa.—Speck v. Phillips, 51 A.2d 399, 160 Pa.Super. 365—Keystone State Building & Loan Ass'n v. Sabo, 14 A.2d 831, 140 Pa.Super. 599.

S.C.—Home Building & Loan Ass'n v. City of Spartanburg, 194 S.E. 139, 185 S.C. 313.

Tex.—Corpus Juris cited in Joy v. City of Terrell, Civ.App., 143 S.W. 2d 704, 708, error dismissed, judgment correct.

44 C.J. p 1371 note 69.

Ordinance held valid

Ky.—City of Richmond v. Goodloe, 153 S.W.2d 921, 287 Ky. 379.

Effect of receivership

City was entitled to penalties which had accrued on realty which was sold in execution in foreclosure proceeding after federal court which had appointed receiver for real owner had relinquished its control, as against contention that under the federal rule penalties for nonpayment of taxes were not allowable on claims against funds in hands of receivers and that such rule was applicable.—Pennsylvania Co. for Insurances on Lives and Granting Annuities v. Barker, 190 A. 193, 124 Pa. Super. 557.

95. Miss.—State v. Columbus, etc., R. Co., 93 So. 362, 129 Miss. 882.

96. Va.—Southern Ry. Co. v. City of Danville, 7 S.E.2d 896, 175 Va. 300.

97. S.C.—Home Building & Loan Ass'n v. City of Spartanburg, 194 S.E. 139, 185 S.C. 313.

98. Tex.—Joy v. City of Terrell, Civ.

Construction, operation, and effect. Provisions authorizing the imposition of penalties are not retroactive and should not be given a retroactive construction.¹ An ordinance is not invalid as retroactive where it does not attempt to impose a penalty for the nonpayment of taxes which were delinquent prior to its passage.² An ordinance fixing a penalty cannot affect the legality of a tax sale which has already taken place.³

Repeal. The right to collect a penalty ceases when the statute authorizing the penalty is repealed.⁴ The repeal of a statute authorizing penalties will not affect penalties already incurred where a general statute so provides.⁵

c. Remission or Abatement

Penalties imposed for the failure to pay municipal taxes may be remitted by the authority having the power to affix them, and some statutes provide for the abatement of penalties under certain circumstances.

The power to remit penalties for failure to pay municipal taxes is implied from the power to affix them,⁶ and a municipal council having power to affix may remit as against the objection of the collector of taxes.⁷ A board of commissioners having power to remit penalties is not liable for the wrongful use of the power by one of its members in the absence of evidence of authorization or ratification.⁸ Some statutes have provided that penalties imposed on delinquent city taxpayers for designated years shall be abated by the council of the city, or abated without further action by the local authorities, if certain conditions are complied

App. 143 S.W.2d 704, error dismissed, judgment correct.

99. S.C.—Home Building & Loan Ass'n v. City of Spartanburg, 194 S.E. 143, 185 S.C. 353.

1. S.C.—Home Building & Loan Ass'n v. City of Spartanburg, 194 S.E. 143, 185 S.C. 353.

44 C.J. p 1371 note 71.

2. S.C.—Home Building & Loan Ass'n v. City of Spartanburg, 194 S.E. 139, 185 S.C. 313.

3. S.C.—Home Building & Loan Ass'n v. City of Spartanburg, 194 S.E. 143, 185 S.C. 353.

4. Pa.—Speck v. Phillips, 51 A.2d 399, 160 Pa.Super. 365.

5. U.S.—Chicago, etc., R. Co. v. Hartshorn, C.C.Iowa, 30 F. 541.

6. Tenn.—Burns v. Nashville, 221 S.W. 828, 142 Tenn. 541.

7. Ky.—Wheatly v. Covington, 11 Bush 18.

8. Tenn.—Burns v. Nashville, 221 S.W. 828, 142 Tenn. 541.

with, such as, the payment of the delinquent taxes in installments and the payment of current taxes before they become delinquent.⁹ In order to be entitled to an abatement under the statute there must be a proper payment of the taxes required to be paid.¹⁰ If the conditions imposed by the statute are not fulfilled, the abated penalties are revived.¹¹

d. Liability, Collection, and Recovery Back

Liability for penalties on a municipal tax accrues when the tax becomes delinquent and the penalties ordinarily may be collected as a part of the tax.

Under some provisions a penalty for failure to pay a municipal tax may be collected only from

the person owing the tax,¹² and not from a purchaser from the person who owned the land at the time the taxes were assessed.¹³ The taxpayer is not liable for penalties before the tax becomes delinquent.¹⁴ A delay in filing the assessment roll, resulting in a postponement of the due date, for payment of taxes, operates as a postponement of the time when penalties can be imposed.¹⁵ Refusal to pay a tax levied under an invalid ordinance does not subject the taxpayer to liability for penalties,¹⁶ but if the city later corrects and vitalizes the levying ordinance, and then makes a demand for a payment of the tax and is refused, the taxpayer becomes liable for the penalty.¹⁷

9. Pa.—*Pennsylvania Co. for Insurances on Lives and Granting Annuities v. Zussman*, 186 A. 378, 122 Pa.Super. 325.

Purpose of statute

(1) Primary purpose of statute is to encourage prompt payment not only of back taxes but also of current taxes, the advantage or benefit to taxpayer being only incidental to main object.—*Braun, for Use of Fisher, now to Use of Louik, v. De Rosa*, 194 A. 514, 128 Pa.Super. 318.

(2) Primary purpose is to obtain payment of taxes long delinquent, without necessity of sale of property by political subdivision.—*Speck v. Phillips*, 51 A.2d 399, 160 Pa.Super. 365.

Retrospective operation

Local tax collection law operates retroactively to relieve taxpayer of penalty imposed by general borough act on persons failing to pay taxes charged against them in tax duplicate.—*Speck v. Phillips, supra*.

Persons entitled to benefit of statute

(1) A mortgagee can take advantage of tax abatement statutes by paying taxes before sheriff's sale and having taxes so paid included in his judgment, and mortgagee is in no sense a volunteer.—*Keystone State Building & Loan Ass'n v. Sabo*, 14 A.2d 831, 140 Pa.Super. 599.—*Braun, for Use of Fisher, now to Use of Louik, v. De Rosa*, 194 A. 514, 128 Pa.Super. 318.

(2) Under a tax abatement act so providing, the benefits of the act are extended to a mortgagee, but this means a mortgagee who has an existing mortgage on realty, and not a person whose lien has been discharged by a sheriff's sale and whose claim is transferred to the fund in sheriff's hands.—*Keystone State Building & Loan Ass'n v. Sabo, supra*.

When taxes are delinquent

(1) The term "delinquent taxes" as used in statute providing for abatement under certain circum-

stances of penalties imposed on delinquent city taxes in cities of first class means taxes not paid during current year following their assessment and thereafter registered as delinquent, and does not include taxes on which penalties were imposed during current year in order to encourage promptness in their payment.—*Pennsylvania Co. for Insurances on Lives and Granting Annuities v. Zussman*, 186 A. 378, 122 Pa.Super. 325.

(2) Under a delinquent tax abatement act, abating penalties and interest on delinquent realty taxes and providing that taxes shall be deemed delinquent "when a penalty attaches to the tax," "delinquent taxes" do not include taxes to which a penalty has been added by a Philadelphia ordinance, or by statute.—*Land Title Bank & Trust Co. v. Marshall*, 34 A.2d 71, 348 Pa. 105.

10. Pa.—*Braun, for Use of Fisher, now to Use of Louik, v. De Rosa*, 194 A. 514, 128 Pa.Super. 318.

Taxes paid by sheriff after sale

Statute is not applicable to taxes paid by sheriff in distribution of funds derived from the sale of real estate.—*Braun, for Use of Fisher, now to Use of Louik, v. De Rosa, supra*.

11. Pa.—*Braun, for Use of Fisher, now to Use of Louik v. De Rosa, supra*.

12. Tex.—*San Antonio v. Raley*, Civ. App., 32 S.W. 180.

Accrual of penalties after transfer of title

Where owner of condemned property failed to make application for payment of city taxes which had become a lien on the property before it was acquired by the United States immediately after vesting of title in United States, penalties on such taxes continued to accrue after title to the property vested in the government until payment of such taxes.—*U. S. v. 53¼ Acres of Land, More or Less in Borough of Brooklyn,*

Kings County, N. Y., D.C.N.Y., 46 F. Supp. 875.

13. Tex.—*San Antonio v. Raley*, Civ. App., 32 S.W. 180.

14. Delinquency during pendency of tax appeal

Under statutes providing for penalties on delinquent municipal tax payments, legislature did not intend that taxpayers were to be considered delinquent during pendency of appeal to court from assessment in which substantial reductions were obtained, especially in view of earlier statute allowing appeals from excessive assessments but lacking any provision for a refund.—*Phlipps v. Kirk*, 5 A.2d 143, 333 Pa. 478.

Municipal income tax

Under income tax ordinance imposing penalty for any failure of taxpayer to pay tax due by him, penalty would not be exacted from taxpayer who in good faith resisted what he considered to be an unjust assessment.—*Dole v. City of Philadelphia*, 11 A.2d 163, 337 Pa. 375, opinion supplemented 11 A.2d 767, 337 Pa. 375.

Payment under protest

Where taxpayer paid taxes under protest and thereafter commenced proceedings to review tax valuation of city board of equalization, payment made by taxpayer was not to be regarded as voluntarily made, but as a tender to extent that board's valuation or that of taxpayer might be sustained, thus releasing taxpayer from penalties.—*Board of Equalization of City of Fort Worth v. McDonald*, 129 S.W.2d 1135, 133 Tex. 521.

15. R.I.—*Rives v. Taylor*, 113 A. 113, 43 R.I. 426.

44 C.J. p 1372 note 79.

16. Ky.—*Jetts Bros. Distilling Co. v. Carrollton*, 199 S.W. 37, 178 Ky. 561.

17. Ky.—*Jetts Bros. Distilling Co. v. Carrollton, supra*.

Collection. The penalty ordinarily is collectable as part of the tax¹⁸ and in the same manner as the tax.¹⁹ Under the statutes in the particular jurisdictions the penalty may be enforced in an action to collect the delinquent tax and penalty²⁰ or a suit in rem to enforce the lien.²¹

Recovery back. A penalty paid under protest, to prevent a seizure, may be recovered back by the taxpayer.²²

e. Amount Recoverable

A penalty for failure to pay a municipal tax within the time required may be imposed in such amount as is fixed or authorized by statutory or charter provision or by ordinance.

A penalty for failure to pay a municipal tax within the time required may be imposed in such

amount as is fixed or authorized by statutory or charter provision or by ordinance.²³ In the absence of constitutional or statutory restrictions, a municipality having power to affix penalties may provide for the payment of penalties in excess of those imposed for failure to pay state taxes.²⁴ Unless expressly so provided, the penal rate of interest does not continue after judgment,²⁵ although there is also authority to the contrary.²⁶

§ 2116. Forfeiture of Property Delinquent

The forfeiture of property for failure to pay taxes is considered in the C.J.S. title Taxation §§ 1037-1053, also 61 C.J. p 1497 note 21 et seq. Forfeitures generally are discussed in Forfeitures § 1 et seq.

Examine Pocket Parts for later cases.

9. DISPOSITION OF TAXES AND REVENUE COLLECTED

§ 2117. In General

The mode of disposition of taxes and other revenue should follow such directions as may be prescribed by constitutional, statutory, or charter provisions.

The mode of disposition for municipal purposes of taxes and other revenue, after collection, should follow such specific directions as may be prescribed

by constitutional, statutory or charter provisions.²⁷ In the absence of any special direction, the municipality may apply them in any manner not inconsistent with the charter provisions.²⁸ A municipality holds the proceeds of taxation as its corporate property²⁹ and it has been held that it may use them for the purposes of local government or for

18. Pa.—*Pennsylvania Co. for Insurances on Lives and Granting Annuities v. Barker*, 190 A. 193, 124 Pa.Super. 557.

Penalty as part of tax see *infra* § 2118.

19. Iowa.—*Burlington v. Burlington, etc., R. Co.*, 41 Iowa 184.

Collection and enforcement of municipal taxes see *supra* §§ 2070-2099.

20. S.C.—*Rothrock v. Oakman*, 10 S.E.2d 345, 195 S.C. 123.

Evidence

Tex.—*City of Lewisville v. Merritt*, Civ.App., 123 S.W.2d 470.

21. Remission of penalty by court

Where city, notwithstanding moratorium acts, could have proceeded against property for collection of taxes thereon within a much shorter period, but instead allowed suit to remain in court for many years until interest and penalty would far exceed amount of taxes due, chancellor properly exercised his discretion in remitting penalty.—*State, for Use of City of Chattanooga, v. Bayless*, Tenn.App., 209 S.W.2d 504.

22. Miss.—*Hodges v. Coffee*, 13 So. 878.

Recovery of taxes wrongfully exacted see *supra* § 2069.

23. Pa.—*Speck v. Phillips*, 51 A.2d 399, 160 Pa.Super. 365.—*City of*

Philadelphia v. Kolb, 30 Pa.Dist. & Co. 229.

Tex.—*Love v. Spur Independent School Dist.*, Civ.App., 143 S.W.2d 793.

Va.—*Southern Ry. Co. v. City of Danville*, 7 S.E.2d 896, 175 Va. 300.

Computation to date of payment of taxes

Where city was vested with title to land in condemnation proceedings, taxes and penalties thereon would be computed to the date of payment of the taxes.—*In re Public Park, Borough of Queens*, 34 N.Y.S.2d 944, 264 App.Div. 784, 794.

24. Ky.—*Carpenter v. Lambert*, 92 S.W. 607, 29 Ky.L. 183.

25. Pa.—*Altoona v. Morrison*, 24 Pa. Super. 417.

26. Mo.—*Westport v. McGee*, 30 S. W. 523, 128 Mo. 152.

27. Ohio.—*City of Youngstown v. Mitchell*, 14 Ohio Supp. 83.

Okl.—*Mid-Continent Pipe Line Co. v. Creek County Excise Bd.*, 169 P.2d 744, 197 Okl. 217.

44 C.J. p 1372 note 95.

Adjustment of accounts with other political bodies see *supra* § 1879.

Disposition of proceeds of bonds see *supra* § 1884.

Injunction to restrain diversion of funds see *infra* § 2148.

Payment of public improvements

from general or special funds see *supra* § 1204.

Note issued against taxes levied or to be levied

N.Y.—*First Nat. Bank & Trust Co. of Bay Shore v. Incorporated Village of Saltaire*, 9 N.Y.S.2d 103, 256 App.Div. 156.

Municipal garage

Construction and operation by city of parking garage, for use of which charge was to be made, did not constitute the putting of city into an unconstitutional private business of a nongovernmental character for which tax moneys might not be expended, or revenue bonds issued.—*Cleveland v. City of Detroit*, 37 N.W. 2d 625, 324 Mich. 527.

28. Ala.—*Corpus Juris cited in Johnson v. City of Sheffield*, 183 So. 265, 267, 236 Ala. 411.

Pa.—*Corporation for Relief of Widows and Children of Clergymen in Communion of Protestant Episcopal Church in Commonwealth of Pennsylvania v. City of Philadelphia*, 176 A. 727, 317 Pa. 76.

44 C.J. p 1372 note 94.

29. N.Y.—*Village of Kenmore v. Erie County*, 169 N.E. 637, 252 N.Y. 437.—*Nassau County v. Lincer*, 3 N.Y.S.2d 327, 165 Misc. 909, affirmed 4 N.Y.S.2d 77, 254 App.Div. 746, 760, affirmed 20 N.E.2d 1018, 280 N.Y. 661.

any other purpose within its corporate powers,³⁰ although it has also been held that taxes may be expended only for governmental purposes.³¹ Tax money may be applied to purposes from which the individual taxpayer receives no benefit.³² It has been held that a sufficient portion of the ad valorem taxes must first be allocated to servicing the municipality's indebtedness and the balance may then be applied to operating expenses,³³ unless the municipality is insolvent, in which case operating expenses are a first charge on the revenue derived from ad valorem taxes.³⁴ The postponement by statute of the date of payment into the year following the year for which the taxes were levied does not withdraw the taxes from the fund available for meeting the obligations of the city maturing during the year of the levy.³⁵

General municipal funds may be used, applied, or expended for any lawful municipal purpose.³⁶ However, it has been held that the general funds of a municipality are a trust fund to carry on the functions of government³⁷ and a creditor of

the municipality, in possession of the funds, may not apply them in satisfaction of his claim.³⁸ Statutory prohibitions against the use of a municipality's general funds must be heeded.³⁹

Dissolution of corporation. There is authority for the view that, on the dissolution of the corporation, all taxes levied or uncollected are subject to the demands of creditors and may be collected and disbursed by a receiver.⁴⁰

§ 2118. Particular Taxes and Moneys Collected

In the absence of a statutory direction, the municipal authorities may designate the fund or funds into which income from the operation of a municipal public utility shall go. Fines or penalties on taxes may be payable into general funds of the municipality.

In the absence of a statutory direction, the governing authorities of a municipal corporation may designate the fund or funds into which income from the operation of a public utility by the municipality shall be paid,⁴¹ and under some statutes

30. N.Y.—*Village of Kenmore v. Erie County*, 169 N.E. 637, 252 N.Y. 437—*Nassau County v. Lincer*, 3 N.Y.S.2d 327, 165 Misc. 909, affirmed 4 N.Y.S.2d 77, 254 App.Div. 746, 760, affirmed 20 N.E.2d 1018, 280 N.Y. 662.

31. Del.—*Town of Seaford v. Eastern Shore Public Service Co.*, 24 A.2d 436, 2 Terry 438.

32. N.Y.—*O'Flynn v. Village of East Rochester*, 54 N.E.2d 343, 292 N.Y. 156, certiorari denied 65 S.Ct. 39, 323 U.S. 713, 89 L.Ed. 674.

33. Tex.—*City of Houston v. McCraw*, 113 S.W.2d 1215, 131 Tex. 127.

34. Tex.—*City of Houston v. McCraw*, *supra*.

35. Idaho.—*Wycoff v. Strong*, 144 P. 341, 26 Idaho 502.

44 C.J. p 1340 note 10.

36. Cal.—*Frank v. Maguire*, 257 P. 515, 201 Cal. 414—*Newton v. Brodie*, 290 P. 1058, 107 Cal.App. 512. Mont.—*State ex rel. Clark v. Bailey*, 44 P.2d 740, 99 Mont. 484.

44 C.J. p 1160 note 46.

What constitutes general fund see *supra* § 1884.

Lawful obligations of municipal corporation are payable out of its general funds.—*Haas v. Lincoln Park Com'rs*, 171 N.E. 526, 339 Ill. 491.

Pensions

Cal.—*England v. City of Long Beach*, 163 P.2d 865, 27 Cal.2d 343, followed in *City of Long Beach v. Lents*, 165 P.2d 677, 27 Cal.2d 890.

Schools

Where city and independent school

district were both independent municipal corporations, the city council was without power to aid in financing the support and maintenance of schools except as authorized by requisition of school board of trustees and could not transfer money from general funds of city to independent school district.—*City of El Paso v. Carroll*, Tex.Civ.App., 108 S.W.2d 251, error refused.

Extra compensation

General funds may not be used to pay additional compensation—to an officer for certain service, where he is expressly prohibited by statute from receiving such compensation.—*McCalla v. Rockdale*, 246 S.W. 654, 112 Tex. 209.

37. N.J.—*Township Committee of Piscataway Tp. v. First Nat. Bank*, 168 A. 757, 111 N.J.Law 412, 90 A.L.R. 423.

Municipal revenues are dedicated funds and persons holding lien thereon are entitled to payment as funds arise.—*Phelps v. Borough of Fort Lee*, 188 A. 689, 14 N.J.Misc. 895, affirmed 191 A. 836, 118 N.J.Law 181.

Restriction to municipal purpose

Tenn.—*Newton v. Hamilton County*, 33 S.W.2d 419, 161 Tenn. 634.

38. N.J.—*Township Committee of Piscataway Tp. v. First Nat. Bank*, 168 A. 757, 111 N.J.Law 412, 90 A.L.R. 423.

39. N.Y.—*Osborn v. La Guardia*, 191 N.E. 519, 264 N.Y. 469, reargument denied *Osborn v. La Guardia*, 191 N.E. 594, 264 N.Y. 630.

Operation of subway

N.Y.—*Osborn v. La Guardia*, *supra*.

40. U.S.—*Garrett v. Memphis, C.C. Tenn.*, 5 F. 860.

41. Okl.—*City of Yale v. Excise Board of Payne County*, 10 P.2d 403, 156 Okl. 192—*In re Tax Levies of City of Woodward*, 288 P. 458, 143 Okl. 204.

S.D.—*Robbins v. Rapid City*, 23 N.W. 2d 144, 71 S.D. 171—*Travaille v. City of Sioux Falls*, 240 N.W. 836, 59 S.D. 391.

Application to purchase price

S.D.—*Robbins v. Rapid City*, 23 N.W. 2d 144, 71 S.D. 171.

Pledge of revenues

City has authority to pledge revenue derived from hospital for repayment of money borrowed for such purposes.—*State v. City of Fort Lauderdale*, 5 So.2d 263, 149 Fla. 177.

Revenue not required to be used for particular purpose

Ohio.—*Union Ice Corporation v. City of Niles*, 13 Ohio Supp. 115.

Okl.—*City of Yale v. Excise Board of Payne County*, 10 P.2d 403, 156 Okl. 192—*In re Tax Levies of City of Woodward*, 288 P. 458, 143 Okl. 204.

Income from parking meters

(1) A city's operation of parking meters was not a public utility within statutes relating to the budgeting of, and segregation of, funds derived from a publicly owned or operated utility, and was not a dedicated revenue within budget law, but was a general revenue of the municipality, notwithstanding such income was applicable to the general function of regulating and controlling traffic and installing and operating the meters.

and ordinances such income may or must be paid into the municipality's general fund in the absence of circumstances warranting a different disposition thereof,⁴² while under others it constitutes a special fund.⁴³ The control of revenues arising from the operation of public service plants owned by the municipality is vested in the board intrusted with the management of the plant without any advisory authority in the city council, where the statute so provides.⁴⁴

Under some statutes the municipality may transfer to its general fund or use for general municipal purposes the revenues or net profits of the utility,⁴⁵ and need not first apply any surplus to the interest and sinking fund for bonds issued for the construction of the utility,⁴⁶ but under other statutes the revenues or net profits derived from the operation of a municipally owned utility may not be used to pay the general expenses of the city, or be transferred to the general fund of the municipality.⁴⁷

—Board of Com'rs of City of Newark v. Local Government Bd. of N. J., 45 A.2d 139, 133 N.J.Law 513.

(2) Parking meter revenues accruing to municipalities are special charges with respect to the operation of motor vehicles and are within the constitutional provision that excess revenue accruing to the state from such special charges must be used for highway purposes; and the constitutional provision would not be violated by the use of parking meter revenues to maintain streets, including streets on which meters are not located, and to acquire, construct, and maintain public parking areas, thereby removing parked vehicles from the highways.—Opinion of the Justices, 51 A.2d 836, 94 N.H. 501.

42. Ky.—Electric Plant Bd. of City of Mayfield v. City of Mayfield, 185 S.W.2d 411, 299 Ky. 375.
Okl.—In re Tax Levies of City of Woodward, 288 P. 458, 143 Okl. 204.

Unanimous consent

S.D.—Travaille v. City of Sioux Falls, 240 N.W. 336, 59 S.D. 391.

Sinking fund

(1) Municipality may appropriate to general fund or sinking fund profits derived from municipally owned utility.—In re Tax Levies of City of Woodward, 288 P. 458, 143 Okl. 204.

(2) Profits derived from operation of municipally owned utilities need not be appropriated to municipality's sinking fund.—Commerce Trust Co., Kansas City, Mo., v. Morris, 11 P.2d 183, 157 Okl. 127.

(3) Money derived from operation of light plant and placed in sinking fund by city clerk without authority from aldermen was not part of sinking fund, and city could make its records speak the truth.—Mewborn v. City of Kingston, 154 S.E. 76, 199 N.C. 72.

Current funds include the surplus or profits arising from the sale of water after the payment of the expenses of maintaining the waterworks system.—Crouch v. McKinney, 104 S.W. 518, 47 Tex.Civ.App. 54.

Transfer not required

Okl.—Dowler v. State ex rel. Prunty, 66 P.2d 1081, 179 Okl. 532.

43. Cal.—City and County of San Francisco v. Boyd, 110 P.2d 1036, 17 Cal.2d 606.

Ill.—Rudin v. City of Harvey, 37 N.E.2d 340, 377 Ill. 595.

Ind.—Wilkins v. Leeds, 35 N.E.2d 442, 216 Ind. 508.

N.Y.—Colbert v. Delaney, 291 N.Y.S. 801, 249 App.Div. 209, affirmed 7 N.E.2d 726, 273 N.Y. 626.

"Funds" as not including realty

Ill.—People ex rel. Illinois Armory Board v. Kelly, 16 N.E.2d 693, 369 Ill. 280.

Income from investment of surplus
Ohio.—Ellis v. Urner, 15 Ohio Supp. 73.

Ordinance held not in conflict with statute

Fla.—Davis v. City of Melbourne, 170 So. 836, 126 Fla. 282.

No fund established

Ohio.—Union Ice Corporation v. City of Niles, 13 Ohio Supp. 115.

44. Ohio.—Kerr v. Bellfontaine, 62 N.E. 1024, 59 Ohio St. 446.

Purpose of separate financial body

The purpose of legislature in requiring a city utility commission to be appointed to manage and control electric and water plans constructed from funds derived from sale of revenue bonds was to place revenues derived from operation of plants under an authority which was not officially concerned with other financial problems of city and which would not be tempted to divert the revenues to defray expenses of general fund at expense of sinking fund and surpluses required to be maintained by statute.—King v. Rowland, 168 S.W.2d 755, 293 Ky. 198.

45. Ark.—City of Harrison v. Braswell, 194 S.W.2d 12, 209 Ark. 1094.
—Mathers v. Moss, 151 S.W.2d 660, 202 Ark. 554.—Johnson v. City of Dermott, 75 S.W.2d 243, 189 Ark. 830.

Ky.—Electric Plant Bd. of City of Mayfield v. City of Mayfield, 185 S.W.2d 411, 299 Ky. 375.

Pa.—Graham v. City of Philadelphia, 6 A.2d 72, 334 Pa. 513.

Tex.—Young v. Taylor, Civ.App., 92 S.W.2d 1075.—South Texas Public Service Co. v. Jahn, Civ.App., 7 S.W.2d 942, error refused.

67 C.J. p 1159 note 40.

Payment of bonds for other utilities

(1) A city has power to pledge or apply surplus net revenue from operation of either its waterworks system or sewer system to payment of revenue bonds issued by it for improvements to the other system.—City of Harrison v. Braswell, 194 S.W.2d 12, 209 Ark. 1094.

(2) In an earlier case, it was held that there was nothing in either statute which authorized any part of revenues derived from one system to be devoted and appropriated to pay costs of construction or operation of the other.—Mathers v. Moss, 151 S.W.2d 660, 202 Ark. 554.

Tax equivalents

City of fourth class has right to require its electric board in operation of municipal waterworks, which were acquired from a private utility corporation, to pay to city reasonable tax equivalents and charge such amounts as operating expenses in computation of net earnings of such waterworks.—Electric Plant Bd. of City of Mayfield v. City of Mayfield, 185 S.W.2d 411, 299 Ky. 375.

If operation of municipal plant requires levying of taxes, there can be no surplus earnings within statute authorizing construction of building for use of other city departments from surplus earnings.—Saltzman v. City of Council Bluffs, 243 N.W. 161, 214 Iowa 1033.

Rates sufficient to pay bonds

A legislative intent to create a trust fund out of water rents may not be inferred from statutory provisions directing that the rate of tax shall be fixed with a view to providing sufficient funds for the payment of bonds, and such statute does not preclude the use of water rents for other purposes.—Sinclair v. Brightman, 84 N.E. 453, 198 Mass. 243.

46. U.S.—St. Louis-San Francisco Ry. Co. v. Moore, C.C.A.Okl., 25 F. 2d 964.

47. Ill.—People ex rel. Schlaeger v. Brand, 59 N.E.2d 664, 389 Ill. 298.
Mich.—Freeland v. City of Sturgis, 226 N.W. 897, 243 Mich. 190.
44 C.J. p 1162 note 81 [a].

Water rents

(1) City budget act did not im-

A statute forbidding the use of the income from a municipally owned utility for any other purpose until the debt for which it is pledged is paid does not forbid the issuance of bonds to retire that debt and to extend and improve the utility.⁴⁸ It is generally held that the maintenance and operating expenses of a municipally owned utility may be paid from its revenues⁴⁹ and are a first charge thereon.⁵⁰

Taxes in arrears. A statute authorizing the investment of money received from the payment of taxes in arrears in revenue bonds theretofore issued by the city and "in any other bonds of the

city" authorizes an investment in bonds thereafter to be issued by the city.⁵¹

Interest, fines, penalties, and forfeitures. In the absence of a statute to the contrary, a penalty when collected forms no separate part of the municipal revenue, but is included with the tax and becomes a part of the special fund into which the tax itself is payable.⁵² However, under some constitutional or statutory provisions, applicable to certain municipalities or classes thereof, fines, penalties, and interest have been held to be payable into the general funds of the city⁵³ or into special funds designated in the constitution or statute.⁵⁴ A statute regulating

pliedly repeal the provisions of the city charter of a city that water rents shall be used exclusively for water supply.—*People ex rel. Schlager v. Brand*, 59 N.E.2d 664, 389 Ill. 298.

(2) Taxpayer could not complain of municipality's application of funds from water department to reduction of its taxes for general administration and other legitimate corporate purposes.—*People ex rel. Toman v. Chicago & N. W. Ry. Co.*, 37 N.E.2d 169, 377 Ill. 547.

County excise board

Transfer of estimated profits from operation of municipally owned utility to sinking fund is beyond authority of county excise board.—*City of Yale v. Excise Board of Payne County*, 10 P.2d 403, 156 Okl. 192.

In Ohio

(1) A diversion of revenue of public utilities for general purposes has been held improper.—*Hartwig Realty Co. v. City of Cleveland*, 192 N.E. 880, 128 Ohio St. 583.—*Roodman v. City of Cleveland*, 70 N.E.2d 695, 78 Ohio App. 401.—*Alcorn v. Deckebach*, 166 N.E. 597, 81 Ohio App. 142.

(2) Statute authorizing taxing authority of any political subdivision to transfer money from one fund to another fund related solely to transfer of funds derived from taxation and did not authorize common pleas court or state tax commission to transfer municipal waterworks funds to general revenue fund of municipality.—*City of Lakewood v. Rees*, 8 N.E.2d 250, 132 Ohio St. 399.—*Union Ice Corporation v. City of Niles*, 13 Ohio Supp. 115.

(3) Revenues derived from municipal waterworks could not be transferred to general revenue fund of municipality and used to meet general governmental expenses; notwithstanding city purchased its water and owned and operated only water distributing system.—*City of Lakewood v. Rees*, supra.

(4) On compliance with conditions

precedent required by statute, city had power, under statute authorizing taxing authority of any political subdivision to transfer any public funds under its supervision, to transfer surplus funds from its electric light and power department in view of omission from statutes governing transfer of funds of provision that there should be no such transfer except among funds raised by taxation.—*City of Niles v. Union Ice Corporation*, 12 N.E.2d 483, 133 Ohio St. 169.

48. Tex.—*City of McAllen v. Daniel*, 211 S.W.2d 944.

49. Cal.—*Powell v. City and County of San Francisco*, 144 P.2d 617, 62 Cal.App.2d 291.

Iowa.—*Jensen v. Zurmuehlen*, 171 N.W. 34, 185 Iowa 593.

Discretion of municipal authorities

When municipality owns and operates public utility, it is within discretion of municipal authorities to charge expenses reasonably attributable to such operation against income or revenue produced thereby.—*City of Mobile v. Marx & Co.*, C.C.A. Ala., 75 F.2d 569.

General fund or special revenues

A municipal water department may pay its operating expenses from appropriations made as a part of the general fund budget of the city, or may pay operating expenses from cash receipts of the department.—*City of Tulsa v. Langley*, 168 P.2d 116, 196 Okl. 680.

50. U.S.—*George v. City of Asheville*, C.C.A.N.C., 80 F.2d 50, 103 A.L.R. 588.

Ark.—*Johnson v. City of Dermott*, 75 S.W.2d 243, 189 Ark. 830.

Ky.—*Electric Plant Bd. of City of Mayfield v. City of Mayfield*, 185 S.W.2d 411, 299 Ky. 375.

Appropriation for expenses

Revenues from city-owned electric light plant properly belonged to, and should have been deposited in, general fund of city, and city council was only required to appropriate and

transfer so much money from general fund to electric light fund as might be necessary for maintenance, enlargement, improvement, extension, operation, and management of electric light department of city.—*Union Ice Corporation v. City of Niles*, 13 Ohio Supp. 115.

Payment of bonds

(1) Bonds may and should be paid from such revenue.

U.S.—*George v. City of Asheville*, C.C.A.N.C., 80 F.2d 50, 103 A.L.R. 588.

Ky.—*King v. Rowland*, 168 S.W.2d 755, 293 Ky. 198.—*Eagle v. City of Corbin*, 122 S.W.2d 798, 275 Ky. 808. S.C.—*Simons v. City Council of Charleston*, 187 S.E. 545, 181 S.C. 353.

(2) Where city proposed bond issue for improvement of existing waterworks system, revenues which city might pledge for payment were held to include revenues from entire system, and were not limited to revenues derived from improvement and betterments made from proceeds of bond issue.—*Wadsworth v. Santaquin City*, 28 P.2d 161, 83 Utah 321.

(3) Municipality was held not required to apply any portion of waterworks collections to waterworks bonds, in the absence of statute, municipal obligation, or provision in bonds requiring it.—*Travaille v. City of Sioux Falls*, 240 N.W. 336, 59 S.D. 391.

51. N.Y.—*Gibson v. Knapp*, 47 N.Y. S. 446, 21 Misc. 499.

52. U.S.—*New Orleans v. Fisher*, La., 21 S.Ct. 347, 180 U.S. 185, 45 L.Ed. 485.

44 C.J. p 1373 note 10.

53. Ky.—*Louisville v. Louisville School Bd.*, 84 S.W. 729, 119 Ky. 574, 27 Ky.L. 203.

44 C.J. p 1373 note 12.

54. Mich.—*Niles Bryant School v. Bailey*, 126 N.W. 116, 161 Mich. 193. 44 C.J. p 1373 note 12.

the use to be made by the city of moneys derived from penalties is held to apply to moneys derived from penalties in arrears as well as to those subsequently accruing.⁵⁵

§ 2119. Purpose of Tax and Obligations of City Connected Therewith

As a general rule, a tax for a special purpose or a special tax must be paid into a special fund for that purpose and a tax levied for one purpose may not be applied or used for a different purpose.

Subject to constitutional limitations,⁵⁶ municipal revenues raised by taxation, although levied for

specific public purposes, are so far subject to the legislative will that by it they may be applied to other uses of the municipality.⁵⁷ As a general rule, however, a tax for a special purpose or a special tax must be paid into a special fund for that purpose,⁵⁸ and a tax levied for one purpose may not be applied to, or used for, another purpose,⁵⁹ nor may it be diverted to the general fund and expended for general purposes.⁶⁰ The power and duty of a municipal corporation to apply taxes to the particular purpose for which they were raised are not affected by the merger into a judgment of a claim properly payable out of such tax,⁶¹ by the

55. Okl.—State v. Bonner, 208 P. 825, 86 Okl. 280.

56. U.S.—Sibley v. Mobile, C.C.Ala., 22 F.Cas.No.12,829, 3 Woods 535. 43 C.J. p 290 note 56.

57. Nev.—Reno v. Stoddard, 167 P. 317, 40 Nev. 537.

43 C.J. p 290 note 57.

Sale of utility

The sale by a city to a utilities company of its light and water systems for part cash and balance on terms was not void on ground that under terms the city was using funds raised by taxation for benefit of private company.—City of Clovis v. Southwestern Public Service Co., 161 P.2d 878, 49 N.M. 270, 161 A.L.R. 504.

58. Ohio.—City of Youngstown v. Mitchell, 14 Ohio Supp. 83.

Surplus from sale of property

Where property is adjudicated to a municipality for nonpayment of a bond tax, the surplus derived from its sale or the income from its rental goes to the general fund and not to the special fund for payment of the bonds.—State ex rel. McGregor v. Diamond, La.App., 167 So. 760.

Pledge of revenue

An express pledge of revenues to be derived by city from particular source creates a lien on the specific revenues designated, precluding lawful appropriation of such revenues to any other governmental function that will be prejudicial to payment of debt for which pledge is given.—State v. City of Lakeland, 16 So.2d 924, 154 Fla. 137.

Special laws held not conflicting

Fla.—State v. City of Tampa, 183 So. 491, 133 Fla. 840.

Port commission

The revenues of a port commission derived from the operation of its facilities must be applied solely and exclusively to the purposes specified by the statute.—Webb v. Port Commission of Morehead City, 172 S.E. 877, 205 N.C. 663.

59. U.S.—Rittenoure v. City of Edinburg, C.C.A.Tex., 159 F.2d 989.

Ark.—City of West Memphis v. Jordan, 208 S.W.2d 164, 212 Ark. 739

—City of Paris v. Street Improvement Dist. No. 2 of Paris, 175 S.W. 2d 199, 206 Ark. 926.

Cal.—Rancho Santa Anita v. City of Arcadia, 125 P.2d 475, 20 Cal.2d 319—Holman v. Santa Cruz County, App., 205 P.2d 767.

Fla.—State ex rel. Cole v. Keller, 176 So. 176, 129 Fla. 276—State ex rel. Lawler v. City of West Palm Beach, 174 So. 737, 125 Fla. 626, followed in City of West Palm Beach v. State ex rel. Peterson, 182 So. 446, 132 Fla. 904—Keefe v. Adams, 143 So. 644, 106 Fla. 733.

Ill.—People ex rel. Nelson v. Beu, 85 N.E.2d 829, 403 Ill. 232—People ex rel. Gill v. Hamilton, 9 N.E.2d 243, 366 Ill. 455.

Ind.—Pavey v. Pavey, 42 N.E.2d 30, 220 Ind. 289.

Iowa.—Mathewson v. City of Shenandoah, 11 N.W.2d 571, 233 Iowa 1368

Kan.—State ex rel. Boynton v. Board of Education of City of Topeka, 21 P.2d 295, 137 Kan. 451.

Ky.—City of Newport v. Rawlings, 158 S.W.2d 12, 289 Ky. 203—City of Newport v. McLane, 77 S.W.2d 27, 256 Ky. 803, 96 A.L.R. 655.

La.—Reuther v. City of New Orleans, 9 So.2d 523, 201 La. 209—Ziemer v. City of New Orleans, 197 So. 754, 195 La. 1054.

Neb.—Darnell v. City of Broken Bow, 299 N.W. 274, 139 Neb. 844, 136 A.L.R. 101.

Ohio.—Board of Ed. v. County Bd. of Ed., 26 Ohio N.P.N.S., 33.

Wash.—State ex rel. Washington Mut. Sav. Bank v. City of Bellingham, 111 P.2d 781, 8 Wash.2d 238. 44 C.J. p 1373 note 18.

Evasion of debt or duty

Law does not countenance evasion by a municipality of its debt or its duty as a trustee, by willful or negligent failure to apply, toward the discharge of obligations, funds collected by it for the specific purpose of meeting such demands.

U.S.—Getz v. City of Harvey, C.C.A. Ill., 118 F.2d 817, certiorari denied City of Harvey v. Getz, 82 S. Ct. 59, two cases, 314 U.S. 628, 86 L.Ed. 504.

Ill.—People ex rel. Anderson v. Vil-

lage of Bradley, 11 N.E.2d 415, 367 Ill. 301—Allbee v. City of Aurora, 28 N.E.2d 742, 306 Ill.App. 457.

Statute or ordinance held not invalid
Ark.—City of Paris v. Street Improvement Dist. No. 2 of Paris, 175 S.W.2d 199, 206 Ark. 926.

Kan.—State ex rel. Boynton v. Board of Education of City of Topeka, 21 P.2d 295, 137 Kan. 451.

What constitutes unlawful diversion

(1) City's contract for construction of municipal electric plant incorporating by reference specifications which provided that revenue from town street lights would be available to municipal plant did not provide for unlawful diversion of tax levy for street lighting under contract with electric company.—Northwestern Light & Power Co. v. Town of Milford, Iowa, C.C.A.Iowa, 82 F. 2d 45, 1023.

(2) City's pledge of surplus revenues from either its waterworks or sewer system to pay the other system's revenue bonds is not unlawful diversion of funds.—City of Harrison v. Braswell, 194 S.W.2d 12, 209 Ark. 1094.

(3) Appropriations in city budget from five of bond funds of an amount owed to the water fund and the levy of taxes to meet that obligation did not violate provision of municipal bond act that taxes levied for bond interest and sinking funds should not be used for any other purpose, where appropriation merely provided for repayment of sums advanced from water fund to bond funds and there was nothing to show that advances were for any purpose other than payment of bond principal and interest.—Rancho Santa Anita v. City of Arcadia, 125 P.2d 475, 20 Cal. 2d 319.

60. Tex.—Spears v. City of South Houston, Civ.App., 137 S.W.2d 197, affirmed 150 S.W.2d 74, 136 Tex. 218.

44 C.J. p 1373 note 18.

61. Kan.—Ward v. Piper, 77 P. 699, 69 Kan. 773.

44 C.J. p 1374 note 20.

fact that the tax is not sufficient in amount to meet the entire requirements of the purpose for which the levy was made,⁶² or by the fact that the tax was not legally collectable, where it has notwithstanding been paid over to the city by way of compromise and the taxpayer is not entitled to recover it back;⁶³ but where the fund is derived from an illegal levy it may not be used for the purpose for which it was levied.⁶⁴

A municipality may not, by an attempted subdivision and reapportionment of the funds collected, make a part of them unavailable for the purpose for which they were raised.⁶⁵ No obligation attaches to the municipality, however, to make good to a special fund taxes levied therefor which have not been paid over to the city and which are not legally collectable.⁶⁶ Where the city cannot apply the tax to the purpose for which it was raised, and the taxpayer cannot recover it back, it goes to the general fund.⁶⁷

Special municipal funds, which are dedicated

by express statutory provision or by the act of a municipal council or board, duly authorized, to a specific municipal object, may not be diverted by the municipality either directly or indirectly to any other purpose;⁶⁸ whenever diversion is threatened it may be enjoined;⁶⁹ at the instance of those entitled to the fund;⁷⁰ and no misapplication of a special fund can hinder or defeat the right of creditors to be paid therefrom.⁷¹ However, this rule is limited to money lawfully paid into the special fund,⁷² and where a special fund is established merely as a matter of administrative convenience and is not dedicated to a particular object, it may be used for any lawful municipal purpose.⁷³ A municipality having the custody and disposition of a special fund has a discretion in its expenditure only within the requirements and provisions of law.⁷⁴

Disposition of surplus of a tax or fund depends on charter or statutory provisions,⁷⁵ it being variously held proper or necessary, under different provisions, for the surplus to be carried over to the

62. La.—Henderson v. Shreveport, 107 So. 139, 160 La. 360.
44 C.J. p 1374 note 21.

63. Ky.—Cynthiana v. Cynthiana Bd. of Education, 52 S.W. 969, 21 Ky.L. 731.
44 C.J. p 1374 note 22.

64. Ill.—People ex rel. Nelson v. Ridge Country Club, 76 N.E.2d 461, 399 Ill. 46.

65. Cal.—Carter v. Tilghman, 51 P. 34, 119 Cal. 104.

66. Ky.—Louisville School Bd. v. Louisville, 113 S.W. 883.

67. S.C.—Shillito v. City of Spartanburg, 51 S.E.2d 95, 214 S.C. 11.
44 C.J. p 1374 note 27.

Corporate purposes fund

Ill.—People ex rel. Nelson v. Ridge Country Club, 76 N.E.2d 461, 399 Ill. 46.

68. U.S.—Federal Deposit Ins. Corporation v. Casady, C.C.A.Okl., 106 F.2d 784.

Cal.—Mahoney v. City and County of San Francisco, 257 P. 49, 201 Cal. 248.

Ohio.—Hartwig Realty Co. v. City of Cleveland, 31 Ohio N.P.N.S., 265.

Wash.—City of Tacoma v. Perkins, 296 P. 829, 161 Wash. 209.

44 C.J. p 1160 note 48.

Trust fund

Idaho.—Maguire v. Whillock, 124 P. 2d 248, 63 Idaho 630.

Mont.—State ex rel. Clark v. Bailey, 44 P.2d 740, 99 Mont. 484.

N.Y.—Hudson River Country Club v. City of Yonkers, 13 N.Y.S.2d 42, 257 App.Div. 970, reargument denied 14 N.Y.S.2d 995, 257 App.Div.

1074, affirmed 27 N.E.2d 47, 282 N.Y. 766.

Previous irregularities

Fact that in former years money from city's general fund had been used to pay interest obligations would not entitle city to reimburse general fund from interest account as against claims of municipal bondholders for payment of accrued interest in excess of amount in interest account.—John Wittbold & Co. v. City of Ferndale, 275 N.W. 225, 281 Mich. 503.

Charge against debt to general fund

With respect to city funds collected for designated purpose and deposited in bank which became insolvent, agreement whereby city should receive credit on its general indebtedness to bank for full value of several special funds deposited therein held unauthorized.—City of Florida v. Matthews, 134 So. 627, 223 Ala. 31.

Income from operation of stadium

Ala.—City of Birmingham v. Wood, 10 So.2d 666, 243 Ala. 480.

Capital outlay fund

Cal.—National City v. Fritz, 204 P. 2d 7.

Library fund

N.Y.—Buffalo Library v. Wanamaker, 293 N.Y.S. 776, 162 Misc. 26—Chicago, R. I. & P. Ry. Co. v. Excise Board of Pottawatomie County, 29 P.2d 586, 167 Okl. 326.

Traction fund

Ill.—People v. City of Chicago, 182 N.E. 419, 349 Ill. 304—Barsaloux v. City of Chicago, 92 N.E. 525, 245 Ill. 598.

69. U.S.—Corpus Juris cited in

George v. City of Asheville, N. C., C.C.A.N.C., 80 F.2d 50, 56.

Wis.—Weik v. Wausau, 128 N.W. 429, 143 Wis. 645.

70. Iowa—Rice v. Walker, 44 Iowa 458.

Injunction at instance of taxpayer see *infra* § 2148.

71. W.Va.—State v. Philippi, 92 S. E. 725, 80 W.Va. 437.

44 C.J. p 1161 note 51.

72. Ohio.—Union Ice Corporation v. City of Niles, 13 Ohio Supp. 115.

73. Cal.—Newton v. Brodie, 290 P. 1058, 107 Cal.App. 512.

Ill.—People ex rel. Chicago Title & Trust Co. v. Village of Glencoe, 23 N.E.2d 697, 372 Ill. 280.

Dedicated revenue

The dedication of municipal revenues is an affirmative legislative act which will not be presumed but must be plainly indicated in the legislative expression; fact that exactions under municipal police regulations are confined to cost of service involved does not transform such exactions into dedicated revenue within the budget law.—Board of Com'rs of City of Newark v. Local Government Bd. of N. J., 45 A.2d 139, 133 N.J. Law 513.

74. Me.—Ayer v. Bangor, 27 A. 523, 85 Me. 511.

44 C.J. p 1161 note 57.

75. Ill.—People ex rel. Chicago Title & Trust Co. v. Village of Glencoe, 23 N.E.2d 697, 372 Ill. 280.

Surplus of tax for payment of particular bonds may be used for payment of other municipal bonds.—Reuther v. City of New Orleans, 9 So.2d 523, 201 La. 209.

same fund for the next year, provided it does not result in the fund exceeding its legal limit;⁷⁶ to be transferred to the general fund;⁷⁷ to be applied to the payment of claims payable out of the general fund;⁷⁸ to be used for general city purposes,⁷⁹ or used to supply the deficiency in any other fund.⁸⁰ A transfer of the surplus in one fund to another fund has been held proper,⁸¹ it being expressly authorized by some statutes or charters;⁸² but money may not be transferred from one fund to another in violation of a charter or statutory prohibition⁸³ unless the statute is unconstitutional,⁸⁴ and a deduction cannot be made from one fund for the purpose of reimbursing another fund for money wrongfully and illegally paid from the latter.⁸⁵

Under some statutes a transfer of funds from the general fund may not be made where the general fund does not have a surplus.⁸⁶ A fund created

by an ordinance complying with statutory requirements is not necessarily invalid because it is composed of money transferred from another related fund which is merely a collection fund.⁸⁷ If there is a right to transfer money from one fund to another, there is likewise a right to retransfer it, in a proper case, to the fund from which it was taken.⁸⁸ It has been held that an appropriation is necessary for the transfer of money from the general to a special fund.⁸⁹

Loan. It has been held proper for a city to make a temporary loan of money in one fund to another fund with an assured income under the control of the city for the purpose of expediting the city's business;⁹⁰ but, on the other hand, it has been denied that a city has power, in the absence of express statutory authorization, to borrow from

76. N.J.—State v. Elizabeth, 17 A. 91, 51 N.J.Law 246.

77. Fla.—Chamberlain v. Tampa, 23 So. 572, 40 Fla. 74.

Mont.—McClintock v. Great Falls, 163 P. 99, 53 Mont. 221.

44 C.J. p 1373 note 1.

78. Ga.—Tate v. Elberton, 71 S.E. 420, 136 Ga. 301.

79. Ill.—People ex rel. Chicago Title & Trust Co. v. Village of Glencoe, 23 N.E.2d 697, 372 Ill. 280.

N.Y.—Wilmerding v. La Guardia, 26 N.Y.S.2d 105, 176 Misc. 449.

80. N.Y.—In re Plattsburgh, 51 N.E. 512, 157 N.Y. 78.

81. Okl.—Miami State Bank v. Miami, 144 P. 597, 43 Okl. 809.

44 C.J. p 1157 note 68 [a].

Transfer to sinking fund

Fla.—State v. City of Sanford, 174 So. 339, 128 Fla. 171—State v. City of Clearwater, 169 So. 602, 125 Fla. 73.

Okl.—City of Yale v. Excise Board of Payne County, 10 P.2d 403, 156 Okl. 192.

Procedure

Ohio.—Union Ice Corporation v. City of Niles, 13 Ohio Supp. 115.

82. Cal.—Hammond v. City of Burbank, 59 P.2d 495, 6 Cal.2d 646, appeal dismissed 57 S.Ct. 316, 299 U.S. 519, 81 L.Ed. 383.

Ohio.—City of Niles v. Union Ice Corporation, 12 N.E.2d 483, 183 Ohio St. 169.

44 C.J. p 1162 note 80.

Limitation on taxing power

Statute permitting political subdivisions to transfer any public funds under its supervision to another municipal fund does not release municipalities from limitations on their taxing power imposed by constitution, and that statute is not repug-

nant to constitution.—City of Niles v. Union Ice Corporation, supra.

83. Ill.—People ex rel. Nash v. Westminster Bldg. Corporation, 197 N.E. 573, 361 Ill. 153.

Ohio.—Union Ice Corporation v. City of Niles, 13 Ohio Supp. 115.

Okl.—Protest of Bledsoe, 17 P.2d 979, 161 Okl. 227—Protest of Chicago, R. I. & P. Ry. Co., 293 P. 539, 146 Okl. 100—C. D. Coggeshall & Co. v. Smiley, 285 P. 48, 142 Okl. 8.

44 C.J. p 1162 note 81.

Eviction of charter limitations

A city may not transfer a surplus in one fund to another where it has already levied for the latter the maximum amounts allowed by its charter for that year.—Chamberlain v. Tampa, 23 So. 572, 40 Fla. 74.

Retransfer

Where money in one fund has been illegally apportioned to another fund, outstanding warrants against second fund may not be considered as charges against cash therein, in determining whether amount illegally transferred should be returned to first fund—Protest of Bledsoe, 17 P.2d 979, 161 Okl. 227.

84. Okl.—Miami State Bank v. Miami, 144 P. 597, 43 Okl. 809, followed in Sulphur v. State, 162 P. 744, 62 Okl. 312.

85. Ky.—Owensboro Waterworks Co. v. Owensboro, 96 S.W. 867, 29 Ky. L. 1118.

86. Cal.—Hammond v. City of Burbank, 59 P.2d 495, 6 Cal.2d 646, appeal dismissed 57 S.Ct. 316, 299 U.S. 519, 81 L.Ed. 383.

Bank balances in fund do not establish a surplus until outstanding charges against the fund are deducted.—Hammond v. City of Burbank, supra.

87. Wash.—Washington-Oregon Corp.

v. Chehalis, 136 P. 681, 76 Wash. 442.

88. Tex.—Texas Electric, etc., Co. v. Vernon, Civ.App., 265 S.W. 176.

89. Ohio.—Union Ice Corporation v. City of Niles, 13 Ohio Supp. 115.

Payment without appropriation illegal

Ohio.—Union Ice Corporation v. City of Niles, supra.

90. Colo.—Montgomery v. City and County of Denver, 80 P.2d 434, 102 Colo. 427.

Ill.—People ex rel. Schlaeger v. Bunge Bros. Coal Co., 64 N.E.2d 365, 392 Ill. 153—People ex rel. Schlaeger v. Brand, 59 N.E.2d 664, 389 Ill. 298—People ex rel. Nash v. Westminster Bldg. Corporation, 197 N.E. 573, 361 Ill. 153—People ex rel. McDonough v. New York Cent. R. Co., 188 N.E. 807, 355 Ill. 80—Gates v. Sweitzer, 179 N.E. 837, 347 Ill. 553, 79 A.L.R. 1151.

Wash.—Griffin v. Tacoma, 95 P. 1107, 49 Wash. 524.

Sound business judgment

The municipal taxing authorities are required to use sound business judgment to prevent default where they have made temporary borrowings from other idle municipal funds to pay municipal liabilities.—People ex rel. Schlaeger v. Bunge Bros. Coal Co., 64 N.E.2d 365, 392 Ill. 153.

Receipts of illegal levy

Where city had accumulated a large sum of money by illegal levies for the working cash fund, notwithstanding the issuance of bonds for such fund in the maximum amount allowed by statute, the city could not carry such sum in an undistributed tax fund and lend it to corporate purpose fund.—People ex rel. Schlaeger v. Brand, 59 N.E.2d 664, 389 Ill. 298.

a special fund for the benefit of the general fund⁹¹ or another special fund.⁹² In some states, cities of a certain class,⁹³ but not those of another class,⁹⁴ are authorized by statute to borrow from one fund for the benefit of another fund in certain cases.

Current expense fund. Some statutes or charters provide that the current expense fund of a municipality shall be made up of all money paid into the treasury which is not assigned or set apart to some other specially created fund.⁹⁵ A current expense fund may be used, under some circumstances, to pay the expenses of a particular department,⁹⁶ but not to pay the cost of constructing a city hall⁹⁷ or, where it is inadequate to pay current expenses, to pay other indebtedness.⁹⁸

A contingent fund may be expended for any legitimate municipal purpose,⁹⁹ such as advertising,¹ reimbursing an official for expenses incurred in securing legislation,² and paying accountants for auditing the city's books.³

Refund. Some statutes provide that, where the funds raised for an improvement exceed the total cost and expense thereof, the excess shall, on demand, be refunded to the property owners who made payments into the fund,⁴ without regard to any previous bar under the statute of limitations.⁵

91. Wis.—Weik v. Wausau, 128 N. W. 429, 143 Wis. 645.

92. Wis.—Weik v. Wausau, supra.

93. Wis.—Weik v. Wausau, supra. 44 C.J. p 1162 note 89.

94. Wis.—Weik v. Wausau, supra. 44 C.J. p 1162 note 90.

95. Minn.—State v. McIlraith, 129 N.W. 377, 113 Minn. 237.

Rents, fines, and dues

Some statutes or charters provide that all money received from rents, fines, and dues in the water and light department shall be credited to the current expense fund.—State v. McIlraith, supra.

96. Minn.—State v. McIlraith, supra. 44 C.J. p 1161 note 60.

97. Wash.—State v. Harvey, 182 P. 931, 108 Wash. 48.

98. Tex.—Capps v. Citizens' Nat. Bank, Civ.App., 134 S.W. 808.

99. Okl.—Woolsey v. Tulsa, 216 P. 126, 90 Okl. 205.

Purpose and classification

A contingent fund is set up by a municipality to pay expense items which will necessarily arise during the year but cannot appropriately be classified under any of the specific purposes for which other taxes are levied.—First Nat. Bank v. City of Norman, 75 P.2d 1109, 182 Okl. 7.

Departmental contingent funds

Where city made no appropriation for auditing, and claim under contract for auditing services was barred under constitutional debt limit provision, claim could not be satisfied by adding together unexpended portions of appropriations for sundry contingent expenses of seven departments of city government, in absence of a supplemental appropriation creating a general contingent fund for satisfaction of claims for general municipal purposes.—First Nat. Bank v. City of Norman, supra.

1. Minn.—Mitchell v. St. Paul, 130 N.W. 66, 114 Minn. 141.

2. Ill.—Meehan v. Parsons, 111 N. E. 529, 271 Ill. 546.

3. N.J.—Heston v. Atlantic City, 107 A. 820, 93 N.J.Law 317.

4. Wash.—State v. Seattle, 110 P. 1008, 60 Wash. 241.

5. Wash.—State v. Seattle, supra.

6. Ill.—McFarland v. People, 2 Ill. App. 615—Galena v. Highway Comrs., 2 Ill.App. 255. 44 C.J. p 1374 note 28.

7. N.Y.—Osterhoudt v. Rigney, 98 N. Y. 222—People v. Brown, 55 N.Y. 180.

44 C.J. p 1374 note 29.

§ 2120. Control of Funds and Payment to Officer or Department Entitled

Ordinarily municipal taxes and revenues are payable to the city treasurer, but may, by statute, be directed to be paid to others.

Ordinarily municipal taxes and revenues are payable to the city treasurer,⁶ but may, by statute, be directed to be paid over to others.⁷ When any municipal fund is not specially disposed of by law, it is subject, within lawful limits, to the control of the fiscal officers of the municipality.⁸ The comptroller may not justify his refusal to pay over the funds collected to the officer or department entitled to them under the statute on the ground that he feared their misappropriation.⁹

§ 2121. Rights and Remedies of Creditors

A judgment creditor has been held entitled to have the surplus revenues of a municipal corporation over and above its ordinary current expenses applied in payment of his judgment.

A judgment creditor has been held entitled to have the surplus revenues of a municipal corporation over and above its ordinary current expenses applied in payment of his judgment.¹⁰ Where all current expenses for prior years have been paid, the amounts realized from delinquent taxes for that period are surplus and should be applied in payment of judgment debts.¹¹ As against

8. Ind.—Center Tp. v. Marion County, 70 Ind. 562.

44 C.J. p 1374 note 30.

9. N.Y.—People v. Fitch, 41 N.Y.S. 349, 9 App.Div. 439, affirmed 46 N. E. 1150, 151 N.Y. 673.

10. Tex.—City of McAllen v. Exchange Nat. Bank of Tulsa, Okl., Civ.App., 154 S.W.2d 971, error refused.

Power and duty to tax for payment of city's indebtedness see supra §§ 1979, 1997.

Payment of current charge postponed

Where account of power and light company with city was being worked out in accordance with parties' plan, it was not a current account, but one of which payment was postponed, and hence did not affect city's judgment creditor's right to payment on judgment of amount of delinquent taxes exceeding paid current obligations incident to operation of city's government for prior years.—City of McAllen v. Exchange Nat. Bank of Tulsa, Okl., supra.

11. Tex.—City of McAllen v. Exchange Nat. Bank of Tulsa, Okl., supra.

Future delinquencies

A city's judgment creditor is not entitled to payment of amount of taxes to become delinquent in future until satisfaction of judgment, as

a judgment creditor whose judgment is payable only from the surplus of current revenues above current expenses, a municipal corporation is without right to use its current revenues for the erection of public buildings.¹² A judgment creditor whose claims are payable out of a special tax is entitled to require the municipal corporation to account for the amount of such tax collected by it for such fund, where the proper board declines to make or compel such an accounting.¹³

The fact that a tax is raised for a particular purpose does not operate to change the ordinary debt relation existing between the municipality and its creditors into a trust relation so as to prevent the application of the statute of limitations to the creditor's claim.¹⁴ If the municipality fails to pay the taxes collected to the board entitled thereto, it is chargeable with such amount and interest thereon in a suit by judgment creditors of the board.¹⁵

interest, however, not commencing to run until after the failure of the municipality to pay such sums when required so to do¹⁶ or its failure to account on demand.¹⁷

Where the tax is levied to meet certain contract expenses, the municipality is bound to remit whatever has been collected to the person to whom the money is due under the contract,¹⁸ and, in an action to compel the remittance, the municipality cannot set up in defense an irregularity in the assessment or levy.¹⁹ Where a judgment creditor, relying on the agreement of the municipality to pay its judgment creditors in a certain order out of its judgment fund, failed to secure an execution within the time allowed by the statute for its issue, the municipality is estopped to set up such failure in an action by the creditor to compel the municipality to recognize the validity of his claim.²⁰

E. RIGHTS AND REMEDIES OF TAXPAYERS

1. IN GENERAL

§ 2122. In General

Ordinarily, taxpayers' actions based on matters which prejudice the rights of taxpayers generally will lie even in the absence of statute; but in some jurisdictions the right to maintain such an action depends on statutory authorization.

In most jurisdictions the so-called taxpayers' actions, that is, actions by taxpayers as such in their own names based on matters which prejudice

the rights of taxpayers generally, will lie²¹ even in the absence of statute;²² but in other jurisdictions the right of taxpayers to maintain a suit in equity in such cases depends on statutory authorization.²³ Taxpayers as such cannot sue in respect of acts of the municipal authorities, although unauthorized or illegal, which do not affect their rights, or injure them, as taxpayers, as discussed *infra* §§ 2127,

question whether there will be a surplus after payment of city's ordinary current expenses for given year cannot be determined in advance.—*City of McAllen v. Exchange Nat. Bank of Tulsa, Okl.*, *supra*.

12. U.S.—*Cunningham v. Cleveland, Tenn.*, 152 F. 907, 82 C.C.A. 55.

13. U.S.—*New Orleans v. Fisher, La.*, 21 S.Ct. 347, 180 U.S. 185, 45 L.Ed. 485.

14. Ky.—*Wurth v. Paducah*, 76 S.W. 143, 116 Ky. 403, 25 Ky.L. 586, 105 Am.S.R. 225.

44 C.J. p 1373 note 16.

Tax for special purpose as trust fund see *supra* § 1992.

15. U.S.—*New Orleans v. Fisher, La.*, 91 F. 574, 34 C.C.A. 15, modified on other grounds 21 S.Ct. 347, 180 U.S. 185, 45 L.Ed. 485.

16. U.S.—*New Orleans v. Fisher, La.*, 21 S.Ct. 347, 180 U.S. 185, 45 L.Ed. 485.

17. U.S.—*New Orleans v. Fisher, La.*, 21 S.Ct. 347, 180 U.S. 185, 45 L.Ed. 485.

18. La.—*Lake Charles Ice, etc., Co.*

v. Lake Charles, 30 So. 289, 106 La. 65.

19. Mich.—*Montpelier Sav. Bank, etc., Co. v. Quinn*, 113 N.W. 308, 149 Mich. 701.

20. U.S.—*Beadles v. Smyser, Okl.*, 28 S.Ct. 522, 209 U.S. 393, 52 L.Ed. 849.

21. Ala.—*Corpus Juris* cited in *Leedy v. Taylor*, 164 So. 820, 821, 231 Ala. 317.

Md.—*Harlan v. Employers' Ass'n of Maryland*, 159 A. 267, 162 Md. 124, 81 A.L.R. 342.

44 C.J. p 1375 note 48, p 1376 note 59, p 1377 note 99, p 1385 note 66. Rights and remedies of taxpayers of: County see Counties §§ 286-296.

School district see the C.J.S. title Schools and School Districts §§ 414-422, also 56 C.J. p 757 note 5-p 775 note 8.

Town see the C.J.S. title Towns §§ 168-172, also 63 C.J. p 206 note 37-p 211 note 55.

Injunction against enforcement of statutes, ordinances, or other regulations see Injunctions § 119.

Institution of quo warranto proceedings by private person see the C.

J.S. title Quo Warranto §§ 28, 30, also 51 C.J. p 335 note 99-p 336 note 25, 51 C.J. p 336 note 30-p 340 note 94.

Objection by citizen and taxpayer to taking of property already devoted to public use see Eminent Domain § 95.

Benefit of municipality

Taxpayers' actions in equity are for benefit of injured municipality, not for taxpayers' benefit.—*Washington County v. Froehlich Mercantile Co.*, 223 N.W. 575, 198 Wis. 56.

22. Minn.—*Cranak v. Link*, 17 N.W. 2d 359, 219 Minn. 112—*Oehler v. City of St. Paul*, 219 N.W. 760, 174 Minn. 410.

44 C.J. p 1375 note 49.

23. N.Y.—*Eagle Nest Corporation v. Carroll*, 37 N.Y.S.2d 716, 179 Misc. 99, reversed on other grounds 38 N.Y.S.2d 599, 265 App.Div. 985, motion granted 50 N.E.2d 103, 290 N.Y. 766—*Blanshard v. City of New York*, 253 N.Y.S. 419, 141 Misc. 609, affirmed 257 N.Y.S. 973, 236 App.Div. 463, affirmed 186 N.E. 29, 262 N.Y. 5.

44 C.J. p 1375 note 51.

2143, and it has usually been held that taxpayers cannot sue to redress public wrongs by which they are affected only as members of the public generally,²⁴ although expressions are found in some of the cases to the effect that, in order to sue, plaintiff need not sustain, or be threatened with, any injury peculiar to himself as distinguished from the public generally.²⁵ Taxpayers cannot assume to act on behalf of the municipality unless its duly constituted authorities wrongfully refuse to do so, as discussed *infra* §§ 2138, 2158. A penalty for the violation of a statute cannot be imposed in a taxpayer's action;²⁶ nor can a taxpayer, where money of a municipality has wrongfully been paid out, sue the municipality in assumpsit to recover an amount proportionate to the taxes paid by him.²⁷

§ 2123. Statutory Provisions in General

In general, statutes conferring or regulating the right of taxpayers to sue in equity give the taxpayer no greater rights than those of the municipal corporation concerned; such statutes are remedial and should be liberally construed, but they cannot be extended to cover acts not within their purview.

In some jurisdictions the right of taxpayers to sue in equity in certain cases has expressly been conferred by constitutional or statutory provisions;²⁸ and in other jurisdictions in which the right to sue does not depend on statute, as discussed *supra* § 2123, statutes recognizing or regulating the right have been enacted,²⁹ which latter statutes, however, are not to be construed as a limitation on the remedy in cases not within the statutes.³⁰

It has been stated generally that the purpose of the statutes is to protect the rights of the municipality,³¹ but some statutes at least have for their ultimate purpose the protection of the taxpayers.³² Some statutes do not confer on taxpayers the power to bring actions which the municipal authorities have no power to bring,³³ and in general the rights of taxpayers are no greater than those of the municipality concerned.³⁴ These statutes are remedial³⁵ and are given a liberal construction in order to accomplish their purpose,³⁶ but cannot be ex-

24. Me.—*Bayley v. Inhabitants of Town of Wells*, 174 A. 459, 133 Me. 141.

44 C.J. p 1375 note 53.

Referendum

A person entitled to petition that an ordinance be referred has sufficient interest to enjoin action under the ordinance and is sufficiently aggrieved by a refusal to call an election to be entitled to appeal.—*State v. Eastcott*, 220 N.W. 613, 53 S.D. 191.

25. Ind.—*Meyer v. Boonville*, 70 N.E. 146, 162 Ind. 165.

44 C.J. p 1375 note 54.

26. Wis.—*Murphy v. Paull*, 212 N.W. 402, 192 Wis. 93.

27. Mass.—*Withington v. Harvard*, 8 Cush. 66.

28. Ark.—*Brookfield v. Harrahan Viaduct Improvement Dist.*, 54 S.W.2d 689, 186 Ark. 599.

N.Y.—*Blanshard v. City of New York*, 253 N.Y.S. 419, 141 Misc. 609, affirmed 257 N.Y.S. 973, 236 App. Div. 663, affirmed 186 N.E. 29, 262 N.Y. 5.—*Herder v. Clifford*, 230 N.Y.S. 464, 132 Misc. 666, appeal dismissed 232 N.Y.S. 56, 225 App. Div. 780, affirmed 234 N.Y.S. 811, 227 App. Div. 645, reversed on other grounds 169 N.E. 118, 252 N.Y. 141.

44 C.J. p 1376 note 73.

Effect on equitable right

The enactment of the General Municipal Law providing for statutory actions by, and in behalf of, taxpayers against public officials neither abrogated nor extended taxpayer's right to relief in equity when taxpayer could show damage to itself not common to all taxpayers.—*Eagle*

Nest Corporation v. Carroll, 37 N.Y.S.2d 716, 179 Misc. 99, reversed on other grounds, 38 N.Y.S.2d 599, 265 App. Div. 985, motion granted 50 N.E.2d 103, 290 N.Y. 766.

Right granted by charter

Minn.—*Oehler v. City of St. Paul*, 219 N.W. 760, 174 Minn. 410.

29. Ohio—*Maxwell v. Ohio Fuel Gas Co.*, 22 N.E.2d 639, 61 Ohio App. 394.

44 C.J. p 1376 note 75.

30. Ohio—*Walker v. Dillonvale*, 92 N.E. 220, 82 Ohio St. 137, 19 Ann. Cas. 773.—*Maxwell v. Ohio Fuel Gas Co.*, 22 N.E.2d 639, 61 Ohio App. 394.—*Kasch v. Peoples Hospital Co.*, 5 N.E.2d 1020, 54 Ohio App. 80, appeal dismissed *Kasch on Behalf of City of Akron v. Peoples Hospital Co.*, 2 N.E.2d 778, 131 Ohio St. 286.

31. Ohio.—*Butler v. Karb*, 117 N.E. 953, 96 Ohio St. 472.

44 C.J. p 1376 note 77.

32. N.Y.—*Eagle Nest Corporation v. Carroll*, 37 N.Y.S.2d 716, 179 Misc. 99, reversed on other grounds, 38 N.Y.S.2d 599, 265 App. Div. 985, motion granted 50 N.E.2d 103, 290 N.Y. 766.

44 C.J. p 1376 note 78.

33. N.Y.—*Herder v. Clifford*, 230 N.Y.S. 464, 132 Misc. 666, appeal dismissed 232 N.Y.S. 56, 225 App. Div. 780, affirmed 234 N.Y.S. 811, 227 App. Div. 645, reversed on other grounds 169 N.E. 118, 252 N.Y. 141.

Ohio.—*City of Cincinnati ex rel. Ott v. Union Gas & Electric Co.*, 195 N.E. 488, 49 Ohio App. 166.

44 C.J. p 1376 note 79.

34. N.Y.—*Marjohn Realty Co., Inc. v. Long Beach*, 204 N.Y.S. 53, 122 Misc. 763, affirmed 206 N.Y.S. 933, 211 App. Div. 805, and 207 N.Y.S. 876, 211 App. Div. 860.

35. N.Y.—*Blanshard v. City of New York*, 253 N.Y.S. 419, 141 Misc. 609, affirmed 257 N.Y.S. 973, 236 App. Div. 663, affirmed 186 N.E. 29, 262 N.Y. 5.

Ohio.—*Parks v. Cleveland Ry. Co.*, 177 N.E. 28, 124 Ohio St. 79.—*Maxwell v. Ohio Fuel Gas Co.*, 22 N.E.2d 639, 61 Ohio App. 394.

44 C.J. p 1376 note 81.

36. N.Y.—*Eagle Nest Corporation v. Carroll*, 37 N.Y.S.2d 716, 179 Misc. 99, reversed on other grounds 38 N.Y.S.2d 599, 265 App. Div. 985, motion granted 50 N.E.2d 103, 290 N.Y. 766.—*Blanshard v. City of New York*, 253 N.Y.S. 419, 141 Misc. 609, affirmed 257 N.Y.S. 973, 236 App. Div. 663, affirmed 186 N.E. 29, 262 N.Y. 5.

Ohio.—*Parks v. Cleveland Ry. Co.*, 177 N.E. 28, 124 Ohio St. 79.—*Maxwell v. Ohio Fuel Gas Co.*, 22 N.E.2d 639, 61 Ohio App. 394.

44 C.J. p 1376 note 83.

Statutes construed together

The sections of the Administrative Code of the city of New York and the New York City Charter establishing an exclusive statutory remedy for review of assessments should be read together.—*Cooper Union for Advancement of Science and Art v. City of New York*, 71 N.Y.S.2d 204, 272 App. Div. 438, appeal and reargument denied 74 N.Y.S.2d 404, 272

tended to cover acts not within the purview of such statutes.³⁷

§ 2124. Intervening in Proceedings Affecting Municipality or Municipal Officers

While a mere taxpayer has no right to intervene in an action to which a municipal corporation is a party, it has been held that a taxpayer may intervene to protect a right of the municipality.

While it has been held that a person, merely because he is a taxpayer, has no such interest in litigation to which a municipal corporation is a party as will entitle him to intervene in such litigation,³⁸ it has also been held that, under certain circumstances, particularly under a permissive statute, a taxpayer may intervene in a pending proceeding to protect a right of the municipality without instituting a separate action,³⁹ or to preserve rights

vested in him as a taxpayer.⁴⁰ A taxpayer may be permitted to intervene where the proper municipal officers fail or refuse to perform their duty⁴¹ or are not proceeding in good faith or with due diligence.⁴² Also, under some statutes, a taxpayer may intervene to defend an action against a municipality even after entry of final judgment,⁴³ or he may intervene to prosecute an appeal,⁴⁴ or he may intervene in an appeal taken by the adverse party.⁴⁵ On the other hand, it has been held that a petition to intervene is properly denied where a judgment⁴⁶ or decree⁴⁷ has been entered in the action or proceeding, especially where the decree has been affirmed and no new matter is presented which was not before the court on final hearing.⁴⁸ It has been held that a taxpayer cannot intervene to protect a fund which is in the hands of municipal officers for the payment of a specific debt;⁴⁹ nor can

App.Div. 1004, affirmed 81 N.E.2d 108, 298 N.Y. 578.

37. Ohio.—Kasch v. Peoples Hospital Co., 5 N.E.2d 1020, 54 Ohio App. 80, appeal dismissed Kasch on Behalf of City of Akron v. Peoples Hospital Co., 2 N.E.2d 778, 131 Ohio St. 286.

44 C.J. p 1376 note 83.

The word "taxpayer," as used in the statute providing that, if the solicitor of a municipality fails on written request of any "taxpayer" to bring actions required by statute, the "taxpayer" may bring those actions himself, should not be enlarged so as to include a class of nontaxpayers not within its terms.—Maxwell v. Ohio Fuel Gas Co., 22 N.E.2d 639, 61 Ohio App. 394.

38. Ariz.—Packard Phoenix Motor Co. v. American-La France & Foamite Corporation (Pacific), 288 P. 1024, 37 Ariz. 35.

N.H.—Berlin Taxpayers' Ass'n v. Mayor and City Council of Berlin, 173 A. 810, 87 N.H. 80.

Intervention by a taxpayer has been held improper where the municipality is already claiming the asserted right in behalf of taxpayers.—Kentucky-Tennessee Light & Power Co. v. City of Paris, Tenn., C.C.A. Tenn., 48 F.2d 795, certiorari denied City of Paris, Tenn., v. Kentucky-Tennessee Light & Power Co., 52 S. Ct. 20, 284 U.S. 638, 76 L.Ed. 543.

Municipality represents taxpayer

Ordinarily, municipality represents the citizen in litigation relating to municipal matters.—School Dist. of City of Ferndale v. Royal Oak Tp. School Dist. No. 8, 291 N.W. 199, 293 Mich. 1, 127 A.L.R. 661.

Vigorous prosecution

Taxpayer could not intervene in pending action brought by city director of law in pursuance of demand by taxpayer to prevent mis-

appropriation of municipal funds, on claim that circumstances were such that vigorous prosecution of case was improbable, where director of law included in petition all demands made by taxpayer, so that full adjudication thereof might be made by court.—City of Lakewood v. Rees, 1 N.E.2d 953, 51 Ohio App. 490.

39. Fla.—Du Bose v. Kelly, 181 So. 11, 132 Fla. 548.

Pa.—Harvey v. Hooversville Borough, 17 Pa. Dist. & Co., 148, 5 Som. Leg. J. 351—Bochinski v. Fell Tp. Poor Dist., Com. Pl., 40 Lack. Jur. 133—Reilly v. Borough of Exeter, Com. Pl., 31 Mun. L.R. 93.

44 C.J. p 1377 note 86.

Contesting election on question of issuing bonds

Va.—Appalachian Electric Power Co. v. Town of Galax, 4 S.E.2d 390, 173 Va. 329—Vaughan v. Town of Galax, 4 S.E.2d 386, 173 Va. 335.

Protection of trust fund

Right of a taxpayer to intervene in a suit by executor for permission to sell, in order to protect a trust fund created by will for the benefit of city schools, has been upheld.—Hartzell v. Hungate, 223 Ill. App. 346.

40. Fla.—American Can Co. v. City of Tampa, 14 So.2d 203, 152 Fla. 798—Atlantic Coast Line R. Co. v. City of Lakeland, 177 So. 206, 130 Fla. 72.

N.H.—Berlin Taxpayers' Ass'n v. Mayor and City Council of Berlin, 173 A. 810, 87 N.H. 80.

Validation of refunding bonds

If refunding bonds to be issued without vote of electors indicated that territorial limits of city had been reduced since bonds refunded were issued in certain years, taxpayer would not be entitled to intervene in suit by city to validate refunding bonds, since taxpayer's alleged right to require excluded terri-

tory to bear its share of taxes to pay refunding bonds, designed to refund bonds issued when excluded territory was within city, would not then be adversely affected by covenants of refunding bonds.—Atlantic Coast Line R. Co. v. City of Lakeland, 177 So. 206, 130 Fla. 72.

41. Mich.—School Dist. of City of Ferndale v. Royal Oak Tp. School Dist. No. 8, 291 N.W. 199, 293 Mich. 1, 127 A.L.R. 661.

Refusal to set up material defense Mich.—School Dist. of City of Ferndale v. Royal Oak Tp. School Dist. No. 8, 291 N.W. 199, 293 Mich. 1, 127 A.L.R. 661.

42. Ohio.—City of Middletown v. City Commission of Middletown, 37 N.E.2d 609, 138 Ohio St. 596—City of Cleveland v. Walsh, 37 N.E.2d 397, 67 Ohio App. 479.

43. Pa.—Harvey v. Hooversville Borough, 17 Pa. Dist. & Co., 148, 5 Som. Leg. J. 351—Reilly v. Borough of Exeter, Com. Pl., 32 Luz. Leg. Reg. 465.

44. Ohio.—City of Middletown v. City Commission of Middletown, 37 N.E.2d 609, 138 Ohio St. 596.

44 C.J. p 1377 note 87.

45. N.M.—Miller v. Socorro, 54 P. 758, 9 N.M. 416.

44 C.J. p 1377 note 88.

46. U.S.—Mackey v. City of Little Rock, C.C.A. Ark., 94 F.2d 546, certiorari denied 58 S.Ct. 1056, 304 U.S. 582, 82 L.Ed. 1544.

Ill.—First Nat. Bank v. Village of Dolton, 254 Ill. App. 521.

47. N.J.—Pamrapau Corporation v. City of Bayonne, 21 A.2d 863, 130 N.J.Eq. 240.

48. N.J.—Pamrapau Corporation v. City of Bayonne, supra.

49. U.S.—Seligman v. Santa Rosa, C.C. Cal., 81 F. 524.

44 C.J. p 1377 note 89.

he intervene in opposition to plaintiff in a suit by a municipal officer to prevent another officer from certifying the sufficiency of a recall petition where defendant officer appears and defends the suit.⁵⁰ Moreover, the right of a taxpayer to intervene in opposition to the municipality in an action by the latter against a public service corporation to enforce lower rates has been denied.⁵¹ A statute permitting a taxpayer to intervene⁵² has been construed as not permitting an appeal in certain cases.⁵³

The court has some discretion in determining whether or not to permit intervention,⁵⁴ and, where intervention is permitted, the taxpayer takes the case as it stands.⁵⁵

§ 2125. Compelling Action by Municipal Authorities

In general, a taxpayer may not maintain a suit to compel action of municipal authorities unless they are acting illegally and the effect of their illegal action will be to occasion the taxpayer some specific injury.

A taxpayer generally may not maintain a suit to

compel action of municipal authorities unless they are acting illegally⁵⁶ and the effect of their illegal action will be to occasion him some specific injury.⁵⁷ A suit in equity by a taxpayer will not lie to compel municipal authorities to act in matters which are within their discretion,⁵⁸ or in matters which are unauthorized by law,⁵⁹ and it has been held that a suit in equity which, if successful, would result indirectly in the expenditure of municipal funds may not be maintained.⁶⁰ Certain statutory provisions conferring on taxpayers the right to sue have been so construed as not to permit actions directly or indirectly to compel action by the municipal authorities,⁶¹ on the ground principally that in such case a full measure of relief is obtainable in mandamus proceedings.⁶² However, it has been held that a mere threat of a substantial and imminent injury may make it proper for a taxpayer to institute a suit for the enforcement by officials of their mandatory duties,⁶³ and in some cases the right of a taxpayer to a mandatory injunction against municipal authorities has been recognized or upheld,⁶⁴ but a

50. Wash.—Hillsinger v. Gillman, 105 P. 471, 56 Wash. 228, 21 Ann. Cas. 305.

51. Mich.—Grand Rapids v. Consumers' Power Co., 185 N.W. 852, 216 Mich. 409.

52. Pa.—Black v. Pittsburg, 79 A. 569, 230 Pa. 312.
44 C.J. p 1377 note 92 [a].

Nature and scope of right to intervene

Pa.—Driscoll v. Chester, 5 Del.Co. 387.
44 C.J. p 1377 note 92 [b].

53. Pa.—Bowman v. Lebanon City School Dist., 2 Pa.Dist. 321.
44 C.J. p 1377 note 93.

54. N.J.—Egan v. City of Garfield, 50 A.2d 661, 135 N.J.Law 145.

Conclusiveness of order

Order allowing taxpayer of city to intervene in action by city solicitor to enjoin city officials from furnishing free water could not be reviewed on taxpayer's application for allowance of attorney fees and, for purposes of such application, the order was conclusively presumed to have been properly made.—City of Cleveland v. Walsh, 37 N.E.2d 397, 67 Ohio App. 479.

Necessity of order

In city's suit to rescind contract, where taxpayers filed amendment, but no order was made admitting them as parties, defendant was not obliged to have them dismissed from record.—Kentucky-Tennessee Light & Power Co. v. City of Paris, C.C.A. Tenn., 48 F.2d 795, certiorari denied City of Paris, Tenn., v. Kentucky-Tennessee Light & Power Co., 52 S.Ct. 20, 284 U.S. 638, 76 L.Ed. 543.

55. Ga.—Darby v. City of Vidalia, 44 S.E.2d 454, 75 Ga.App. 804.

Waiver

Municipality's waiver of misnomer in suit against it was binding on citizens and taxpayers intervening and contesting right to validate municipal bonds.—Saunders v. Town of Arlington, 94 S.E. 1022, 147 Ga. 581, Ann.Cas.1918D 907.

56. N.C.—Goswick v. City of Durham, 191 S.E. 728, 211 N.C. 687.
Tenn.—State ex rel. Allen v. American Glanzstoff Corporation, 72 S.W.2d 775, 167 Tenn. 597.

Precautions against future happenings

Municipal authorities may not be compelled to take the usual and ordinary precautions against possible future happenings that may occur because of uncanceled and undestroyed evidences of indebtedness which city has extinguished by payment.—Waddle v. City of Somerset, 134 S.W.2d 956, 281 Ky. 80.

Compelling observance of law in future

Ky.—Waddle v. City of Somerset, supra.

57. Tenn.—State ex rel. Allen v. American Glanzstoff Corporation, 72 S.W.2d 775, 167 Tenn. 597.

Prevention or abatement of improper use of public parks, squares, commons, and places see supra § 1823.
Remedies for obstruction or unlawful use of way see supra §§ 1710-1715.

Removal of obstructions and encroachments by judicial proceedings see supra §§ 1751-1753.

58. Colo.—Antero, etc., Reservoir Co. v. Lowe, 194 P. 945, 69 Colo. 409.
44 C.J. p 1416 note 73.

59. Iowa.—Iowa Public Service Co. v. City of Emmetsburg, 237 N.W. 514, 210 Iowa 300.

Application of funds

Where revenues of city-owned electric light system were illegally placed in city electric light fund directly, without any appropriation through general fund, taxpayers of city bringing representative suit could not require that funds transferred illegally, or otherwise, from the electric light fund, and which did not belong to such fund, should be restored to the fund; nor were they entitled to an accounting of funds so transferred.—Union Ice Corporation v. City of Niles, 13 Ohio Supp. 115.

60. Pa.—Schlanger v. West Berwick Borough, 104 A. 764, 261 Pa. 605.

61. Mass.—Kelley v. Peabody Board of Health, 143 N.E. 39, 248 Mass. 165.
44 C.J. p 1416 note 75.

62. N.Y.—Southern Leasing Co. v. Ludwig, 111 N.E. 470, 217 N.Y. 100.
44 C.J. p 1416 note 76.

63. N.Y.—Guastoferrri v. Board of Education of City of New York, 47 N.Y.S.2d 561, 183 Misc. 158, reversed on other grounds 63 N.Y. S.2d 257, 270 App.Div. 946.

64. Ky.—Herd v. City of Middleboro, 99 S.W.2d 458, 266 Ky. 488.
44 C.J. p 1416 note 77.
Mandatory injunction in general see Injunctions § 5.

taxpayer has no right to such injunction when the right or duty affects the state in its sovereign capacity as distinguished from the people at large.⁶⁵

Levy of tax. An action by an individual citizen to compel a levy of taxes will not lie where there is no showing that plaintiff will sustain special injury by a failure to make the levy or that the city at large will be prejudiced by such omission.⁶⁶

Compelling holding of election. No private remedy is available to an individual to compel a municipal officer to cause an election to be held to fill a vacancy.⁶⁷

Compelling compliance with conditions of charitable trust. It has been held that a taxpayer may not maintain an action to compel compliance with conditions impressed on a testamentary gift for charitable purposes to a municipal corporation.⁶⁸

Mandamus. Questions as to the right of taxpay-

ers to proceed by mandamus against municipal authorities are considered in Mandamus § 47.

§ 2126. Testing or Trying Title to Office

In general, the title to a particular office will not be tried or tested in a taxpayer's suit in equity.

Ordinarily the title to a particular office will not be tried or tested in a taxpayer's suit in equity,⁶⁹ as for example, a suit for an injunction to restrain the payment of salary, where such suit involves a determination as to the title of the person to whom the proposed payment is to be made, as discussed *infra* § 2150, or a suit to enjoin the incumbent from exercising the functions of the particular office, as discussed *infra* § 2155; and this rule applies to actions under statutes.⁷⁰ However, under a statute providing for the review of the determination of a municipal body or officer, it has been held that a taxpayer may maintain a suit in equity to determine whether an improperly qualified person has been appointed to a position in the municipal corporation.⁷¹

2. CONTESTING MUNICIPAL ORDINANCES OR ACTS AND ACTS OF PERSONS DEALING WITH MUNICIPAL AUTHORITIES IN GENERAL

§ 2127. In General

In general, taxpayers may not contest municipal ordinances or acts merely on the ground that they are unauthorized or invalid; but they may contest the validity of any ordinance, resolution, or official act which prejudicially affects their rights as taxpayers.

Ordinarily a taxpayer cannot contest, or sue in respect of, municipal ordinances or acts merely on the ground that they are unauthorized or illegal,⁷² where there is no injury or threatened injury to, or prejudice to the rights of, taxpayers,⁷³ or where

65. Ky.—Pineville v. Moore, 227 S. W. 477, 190 Ky. 357.

44 C.J. p 1417 note 78.

66. Iowa.—Collins v. Keokuk, 125 N. W. 231, 147 Iowa 605.

67. N.Y.—Demarest v. Wickham, 63 N.Y. 320.

68. Minn.—Longcor v. City of Red Wing, 289 N.W. 570, 206 Minn. 627.

The attorney general is the proper person to maintain the action in such a case.—Longcor v. City of Red Wing, *supra*.

69. Ky.—Spurlock v. Lafferty, 283 S.W. 124, 214 Ky. 333.

44 C.J. p 1417 note 82.

70. Mass.—Prince v. Boston, 19 N. E. 218, 148 Mass. 285.

44 C.J. p 1417 note 85.

Allen incumbent

The interest of taxpayer and voter was not such special interest within statute as would entitle him to maintain action to determine another's right to hold elective office of city commissioner, notwithstanding other was allegedly an alien.—Knockenmuss v. De Kerchove, 285 N.W. 441, 66 S.D. 446.

71. N.Y.—Kay v. Board of Higher

Education of City of New York, 18 N.Y.S.2d 821, 173 Misc. 943, affirmed 20 N.Y.S.2d 1016, 259 App. Div. 879, appeal denied 21 N.Y.S.2d 396, 259 App.Div. 1000, and 29 N.E.2d 657, 284 N.Y. 578.

72. Ill.—Harz v. City of Chicago, 78 N.E.2d 660, 334 Ill.App. 106.

Okl.—Sherman v. City of Picher, 204 P.2d 535.

Wash.—Weisfield v. City of Seattle, 40 P.2d 149, 180 Wash. 288, 98 A.L.R. 1190.

44 C.J. p 1377 note 95.

Who may attack validity of ordinances in general see *supra* § 433.

Invalidity in favor of taxpayer

Taxpayer could not object to ordinance authorizing maintenance of municipal hospital on ground that funds appropriated by city for charity patients were omitted from requirements of being paid into sinking fund in accordance with statutory requirement, since alleged invalidity was in taxpayers' favor.—Davis v. City of Melbourne, 170 So. 836, 126 Fla. 282.

73. U.S.—Iowa Southern Utilities Co. v. Town of Lamoni, D.C.Iowa, 11 F.Supp. 581, appeal dismissed,

C.C.A., Iowa Southern Utilities Co. v. Town of Lamoni, Iowa, 79 F.2d 1000.

Mich.—Anderson v. Village of Rochester, 248 N.W. 571, 263 Mich. 130.

Okl.—Corpus Juris cited in State v. Muskogee Iron Works, 103 P.2d 101, 103, 187 Okl. 380.

Wis.—McClutchey v. Milwaukee County, 300 N.W. 224, 289 Wis. 139, 137 A.L.R. 628, rehearing denied 300 N.W. 917, 239 Wis. 136, 137 A.L.R. 630.

44 C.J. p 1377 note 96.

Financial or pecuniary interest

(1) The legal interest which qualifies a complainant other than the state to bring suit against municipality charging municipality's enterprise to be ultra vires is a pecuniary interest in preventing municipality from doing an act where injury flows from its quality as a breach of some legal or equitable duty to complainant.—Birmingham Electric Co. v. City of Bessemer, 186 So. 569, 237 Ala. 240.

(2) In order to sustain a taxpayer's suit, taxpayer must show some material injury to him and his interest must be a financial interest.—

the ordinance or act affects him only as a member of the public generally;⁷⁴ nor can plaintiff in his capacity as a taxpayer maintain a suit in which only his private interests other than as a taxpayer are involved.⁷⁵ However, in most jurisdictions taxpayers as such may judicially contest the validity of an ordinance, resolution, or official act which prejudicially affects their rights as taxpayers by increasing the burden of taxation or otherwise,⁷⁶ without showing injury or loss other than that sustained by taxpayers generally,⁷⁷ although in some jurisdictions the right to sue in equity, where the taxpayer has not sustained an injury peculiar to himself, depends on statutory authorization, as discussed *infra* § 2128. Taxpayers may enforce their rights by a suit for affirmative relief against a wrong already committed,⁷⁸ or, in some jurisdic-

tions, by suit to have an ordinance declared invalid.⁷⁹

Who may sue. One who does not show that he is a taxpayer of the municipal corporation may not complain of any act of the corporation which does not prejudice his rights.⁸⁰

Wrongful act. Plaintiff must show a wrongful act of the municipal authorities,⁸¹ and must make it appear at least that the commission of the act complained of is imminent.⁸²

Elections. It has been held that a taxpayer may contest the result of an election, determining a change in the existing form of municipal government, where the power of the municipal council to hold such an election is involved,⁸³ even though he has no pecuniary interest.⁸⁴ Taxpayers may

State ex rel. Johnson v. Washburn, 16 Ohio Supp. 31.

Future injury

Where waterworks bonds were issued under statute providing that bonds should be payable solely from revenues of waterworks system, property owners fearing that in future municipality would compel owners to connect with watermains and pay exorbitant prices for water consumed were not entitled to maintain action to determine such question.—Ringgold v. Bailey, 97 S.W.2d 80, 193 Ark. 1.

74. Ill.—Price v. City of Mattoon, 4 N.E.2d 850, 364 Ill. 512.
44 C.J. p 1377 note 97.

75. Md.—Kelly v. Baltimore, 53 Md. 134.

Validity of ordinance permitting gasoline curb pumps on streets cannot be attacked on bill for declaratory relief by taxpayers engaged in gasoline business since municipality owed taxpayers engaged in gasoline business no immunity from competition of others who might engage in like business.—Anderson v. Village of Rochester, 248 N.W. 571, 268 Mich. 130.

76. Ill.—Gray v. W. A. Black Co., 170 N.E. 713, 338 Ill. 488.

Kan.—Grecian v. Hill City, 256 P. 163, 123 Kan. 542.

Md.—Harlan v. Employers' Ass'n. of Maryland, 159 A. 267, 162 Md. 124, 81 A.L.R. 342.

N.J.—Koons v. Board of Com'rs of Atlantic City, 47 A.2d 589, 134 N.J.Law 329, affirmed 50 A.2d 869, 135 N.J.Law 204.

Pa.—White v. City of Chester, Com. Pl., 30 Del.Co. 86.

Tenn.—Reams v. Town of McMinnville, 291 S.W. 1067, 155 Tenn. 222.

44 C.J. p 1377 note 99.

Mistake in assessment

A taxpayer of borough had legal status to challenge the validity of resolution authorizing reduction of assessments on described realty because of mistake made in the assessments, notwithstanding reduction called for was small, and would be more than offset by unanticipated revenue, and would make no change in the tax rate.—Alchele v. Borough of Oaklyn, N.J.Super.L., 64 A.2d 924.

Exemption from taxes

(1) Class suit by taxpayer in his own name for the use and benefit of himself and other taxpayers against city to have ordinance exempting from all taxes three thousand dollars of assessed taxable values of all residence homesteads of city declared void was proper under blended system of law and equity.—City of Wichita Falls v. Cooper, Tex.Civ. App., 170 S.W.2d 777.

(2) The statute providing that no educational corporation, holding itself out to public as nonsectarian and exempt from taxation, shall deny use of its facilities to any person because of his race, color, or religion, confers on person so aggrieved right to compel such corporation to grant him use of its facilities, but person not so aggrieved, or not within such category, has no such right and cannot bring proceeding to compel city tax commissioners to cancel corporation's tax exemption on ground of such discrimination.—Goldstein v. Mills, 57 N.Y.S.2d 810, 185 Misc. 851, affirmed 62 N.Y.S.2d 619, 270 App. Div. 930.

Order of commission

A taxpayer, suing in his own interest and in behalf of those similarly situated, had sufficient interest to maintain action to set aside order of public service commission authorizing city to install electricity generating plant.—Wisconsin Hydro Electric Co.

v. Public Service Commission of Wisconsin, 291 N.W. 784, 234 Wis. 627.

77. Ala.—New Orleans, etc., R. Co. v. Dunn, 51 Ala. 128.

Iowa.—Poor v. Incorporated Town of Duncombe, 2 N.W.2d 294, 231 Iowa 907.

N.J.—Koons v. Board of Com'rs of Atlantic City, 47 A.2d 589, 134 N.J. Law 329, affirmed 50 A.2d 869, 135 N.J.Law 204.

78. W.Va.—Miller v. Huntington & Ohio Bridge Co., 15 S.E.2d 687, 123 W.Va. 320.

44 C.J. p 1378 note 5.

Setting aside or invalidating particular acts of municipal authorities see *infra* §§ 2131–2136.

Suit to set aside sheriff's deed

A resident and taxpayer of city had a right to maintain action to have sheriff's deed as result of tax foreclosure proceeding set aside and city decreed to be the owner of the realty, on city's refusal to do so, without showing any interest peculiar to himself.—Taxpayers League of Wayne County v. Wightman, 296 N.W. 886, 139 Neb. 212.

79. Ariz.—Colquhoun v. City of Tucson, 103 P.2d 269, 55 Ariz. 451.

44 C.J. p 1378 note 6.

Proceedings to determine validity of ordinance in general see *supra* § 206.

80. La.—Peck v. City of New Orleans, 5 So.2d 508, 199 La. 76.

81. Wis.—Murphy v. Paull, 213 N. W. 402, 192 Wis. 93.

44 C.J. p 1378 note 7.

82. Tenn.—Sweeney v. Tennessee Cent. R. Co., 100 S.W. 732, 118 Tenn. 297.

83. La.—Morrisett v. City of Shreveport, App., 155 So. 478.

84. La.—Morrisett v. City of Shreveport, *supra*.

contest the result of an election held to determine the question as to incurring an indebtedness or as to issuing bonds,⁸⁵ whether the result is in favor of or against the proposition.⁸⁶ The time within which the taxpayer may contest the legality of the election may be limited by statute.⁸⁷

Taxation. The right of taxpayers to maintain a suit to annul the levy of a tax has been recognized,⁸⁸ but it has been held that a suit will not lie under some statutes to set aside a tax levy because of failure to comply with statutory requirements as to notice and hearing in respect of grievance day,⁸⁹ and that a suit by a taxpayer will not lie to set aside an entire assessment on the property within the limits of a municipal corporation.⁹⁰

Where municipal bonds have been sold and delivered and have been duly certified as required by statute, in some jurisdictions the only ground on which their validity may be attacked is forgery, fraud, or issuance in violation of the state constitution.⁹¹

Remedy by certiorari. In some jurisdictions a taxpayer may maintain certiorari to question the

validity of a resolution or ordinance of municipal authorities, as discussed *supra* § 206 c.

§ 2128. Statutory Provisions in General

In some jurisdictions a taxpayer at large, who has no private interest involved different from that of other taxpayers, cannot maintain a suit in equity based on illegal acts of municipal authorities, except to the extent that statutes have conferred the power to do so.

In some jurisdictions a taxpayer at large, who has no private interest involved different from that of other taxpayers, cannot maintain a suit in equity based on the illegal acts of municipal authorities,⁹² except when and to the extent that statutes have conferred on him power to do so,⁹³ as for example, by a suit to declare official acts void;⁹⁴ but, where such statutes exist, the rule has been laid down that the court cannot inquire into the motives inducing legislative action on the part of a common council,⁹⁵ even though such motives were dishonest and corrupt,⁹⁶ and that such statutes are designed only to frustrate or undo acts of officials, which are either beyond their power or are fraudulent breaches of their official trust.⁹⁷ Such statutes should not be used as a basis for unwarranted attacks on honest offi-

In such a case unquestionably a taxpayer and voter, in addition to the general interest common to all, has a vital particular concern in the kind of government under which he is to live.—*Morrisett v. City of Shreveport*, *supra*.

85. Va.—*Appalachian Electric Power Co. v. Town of Galax*, 4 S.E.2d 390, 173 Va. 329.—*Vaughan v. Town of Galax*, 4 S.E.2d 386, 173 Va. 335.

44 C.J. p 1378 note 9.

86. Cal.—*Gibson v. Trinity County*, 22 P. 225, 80 Cal. 859.

87. La.—*Miller v. Town of Bernice*, 173 So. 192, 186 La. 742.

88. N.Y.—*Borek v. Golder*, 74 N.Y. S.2d 675, 190 Misc. 236.

44 C.J. p 1378 note 11.

89. N.Y.—*Trumbull v. Palmer*, 93 N.Y.S. 349, 104 App.Div. 51.

90. Wis.—*Gilkey v. Merrill*, 30 N.W. 733, 67 Wis. 459.

91. Tex.—*Simpson v. Nacogdoches*, Civ.App., 152 S.W. 858.

92. N.Y.—*Wilmerding v. La Guardia*, 26 N.Y.S.2d 105, 176 Misc. 449.—*Bartholomew v. Village of Endicott*, 59 N.Y.S.2d 84.

44 C.J. p 1378 note 23.

Matters of discretion or policy see *infra* § 2129.

The rule has its origin in a sound policy which holds that municipal officers should not be subjected to litigation at the suit of every dissatisfied taxpayer. The restriction, however, does not apply where the

taxpayer is seeking preventive relief.—*Bayley v. Inhabitants of Town of Wells*, 174 A. 459, 133 Me. 141.

Transfer of funds

Where revenues of city-owned electric light system were illegally placed in city electric light fund directly, without any appropriation through general fund, taxpayers and rate payers of city bringing representative suit could not require that funds transferred illegally, or otherwise, from the electric light fund, and which did not belong to such fund, should be restored to the fund.—*Union Ice Corporation v. City of Niles*, 13 Ohio Supp. 115.

93. Me.—*Bayley v. Inhabitants of Town of Wells*, 174 A. 459, 133 Me. 141.

N.Y.—*Blanshard v. City of New York*, 253 N.Y.S. 419, 141 Misc. 609, affirmed 257 N.Y.S. 973, 236 App.Div. 663, affirmed 186 N.E. 29, 262 N.Y. 5.—*Bartholomew v. Village of Endicott*, 59 N.Y.S.2d 84.

44 C.J. p 1378 note 24.

Legality of proceedings whereby city's common council adopted specifications for fire apparatus to be purchased, and, after publication of notice that bids would be received therefor, awarded contracts for such apparatus in accordance with specifications, and by motion authorized mayor and city clerk to execute contracts for purchase of apparatus, and adopted resolution providing for issuance of bonds to defray cost to city of such equipment, should be

raised through statutory action by taxpayer.—*Finigan v. Zuber*, 281 N.Y.S. 980, 156 Misc. 479.

Action against third person

Where there was no evidence that vendor of land sold to city paid for by issuance of warrants in excess of authorized appropriation knew that payment was illegal, and none that company for which he was alleged to be an agent had any notice of such illegality, such company was not liable for statutory penalty for such illegal expenditure.—*State ex rel. Prunty v. Dowler*, 69 P.2d 68, 180 Okl. 265.

94. Ariz.—*Colquhoun v. City of Tucson*, 103 P.2d 269, 55 Ariz. 451.

N.Y.—*McCutcheon v. Buffalo Terminal Station Common*, 154 N.Y.S. 711, 168 App.Div. 301, affirmed 111 N.E. 661, 217 N.Y. 127.—*Blanshard v. City of New York*, 253 N.Y.S. 419, 141 Misc. 609, affirmed 257 N.Y.S. 973, 236 App.Div. 663, affirmed 186 N.E. 29, 262 N.Y. 5.

95. N.Y.—*Kittinger v. Buffalo Traction Co.*, 54 N.E. 1081, 160 N.Y. 387.—*Adamson v. Nassau Electric R. Co.*, 34 N.Y.S. 1073, 89 Hun 261.

96. N.Y.—*Blanshard v. City of New York*, 186 N.E. 29, 262 N.Y. 5.—*Kittinger v. Buffalo Traction Co.*, 54 N.E. 1081, 160 N.Y. 387.

97. N.Y.—*Blanshard v. City of New York*, 253 N.Y.S. 419, 141 Misc. 609, affirmed 257 N.Y.S. 973, 236 App.Div. 663, affirmed 186 N.E. 29, 262 N.Y. 5.

44 C.J. p 1379 note 28.

cial,⁹⁸ or to interfere with a legitimate course of action by governing bodies acting within their jurisdiction,⁹⁹ and, in order to be entitled to sue under such a statute, the taxpayer must bring his case within its terms.¹

§ 2129. Matters of Discretion, Policy, or Judgment in General

Courts will not entertain suits by taxpayers to contest the validity of acts which are within the discretion of municipal officers in the absence of fraud or bad faith.

The courts will not entertain suits to contest the validity of acts which are within the discretion of municipal officers in the absence of fraud or bad faith,² and the court is not concerned with questions as to the wisdom of the act or as to matters of judgment or policy.³ While the discretion of municipal officers is not subject to judicial control, gross abuse of such discretion⁴ and deliberate waste of municipal funds⁵ may be inquired into by courts and appropriate relief granted, if established.

§ 2130. Motive, Intention, or Adverse Interest of Plaintiff in General

In general, the motive of a taxpayer in suing is not

material as affecting his right to relief, but the right of a taxpayer to maintain a suit has been denied where he permits the use of his name by others who are seeking to protect private interests.

It has been laid down that the motive of plaintiff in suing is not material as affecting his right to relief,⁶ and that the fact that a third person is to defray expenses, and that such person induced the bringing of the suit, does not affect plaintiff's right to maintain the suit.⁷ On the other hand, the right of a taxpayer to maintain a suit has been denied where he merely permits the use of his name by others who are seeking to protect private interests,⁸ and there is authority for the view that the motive of plaintiff may be considered in determining what relief shall be granted, as considered *infra* § 2169.

§ 2131. Particular Acts or Transactions

The right of taxpayers to oppose or question particular acts or transactions of municipal authorities and of persons dealing with municipal authorities is discussed *infra* §§ 2132-2136.

Examine Pocket Parts for later cases.

98. N.Y.—*Grace v. Scott*, 211 N.Y.S. 68, 125 Misc. 660, affirmed 211 N.Y. S. 75, 214 App.Div. 792.

99. N.Y.—*Blanshard v. City of New York*, 253 N.Y.S. 419, 141 Misc. 609, affirmed 257 N.Y.S. 973, 236 App.Div. 663, affirmed 186 N.E. 29, 262 N.Y. 5—*Herder v. Clifford*, 230 N.Y.S. 464, 132 Misc. 666, appeal dismissed 232 N.Y.S. 56, 225 App.Div. 780, affirmed 234 N.Y.S. 811, 227 App.Div. 645, reversed on other grounds 169 N.E. 118, 252 N.Y. 141.

1. N.Y.—*Zielinski v. Harding*, 31 N.Y.S.2d 925, 177 Misc. 773.

2. Okl.—*Corpus Juris* cited in Application of Board of Education of City of Ardmore, 49 P.2d 122, 127, 173 Okl. 296.

Pa.—*Hayes v. City of Scranton*, 47 A.2d 798, 354 Pa. 477.

Wash.—*Christie v. Port of Olympia*, 179 P.2d 294, 27 Wash.2d 534, 44 C.J. p 1379 note 30.

Budgets

Pa.—*Hayes v. City of Scranton*, 47 A.2d 798, 354 Pa. 477.

Constitutional provision

The constitutional provision that cities' power of taxation, assessment, borrowing money, contracting debts, and loaning their credit shall be so restricted as to prevent the abuse of such power is an admonition to the legislative branch of the government, and cannot be invoked by taxpayers to induce the court to interfere with discretionary powers of

city where no statute has been violated—*Lewis v. City of South Hutchinson*, 174 P.2d 51, 162 Kan. 104.

In suits under statutes

(1) In general—*Town of Irondequoit v. Monroe County*, 11 N.Y.S.2d 933, 171 Misc. 125—44 C.J. p 1379 note 30 [a].

(2) The rule applies where there has been mere illegality without public injury.—*Town of Irondequoit v. Monroe County*, 11 N.Y.S.2d 933, 171 Misc. 125.

(3) Under statute authorizing sinking fund commission to credit any excess against appropriation that would otherwise be required for the following year or years, a court of equity cannot interfere with the discretion of such commission—*Hayes v. City of Scranton*, 47 A.2d 798, 354 Pa. 477.

3. Kan.—*Drenning v. Board of Com'rs of City of Topeka*, 81 P.2d 720, 148 Kan. 366, 117 A.L.R. 884.

Okl.—*Corpus Juris* cited in Application of Board of Education of City of Ardmore, 49 P.2d 122, 127, 173 Okl. 296.

Utah.—*Brummitt v. Ogden Waterworks Co.*, 93 P. 823, 33 Utah 289.

In suits under statute

(1) The rule applies.

N.Y.—*Wilmerding v. O'Brien*, 268 N.Y.S. 206, 149 Misc. 735—*Herder v. Clifford*, 230 N.Y.S. 464, 132 Misc. 666, appeal dismissed 232 N.Y.S. 56, 225 App.Div. 780, affirmed

234 N.Y.S. 811, 227 App.Div. 645, reversed on other grounds 169 N.E. 118, 252 N.Y. 141.

Pa.—*Hayes v. City of Scranton*, 47 A.2d 798, 354 Pa. 477, 44 C.J. p 1379 note 31 [a].

(2) Fact that taxpayer may be inconvenienced is not ground for interference—*Eighth Avenue Coach Corporation v. City of New York*, 10 N.Y.S.2d 170, 170 Misc. 243, affirmed 20 N.Y.S.2d 402, 259 App.Div. 870, affirmed 35 N.E.2d 907, 286 N.Y. 84—*McCarthy v. City of New York*, 10 N.Y.S.2d 170, 170 Misc. 243, affirmed 20 N.Y.S.2d 401, 259 App. Div. 870, affirmed 36 N.E.2d 684, 286 N.Y. 636.

4. Colo.—*Tamblyn v. City and County of Denver*, 194 P.2d 299, 118 Colo. 191—*Ferch v. Hansen*, 174 P.2d 719, 115 Colo. 366.

5. Colo.—*Tamblyn v. City and County of Denver*, 194 P.2d 299, 118 Colo. 191—*Ferch v. Hansen*, 174 P.2d 719, 115 Colo. 366.

6. Fla.—*R. D. Lamar, Inc. v. Ray*, 182 So. 292, 132 Fla. 704, 44 C.J. p 1379 note 33.

7. Fla.—*R. D. Lamar, Inc., v. Ray*, supra. Wash.—*Goshert v. Seattle*, 107 P. 860, 57 Wash. 645.

8. Ohio.—*Vadakin v. Crilly*, 7 Ohio Cir.Ct., N.S., 341, 28 Ohio Cir.Ct. 634, affirmed 78 N.E. 1140, 73 Ohio St. 380.

§ 2132. — Contracts

Taxpayers may not oppose or question a municipal contract merely on the ground that it is unauthorized or invalid, but, subject to some limitations, if their rights as taxpayers are affected, they may do so.

Taxpayers may not oppose or question a municipal contract merely on the ground that it is unauthorized or invalid,⁹ and they have no standing to attack a contract where there is no showing that it is affected by fraud or invalidity,¹⁰ or that injury has resulted.¹¹ It has been held that a taxpayer cannot take advantage of a statutory provision that certain contracts, shall be absolutely void "against the city or any board or department thereof."¹² Subject to these qualifications and exceptions, and subject to the qualifications and exceptions discussed supra §§ 2127-2130, in most jurisdictions, if the rights of taxpayers as such are affected by an unauthorized or invalid contract, they may sue.¹³ In accordance with this rule, ordinarily taxpayers may enforce their rights by suits to declare invalid or to annul or set aside a contract,¹⁴ or, in some jurisdictions, an ordinance authorizing,

or otherwise affecting, a contract;¹⁵ or, in still other jurisdictions, by certiorari to review a contract,¹⁶ or an ordinance authorizing a contract.¹⁷

In some jurisdictions a taxpayer, merely as such, cannot maintain a suit in equity to annul or set aside or to invalidate a contract,¹⁸ except where such right has been conferred on him by statute.¹⁹ Such statutes are not applicable in the absence of a showing that the contract is affected by fraud, collusion, or illegality,²⁰ and it has been held that taxpayers can sue only on the grounds on which the municipality might maintain a suit or a defense to accomplish the same purpose,²¹ and that, if the municipal authorities could have waived alleged illegal provisions in a contract, a taxpayer could not sue to set aside the contract because of the insertion of such provisions.²² Such statutes do not authorize the courts to review the action of municipal authorities in entering into a contract where the matters involved are within the discretion of such authorities, in the absence of fraud, corruption, or bad faith.²³

9. Mich.—Schurtz v. Grand Rapids, 165 N.W. 766, 199 Mich. 20.

44 C.J. p 1379 note 38.

Injunction to restrain execution or carrying out of contract see infra § 2147.

10. Kan.—Kansas Utilities Co. v. City of Burlington, 44 P.2d 223, 141 Kan. 926, appeal dismissed 56 S.Ct. 81, 296 U.S. 658, 80 L.Ed. 469.

44 C.J. p 1379 note 39.

11. N.J.—Smith v. Board of Com'rs of Atlantic City, 139 A. 33, 104 N.J.Law 143.

44 C.J. p 1379 note 40.

12. Mich.—Schurtz v. Grand Rapids, 165 N.W. 766, 199 Mich. 20.

13. Colo.—Ferch v. Hansen, 174 P.2d 719, 115 Colo. 366.

Neb.—Neisius v. Henry, 5 N.W.2d 291, 142 Neb. 29, rehearing denied 9 N.W.2d 163, 143 Neb. 273.

N.J.—Waszen v. Atlantic City, 63 A. 2d 255, 1 N.J. 272.

44 C.J. p 1379 note 42.

Special interest

Plaintiffs as taxpayers and employees of city within classified civil service had such a special interest in subject matter of suit seeking to annul a contract employing one outside classified civil service to perform duties of position in classified civil service as to authorize plaintiffs to bring representative suit.—Cranak v. Link, 17 N.W.2d 359, 219 Minn. 112.

Violation of rights

A freeholder and taxpayer could complain of contract between city and the Works Progress Administration for the construction of a park,

recreational center, and fair grounds only in so far as the enterprise violated its rights, and, where city had issued bonds, bought land, and started to build, and the Administration contributed money, further steps to be taken rested in the determination of the two contracting parties subject to the requirements of the law.—Aquamsi Land Co. v. City of Cape Girardeau, 142 S.W.2d 332, 346 Mo. 524.

14. Colo.—Ferch v. Hansen, 174 P. 2d 719, 115 Colo. 366.

Minn.—Cranak v. Link, 17 N.W.2d 359, 219 Minn. 112.

Tex.—South Texas Public Service Co. v. Jahn, Civ.App., 7 S.W.2d 942.

44 C.J. p 1380 note 44.

15. Ind.—Meyer v. Boonville, 70 N. E. 146, 162 Ind. 165.

44 C.J. p 1380 note 45.

16. N.J.—Read v. Atlantic City, 9 A. 759, 49 N.J.Law 558, affirmed 15 A. 10, 50 N.J.Law 665.—Jackson v. Newark, 31 A. 233, 53 N.J.Eq. 322.

17. N.J.—Read v. Atlantic City, 9 A. 759, 49 N.J.Law 558, affirmed 15 A. 10, 50 N.J.Law 665.

Right of taxpayer to maintain certiorari in general see supra § 206 c.

18. N.Y.—Phelps v. Watertown, 61 Barb. 121.—Brady v. New York, 35 How.Pr. 81.

19. N.Y.—Hendrickson v. New York, 54 N.E. 680, 160 N.Y. 144.

44 C.J. p 1380 note 50.

Operating contract

In taxpayer's action to declare invalid an operating contract between city and private corporation, where-

by private corporation undertook to operate a foreign trade zone theretofore operated by city under a federal grant obtained from foreign trade zones board, plaintiffs could properly urge that an assignment or transfer of grant by city was a violation of statute authorizing grant, since city might, in consequence, incur obligations and liabilities ultimately compensable from city funds.—American Dock Co. v. City of New York, 21 N.Y.S.2d 943, 174 Misc. 813, affirmed 26 N.Y.S.2d 704, 261 App. Div. 1063, affirmed 36 N.E.2d 696, 286 N.Y. 658.

20. N.Y.—Halleran v. City of New York, 228 N.Y.S. 116, 132 Misc. 73. 44 C.J. p 1380 note 51.

Change in economic conditions rendering city's contract unprofitable does not authorize abrogation for "impossibility of performance" in suit by taxpayer.—Halleran v. City of New York, supra.

21. N.Y.—Knowles v. New York, 75 N.Y.S. 189, 37 Misc. 195, affirmed 77 N.Y.S. 1130, 74 App.Div. 632, affirmed 68 N.E. 860, 176 N.Y. 430.

22. N.Y.—Knowles v. New York, 68 N.E. 860, 176 N.Y. 430.

23. N.Y.—McCutcheon v. Buffalo Terminal Station Commn., 111 N.E. 661, 217 N.Y. 127.

44 C.J. p 1380 note 54.

Modification of contract

The action of a municipality and a private contracting party in modifying their contract is not open to attack by a taxpayer.—Halleran v. New York, 228 N.Y.S. 116, 132 Misc. 73.

§ 2133. — Acquisition or Disposition of Property

Subject to some limitations, taxpayers may oppose or question the validity of the action of municipal authorities in disposing of municipal property or in acquiring property.

Subject to the qualifications and exceptions considered supra §§ 2127-2132, in most jurisdictions taxpayers may oppose or question the validity of the action of municipal authorities in disposing of municipal property,²⁴ or in acquiring property.²⁵ Thus, courts have recognized or upheld the right of a taxpayer to sue to annul an ordinance providing for the wrongful disposition,²⁶ or acquisition,²⁷ of property, or to cancel, rescind, or set aside an unauthorized sale or other disposition of such property,²⁸ or the unauthorized acquisition of property by municipal authorities.²⁹ However, according to one view, plaintiff taxpayers are not entitled to relief which would be denied to the municipality,³⁰ and the right of a taxpayer to sue to rescind a purchase by the municipal authorities has been denied,³¹ at least where the parties to the transaction could not be placed in statu quo.³² Also, it has been held that a taxpayer may not require a municipal corporation to sell property it had purchased and pay back the proceeds in reduction of the prospective tax rate,³³ where the acquisition of the property was within the power of the municipality.³⁴ The right of a taxpayer to complain of a proposed mineral lease of a municipal park has been denied³⁵ where only a very small portion of

the park was required for mineral development³⁶ and the land could be safely developed without danger to the public or substantial interference with its use for park purposes.³⁷ Moreover, under the rule in other jurisdictions, which refuses relief in equity to a taxpayer who has only such interest as taxpayers in general have, as discussed supra § 2128, in the absence of statute, a taxpayer cannot sue to set aside an unauthorized conveyance of municipal property,³⁸ but statutes have been enacted conferring the right to maintain an action to cancel, rescind, or set aside an unauthorized conveyance or sale of such property.³⁹ Where municipal authorities are authorized to sell property, under a statute leaving the sale of the property to their judgment, a taxpayer may not attack such sale in the absence of illegality, fraud, or clear abuse of discretion,⁴⁰ at least where the situation has changed since the sale and justice between the parties cannot be had.⁴¹

§ 2134. — Aid to Corporations or Associations

In a proper case taxpayers may contest the validity of a grant of municipal aid to a corporation or association.

Subject to qualifications and exceptions discussed supra §§ 2127-2130, taxpayers may contest the validity of a grant of municipal aid to a voluntary association,⁴² or to a corporation, such as a railroad company,⁴³ by suit to contest the result of an election held to submit the question to the voters,⁴⁴

24. Ala.—Wakefield v. Carbon Hill, 108 So. 855, 215 Ala. 22.

44 C.J. p 1380 note 57.

Injunction to prevent:

Purchase of property by municipal corporation see infra § 2151.

Sale of property by municipal corporation see infra § 2152.

25. Ind.—Hamer v. City of Huntington, 21 N.E.2d 407, 215 Ind. 594.

44 C.J. p 1380 note 58.

26. La.—Gill v. Lake Charles, 43 So. 897, 119 La. 17—Handy v. New Orleans, 1 So. 593, 39 La. Ann. 107.

27. La.—Dunham v. Slidell, 72 So. 465, 189 La. 938.

N.J.—Jersey Central Power & Light Co. v. Borough of Seaside Heights in Ocean County, 187 A. 533, 117 N.J. Law 253.

Annexation of territory

Ariz.—Colquhoun v. City of Tucson, 103 P.2d 269, 55 Ariz. 451.

28. Wis.—Ryan v. Olson, 197 N.W. 727, 183 Wis. 200.

44 C.J. p 1380 note 61.

Lease

N.J.—Streeper v. Auditorium Kennel Club, 180 A. 212, 13 N.J. Misc. 584.

Pa.—Wilson v. Public Service Commission of Pennsylvania, 157 A. 497, 103 Pa. Super. 558.

Wash.—Bremerton Municipal League v. Bremer, 130 P.2d 367, 15 Wash. 2d 231.

44 C.J. p 1380 note 61 [a].

Vacation of portion of park property
N.M.—McCarter v. City of Raton, 115 P.2d 90, 45 N.M. 351.

29. La.—Dunham v. Slidell, 72 So. 465, 139 La. 938.

44 C.J. p 1381 note 62.

30. N.C.—Harrison v. New Bern, 137 S.E. 582, 193 N.C. 555.

31. N.C.—Harrison v. New Bern, supra.

44 C.J. p 1381 note 64.

32. Ill.—Sherlock v. Winnetka, 59 Ill. 389.

33. N.C.—Goswick v. City of Durham, 191 S.E. 728, 211 N.C. 687.

34. N.C.—Goswick v. City of Durham, supra.

35. La.—City of Shreveport v. Kahn, 193 So. 461, 194 La. 55.

36. La.—City of Shreveport v. Kahn, supra.

37. La.—City of Shreveport v. Kahn, supra.

38. N.Y.—Roosevelt v. Draper, 23 N. Y. 318—Warwick v. New York, 28 Barb. 210, 7 Abb. Pr. 265, 16 How. Pr. 357.

39. N.Y.—Wenk v. New York, 64 N. E. 509, 171 N.Y. 607.

44 C.J. p 1381 note 68.

40. Wyo.—Quackenbush v. City of Cheyenne, 70 P.2d 577, 52 Wyo. 146.

The mere fact that city's sale of lots was improvident, in that higher price should have been obtained, does not authorize suit attacking such sale on behalf of taxpayers.—Quackenbush v. City of Cheyenne, supra.

41. Wyo.—Quackenbush v. City of Cheyenne, supra.

42. Minn.—Burns v. Essling, 203 N. W. 605, 163 Minn. 57.

44 C.J. p 1381 note 70.

43. La.—W. K. Henderson Iron Works, etc., Co. v. Shreveport, 52 So. 477, 126 La. 255.

44 C.J. p 1381 note 72.

44. La.—Sentell v. Avoyelles Parish

by certiorari to review the proceedings of the municipal authorities,⁴⁵ by suit to annul the tax or the ordinance imposing the tax,⁴⁶ by injunction to prevent the giving of the contemplated aid, as considered infra §§ 2139-2155, by suit to cancel the subscription to stock,⁴⁷ or, under statute, by a suit to have bonds illegally issued in aid of a corporation delivered up and canceled.⁴⁸

§ 2135. — Grant or Exercise of Rights, Privileges, or Franchises

In general, taxpayers may not oppose or question the validity of grants of rights or franchises which can in no way affect their rights as such, but they may do so where their interests as taxpayers are affected.

Taxpayers may not oppose or question the validity of grants of rights or franchises which can in no way affect their rights as such,⁴⁹ nor may the taxpayer move until there is actual danger of injury;⁵⁰ but, according to some decisions, sometimes by virtue of statutory provisions, they may do so where their interests as taxpayers are affected,⁵¹ by certiorari to review the validity of the ordinance or resolution,⁵² or by a suit for an injunction, as discussed infra § 2153. The right of a citizen and taxpayer to maintain a suit to avoid the effect of an election at which an ordinance granting a franchise was repealed has been upheld,⁵³ but the right of a taxpayer to maintain a suit to annul an ordinance which grants a franchise has been denied.⁵⁴

Matters of discretion. Taxpayers may not ordinarily contest the validity of the grant of a fran-

chise or privilege where the matters involved are within the discretion of the municipal officers.⁵⁵

§ 2136. — Audit, Allowance, Settlement, or Payment of Claims

In general, a taxpayer may oppose the allowance or payment of any unauthorized claim against the municipal corporation, or any illegal release of anyone indebted to the municipality; but ordinarily a taxpayer may not question the settlement of a disputed claim.

A taxpayer may oppose the payment of any unauthorized or illegal claim against the municipal corporation,⁵⁶ or the allowance of a claim not properly verified,⁵⁷ or any illegal release of anyone indebted to the municipality.⁵⁸ In some jurisdictions, while a taxpayer cannot maintain a suit in equity in the absence of statute,⁵⁹ by virtue of statute he may sue to vacate the audit of a claim which the board of audit had no authority to audit or where such audit was fraudulent or collusive.⁶⁰ It has been held that the allowance of a claim arising under a contract will not be interfered with where, although the power to contract was irregularly exercised, the municipality retained the property received and there was no fraud.⁶¹

Compromise. Since, in the absence of any restriction, a municipality may compromise a disputed claim against it, as discussed infra §§ 2181, 2197, such settlement may not be questioned by a taxpayer in the absence of fraud or collusion;⁶² but the right of a taxpayer to sue to annul an ordinance providing for a compromise with a delin-

Police Jury, 18 So. 910, 48 La. Ann. 96.

45. N.Y.—*People v. Morgan*, 65 Barb 473, 1 Thomps. & C. 101, reversed on other grounds 55 N.Y. 587.

46. La.—*W. K. Henderson Iron Works, etc., Co. v. Shreveport*, 52 So. 477, 126 La. 255—*Sentell v. Avoyelles Parish Police Jury*, 18 So. 910, 48 La. Ann. 96.

47. Ind.—*Madison v. Smith*, 83 Ind. 502.

48. N.Y.—*Metzger v. Attica, etc., R. Co.*, 79 N.Y. 171—*Strang v. Cook*, 47 Hun 46, 14 N.Y. St. 150.

49. Wis.—*Warden v. Hart*, 156 N.W. 466, 162 Wis. 495.

44 C.J. p 1381 note 79.

50. La.—*Morris v. Municipal Gas Co.*, 46 So. 1001, 121 La. 1016.

44 C.J. p 1381 note 80.

51. N.Y.—*Blanshard v. City of New York*, 253 N.Y.S. 419, 141 Misc. 609, affirmed 257 N.Y.S. 973, 236 App. Div. 663, affirmed 186 N.E. 29, 262 N.Y. 5—*Loos v. City of New York*, 9 N.Y.S.2d 760, 170 Misc. 14,

104, reversed on other grounds 13 N.Y.S.2d 119, 257 App. Div. 219.

44 C.J. p 1381 note 81.

Taxpayers are sometimes permitted to raise the question under statutory provisions.—*Circleville Light, etc., Co. v. Buckeye Gas Co.*, 24 Ohio Cir. Ct. 684.

Under zoning ordinance

Md.—*Mayor and City Council of Baltimore v. Byrd*, 62 A.2d 588.

52. N.J.—*Lewis v. Cumberland*, 28 A. 553, 56 N.J. Law 416.

Certiorari to review validity of ordinance or resolution generally see supra § 206 c.

53. Cal.—*Reed v. Wing*, 144 P. 964, 168 Cal. 706.

54. Neb.—*Clark v. Interstate Independent Tel. Co.*, 101 N.W. 977, 72 Neb. 883.

44 C.J. p 1381 note 84.

55. Wis.—*Linden Land Co. v. Milwaukee Electric R., etc., Co.*, 83 N.W. 851, 107 Wis. 493.

56. La.—*Pleasants v. Shreveport*, 85 So. 283, 110 La. 1046.

44 C.J. p 1381 note 87.

57. Wis.—*Wilcox v. Porth*, 143 N.W. 165, 154 Wis. 422.

58. La.—*City-Item Co-op. Printing Co. v. New Orleans*, 25 So. 313, 51 La. Ann. 713.

59. N.Y.—*Osterhoudt v. Rigney*, 98 N.Y. 222.

60. N.Y.—*Osterhoudt v. Rigney*, supra.

61. Neb.—*Stickel Lumber Co. v. Kearney*, 173 N.W. 595, 103 Neb. 636.

62. U.S.—*Warren v. St. Paul, C.C. Minn.*, 29 F. Cas. No. 17,199, 5 Dill. 498.

N.Y.—*Herder v. Clifford*, 169 N.E. 118, 252 N.Y. 141.

Settlement and discontinuance of action by town against town officers to recover moneys wrongfully withdrawn were not discharge or satisfaction of claim precluding taxpayer from bringing action.—*Herder v. Clifford*, 169 N.E. 118, 252 N.Y. 141.

quent taxpayer, which is in violation of a constitutional provision, has been affirmed.⁶³

§ 2137. Investigation of Municipal Finances or Expenditures; Receivership

The right of taxpayers to make investigations, sometimes by virtue of statutes providing a summary proceeding, in respect of municipal finances has been recognized; and, under some statutes, provision is made for suits by taxpayers for the appointment of receivers for public utilities owned by a municipal corporation.

The right of a taxpayer to make investigations in respect of municipal finances has been recognized,⁶⁴ and in some jurisdictions there are statutes providing for a summary proceeding to investigate municipal finances or expenditures⁶⁵ on the application of a specified number of freeholders who have paid taxes within a specified time.⁶⁶ The freeholders who make the application are vir-

tually plaintiffs in the proceeding,⁶⁷ and the proceedings are against the officers whose acts are in question and not against the municipality.⁶⁸ The application, if properly made, vests the court with jurisdiction in its discretion⁶⁹ to make a summary investigation of the affairs, including unlawful or corrupt expenditures, of the municipal corporation.⁷⁰ The statute does not restrict the scope of inquiry into financial matters⁷¹ but is principally aimed at corruption in public office,⁷² whether or not it takes the form of illegal expenditure.⁷³ Summary investigation under such a statute is solely an investigation.⁷⁴ It is not an accusation of wrongdoing;⁷⁵ nor is it limited to matters to be prosecuted under the criminal law.⁷⁶

The statutes in question are remedial⁷⁷ and should be liberally construed to effectuate their purpose.⁷⁸ Such statutes, however, are not to be construed as

63. La.—City-Item Co-op. Printing Co. v. New Orleans, 25 So. 313, 51 La. Ann. 713.

64. Ind.—Michigan City v. Marwick, 116 N.E. 434, 119 N.E. 154, 67 Ind. App. 294.

Ky.—Metch v. City of Middlesboro, 47 S.W.2d 56, 242 Ky. 653.

List of bondholders

It has been held that a taxpayer is not entitled, on his own behalf, or on behalf of a particular political party, to inspect a list of municipal bondholders in the hands of the fiscal agent of a municipal corporation in order to obtain information necessary for the preparation of a petition for municipal bankruptcy.—Reeve v. Wilson, 34 Pa. Dist. & Co. 380.

65. N.J.—Application of Wellhofer, 59 A.2d 393, 137 N.J. Law 165—North Bergen Tp. v. Gough, 154 A. 113, 107 N.J. Law 424—Taxpayers Ass'n of Cape May, New Jersey v. City of Cape May, 64 A.2d 453, 2 N.J. Super. 48.

N.Y.—In re Village of Haverstraw, Rockland County, 229 N.Y.S. 357, 132 Misc. 42.

44 C.J. p 1382 note 1.

Statute held valid

N.J.—Application of Wellhofer, 60 A.2d 247, 137 N.J. Law 342—In re City of Newark, 194 A. 620, 119 N.J. Law 221—North Bergen Tp. v. Gough, 154 A. 118, 107 N.J. Law 424.

44 C.J. p 1382 note 5.

66. N.J.—Application of Wellhofer, 59 A.2d 393, 137 N.J. Law 165—Taxpayers Ass'n of Cape May, New Jersey v. City of Cape May, 64 A. 2d 458, 2 N.J. Super. 48.

44 C.J. p 1382 note 2.

67. N.Y.—Matter of Monticello, 205 N.Y.S. 839, 123 Misc. 556, affirmed 206 N.Y.S. 970, 211 App. Div. 826, 829.

68. N.Y.—Matter of Kenmore, 110 N.Y.S. 1008, 59 Misc. 388.

69. N.J.—Application of Wellhofer, 60 A.2d 247, 137 N.J. Law 342—Application of Wellhofer, 59 A.2d 393, 137 N.J. Law 165.

Grounds of belief

(1) Under some statutes the affidavit need not contain a statement of the grounds of affiants' belief that corrupt expenditures have been made, and is sufficient to state merely that they have cause to believe.—Application of Wellhofer, 59 A.2d 393, 137 N.J. Law 165—In re City of Newark, 190 A. 306, 118 N.J. Law 533.

(2) Submission and use, particularly in rebuttal, of a supplementary affidavit by one not an applicant fortifying the grounds for such belief is proper.—Application of Wellhofer, 60 A.2d 247, 137 N.J. Law 342.

There should be enough in the proofs to support exercise of judicial discretion.—Application of Wellhofer, 60 A.2d 247, 137 N.J. Law 342—44 C.J. p 1382 note 1 [b].

Interrogation of applicants

Under the statute authorizing summary investigation into financial affairs of a municipality by a supreme court justice on application of freeholders, municipality has no absolute right to interrogate applicants.—Application of Wellhofer, 60 A.2d 247, 137 N.J. Law 342.

Allegations held sufficient to state grounds for summary investigation

N.J.—Application of Wellhofer, 59 A.2d 393, 137 N.J. Law 165.

70. N.J.—Application of Wellhofer, 59 A.2d 393, 137 N.J. Law 165.

71. N.J.—In re City of Newark, 190 A. 306, 118 N.J. Law 533.

72. N.J.—In re City of Newark, 190 A. 306, 118 N.J. Law 533.

73. N.J.—Application of Wellhofer,

59 A.2d 393, 137 N.J. Law 165—In re City of Newark, 190 A. 306, 118 N.J. Law 533.

74. N.J.—Application of Wellhofer, 59 A.2d 393, 137 N.J. Law 165.

Quasi-judicial method

The statute authorizing summary investigation into financial affairs of a municipality by a supreme court justice on application of freeholders sets up a quasi-judicial method, not of charging an offense or causing trial thereof, but of ascertaining and of publishing the facts of a particular phase of governmental activity, and the investigation may be regarded as an effort to ascertain the truth of a charge involving swindling the government out of its money.—Application of Wellhofer, 60 A.2d 247, 137 N.J. Law 342.

75. N.J.—Application of Wellhofer, 59 A.2d 393, 137 N.J. Law 165.

It does not take the place of an indictment by grand jury should investigation develop evidence of wrongdoing.—Application of Wellhofer, 59 A.2d 393, 137 N.J. Law 165.

76. N.J.—In re City of Newark, 190 A. 306, 118 N.J. Law 533.

Laches

Summary investigation into affairs of city was not barred by laches, although several years had elapsed since commission of acts on which many of the charges made in application were based, since such investigation is not limited to matters to be prosecuted under criminal law.—Application of Wellhofer, 59 A.2d 393, 137 N.J. Law 165.

77. N.J.—In re City of Newark, 190 A. 306, 118 N.J. Law 533.

N.Y.—Matter of Monticello, 205 N.Y. S. 839, 123 Misc. 556, affirmed 206 N.Y.S. 970, 211 App. Div. 826, 829.

78. N.J.—In re City of Newark, 190

restricting the right of interested taxpayers to inspect public records.⁷⁹

In proceedings under such statutes the court does not consider political questions or matters of policy,⁸⁰ or pass on the wisdom or expediency of the acts complained of,⁸¹ and is empowered to investigate or to correct only such acts as are unlawful or corrupt.⁸² The court should not determine the truth or falsity of the allegations made,⁸³ but only whether or not there exist grounds giving cause to believe that expenditures have been unlawfully or corruptly made.⁸⁴ Some statutes give the court the right to appoint an expert to make the investigation⁸⁵ and also to cause the publication of the result.⁸⁶ The court may in such proceedings make an order restraining the improper expenditure of municipal funds,⁸⁷ but it seems that an order restraining the payment of certain claims or debts is not justified merely because there were technical defects affecting the transactions out of which such claims or debts arose.⁸⁸

Applicants may be required to furnish a bond to secure payment of costs and expenses of the investigation,⁸⁹ but the amount of the bond should not be so large in amount that applicants are unable to furnish it,⁹⁰ and it is not necessary that all of the applicants be signatories on the bond.⁹¹

Appointment of receiver. Under some statutes

provision is made for suits by taxpayers for the appointment of receivers for public utilities owned by the municipality, under certain circumstances, and such statutes have been construed as not depriving the municipality of its property without due process of law.⁹² By virtue of its general equity jurisdiction the court has power to terminate the proceedings and to restore the public utility to the municipal authorities.⁹³

§ 2138. Suing or Defending on Behalf of Municipality

- a. In general
- b. Recovery of, or restitution in respect of, municipal property

a. In General

Where a cause of action exists in favor of a municipal corporation, ordinarily a taxpayer may not sue on its behalf except to prevent a failure of justice, as where the municipal authorities wrongfully refuse to act.

Since, as discussed *infra* § 2204, the municipal corporation is the proper party to sue to enforce a cause of action existing in its favor, a taxpayer may not bring the action on behalf of the municipality where the municipal authorities have not wrongfully refused or neglected to act,⁹⁴ after a proper request to do so, unless, as discussed *infra* § 2158, the circumstances are such as to indicate

A. 306, 118 N.J.Law 533—North Bergen Tp. v. Gough, 154 A. 113, 107 N.J.Law 424.

79. N.J.—Taxpayers Ass'n of Cape May, New Jersey v. City of Cape May, 64 A.2d 453, 2 N.J.Super. 27. Right of taxpayers to inspect public records in general see the C.J.S. title Records § 37, also 53 C.J. p 629 note 25—p 630 note 37.

80. N.Y.—Matter of Kenmore, 110 N.Y.S. 1008, 59 Misc. 88.

81. N.Y.—Matter of Kenmore, *supra*—Matter of East Syracuse, 20 Abb. N.Cas. 131.

82. N.Y.—Matter of East Syracuse, *supra*.
44 C.J. p 1382 note 12.

83. N.J.—Application of Wellhofer, 59 A.2d 393, 137 N.J.Law 165.

84. N.J.—Application of Wellhofer, 59 A.2d 393, 137 N.J.Law 165.

85. N.J.—North Bergen Tp. v. Gough, 154 A. 113, 107 N.J.Law 424.

44 C.J. p 1382 note 8.

86. N.J.—Hoboken v. O'Neill, 64 A. 981, 74 N.J.Law 57.
44 C.J. p 1382 note 9.

87. N.Y.—Matter of Kenmore, 110 N.Y.S. 1008, 59 Misc. 88.

Restraining misappropriation of municipal funds in general see *infra* § 2148.

88. N.Y.—In re Plattsburgh, 51 N.E. 512, 157 N.Y. 78.

89. N.J.—Application of Wellhofer, 59 A.2d 393, 137 N.J.Law 165. Costs and expenses see *infra* § 2171.

90. N.J.—Application of Wellhofer, 59 A.2d 393, 137 N.J.Law 165.

91. N.J.—Application of Wellhofer, 60 A.2d 247, 137 N.J.Law 342.

92. N.M.—Dreyfus v. Socorro, 189 P. 878, 26 N.M. 127.

93. N.M.—Dreyfus v. Socorro, *supra*.

94. U.S.—Kentucky-Tennessee Light & Power Co. v. City of Paris, C.C. A.Tenn., 48 F.2d 795, certiorari denied City of Paris, Tenn., v. Kentucky-Tennessee Light & Power Co., 52 S.Ct. 20, 284 U.S. 638, 78 L. Ed. 543.

Cal.—Pratt v. Security Trust & Savings Bank, 59 P.2d 862, 15 Cal.App. 2d 630—*Corpus Juris* cited in Gray v. White, 43 P.2d 318, 320, 5 Cal. App.2d 463.

Ky.—Wagner v. Wallingford, 78 S.W. 2d 326, 257 Ky. 477.

Minn.—Cranah v. Link, 17 N.W.2d 359, 219 Minn. 112.

Okl.—*Corpus Juris* cited in State v. Ford, 116 P.2d 988, 992, 189 Okl. 299.

Va.—Sauer v. Monroe, 199 S.E. 487, 171 Va. 421.
44 C.J. p 1382 note 20.

Action in own name

A taxpayer cannot maintain an action in his own name for the personal recovery of taxes due a municipality, although the city solicitor refuses to do so.—Alcorn v. Cincinnati Traction Co., 25 Ohio N.P.N. S., 523.

In cases of quasi-municipal corporations where interest of taxpayers is negligible, proceedings in equity to obtain redress for wrongs to corporation should not be entertained when brought by taxpayers alone.—Burkett v. Blaisdell, 17 A.2d 460, 137 Me. 200.

Where refusal of city officials to collect water rentals does not entitle taxpayer or water consumer of municipality to invoke equity jurisdiction to enforce collection on behalf of municipality.—Kasch v. Peoples Hospital Co., 5 N.E.2d 1020, 54 Ohio App. 80, appeal dismissed Kasch on Behalf of City of Akron v. Peoples Hospital Co., 2 N.E.2d 778, 131 Ohio St. 286.

affirmatively that such a demand would be unavailing. Moreover, a taxpayer cannot sue a third person where no duty is imposed on the municipal authorities to bring the action in question,⁹⁵ or where there is no right in the municipal corporation to prosecute such an action.⁹⁶ So, also, a taxpayer may not sue on behalf of a municipal corporation when maintenance of the suit by the corporation would be an act of bad faith,⁹⁷ notwithstanding the legal right to maintain the action is clear.⁹⁸ A taxpayer may not bring an action in affirmance of a contract of a municipality which contains no provision in favor of such taxpayer.⁹⁹ It has been held that a taxpayer cannot maintain a suit for damages on behalf of a municipal corporation under charter provisions authorizing a taxpayer to maintain actions to restrain the execution of illegal contracts on behalf of the municipality and to restrain municipal officers from paying illegal claims.¹

In most jurisdictions, however, where the municipal authorities improperly refuse or fail to act, a taxpayer may sue on behalf of the municipality,² although in some jurisdictions an action will not lie in the absence of statutory authorization.³ Although taxpayers have an interest which entitles them to protect the interest of the municipal corporation,⁴ the cause of action remains in the corporation,⁵ and final relief is for its benefit.⁶ Certain statutory provisions have been construed as au-

thorizing suits by taxpayers against the municipal authorities and as not authorizing suits by taxpayers on behalf of the municipal corporation against third persons.⁷

Taxpayers suing on behalf of the municipality have no greater rights than the municipality itself,⁸ and taxpayers may not assert a better claim for the municipality than it could assert in its own behalf,⁹ and any defense which might be interposed in an action by the municipal corporation is available in a taxpayer's suit.¹⁰

b. Recovery of, or Restitution in Respect of, Municipal Property

In general, sometimes by virtue of statutory provisions, where municipal authorities neglect or refuse to act, a taxpayer may maintain an action for the benefit of a municipal corporation to recover property or funds of the corporation which have been wrongfully expended or misapplied.

While the right of a taxpayer to sue for the recovery of moneys or other property of the corporation has been denied in the absence of statutory authorization,¹¹ in most jurisdictions, where an unlawful expenditure of money has been made by the officers of a municipal corporation and the proper municipal authorities neglect or refuse to act,¹² a taxpayer may maintain an action to recover the amount illegally disbursed for the benefit of the municipal corporation.¹³ In accordance with this

95. Cal.—Dunn v. Long Beach Land, etc., Co., 46 P. 607, 114 Cal. 605.

Where institution of action is discretionary

Tex.—Osborne v. Keith, 177 S.W.2d 198, 142 Tex. 262.

44 C.J. p 1383 note 22 [a].

96. Ohio.—City of Cincinnati ex rel. Ott v. Union Gas & Electric Co., 195 N.E. 488, 49 Ohio App. 166.

97. Tenn.—State ex rel. Allen v. American Glanzstoff Corporation, 72 S.W.2d 775, 167 Tenn. 597.

98. Tenn.—State ex rel. Allen v. American Glanzstoff Corporation, supra.

99. La.—Loeber v. New Orleans, etc., R. Co., 5 So. 60, 41 La. Ann. 1151.

1. Tex.—City of Corpus Christi ex rel. Harris v. Flato, Civ.App., 83 S.W.2d 433, error dismissed.

2. Mo.—Smith v. Hendricks, App., 136 S.W.2d 449.

Ohio.—Parks v. Cleveland Ry. Co., 177 N.E. 28, 124 Ohio St. 79—State v. Council of Village of Bedford, 174 N.E. 601, 37 Ohio App. 265, affirmed Council of Village of Bedford v. State, 175 N.E. 607, 123 Ohio St. 413—Rogers v. City of Cincinnati, 14 Ohio N.P.N.S., 193.

Okl.—Johnson v. Williams, 134 P.2d 584, 192 Okl. 163.

Wis.—Coyle v. Richter, 234 N.W. 906, 203 Wis. 590.

44 C.J. p 1383 note 23.

Nature and form of action see infra § 2157.

Parties to actions see infra § 2162.

3. N.Y.—Feeley v. Wurster, 54 N.Y. S. 1060, 25 Misc. 544.

44 C.J. p 1383 note 24.

4. Wis.—Coyle v. Richter, 234 N.W. 906, 203 Wis. 590.

In order to warrant action by taxpayer to conserve municipal funds or property, evidence must show that municipality is about to sustain loss, and that loss to general taxpayers will follow.—Stuart v. City of Neenah, 255 N.W. 142, 215 Wis. 546.

5. Wis.—Coyle v. Richter, 234 N.W. 906, 203 Wis. 590.

6. Wis.—Coyle v. Richter, supra.

7. Tex.—Corpus Christi v. Mireur, Civ.App., 214 S.W. 528.

8. U.S.—New Orleans v. New Orleans Water Works Co., La., 12 S. Ct. 142, 142 U.S. 79, 35 L.Ed. 943. Cal.—Warfield v. Anglo & London Paris Nat. Bank, 260 P. 881, 202 Cal. 345.

Neb.—Neisius v. Henry, 6 N.W.2d

291, 142 Neb. 29, rehearing denied 9 N.W.2d 163, 143 Neb. 273.

Ohio.—Vollmer v. Village of Amherst, 29 N.E.2d 379, 65 Ohio App. 26, appeal dismissed 38 N.E.2d 409, 139 Ohio St. 139, affirmed 43 N.E.2d 235, 140 Ohio St. 257—City of Cincinnati ex rel. Ott v. Union Gas & Electric Co., 195 N.E. 488, 49 Ohio App. 166.

S.C.—Mason v. Williams, 9 S.E.2d 537, 194 S.C. 290.

9. Ohio.—Vollmer v. Village of Amherst, 29 N.E.2d 379, 65 Ohio App. 26, appeal dismissed 38 N.E.2d 409, 139 Ohio St. 139, affirmed 43 N.E.2d 235, 140 Ohio St. 257.

10. Neb.—Neisius v. Henry, 5 N.W.2d 291, 142 Neb. 29, rehearing denied 9 N.W.2d 163, 143 Neb. 273.

11. S.D.—Cralle v. American-News Co., 212 N.W. 913, 51 S.D. 176.

44 C.J. p 1383 note 28.

12. Minn.—Cranak v. Link, 17 N.W.2d 359, 219 Minn. 112.

Or.—Young v. Gard, 277 P. 1005, 125 Or. 534.

44 C.J. p 1383 note 29.

Necessity for requesting municipal authorities to sue see infra § 2158.

13. Fla.—Armstrong v. Richards, 175 So. 340, 128 Fla. 561.

rule, municipal officers may be compelled to restore municipal funds which they have wrongfully expended or misapplied¹⁴ or received from the corporation,¹⁵ or for which they have failed to account;¹⁶ and an action will also lie to recover from a third person municipal moneys or other property to which he is not entitled.¹⁷ Moreover, the right of the court to charge certain municipal officers with the cost of reproducing municipal books which were destroyed by such officers to conceal embezzlements has been recognized where reproduction is necessary to ascertain the extent of the embezzlement and the financial condition of the municipality.¹⁸

In order to entitle a taxpayer to a judgment against municipal officers, it must appear that the municipality could have maintained the action in the first instance.¹⁹ So, where orders for payment

of money were in proper form, a city treasurer cannot, in a taxpayer's action, be held liable for money paid out thereon.²⁰ It has been held that taxpayers cannot demand an accounting of a contractor for moneys received by him in excess of the work actually done under the contract,²¹ and municipal officers cannot be held personally liable in damages because municipal indebtedness in excess of the constitutional limit has been contracted or permitted.²² Moreover, an action does not lie where it would be grossly inequitable to enforce the claim,²³ where the expenditure has been ratified by the taxpayers,²⁴ or, it has been held, where the taxpayer has failed to make use of another available remedy.²⁵

What taxpayers may sue. A nonresident taxpayer may sue.²⁶

Minn.—Cranak v. Link, 17 N.W.2d 359, 219 Minn. 112—Oehler v. City of St. Paul, 219 N.W. 760, 174 Minn. 410.

Or.—Young v. Gard, 277 P. 1005, 129 Or. 534.

Wis.—Murphy v. Paull, 212 N.W. 402, 192 Wis. 93.

14. Fla.—Armstrong v. Richards, 175 So. 340, 128 Fla. 561.

S.D.—Corpus Juris cited in Dale v. School Dist. No. 9 of Bennett County, 283 N.W. 158, 159, 66 S.D. 346.

Wis.—Coyle v. Richter, 234 N.W. 906, 203 Wis. 590.

44 C.J. p 1383 note 30.

Action favored by courts

Wis.—Coyle v. Richter, 234 N.W. 906, 203 Wis. 590—Kaiser v. Niemeyer, 225 N.W. 188, 198 Wis. 581. 44 C.J. p 1383 note 30 [a].

Right to sue city

In California, taxpayer of city may sue the officers guilty of misapplication to recover such sums on behalf of municipality but cannot sue city for such misapplication.—Fox v. City of Pasadena, C.C.A.Cal., 78 F.2d 948.

15. Neb.—Neisius v. Henry, 5 N.W. 2d 291, 142 Neb. 29, rehearing denied 9 N.W.2d 163, 143 Neb. 273.

44 C.J. p 1383 note 31.

Payments under illegal contract

Neb.—Neisius v. Henry, supra.

16. Fla.—Armstrong v. Richards, 175 So. 340, 128 Fla. 561.

44 C.J. p 1383 note 32.

17. N.Y.—W. A. Brockhurst Co. v. City of Yonkers, 42 N.Y.S.2d 907, 180 Misc. 820, affirmed 42 N.Y.S. 2d 930, 266 App.Div. 778, appeal denied 43 N.Y.S.2d 748, 266 App. Div. 856.

Ohio—State v. Council of Village of Bedford, 174 N.E. 601, 37 Ohio App. 265, affirmed. Council of Village of

Bedford v. State, 175 N.E. 607, 123 Ohio St. 413.

Okl.—Corpus Juris cited in Johnson v. Williams, 134 P.2d 584, 685, 192 Okl. 163.

Or.—Young v. Gard, 277 P. 1005, 129 Or. 534.

44 C.J. p 1384 note 33.

Void agreement

Where contract required removal of foreign substances from water tanks and standpipes which were part of city water system by sand-blasting operations, and such operations uncovered deteriorations of rivets and metal body of tanks, a subsequent oral agreement whereby city water commissioner undertook to oblige the city to pay to contractor for extra work in repairing deteriorations at certain price for labor and machinery used was void, and a taxpayer on behalf of city could recover back the money paid under such agreement, on ground that no bids were asked for and that no contracts had been let for such extra work to the lowest bidder as required by statutes.—Sioux Falls Taxpayers Ass'n v. City of Sioux Falls, 7 N.W. 2d 136, 69 S.D. 93.

Illegal assignment of tax certificate

A taxpayer was entitled to sue as an individual and as a taxpayer on behalf of city to vacate assignments of municipal tax certificates exchanged by city for others which city had previously assigned for an inadequate consideration but which city received back at their face value, notwithstanding the certificates had passed to the hands of a third person who it was alleged should not be required to defend against the city's ultra vires acts.—R. D. Lamar, Inc. v. Ray, 132 So. 292, 132 Fla. 704.

18. Tenn.—Burns v. Nashville, 221 S.W. 828, 142 Tenn. 541.

19. Neb.—Cathers v. Moores, 113 N.

W. 119, 78 Neb. 17, 14 L.R.A.N.S. 302.

Special assessment funds

General taxpayer had no interest authorizing him to sue village collector for accounting for percentage of special assessments deducted as fees, since general taxpayer's interest must be based on the right of municipality to the funds, since city has no interest in special assessment fund other than right to be reimbursed therefrom for costs advanced, and to see that funds are properly collected and used to pay for improvements, and since any balance remaining belongs to the property owner against whose property it was assessed.—Dudick v. Baumann, 181 N.E. 690, 349 Ill. 46.

20. Conn.—Sullivan v. Willis, 163 A. 407, 116 Conn. 9.

21. Pa.—Anders v. Philadelphia, 83 A. 939, 235 Pa. 125.

22. Ga.—Williford for Use of Mayor and City Council of Madison v. Moore, 181 S.E. 515, 51 Ga.App. 869.

Iowa.—Lough v. Esherville, 98 N.W. 308, 122 Iowa 479.

Moneys diverted to legal purpose

Taxpayer citizen could not recover, for use of municipality, from mayor and councilmen, as individuals, amount of ad valorem taxes illegally, but not in bad faith, diverted to school purposes.—Williford for Use of Mayor and City Council of Madison v. Moore, 181 S.E. 515, 51 Ga.App. 869.

23. Wis.—Murphy v. Paull, 212 N.W. 402, 192 Wis. 93.

24. Wis.—Murphy v. Paull, supra.

25. Neb.—Cathers v. Moores, 113 N.W. 119, 78 Neb. 17, 14 L.R.A.N.S. 302.

44 C.J. p 1384 note 40.

26. Cal.—Mines v. Del Valle, 257 P. 580, 201 Cal. 273.

Motive of plaintiff. It has been held that the motive of plaintiff taxpayer in bringing the action is immaterial.²⁷

Statutory provisions. In some jurisdictions provision has been made by statute for actions for the recovery or restoration of municipal funds or property wrongfully paid out or transferred²⁸ against municipal officers²⁹ and persons receiving the funds or other property.³⁰ While in favor of the remedy a somewhat liberal construction should be given to the statute,³¹ the remedy under some statutes is confined to cases in which fraud or corruption or illegal official acts are shown,³² and a mere technical illegality is not a ground for the maintenance of an action.³³

Under some statutes a taxpayer can maintain an action only for double the value of the property or money wrongfully and fraudulently disposed of or

paid out.³⁴ Such a statute, generally speaking, is penal in nature and subject to a strict construction in its penal aspect,³⁵ but actual fraud need not be shown.³⁶

Matters of discretion or policy. A municipal officer³⁷ or the person to whom payment is made³⁸ is not liable where expenditures are made in the honest exercise of discretionary powers,³⁹ even though such exercise constitutes a mistake of judgment.⁴⁰

Injury, loss, or damage; benefit to municipality or to taxpayers. According to some authority the mere fact that the municipal corporation has received some benefit in the transaction does not prevent a recovery,⁴¹ but a recovery has been denied where the municipality has received the benefit of the expenditure and the taxpayers have not sustained injury,⁴² at least where the general matter

27. Fla.—*R. D. Lamar, Inc., v. Ray*, 182 So. 292, 132 Fla. 704.
Minn.—*Cranak v. Link*, 17 N.W.2d 359, 219 Minn. 112—*Burns v. Esling*, 203 N.W. 605, 163 Minn. 57.

28. Mass.—*Morse v. City of Boston*, 157 N.E. 523, 260 Mass. 255.
44 C.J. p 1384 note 41.

Exclusiveness

Statutes relating to suits by taxpayers involving misapplication of funds of municipal corporations are not exclusive.—*Himebaugh v. City of Canton*, 61 N.E.2d 483, 145 Ohio St. 237.

29. Ohio.—*Wright v. Clark*, 164 N.E. 512, 119 Ohio St. 462.
44 C.J. p 1384 note 42.

Public policy

A statute providing that any claim for compensation for work done or supplies or materials furnished city under a contract in which officer of the city was interested should be void provided merely a cumulative remedy and did not prohibit recovery of compensation already paid, since such recovery was based on express language making such transactions void and on the broad principle of public policy which recognized no equities or estoppels.—*Miller v. City of Martinez*, 82 P.2d 519, 28 Cal.App.2d 364.

Recovery of illegal payments may be had in taxpayer's action from an individual who, while an officer of a municipal corporation, enters into a contract in which he has an interest or renders service to the municipality for which he illegally receives compensation.—*Hammon v. Miller*, 13 Tenn.App. 458.

30. Ill.—*Knight v. Thompsonville*, 74 Ill.App. 550.
44 C.J. p 1384 note 43.

31. N.Y.—*Hicks v. Cocks*, 153 N.Y.S. 776, 167 App.Div. 862.

32. N.Y.—*Western New York Water Co. v. Laughlin*, 157 N.Y.S. 257

33. N.Y.—*Western New York Water Co. v. Laughlin*, supra.

34. Okl.—*State ex rel. Foster v. Oklahoma City*, 141 P.2d 994, 193 Okl. 177.
44 C.J. p 1384 note 41 [b].

Action in own name

A taxpayer cannot maintain an action in his own name to recover specific personal property for the use and benefit of a municipality.—*Vaughan v. Latta*, 33 P.2d 795, 168 Okl. 492.

A person chargeable with an ad valorem tax, or who owns taxable property within taxing jurisdiction, is a "taxpayer" within statute authorizing suit by taxpayer to recover penalty for unlawful expenditures by a local officer.—*Dowler v. State ex rel. Prunty*, 66 P.2d 1081, 179 Okl. 532.

Failure to meet guarantee

Failure of waterworks improvements to produce amount of water guaranteed did not render construction contract fraudulent and void, so as to authorize taxpayer's action to recover double money paid thereunder.—*State v. City of Shawnee*, 13 P.2d 89, 158 Okl. 173.

35. Okl.—*State ex rel. Foster v. Oklahoma City*, 141 P.2d 994, 193 Okl. 177—*State ex rel. Higgs v. Muskogee Iron Works*, 103 P.2d 101, 187 Okl. 419—*Dowler v. State ex rel. Prunty*, 66 P.2d 1081, 179 Okl. 532—*State ex rel. Woods v. Elk City*, 62 P.2d 1203, 178 Okl. 521.

44 C.J. p 1384 note 41 [b] (8).

Action for damages

A taxpayer as relator cannot under the statutes maintain an action to recover damages calculated on the basis of alleged excessive interest to be paid on municipal bonds in the future, alleged to have been suffered by municipality by sale of bonds at a rate of interest in excess of that which it allegedly could have obtained under more favorable circumstances.—*State ex rel. Foster v. Oklahoma City*, 141 P.2d 994, 193 Okl. 177.

36. Okl.—*State ex rel. Woods v. Cole*, 63 P.2d 730, 178 Okl. 567.

37. Tenn.—*Burns v. Nashville*, 221 S.W. 828, 142 Tenn. 541.
44 C.J. p 1384 note 47.

38. Under statutory remedy N.Y.—*Western New York Water Co. v. Laughlin*, 157 N.Y.S. 257.

39. Cal.—*Osburn v. Stone*, 150 P. 367, 170 Cal. 480.

40. Cal.—*Osburn v. Stone*, supra.

41. Wis.—*Neacy v. Drew*, 187 N.W. 218, 176 Wis. 348.
44 C.J. p 1384 note 51.

42. Ky.—*Dally v. Smith's Adm'x*, 180 S.W.2d 861, 297 Ky. 689.
Minn.—*Farmer v. St. Paul*, 67 N.W. 990, 65 Minn. 176, 33 L.R.A. 199.
Wis.—*Murphy v. Paul*, 212 N.W. 402, 192 Wis. 93.

Return of goods

The price of goods received by city under a contract with oil company in which city councilman was interested as a stockholder and of which he was office manager could be recovered without an offer to return the goods.—*Miller v. City of Martinez*, 82 P.2d 519, 28 Cal.App.2d 364.

involved is within the power of the municipality,⁴³ as where there were merely irregularities in the letting of a contract under which the payments were made,⁴⁴ or, it seems, where the property received

by the municipality has changed hands and possession cannot be restored.⁴⁵ In order to maintain a suit plaintiff need not show special damage.⁴⁶

3. RESTRAINING MUNICIPAL ACTS AND ACTS OF PERSONS DEALING WITH MUNICIPAL AUTHORITIES

a. In General

§ 2139. In General

In a large number of jurisdictions a taxpayer, independently of express statutory authorization, may resort to a court of equity for an injunction to restrain unlawful action by municipal authorities.

In a large number of jurisdictions a taxpayer, independently of express statutory authorization, may resort to a court of equity for an injunction to restrain unlawful action by municipal authorities,⁴⁷ and the existence of corruption or moral turpitude on the part of municipal officers is not essential in order to permit the maintenance of the suit.⁴⁸ The right of the taxpayer to sue has been held to be based on the theory that he is attempting to prevent the violation of a trust,⁴⁹ and it has

also been regarded as analogous to the right of stockholders in a private corporation to sue the officers of such corporation.⁵⁰ An injunction will not be granted where it is not shown that the act or transaction sought to be enjoined is in fact unauthorized, illegal, or otherwise wrongful,⁵¹ and the illegality or want of authority should be made clearly to appear;⁵² nor as a rule will the mere fact that an act or ordinance is unauthorized or illegal entitle a taxpayer, regardless of its nature and effect, to sue.⁵³ The remedy is not one lightly to be applied,⁵⁴ and it must appear that the commission of the wrongful act is imminent in order that a taxpayer may sue.⁵⁵

Other available remedies. In accordance with the

43. Ky.—Daily v. Smith's Adm'x, 180 S.W.2d 861, 297 Ky. 689.

44 C.J. p 1385 note 53.

44. Tenn.—Burns v. Nashville, 221 S.W. 828, 142 Tenn. 541.

Wash.—Jones v. City of Centralia, 289 P. 3, 157 Wash. 194.

45. Minn.—Mares v. Janutka, 264 N.W. 222, 196 Minn. 87—Frisch v. St. Charles, 208 N.W. 650, 167 Minn. 171.

46. Cal.—Mines v. Del Valle, 257 P. 530, 201 Cal. 273.

47. Fla.—Adolphus v. Baskin, 116 So. 225, 95 Fla. 603.

Ga.—Bagby v. Bowen, 178 S.E. 439, 180 Ga. 214.

Iowa.—Abbott v. Iowa City, 277 N.W. 437, 224 Iowa 698.

La.—Suarez v. Police Jury of Parish of St. Bernard, 14 So.2d 601, 203 La. 680.

Md.—Baltimore Retail Liquor Package Stores Ass'n v. Kerngood, 189 A. 209, 171 Md. 426, 109 A.L.R. 1253.

Mich.—General Development Corp. v. City of Detroit, 33 N.W.2d 919, 322 Mich. 495.

Minn.—Williams v. Klemmer, 224 N.W. 261, 177 Minn. 44—Oehler v. City of St. Paul, 219 N.W. 760, 174 Minn. 410.

Neb.—May v. City of Kearney, 17 N.W.2d 448, 145 Neb. 475.

S.C.—Shillito v. City of Spartanburg, 51 S.E.2d 95, 214 S.C. 11—Kirk v. Clark, 4 S.E.2d 13, 191 S.C. 205.

Wash.—State ex rel. Gebhardt v. Superior Court for King County, 131 P.2d 943, 15 Wash.2d 673—Barnett v. Lincoln, 299 P. 392, 162 Wash. 613.

44 C.J. p 1385 note 61, p 1386 note 69—32 C.J. p 259 note 11.

Injunctions against municipalities and municipal officers in general see Injunctions § 111.

Injunction to restrain collection of tax on property of individual taxpayer see supra § 2106.

De jure or de facto officers

Illegal action may be enjoined by taxpayer without regard to whether officers are de jure or de facto.—Long v. Stemmer, 7 N.E.2d 188, 212 Ind. 204.

48. N.C.—Murphy v. Greensboro, 129 S.E. 614, 190 N.C. 268, 276.

44 C.J. p 1387 note 80.

49. Ky.—Louisville Park Com'rs v. Speed, 285 S.W. 212, 215 Ky. 319.

44 C.J. p 1387 note 81.

The principle underlying the right is that the inhabitants of the municipality are the corporators and that the governing boards are the agents and trustees of the corporation.—Birmingham Electric Co. v. City of Bessemer, 186 So. 569, 237 Ala. 240.

50. Wis.—Victoria v. Village of Muscoda, 279 N.W. 663, 228 Wis. 455.

44 C.J. p 1387 note 83.

51. Md.—Smart v. Graham, 20 A.2d 574, 179 Md. 476.

Okl.—White v. City of Pawhuska, 265 P. 1059, 130 Okl. 156.

Tenn.—State ex rel. Allen v. American Glanzstoff Corporation, 72 S.W.2d 775, 167 Tenn. 597—Reams v. Town of McMinnville, 291 S.W. 1067, 155 Tenn. 222.

Wash.—Butchek v. Collier, 24 P.2d 619, 174 Wash. 311.

44 C.J. p 1387 note 76.

Competition with private enterprise

If slum clearance project was one within statute, objection that competition with private enterprise in building existed could not support injunction by taxpayer since public authorities need not abstain from removing conditions dangerous to community because private enterprise could do it.—Matthaei v. Housing Authority of Baltimore City, 9 A.2d 835, 177 Md. 506.

52. S.C.—Woodworth v. Gallman, 10 S.E.2d 316, 195 S.C. 157.

44 C.J. p 1387 note 77.

53. Ga.—Ellis v. City of Hapeville, 47 S.E.2d 265, 203 Ga. 864.

44 C.J. p 1387 note 78.

Necessity for injury or loss in general see infra § 2143.

54. Tenn.—Public Ledger Co. v. Memphis, 23 S.W. 51, 93 Tenn. 77.

55. Iowa.—Mote v. Incorporated Town of Carlisle, 233 N.W. 695, 211 Iowa 392.

44 C.J. p 1387 note 79.

rules applicable to the issuance of injunctions generally, an injunction to restrain an illegal act by a municipality will not lie where there is an adequate remedy at law;⁵⁶ but the existence of a legal remedy will not preclude the granting of an injunction if it is not as adequate and efficient as the remedy in equity.⁵⁷ In jurisdictions in which the remedy of a taxpayer is by certiorari, he is not entitled to an injunction.⁵⁸

Legislative or governmental acts; ordinances. The courts will not restrain the valid exercise of its legislative functions by a municipal council or other governing body at the suit of a citizen and taxpayer,⁵⁹ as, for example, the enactment of municipal ordinances in the exercise of a legislative power,⁶⁰ but it has been held that an injunction, if otherwise proper, may be granted to prevent the enactment of an ordinance authorizing an illegal or otherwise wrongful act in connection with matters in which the municipality acts in a private or proprietary character.⁶¹ A taxpayer may sue in equity to enjoin the enforcement of a void ordinance where its enforcement would increase municipal taxes.⁶²

Suits against third persons. The right of a tax-

payer to maintain a suit against a person dealing with the corporation in respect of matters in which taxpayers are interested has been recognized.⁶³

§ 2140. Statutory Provisions in General

In accordance with express statutory provisions, a taxpayer may sue to restrain unlawful action by municipal authorities. In some jurisdictions the statutes merely affirm an existing right in equity but in other jurisdictions the statutes create the right.

In accordance with express statutory provisions, a taxpayer may sue to restrain unlawful action by municipal authorities⁶⁴ where the action is of such a character that it could be restrained on the application of the attorney general or some body or officer acting on behalf of the public.⁶⁵ In some jurisdictions the statutes merely affirm an existing right in equity⁶⁶ and are not to be construed as a limitation on the remedy in cases not within the statutes;⁶⁷ in other jurisdictions, it has been held that a taxpayer, merely as a member of the general body of taxpayers, has no such right in the absence of statute,⁶⁸ and that he can maintain an action or suit for an injunction to restrain illegal or unauthorized acts only to the extent authorized by statute.⁶⁹ The act complained of must be with-

56. Ark.—Lewis v. A. Hirsch & Co., 90 S.W.2d 976, 192 Ark. 209.

44 C.J. p 1387 note 88.

Statutory remedy

Injunction suit or suit in equity will not lie where a taxpayer has an adequate statutory remedy.—Baxter v. Land Const. Co., 206 S.W.2d 325, 357 Mo. 58.

57. Okl.—Bowles v. Neely, 115 P. 344, 28 Okl. 556.

44 C.J. p 1387 note 89.

58. N.J.—Jackson v. Newark, 31 A. 233, 53 N.J.Eq. 322.

59. Cal.—Muchenberger v. City of Santa Monica, 275 P. 803, 206 Cal. 635.

44 C.J. p 1387 note 84.

60. Iowa.—Van Horn v. Des Moines, 191 N.W. 144, 195 Iowa 840.

44 C.J. p 1387 note 85.

61. Ky.—Roberts v. Louisville, 17 S.W. 216, 92 Ky. 95, 13 Ky.L. 406, 13 L.R.A. 844.

62. Ga.—Bagby v. Bowen, 178 S.E. 439, 180 Ga. 214.

Pa.—Bloom v. City of Scranton, 64 Pa.Dist. & Co. 358.

Injunction to restrain enforcement of ordinance in general see Injunctions § 119.

63. Ky.—Merchants' Police, etc., Co. v. Citizens' Tel. Co., 93 S.W. 642, 123 Ky. 90.

64. Cal.—Wirin v. Horrall, 193 P.2d 470, 85 Cal.App.2d 497.

Me.—Bayley v. Inhabitants of Town of Wells, 174 A. 459, 133 Me. 141.

Mass.—Amory v. Assessors of Boston, 37 N.E.2d 459, 310 Mass. 199.

N.Y.—Lewis v. Board of Education of New York City, 179 N.E. 315, 258 N.Y. 117—Bauer v. City of Niagara Falls, 29 N.Y.S.2d 448, 262 App.Div. 938—Cortellini v. City of Niagara Falls, 14 N.Y.S.2d 924, 257 App.Div. 615, reargument denied 16 N.Y.S.2d 694, 258 App.Div. 852—Welling v. Buck, 53 N.Y.S.2d 281, 184 Misc. 322—Hathaway v. City of Oneonta, 266 N.Y.S. 237, 148 Misc. 695—Heeran v. McNally, 244 N.Y.S. 151, 136 Misc. 851, reversed on other grounds 246 N.Y.S. 912, 231 App.Div. 779, affirmed 178 N.E. 787, 257 N.Y. 542—Morse v. Ereth, 80 N.Y.S.2d 321, affirmed 78 N.Y.S.2d 377, 273 App.Div. 938, appeal denied 79 N.Y.S.2d 190, 273 App.Div. 944—Bartholomew v. Village of Endicott, 59 N.Y.S.2d 89.

Ohio.—Maxwell v. Ohio Fuel Gas Co., 22 N.E.2d 639, 61 Ohio App. 394—City of Cleveland v. Division 268 of Amalgamated Ass'n of St., Elec. Ry. & Motor Coach Employees of America, 15 Ohio Supp. 76.

S.D.—Eriksen v. City of Sioux Falls, 14 N.W.2d 89, 70 S.D. 38.

65. N.Y.—Altschul v. Ludwig, 111 N.E. 216, 216 N.Y. 459.

44 C.J. p 1389 note 18.

66. Ohio.—Maxwell v. Ohio Fuel

Gas Co., 22 N.E.2d 639, 61 Ohio App. 394.

44 C.J. p 1388 note 95.

67. Ohio.—Walker v. Dillonvale, 92 N.E. 220, 82 Ohio St. 137, 19 Ann. Cas. 773.

68. N.Y.—Hathaway v. City of Oneonta, 266 N.Y.S. 237, 148 Misc. 695—Connolly v. City of Elmira, 258 N.Y.S. 603, 144 Misc. 282—Morse v. Ereth, 80 N.Y.S.2d 321, affirmed 78 N.Y.S.2d 377, 273 App.Div. 938, appeal denied 79 N.Y.S.2d 190, 273 App.Div. 944.

44 C.J. p 1386 notes 70, 71.

Violation of trust

In the absence of statute a taxpayer is not entitled to an injunction on the theory that the municipal authorities are trustees and his suit is to prevent the violation of a trust.—Carlton v. Salem, 103 Mass. 141.

69. N.Y.—New Colonia Ice Co. v. Woolley, 41 N.Y.S.2d 662, 181 Misc. 473—Eighth Avenue Coach Corporation v. City of New York, 10 N.Y.S.2d 170, 170 Misc. 243, affirmed 20 N.Y.S.2d 402, 259 App.Div. 870, affirmed 35 N.E.2d 907, 286 N.Y. 84—McCarthy v. City of New York, 10 N.Y.S.2d 170, 170 Misc. 243, affirmed 20 N.Y.S.2d 401, 259 App.Div. 870, affirmed 36 N.E.2d 684, 286 N.Y. 636—Connolly v. City of Elmira, 258 N.Y.S. 603, 144 Misc. 282.

44 C.J. p 1388 note 98.

in the provisions of the statute which, it is claimed, is applicable,⁷⁰ but, where the statute recognizes several grounds for suit, the existence of one of such grounds is sufficient to support the suit.⁷¹

The statutes in question are remedial⁷² and are given a liberal construction in order to accomplish their purpose.⁷³ While some provisions are designed to give taxpayers a remedy under conditions where none was available to them before,⁷⁴ they do not confer on courts of equity jurisdiction over subjects which have always been excluded from their cognizance, as stated *infra* § 2161, and do not authorize taxpayers to bring actions which the municipal authorities have no power to bring,⁷⁵ and in general the rights of taxpayers are no greater than those of the municipal corporation concerned.⁷⁶ It has been stated generally that the statutes are designed to protect the rights of the municipal corporation,⁷⁷ but some statutes, at least, have for an ultimate purpose the protection of taxpayers.⁷⁸ The right of taxpayers to sue under statute has been regarded as analogous to the right of stockholders in a private corporation to sue officers of such corporation.⁷⁹

General principles which govern the exercise of equitable jurisdiction are applied in determining whether the remedy under the foregoing statutes is to be granted or withheld,⁸⁰ and an injunction will not be granted under such statutes where an injunction under the circumstances would be inequitable rather than equitable.⁸¹ Moreover, the rule that an action by injunction will not lie where there is an adequate remedy at law, as considered in Injunctions § 25, applies in the case of suits under statutes,⁸² as where a full measure of relief is obtainable in mandamus proceedings.⁸³ Where the question involved is moot, an injunction will not issue.⁸⁴

Illegal acts. The mere illegality of an official act in and of itself does not justify injunctive relief in a taxpayer's action under a statute aimed at "illegal official acts,"⁸⁵ nor does a mere informality in procedure render an act illegal within the meaning of the statute.⁸⁶ In order to justify the granting of an injunction under the statutory provision in question it must clearly appear that the official act complained of was illegal.⁸⁷ There can be no illegal act where the municipal authorities follow the

70. Mass.—Dealtry v. Selectmen of Town of Watertown, 180 N.E. 621, 279 Mass. 22.

N.Y.—Borek v. Golder, 74 N.Y.S.2d 675, 190 Misc. 366—Heeran v. McNally, 244 N.Y.S. 151, 136 Misc. 851, reversed on other grounds 246 N.Y.S. 912, 231 App.Div. 779, affirmed 178 N.E. 787, 257 N.Y. 542—Petition of Board of Fire Com'rs of Columbia-Litchfield Fire Dist., 29 N.Y.S.2d 605.

44 C.J. p 1388 note 1.

71. N.Y.—Altschul v. Ludwig, 111 N.E. 216, 216 N.Y. 459.

44 C.J. p 1388 note 2.

72. N.Y.—Holton v. Board of Sup'rs of Monroe County, 281 N.Y.S. 350, 245 App.Div. 144—Eagle Nest Corporation v. Carroll, 37 N.Y.S.2d 716, 179 Misc. 99, reversed on other grounds 38 N.Y.S.2d 599, 265 App.Div. 985, motion granted 50 N.E.2d 103, 290 N.Y. 766.

Ohio.—Maxwell v. Ohio Fuel Gas Co., 22 N.E.2d 639, 61 Ohio App. 394.

44 C.J. p 1388 note 10.

73. N.Y.—Holton v. Board of Sup'rs of Monroe County, 281 N.Y.S. 350, 245 App.Div. 144—Eagle Nest Corporation v. Carroll, 37 N.Y.S.2d 716, 179 Misc. 99, reversed on other grounds 38 N.Y.S.2d 599, 265 App.Div. 985, motion granted 50 N.E.2d 103, 290 N.Y. 766.

Ohio.—Maxwell v. Ohio Fuel Gas Co., 22 N.E.2d 639, 61 Ohio App. 394.

44 C.J. p 1388 note 11.

74. N.Y.—Southern Leasing Co. v. Ludwig, 111 N.E. 470, 217 N.Y. 100.

75. N.Y.—Altschul v. Ludwig, 111 N.E. 216, 216 N.Y. 459—Gilgar v. Low, 77 N.Y.S. 852, 38 Misc. 292.

76. Ohio.—McCaslin v. Perrysburg, 10 Ohio Cir.Ct., N.S., 325, 30 Ohio Cir.Ct. 103.

77. Ohio.—Butler v. Karb, 117 N.E. 953, 96 Ohio St. 472.

44 C.J. p 1388 note 7.

78. N.Y.—Gordon v. Strong, 53 N.E. 38, 158 N.Y. 407.

44 C.J. p 1388 note 8.

79. Ohio.—Fergus v. Columbus, 8 Ohio S. & C.P. 290, 6 Ohio N.P. 82.

80. Mass.—Parsons v. Northampton, 28 N.E. 350, 154 Mass. 410.

N.Y.—Southern Leasing Co. v. Ludwig, 111 N.E. 470, 217 N.Y. 100.

81. Mass.—Parsons v. Northampton, 28 N.E. 350, 154 Mass. 410.

N.Y.—Smith v. City of Buffalo, 78 N.Y.S.2d 540, 191 Misc. 439.

82. N.Y.—Southern Leasing Co. v. Ludwig, 111 N.E. 470, 217 N.Y. 100.

44 C.J. p 1390 note 37.

83. N.Y.—Slavin v. McGuire, 98 N.E. 405, 205 N.Y. 84, Ann.Cas.1913C 851.

44 C.J. p 1390 note 38.

Where mandamus is not available, the right to an injunction may be upheld.—Southern Leasing Co. v. Williams, 160 N.Y.S. 440, 96 Misc. 358.

84. N.Y.—Goetz v. City of Mount Vernon, 68 N.Y.S.2d 265, 271 App. Div. 986.

85. N.Y.—Wilmerding v. La Guardia, 26 N.Y.S.2d 105, 176 Misc. 449—Breen v. Valentine, 10 N.Y.S.2d 821, 170 Misc. 590, affirmed 12 N.Y.S.2d 240, 256 App.Div. 1066—Elighth Avenue Coach Corporation v. City of New York, 10 N.Y.S.2d 170, 170 Misc. 243, affirmed 20 N.Y.S.2d 402, 259 App.Div. 870, affirmed 35 N.E.2d 807, 286 N.Y. 84—McCarthy v. City of New York, 10 N.Y.S.2d 170, 170 Misc. 243, affirmed 20 N.Y.S.2d 401, 259 App. Div. 870, affirmed 36 N.E.2d 684, 286 N.Y. 636—Hathaway v. City of Oneonta, 266 N.Y.S. 237, 148 Misc. 695—Connelly v. City of Elmira, 258 N.Y.S. 603, 144 Misc. 282—Manhattan Sec. Corporation v. Delaney, 233 N.Y.S. 241, 183 Misc. 671—Vandervoort v. City of Troy, 223 N.Y.S. 454, 130 Misc. 151, affirmed Vandervoort v. City of Troy, 224 N.Y.S. 931, 22 App.Div. 707—Bartholomew v. Village of Endicott, 59 N.Y.S.2d 84.

44 C.J. p 1389 note 13.
Necessity for injury or loss see *infra* § 2143.

86. N.Y.—Farley v. Lockport, 113 N.Y.S. 702, 61 Misc. 417.

87. N.Y.—Smith v. City of Buffalo, 78 N.Y.S.2d 540, 191 Misc. 439—Borek v. Golder, 74 N.Y.S.2d 675, 190 Misc. 366.

44 C.J. p 1389 note 20.

commands of a constitutional enactment.⁸⁸ The act may be illegal within the meaning of the statute notwithstanding the particular officer whose conduct is complained of is acting innocently and in good faith.⁸⁹ The statute does not permit a taxpayer to test the legality of the municipal corporation.⁹⁰

Abuse of corporate powers. Under some statutes a taxpayer may sue to prevent the abuse of corporate powers.⁹¹ The abuse of corporate powers referred to in the statute includes an unauthorized or unlawful exercise of the powers possessed by the corporation,⁹² as well as the assumption of powers not conferred.⁹³ In order to constitute an abuse of corporate powers it is not necessary that there should be an intentional or willful disregard of duties; an omission properly to perform them may be sufficient.⁹⁴ The statute has no application to the abuse of powers by a public body other than the municipal corporation involved.⁹⁵

Against whom suit lies. Some statutes apply only to those officers acting or who have acted for, or on behalf of, the municipal corporation,⁹⁶ but it has been held that certain officers who, although they perform a state function, are engaged in the disbursement of municipal funds in connection with the performance of their duties are subject to

suit.⁹⁷ A suit to restrain an illegal act may be brought against the offending officer only,⁹⁸ and not against another officer who merely has knowledge of the wrongful act.⁹⁹ Some statutory provisions have been construed as not permitting suits against persons dealing with the municipal authorities,¹ at least where the alleged illegal act of the municipal authorities has already been performed.²

§ 2141. Particular Taxpayers Entitled to Sue

A person is a taxpayer and entitled to sue to restrain illegal acts by officers of the municipal corporation if he is the owner of property listed for taxation, although he has not resided in the community long enough to have actually paid any taxes.

A person is a taxpayer and entitled to sue to restrain illegal acts by officers of the municipal corporation if he is the owner of property listed for taxation, although he has not resided within the municipality long enough to have actually paid any taxes,³ but a person who owns only personal property and who has not resided within the municipality a sufficient period of time to be assessed for taxes on the property has been held not entitled to sue as a taxpayer.⁴ A corporation,⁵ including a public utility,⁶ which is a taxpayer may sue.

Acts held not illegal

N.Y.—Timmerman v. City of New York, 69 N.Y.S.2d 102, affirmed 70 N.Y.S.2d 140, 272 App.Div. 758. 44 C.J. p 1389 note 22.

88. N.Y.—Campbell v. New York, 155 N.E. 628, 244 N.Y. 317, 50 A.L.R. 1473.

89. N.Y.—Wenk v. New York, 64 N.E. 509, 171 N.Y. 607.

90. N.Y.—Petition of Board of Fire Com'rs of Columbia-Litchfield Fire Dist., 29 N.Y.S.2d 605.

91. Ohio.—Butler v. Karb, 117 N.E. 953, 96 Ohio St. 472. 44 C.J. p 1389 note 23.

Enforcement of ordinance

Under statute authorizing an action to restrain city from exceeding its corporate powers, taxpayer could maintain action on behalf of city and all other taxpayers to enjoin enforcement of illegal ordinance.—State ex rel. Sergi v. City of Youngstown, 40 N.E.2d 477, 68 Ohio App. 254, appeal dismissed 32 N.E.2d 852, 138 Ohio St. 123.

92. Ohio.—McGrath v. Cowen, 49 N.E. 338, 57 Ohio St. 385.

93. Ohio.—McGrath v. Cowen, supra.

94. Ohio.—Elyria Gas, etc., Co. v. Elyria, 49 N.E. 335, 57 Ohio St. 374.

95. Ohio.—City of Columbus ex rel. Falter v. Columbus Metropolitan

Housing Authority, Com.Pl., 67 N.E.2d 338, affirmed, App., 68 N.E.2d 108—McCaslin v. Perrysburg, 18 Ohio S. & C.P. 196, 6 Ohio N.P., N.S., 48, affirmed 10 Ohio Cir.Ct., N.S., 325, 30 Ohio Cir.Ct. 103.

96. N.Y.—Borek v. Golder, 74 N.Y.S.2d 675, 190 Misc 366.

44 C.J. p 1389 note 29.

Illegal acts of city officials

Statute permitting city taxpayer to bring action to prevent illegal official acts of city officials cannot, in absence of waste or illegal expenditures, be used to enjoin educational functions of state.—Lewis v. Board of Education of New York City, 179 N.E. 315, 258 N.Y. 117.

97. N.Y.—Lewis v. Board of Education of New York City, supra. 44 C.J. p 1390 note 31.

Waste of funds

Statute authorizes action by city taxpayer to prevent waste of city's money by state officers.—Lewis v. Board of Education of New York City, supra—Rees v. Teachers' Retirement Board of City of New York, 223 N.Y.S. 716, 180 Misc. 442, reversed on other grounds 224 N.Y.S. 544, 221 App.Div. 646 and reversed on other grounds 160 N.E. 644, 247 N.Y. 372.

98. N.Y.—Sheehy v. Clausen, 55 N.Y.S. 1000, 26 Misc. 269, affirmed 59 N.Y.S. 1114, 42 App.Div. 622. 43 C.J. p 720 note 15.

99. N.Y.—Sheehy v. Clausen, supra.

1. Ohio.—City of Columbus ex rel. Falter v. Columbus Metropolitan Housing Authority, Com.Pl., 67 N.E.2d 338, affirmed, App., 68 N.E.2d 108.

Early cases in Ohio have held that the statute authorizes such a suit by a taxpayer.—Haskins v. Cincinnati Cons. St. R. Co., 7 Ohio Dec. (Reprint) 713, 4 Cinc.L.Bul. 1126—Ampt v. Cincinnati, 9 Ohio S. & C.P. 391, 6 Ohio N.P. 401.

2. N.Y.—Gallagher v. Keating, 57 N.Y.S. 632, 1123, 40 App.Div. 81.

44 C.J. p 1389 note 30.

3. Ind.—Alexander v. Johnson, 41 N.E. 811, 144 Ind. 82.

4. N.J.—Simmons v. Borough of Wenonah, 143 A. 73, 6 N.J.Misc. 902.

5. Fla.—Kathleen Citrus Land Co. v. City of Lakeland, 169 So. 356, 124 Fla. 659. 44 C.J. p 1390 note 44.

6. Ky.—People's Transit Co. v. Louisville R. Co., 295 S.W. 1055, 220 Ky. 728.

Expiration of franchise

A power company which was the largest taxpayer in city was not barred from joining other taxpayers in suit to restrain city from proceeding to construct municipal power plant on ground that election authorizing construction was invalid,

A nonresident taxpayer may sue,⁷ and this rule has been applied in suits under statutes;⁸ but it has also been held that the taxpayer must be a citizen of the municipality in order to be entitled to sue to restrain illegal acts of the municipality,⁹ and that a public utility which is not an inhabitant of the city, although it pays taxes therein, is not entitled to sue.¹⁰ The fact that plaintiff prosecutes the action on behalf of a citizens' organization does not affect his right to sue where he is otherwise duly qualified.¹¹ Under some statutes plaintiff must show that his assessment for taxation is at least a specified amount.¹²

The fact that a taxpayer, after commencing a suit for an injunction against the municipality, has become a municipal officer does not preclude him from maintaining the suit.¹³

§ 2142. Matters of Discretion, Judgment, or Policy in General

The discretionary powers of municipal authorities will not be interfered with in a suit by a taxpayer for an injunction in the absence of fraud or palpable abuse.

The discretionary powers of municipal authorities will not be interfered with in a suit by a taxpayer for an injunction in the absence of fraud or pal-

pable abuse,¹⁴ and matters in which questions as to judgment, wisdom, or policy alone are involved are not subject to control by injunction.¹⁵ The courts will interfere where an abuse of discretion¹⁶ or fraud¹⁷ on the part of municipal authorities has occurred or is threatened.

§ 2143. Necessity, Nature and Extent of Interest, Injury, or Loss in General

As a general rule, either in suits brought under statutes or in suits brought independently of statute, a taxpayer is not entitled to an injunction restraining an act by municipal authorities where the threatened act is not prejudicial to his rights or to the rights of the taxpayers, or will not result in loss to the municipality.

Under some statutes a taxpayer may sue to enjoin the municipality from executing an invalid ordinance without showing damage,¹⁸ but, as a general rule, either in suits brought under statutes or in suits brought independently of statute, a taxpayer is not entitled to an injunction restraining an act by municipal authorities where the threatened act is not prejudicial to his rights or to the rights of the taxpayers,¹⁹ or will not result in loss to the municipality.²⁰ Furthermore, as a general rule, a taxpayer cannot sue where he has not sustained or is not threatened with any injury peculiar to himself or to the taxpayers as a class, as distinguished

even though its franchise had expired, where company was furnishing light and power at rates fixed by city council and was a consumer of electricity as the owner and operator of gas plant.—*Abbott v. Iowa City*, 277 N.W. 437, 224 Iowa 698.

7. Ga.—*Board of Lights, etc., v. Dobbs*, 105 S.E. 611, 151 Ga. 53. 44 C.J. p 1390 note 42.

8. N.Y.—*Steele v. Glen Park*, 86 N.E. 26, 193 N.Y. 341. 44 C.J. p 1390 note 43.

9. Ala.—*Birmingham Electric Co. v. City of Bessemer*, 186 So. 569, 237 Ala. 240.

10. Ala.—*Birmingham Electric Co. v. City of Bessemer*, *supra*.

11. Idaho.—*Moore v. Hupp*, 105 P. 209, 17 Idaho 232.

12. N.Y.—*Lees v. Cohoes Motor Car Co.*, 203 N.Y.S. 65, 122 Misc. 373. 44 C.J. p 1390 note 46.

13. Ill.—*Gray v. W. A. Black Co.*, 170 N.E. 713, 338 Ill. 488.

14. Md.—*Smart v. Graham*, 20 A.2d 574, 179 Md. 476.

Mont.—*Corpus Juris cited in Colwell v. City of Great Falls*, 157 P.2d 1013, 1022, 117 Mont. 126.

Tex.—*Mayer v. Kostas*, Civ.App., 71 S.W.2d 398, error refused—*Lamm v. Chambers*, Civ.App., 18 S.W.2d 212.

14 C.J. p 1390 note 47.

In suits under statutes the rule has been applied.—*Hanrahan v. Corrou*, 12 N.Y.S.2d 536, 170 Misc. 922—*Eighth Avenue Coach Corporation v. City of New York*, 10 N.Y.S.2d 170, 170 Misc. 243, affirmed 20 N.Y.S.2d 402, 259 App.Div. 870, affirmed 35 N.E.2d 907, 286 N.Y. 84—*McCarthy v. City of New York*, 10 N.Y.S.2d 170, 170 Misc. 243, affirmed 20 N.Y.S.2d 401, 259 App.Div. 870, affirmed 36 N.E.2d 684, 286 N.Y. 636—44 C.J. p 1390 note 47 c.

15. Wash.—*Von Herberg v. City of Seattle*, 288 P. 646, 157 Wash. 141, 70 A.L.R. 417.

44 C.J. p 1391 note 48.

In suits under statutes the rule has been applied.—*Goetz v. City of Mount Vernon*, 68 N.Y.S.2d 265, 271 App.Div. 986—*Hanrahan v. Corrou*, 12 N.Y.S.2d 536, 170 Misc. 922—*Eighth Avenue Coach Corporation v. City of New York*, 10 N.Y.S.2d 170, 170 Misc. 243, affirmed 20 N.Y.S.2d 402, 259 App.Div. 870, affirmed 35 N.E.2d 907, 286 N.Y. 84—*McCarthy v. City of New York*, 10 N.Y.S.2d 170, 170 Misc. 243, affirmed 20 N.Y.S.2d 401, 259 App.Div. 870, affirmed 36 N.E.2d 684, 286 N.Y. 636. 44 C.J. p 1391 note 48 [a].

16. Okl.—*Afton v. Gill*, 156 P. 658, 57 Okl. 36.

Pa.—*Soltz v. Yeadon Borough School Dist.*, Com.Pl., 29 Del.Co. 188. 44 C.J. p 1391 note 49.

17. Ark.—*Lackey v. Fayetteville Water Co.*, 96 S.W. 622, 80 Ark. 103.

44 C.J. p 1391 note 50.

18. S.D.—*Haines v. Rapid City*, 238 N.W. 145, 59 S.D. 58.

19. Ga.—*Ellis v. City of Hapeville*, 47 S.E.2d 265, 203 Ga. 364.

Ill.—*Avery v. City of Chicago*, 178 N.E. 351, 345 Ill. 640.

Iowa.—*Donovan Const. Co. v. City of Waterloo*, 231 N.W. 499, 211 Iowa 506.

Kan.—*Robertson v. Kansas City*, 56 P.2d 1032, 143 Kan. 726.

N.Y.—*Borek v. Golder*, 74 N.Y.S.2d 675, 190 Misc. 366—*Breen v. Valentine*, 10 N.Y.S.2d 821, 170 Misc. 590, affirmed 12 N.Y.S.2d 240, 256 App.Div. 1066—*Goebel v. Bolan*, 268 N.Y.S. 501, 150 Misc. 574.

Or.—*Morris v. City of Salem*, 174 P. 2d 192, 179 Or. 866.

44 C.J. p 1391 note 54, p 1392 note 61—32 C.J. p 259 note 11.

Interest in plaintiff must be shown.—*Parsons v. Northampton*, 28 N.E. 850, 154 Mass. 410.

20. Ind.—*Richmond v. Davis*, 3 N.E. 130, 103 Ind. 449.

44 C.J. p 1392 notes 55, 61.

from the public generally,²¹ since in such case the suit must be brought by the proper public officer.²²

A distinction is generally made between a case where the act in question affects plaintiff merely as a citizen of the municipality or as one of the general public and one where the act directly affects his rights as a taxpayer;²³ and, where an illegal or unauthorized act is prejudicial to the rights of taxpayers as such,²⁴ as where it tends to increase the burden of taxation,²⁵ a taxpayer may sue to restrain it without showing any special injury different from that sustained by other taxpayers. Plaintiff in his capacity as a taxpayer cannot maintain a suit in which only his private interests are involved;²⁶ he must seek such relief as will be beneficial to all the class represented.²⁷ Under some statutes, in order that an "illegal official act" may be enjoined where waste of public property or funds is not threatened, it must appear that such act is one which imperils the public interests or is calculated to work public injury or to produce some public mischief,²⁸ but it is not necessary that the act complained of result in a pecuniary loss to the municipal corporation.²⁹

The injury which plaintiff seeks to prevent by

the injunction must be immediate and imminent,³⁰ although it has been held that plaintiff need not show threat of an immediate pecuniary loss with definiteness and certainty.³¹ The fact that the pecuniary interest of plaintiff is small,³² or that the amount of his tax will be increased only a slight amount as a result of the act complained of,³³ does not affect his right to an injunction, but, where the total damage to all the taxpayers is trifling, an injunction will not be granted.³⁴

A nontaxpayer cannot sue on the ground that the act complained of is prejudicial to the rights of taxpayers.³⁵

§ 2144. Motive, Intention, or Adverse Interest of Plaintiff

As a general rule, if the plaintiff is a taxpayer and his rights as such are affected, his motives in bringing suit to restrain illegal acts by a municipal corporation are not material.

As a general rule, if plaintiff is a taxpayer and his rights as such are affected, his motives in bringing suit to restrain illegal acts by a municipal corporation are not material,³⁶ and his right to sue is not affected by the fact that he may have some

21. Ill.—Price v. City of Mattoon, 4 N.E.2d 850, 364 Ill. 512—Koehler v. A Century of Progress, 188 N.E. 445, 354 Ill. 347—Harz v. City of Chicago, 78 N.E.2d 660, 334 Ill. App. 106.

Kan.—Douglas v. City of Wichita, 83 P.2d 657, 148 Kan. 619. N.C.—Turner v. City of Reidsville, 29 S.E.2d 211, 224 N.C. 42. Ohio.—Fischer v. City of Cleveland, 181 N.E. 688, 42 Ohio App. 76.

S.C.—Shillito v. City of Spartanburg, 51 S.E.2d 95, 214 S.C. 11. Tenn.—State ex rel. Allen v. American Glanzstoff Corporation, 72 S.W.2d 775, 167 Tenn. 597.

Tex.—Powell v. City of Baird, Civ. App., 132 S.W.2d 464—Lamm v. Chambers, Civ. App., 18 S.W.2d 212.

W.Va.—Baler v. City of St. Albans, 39 S.E.2d 145, 128 W.Va. 630. 44 C.J. p 1385 note 62.

22. Kan.—Robertson v. Kansas City, 56 P.2d 1032, 143 Kan. 726. W.Va.—Baler v. City of St. Albans, 39 S.E.2d 145, 128 W.Va. 630. 44 C.J. p 1385 note 63.

23. Ill.—Koehler v. A Century of Progress, 188 N.E. 445, 354 Ill. 347.

S.C.—Shillito v. City of Spartanburg, 51 S.E.2d 95, 214 S.C. 11.

Tenn.—Wright v. Nashville Gas & Heating Co., 194 S.W.2d 459, 183 Tenn. 594.

44 C.J. p 1385 note 65.

24. N.Y.—Smith v. City of Buffalo, 78 N.Y.S.2d 540, 19 Misc. 439—

Bartholomew v. Village of Endicott, 59 N.Y.S.2d 89.

Wash.—Barnett v. Lincoln, 299 P. 392, 162 Wash. 613.

44 C.J. p 1385 notes 64, 66, p 1391 note 53, p 1392 note 65.

25. Md.—Ruark v. International Union of Operating Engineers, Local Union No. 37, 146 A. 797, 157 Md. 576.

Tenn.—Wright v. Nashville Gas & Heating Co., 194 S.W.2d 459, 183 Tenn. 594.

Wash.—State ex rel. Gebhardt v. Superior Court for King County, 131 P.2d 943, 15 Wash.2d 673.

44 C.J. p 1386 note 67—32 C.J. p 259 note 11.

26. Md.—Kelly v. Baltimore, 53 Md. 134.

Statutes expressly authorizing suit by taxpayer to restrain illegal acts by city officials do not authorize a suit merely to protect the individual interest of plaintiff—Rogers v. O'Brien, 47 N.E. 456, 153 N.Y. 357—Holtz v. Diehl, 56 N.Y.S. 841, 26 Misc. 224.

27. Tenn.—Wright v. Nashville Gas & Heating Co., 194 S.W.2d 459, 183 Tenn. 594.

44 C.J. p 1387 note 73, p 1392 note 59.

28. N.Y.—Breen v. Valentine, 10 N.Y.S.2d 821, 170 Misc. 590, affirmed 12 N.Y.S.2d 240, 256 App.Div. 1066.

44 C.J. p 1392 note 63.

29. N.Y.—Altschul v. Ludwig, 111 N.E. 216, 216 N.Y. 459.

44 C.J. p 1392 note 64.

30. N.Y.—Breen v. Valentine, 10 N.Y.S.2d 821, 170 Misc. 590, affirmed 12 N.Y.S.2d 240, 256 App.Div. 1066.

44 C.J. p 1392 notes 56, 62.

31. Iowa.—Abbott v. Iowa City, 277 N.W. 437, 224 Iowa 698—Miller v. Des Moines, 122 N.W. 226, 143 Iowa 409, 23 L.R.A., N.S., 815, 21 Ann.Cas. 207.

32. La.—Suarez v. Police Jury of Parish of St. Bernard, 14 So.2d 601, 203 La. 680.

44 C.J. p 1392 note 67.

33. Ill.—Rock Island v. Huesing, 25 Ill.App. 600, reversed on other grounds 21 N.E. 558, 128 Ill. 465, 15 Am.S.R. 129.

La.—Suarez v. Police Jury of Parish of St. Bernard, 14 So.2d 601, 203 La. 680.

34. Ill.—Ryan v. City of Chicago, 15 N.E.2d 708, 369 Ill. 59.

35. Iowa.—Donovan Const. Co. v. City of Waterloo, 231 N.W. 499, 211 Iowa 506.

N.C.—Edenton Ice, etc., Co. v. Plymouth, 134 S.E. 449, 192 N.C. 180.

36. Fla.—R. D. Lamar, Inc., v. Ray, 182 So. 292, 132 Fla. 704.

44 C.J. p 1392 note 72.

Conduct and motive of complainant as affecting right to injunction in general see Injunctions § 26.

purely private right or interest which will be affected by the action which he seeks to prevent;³⁷ but there is authority for the view that the motive of plaintiff may be considered in determining what relief shall be granted, as discussed *infra* § 2169. The taxpayer must act in good faith and not lend his name and standing as a taxpayer to further the interests of a stranger to the record,³⁸ and the

view is taken in some cases that the fact that plaintiff is proceeding in the interest of third persons who themselves would not be entitled to relief is ground for refusing an injunction;³⁹ but it has also been held that the facts that a third person is to defray the expenses and that such person induced the bringing of the suit do not affect plaintiff's right to relief.⁴⁰

b. Particular Acts or Transactions

§ 2145. Levy and Collection of Tax or Assessment

As a general rule in most jurisdictions, a taxpayer may, independently of express statutory authorization, sue to enjoin a municipal corporation from levying or collecting an illegal tax, but in some jurisdictions the right is dependent on statute.

As a general rule in most jurisdictions, a taxpayer may, independently of express statutory authorization, sue to enjoin a municipal corporation from levying an illegal tax, or one for an illegal or unauthorized purpose,⁴¹ and the right of a tax-

payer to an injunction against the collection of such a tax,⁴² or the right of a taxpayer to maintain a suit to enjoin the making of a threatened illegal assessment,⁴³ has been recognized or upheld. In some jurisdictions a representative suit by taxpayers to restrain the levy, collection, or assessment of a tax does not lie in the absence of statutory authorization where they have no interest apart from that of the general body of taxpayers,⁴⁴ and, although the right may be exercised when conferred by statute,⁴⁵ the taxpayer must bring himself within the provisions of the statute,⁴⁶ and, under some

37. N.Y.—*Del Balso Const. Corporation v. Gillespie*, 232 N.Y.S. 261, 225 App.Div. 42, affirmed 166 N.E. 333, 250 N.Y. 584.

44 C.J. p 1393 note 73.

Motive for suing to enjoin contract see *infra* § 2147.

38. N.Y.—*Smith v. City of Buffalo*, 78 N.Y.S.2d 540, 191 Misc. 437.

R.I.—*Higgins v. Green*, 185 A. 686, 56 R.I. 330.

39. Ill.—*Bednarski v. West Hammond*, 170 Ill.App. 543.

44 C.J. p 1393 note 75.

40. Wash.—*Goshert v. Seattle*, 107 P. 860, 57 Wash. 645.

41. Fla.—*Olds v. Alvord*, 183 So. 711, 133 Fla. 221, 345, reheard 191 So. 434, 139 Fla. 745, certiorari denied *Alvord v. Town of Belleair*, 60 S.Ct. 141, 308 U.S. 603, 84 L.Ed. 505—*Williams v. Town of Dunnellon*, 169 So. 631, 125 Fla. 114.

Pa.—*Carey v. Borough of Larksville*, 38 Pa.Dist. & Co. 505, 33 Luz.Leg. Reg. 403, 31 Mun.L.R. 182—*Bickert v. Borough of West View*, Com. Pl., 90 Pittsb.Leg.J. 377.

Tex.—*City of Del Rio v. Lowe*, Civ. App., 111 S.W.2d 1208, reversed on other grounds *Lowe v. City of Del Rio*, 122 S.W.2d 191, 132 Tex. 111.

44 C.J. p 1393 note 78.

Enjoining special assessment against taxpayer's property see *supra* §§ 1528-1540.

42. Cal.—*Holman v. Santa Cruz County*, App., 205 P.2d 767.

Ill.—*Anderson v. City of Park Ridge*, 72 N.E.2d 210, 396 Ill. 235—*Gray v. W. A. Black Co.*, 170 N.E. 713, 338 Ill. 488.

Pa.—*Bloom v. City of Scranton*, 64 Pa.Dist. & Co. 358—*White v. Peoples, Com.Pl.*, 32 Del.Co. 368, 35 Mun.L.R. 241.

44 C.J. p 1393 note 79.

Enjoining collection of tax against individual taxpayers see *supra* § 2106.

Illegal incorporation of municipality

Equity has jurisdiction to entertain a bill brought by taxpayers to enjoin the collection of taxes on the ground that the statute which purports to incorporate the municipality involved is unconstitutional and void.—*Campbell v. Bryant*, 52 S.E. 638, 104 Va. 509.

43. Ind.—*Jordan v. Logansport*, 86 N.E. 47, 171 Ind. 280.

44 C.J. p 1394 note 80.

44. Mass.—*Amory v. Assessors of Boston*, 37 N.E.2d 459, 310 Mass. 199.

44 C.J. p 1394 notes 86, 87.

45. N.Y.—*Martin v. City of Kingston*, 61 N.Y.S.2d 552, 186 Misc. 124.

44 C.J. p 1394 note 88.

Purpose of statute

The statute, authorizing a taxpayers' petition to restrain municipal officers from raising money or incurring liability for any purpose or in any manner other than as prescribed by law, was enacted to prohibit the raising of money by taxation in any manner not authorized by law.—*Amory v. Assessors of Boston*, 37 N.E.2d 459, 310 Mass. 199.

Words "to raise money," within the meaning of a statute authorizing taxpayers to petition for an in-

junction when officers of the city are about to raise money for unwarranted purposes, mean to raise money by taxation.—*Dowling v. Board of Assessors of City of Boston*, 168 N.E. 73, 268 Mass. 480.

Assessors are officers who may be restrained from raising money by the levy of a tax contrary to law.—*Dowling v. Board of Assessors of City of Boston*, *supra*.

46. Mass.—*Amory v. Assessors of Boston*, 37 N.E.2d 459, 310 Mass. 199.

44 C.J. p 1394 note 89.

Overvaluation of certain property by city assessors, although improperly raising limit of municipal indebtedness, would not subject city to any financial obligations, so as to render such overvaluation by assessors subject to restraint on taxpayers' petition under statute providing for such petition to prevent municipal officers from illegally raising or expending money or incurring obligations, since assessors were without power to appropriate municipal funds, that authority being possessed by legislative branch of municipal government.—*Amory v. Assessors of Boston*, *supra*.

Past transactions

The statute authorizing taxpayers' petition to prevent municipal officers from raising or expending money or incurring obligations otherwise than as authorized by law does not reach past transactions unless in exceptional cases, and a proceeding to restrain city assessors from valuing taxable property otherwise than at

statutes, where the inclusion of a certain amount in the levy is merely a technical illegality, suit will not lie.⁴⁷

An injunction will not be granted where the tax or the action concerning the tax is not illegal,⁴⁸ where no injury to the taxpayer is shown,⁴⁹ where the remedy at law is adequate,⁵⁰ or where the matter is within the discretion of the municipal authorities.⁵¹ The action of municipal authorities in levying a tax for the payment of certain bonds will not be restrained at the instance of a taxpayer where such action would be ordered at the instance of the holders of such bonds.⁵² A suit will not lie to enjoin the collection of authorized taxes where it is based on the possibility that if collected the municipal authorities will misapply them,⁵³ and it has also been held that a suit to enjoin the collection of taxes cannot be based on the alleged fact that the municipality has failed to keep its streets in good repair and has thereby forfeited its charter.⁵⁴

Suit against beneficiary of tax. The right of tax-

payers to maintain an action against the beneficiary of a special tax, to enjoin the collection of such tax, has been recognized.⁵⁵

Exemption of properties from taxation. Taxpayers who would be affected by exemption of properties from paying taxes may sue for an injunction.⁵⁶

§ 2146. Incurring Indebtedness or Issuing Evidence of Indebtedness

a. In general

b. Bonds or other evidence of indebtedness

a. In General

As a general rule, a taxpayer may sue to enjoin municipal authorities from incurring an illegal or unauthorized indebtedness.

As a general rule, in most jurisdictions a taxpayer may, independently of express statutory authorization, sue to enjoin municipal authorities from incurring an illegal or unauthorized indebtedness.⁵⁷ In some jurisdictions, the taxpayer has the right

its fair cash value on the ground that outstanding indebtedness of city was greater than law would permit had not limit of indebtedness been improperly raised by overvaluation of certain property during preceding years was not such an exceptional case.—*Amory v. Assessors of Boston*, supra.

47. N.Y.—*Schieffelin v. Craig*, 170 N.Y.S. 603, 183 App.Div. 515. 44 C.J. p 1394 note 90.

48. Ind.—*Hoess v. Whitaker*, 192 N.E. 443, 207 Ind. 338.

La.—*Mouledoux v. Maestri*, 2 So.2d 11, 197 La. 525.

Tex.—*Austin v. Nalle*, 22 S.W. 668, 960, 85 Tex. 520.

Tax to advertise city

Where charter of home-rule city authorizes establishment of board of city development and tax in support thereof to advertise city, courts cannot restrain levy of tax for such purpose.—*Davis v. City of Taylor*, 67 S.W.2d 1033, 123 Tex. 39.

49. Mont.—*Northern Pac. Ry. Co. v. Lutey*, 66 P.2d 785, 104 Mont. 321.

Assessment of property of others at an excessive valuation does not entitle a taxpayer to an injunction. Mass.—*Amory v. Assessors of Boston*, 37 N.E.2d 459, 310 Mass. 199. Mont.—*Northern Pac. Ry. Co. v. Lutey*, 66 P.2d 785, 104 Mont. 321.

50. U.S.—*Valentine v. City of Juneau*, C.C.A.Alaska, 36 F.2d 904, followed in *Simpson v. City of Juneau*, 36 F.2d 907.

Proceedings for abatement of taxes Mass.—*Amory v. Assessors of Boston*, 37 N.E.2d 459, 310 Mass. 199.

Remedy at law held not adequate

Pa.—*Bickert v. Borough of West View*, Com.Pl., 90 Pittsb.Leg.J. 377.

51. N.Y.—*Schieffelin v. Craig*, 170 N.Y.S. 603, 183 App.Div. 515. 44 C.J. p 1394 note 91.

Collateral attack

Decision of city officials that petition for election on tax for municipal band fund was signed by proper number of qualified electors as required by law was held not open to collateral attack in suit to enjoin levy of such tax in absence of fraud.—*State ex rel. Rose v. Webb City*, Mo.App., 74 S.W.2d 45.

52. N.C.—*Duffy v. Greensboro*, 120 S.E. 53, 186 N.C. 470.

53. Iowa.—*Strohm v. Iowa City*, 47 Iowa 42.

54. W.Va.—*Hornbrook v. Elm Grove*, 21 S.E. 851, 40 W.Va. 543, 28 L.R.A. 416.

44 C.J. p 1394 note 82.

55. La.—*Lawson v. Opelousas, etc.*, R. Co., 56 So. 625, 129 La. 649.

56. Md.—*Matthaei v. Housing Authority of Baltimore City*, 9 A.2d 835, 177 Md. 506.

Homestead exemption

Class suit by taxpayer in his own name for the use and benefit of himself and other taxpayers against city to have ordinance exempting from all taxes a specified amount of assessed taxable values of all residence homesteads of city declared void, and for permanent injunction against city from allowing such exemption and issuing certificate

therefor to owners of homesteads, was proper under blended system of law and equity.—*City of Wichita Falls v. Cooper*, Tex.Civ.App., 170 S.W.2d 777.

57. Alaska.—*Valentine v. Robertson*, 7 Alaska 150.

Ga.—*City of Valdosta v. Singleton*, 28 S.E.2d 759, 197 Ga. 194.

Mich.—*Kirchen v. Remenga*, 288 N.W. 344, 291 Mich. 94.

Minn.—*Williams v. Klemmer*, 224 N.W. 261, 177 Minn. 44.

N.D.—*Chester v. Elnarson*, 34 N.W. 2d 418, rehearing denied 35 N.W. 2d 137.

Okl.—*Payne v. Jones*, 146 P.2d 113, 193 Okl. 609.

Tenn.—*Soukup v. Sell*, 104 S.W.2d 830, 171 Tenn. 437, modified on other grounds 105 S.W.2d 107, 171 Tenn. 491.

Va.—*Appalachian Electric Power Co. v. Town of Galax*, 4 S.E.2d 390, 173 Va. 329.

Wash.—*State ex rel. Gebhardt v. Superior Court for King County*, 131 P.2d 943, 15 Wash.2d 673.

44 C.J. p 1394 note 95, p 1395 note 96.

Enjoining contract which would result in unauthorized indebtedness see *infra* § 2147.

Legislature may not deny to a taxpayer the right to assert invalidity of indebtedness about to be incurred by a city.—*Faught v. City of Sapulpa*, 292 P. 15, 145 Okl. 164.

Theory of equitable jurisdiction Equitable jurisdiction over an official action is based on the theory that a taxpayer has an equitable interest in public funds which it is

to sue under statutes conferring the right,⁵⁸ and the right is held to be dependent on statute,⁵⁹ but some statutes merely recognize and regulate an existing right.⁶⁰

An injunction is properly granted where the indebtedness will exceed the authorized debt limit⁶¹ or the revenues of the current year where expenditures are so limited,⁶² or the authorities are proceeding in an illegal manner.⁶³ The taxpayer must show that, unless injunctive relief is granted, injury will result to the taxpayers,⁶⁴ but he need not show any injury to himself different from that sustained by other taxpayers.⁶⁵ An injunction will not be granted where the incurring of an indebtedness is not threatened.⁶⁶

Matters of discretion, judgment, or policy. In the absence of fraud or bad faith, or palpable abuse, the court will not interfere with the exercise of discretionary powers in regard to the transaction which is attacked;⁶⁷ nor will it consider matters in which are involved only questions as to judg-

ment, wisdom, or policy.⁶⁸

Showing illegality or other wrong. An injunction will not be granted where it is not shown that the transaction in question is unauthorized, illegal or otherwise wrongful,⁶⁹ and a mere apprehension that the proposed indebtedness will exceed the authorized debt limit is not ground for interference by the court.⁷⁰

Authority of assessors. It has been held that a suit to prevent a municipal corporation from increasing its indebtedness could not be based on the theory that the board of assessors was not authorized to assess taxes to meet the proposed indebtedness.⁷¹

b. Bonds or Other Evidence of Indebtedness

As a general rule, sometimes by virtue of statutory authorization, a taxpayer, in a proper case, may sue to enjoin municipal authorities from issuing, selling, or delivering municipal bonds or other securities or evidences of indebtedness.

As a general rule, sometimes by virtue of stat-

charged will be expended for an illegal purpose, thus incurring a liability on the taxpayer to replenish the treasury.—*Ryan v. City of Chicago*, 15 N.E.2d 708, 369 Ill. 59.

58. N.Y.—*New York State Electric & Gas Corporation v. City of Plattsburg*, 6 N.Y.S.2d 419, 168 Misc. 597, modified on other grounds 12 N.Y.S.2d 318, 256 App. Div. 732, 257 App.Div. 1022, modified on other grounds 24 N.E.2d 122, 281 N.Y. 450, reargument denied 26 N.E.2d 812, 282 N.Y. 682.
34 C.J. p 1394 note 95 [c].

59. Mass.—*Prince v. Crocker*, 44 N. E. 446, 166 Mass. 347, 32 L.R.A. 610.

44 C.J. p 1394 note 94.

60. Ohio.—*Pullen v. Smith*, 5 Ohio Cir.Ct.N.S., 1, 26 Ohio Cir.Ct. 549.
44 C.J. p 1395 note 96 [a].

61. Ga.—*Cartledge v. City Council of Augusta*, 188 S.E. 675, 183 Ga. 414—*Dortch v. Southeastern Fair Ass'n*, 186 S.E. 685, 182 Ga. 638.
44 C.J. p 1395 note 97.

62. Ky.—*Providence v. Ruckman*, 242 S.W. 844, 195 Ky. 471.
44 C.J. p 1395 note 98.

63. Fla.—*Carlton v. Jones*, 158 So. 170, 117 Fla. 622.

Idaho.—*Straughan v. City of Coeur D'Alene*, 24 P.2d 821, 53 Idaho 494.
44 C.J. p 1395 note 99.

64. N.D.—*Chester v. Elnarson*, 34 N.W.2d 418, rehearing denied 35 N.W.2d 187.

Injury is irreparable when threatened acts would result in unauthorized or unlawful expenditure of public funds, and no other prompt rem-

edy is available.—*Williams v. Klemmer*, 224 N.W. 261, 177 Minn. 44.

65. N.D.—*Chester v. Elnarson*, 34 N.W.2d 418, rehearing denied 35 N.W.2d 187.

Okl.—*Payne v. Jones*, 146 P.2d 118, 193 Okl. 609.

66. Ky.—*Jody v. City of London*, 203 S.W.2d 41, 305 Ky. 303.

Contingent liability of city in event of default by housing authority under amended loan and subsidy contract for financing and construction of low rent housing project under the public housing law was not a debt to which taxpayer could object on ground of illegal waste of property or funds of city.—*Borek v. Golder*, 74 N.Y.S.2d 675, 190 Misc. 366.

Obligation to give tax exemptions

Loan and subsidy contract which required city to match state subsidy by tax exemptions but which did not call on city to pay any cash subsidy or incur any debt did not authorize taxpayer's action as an illegal waste of property and funds of city.—*Borek v. Golder*, supra.

"Incurring of obligation" within statute

(1) Doing act which might involve town in litigation at instance of owner of patent is not "incurring of obligation" within statute authorizing suit to restrain town from expending money or "incurring obligation" for illegal and unconstitutional purpose.—*Dealtry v. Selectmen of Town of Watertown*, 180 N.E. 621, 279 Mass. 22.

(2) Even if receipt of revenue by city from underground garage con-

structed under common would deprive city of defenses which it now has in actions brought by persons injured by reason of defective condition of the common, the deprivation of such defense would not be the "incurring of obligation" within statute permitting taxpayers' suit.—*Lowell v. City of Boston*, 79 N.E.2d 713, 322 Mass. 709, appeal dismissed *Pierce v. City of Boston*, 69 S.Ct. 84, 335 U.S. 849, 93 L.Ed. —.

67. Kan.—*Lewis v. City of South Hutchinson*, 174 P.2d 51, 162 Kan. 104.

44 C.J. p 1395 note 2.

68. Iowa.—*Moses v. Risdon*, 46 Iowa 251.

Whether pigeons are carriers of disease communicable to human beings was not for determination of court in suit to enjoin expenditure of public funds in exterminating pigeons, where a definite possibility of dangerous infection was established.—*Hayward v. Samuel*, 47 A.2d 251, 354 Pa. 266.

69. Mich.—*Worden v. City of Detroit*, 216 N.W. 461, 241 Mich. 139.
N.Y.—*Timmerman v. City of New York*, 69 N.Y.S.2d 102, affirmed 70 N.Y.S.2d 140, 272 App.Div. 758.
44 C.J. p 1395 note 5.

70. Ala.—*Balsden v. Greenville*, 111 So. 2, 215 Ala. 512.

Iowa.—*Keokuk Water Works Co. v. City of Keokuk*, 277 N.W. 201, 224 Iowa 718.

N.D.—*Cummings v. City of Minot*, 271 N.W. 421, 67 N.D. 214.

71. U.S.—*Chostkov v. Pittsburgh, C. C.Pa.*, 177 F. 936.

44 C.J. p 1396 note 3.

utory authorization, a taxpayer may sue to enjoin municipal authorities from issuing, selling, or delivering municipal bonds or other securities or evidences of indebtedness without authority,⁷² or from indorsing or guaranteeing without authority the bonds of another corporation.⁷³ A taxpayer who has acquiesced in an improvement which benefits his property is not entitled to enjoin the issuance of bonds to cover the cost of the improvement where he fails to offer to pay for the benefits received.⁷⁴

Specific grounds for injunction. Among other grounds for granting injunctions against the issuance, sale, or delivery of bonds or other securities⁷⁵ are that such issuance, sale, or delivery would increase the municipal indebtedness, or the apparent indebtedness, to an amount in excess of the amount permitted by a statutory or constitutional provision,⁷⁶ that the bonds are to be issued for an un-

authorized purpose,⁷⁷ that the period of time until maturity of the bonds exceeds the maximum permitted by statute,⁷⁸ that the proceedings preliminary to the issuance of the bonds did not comply with the statute,⁷⁹ that the question of issuance of bonds was not submitted to popular vote⁸⁰ or approved by the requisite majority of qualified voters,⁸¹ or that an election in which the issuance of securities was authorized was illegal or defective.⁸²

A bond issue may not be enjoined on the ground that the money to be realized from the bond issue will be insufficient for the proposed purpose,⁸³ that the public improvement to be constructed from the proceeds is inadequate for the community,⁸⁴ that details of the improvement have been changed after authorization of the bond issue by the electors,⁸⁵ that the estimates for the improvement were improper or fallacious,⁸⁶ that city officers issuing the bonds were not qualified to hold office,⁸⁷ or

72. Neb.—May v. City of Kearney, 17 N.W.2d 448, 145 Neb. 475.

Nev.—Ronnow v. City of Las Vegas, 65 P.2d 133, 57 Nev. 332.

Ohio.—City of Sandusky v. City Commission of Sandusky, 11 N.E.2d 115, 56 Ohio App. 284, appeal dismissed City of Niles v. Union Ice Corporation, 9 N.E.2d 505, 132 Ohio St. 554.

Okl.—Armstrong v. Sewer Imp. Dist. No. 1, Tulsa County, 199 P.2d 1012, reheard 207 P.2d 917.

Wis.—Roberts v. City of Madison, 27 N.W.2d 233, 250 Wis. 317.

44 C.J. p 1396 notes 10-12.

Necessity for statute

(1) In some jurisdictions persons suing as general taxpayers cannot maintain the suit in the absence of statute.—Ayers v. Lawrence, 59 N.Y. 192.

(2) In other jurisdictions statutory authorization is unnecessary.—Kissell v. Columbus Grove, 11 Ohio Dec. (Reprint) 501, 27 Cinc.L.Bul. 183—44 C.J. p 1396 note 14.

Corporate taxpayer may sue.—Kathleen Citrus Land Co. v. City of Lakeland, 169 So. 356, 124 Fla. 659.

73. Ga.—Blake v. Macon, 53 Ga. 172.

Va.—Lynchburg, etc., R. Co. v. Dameron, 28 S.E. 951, 95 Va. 545.

74. Ga.—Cochran v. City of Thomassville, 146 S.E. 462, 167 Ga. 579.

75. La.—Powell v. Providence, 53 So. 429, 127 La. 66.

44 C.J. p 1396 note 17.

Sale for less than value

A sale of bonds at a discount or for less than their par value, if in violation of law, will be enjoined, although the issuance of the bonds is authorized.—Appeal of Whelen, 1 A. 88, 108 Pa. 162—Roumfort v. Harrisburg, 3 Pearson (Pa.) 101.

76. Iowa.—Brunk v. City of Des Moines, 291 N.W. 395, 228 Iowa 287, 134 A.L.R. 1391.

N.D.—Schiebler v. City of Mohall, 268 N.W. 445, 66 N.D. 593.

Okl.—City of Lawton v. Morford, 293 P. 1068, 146 Okl. 222.

S.C.—Marshall v. Rose, 49 S.E.2d 720, 213 Mo. 428.

44 C.J. p 1396 note 18.

Bonds held not beyond debt limit

Ind.—Letz Mfg. Co. v. Public Service Commission of Indiana, 4 N.E.2d 194, 210 Ind. 467.

77. Minn.—Bybee v. City of Minneapolis, 292 N.W. 617, 208 Minn. 55.

44 C.J. p 1396 note 17 [b].

78. Ohio.—Ohio Power Co. v. Craig, 197 N.E. 820, 50 Ohio App. 239.

79. N.Y.—Schieffelin v. Hylan, 140 N.E. 689, 236 N.Y. 254.

Noncompliance with charter

Ohio.—City of Sandusky v. City Commission of Sandusky, 11 N.E.2d 115, 56 Ohio App. 284, appeal dismissed City of Niles v. Union Ice Corporation, 9 N.E.2d 505, 132 Ohio St. 554.

80. Ark.—Carpenter v. City of Paragould, 128 S.W.2d 980, 198 Ark. 454.

Neb.—May v. City of Kearney, 17 N.W.2d 448, 145 Neb. 475.

Wash.—Hughbanks v. Port of Seattle, 76 P.2d 603, 193 Wash. 498.

Election unnecessary

(1) Where issuance of the bonds is legal without an election, issuance of the bonds will not be enjoined for failure to submit the question of the issuance of the bonds to the voters.—Montana-Dakota Utilities Co. v. City of Havre, 94 P.2d 660, 109 Mont. 164.

(2) So, an injunction will not be granted for failure to submit the

ordinance authorizing the bond issue to the voters where the statute requires submission to the voters only when a petition therefor is filed, and no petition was filed.—Atkins v. City of Durham, 186 S.E. 330, 210 N.C. 295.

81. N.C.—Twining v. City of Wilmington, 200 S.E. 416, 214 N.C. 655.

82. Conn.—Pollard v. City of Norwalk, 142 A. 807, 108 Conn. 145.

Ky.—Milton v. City of Lawrenceburg, 129 S.W.2d 583, 278 Ky. 741.

N.M.—Mann v. City of Artesia, 76 P.2d 941, 42 N.M. 224.

Vt.—E. B. & A. C. Whiting Co. v. City of Burlington, 175 A. 35, 106 Vt. 446.

Va.—Appalachian Electric Power Co. v. Town of Galax, 4 S.E.2d 390, 173 Va. 329.

44 C.J. p 1397 note 19.

Obscure statement of question submitted

Kan.—Kansas Utilities Co. v. City of Paola, 80 P.2d 1084, 148 Kan. 267.

83. Kan.—Lewis v. City of South Hutchinson, 174 P.2d 51, 162 Kan. 104.

104.—Kansas Power Co. v. City of Washington, 67 P.2d 1095, 145 Kan. 962.

84. Kan.—Lewis v. City of South Hutchinson, 174 P.2d 51, 162 Kan. 104.

85. Kan.—Kansas Power Co. v. City of Washington, 67 P.2d 1095, 145 Kan. 962.

86. Kan.—Lewis v. City of South Hutchinson, 174 P.2d 51, 162 Kan. 104.

104.—Kansas Power Co. v. City of Washington, 67 P.2d 1095, 145 Kan. 962.

87. Okl.—Hughes v. City of Cushing, 39 P.2d 13, 170 Okl. 118.

that the bonds are to be issued for a total amount less than that authorized by an election.⁸⁸

An injunction against the issuance of bonds will not be issued because of the mere possibility that the proceeds will be misapplied,⁸⁹ and the fact that proceeds of a prior bond issue have been misapplied is not ground for restraining the municipal authorities from making an issue of other bonds until they have restored to a sinking fund the amount misapplied.⁹⁰ Where a suit to enjoin the issuance of bonds amounts merely to a contest of the election at which the bonds are voted,⁹¹ that is, where the suit challenges only the conduct of such election,⁹² the right to maintain the suit has been denied. Moreover, plaintiff cannot succeed on the theory that there was an irregularity in the canvass of the votes at the election at which the question as to the establishment of the municipality was decided.⁹³ Under a statute expressly authorizing taxpayers to enjoin the registration of municipal bonds illegally issued, an irregularity in the election has been held not to be a sufficient cause.⁹⁴

The failure of the municipal authorities to obtain the consent of the war department,⁹⁵ or of another municipality⁹⁶ to the construction of a public work for which the proceeds of the bonds are to be used does not, it has been held, furnish a basis for a taxpayer's suit to enjoin the issuance of the bonds, since the question as to consent is a matter between the municipal authorities and the other gov-

ernmental agencies.

Matters of discretion, policy, or wisdom. Where a municipal corporation is authorized to issue bonds, a court of equity will not, in the absence of fraud or a clear abuse of authority, interfere with its discretionary powers;⁹⁷ it cannot pass on the necessity or propriety of acts within the power of the municipal authorities.⁹⁸

Showing illegality or other wrong. An injunction will not be granted where it is not shown that the transaction in question is unauthorized, illegal, or otherwise wrongful,⁹⁹ and a mere apprehension that the issuance of bonds or other securities will constitute an illegal act has been held insufficient to warrant the granting of an injunction.¹ It has been held that an authorized issue of bonds will not be enjoined because the ordinance providing for the issue does not also provide for levying taxes to pay the interest and provide a sinking fund to pay the principal.²

Necessity of showing injury or loss. An injunction will not be granted where it is not shown that the rights of the taxpayers will be prejudiced by the act or acts complained of,³ or, it has been held, where plaintiffs' rights are not clear and the injury likely to result to them is not shown to be irrevocable or even serious.⁴ It has been held that, where bonds would be void even in the hands of so-called bona fide holders, an action to enjoin municipal officers from putting such bonds in circulation is not

88. S.C.—Banister v. Lollis, 190 S.E. 511, 183 S.C. 218.

89. Mo.—Southworth v. Glasgow, 132 S.W. 1168, 232 Mo. 108, Ann. Cas.1912B 1267.

90. Tex.—Cohen v. Houston, Civ. App., 176 S.W. 809.

91. Ohio.—Link v. Karb, 104 N.E. 632, 89 Ohio St. 326.

92. Ohio.—Link v. Karb, *supra*.

93. Wash.—Paine v. Seattle, 126 P. 628, 127 P. 580, 70 Wash. 294.

94. Mo.—Arkansas-Missouri Power Corp. v. City of Potosi, 196 S.W.2d 152, 355 Mo. 356.

95. Or.—Klarnan v. Portland, 111 P. 879, 112 P. 402, 57 Or. 454, 37 L.R.A., N.S., 332, error dismissed 32 S.Ct. 231, 223 U.S. 151, 56 L.Ed. 386.

44 C.J. p 1397 note 23.

96. Or.—Klarnan v. Portland, *supra*. 44 C.J. p 1397 note 24.

97. Kan.—Lewis v. City of South Hutchinson, 174 P.2d 51, 162 Kan. 104.

44 C.J. p 1397 note 27.

98. Del.—Taylor v. Smith, 115 A. 405, 13 Del.Ch. 39.

Va.—Ficklen v. Danville, 131 S.E. 689, 132 S.E. 705, 146 Va. 428.

99. Ark.—McKenzie v. City of De Witt, 121 S.W.2d 71, 196 Ark. 1115.

Kan.—Kansas Electric Power Co. v. City of Eureka, 45 P.2d 877, 142 Kan. 117—State ex rel. Boynton v. City of Topeka, 41 P.2d 260, 141 Kan. 309.

Ky.—Field v. City of Catlettsburg, 108 S.W.2d 1017, 270 Ky. 25—Rowland v. City of Paris, 13 S.W.2d 791, 227 Ky. 570.

Mont.—Montana-Dakota Utilities Co. v. City of Havre, 94 P.2d 660, 109 Mont. 164.

Nev.—Ronnnow v. City of Las Vegas, 65 P.2d 133, 57 Nev. 332.

N.C.—Nash v. Board of Com'rs of St. Pauls, 190 S.E. 475, 211 N.C. 301—Smith v. Town of Carolina Beach, 175 S.E. 313, 206 N.C. 834.

Okl.—White v. City of Pawhuska, 265 P. 1059, 130 Okl. 156.

S.C.—Banister v. Lollis, 190 S.E. 511, 183 S.C. 218.

Va.—Scott v. Lichford, 180 S.E. 893, 164 Va. 419.

Wash.—Weisfield v. City of Seattle, 40 P.2d 149, 180 Wash. 288, 96 A.L.R. 1190.

44 C.J. p 1397 note 29.

1. U.S.—City of Allegan, Mich., v. Consumers' Power Co., C.C.A.Mich., 71 F.2d 477, certiorari denied Consumers' Power Co. v. City of Allegan, 55 S.Ct. 100, 293 U.S. 586, 79 L.Ed. 681.

44 C.J. p 1398 note 30.

2. S.C.—Cleveland v. Spartanburg, 31 S.E. 871, 54 S.C. 83.

3. N.C.—Nash v. Board of Com'rs of St. Pauls, 190 S.E. 475, 211 N.C. 301.

Tex.—Texsan Service Co. v. City of Nixon, Civ.App., 158 S.W.2d 88, error refused—Fisher v. City of Bartlett, Civ.App., 76 S.W.2d 535, error dismissed.

44 C.J. p 1398 note 32.

Failure of bidder to make deposit

Sale of municipal bonds will not be enjoined at suit of individual taxpayer on ground that bidder failed to make cash deposit with bid, in absence of showing of actual injury to taxpayer.—Hughes v. City of Cushing, 39 P.2d 13, 170 Okl. 118.

4. U.S.—Fellows v. Walker, C.C. Ohio, 89 F. 651, appeal dismissed 11 S.Ct. 1020, 140 U.S. 680, 35 L.Ed. 603.

44 C.J. p 1398 note 33.

maintainable;⁵ but there is authority for the view that, even though bonds would be void and the municipal corporation could defend in an action based on such bonds, a suit to enjoin the issuance and disposal of them would lie where, by their issuance, a constitutional limitation as to the amount of indebtedness would be violated,⁶ and that taxpayers may sue to enjoin a city from guaranteeing bonds, although the guaranty would be void as to bonds in the hands of innocent purchasers.⁷ The right of plaintiff to base his suit on injuries to persons other than himself has been denied.⁸ Where the bonds are not a debt against the city and are not payable out of tax funds, a taxpayer has no litigable interest.⁹

Other available remedies. The right to sue to enjoin the issuance of bonds because of the alleged invalidity of the election at which they were authorized has been recognized notwithstanding a statutory provision authorizing a proceeding to contest such election.¹⁰

Effect of prior validation proceedings. The right of a taxpayer to maintain a suit to enjoin the issuance or sale of bonds has been denied where it is based on matters involved in previous proceedings to validate such bonds, and by statute the judgment of validation is conclusive unless a review of such judgment is had in the manner prescribed

by the statute.¹¹

Actions against third persons. An action to enjoin the negotiation of municipal bonds in the hands of a railroad company in whose aid they were issued has been upheld.¹²

§ 2147. Contracts

- a. In general
- b. Statutory provisions in general
- c. Matters of discretion, policy, or judgment

a. In General

Where a contract or proposed contract of municipal authorities affects the rights of taxpayers as such, as a general rule the taxpayers may, independently of express statutory authorization, if the contract is illegal or unauthorized, sue to prevent the award or the making of the contract or the performance thereof.

Where a contract or proposed contract of municipal authorities affects the rights of taxpayers as such, as a general rule the taxpayers may, independently of express statutory authorization, if the contract is illegal or unauthorized, sue to prevent the award or the making of the contract¹³ or the performance thereof.¹⁴ Thus an injunction may be granted where the authorities have proceeded or are proceeding in violation of constitutional or statutory requirements as to how the contract shall be made or awarded,¹⁵ such as requirements with re-

5. Cal.—McCoy v. Briant, 53 Cal. 247.

Tex.—Texsan Service Co. v. City of Nixon, Civ.App., 158 S.W.2d 88, error refused—Fisher v. City of Bartlett, Civ.App., 76 S.W.2d 535, error dismissed—Tyrrell & Garth Inv. Co. v. City of Highlands, Civ. App., 44 S.W.2d 1059—Womack v. City of West University Place, Civ. App., 32 S.W.2d 930.

Equity courts will not bother to restrain issuance of void bonds or bonds about to be issued without semblance of authority.—Johnson v. Town of Refugio, Tex.Civ.App., 56 S.W.2d 674.

6. Wis.—Fowler v. Superior, 54 N. W. 800, 85 Wis. 411.

7. Va.—Lynchburg, etc., R. Co. v. Dameron, 28 S.E. 951, 95 Va. 545.

8. Tex.—Hoff v. Westhoff, Civ.App., 102 S.W.2d 298, error refused. 44 C.J. p 1398 note 37.

9. Tex.—Jenkins v. City of Cooper, Civ.App., 87 S.W.2d 778, error refused—Hazelwood v. City of Cooper, Civ.App., 87 S.W.2d 776, error refused.

Revenue from electric plant

A municipal taxpayer does not have a "litigable interest" in subject matter which would authorize

him to maintain a suit to enjoin execution of bonds by city seeking to acquire an electric plant where bonds were to be secured only by mortgage on plant to be erected and revenue therefrom.—West Texas Utilities Co. v. Smith, Tex.Civ.App., 168 S.W.2d 665—Fisher v. City of Bartlett, Tex. Civ.App., 76 S.W.2d 535, error dismissed.

10. Ala.—Coleman v. Eutaw, 47 So. 703, 157 Ala. 327.

11. Ga.—Thomas v. Blakely, 81 S.E. 218, 141 Ga. 488. 44 C.J. p 1398 note 39.

12. Ind.—Madison v. Smith, 83 Ind. 502.

13. Fla.—Maley v. City of Daytona Beach, 146 So. 837, 108 Fla. 471.

Ill.—Siegel v. City of Belleville, 181 N.E. 687, 349 Ill. 240.

Ind.—Budd v. Board of Com'rs of St. Joseph County, 22 N.E.2d 973, 216 Ind. 35.

Ky.—City of Ashland v. Fannin, 111 S.W.2d 420, 271 Ky. 270.

Tex.—McCann v. Akard, Civ.App., 68 S.W.2d 1033.

44 C.J. p 1398 note 42.

Wage scale for municipal contracts

Taxpayers who would suffer additional tax burden were held to have sufficient interest to enjoin enforcement of city's minimum wage scale

for municipal contracts.—Harlan v. Employers' Ass'n of Maryland, 159 A. 267, 162 Md. 124, 81 A.L.R. 342.

14. Ark.—Gladson v. Wilson, 120 S. W.2d 732, 196 Ark. 996.

Fla.—City of Daytona Beach v. News Journal Corporation, 156 So. 887, 116 Fla. 706.

Wash.—Barnett v. Lincoln, 299 P. 392, 162 Wash. 613.

Wis.—Victoria v. Village of Muscoda, 279 N.W. 663, 228 Wis. 455.

44 C.J. p 1399 note 43.

15. Ky.—City of Ashland v. Fannin, 111 S.W.2d 420, 271 Ky. 270.

44 C.J. p 1399 note 44.

Submission to electorate

Tex.—South Texas Public Service Co. v. Jahn, Civ.App., 7 S.W.2d 942, error refused.

Statement of name in bid

Taxpayer could enjoin city from executing contract for construction of sewer with successful bidder on showing that binding contract existed between bidder and another by which latter was to receive compensation contingent on award, whose name did not appear in full in bid, in violation of a statute requiring the statement of the full names of any one interested in the bid.—Powers v. City of Cincinnati, 187 N.E. 305, 45 Ohio App. 445.

spect to prior advertisement for bids,¹⁶ and as to letting to lowest or highest bidders.¹⁷

Moreover, a suit may be maintained where the contract, entered into or proposed, does not conform to the terms of the advertisement or invitation for proposals or bids,¹⁸ contains unauthorized provisions, the effect of which is to increase the cost to the municipality,¹⁹ is against public policy,²⁰ or would result in an illegal or unauthorized indebtedness.²¹ The motive of the taxpayer does not affect his right to bring the suit.²² An injunction will not lie where plaintiff has an adequate remedy at law,²³ or where the contract has been fully performed by the city.²⁴ It has been held that performance of a void contract cannot be enjoined since, in effect, it is nonexistent, but that the court may issue an injunction forbidding the city to perform certain acts provided for by the terms of the void contract if such acts would be unlawful.²⁵

Necessity of showing illegality or other wrong. An injunction will not be granted where it is not

shown that the contract in question is unauthorized, illegal, or otherwise wrongful.²⁶ Mere partial invalidity not affecting the contract as a whole has been regarded as an insufficient ground for an injunction.²⁷ There is authority for the view that, where one of several bidders has consented to an investigation on the part of municipal authorities, designed to determine which bid should be accepted, a taxpayer in a suit based on the rejection of the bid of such bidder cannot complain of the fact that the municipal authorities made such investigation.²⁸ The court has no power, on the suit of a taxpayer, to enjoin the municipality from performing a contract which it is legally liable to perform.²⁹ Corruption or moral turpitude on the part of municipal authorities is not an essential element of plaintiff's right to sue.³⁰

Injury or loss; extent of interest. An injunction will not be granted where it is not shown that the contract is of such a character as to prejudice the rights of taxpayers,³¹ or that there is imminent

16. Wis.—Victoria v. Village of Muscoda, 279 N.W. 663, 228 Wis. 455.
44 C.J. p 1399 note 45.

17. Fla.—City of Daytona Beach v. News Journal Corporation, 156 So. 887, 116 Fla. 706.

Ind.—Budd v. Board of Com'rs of St. Joseph County, 22 N.E.2d 973, 216 Ind. 35.

44 C.J. p 1399 note 46.

Sale of franchise

Where operation of utility is of a permanent nature because of permanent structures placed upon city streets, attempted licensing of operation of utility without sale of franchise to highest and best bidder, as required by Constitution, is void, and may be enjoined.—City of Ashland v. Fannin, 111 S.W.2d 420, 271 Ky. 270.

Reduction of bid by successful bidder

A taxpayer is not entitled to an injunction because of the fact that the city has not accepted the lowest bid for a printing contract where the successful bidder reduces his bid to conform to the lowest submitted.—Bellingham American Pub. Co. v. Bellingham Pub. Co., 258 P. 836, 145 Wash. 25.

18. Minn.—Le Tourneau v. Hugo, 97 N.W. 115, 90 Minn. 420.

44 C.J. p 1400 note 47.

19. Ala.—Inge v. Mobile Board of Public Works, 33 So. 678, 135 Ala. 187, 93 Am.S.R. 20.

44 C.J. p 1400 note 48.

20. Ga.—Trainer v. City of Covington, 189 S.E. 842, 183 Ga. 759.

Contract between city and mayor

Ga.—Trainer v. City of Covington, supra.

21. Mo.—Sager v. City of Stanberry, 78 S.W.2d 431, 336 Mo. 213—Hight v. City of Harrisonville, 41 S.W.2d 155, 328 Mo. 549.

44 C.J. p 1400 note 49.

Enjoining creation of illegal indebtedness in general see supra § 2146.

22. Ind.—Budd v. Board of Com'rs of St. Joseph County, 22 N.E.2d 973, 216 Ind. 35.

44 C.J. p 1392 note 72 [a].

Motive or intention of plaintiff in general see supra § 2144.

Unsuccessful bidder

The fact that the taxpayer bringing the action was also an unsuccessful bidder for the contract is immaterial if he is otherwise qualified.—Budd v. Board of Com'rs of St. Joseph County, supra—44 C.J. p 1393 note 73 [a].

Grant of franchise

A motorbus operator, as a resident and taxpayer of city, was entitled to maintain suit to enjoin city from granting annual franchise rights to jitney bus operators.—City of Ashland v. Fannin, 111 S.W.2d 420, 271 Ky. 270.

23. Tex.—Sayles v. Abilene, Civ. App., 196 S.W. 1000—Wood v. Victoria, 46 S.W. 284, 18 Tex.Civ.App. 573.

Statutory remedy

Mo.—Baxter v. Land Const. Co., 206 S.W.2d 325, 357 Mo. 58.

24. Cal.—Hodgeman v. City of San Diego, 128 P.2d 412, 53 Cal.App.2d 610.

Installation of parking meters

Cal.—Hodgeman v. City of San Diego, supra.

25. Mo.—Arkansas-Missouri Power Corporation v. City of Kennett, 156 S.W.2d 913, 348 Mo. 1108.

26. Cal.—Strain v. East Bay Municipal Utility Dist., 69 P.2d 191, 21 Cal.App.2d 281.

Ky.—Veall v. Louisville and Jefferson County Metropolitan Sewer Dist., 197 S.W.2d 413, 303 Ky. 248—Douthitt v. City of Covington, 144 S.W.2d 1025, 284 Ky. 382.

Mo.—Missouri Service Co. v. City of Stanberry, 108 S.W.2d 25, 341 Mo. 500.

Mont.—Montana-Dakota Utilities Co. v. City of Havre, 94 P.2d 660, 109 Mont. 164.

S.C.—Carter v. City of Greenville, 178 S.E. 508, 175 S.C. 130.

Tex.—Mayer v. Kostas, Civ.App., 71 S.W.2d 398, error refused.

44 C.J. p 1400 note 55.

A department will not be enjoined from exercising a certain function of government where under the statute creating the departments the court is enabled to recognize indifferently it or another department as competent to act for the municipality.—McIntyre v. Philadelphia, 9 Pa.Dist. 714, 24 Pa.Co. 439—43 C.J. p 738 note 46.

27. Utah.—Brummitt v. Ogden Waterworks Co., 93 P. 828, 83 Utah 289.

28. Cal.—West v. Oakland, 159 P. 202, 30 Cal.App. 556.

29. N.H.—Cox v. Jones, 63 A. 178, 73 N.H. 504.

30. N.C.—Murphy v. Greensboro, 129 S.E. 614, 190 N.C. 268.

31. Ill.—Price v. City of Mattoon, 4 N.E.2d 850, 364 Ill. 512—Schu-

danger of the violation of their rights.³³ A general taxpayer may sue to enjoin the making or entering into,³³ or the performance of,³⁴ an illegal or unauthorized contract for an improvement where all or part of the cost is payable out of the general taxes or funds. Where the entire cost is to be paid from revenues from the improvement, there is authority which holds that the taxpayer sustains no special injury which entitles him to sue,³⁵ but there is other authority which holds that a taxpayer may sue to enjoin the execution of a contract for a public improvement, even though it is to be paid for out of revenues from the improvement.³⁶

It has been held that an injunction to prevent the entering into a contract will not be granted where the contract, if made, would not be enforceable against the municipal corporation;³⁷ but there is authority to the contrary.³⁸ The fact that the pe-

cuinary interest of plaintiff is small does not affect his right to an injunction,³⁹ and, according to some authorities, it is not necessary for plaintiff to show that there will be a pecuniary loss to the municipal corporation or to plaintiff.⁴⁰ A taxpayer as such cannot maintain a suit to protect rights other than his rights as a taxpayer.⁴¹

b. Statutory Provisions in General

In accordance with statutes conferring the right, a taxpayer may sue, in a proper case, to enjoin municipal authorities from entering into, or performing, contracts which are illegal, unauthorized or wasteful. In some jurisdictions the right is dependent on statute, but in other jurisdictions the statutes merely recognize and regulate an existing right.

In accordance with statutes conferring the right, a taxpayer may sue, in a proper case, to enjoin municipal authorities from entering into⁴² or performing⁴³ contracts which are illegal, unauthorized, or

macher v. Klitzing, 269 Ill.App. 60, affirmed 187 N.E. 458, 353 Ill. 530.

S.C.—McNulty v. Owens, 199 S.E. 425, 188 S.C. 377.

44 C.J. p 1400 note 61, p 1401 note 70.

Ultra vires not by other party

Taxpayer suing for adjudication of invalidity of municipal contract could not complain that other contracting party had no corporate power to enter into contract for that fact does not injuriously affect him.—Avery v. City of Chicago, 178 N.E. 351, 345 Ill. 640.

Risk of injury held sufficient

Wash.—Barnett v. Lincoln, 299 P. 392, 162 Wash. 613.

32. Iowa.—Shoemaker v. Des Moines, 105 N.W. 520, 129 Iowa 244, 3 L.R.A., N.S., 382—Dodge v. Council Bluffs, 10 N.W. 886, 57 Iowa 560.

33. Ill.—Loeffler v. Chicago, 92 N.E. 586, 246 Ill. 43, 20 Ann.Cas. 335.

34. Md.—Bennett v. Baltimore, 68 A. 14, 106 Md. 484, 14 Ann.Cas. 419. 44 C.J. p 1401 note 69.

35. Ill.—Price v. City of Mattoon, 4 N.E.2d 850, 364 Ill. 512.

Tex.—Jenkins v. City of Cooper, Civ. App., 87 S.W.2d 778, error refused—Hazelwood v. City of Cooper, Civ.App., 87 S.W.2d 776, error refused.

44 C.J. p 1401 note 70.

36. Iowa.—Poor v. Incorporated Town of Duncombe, 2 N.W.2d 294, 231 Iowa 907.

Resident taxpayer may sue

Ky.—Kentucky Utilities Co. v. Ginsberg, 72 S.W.2d 738, 255 Ky. 148.

Benefit from earlier payment of debt

Taxpayers of town which had entered into contract for construction of municipal electric plant could challenge validity of contract as

against contention that, because payment for plant was to be made from its earnings, taxpayers suffered no damage, there being no increase of their tax burden, since consumers would be benefited by earlier acquisition of ownership of plant, free from debt.—Miller v. Incorporated Town of Milford, 276 N.W. 826, 224 Iowa 753, 114 A.L.R. 1423.

37. Iowa.—Shoemaker v. Des Moines, 105 N.W. 520, 129 Iowa 244, 3 L.R.A., N.S., 382.

44 C.J. p 1401 note 63.

38. Ill.—O'Beirne v. Elgin, 187 Ill. App. 581.

39. La.—Saxon v. New Orleans, 50 So. 663, 124 La. 717.

40. Pa.—Harris v. City of Philadelphia, 149 A. 722, 299 Pa. 473.

44 C.J. p 1401 note 66.

Personal loss

Whether taxpayer could maintain suit to have contract entered into by city giving transportation company a preference in use of city dock declared ultra vires and void, and to enjoin the city from operating the dock and from expending moneys from general fund for maintenance and operation of the dock, did not depend on whether taxpayer personally had suffered some loss or inconvenience as result of the contract.—Femmer v. City of Juneau, 9 Alaska 175.

41. Md.—Kelly v. Baltimore, 53 Md 134.

Delinquent taxpayers, who had neither paid nor tendered payment of taxes to city at time of institution of suit were not entitled to enjoin city and individual from proceeding further in collection of delinquent taxes under contract between city and individual whereby individual was to receive twenty per cent for collection of delinquent taxes, on

ground that contract was illegal under statute.—Wilburn v. City of Ladonia, Tex.Civ.App., 125 S.W.2d 1061.

42. N.Y.—Bartholomew v. Village of Endicott, 59 N.Y.S.2d 84.

S.D.—Erickson v. City of Sioux Falls, 14 N.W.2d 89, 70 S.D. 40.

44 C.J. p 1401 note 75.

Charter provisions

N.H.—Stocklan v. Brackett, 61 A.2d 140.

"Town" in statute authorizing supreme judicial court on application of ten or more taxable citizens to restrain proceedings violating statute prohibiting town officials to be peculiarly interested in town contracts includes cities.—Tuscan v. Smith, 153 A. 289, 130 Me. 36, 73 A.L.R. 1344.

Requirement for bids

(1) A taxpayer can bring suit to restrain city agency from awarding contract in violation of law to one other than lowest responsible bidder.—Luboll Heat & Power Corporation v. Pleydell, 34 N.Y.S.2d 587, 178 Misc. 562.

(2) A taxpayer was held entitled to injunctive relief to restrain city officials from awarding contract where specifications for bids were so drawn as to prevent manufacturers, aside from two companies, from furnishing standard equipment at competitive price.—American La France & Foamite Corporation v. City of New York, 281 N.Y.S. 519, 156 Misc. 2, affirmed 283 N.Y.S. 899, 246 App. Div. 699.

43. Kan.—Kansas Power Co. v. Fairbanks, Morse & Co., 45 P.2d 872, 142 Kan. 109—Kansas Electric Power Co. v. City of Eureka, 45 P.2d 880, 142 Kan. 123.

N.Y.—American Dock Co. v. City of New York, 26 N.Y.S.2d 704, 261

wasteful. In some jurisdictions the right is dependent on statute,⁴⁴ but in other jurisdictions the statutes merely recognize and regulate an existing right.⁴⁵ Plaintiff must bring his case within the statutory provisions,⁴⁶ and the contract must actually be illegal or unauthorized.⁴⁷

Ordinarily, the mere illegality of the transaction is not a sufficient basis for an injunction,⁴⁸ but there must be a showing of possible detriment as a result of the acts in question to the interest of the municipality, the public, or the taxpayers,⁴⁹ such as an increase in the burden of taxation,⁵⁰ or a waste of the city's assets.⁵¹

Fraud in the performance of the contract as dis-

tinguished from fraud in the making thereof is not a ground for enjoining the performance of the contract at the suit of a taxpayer against the will of the contracting parties.⁵² Where the contract has been completed, its performance will not be enjoined.⁵³

The taxpayer's motive for seeking to enjoin the execution of contracts by the municipality does not affect his right to the remedy.⁵⁴

Suits against contractor. Statutes permitting suits by taxpayers to enjoin the execution or performance of any illegal contract made in behalf of the city have been held not to authorize suits against the contractor,⁵⁵ but under some statutes a

App.Div. 1063, affirmed 36 N.E.2d 696, 286 N.Y. 658—Blanshard v. City of New York, 253 N.Y.S. 419, 141 Misc. 609, affirmed 257 N.Y.S. 973, 236 App.Div. 663, affirmed 186 N.E. 29, 262 N.Y. 5.

44 C.J. p 1401 note 76.

Contract for use of city sewers
S.D.—Erickson v. City of Sioux Falls, 14 N.W.2d 89, 70 S.D. 40.

Contract awarded without proper bid
(1) A taxpayer may sue to restrain municipal authorities from carrying into effect a contract for which there has been no advertisement for bids as required by law.—Maribu v. Nohowec, 293 N.Y.S. 457, 161 Misc. 944.

(2) A taxpayer can bring suit to restrain municipal authorities from carrying out the terms of a contract awarded in violation of law to one other than the lowest responsible bidder.—Luboll Heat & Power Co. v. Pleydell, 34 N.Y.S.2d 587, 178 Misc. 562.

44. Mass.—Fuller v. Deerfield Academy, 147 N.E. 878, 252 Mass. 258.
44 C.J. p 1400 notes 51, 52.

45. Ohio.—Link v. Karb, 104 N.E. 632, 89 Ohio St. 326—Smith v. Rockford, 17 Ohio S. & C. P. 649, 4 Ohio N.P.N.S., 513, affirmed 9 Ohio Cir.Ct., N.S., 465, 29 Ohio Cir. Ct. 478.

44 C.J. p 1401 note 77.

46. N.Y.—Lowe v. Town of Mt. Pleasant, 268 N.Y.S. 218, 240 App. Div. 997—New Colonia Ice Co. v. Woolley, 41 N.Y.S.2d 662, 181 Misc. 473—Halleran v. City of New York, 228 N.Y.S. 116, 132 Misc. 73—Bartholomew v. Village of Endicott, 59 N.Y.S.2d 84.

44 C.J. p 1402 note 79.

47. Mass.—Howard v. City of Chicopee, 12 N.E.2d 106, 299 Mass. 115—Dealtry v. Selectmen of Town of Watertown, 180 N.E. 621, 279 Mass. 22.

N.Y.—Amalithone Realty Co. v. City of New York, 297 N.Y.S. 263, 251

App.Div. 450—New Colonia Ice Co. v. Woolley, 41 N.Y.S.2d 662, 181 Misc. 473.

Ohio.—Priest v. City of Wapakoneta, App., 32 N.E.2d 869, appeal dismissed 9 N.E.2d 292, 132 Ohio St. 527.

44 C.J. p 1402 note 81.

An ambiguity in contract entered into by municipality for purchase of electricity would not constitute an "illegal official act" so as to authorize taxpayer's action to avoid contract.—Bartholomew v. Village of Endicott, 59 N.Y.S.2d 84.

Submission of contract to electors

A taxpayer is not entitled to sue to restrain the performance of a contract because of an irregularity in the election in which the contract was submitted to the electors for approval where the law does not require that the contract be submitted to the electors.—Robbins v. Rapid City, 23 N.W.2d 144, 71 S.D. 171.

48. N.Y.—Lowe v. Town of Mt. Pleasant, 268 N.Y.S. 218, 240 App. Div. 997—American Dock Co. v. City of New York, 21 N.Y.S.2d 943, 174 Misc. 813, affirmed 26 N.Y.S.2d 704, 261 App.Div. 1063, affirmed 36 N.E.2d 696, 286 N.Y. 658—American La France & Foamite Corporation v. City of New York, 281 N.Y.S. 519, 156 Misc. 2, affirmed 283 N.Y.S. 899, 246 App.Div. 699—Bartholomew v. Village of Endicott, 59 N.Y.S.2d 84.

44 C.J. p 1402 note 78.

49. Mass.—Howard v. City of Chicopee, 12 N.E.2d 106, 299 Mass. 115. N.Y.—Utica Gas & Electric Co. v. Merry, 191 N.E. 490, 264 N.Y. 411—Campbell v. City of New York, 244 N.Y. 317, 155 N.E. 628, 50 A.L.R. 1473—Morse v. Delaney, 155 N.E. 628, 244 N.Y. 317, 50 A.L.R. 1473—American La France & Foamite Corporation v. City of New York, 281 N.Y.S. 519, 156 Misc. 2, affirmed 283 N.Y.S. 899, 246 App.Div. 699.

44 C.J. p 1402 note 82.

Public improvement payable from earnings

Kan.—Kansas Utilities Co. v. City of Burlington, 44 P.2d 223, 141 Kan. 926, appeal dismissed 56 S.Ct. 81, 296 U.S. 658, 80 L.Ed. 469.

More speculative injury is not sufficient.—Pratt v. La Guardia, 47 N.Y.S.2d 359, 182 Misc. 462, affirmed 52 N.Y.S.2d 569, 268 App.Div. 973, appeal granted 62 N.E.2d 394, 294 N.Y. 842.

50. Kan.—Rodenbeck v. Darby, 33 P.2d 306, 139 Kan. 759—Home Riverside Coal Mines Co. v. McAuliffe, 267 P. 996, 126 Kan. 347.

51. N.Y.—Lowe v. Town of Mt. Pleasant, 268 N.Y.S. 218, 240 App. Div. 997—New Colonia Ice Co. v. Woolley, 41 N.Y.S.2d 662, 181 Misc. 473—Bartholomew v. Village of Endicott, 59 N.Y.S.2d 84.

44 C.J. p 1402 note 80.

52. N.Y.—Halleran v. City of New York, 228 N.Y.S. 116, 132 Misc. 73.

53. S.D.—Robbins v. Rapid City, 23 N.W.2d 144, 71 S.D. 171.

54. N.Y.—Del Balso Const. Corporation v. Gillespie, 232 N.Y.S. 261, 226 App.Div. 42, affirmed 166 N.E. 333, 250 N.Y. 534.

44 C.J. p 1392 note 72 [b], [c].
Motive of taxpayer generally see supra § 2144.

55. Tex.—City of Corpus Christi ex rel. Harris v. Flato, Civ.App., 83 S.W.2d 423, error dismissed.

Against whom suit for injunction lies in general see supra §§ 2139, 2140.

Parties to suit see infra § 2162.

City attorney suing for taxpayer

The right of the city attorney to bring an action in name of city on written request of a taxpayer is limited by city charter to an action for injunction to restrain city or its agents or officials from abuse of its corporate powers or execution or performance of any contract made in behalf of city.—City of Columbus

suit for an injunction by a taxpayer to restrain performance on the part of both the city and the contractor has been permitted.⁵⁶

c. Matters of Discretion, Policy, or Judgment

A taxpayer is not entitled to an injunction to restrain municipal authorities from entering into or carrying out any contract which the municipal authorities may make on behalf of the municipal corporation in the proper exercise of their discretionary powers.

In a suit brought under express statutes or in a suit brought independently of statute, a taxpayer is not entitled to an injunction to restrain municipal authorities from entering into or carrying out any contract which the municipal authorities may make on behalf of the municipal corporation in the proper exercise of their discretionary powers;⁵⁷ the courts will not interfere in matters in which questions as to policy, judgment, or wisdom are involved.⁵⁸ However, where a manifest abuse of discretion⁵⁹ or fraud⁶⁰ in the matter of letting or awarding a contract has occurred or is threatened, a suit will lie. In accordance with these rules, where the law does not require that the lowest

bid be accepted, the court will not enjoin the municipal authorities from entering into a contract with a bidder other than the lowest bidder if the municipal authorities exercise a reasonable discretion,⁶¹ but it may grant an injunction where the municipal authorities act unreasonably.⁶²

§ 2148. Misapplication, Diversion, or Waste of Funds

- a. In general
- b. Statutory provisions

a. In General

As a general rule in most jurisdictions, a taxpayer may, independently of express statutory authorization, sue to enjoin municipal authorities from making any illegal or unauthorized appropriation, use, or expenditure of corporate funds.

As a general rule in most jurisdictions, a taxpayer may, independently of express statutory authorization, sue to enjoin municipal authorities from making any illegal or unauthorized appropriation, use, or expenditure of corporate funds,⁶³

ex rel. *Falter v. Columbus Metropolitan Housing Authority*, Ohio Com.Pl., 67 N.E.2d 338, affirmed, App., 68 N.E.2d 108.

Suit against housing authority

An action against metropolitan housing authority to enjoin its abuse of its corporate powers or to restrain it from executing or performing any contract on its behalf with the city can only be brought by the state attorney general, either in his own capacity or on relation of another, and cannot be brought by a taxpayer or private individual, whether under city charter or under general laws of state.—*City of Columbus ex rel. Falter v. Columbus Metropolitan Housing Authority*, supra.

The object of the city charter is to give authority to the taxpayer to prevent illegal action on the part of the city or its officers and not to assist them in avoiding some contract into which they have been inveigled.—*Corpus Christi v. Mireur*, Tex.Civ.App., 214 S.W. 528.

In an early case in Ohio it was held that a statute which permits an injunction suit by a taxpayer to restrain the abuse of the city's corporate power or the execution or performance of any unlawful contract should be liberally construed to permit an injunction suit by a taxpayer against the contractor.—*Haskins v. Cincinnati Cons. St. R. Co.*, 7 Ohio Dec., Reprint, 713, 4 Cinc.L.Bul. 1126.

56. N.Y.—*Simson v. Parker*, 82 N.E. 732, 190 N.Y. 19.

57. N.Y.—*Borek v. Golder*, 74 N.Y.S. 2d 675, 190 Misc. 366—*Hanrahan v.*

Corrou, 12 N.Y.S.2d 536, 170 Misc. 922—*Brockway Motor Truck Corporation v. City of New York*, 261 N.Y.S. 725, 145 Misc. 693—*Bartholomew v. Village of Endicott*, 59 N.Y.S.2d 84.

Or.—*Seafeldt v. Port of Astoria*, 16 P.2d 943, 141 Or. 418.

Pa.—*Barnes v. Scranton Poor Dist.*, 160 A. 241, 105 Pa.Super. 149.

Tex.—*Mayer v. Kostos*, Civ.App., 71 S.W.2d 398, error refused.

44 C.J. p 1402 note 86.

Matters of discretion in general see supra § 2142.

58. Neb.—*Southern Nebraska Power Co. v. Village of Deshler*, 265 N.W. 880, 130 Neb. 598.

N.Y.—*Hanrahan v. Corrou*, 12 N.Y.S.2d 536, 170 Misc. 922.

44 C.J. p 1403 note 87.

59. Iowa.—*Miller v. Des Moines*, 122 N.W. 226, 143 Iowa 409, 23 L.R.A., N.S., 815, 21 Ann.Cas. 207.

44 C.J. p 1403 note 88.

60. Ill.—*Standard Pav. Co. v. Elgin*, 164 Ill.App. 396.

61. Ill.—*Panozzo v. City of Rockford*, 28 N.E.2d 748, 306 Ill.App. 443.

N.Y.—*Amalthone Realty Co. v. City of New York*, 295 N.Y.S. 423, 162 Misc. 715, affirmed 297 N.Y.S. 262, 251 App.Div. 450—*Connolly v. City of Elmira*, 258 N.Y.S. 603, 144 Misc. 282—*Ross v. City of Schenectady*, 21 N.Y.S.2d 421.

Pa.—*Barnes v. Scranton Poor Dist.*, 160 A. 241, 105 Pa.Super. 149.

62. Fla.—*Adolphus v. Baskin*, 116 So. 225, 95 Fla. 603.

44 C.J. p 1403 note 88 [a].

63. U.S.—*Getz v. City of Harvey*, C.C.A.Ill., 118 F.2d 817, certiorari denied *City of Harvey v. Getz*, 62 S.Ct. 59, two cases, 314 U.S. 628, 86 L.Ed. 504.

Alaska.—*Valentine v. Robertson*, 7 Alaska 150.

Ariz.—*Ethington v. Wright*, 189 P.2d 209, 66 Ariz. 332.

Colo.—*Johnson-Olmsted Realty Co. v. City and County of Denver*, 1 P.2d 928, 89 Colo. 250.

Fla.—*State Bd. of Administration v. Pasco County*, 22 So.2d 387, 156 Fla. 37—*Williams v. Town of Dunnellon*, 169 So. 631, 125 Fla. 114.

Ga.—*Morris v. City Council of Augusta*, 40 S.E.2d 710, 201 Ga. 666.

Ill.—*Ryan v. City of Chicago*, 8 N.E.2d 369, 290 Ill.App. 604—*Koons v. City of Mt. Vernon*, 245 Ill.App. 165.

Mich.—*Kirchen v. Remenga*, 288 N.W. 344, 291 Mich. 94.

Minn.—*Cranak v. Link*, 17 N.W.2d 359, 219 Minn. 361—*Behrens v. City of Minneapolis*, 271 N.W. 814, 199 Minn. 363—*Williams v. Klemmer*, 224 N.W. 261, 177 Minn. 44—*Oehler v. City of St. Paul*, 219 N.W. 760, 174 Minn. 410.

Or.—*Tillamook Peoples' Utility Dist. v. Coates*, 149 P.2d 558, 174 Or. 476.

Pa.—*Downing v. School Dist. of City of Erie, Lumbermen's Mut. Ins. Co. of Mansfield, Ohio, Interveners*, 61 A.2d 133, 360 Pa. 29—*White v. Peoples, Com.Pl.*, 32 Del.Co. 368, 35 Mun.L.R. 241.

S.C.—*Shillito v. City of Spartanburg*, 51 S.E.2d 95, 214 S.C. 11.

Va.—*Appalachian Electric Power Co.*

as where there is a threatened use or expenditure of funds for an illegal or unauthorized purpose,⁶⁴ or a threatened diversion of funds,⁶⁵ or where the municipal authorities have not substantially followed the proper preliminary procedure in respect of the proposed expenditure or disposition;⁶⁶ and it makes no difference in principle whether the amount sought to be wrongfully appropriated is large or small.⁶⁷ The right of taxpayers to sue to prevent the misappropriation of municipal funds has been placed on the ground that the municipal authorities are trustees with respect to such funds,⁶⁸ and it has been regarded as analogous to the right of stockholders of private corporations to protect their interests in such corporations.⁶⁹ No

showing of fraud is required where the transaction in question is void.⁷⁰ In the absence of fraud or palpable abuse an injunction will not be granted to restrain acts which fall within the discretionary powers of the municipal authorities⁷¹ or which involve merely questions of policy and the wisdom and good judgment of the municipal authorities.⁷²

Wrongfulness of act and injury or damage. An injunction will not be granted where it is not shown that the act which it is sought to enjoin is in fact illegal, unauthorized, or otherwise wrongful,⁷³ or would prejudice the rights of the municipality or its taxpayers;⁷⁴ but sufficient injury is shown where the illegal act is one which may prevent the mu-

v. Town of Galax, 4 S.E.2d 390, 173 Va. 329.

Wash.—Sasse v. King County, 82 P. 2d 536, 196 Wash. 242.

Wis.—Roberts v. City of Madison, 27 N.W.2d 233, 250 Wis. 317—Victoria v. Village of Muscoda, 279 N.W. 663, 228 Wis. 455.

44 C.J. p 1403 note 91, p 1405 note 1. Injunction to restrain holding of illegal election as useless expenditure of funds see *infra* § 2154.

64. Ariz.—City of Glendale v. White, 194 P.2d 435, 67 Ariz. 231.

S.C.—Kirk v. Clark, 4 S.E.2d 13, 191 S.C. 205.

Wash.—Jones v. City of Centralia, 289 P. 3, 157 Wash. 194.

44 C.J. p 1404 note 92.

Payment of funds for county school
Ga.—Miller v. City of Cornelia, 4 S.E.2d 568, 188 Ga. 674.

65. Ark.—Sanders v. Green, 214 S. W.2d 67, 213 Ark. 943.

Ga.—City of Cornelia v. Wells, 183 S.E. 66, 181 Ga. 554—Mathews v. Darby, 141 S.E. 304, 166 Ga. 509.

Md.—Matthaei v. Housing Authority of Baltimore City, 9 A.2d 835, 177 Md. 506.

Mich.—Kirchen v. Remenga, 288 N. W. 344, 291 Mich. 94.

S.C.—Shillito v. City of Spartanburg, 51 S.E.2d 95, 214 S.C. 11.

Tex.—Spears v. City of South Houston, Civ.App., 137 S.W.2d 197, affirmed 150 S.W.2d 74, 136 Tex. 218.

44 C.J. p 1404 note 93.

Use of special fund for general purposes

(1) Proceeds of bonds.—City of Fayetteville v. Huddleston, 142 S.E. 280, 165 Ga. 899—44 C.J. p 1404 note 93 [a].

(2) Tax levy allocated to debt service by municipal budget.—Town of North Miami v. Travis Co., 160 So. 360, 118 Fla. 379.

(3) Revenues received by city from electric plant.—Freeland v. City of Sturgis, 226 N.W. 897, 248 Mich. 190.

(4) Other revenue.—Chamberlain v. Tampa, 23 So. 572, 40 Fla. 74.

66. N.C.—Purser v. Ledbetter, 40 S. E.2d 702, 227 N.C. 1.

44 C.J. p 1404 note 94.

Failure to advertise ordinance
Ga.—Morris v. City Council of Augusta, 40 S.E.2d 710, 201 Ga. 666.

67. Alaska.—Bates v. Nome, 1 Alaska 208.

68. Ill.—Litz v. West Hammond, 82 N.E. 634, 230 Ill. 310.

44 C.J. p 1405 note 5.

69. Ind.—Michigan City v. Marwick, 116 N.E. 434, 119 N.E. 154, 67 Ind. App. 294.

44 C.J. p 1405 note 6.

Corporators

With respect to rule that citizen and taxpayer of a municipal corporation may enjoin illegal expenditure of tax funds, inhabitants of municipality are corporators, and governing boards are agents and trustees of the corporation.—Birmingham Electric Co. v. City of Bessemer, 186 So. 569, 237 Ala. 240.

70. Ill.—Head v. Wood River, 194 Ill.App. 104.

71. Ala.—State ex rel. Austin v. City of Mobile, 28 So.2d 177, 248 Ala. 467.

Ill.—Capesius v. Moulton, 12 N.E.2d 911, 293 Ill.App. 630.

La.—Wilkinson v. Poag, App., 181 So. 27.

Tex.—Lamm v. Chambers, Civ.App., 18 S.W.2d 212.

44 C.J. p 1405 note 8.

Injunction with respect to matters within discretion of municipal authorities in general see *supra* § 2142.

Public market funds

Proposed use by board of commissioners of home-rule city of proceeds of bonds legally voted for purposes of public market to provide cold storage facilities for use of

wholesalers and jobbers was not so unreasonable or arbitrary so as to authorize court to interfere by issuance of injunction—Gillham v. City of Dallas, Tex.Civ.App., 207 S.W. 2d 978, error refused, no reversible error.

72. Ind.—Brashear v. Madison, 36 N. E. 252, 42 N.E. 349, 142 Ind. 685, 37 L.R.A. 474.

Pa.—Ahlgren v. O'Toole, Com.Pl., 88 Pittsb.Leg.J. 74.

73. Fla.—City of Marianna v. Davis, 169 So. 50, 124 Fla. 145.

Ky.—Wickliffe v. Greenville, 186 S.W. 476, 170 Ky. 528.

Mich.—Worden v. City of Detroit, 216 N.W. 461, 241 Mich. 139.

Tex.—Davis v. City of San Antonio, Civ.App., 135 S.W.2d 306, error refused.

44 C.J. p 1405 note 11.

Loan from one city fund to another

Injunction against temporary loan from city light fund to city railroad fund was held properly refused, where railroad fund was solvent and light fund was not impaired.—Von Herberg v. City of Seattle, 288 P. 646, 157 Wash. 141, 70 A.L.R. 417.

74. Pa.—White v. City of Chester, Com.Pl., 30 Del.Co. 86.

Tex.—Young v. Taylor, Civ.App., 92 S.W.2d 1075.

44 C.J. p 1405 note 12.

Right of municipality in funds

(1) Taxpayer's right to sue municipality rests on misappropriation of general public funds, and municipality must have a right in funds alleged to be misappropriated.—Price v. City of Mattoon, 4 N.E.2d 850, 364 Ill. 512—Dudick v. Baumann, 181 N. E. 690, 349 Ill. 46.

(2) Misuse of federal funds in housing project would not cause injury to complainants as city taxpayers and support suit for injunction by them.—Matthaei v. Housing Authority of Baltimore City, 9 A.2d 835, 177 Md. 506.

municipal corporation from receiving the best service for the money which is to be expended.⁷⁵ A taxpayer may enjoin the wrongful expenditure or diversion of municipal funds although he has no special interest differing from that of other taxpayers⁷⁶ and although the loss to each individual taxpayer would be very small.⁷⁷ The view has been taken that, where the proposed appropriation is only technically illegal and it would be more inequitable to grant the injunction than to refuse it, it may be refused.⁷⁸ The alleged wrongful expenditure or diversion must be imminent in order to warrant the issuance of an injunction.⁷⁹

Other available remedies. A suit for an injunction to restrain an illegal expenditure of money will not be entertained where the taxpayer has an adequate remedy at law.⁸⁰

b. Statutory Provisions

In accordance with statutes conferring the right a taxpayer may sue, in a proper case, to restrain municipal authorities from wasting, or from making a wrongful use or expenditure of, municipal funds. In some jurisdictions the statutes merely recognize and regulate an existing right.

In accordance with statutes conferring the right, a taxpayer may sue, in a proper case, to restrain municipal authorities from wasting, or from making a wrongful use or expenditure of, municipal funds.⁸¹ In some jurisdictions the right is dependent on statute,⁸² but in other jurisdictions the statutes merely recognize and regulate an existing right.⁸³ Plaintiff must bring his case within the statutory provisions⁸⁴ and he must show that the proposed expenditure is illegal or unauthorized.⁸⁵ Not every illegal act affecting a proposed expendi-

75. Cal.—Clouse v. San Diego, 114 P. 573, 159 Cal. 434.

44 C.J. p 1405 note 13.

76. Neb.—Neumann v. Knox, 214 N. W. 290, 115 Neb. 679.

N.D.—Lang v. City of Cavalier, 228 N.W. 819, 59 N.D. 75.

Okl.—Payne v. Jones, 146 P.2d 113, 193 Okl. 609—Allen v. Board of Com'rs of Logan County, 267 P. 860, 131 Okl. 41—Moore v. Crabtree, 258 P. 916, 126 Okl. 56.

Wash.—State ex rel. Gebhardt v. Superior Court for King County, 131 P.2d 943, 15 Wash.2d 673.

Wis.—Wagner v. City of Milwaukee, 220 N.W. 207, 196 Wis. 328.

77. Wis.—Wagner v. City of Milwaukee, supra.

78. Minn.—Farmer v. St. Paul, 67 N. W. 990, 65 Minn. 176, 33 L.R.A. 199.

Failure to comply strictly with statute

Tex.—Young v. Taylor, Civ.App., 92 S.W.2d 1075.

79. Mich.—Worden v. City of Detroit, 216 N.W. 461, 241 Mich. 139.

Mo.—Southworth v. Glasgow, 132 S. W. 1168, 232 Mo. 108, Ann.Cas. 1912B 1267.

80. *Placing firemen under civil service*

Injunction against illegal expenditure of public money is not proper remedy to compel board of education to place stationary firemen under civil service.—People ex rel. Brennan v. Ellicott, 243 Ill.App. 374.

Statutory remedy held not adequate

Okl.—Bowles v. Neely, 115 P. 344, 28 Okl. 556.

44 C.J. p 1405 note 16.

81. U.S.—Fox v. City of Pasadena, C.C.A.Cal., 78 F.2d 948.

Cal.—Wirin v. Horrall, 193 P.3d 470, 85 Cal.App.2d 497—Brown v. Boyd, 91 P.2d 926, 83 Cal.App.2d 416.

Mass.—Amory v. Assessors of Boston, 37 N.E.2d 459, 310 Mass. 199—Burt v. Municipal Council of Taunton, 172 N.E. 230, 272 Mass. 130.

N.Y.—Wilmerding v. LaGuardia, 52 N.Y.S.2d 169, 268 App.Div. 496, motion denied 52 N.Y.S.2d 941, 268 App.Div. 1027—Heeran v. McNally, 246 N.Y.S. 912, 231 App.Div. 779, affirmed 178 N.E. 787, 257 N.Y. 542.

Ohio—State ex rel. Kittel v. Bigelow, 37 N.E.2d 41, 138 Ohio St. 497—Mayer v. Ames, 14 N.E.2d 617, 133 Ohio St. 458, certiorari denied 69 S.Ct. 82, 305 U.S. 621, 83 L.Ed. 396.

44 C.J. p 1406 note 18.

Expenditure for construction violating zoning laws

If site on which incinerator was proposed to be built by commissioners of sanitary district of town was zoned against such use, then construction would be illegal and commissioners would be restrained from expending any money for engineering fees or architects' fees for construction of the incinerator.—Nugent v. Quinn, 82 N.Y.S.2d 243.

Illegal appropriation for lawful purpose

A threatened expenditure of public funds under an illegal appropriation, although for a purpose in itself lawful, sustains a taxpayer's action.—Wilmerding v. La Guardia, 54 N.Y.S.2d 531, 184 Misc. 607.

Gift of money for other than city purpose

N.Y.—Schieffelin v. Henry, 206 N.Y. S. 172, 123 Misc. 792, affirmed 207 N.Y.S. 914, 212 App.Div. 808, 212 N.Y.S. 914, 215 App.Div. 706, affirmed 152 N.E. 436, 342 N.Y. 581.

44 C.J. p 1445 note 81.

Use of general funds for subway

N.Y.—Osborn v. La Guardia, 191 N. E. 519, 264 N.Y. 469, reargument denied Osborn v. La Guardia, 191 N.E. 594, 264 N.Y. 620.

Use of water rentals for generation of electricity

Ohio.—Ohio Power Co. v. Craig, 197 N.E. 820, 50 Ohio App. 239.

82. Mass.—Amory v. Assessors of Boston, 37 N.E.2d 459, 310 Mass. 199—Stone v. Hughes, 34 N.E.2d 610, 309 Mass. 300.

N.Y.—Borek v. Golder, 74 N.Y.S.2d 675, 190 Misc. 366—Eagle Nest Corporation v. Carroll, 37 N.Y.S.2d 716, 179 Misc. 99, reversed on other grounds 38 N.Y.S.2d 599, 265 App. Div. 985, motion granted 60 N.E.2d 103, 290 N.Y. 766.

44 C.J. p 1405 note 2.

Anticipatory or retroactive character of statute

The statute providing for restraint of illegal appropriations by cities is neither anticipatory nor retroactive.—Howard v. City of Chicopee, 12 N. E.2d 106, 299 Mass. 115.

83. Ohio.—Pierce v. Hagans, 86 N. E. 519, 79 Ohio St. 9, 36 L.R.A.N.S., 1, 15 Ann.Cas. 1170.

44 C.J. p 1406 note 20.

Request to city solicitor to sue see infra § 2158.

84. Mass.—Amory v. Assessors of Boston, 37 N.E.2d 459, 310 Mass. 199—Stone v. Hughes, 34 N.E.2d 610, 309 Mass. 300.

N.Y.—Borek v. Golder, 74 N.Y.S.2d 675.

44 C.J. p 1406 note 21.

85. Mass.—Stone v. Hughes, 34 N.E.2d 610, 309 Mass. 300.

N.Y.—Borek v. Golder, 74 N.Y.S.2d 675, 190 Misc. 366.

Ohio.—Kellogg v. Sherrill, 156 N.E. 418, 24 Ohio App. 169.

Inspection fees

Where city ordinance providing for compulsory inspection of motor vehicles also provided for allocation of inspection fees to the expense of carrying out the provisions of the or-

ture will warrant a suit by a taxpayer,⁸⁶ and, although it is not necessary for plaintiff to show that he will suffer peculiar injury,⁸⁷ plaintiff must show some threatened injury or prejudice to his rights as a taxpayer or to the rights of the municipality.⁸⁸ Thus, where the suit is to prevent payment from a public fund and no waste is shown, it must appear that the act is such as to imperil the public interests or is calculated to work public injury or to produce some other mischief,⁸⁹ but the fact that the act complained of is prohibited by statute and is against public policy indicates that it is likely to produce some public mischief.⁹⁰ Moreover, an injunction may be refused where to grant it would produce inequitable results.⁹¹ The fact that the municipal authorities do not contemplate the making of certain expenditures which are questioned in a suit is sufficient to warrant the refusal of an injunction.⁹²

Adequate remedy at law. Where a taxpayer has an adequate remedy at law he is not entitled to maintain a suit for an injunction.⁹³

Matters of discretion. Under a statutory provision for an action to enjoin waste of public funds, the courts cannot control acts within the discretion of public boards or officials in the absence of fraud, corruption, collusion, or palpable abuse;⁹⁴ nor will the courts interfere with matters which involve merely questions as to policy, wisdom, or judgment.⁹⁵

dinance, such allocation did not constitute a misapplication of funds of the city as to which equity would interfere.—*Mayer v. Ames*, 16 N.E.2d 498, 58 Ohio App. 295, affirmed 14 N.E.2d 617, 138 Ohio St. 458, certiorari denied 59 S.Ct. 82, 305 U.S. 621, 83 L.Ed. 396.

86. Mass.—*Parsons v. Northampton*, 28 N.E. 350, 154 Mass. 410.
N.Y.—*Breen v. Valentine*, 10 N.Y.S. 2d 821, 170 Misc. 590, affirmed 12 N.Y.S.2d 240, 256 App.Div. 1066—*Borek v. Golder*, 74 N.Y.S.2d 675, 190 Misc. 366.

87. Cal.—*Mines v. Del Valle*, 257 P. 530, 201 Cal. 273.
N.Y.—*Gerlach v. Brandreth*, 54 N.Y. S. 479, 34 App.Div. 197.
Ohio.—*Hartwig Realty Co. v. City of Cleveland*, 31 Ohio N.P.N.S., 265.

88. N.Y.—*Borek v. Golder*, 74 N.Y.S. 2d 675, 190 Misc. 366.
44 C.J. p 1406 note 24.

Low rent housing project did not, in view of testimony, constitute waste or injury on the ground that amended plan and project did not afford adequate school, church, trad-

ing, and working facilities and conveniences within easy and convenient walking distance and that there was entailed the additional burden on taxpayers of supplying and furnishing schools and school facilities and further additional cost in event occupants required welfare and other relief.—*Borek v. Golder*, supra.

89. N.Y.—*Sebring v. Starner*, 197 N.Y.S. 201, 119 Misc. 651.

90. N.Y.—*Sebring v. Starner*, supra. 44 C.J. p 1406 note 26.

91. Mass.—*Parsons v. Northampton*, 28 N.E. 350, 154 Mass. 410.

92. N.Y.—*Hanrahan v. Terminal Station Commn.*, 100 N.E. 414, 206 N.Y. 494.
44 C.J. p 1406 note 28.

93. Mass.—*Amory v. Assessors of Boston*, 37 N.E.2d 459, 310 Mass. 199.

Abatement of taxes

The owners of properties, which had allegedly been knowingly overvalued by city tax assessors, had a plain and complete remedy in proceedings for abatement, which have always been considered as an exclu-

§ 2149. — Audit, Allowance, Compromise, or Settlement of Claims

In suits under some statutes conferring on taxpayers the right to sue, it has been held that, where the matters involved are within the discretion of the municipal authorities and no fraud, collusion, or abuse of discretion is shown, the court will not enjoin the audit or the compromise of a claim even though the municipal authorities display incompetency or bad judgment.

In suits under some statutes conferring on taxpayers the right to sue, it has been held that, where the matters involved are within the discretion of the municipal authorities and no fraud, collusion, or abuse of discretion is shown, the court will not enjoin the audit or the compromise of a claim⁹⁶ even though the municipal authorities display incompetency or bad judgment;⁹⁷ and the court has refused to restrain a particular officer from making an audit where the power to audit was vested in a different officer and there was no imminent danger of injury to taxpayers.⁹⁸ On the other hand, the right under the statute to enjoin the consummation of a compromise because of an abuse of discretion⁹⁹ or because such compromise is affected by bad faith and fraud¹ has been recognized.

§ 2150. — Payment of Claims or Debts

- a. In general
- b. Payments under contracts
- c. Warrants, bonds, or other evidence of indebtedness, and judgments
- d. Payment of salary or compensation to officer, agent, or employee

sive remedy for an excessive tax due to overvaluation, and statute authorizing a taxpayers' petition to prevent municipal officers from expending money or incurring obligations for any purpose or in any manner not authorized by law was not intended to supersede statutory system for abatement of taxes.—*Amory v. Assessors of Boston*, supra.

94. N.Y.—*Evadan Realty Corp. v. Patterson*, 78 N.Y.S.2d 114, 192 Misc. 850.

44 C.J. p 1406 note 29.

95. N.Y.—*Talcott v. Buffalo*, 26 N.E. 263, 125 N.Y. 280—*Marsch v. Seibert*, 156 N.Y.S. 1083.

96. N.Y.—*Hearst v. McClellan*, 92 N.Y.S. 484, 102 App.Div. 336.

97. N.Y.—*Hearst v. McClellan*, supra.

98. N.Y.—*Tietz v. Williams*, 155 N.Y.S. 612, 91 Misc. 623, affirmed 155 N.Y.S. 1144, 170 App.Div. 964.

99. N.Y.—*People's Gas, etc., Co. v. Oswego*, 177 N.Y.S. 626, 103 Misc. 247.

1. N.Y.—*People's Gas, etc., Co. v. Oswego*, supra.

A. In General

As a general rule, authorities of a municipal corporation may be enjoined at the suit of taxpayers from paying out money of the municipality on a claim or an alleged indebtedness which is illegal or unauthorized.

As a general rule, sometimes by virtue of statutes, authorities of a municipal corporation may be enjoined at the suit of taxpayers from paying out money of the municipality on a claim² or an alleged indebtedness³ which is illegal or unauthorized. The view has been taken that an injunction will not be granted for every technical irregularity⁴ or where its effect would be inequitable rather than equitable.⁵ A payment which the municipality may lawfully make will not be enjoined,⁶ and according to some authorities, if the claim or indebtedness is just and equitable and based on a benefit to the public so that its payment cannot be said to be prejudicial to the rights of taxpayers, the payment will not be enjoined although there may be some doubt as to the authority of the municipality or some irregularity in the proceedings;⁷ but, where the claim is clearly unauthorized or illegal, the fact that claimant may have rendered services or incurred expenses in good faith in reliance on

the authority of the municipality is not necessarily a ground for refusing to enjoin its payment.⁸ An injunction will not be granted at the suit of a taxpayer to prevent a payment where the matters involved are within the discretion of the municipal authorities, in the absence of fraud, collusion, or abuse of discretion.⁹

b. Payments under Contracts

As a general rule, taxpayers may enjoin payments under illegal or unauthorized contracts or payments in excess of the amount due under a contract.

As a general rule, sometimes by reason of statutory authorization, taxpayers may enjoin payments under illegal or unauthorized contracts¹⁰ or payments in excess of the amount due under a contract;¹¹ but the taxpayer asserting such right must bring himself within the established rules.¹² An injunction will not be granted where it is not shown that the contract, or the proposed payment thereunder, is illegal, unauthorized, or otherwise wrongful,¹³ or where the contract provision under which payment is to be made is within the discretion of the municipal authorities and no fraud or abuse of discretion is shown.¹⁴

2. Minn.—Williams v. Klemmer, 224 N.W. 261, 177 Minn. 44.
44 C.J. p 1407 note 38.

3. Ga.—Brumby v. Marietta Lights, etc., 95 S.E. 7, 147 Ga. 592.
44 C.J. p 1407 note 39.

4. Minn.—Farmer v. St. Paul, 67 N.W. 990, 65 Minn. 176, 33 L.R.A. 199.

5. Mich.—Chaffee v. Granger, 6 Mich. 51.

Minn.—Farmer v. St. Paul, 67 N.W. 990, 65 Minn. 176, 33 L.R.A. 199.

6. Fla.—Hendry v. Kellow, 114 So. 235, 94 Fla. 23.

Mass.—Dealtry v. Selectmen of Town of Watertown, 180 N.E. 621, 279 Mass. 22.

N.Y.—Hearst v. McClellan, 92 N.Y.S. 484, 102 App.Div. 336.

7. S.C.—Luther v. Wheeler, 52 S.E. 874, 73 S.C. 83, 4 L.R.A.N.S., 746, 6 Ann.Cas. 754.

44 C.J. p 1407 note 42.

Expenses of city officials

An injunction to restrain the payment of money advanced for expenses of city officials acting in the interests of the city is properly denied.

Cal.—Powell v. City and County of San Francisco, 144 P.2d 617, 63 Cal.App.2d 291.

Minn.—Tousley v. Leach, 230 N.W. 788, 180 Minn. 293.

8. Pa.—Bergner v. Harrisburg, 1 Pearson 291.

R.I.—Austin v. Coggeshall, 12 R.I. 329, 34 Am.R. 648.

9. N.Y.—Hearst v. McClellan, 92 N.Y.S. 484, 102 App.Div. 336.
44 C.J. p 1407 note 45.

10. U.S.—Femmer v. City of Juneau, C.C.A.Alaska, 97 F.2d 649.

Fla.—Robert G. Lassiter & Co. v. Taylor, 128 So. 14, 99 Fla. 819, 69 A.L.R. 689.

Ill.—Haas v. Lincoln Park Com'rs, 171 N.E. 526, 339 Ill. 491.

Ind.—Hamer v. City of Huntington, 21 N.E.2d 407, 215 Ind. 594.

Mass.—City of Lowell v. Massachusetts Bonding & Insurance Co., 47 N.E.2d 265, 313 Mass. 257.

N.Y.—Leffingwell v. Scutt, 224 N.Y.S. 168, 221 App.Div. 462.

Ohio.—Hawley v. City of Toledo, 191 N.E. 827, 47 Ohio App. 246.

Wis.—Federal Paving Corporation v. City of Wauwatosa, 286 N.W. 546, 231 Wis. 655—Bechthold v. City of Wauwatosa, 280 N.W. 320, 228 Wis. 544—Shulze v. City of Mayville, 271 N.W. 643, 223 Wis. 624.
44 C.J. p 1407 note 48.

Competitive bids

Taxpayer may sue to restrain city from paying funds for architectural services in violation of charter requiring competitive bids.—Johnson-Olmsted Realty Co. v. City and County of Denver, 1 P.2d 928, 89 Colo. 250.

Contract not let to lowest bidder

Wis.—Wagner v. City of Milwaukee, 220 N.W. 207, 196 Wis. 328.

Contract to pay excessive brokerage commissions

Fla.—Bryan v. City of Miami, 190 So. 772, 139 Fla. 650.

11. Pa.—Wright v. Barber, 113 A. 200, 270 Pa. 186.

44 C.J. p 1408 note 49.

12. Tex.—Osborne v. Keith, 177 S.W.2d 198, 142 Tex. 262.

13. U.S.—Femmer v. City of Juneau, C.C.A.Alaska, 97 F.2d 649.

Ill.—Murrie v. Harper, 249 Ill.App. 586.

Tex.—Osborne v. Keith, 177 S.W.2d 198, 142 Tex. 262.

44 C.J. p 1408 note 51.

Contract made before appropriation

A contract whereby home rule city engaged engineering firm to make scientific reappraisal of all the property in the city for tax purposes was valid although no appropriation had been made to pay for the services to be rendered, and where there was no evidence of any intent to pay any sums until an appropriation had been made, injunction would not issue to restrain city from making payments on the contract.—Conroy v. City of Battle Creek, 23 N.W.2d 275, 314 Mich. 210.

14. Fla.—Pierce v. Isaac, 184 So. 509, 134 Fla. 666.

Tex.—Osborne v. Keith, 177 S.W.2d 198, 142 Tex. 262.

44 C.J. p 1408 note 50.

Injury to municipality or taxpayer; benefits. The necessity for showing that the rights of the municipality or of taxpayers will be prejudiced by the proposed payment has been recognized,¹⁵ and payments under a valid contract will not be enjoined merely because of an informality in the bond of the contractor where no showing of injury either to the public or to the taxpayer is made or suggested.¹⁶ The fact that payments under an illegal contract are to be made out of a general fund of the municipality is sufficient to show that plaintiff taxpayer will sustain injury,¹⁷ and a taxpayer is not required to show a direct personal loss.¹⁸

In some jurisdictions the fact that the contractor has fully or partially performed¹⁹ and that the municipality has received benefits under an illegal or unauthorized contract²⁰ is not a ground for refusing an injunction, even though the contractor performed in good faith,²¹ at least where the illegality is in respect of a matter which is not within the general powers of municipalities²² or where a statute expressly prohibits the act complained of.²³

On the other hand, an injunction has been refused as to benefits actually received by the municipality²⁴ where the other party to the contract performed in good faith²⁵ and without notice of the invalidity of the contract,²⁶ and the contract was not ultra vires,²⁷ or even though the contract was ultra vires.²⁸

c. Warrants, Bonds, or Other Evidence of Indebtedness, and Judgments

As a general rule, the authorities of a municipal corporation may be enjoined at the suit of taxpayers from paying out money of the municipality on illegal or unauthorized warrants or on void municipal bonds or notes.

As a general rule, either under statute or independently of statute, the authorities of a municipal corporation may be enjoined at the suit of taxpayers from paying out money of the municipality on illegal or unauthorized warrants²⁹ or on void municipal bonds³⁰ or notes;³¹ but the evidence of indebtedness or the debt must actually be illegal,³² and threatened injury or loss to the taxpayer must be shown,³³ in order to entitle the taxpayer to an

15. Md.—Konig v. Baltimore, 97 A. 837, 128 Md. 465.

Wash.—Maxwell v. Smith, 152 P. 530, 87 Wash. 629.

16. Cal.—Crowe v. Boyle, 193 P. 111, 184 Cal. 117.

17. Iowa.—Hanson v. Hunter, 48 N. W. 1005, 53 N.W. 84, 86 Iowa 722.

18. Alaska.—Femmer v. City of Juneau, 9 Alaska 175.

19. Fla.—Robert G. Lassiter & Co. v. Taylor, 128 So. 14, 99 Fla. 819, 69 A.L.R. 689.

Ill.—Meehan v. Parsons, 194 Ill.App. 131, affirmed 111 N.E. 529, 271 Ill. 546.

Wis.—Federal Paving Corporation v. City of Wauwatosa, 286 N.W. 546, 231 Wis. 655—Bechthold v. City of Wauwatosa, 280 N.W. 320, 228 Wis. 544—Shulze v. City of Mayville, 271 N.W. 643, 223 Wis. 624.

20. Iowa.—Bay v. Davidson, 111 N. W. 25, 133 Iowa 688, 119 Am.S.R. 650, 9 L.R.A., N.S., 1014.

44 C.J. p 1408 note 56.

Use of materials

City's contract for purchase of materials for bridge repair, not authorized by city council and executed without director of finance certifying that money required for contract was in treasury to credit of fund from which it was to be drawn, and in absence of certificate that money was in treasury applicable to such purpose, was held void, entitling taxpayer to have city's payment of money thereunder enjoined, even though materials had been used for purposes intended.—Hawley v. City of Toledo, 191 N.E. 827, 47 Ohio App. 246.

21. Iowa.—Bay v. Davidson, 111 N. W. 25, 133 Iowa 688, 119 Am.S.R. 650, 9 L.R.A., N.S., 1014.

Wis.—Chippewa Bridge Co. v. Durand, 99 N.W. 603, 122 Wis. 85, 106 Am.S.R. 931.

22. Mich.—Black v. Detroit, 78 N. W. 660, 119 Mich. 571.

44 C.J. p 1408 note 58.

23. Ill.—De Kam v. Streator, 146 N. E. 550, 316 Ill. 123.

44 C.J. p 1408 note 59.

No estoppel

Ill.—De Kam v. Streator, *supra*.

24. Wash.—Maxwell v. Smith, 152 P. 530, 87 Wash. 629.

44 C.J. p 1409 note 60.

25. La.—McMahon v. New Orleans, 27 So. 650, 52 La. Ann. 1226.

44 C.J. p 1409 note 61.

26. Minn.—Farmer v. St. Paul, 67 N.W. 990, 65 Minn. 176, 33 L.R.A. 199.

27. Ill.—Stripe v. Yager, 180 N.E. 915, 348 Ill. 362.

28. La.—McMahon v. New Orleans, 27 So. 650, 52 La. Ann. 1226.

Minn.—Farmer v. St. Paul, 67 N.W. 990, 65 Minn. 176, 33 L.R.A. 199.

29. Cal.—Chapman v. City of Fullerton, 265 P. 1035, 90 Cal.App. 463.

44 C.J. p 1409 note 66.

Claims presented in improper form

Even though the amount claimed is legally due, where the warrant is issued on a claim presented in a form which wholly fails to comply with the requirements of law its payment may be enjoined.—Chapman v. City of Fullerton, *supra*.

30. N.Y.—Metzger v. Attica, etc., R. Co., 79 N.Y. 171.

44 C.J. p 1409 note 67.

31. Ga.—Marietta v. Dobbins, 104 S. E. 444, 150 Ga. 422.

44 C.J. p 1409 note 68.

32. Ga.—Monk v. Moultrie, 90 S.E. 71, 145 Ga. 843.

Constitutional limitation on indebtedness

An injunction to prevent the payment of a note on the ground that the giving of the note was an effort to create a debt beyond the constitutional limitation was not granted where it appeared that such note did not constitute a debt in violation of the constitutional limitation.—Monk v. Moultrie, *supra*.

33. Tex.—Jenkins v. City of Cooper, Civ.App., 87 S.W.2d 778, error refused—Hazelwood v. City of Cooper, Civ.App., 87 S.W.2d 776, error refused.

Funds not allocated to another purpose

A taxpayer of a city was without interest and without right of action to enjoin treasurer of city from performing ministerial duty by payment of voucher for newspaper advertising under valid contract, where amount in city treasury not allocated to any other fund or purpose was more than sufficient to pay voucher, since payment of voucher could not cost taxpayer any amount in additional taxes and taxpayer could not recover taxes already paid, and hence would not be injured by action of treasurer in paying voucher.—Wilkinson v. Poag, La.App., 181 So. 27.

injunction. According to some cases, where the municipality has received and uses or retains moneys received from the disposition of illegal bonds³⁴ or notes,³⁵ an injunction will not lie in respect of the moneys so retained or used; nor will it lie against the payment of bonds, issued for a legal purpose, solely on the ground that the municipal authorities made an illegal use of the proceeds.³⁶ It has also been held that a taxpayer is not entitled to restrain the payment of warrants given for public improvements where the grounds for the injunction are based, not on lack of power by the city, but on irregularities in procedure.³⁷

The legislature has the power to confer on taxpayers the right to injunctive relief against the municipality's payment of securities which are payable from sources other than funds raised by taxation,³⁸ but the intention of the legislature to do so must be clearly expressed,³⁹ and a statute which merely authorizes a taxpayer to enjoin the payment of bonds or warrants from funds raised by taxation does not apply to obligations payable from other sources.⁴⁰

Judgments. Municipal authorities may be enjoined from paying a judgment if it was fraudulently or collusively obtained;⁴¹ but in the absence of fraud or collusion, if the liability of the municipality has been established by the judgment of a court of competent jurisdiction, it cannot be

relitigated in a court of equity and its payment enjoined at the suit of a taxpayer.⁴²

d. Payment of Salary or Compensation to Officer, Agent, or Employee

In general, the right of a taxpayer to sue to enjoin the payment of salary to the incumbent of a municipal office has been denied where the granting of relief will involve a trial of the title to office; but the right of a taxpayer to prevent payments to a person who is neither an officer de jure nor de facto has been recognized or upheld.

In general, the right of a taxpayer to sue to enjoin the payment of salary to the incumbent of a municipal office has been denied where the granting of relief will involve a trial of the title to office;⁴³ or, as sometimes expressed, where an office has legally been created, the right of a de facto incumbent to receive the salary provided for by law will not be inquired into in a taxpayer's suit to enjoin the payment of salary.⁴⁴ The right of a taxpayer to sue to prevent payments to a person who is neither an officer de jure nor de facto⁴⁵ or to the incumbent of an office or position which the municipal authorities have no power to create⁴⁶ has been recognized or upheld. The right of a citizen and taxpayer to sue to enjoin an illegal payment of salary or compensation has been recognized where title to the office was not involved,⁴⁷ as where the steps taken for payment did not conform to the requirements of a city ordinance,⁴⁸ where pay-

34. Minn.—White v. Chatfield, 133 N.W. 962, 116 Minn. 371.

35. S.C.—Luther v. Wheeler, 52 S.E. 874, 73 S.C. 83, 4 L.R.A., N.S., 746, 6 Ann Cas. 754.

36. Minn.—White v. Chatfield, 133 N.W. 962, 116 Minn. 371.

37. Neb.—Tidd v. Kirkham, 247 N.W. 594, 124 Neb. 605.

Notice of intention to issue warrants
Tex.—City of Del Rio v. Lowe, Civ. App., 111 S.W.2d 1208, reversed on other grounds Lowe v. City of Del Rio, 122 S.W.2d 191, 132 Tex. 111.

38. Tex.—Fisher v. City of Bartlett, Civ.App., 76 S.W.2d 535, error dismissed.

39. Tex.—Fisher v. City of Bartlett, supra.

40. Tex.—Jenkins v. City of Cooper, Civ.App., 87 S.W.2d 778, error refused.—Hazelwood v. City of Cooper, Civ.App., 87 S.W.2d 776, error refused.

Obligations payable from electric plant revenues

Tex.—Fisher v. City of Bartlett, Civ. App., 76 S.W.2d 535, error dismissed.

41. Wis.—Balch v. Beach, 95 N.W. 132, 119 Wis. 77.

44 C.J. p 1409 note 73.

42. Ill.—Carney v. Marseilles, 26 N.E. 491, 136 Ill. 401, 29 Am.S.R. 328.

43. Ark.—Scott v. McCoy, 206 S.W. 2d 440, 212 Ark. 574.

Md.—Corpus Juris cited in Carey v. Jackson, 169 A. 922, 924, 165 Md. 472.

44 C.J. p 1409 note 75.

44. Ill.—Kucharski v. Harrison, 106 N.E. 488, 264 Ill. 563.

44 C.J. p 1409 note 76.

45. Conn.—Samis v. King, 40 Conn. 298.

46. Cal.—Barry v. Goad, 26 P. 785, 89 Cal. 215.

Ga.—Fluker v. Union Point, 64 S.E. 648, 132 Ga. 568.

Statutory authorization

A taxpayer showing that ordinances purporting to create three new positions of police captains were void could maintain action to restrain payment of salaries attached to such offices under statute authorizing action by taxpayer to restrain illegal expenditure of public funds.—Brown v. Boyd, 91 P.2d 926, 33 Cal.App.2d 416.

47. Ky.—Spurlock v. Lafferty, 283 S.W. 124, 214 Ky. 333.

Pension

Ga.—Morris v. City Council of Augusta, 40 S.E.2d 710, 201 Ga. 666.

Salary fixed after election

A resident and general taxpayer of village had interest justifying suit by him to restrain village and officers thereof from paying president of village board salary fixed by ordinance adopted after his election on ground of unconstitutionality of such ordinance.—Baumrucker v. Brink, 25 N.E.2d 51, 373 Ill. 82.

Attorneys defending officers from criminal charges

City was properly restrained from paying out of its general fund, pursuant to resolution of the city commissioners, attorneys' fees incurred in defending such commissioners in prosecutions for offenses based on acts done by them in the discharge of their official duties.—City of Del Rio v. Lowe, Civ.App., 111 S.W.2d 1208, reversed on other grounds Lowe v. City of Del Rio, 122 S.W.2d 191, 132 Tex. 111.

48. Pa.—Thiel v. Philadelphia, 91 A. 490, 245 Pa. 406.

44 C.J. p 1409 note 80.

ment of an excessive amount is threatened,⁴⁹ or where there is an invalid contract between the municipality and an officer in respect of the manner of determining his compensation.⁵⁰ The fact that incumbent did not take an oath of office has been regarded as insufficient to support a suit to enjoin a payment of salary, where the statutory provision for taking the oath is merely directory.⁵¹

Where the matter of payment of salary is within the discretion of the municipal authorities, an injunction will not be granted.⁵² The right to an injunction has been denied where plaintiff does not show injury to the taxpayers⁵³ and where services have actually been performed under claim of right and color of title;⁵⁴ but an injunction has been granted as to a payment for services already rendered under an invalid contract as to the method of determining the compensation.⁵⁵

In *New York* a taxpayer has the right, under Civil Service Law § 28, to maintain an action for an injunction to restrain the payment of salaries to persons who have been illegally employed and continued in their positions.⁵⁶ The action cannot be maintained where it involves primarily and directly a determination as to title and where such title depends on extraneous and disputable facts,⁵⁷ but the fact that a question as to title is collaterally involved does not prevent the maintenance of the action,⁵⁸ and, if otherwise maintainable, an action will lie where the question as to title turns

on the construction or validity of a statutory provision,⁵⁹ or on admitted facts⁶⁰ or indisputable records;⁶¹ where in such situations it clearly appears that the incumbent is not entitled to the office or position, the court should enjoin payments of salary or compensation⁶² as illegal and a waste of the public funds,⁶³ and no special damage need be shown.⁶⁴

A taxpayer may sue to restrain the illegal payment of a salary under a general statute permitting taxpayers to sue to restrain an illegal expenditure of public funds,⁶⁵ but a showing that injury would result to the municipality or taxpayers from the proposed payment must be made.⁶⁶ A plain case should be established by plaintiff,⁶⁷ and an action will not lie to prevent the payment of salary to a person duly appointed, merely because such person is given an improper assignment to duty.⁶⁸

§ 2151. Acquisition of Property

As a general rule, a purchase or other acquisition of property by municipal authorities may be enjoined at the instance of a taxpayer where it is unauthorized, illegal, or otherwise wrongful.

As a general rule, sometimes by virtue of statutory provisions, a purchase or other acquisition of property by municipal authorities may be enjoined at the instance of a taxpayer where it is unauthorized, illegal, or otherwise wrongful,⁶⁹ as where the municipality is not authorized to ac-

49. Ky.—*Spurlock v. Lafferty*, 283 S.W. 124, 214 Ky. 333.

44 C.J. p 1410 note 81.

50. Ill.—*Koons v. Richardson*, 227 Ill.App. 477.

51. Wash.—*Maxwell v. Smith*, 152 P. 530, 87 Wash. 629.

52. Pa.—*Bailey v. Philadelphia*, 31 A. 925, 187 Pa. 569, 46 Am.S.R. 691.

Attorney's fees

Where the city has discretionary power to employ an attorney, a taxpayer is not entitled to enjoin the payment of his fee.—*City of Corsicana v. Babb*, Tex.Com.App., 290 S.W. 736.

53. Wash.—*Maxwell v. Smith*, 152 P. 530, 87 Wash. 629.

44 C.J. p 1410 note 85.

54. Pa.—*Bailey v. Philadelphia*, 31 A. 925, 187 Pa. 569, 46 Am.S.R. 691.

55. Ill.—*Koons v. Richardson*, 227 Ill.App. 477.

56. N.Y.—*Ordway v. Leary*, 225 N.Y.S. 350, 130 Misc. 781, affirmed 227 N.Y.S. 862, 223 App.Div. 762.

—*Welling v. Portfolio*, 26 N.Y.S. 2d 823.

44 C.J. p 1410 note 94 [a].

57. N.Y.—*Greene v. Knox*, 67 N.E. 910, 175 N.Y. 432.

44 C.J. p 1410 notes 88, 89.

58. N.Y.—*Greene v. Knox*, supra.

59. N.Y.—*Forman v. Bostwick*, 123 N.Y.S. 1048, 139 App.Div. 333.

44 C.J. p 1410 note 91.

60. N.Y.—*Forman v. Bostwick*, 123 N.Y.S. 1048, 139 App.Div. 333.

44 C.J. p 1410 note 92.

61. N.Y.—*Forman v. Bostwick*, supra.

44 C.J. p 1410 note 93.

62. N.Y.—*O'Connor v. Walsh*, 82 N.Y.S. 499, 83 App.Div. 179.

44 C.J. p 1410 note 94.

63. N.Y.—*Peck v. Belknap*, 29 N.E. 977, 130 N.Y. 394.

44 C.J. p 1410 note 95.

64. N.Y.—*Hellyer v. Prendergast*, 162 N.Y.S. 788, 176 App.Div. 383.

65. N.Y.—*Rees v. Teachers' Retirement Board of City of New York*, 223 N.Y.S. 716, 130 Misc. 442, reversed on other grounds 224 N.Y.S. 544, 221 App.Div. 646, and re-

versed on other grounds 160 N.E. 644, 247 N.Y. 372.

44 C.J. p 1410 note 95 [b].

66. N.Y.—*Tappen v. Crissey*, 64 How.Pr. 496.

44 C.J. p 1410 note 97.

67. N.Y.—*Tappen v. Crissey*, supra.

68. N.Y.—*Stone v. New York Municipal Civ. Serv. Commn.*, 71 N.Y.S. 1054, 63 App.Div. 278.

69. Minn.—*Williams v. Klemmer*, 224 N.W. 261, 177 Minn. 44.

44 C.J. p 1411 note 2.

Improper proceedings

Taxpayers were held entitled to enjoin as illegal commission's purchase of, and payment for, property for fire department, where proceedings were had without authority of mayor and council.—*Renshaw v. Grace*, 142 A. 99, 155 Md. 294.

Removal of property from tax rolls

It is a waste of public money for a city to purchase property for which it has no use, and thus cause its removal from the tax rolls and the loss of taxes which would otherwise be paid upon it.—*Bauer v. City of Niagara Falls*, 39 N.Y.S.2d 448, 262 App.Div. 938.

quire the property for the purpose proposed⁷⁰ or where no provision has been made for the creation of a fund for the discharge of the indebtedness which would result, as required by constitutional provision.⁷¹

Matters of discretion, policy, or judgment. Where municipal authorities are authorized to purchase property, a court of equity will not interfere with the exercise of their discretion in the absence of fraud or collusion or manifest abuse of their powers;⁷² but the court may properly grant an injunction where the conduct of the municipal authorities amounts to a manifest abuse of their discretion or a fraud on the rights of taxpayers.⁷³ While it has been held that the intention to pay a grossly excessive purchase price will, in connection with other circumstances, constitute a ground for injunction,⁷⁴ ordinarily the court will not base its action solely on the amount of the purchase price.⁷⁵

Necessity of showing illegality or other wrong, and injury. Plaintiff is not entitled to an injunction in the absence of a showing that the act complained of is illegal, unauthorized, or otherwise wrongful,⁷⁶ and that an injury or loss will result.⁷⁷ Where an action is statutory, plaintiff must bring his case

within the statutory provisions.⁷⁸

§ 2152. Injury to, or Waste, Disposition, or Use of, Property Other than Money

- a. In general
- b. Statutory provisions

a. In General

As a general rule, in most jurisdictions a taxpayer may, independently of express statutory authorization, sue to enjoin an unauthorized or illegal disposition, or an illegal or unauthorized use, of municipal property other than money or other funds.

As a general rule, in most jurisdictions a taxpayer may, independently of express statutory authorization, sue to enjoin an unauthorized or illegal disposition,⁷⁹ or an illegal or unauthorized use,⁸⁰ of municipal property other than money or other funds. Accordingly, a taxpayer may sue to enjoin the municipality from wrongfully leasing municipal property,⁸¹ from drilling oil wells on land used for a street,⁸² from permitting the use of a park for other than park purposes,⁸³ or from illegally assigning a tax certificate without lawful consideration.⁸⁴

In West Virginia a taxpayer ordinarily is not entitled to sue to enjoin an illegal disposition or

70. N.C.—Stratford v. Greensboro, 32 S.E. 394, 124 N.C. 127.

44 C.J. p 1411 note 3.

71. Tex.—Austin v. McCall, 68 S.W. 791, 95 Tex. 565.

72. N.Y.—Hanrahan v. Corrou, 12 N.Y.S.2d 536, 170 Misc. 922.

44 C.J. p 1411 note 7.

73. Or.—Avery v. Job, 36 P. 293, 25 Or. 512.

74. Or.—Avery v. Job, supra.

44 C.J. p 1411 note 9.

75. N.Y.—Ziegler v. Chapin, 27 N.E. 471, 126 N.Y. 342.

44 C.J. p 1411 note 10.

76. Tenn.—Reams v. Town of McMinnville, 291 S.W. 1067, 155 Tenn. 222.

44 C.J. p 1411 note 11.

77. Mich.—Schneider v. Grand Rapids, 179 N.W. 285, 211 Mich. 399.

44 C.J. p 1411 note 12.

Money not raised by taxation

Where city's contract for purchase of water company's properties and franchises contemplated payment out of proceeds from sale of revenue bonds, no money was to be raised by taxation, city was not liable on the obligation, and bonds would not be a lien on the property purchased, the transaction would not entail any waste or injury to the city or taxpayers, and statute authorizing action to restrain carrying out of wasteful or injurious contracts was inapplicable.—Hanrahan

v. Corrou, 12 N.Y.S.2d 536, 170 Misc. 922.

78. N.Y.—Voelcker v. Schnell, 166 N.Y.S. 420.

44 C.J. p 1411 note 13.

79. Mich.—Kirchen v. Remenga, 288 N.W. 344, 291 Mich. 94.

Or.—Corpus Juris cited in Seafeldt v. Port of Astoria, 16 P.2d 943, 945, 141 Or. 418.

Wis.—Matson v. Town of Caledonia, 227 N.W. 298, 200 Wis. 43.

44 C.J. p 1412 note 16.

Water

(1) Operation of motion illegally adopted by city council to furnish free water to city officials may be enjoined at taxpayer's suit.—Ward v. City of Roswell, 281 P. 28, 34 N.M. 326.

(2) City was held properly enjoined from carrying out its purpose to sell and furnish water to persons residing without city limits and within limits of neighboring municipality.—City of Cornelia v. Wells, 183 S.E. 66, 181 Ga. 554.

80. Fla.—Williams v. Town of Dunnellon, 169 So. 631, 125 Fla. 114.

Pa.—Clarey v. City of Philadelphia, 16 Pa.Dist. & Co. 375, affirmed 166 A. 237, 311 Pa. 11.

44 C.J. p 1412 note 17.

Use of city sewers by village or county

Ill.—City of Belleville v. Miller, 171 N.E. 535, 339 Ill. 360.

81. Ga.—Aven v. Steiner Cancer Hospital, 5 S.E.2d 356, 189 Ga. 126.
Va.—Roper v. McWhorter, 77 Va. 214.

Municipal auditorium

Ala.—City of Bessemer v. Huey, 22 So.2d 325, 247 Ala. 12.

Mont.—Colwell v. City of Great Falls, 157 P.2d 1013, 117 Mont. 126.

Park property

Md.—Hanton v. Levin, 179 A. 286, 168 Md. 674.

82. Cal.—Marshall v. Standard Oil Co. of California, 61 P.2d 520, 17 Cal.App.2d 19.

83. La.—City of Shreveport v. Kahn, 193 So. 461, 194 La. 55.
44 C.J. p 1412 note 16 [e].

Erection of auditorium

Taxpayers could maintain suit to enjoin city from erecting public auditorium on lot used as public park.—Anderson v. Thomas, 117 So. 573, 166 La. 512.

84. Fla.—R. D. Lamar, Inc., v. Ray, 182 So. 292, 132 Fla. 704.—Southwest Enterprises v. Frasse, 152 So. 175, 113 Fla. 770.

If the certificate has been illegally assigned a taxpayer may enjoin the issuance of a tax deed thereunder.—R. D. Lamar, Inc., v. Ray, 182 So. 292, 132 Fla. 704.

use of municipal property,⁸⁵ but where both the state and the municipality concur in the disposition or use of the property a suit for an injunction may lie at the instance of a taxpayer.⁸⁶ It has also been held that a taxpayer is entitled to maintain an action to enjoin the city from using property in a manner which may subject it to forfeiture for failure to comply with the conditions on which it was conveyed to the city.⁸⁷

Necessity of showing illegality and injury. A taxpayer cannot sue where the proposed act is not illegal, unauthorized, or otherwise wrongful.⁸⁸ The fact that the municipality had no power to acquire the property does not entitle a taxpayer to an injunction to restrain its sale,⁸⁹ and a proposed unauthorized use of a municipal building is not of itself ground for enjoining the completion of the building.⁹⁰ The necessity of showing that the rights of taxpayers will be injuriously affected by the act complained of has been recognized,⁹¹ although the injury shown need not be special or peculiar to plaintiff.⁹² Ordinarily a suit will not lie where the commission of the act complained of is not imminent.⁹³

Matters of discretion, policy, or judgment. A court of equity will not interfere at the suit of a taxpayer to restrain the authorities of a municipal corporation in the exercise of their discretionary powers with regard to the control or disposition of property of the municipality, in the absence of fraud or clear abuse of their authority.⁹⁴ So the court will not interfere on the ground of inadequacy of the price to be received from the sale or lease of the property if no fraud or abuse of discretion is shown.⁹⁵

b. Statutory Provisions

In the absence of statutory authorization, in some jurisdictions a taxpayer cannot sue to prevent waste or wrongful disposition or use of, or injury to, municipal property, but he may do so in a proper case where the right is conferred by statute.

In the absence of statutory authorization, in some jurisdictions a taxpayer cannot sue to prevent waste or wrongful disposition or use of, or injury to, municipal property,⁹⁶ but he may do so in a proper case where the right is conferred by statute.⁹⁷ Plaintiff must bring his case within the statutory provisions⁹⁸ and must show that the act complained

85. W.Va.—Bryant v. Logan, 49 S. E. 21, 56 W.Va. 141, 3 Ann.Cas. 1011.

44 C.J. p 1412 note 18.

86. W.Va.—Baler v. City of St. Albans, 39 S.E.2d 145, 128 W.Va. 630.

Transfer of city-owned bridge to state

W.Va.—Baler v. City of St. Albans, supra.

87. W.Va.—McVean v. City of Elkins, 32 S.E.2d 233, 127 W.Va. 225.

88. Pa.—Williams v. Samuel, 2 A.2d 834, 332 Pa. 265.

44 C.J. p 1412 note 19.

Contract of sale held valid

Md.—Smart v. Graham, 20 A.2d 574, 179 Md. 476.

89. Del.—Drexler v. Commissioners of Town of Bethany Beach, 135 A. 484, 15 Del. Ch. 214.

90. Minn.—White v. Chatfield, 133 N.W. 962, 116 Minn. 371.

91. Ill.—Koehler v. A Century of Progress, 188 N.E. 445, 354 Ill. 347.

44 C.J. p 1412 note 22.

Closing of street

(1) Action of city or town in authorizing the closing of a street cannot be successfully challenged in civil suit by private citizen, whose only interest therein is that of general taxpayer of city or town.—Shaw v. Liggett & Myers Tobacco Co., 38 S.E.2d 313, 226 N.C. 477.

(2) Where all parties having any interest in property fronting on city street gave written consent to closing

of part thereof by corporation's erection of building across it, a private citizen, interested only as general taxpayer of city, was not entitled to injunction against erection of building.—Shaw v. Liggett & Myers Tobacco Co., supra.

Inconsequential injury

Possible interference with recreational uses of four thousand acres of park property for duration of emergency as result of use of one hundred and sixty acres of the park property for temporary housing purposes to help meet the emergency housing shortage caused by necessities of war having retarded construction of sufficient housing would be too inconsequential to justify interference therewith by the courts by issuance of an injunction on a taxpayer's application.—Griffith v. City of Los Angeles, 178 P.2d 793, 73 Cal.App.2d 796.

92. N.M.—Ward v. City of Roswell, 281 P. 28, 84 N.M. 326.

93. Minn.—Reed v. Hibbing, 184 N. W. 842, 150 Minn. 130.

94. Mont.—Corpus Juris cited in Colwell v. City of Great Falls, 157 P.2d 1013, 1022, 117 Mont. 126.

Or.—Corpus Juris cited in Seafeldt v. Port of Astoria, 16 P.2d 943, 945, 141 Or. 418.

S.C.—Green v. City of Rock Hill, 147 S.E. 346, 149 S.C. 234.

Wyo.—Corpus Juris cited in Quackenbush v. City of Cheyenne, 70 P. 2d 577, 579, 52 Wyo. 146.

44 C.J. p 1412 note 25.

95. Ga.—Mathews v. Darby, 141 S. E. 304, 165 Ga. 509.

Md.—Smart v. Graham, 20 A.2d 574, 179 Md. 476.

Mont.—Colwell v. City of Great Falls, 157 P.2d 1013, 117 Mont. 126.

S.C.—Truesdale v. City of Columbia, 27 S.E.2d 455, 203 S.C. 338.

96. N.C.—Eagle Nest Corporation v. Carroll, 37 N.Y.S.2d 716, 179 Misc. 99, reversed on other grounds 38 N.Y.S.2d 599, 265 App.Div. 985, motion granted 50 N.E.2d 103, 290 N. Y. 766.

44 C.J. p 1413 note 27.

97. N.Y.—Welling v. Buck, 53 N.Y. S.2d 281, 184 Misc. 322.

44 C.J. p 1413 notes 28–30.

Building for private purposes

Construction by city of building for private purposes on municipal lands indicates a waste of public resources which would justify maintenance of taxpayer's action to restrain construction.—Elth v. City of New York, 300 N.Y.S. 558, 165 Misc. 18.

98. N.Y.—Borek v. Golder, 74 N.Y. S.2d 675, 190 Misc. 366.

44 C.J. p 1413 note 31.

Erection of poles and stringing of wires in a street already occupied by a street railroad and another set of poles and wires are not an injury or waste to the city, within a statute providing for actions against officers to prevent injury or waste to public property.—Sheehy v. Clausen, 55 N.

of is wrongful.⁹⁹ Ordinarily the mere illegality of the act is insufficient as the basis for an injunction,¹ where neither the public, the municipality, nor the taxpayers have sustained loss or injury;² but under a statute which permits an injunction merely if the act is an "illegal official act," it has been held that an injunction will not be refused on the ground that it is not shown that there will be a waste of, or actual injury to, the municipal property.³ The terms "waste" and "injury," used in a statute, have been held not to comprehend individual acts, but only illegal, wrongful, and dishonest acts of public officials.⁴ Where the issue involved is moot, an injunction will not be granted.⁵

Matters of discretion, policy, or judgment. The court will not interfere with matters which are within the discretion of the municipal authorities, in the absence of abuse or fraud,⁶ nor will they interfere with matters which involve merely questions as to policy, wisdom, or judgment.⁷

§ 2153. Grant or Exercise of Franchises, Rights, or Privileges

In a number of jurisdictions it has been held that a taxpayer may sue to restrain the illegal or unauthorized grant, sale, or carrying out of a franchise or other privilege by the municipal authorities, and also to restrain the grantee of a franchise or permit from enjoying, or from operating under, it; but there is authority holding that a suit by a taxpayer to restrain the exercise of a franchise is not the proper remedy where there is a claim that the ordinance granting the franchise is illegal.

In a number of jurisdictions it has been held that a taxpayer may sue to restrain the illegal or unauthorized grant, sale, or carrying out of a franchise or other privilege by the municipal authorities,⁸ to restrain a municipality from proceeding under an ordinance purporting to grant a franchise or privilege which is illegal or unauthorized,⁹ and also to restrain the grantee of a franchise, privilege, or permit from enjoying, or from operating under, it,¹⁰ and to prevent the use of streets without obtaining a franchise.¹¹ There is, however, authority for the view that a suit by a taxpayer to restrain the exercise of a franchise is not the proper

Y.S. 1000, 26 Misc. 269, affirmed 59 N.Y.S. 1111, 42 App.Div. 622.

99. N.Y.—Borek v. Golder, 74 N.Y.S. 2d 675, 190 Misc. 366—New Colonia Ice Co. v. Woolley, 41 N.Y.S.2d 662, 181 Misc. 473.

Ohio.—Thompson v. Nemeyer, 52 N.E. 1024, 59 Ohio St. 486.

Protection of street from floods

Ohio.—U. S. Bung Mfg. Co. v. City of Cincinnati, 54 N.E.2d 432, 73 Ohio App. 80.

1. N.Y.—Western New York Water Co. v. Buffalo, 151 N.E. 207, 242 N.Y. 202—Borek v. Golder, 74 N.Y.S.2d 675, 190 Misc. 366.

Ultra vires license

Fact that license to maintain refreshment stands in parks is ultra vires does not entitle taxpayer to injunction.—Williams v. City of New York, 222 N.Y.S. 163, 129 Misc. 654, affirmed Williams v. Hyman, 227 N.Y.S. 392, 223 App.Div. 48, affirmed Williams v. City of New York, 162 N.E. 547, 248 N.Y. 616.

2. N.Y.—Borek v. Golder, 74 N.Y.S. 2d 675, 190 Misc. 366.

Ohio.—Fischer v. City of Cleveland, 181 N.E. 668, 42 Ohio App. 75. 44 C.J. p 1413 note 34.

3. Ohio.—Tompkins v. Pallas, 95 N.Y.S. 875, 47 Misc. 309. 44 C.J. p 1413 note 35.

4. N.Y.—Sheehy v. Bronx Gas, etc., Co., 49 N.Y.S. 1088, 26 App.Div. 140.

5. N.Y.—Goetz v. City of Mount Vernon, 68 N.Y.S.2d 265, 271 App.Div. 986.

6. Ohio.—Thompson v. Nemeyer, 52 N.E. 1024, 59 Ohio St. 486. 44 C.J. p 1414 note 37.

Use of field for sports activities

N.Y.—Goetz v. City of Mount Vernon, 68 N.Y.S.2d 265, 271 App.Div. 986.

7. N.Y.—Talcott v. Buffalo, 26 N.E. 263, 125 N.Y. 280.

Terms of lease

In action by a taxpayer to enjoin the commissioner of markets from carrying out the terms of a lease of an ice plant in a city market under a statute relating to the prevention of illegal acts of officials, where there was no fraud charged and taxpayer failed to show any illegal act, questions of waste or lack of good business judgment could not be considered and no injunction could be issued.—New Colonia Ice Co. v. Woolley, 41 N.Y.S.2d 662, 181 Misc. 473.

8. Iowa.—Central States Electric Co. v. Incorporated Town of Randall, 297 N.W. 804, 230 Iowa 376. 44 C.J. p 1414 note 41.

Statutory authorization

(1) Such suits may be permitted by reason of statutory authorization.

N.Y.—Bee Line v. La Guardia, 279 N.Y.S. 274, 244 App.Div. 151.

S.D.—Haines v. Rapid City, 238 N.W. 145, 59 S.D. 68.

44 C.J. p 1414 note 41 [b], [c].

(2) Even if statute authorizes attorney general to bring action, attacking franchise as illegal, wasteful, and fraudulent, taxpayer is not

precluded from maintaining action for injunction attacking franchise on similar grounds under statute conferring on taxpayers right to enjoin illegal acts of municipal officers.—Blanshard v. City of New York, 253 N.Y.S. 419, 141 Misc. 600, affirmed 257 N.Y.S. 973, 236 App.Div. 663, affirmed 186 N.E. 29, 262 N.Y. 5.

(3) But it has also been held that individual taxpayer could not have injunction to restrain officials of city from carrying out grant of franchise, since court, by granting injunction, would virtually set aside franchise previously granted, and whether franchise should be canceled can be determined only in action brought by state.—Meth v. City of New York, 253 N.Y.S. 248, 142 Misc. 203.

9. Iowa.—Hall v. Cedar Rapids, 88 N.W. 448, 115 Iowa 199. 44 C.J. p 1414 note 42.

10. Ky.—People's Transit Co. v. Louisville R. Co., 295 S.W. 1055, 220 Ky. 728.

44 C.J. p 1414 note 43.

Authorization under statute

N.Y.—Bee Line v. La Guardia, 279 N.Y.S. 274, 244 App.Div. 151. 44 C.J. p 1414 note 43 [a].

11. Ky.—People's Transit Co. v. Louisville R. Co., 295 S.W. 1055, 220 Ky. 728.

Authorization under statute

N.Y.—Walsh v. La Guardia, 199 N.E. 652, 269 N.Y. 437, motion denied 199 N.E. 673, 269 N.Y. 564—Blanshard v. City of New York, 186 N.Y. 5, 262 N.Y. 5.

remedy where there is a claim that the ordinance granting the franchise is illegal and was improperly enacted.¹²

Legislative functions. In some cases the rule is laid down that the courts will not enjoin the enactment of ordinances involving franchises on the ground that in the particular instance the governing body would be exercising a legislative function,¹³ as, for example, an ordinance recognizing or granting the right to use of the streets;¹⁴ but it has been held that the rule has no application in a suit to enjoin the issuance of street railway certificates secured by a mortgage covering the franchises and property owned by the municipality and granting the right to operate in case of default by the municipality.¹⁵

Matters of discretion, policy, or judgment. The courts will not interfere in the exercise of discretionary powers by municipal authorities in the absence of fraud or palpable abuse.¹⁶

Wrongfulness, injury, or loss; interest of plaintiff. Plaintiff must show that the proposed grant or exercise of a franchise or privilege is illegal, unauthorized, or otherwise wrongful,¹⁷ and in suits under a statute the act complained of must be brought within the provisions of the statute.¹⁸ City officials will not be restrained from interfering with the use of streets by a company without a franchise.¹⁹ Moreover, no injunction will be granted

in the absence of a threatened loss or injury to the municipality or to the taxpayers.²⁰ A taxpayer has not necessarily such an interest under a franchise of a public utility corporation as will permit the maintenance of a suit by him to enjoin the repeal of such franchise²¹ and the grant of another franchise covering the same subject matter.²² A taxpayer cannot, by a suit for an injunction, challenge the validity of a franchise ordinance giving the city an option to purchase an electric plant where the plant, if acquired, would cost the taxpayers nothing.²³

§ 2154. Elections; Selection for Office

In some jurisdictions taxpayers may sue to enjoin the holding of an illegal or unauthorized election, but in other jurisdictions the rule is otherwise.

Where an election for the determination of certain questions, other than the selection of officers, would be illegal or unauthorized, the right of taxpayers to sue to prevent by injunction the holding of such election has been recognized or upheld²⁴ on the ground that municipal funds will be expended in the performance of the act of which complaint is made.²⁵ Even though the cost of the election is to be defrayed by private interests, the election may be enjoined under a statute which authorizes a taxpayer to restrain illegal official acts which are detrimental to public interests.²⁶ In order that an in-

12. Neb.—Clark v. Interstate Independent Tel. Co., 101 N.W. 977, 72 Neb. 883.

44 C.J. p 1414 note 45.

13. Ill.—Roby v. Chicago, 74 N.E. 768, 215 Ill. 604.

44 C.J. p 1414 note 46.

Action to enjoin before vote

Taxpayer's action to enjoin board of estimate and apportionment of city and city itself from granting proposed bus franchise before a vote was had thereon was held to be premature.—Greenberg v. O'Brien, 269 N.Y.S. 458, 149 Misc. 866.

14. Ill.—Roby v. Chicago, 74 N.E. 768, 215 Ill. 604.

15. Ill.—Lobdell v. Chicago, 81 N.E. 354, 227 Ill. 218.

44 C.J. p 1414 note 48.

16. N.Y.—People v. New York, 32 Barb. 102.

Wis.—Linden Land Co. v. Milwaukee Electric R., etc., Co., 83 N.W. 851, 107 Wis. 493.

44 C.J. p 1415 note 49.

17. Ark.—Citizens Pipe Line Co. v. Twin City Pipe Line Co., 10 S.W. 493, 178 Ark. 309.

N.Y.—Meth v. City of New York, 253 N.Y.S. 248, 142 Misc. 203.

Wis.—Linden Land Co. v. Milwaukee

Electric R., etc., Co., 83 N.W. 851, 107 Wis. 493.

18. U.S.—Seccomb v. Wurster, C.C. N.Y., 83 F. 856.

44 C.J. p 1415 note 51.

19. N.Y.—Bee Line v. La Guardia, 279 N.Y.S. 274, 244 App.Div. 151.

20. Ark.—Citizens Pipe Line Co. v. Twin City Pipe Line Co., 10 S.W.2d 493, 178 Ark. 309.

Iowa.—Iowa Public Service Co. v. City of Emmetsburg, 227 N.W. 514, 210 Iowa 300.

N.Y.—Meth v. City of New York, 253 N.Y.S. 248, 142 Misc. 203.

44 C.J. p 1415 note 52.

21. Iowa.—Van Horn v. Des Moines, 191 N.W. 144, 195 Iowa 840.

22. Iowa.—Van Horn v. Des Moines, supra.

44 C.J. p 1415 note 54.

23. Iowa.—Iowa Public Service Co. v. City of Emmetsburg, 227 N.W. 514, 210 Iowa 300.

24. Ark.—Sanders v. Green, 214 S.W.2d 67, 213 Ark. 943.

Cal.—Holman v. Santa Cruz County, App., 205 P.2d 767.

Ga.—City of Brunswick v. Trunnell, 185 S.E. 918, 182 Ga. 489.

Ky.—Ginsburg v. Giles, 72 S.W.2d 438, 254 Ky. 720.

N.Y.—New York Edison Co. v. City of New York, 198 N.E. 550, 268 N.Y. 669—Hathaway v. City of Oneonta, 266 N.Y.S. 237, 148 Misc. 695.

44 C.J. p 1415 note 64, p 1416 note 68. Injunction to restrain holding of election in general see Injunctions § 115.

Amendment to city charter

Ohio.—State ex rel. Kittel v. Bigelow, 37 N.E.2d 41, 138 Ohio St. 497.

25. Ark.—Sanders v. Green, 214 S.W.2d 67, 213 Ark. 943.

Cal.—Holman v. Santa Cruz County, App., 205 P.2d 767.

Ky.—Ginsburg v. Giles, 72 S.W.2d 438, 254 Ky. 720.

44 C.J. p 1416 note 66.

Right of taxpayers to enjoin misapplication or waste of funds in general see supra § 2148.

The distinction has been made that such a suit by a taxpayer is not one to enjoin the holding of an election but is one to enjoin the expenditures of public moneys on the ground that the election was unauthorized by law.—Hawkins v. St. Joseph, Mo., 281 S.W. 420—44 C.J. p 1416 note 67.

26. N.Y.—Hathaway v. City of Oneonta, 266 N.Y.S. 237, 148 Misc. 695.

junction may be available as a remedy, the proposed election must actually be illegal.²⁷

In other jurisdictions it has been held that a taxpayer is not entitled to maintain a suit to enjoin the holding of an election submitting a question for determination by the voters²⁸ and that the mere fact that the holding of an election involves some expense does not entitle a taxpayer to maintain the action.²⁹

Election of municipal officers. In some jurisdictions it has been held that a taxpayer may enjoin the holding of an election for a municipal office where the election would be illegal,³⁰ and that a taxpayer is entitled to an injunction to prevent election officers from printing on the ballots the names of candidates for certain offices where such offices are not elective offices³¹ and from holding an election of officers in subdivisions of the municipality which are wrongfully constituted.³² The basis for the right is that the holding of the illegal election would be a useless expenditure of public funds.³³ In other jurisdictions it has been held that a taxpayer, as such, has no right to an injunction to restrain election officers or other public authorities from holding an election for the selection of officers³⁴ or from holding an election for the

recall of municipal officers.³⁵

Selection for office or position other than by election by people. A selection for a municipal office or position by municipal authorities may be enjoined at the suit of a taxpayer on the ground that the proposed method of selection is illegal.³⁶

§ 2155. Miscellaneous Acts or Transactions

a. In general

b. Holding office or exercising functions

a. In General

The general rule that a taxpayer may, in a proper case, sue to enjoin illegal acts of municipal authorities has been applied so as to permit a taxpayer to sue to enjoin a number of miscellaneous acts or transactions of municipal authorities.

The general rule that a taxpayer may, in a proper case, sue to enjoin illegal acts of municipal authorities, as discussed supra §§ 2139, 2140, has been applied so as to permit a taxpayer to sue to enjoin a number of miscellaneous acts or transactions of municipal authorities,³⁷ such as the continuance of an illegal requirement pertaining to printing for the city,³⁸ the enforcement of an ordinance licensing as games of skill certain devices used for gambling purposes,³⁹ unauthorized examination of

27. N.Y.—Johnson v. Etkin, 7 N.Y.S. 2d 67, 255 App.Div. 817, affirmed 17 N.E.2d 401, 279 N.Y. 1.

Election after defeat of similar proposition

Where there was no showing of impropriety by commissioners of sanitary district of town in proposed submission to voters of a proposition to borrow money for construction of a garbage incinerator several months after a similar proposition was defeated, and a number of prospective voters at prior election did not vote because of inadequacy of voting facilities, commissioners would not be enjoined from submission of the proposition.—Nugent v. Quinn, 82 N.Y.S.2d 242.

Proposed election held illegal

Ga.—City of Brunswick v. Trunnell, 185 S.E. 918, 182 Ga. 489.

28. Ill.—Fletcher v. City of Paris, 35 N.E.2d 329, 377 Ill. 89.

Or.—Portland General Elec. Co. v. Judd, 198 P.2d 605.

Granting of franchise

Okl.—Lowry v. Town of Meeker, 1 P.2d 378, 151 Okl. 264.

Levy of tax

Taxpayers are not entitled to an injunction restraining municipal officers from holding an election to determine whether or not a tax should be levied under a statute alleged to be unconstitutional.—Rou-

danez v. New Orleans, 29 La. Ann. 271.

29. Ill.—Fletcher v. City of Paris, 35 N.E.2d 329, 377 Ill. 89.

In Oregon

(1) It has been held that the mere fact that the holding of an election involves some expense and therefore indirectly may affect all taxpayers does not entitle taxpayers as such to maintain action to enjoin the placing of a measure on a ballot at ensuing city election.—Portland General Elec. Co. v. Judd, 198 P.2d 605.

(2) However, in an earlier case it was held that a peoples' utility district and residents and taxpayers therein were proper parties to institute suit to prevent misapplication and waste of public funds by submitting an ordinance to voters of the district which was not subject to referendum.—Tillamook Peoples' Utility Dist. v. Coates, 149 P.2d 558, 174 Or. 476.

30. Ark.—McCarley v. Hundhausen, 162 S.W.2d 565, 204 Ark. xviii.

31. Mo.—Stoche v. Edwards, 244 S.W. 802, 295 Mo. 402.

32. Iowa.—Cascaden v. Waterloo, 77 N.W. 333, 106 Iowa 673.

33. Ark.—McCarley v. Hundhausen, 162 S.W.2d 565, 204 Ark. xviii.

Iowa.—Cascaden v. Waterloo, 77 N.W. 333, 106 Iowa 673.

Increase in burden of taxation

Making expenditures for printing on ballots the names of candidates for offices that are not elective offices increases the burden of taxation and constitutes special and individual damage to plaintiffs.—Stoche v. Edwards, 244 S.W. 802, 295 Mo. 402.

34. Pa.—In re Taxes Election Receiver, 4 Pa. Dist. 71.

44 C.J. p 1415 note 59.

35. Okl.—McAlester v. Milwee, 122 P. 173, 31 Okl. 620, 40 L.R.A., N.S., 576.

44 C.J. p 1415 note 61.

36. Ga.—Americus v. Perry, 40 S.E. 1004, 114 Ga. 871, 57 L.R.A. 230.

44 C.J. p 1416 note 69.

37. N.Y.—Wenk v. New York, 64 N.E. 509, 171 N.Y. 607.

44 C.J. p 1389 note 21.

38. N.Y.—Amalithone Realty Co. v. City of New York, 295 N.Y.S. 423, 162 Misc. 715, affirmed 297 N.Y.S. 262, 251 App.Div. 450.

Label of particular union

N.Y.—Amalithone Realty Co. v. City of New York, supra.

39. Ohio.—State ex rel. Sergi v. City of Youngstown, 40 N.E.2d 477, 68 Ohio App. 254, appeal dismissed 32 N.E.2d 852, 138 Ohio St. 123.

civil service employees,⁴⁰ the completion of an attempt to change boundaries or to incorporate another municipality on the ground of lack of jurisdiction,⁴¹ permitting ineligible persons to occupy houses provided by public housing projects,⁴² conducting a retail business without statutory authorization,⁴³ or installation of parking meters in violation of statute.⁴⁴ A taxpayer may restrain an examination of the city's financial affairs by the state comptroller where it is not being conducted in compliance with statute.⁴⁵

Interest, injury, or loss. The rule that interest or injury must be shown in order to entitle a taxpayer to sue for an injunction, considered supra § 2143, has been applied in suits by a taxpayer to restrain the municipal authorities from destroying

slot machines,⁴⁶ from discharging municipal employees,⁴⁷ from enforcing a traffic regulation,⁴⁸ from infringing patents on paving materials,⁴⁹ from installing parking meters,⁵⁰ from operating a wholesale produce market,⁵¹ from permitting a police band to play in competition with private musicians,⁵² or from vacating a street.⁵³

b. Holding Office or Exercising Functions

A taxpayer as such cannot sue to enjoin a de facto officer from holding, or exercising the functions of, a municipal office.

A taxpayer as such cannot sue to enjoin a de facto officer from holding, or exercising the functions of, a municipal office.⁵⁴ The right to sue is properly denied on the ground that the suit is one to test the title to office.⁵⁵

4. ACTIONS OR PROCEEDINGS

§ 2156. In General

The nature and form of the remedy available to taxpayers seeking to prevent or redress municipal wrongs, conditions precedent, parties, etc., are discussed infra §§ 2157-2172. Actions by or against municipal corporations generally are discussed infra §§ 2186-2214.

Examine Pocket Parts for later cases.

§ 2157. Nature and Form of Action or Proceeding

Taxpayers' suits are generally equitable in nature.

Ordinarily taxpayers' suits, even where statu-

tory, are equitable ones,⁵⁶ as, for example, the remedy of a taxpayer who seeks to contest the validity of the actions of municipal authorities,⁵⁷ including the prevention of unauthorized acts by them,⁵⁸ suits to cancel, set aside, or invalidate certain instruments or transactions, discussed supra §§ 2127-2136, and suits for injunctions, discussed supra §§ 2139-2155. Likewise, suits by taxpayers to enforce liability on behalf of the municipality for funds or other property wrongfully disposed of or taken usually are regarded as equitable ones,⁵⁹ in which equitable principles apply;⁶⁰ and it has been held that a common-law action for the use of the municipality to recover from municipal officers money

40. N.Y.—*Maclay v. Finegan*, 299 N. Y.S. 897, 164 Misc. 815.

41. Ariz.—*Colquhoun v. City of Tucson*, 103 P.2d 269, 55 Ariz. 451.

42. Md.—*Matthaei v. Housing Authority of Baltimore City*, 9 A.2d 835, 177 Md. 506.

43. Mass.—*MacRae v. Selectmen of Town of Concord*, 6 N.E.2d 366, 296 Mass. 394, 108 A.L.R. 1450.

44. Ark.—*Deaderick v. Parker*, 200 S.W.2d 787, 211 Ark. 394.

45. Fla.—*Coen v. Lee*, 156 So. 747, 116 Fla. 215.

46. N.Y.—*Smith v. City of Buffalo*, 78 N.Y.S.2d 540, 191 Misc. 439.

47. Ill.—*Ryan v. City of Chicago*, 15 N.E.2d 708, 369 Ill. 59.

Trifling expense

Expense of conducting civil service examination to fill vacancies caused by compulsory retirement of policemen and firemen over specified age was too trifling to enable taxpayer to maintain suit in equity to restrain city from discharging such

policemen and firemen on ground of unconstitutionality of statute permitting the discharge.—*Ryan v. City of Chicago*, supra.

48. N.Y.—*Eighth Avenue Coach Corporation v. City of New York*, 10 N.Y.S.2d 170, 170 Misc. 243, affirmed 20 N.Y.S.2d 402, 259 App.Div. 870, affirmed 35 N.E.2d 907, 286 N. Y. 84.—*McCarthy v. City of New York*, 10 N.Y.S.2d 170, 170 Misc. 243, affirmed 20 N.Y.S.2d 401, 259 App.Div. 870, affirmed 36 N.E.2d 684, 286 N.Y. 636.

49. Mass.—*Dealtry v. Selectmen of Town of Watertown*, 180 N.E. 621, 279 Mass. 22.

50. Conn.—*Cassidy v. City of Waterbury*, 83 A.2d 142, 130 Conn. 237. Tenn.—*Porter v. City of Paris*, 201 S.W.2d 688, 184 Tenn. 555.

51. Kan.—*Douglas v. City of Wichita*, 83 P.2d 657, 148 Kan. 619.

52. N.Y.—*Goebel v. Bolan*, 268 N.Y. S. 501, 150 Misc. 574.

53. Nev.—*Blanding v. City of Las*

Vegas, 280 P. 644, 52 Nev. 52, 68 A.L.R. 1273.

54. Ind.—*Long v. Stemm*, 7 N.E.2d 188, 212 Ind. 204.

44 C.J. p 1416 note 70.

Trustees to manage waterworks Ind.—*Long v. Stemm*, supra.

55. Wis.—*Huels v. Hahn*, 44 N.W. 507, 75 Wis. 468.

56. N.M.—*Dreyfus v. Socorro*, 189 P. 878, 26 N.M. 127.

44 C.J. p 1417 note 94.

57. R.I.—*Sisson v. Peloquin*, 133 A. 621.

58. Iowa.—*Brockman v. Creston*, 44 N.W. 822, 79 Iowa 587.

59. Ill.—*Jones v. O'Connell*, 107 N.E. 731, 266 Ill. 443.

44 C.J. p 1417 note 97.

"In equity, the taxpayers of a municipality are the owners of the property of the municipality . . . a right which may be enforced only in equity."—*People, for Use of Marks, v. Harding*, 268 Ill.App. 204.

60. Wis.—*Ellefson v. Smith*, 196 N. W. 834, 182 Wis. 398.

misappropriated by such officers cannot be maintained.⁶¹ In some jurisdictions, however, a taxpayer's remedy to recover property for the municipality is by action at law.⁶² A taxpayer's suit for an injunction cannot be used as a substitute for a statutory appeal which is available to review municipal action.⁶³

Class or representative suit. Usually a taxpayer's suit is regarded as a class or representative suit,⁶⁴ and is designed to protect the interests of all taxpayers;⁶⁵ but in a suit under a statute the rule has been laid down that plaintiff is not suing on behalf of the public or in the interest of the public, but in his own name for the protection of his own property.⁶⁶

Petition or motion. It has been held that taxpayers who seek to set aside judgments against the municipality should proceed by petition and not by motion.⁶⁷

§ 2158. Conditions Precedent

- a. In general
- b. Security for costs
- c. Request for, and refusal of, action by municipal authorities

a. In General

Compliance with conditions precedent is essential to the maintenance of a taxpayer's suit.

Before a taxpayer may bring a representative taxpayer's suit it is essential that conditions preced-

ent to the maintenance of the action have been complied with.⁶⁸ The requirement of a charter for the filing of a notice showing the nature and amount of a claim before a bill in equity thereon can be maintained against the municipality, discussed *infra* § 2199, has been held inapplicable to a taxpayer's suit to restrain the unlawful appropriation of public funds.⁶⁹ Realty taxpayers, suing for themselves and others similarly situated, cannot maintain a suit to enjoin the enforcement of a tax execution and to restrain tax sales on the ground that the assessors discriminated against realty and in favor of personalty in fixing the basis of value for taxation, without tendering amounts equal to the taxes which would have been due on realty if it had been assessed at the lowest proportion of value applied to personalty.⁷⁰

b. Security for Costs

Security for costs must be given in taxpayers' suits under some statutes.

In some jurisdictions the statutes require that plaintiff taxpayer shall give security for costs,⁷¹ sometimes in the form of a bond.⁷² The bond for costs need not necessarily contain provision for the payment of damages arising from an injunction *pendente lite*.⁷³ The court may permit a filing of the bond *nunc pro tunc*.⁷⁴ Failure to file the requisite bond justifies dismissal of the suit.⁷⁵

c. Request for, and Refusal of, Action by Municipal Authorities

A demand on, and refusal by, the municipal author-

61. Ga.—*Young v. Moor*, 87 S.E. 401, 144 Ga. 401.

44 C.J. p 1418 note 99.

62. N.J.—*Suburban Homes Co. v. Town of West Orange*, 144 A. 794, 104 N.J.Eq. 227.

44 C.J. p 1418 note 1.

63. N.C.—*Cox v. City of Kinston*, 8 S.E.2d 252, 217 N.C. 391.

64. Ohio.—*Ohio Fuel Gas Co. v. City of Mount Vernon*, 174 N.E. 260, 37 Ohio App. 459.

Pa.—*Gericke v. City of Philadelphia*, 44 A.2d 233, 353 Pa. 60.

44 C.J. p 1418 note 9.

Plaintiff as representative party see *infra* § 2162.

65. Pa.—*Gericke v. City of Philadelphia*, 44 A.2d 233, 353 Pa. 60—*Schlanger v. West Berwick Borough*, 104 A. 764, 261 Pa. 605.

44 C.J. p 1418 note 9.

66. Kan.—*Water, etc., Co. v. Hutchinson Interurban R. Co.*, 87 P. 882, 74 Kan. 661.

44 C.J. p 1418 note 11.

67. Okl.—*Allan v. Norman*, 225 P. 507, 99 Okl. 45.

68. Cal.—*Briere v. Mathews*, 258 P. 939, 202 Cal. 1.

Ky.—*Wagner v. Wallingford*, 78 S.W. 2d 326, 257 Ky. 477.

N.Y.—*Birch v. Huie*, 9 N.Y.S.2d 450, 169 Misc. 1011, affirmed 11 N.Y.S. 2d 839, 256 App.Div. 1057.

Ohio.—*State v. Turgeon*, 167 N.E. 901, 32 Ohio App. 241.

Okl.—*Vaughan v. Latta*, 33 P.2d 795, 168 Okl. 492.

Wash.—*Jones v. City of Centralia*, 289 P. 3, 157 Wash. 194.

Conditions precedent to actions by and against municipal corporations generally see *infra* § 2198.

69. N.H.—*Stocklan v. Brackett*, 61 A.2d 140.

70. Ga.—*Mayor and Aldermen of Savannah v. Fawcett*, 197 S.E. 253, 186 Ga. 132.

Tender of taxes in individual taxpayer's suit to enjoin wrongful collection of tax see *supra* § 2106.

71. Okl.—*Dowler v. State ex rel. Prunty*, 66 P.2d 1081, 179 Okl. 532.

44 C.J. p 1418 note 15.

72. N.Y.—*Birch v. Huie*, 9 N.Y.S.2d 450, 169 Misc. 1011, affirmed 11 N.Y.S. 2d 839, 256 App.Div. 1057—*Elth v. City of New York*, 300 N.Y.S. 558, 165 Misc. 18.

44 C.J. p 1418 note 15 [b].

A bond is unnecessary where money deposited for costs was not shown to have been insufficient for that purpose.—*Dowler v. State ex rel. Prunty*, 66 P.2d 1081, 179 Okl. 532.

73. N.Y.—*Burns v. Watertown*, 213 N.Y.S. 90, 126 Misc. 140.

Security for damages see *infra* § 2169.

74. N.Y.—*Birch v. Huie*, 9 N.Y.S.2d 450, 169 Misc. 1011, affirmed 11 N.Y.S. 2d 839, 256 App.Div. 1057—*Elth v. City of New York*, 300 N.Y.S. 558, 165 Misc. 18.

44 C.J. p 1418 note 18.

75. N.Y.—*Birch v. Huie*, 9 N.Y.S.2d 450, 169 Misc. 1011, affirmed 11 N.Y.S. 2d 839, 256 App.Div. 1057.

Dismissal of taxpayers' suits generally see *infra* § 2166.

ities to act are frequently conditions precedent to a taxpayer's suit in behalf of a municipal corporation.

If it appears that the municipal authorities are ready and willing to take the steps necessary to protect the interests of the municipality and of the taxpayers, ordinarily, as discussed supra § 2138, the latter have no right to sue to protect such interests; therefore it is usually held that taxpayers may not maintain an action to recover on account of, or to compel an accounting for, municipal funds or other municipal property wrongfully misappropriated, taken, or held, in the absence of a showing that the proper municipal authorities have failed or refused to act after request by taxpayers;⁷⁶ and a like rule has been recognized in a suit to set aside a fraudulent conveyance of municipal property.⁷⁷ So the right of a taxpayer to sue to restrain alleged improper acts of municipal authorities has been denied where it was not shown that he had first sought to have the proper municipal authorities perform their duty.⁷⁸

On the other hand, a demand on the municipality to perform its duty has been held unnecessary as a condition precedent to a suit by a taxpayer to re-

strain the performance of an illegal act,⁷⁹ nor is a demand necessary as a condition to the institution of a suit to declare an ordinance invalid,⁸⁰ nor, it has been held, is it necessary first to request the law officer of the municipality to bring the action.⁸¹ No demand is necessary where the circumstances are such as to indicate affirmatively that such a request would be unavailing,⁸² as where the municipality is in control of officers who participated in the wrongdoing involved in the suit⁸³ or where the official on whom the demand must be made is the one whose acts are sought to be prevented or redressed.⁸⁴

Where a request to sue is necessary, it should be directed to the municipal officers who have authority to initiate litigation,⁸⁵ and it must be signed by the requisite number of qualified taxpayers⁸⁶ and be served as required by statute.⁸⁷ Where there are no technical requirements as to the contents of the notice or demand specified by statute, it must be sufficient fairly to advise the municipal officers of the matters complained of and the action demanded,⁸⁸ and generally be sufficient in form and substance to serve its purpose.⁸⁹ It must not be

76. Cal.—Briare v. Mathews, 258 P. 939, 202 Cal. 1.

Ill.—People ex rel. City of Chicago v. Schreiber, 54 N.E.2d 862, 322 Ill.App. 452.

Ky.—Wagner v. Wallingford, 78 S.W.2d 326, 257 Ky. 477—Schoening v. Paducah Water Co., 19 S.W.2d 1073, 230 Ky. 453.

Okl.—Corpus Juris quoted in State for Use of Board of County Comm'rs of Pontotoc County ex rel. Braly v. Ford, 116 P.2d 988, 991, 992, 189 Okl. 299—State ex rel. Higgs v. Muskogee Iron Works, 103 P.2d 101, 187 Okl. 419—State ex rel. Woods v. Elk City, 62 P.2d 1203, 178 Okl. 521—Vaughan v. Latta, 33 P.2d 795, 168 Okl. 492.

Va.—Sauer v. Monroe, 199 S.E. 487, 171 Va. 421.

Wash.—Jones v. City of Centralia, 289 P. 3, 157 Wash. 194.

Wis.—City of Kiel v. Frank Shoe Mfg. Co., 4 N.W.2d 117, 240 Wis. 594.

44 C.J. p 1419 note 20.

77. Wis.—Ryan v. Olson, 197 N.W. 727, 183 Wis. 290.

78. N.C.—Merrimon v. Southern Pav., etc., Co., 55 S.E. 366, 142 N.C. 539, 8 L.R.A., N.S., 574.

44 C.J. p 1419 note 22.

79. Ind.—Noble v. Davison, 96 N.E. 325, 177 Ind. 10.

80. Ky.—Schoening v. Paducah Water Co., 19 S.W.2d 1073, 230 Ky. 453.

81. Tex.—Goodhue v. Beaumont, Civ.App., 271 S.W. 128.

44 C.J. p 1419 note 24.

82. Cal.—Briare v. Mathews, 258 P. 939, 202 Cal. 1.

Ill.—People ex rel. City of Chicago v. Schreiber, 54 N.E.2d 862, 322 Ill.App. 452.

Ky.—Louisville & N. R. Co. v. City of Jackson, 136 S.W.2d 1051, 281 Ky. 639.

Neb.—Darnell v. City of Broken Bow, 299 N.W. 274, 139 Neb. 844, 136 A.L.R. 101.

W.Va.—Sauer v. Monroe, 199 S.E. 487, 171 Va. 421.

Wis.—City of Kiel v. Frank Shoe Mfg. Co., 4 N.W.2d 117, 240 Wis. 594—Reetz v. Kitch, 283 N.W. 348, 230 Wis. 1.

44 C.J. p 1419 note 25.

Waiver

In action by taxpayer wherein city joined issue by answer contesting taxpayer's cause of action, demand on city to institute the action would be deemed to have been waived, since a demand under such circumstances would have been an idle ceremony.—Taxpayers League of Wayne County v. Wightman, 296 N.W. 886, 139 Neb. 212.

83. Neb.—Darnell v. City of Broken Bow, 299 N.W. 274, 139 Neb. 844, 136 A.L.R. 101.

N.C.—Atkinson v. Greene, 147 S.E. 811, 197 N.C. 118.

44 C.J. p 1419 note 25 [a] (1), (2).

84. Ky.—Caudill v. Pansion, 24 S.W. 2d 928, 233 Ky. 12.

44 C.J. p 1419 note 25 [a] (3).

85. Ill.—People ex rel. City of Chi-

cago v. Schreiber, 54 N.E.2d 862, 322 Ill.App. 452.

44 C.J. p 1419 note 26.

86. Okl.—State ex rel. Higgs v. Muskogee Iron Works, 103 P.2d 419, 187 Okl. 419—Dowler v. State ex rel. Prunty, 66 P.2d 1081, 179 Okl. 532—Vaughan v. Latta, 33 P.2d 795, 168 Okl. 492.

Resident taxpayers

Those who paid sales taxes only, no part of which went to city, were not resident taxpayers of city within meaning of statutes authorizing recovery of penalties based on unlawful or fraudulent contracts or transactions by officers of governmental subdivisions.—State ex rel. Higgs v. Muskogee Iron Works, 103 P.2d 419, 187 Okl. 419.

87. Okl.—State ex rel. Mahler v. City of Tulsa, 138 P.2d 86, 193 Okl. 547.

88. Okl.—Dowler v. State ex rel. Prunty, 66 P.2d 1081, 179 Okl. 532.

89. Okl.—Dowler v. State ex rel. Prunty, supra.

Demand held sufficient

Demand which challenges attention of public officers receiving the demand to an irregularity of expenditure or to an illegal or fraudulent contract or disbursement of public moneys, and demanding suit, is sufficient under statute in absence of an affirmative showing that substantial rights of public officers have been prejudiced by reason of fault or omission of demand.—State ex rel.

so indefinite as to mislead,⁹⁰ but absolute completeness of detail or technical accuracy is unnecessary if it is otherwise sufficient.⁹¹

Under the Ohio statute, before a taxpayer may sue to enjoin certain acts of, or abuses of corporate powers by, municipal authorities, the municipal solicitor must be requested in writing to sue, and must have failed or refused to act;⁹² but the requirement does not apply where the municipality has no solicitor,⁹³ or where plaintiff is suing not as a taxpayer to protect the public interest but to protect a private interest which the act sought to be enjoined will affect,⁹⁴ or where plaintiff sues as a water rent payer and not as a taxpayer.⁹⁵ Substantial compliance by the solicitor with the taxpayer's demand is essential to the end that the court will have presented to it all the issues of law and fact so that a full and complete adjudication may be had.⁹⁶ The failure to sue contemplated by the statute can be predicated only on a refusal to act or an actual failure to do so beyond a reasonable time required for investigation⁹⁷ and prosecution.⁹⁸ The solicitor may sue in the name of taxpayers with their consent without being requested by them in writing to do so.⁹⁹ The provisions of the statutes are held to be remedial and as such are to be liberally construed to accomplish the purpose for which they are designed.¹

§ 2159. Defenses and Loss of Right to Relief

- a. In general
- b. Estoppel or waiver
- c. Effect of prior, pending, or subsequent action or proceeding

a. In General

Defenses which might have been available against a municipal corporation had it instituted suit are available in a taxpayer's suit instituted on failure of the municipality to sue.

In addition to various matters constituting defenses in taxpayers' actions which have been discussed supra §§ 2122-2155, any defense which might be interposed in an action by the municipality is available in a taxpayer's suit brought after failure of the municipality to bring the action.² However, a contractor who has proceeded with full or presumptive knowledge of the invalidity of the contract cannot rely on equitable defenses in an action by a taxpayer to recover back on behalf of the municipality money paid under the illegal contract.³ The contractor is not relieved of his obligation by having employed another to do the work under the contract being attacked.⁴

In a suit to enjoin a municipal officer from making payments for an unauthorized purpose, defendant officer cannot set up a defense that the person to whom the payment is to be made has acted in good faith and in ignorance of the want of capacity on the part of the municipality.⁵ Where relief is sought in a taxpayer's suit on the ground that the municipality has exceeded its debt limits, whether such limits have been extended as permitted by statute is a matter of defense to be set up by the municipality.⁶ In a taxpayer's suit to enjoin a bond issue, in which the attorney general appeared to give the court jurisdiction to try the issues involved, the fact that the attorney general had theretofore approved the validity of such bonds cannot be urged as a defense.⁷ Defenses available

Mahler v. City of Tulsa, 188 P.2d 86, 193 Okl. 547—*Dowler v. State ex rel. Prunty*, 66 P.2d 1081, 179 Okl. 532.

90. Okl.—*Dowler v. State ex rel. Prunty*, supra.

91. Okl.—*Dowler v. State ex rel. Prunty*, supra.

Separate notices unnecessary

Notice and demand on city commissioners calling their attention to alleged unlawful purchases of land by them for city and demanding suit were held sufficient as prerequisite to suit to recover statutory penalty, as against contention that separate notice was required for each unlawful expenditure, where substantial rights of city commissioners were not prejudiced.—*Dowler v. State ex rel. Prunty*, supra.

92. Ohio.—*State v. Turgeon*, 167 N.E. 901, 32 Ohio App. 241, 44 C.J. p 1419 note 27.

Jurisdictional requirement

Ohio.—*Nunnold v. City of Toledo*, 3 N.E.2d 550, 52 Ohio App. 172.

93. Ohio.—*Nunnold v. City of Toledo*, supra.

44 C.J. p 1419 note 28.

94. Ohio.—*Lake Shore Fdy. v. Cleveland*, 8 Ohio Cir.Ct. 671, 4 Ohio Cir.Dec. 230.

44 C.J. p 1419 note 29.

95. Ohio.—*Himebaugh v. City of Canton*, 61 N.E.2d 483, 145 Ohio St. 237.

96. Ohio.—*City of Cleveland v. Walsh*, 37 N.E.2d 397, 67 Ohio App. 479—*City of Lakewood v. Rees*, 1 N.E.2d 953, 51 Ohio App. 490.

97. Ohio.—*City of Cleveland v. Walsh*, supra—*Nunnold v. City of Toledo*, 3 N.E.2d 550, 52 Ohio App. 172.

44 C.J. p 1419 note 30.

98. Ohio.—*City of Cleveland v. Walsh*, 37 N.E.2d 397, 67 Ohio App. 479.

99. Ohio.—*Cincinnati St. R. Co. v. Smith*, 29 Ohio St. 291.

1. Ohio.—*Maxwell v. Ohio Fuel Gas Co.*, 22 N.E.2d 639, 61 Ohio App. 394.

Time for solicitor to sue

Ohio.—*City of Cleveland v. Walsh*, 37 N.E.2d 397, 67 Ohio App. 479.

2. Neb.—*Neisius v. Henry*, 5 N.W. 2d 291, 142 Neb. 29, affirmed 9 N.W.2d 163, 143 Neb. 273.

3. Cal.—*Miller v. City of Martinez*, 82 P.2d 519, 28 Cal.App.2d 364. Wis.—*Neacy v. Drew*, 187 N.W. 218, 176 Wis. 348.

4. Ill.—*Avery v. City of Chicago*, 178 N.E. 351, 345 Ill. 640.

5. R.I.—*Austin v. Coggeshall*, 12 R.I. 329, 34 Am.R. 648.

6. Mont.—*Commonwealth Public Service Co. of Montana v. City of Deer Lodge*, 28 P.2d 472, 96 Mont. 15.

7. Kan.—*Eastern Kan. Utilities v.*

to a municipality in a taxpayer's suit to restrain the municipality from paying certain warrants may be available in an action to restrain payment of bonds issued to refund such warrants.⁸

b. Estoppel or Waiver

Estoppel or waiver, under some circumstances, may bar relief in a taxpayer's suit.

Where the rights of persons who have dealt with the municipality in good faith are involved, the view has been taken that taxpayers may by acquiescence, in the acts complained of be precluded from obtaining relief.⁹ This rule has been applied in a suit to prevent payments to a contractor for work done,¹⁰ and also in an action to recover from a person who has dealt with the municipality moneys which were received in good faith by such person for benefits conferred on the municipality.¹¹ So taxpayers may be estopped by acquiescence to object to the levy of a tax to pay for an improvement which has already been completed.¹² However, in order that an estoppel may be available, the essential elements thereof must be present.¹³

On the other hand, it has been held that no rule of estoppel can operate against a taxpayer so as to validate a void thing,¹⁴ and there is authority for the view that inaction or failure to object,¹⁵ even where coupled with certain acts which might be construed as indicating assent,¹⁶ does not necessarily deprive a taxpayer of the right subsequently to sue. Thus the mere fact that plaintiff taxpayer participated in certain unauthorized or illegal acts of municipal authorities preliminary to certain payments does not prevent him ultimately from

suing to prevent such payments.¹⁷ Moreover, the mere fact that such taxpayer had knowledge of such preliminary acts,¹⁸ or that he had knowledge of, and did not object to, the payments,¹⁹ does not estop him to sue to compel the municipal officers to refund the amount of the improper payment. The fact that a taxpayer did not take any action with respect to previous illegal or unauthorized acts similar to the acts complained of by him in a suit for an injunction does not preclude his maintaining such suit.²⁰ An estoppel, from acquiescence and the enjoyment of benefits, against plaintiff taxpayer to prevent him from suing to annul a levy for, and to enjoin the collection of, a special tax may not be indulged where the condition on which the tax was voted has not been complied with and the tax has not been earned.²¹ Where some of the complaining taxpayers are not estopped to sue in a representative capacity, a decree granting an injunction has been upheld.²²

c. Effect of Prior, Pending, or Subsequent Action or Proceeding

Under some statutes the pendency of an action by a taxpayer does not prevent another taxpayer from instituting an action involving the same subject matter.

There is authority for the view that the pendency of an action brought by one taxpayer does not prevent the prosecution of an action by another taxpayer involving the same transaction.²³ However, under some statutes, where one taxpayer sues on behalf of the municipality on refusal of the municipal solicitor to do so, the pendency of such a suit is a bar to another suit by a different

City of Paola, 196 P.2d 199, 165 Kan. 558.

8. Tex.—City of Del Rio v. Lowe, Civ.App., 111 S.W.2d 1208, reversed on other grounds Lowe v. City of Del Rio, 122 S.W.2d 191, 132 Tex. 111.

9. Kan.—Drenning v. Board of Com'rs of City of Topeka, 81 P.2d 720, 148 Kan. 366, 117 A.L.R. 884.

44 C.J. p 1420 notes 37, 38.

10. Neb.—Hadlock v. Tucker, 141 N.W. 192, 93 Neb. 510.

11. Minn.—Farmer v. St. Paul, 67 N.W. 990, 65 Minn. 176, 33 L.R.A. 199.

12. N.C.—Berry v. Payne, 13 S.E.2d 217, 219 N.C. 171.

13. Tex.—City of Wichita Falls v. Cooper, Civ.App., 170 S.W.2d 777.

14. Okl.—Faught v. City of Sapulpa, 292 P. 15, 145 Okl. 164.

Failure to protest at budget hearing

Ohio.—State ex rel. City of Akron v.

Slusser, 56 N.E.2d 239, 144 Ohio St. 123.

15. Fla.—Smith v. City of Winter Haven, 18 So.2d 4, 154 Fla. 439.

Ind.—Hamer v. City of Huntington, 21 N.E.2d 407, 215 Ind. 594.

44 C.J. p 1420 note 39.

Absence of knowledge

Cal.—Holman v. Santa Cruz County, App., 205 P.2d 767.

16. Fla.—City of South Miami v. State ex rel. Gibbs, 197 So. 109, 143 Fla. 524.

44 C.J. p 1420 note 40.

17. Ill.—Stadler v. Fahey, 87 Ill. App. 411.

44 C.J. p 1420 note 41.

18. Ala.—Drennen v. Griffin, 43 So. 785, 150 Ala. 241.

44 C.J. p 1420 note 42.

Assumption of propriety

A taxpayer need not keep himself informed as to appropriation balances and bring an action to enjoin

city officials from entering into contracts purporting to obligate the city in an amount beyond its appropriated funds, since he may assume that the officials would comply with the law with respect to expenditures.—Hamer v. City of Huntington, 21 N.E.2d 407, 215 Ind. 594.

19. Ala.—Drennen v. Griffin, 43 So. 785, 150 Ala. 241.

44 C.J. p 1420 note 43.

20. N.Y.—Schieffelin v. Hylan, 174 N.Y.S. 506, 106 Misc. 347, affirmed 176 N.Y.S. 809, 188 App.Div. 192, affirmed 125 N.E. 925, 227 N.Y. 593. 44 C.J. p 1420 note 44.

21. La.—Lawson v. Opelousas, etc., R. Co., 56 So. 625, 129 La. 649.

22. Ga.—Athens v. Hemerick, 16 S.E. 72, 89 Ga. 674.

23. Mont.—Carlson v. Helena, 101 P. 163, 38 Mont. 581.

44 C.J. p 1420 note 48.

Conclusiveness on taxpayers of prior judgment see Judgments § 796.

taxpayer for the same cause.²⁴ Where a municipality neglects to sue for money unlawfully expended by municipal officers, after demand by taxpayers, a taxpayer who sues has an interest in the cause of action which is not affected by the municipality's subsequent suit, and such subsequent suit does not constitute a defense to the taxpayer's suit.²⁵ The fact that a municipal officer has been directed by an order in mandamus to perform a certain act does not prevent a taxpayer's suit for an injunction against another officer who has wholly separate functions where the act which it is sought to restrain would tend further to complicate the situation.²⁶

§ 2160. Time to Sue; Limitations and Laches

- a. In general
- b. Delay in proceeding; laches
- c. Statutes of limitation

a. In General

A taxpayer need not wait until execution of a proposed undertaking before instituting suit if it appears reasonably certain that the municipal corporation will proceed unless enjoined.

Where it appears reasonably certain that the city officials will proceed with a proposed undertaking unless enjoined, the taxpayer is not obliged to wait until its execution before instituting suit.²⁷ Thus, it has been held that, in bringing suit to prevent an assessment against a municipality for its share of benefits from an improvement, a taxpayer does not proceed prematurely for the protection of the rights of the taxpayers as a whole where the improvement was completed and accepted before the suit was brought;²⁸ moreover, although no assess-

ment against the city as a whole has been made, where the improvement has been completed and accepted, plaintiff may sue to prevent the levy of a tax against the property of the taxpayers generally,²⁹ or to prevent payments for such improvement,³⁰ on the ground that a debt in excess of the legal limit has been created. Likewise, it is not necessary for the taxpayer to postpone an action until the municipality is about to pay out money under the contract complained of.³¹

A suit for an injunction has been regarded as premature, however, where there were certain preliminaries to be performed before there would be imminent danger of the performance of the act complained of, in the case of a suit to enjoin the execution of a contract,³² and of a suit to prevent certain expenditures,³³ and also of a suit to enjoin the issuance of bonds.³⁴ Under a statute requiring that there shall be a request that the proper municipal officers shall sue and a refusal of such request before suit is brought by a taxpayer, discussed supra § 2158 c, the right to sue does not accrue before the performance of such requirement;³⁵ if the officer on whom demand is made is entitled to a reasonable time in which to act on the demand, a taxpayer's suit brought before the lapse of such time is premature.³⁶

b. Delay in Proceeding; Laches

Laches may bar a taxpayer's right to relief in a taxpayers' suit.

Taxpayers seeking to contest municipal action by a taxpayers' suit are generally required to act promptly,³⁷ and under general rules it is usually held that the right of taxpayers to equitable re-

24. Ohio.—Mathers v. Cincinnati, 7 Ohio Dec. (Reprint) 496, 3 Cinc.L. Bul. 551.

25. Okl.—State v. Muskogee, 172 P. 796, 70 Okl. 19.

26. N.Y.—Southern Leasing Co. v. Williams, 160 N.Y.S. 440, 96 Misc. 358.

44 C.J. p 1420 note 51.

27. Ga.—City of Valdosta v. Singleton, 28 S.E.2d 759, 197 Ga. 194.

Mich.—Lake Superior District Power Co. v. City of Bessemer, 285 N.W. 20, 238 Mich. 455.

Action held not premature

N.Y.—New York State Electric & Gas Corporation v. City of Plattsburgh, 12 N.Y.S.2d 318, 256 App. Div. 732, 257 App.Div. 1022, modified on other grounds 24 N.E.2d 122, 281 N.Y. 456, reargument denied 26 N.E.2d 812, 282 N.Y. 682.

28. Ind.—Jordan v. Logansport, 86 N.E. 47, 171 Ind. 280.

29. Ind.—Logansport v. Jordan, 85 N.E. 959, 171 Ind. 121, 37 L.R.A., N.S., 1036, 17 Ann.Cas. 415.

30. Ind.—Logansport v. Jordan, supra.

31. Mont.—Davenport v. Kleinschmidt, 13 P. 249, 6 Mont. 502, 20 P. 823, 8 Mont. 476.

32. N.Y.—Admiral Realty Co. v. Gaynor, 132 N.Y.S. 220, 147 App. Div. 719.

Lease of property

Taxpayer's suit to enjoin city from leasing city building to private corporation on ground that city council had no authority to exclude public entirely from building was premature, in absence of showing of terms or conditions of proposed lease or extent to which public might still be permitted to use building.—Latta v. City of Durham, 6 S.E.2d 508, 216 N.C. 732.

33. Mont.—Larkin v. Butte, 158 P. 316, 52 Mont. 410.

44 C.J. p 1421 note 57.

34. Tex.—Davis v. City of San Antonio, Civ.App., 135 S.W.2d 306, error refused—Johnson v. Town of Refugio, Civ.App., 56 S.W.2d 674.

Suit held not premature

Tex.—Cameron v. City of Waco, Civ. App., 8 S.W.2d 249.

35. Okl.—State v. Oklahoma City, 168 P. 227, 67 Okl. 18—Territory v. Woolsey, 130 P. 934, 35 Okl. 545.

36. Ohio.—Nunnold v. City of Toledo, 3 N.E.2d 550, 52 Ohio App. 172.

37. Kan.—Drenning v. Board of Com'rs of City of Topeka, 81 P.2d 720, 148 Kan. 386, 117 A.L.R. 884.

Mass.—Merrymount Co. v. Metropolitan Dist. Commission, 172 N.E. 593, 272 Mass. 457.

More than ordinary promptness is

relief,³⁸ including relief by injunction,³⁹ may be lost by laches. Similarly, under general rules, certiorari by a taxpayer to review acts of municipal authorities may be barred by delay in proceeding where conditions have changed during the period of such delay.⁴⁰ Moreover, a rule to show cause sought by a taxpayer in connection with the award of a municipal contract has been refused on the ground of laches.⁴¹

There is, however, authority for the view that the doctrine of equitable estoppel by laches is rarely applied in taxpayers' suits,⁴² and that all taxpayers of the municipality cannot be estopped by the laches of some of them.⁴³ Moreover, a person who might be precluded by laches from using a judicial remedy in respect of municipal acts, to protect his individual interests, may still be recognized as competent to sue to prevent the illegal use of municipal funds.⁴⁴ Delay in bringing suit has been regarded as not fatal where the transaction involved was fraudulent and void.⁴⁵

Where laches is available as a defense, the essential elements thereof must be present to charge a taxpayer therewith.⁴⁶ Thus, in order to charge a taxpayer with laches, it must appear that he had

notice or knowledge of the facts on which his suit is based,⁴⁷ and it has been held that constructive notice is not sufficient.⁴⁸ It has also been held, however, that, for the purpose of determining laches, a taxpayer may be charged with knowledge of facts which he must have known.⁴⁹ Laches cannot be asserted to defeat the action if the situation has not changed during the delay and no injury has resulted therefrom.⁵⁰ The right to rely on the plea of laches in a suit to enjoin an expenditure by a municipal officer for an unauthorized purpose to persons not entitled to receive the payment has been denied on the grounds that the injunction would not injure such officer and would benefit the municipality.⁵¹ Taxpayers who sue to prevent the disbursement of public money under a void contract are not estopped merely because they did not commence their suit until the completion of the work.⁵² A contractor with the municipality cannot rely on alleged laches of plaintiff taxpayer where such contractor proceeded under the contract with due notice of illegality and for the purpose of inviting litigation.⁵³

In the notes will be found illustrations of cases in which it was held that the taxpayer was⁵⁴ or was

required of taxpayer seeking to rescind bond sale.—*Warfield v. Anglo & London Paris Nat. Bank*, 260 P. 881, 202 Cal. 845.

38. Cal.—*Warfield v. Anglo & London Paris Nat. Bank*, supra.

Fla.—*Sharrow v. City of Dania*, 180 So. 18, 131 Fla. 641.

Ga.—*City of Valdosta v. Singleton*, 28 S.E.2d 759, 197 Ga. 194.

Kan.—*Drenning v. Board of Com'rs of City of Topeka*, 81 P.2d 720, 148 Kan. 366, 117 A.L.R. 884.

Tex.—*City of Corpus Christi ex rel. Harris v. Flato*, Civ.App., 83 S.W. 2d 433, error dismissed.

44 C.J. p 1421 note 61.

39. Fla.—*Smith v. Daffin*, 155 So. 658, 798, 115 Fla. 418.

Ga.—*Mayor & Aldermen of Savannah v. Fawcett*, 197 S.E. 253, 186 Ga. 132.

Kan.—*Drenning v. Board of Com'rs of City of Topeka*, 81 P.2d 720, 148 Kan. 366, 117 A.L.R. 884.

Pa.—*Sambor v. Hadley*, 140 A. 347, 291 Pa. 395, followed in *Turner Construction Co. v. Mackey*, 140 A. 353, 291 Pa. 412, and *Plumly v. Hadley*, 140 A. 353, 291 Pa. 411.

44 C.J. p 1421 note 62.

40. N.J.—*Groth v. Borough of Maywood*, 151 A. 59, 8 N.J.Misc. 514—*Stern v. Jersey City*, 150 A. 9, 8 N.J.Misc. 307.

44 C.J. p 1421 note 64.

41. N.J.—*Brown v. Atlantic City*, 186 A. 808, 5 N.J.Misc. 397.

42. N.D.—*Engstad v. Dinnie*, 76 N.W. 292, 8 N.D. 1.

43. Wis.—*Sayles v. Hartford*, 152 N.W. 853, 161 Wis. 136.

44 C.J. p 1421 note 67.

44. N.D.—*Lang v. City of Cavalier*, 228 N.W. 819, 59 N.D. 75.

45. Pa.—*Lewis v. Philadelphia*, 20 Pa.Dist. 113.

44 C.J. p 1421 note 71.

46. Tex.—*City of Wichita Falls v. Cooper*, Civ.App., 170 S.W.2d 777.

47. Neb.—*Neisius v. Henry*, 5 N.W. 2d 291, 142 Neb. 29, affirmed 9 N.W.2d 163, 143 Neb. 273.

44 C.J. p 1421 note 73.

48. Mich.—*Black v. Detroit*, 78 N.W. 660, 119 Mich. 571.

44 C.J. p 1421 note 74.

Actual knowledge of an unlawful appropriation of public moneys by the common council of a city is necessary to deprive a taxpayer of the right to object on the ground of laches.—*Black v. Detroit*, 78 N.W. 660, 119 Mich. 571—21 C.J. p 250 note 63.

49. Tex.—*City of Corpus Christi ex rel. Harris v. Flato*, Civ.App., 83 S.W.2d 433, error dismissed.

50. Ill.—*Baumrucker v. Brink*, 25 N.E.2d 51, 373 Ill. 82.

Neb.—*Neisius v. Henry*, 5 N.W.2d 291, 142 Neb. 29, affirmed 9 N.W.2d 163, 143 Neb. 273.

N.Y.—*American Dock Co. v. City of New York*, 21 N.Y.S.2d 943, 174

Misc. 813, affirmed 26 N.Y.S.2d 704, 261 App.Div. 1063, affirmed 36 N.E. 2d 696, 286 N.Y. 658.

51. R.I.—*Austin v. Coggeshall*, 12 R.I. 329, 34 Am.R. 648.

52. Wis.—*Cawker v. Milwaukee*, 113 N.W. 417, 133 Wis. 35.

53. N.D.—*Engstad v. Dinnie*, 76 N.W. 292, 8 N.D. 1.

54. Cal.—*Warfield v. Anglo & London Paris Nat. Bank*, 260 P. 881, 202 Cal. 845.

N.J.—*Stern v. Jersey City*, 150 A. 9, 8 N.J.Misc. 307.

Ohio.—*Union Ice Corporation v. City of Niles*, 13 Ohio Supp. 115.

44 C.J. p 1422 note 75.

Suit for injunction

Cal.—*Price v. Sixth Dist. Agricultural Ass'n*, 258 P. 387, 201 Cal. 502.

Ga.—*Mayor and Aldermen of Savannah v. Fawcett*, 197 S.E. 253, 186 Ga. 132.

Kan.—*Drenning v. Board of Com'rs of City of Topeka*, 81 P.2d 720, 148 Kan. 366, 117 A.L.R. 884.

Pa.—*Sambor v. Hadley*, 140 A. 347, 291 Pa. 395, followed in *Turner Const. Co. v. Mackey*, 140 A. 353, 291 Pa. 412, and *Plumly v. Hadley*, 140 A. 353, 291 Pa. 411.

44 C.J. p 1422 note 75 [a].

Rescission of contract

The right to the rescission of a contract merely because of the inadequacy of the consideration is lost by a long delay in the bringing of

not⁵⁵ chargeable with laches.

c. Statutes of Limitation

Taxpayers' suits must be instituted within the time prescribed by constitutional or statutory provision.

A taxpayers' suit attacking municipal action must be instituted within the time prescribed by constitutional or statutory provisions,⁵⁶ as in the case of a suit contesting the validity of a bond issue⁵⁷ or the payment of a bond issue,⁵⁸ or one seeking to enjoin performance of a municipal contract,⁵⁹ or one attacking a municipal election.⁶⁰ Certain statutes of limitations have been held to be⁶¹ or not to be⁶² applicable to taxpayers' actions.

§ 2161. Jurisdiction and Venue

In the absence of statute, general rules apply in determining the jurisdiction and venue of a taxpayers' suit.

Some statutes conferring on taxpayers the right to sue specify the courts which are to have jurisdiction.⁶³ Equity courts generally have jurisdic-

tion of taxpayers' suits properly cognizable therein, such as suits for injunctive relief,⁶⁴ but the law courts have been held to be the proper courts for the recovery of money on behalf of the municipality by a taxpayer's action.⁶⁵ The view has been taken that certain statutes conferring the right to sue do not confer on courts of equity jurisdiction over subjects which have always been excluded from their cognizance.⁶⁶ Thus, where there is available to the taxpayer an adequate remedy at law, equity cannot take jurisdiction.⁶⁷ Some statutes limiting the jurisdiction of courts to issue injunctions against the erection or use of public works have been construed as applicable to taxpayers' suits.⁶⁸

Jurisdictional amount. Under general rules, where the matter in dispute is less than the amount fixed by statute, an equity court will not take jurisdiction of a taxpayers' suit.⁶⁹ The amount is sufficient where the taxpayer's interest in a particu-

suit where the position of the parties has changed and the municipality will not benefit by a rescission.—*Sharrow v. City of Dania*, 180 So. 18, 181 Fla. 641.

55. Fla.—*Smith v. City of Winter Haven*, 18 So.2d 4, 154 Fla. 439.
Neb.—*Neisius v. Henry*, 5 N.W.2d 291, 142 Neb. 29, affirmed 9 N.W.2d 163, 143 Neb. 273.
44 C.J. p 1422 note 76.

Suit for injunction

Ill.—*Baumrucker v. Brink*, 25 N.E.2d 51, 373 Ill. 82—*Haas v. Lincoln Park Com'rs*, 171 N.E. 526, 339 Ill. 491.

Mass.—*MacRae v. Selectmen of Town of Concord*, 6 N.E.2d 366, 299 Mass. 394, 108 A.L.R. 1450.

W.Va.—*Warden v. City of Grafton*, 26 S.E.2d 1, 125 W.Va. 658.
44 C.J. p 1422 note 76 [a].

56. La.—*Thistlethwaite v. Mayor and Board of Aldermen of City of Opelousas*, 7 So.2d 175, 199 La. 890—*Lapeyronnie v. Police Jury of Parish of Jefferson*, 189 So. 132, 192 La. 775—*Miller v. Town of Bernice*, 173 So. 192, 186 La. 742.
N.Y.—*Goldstein v. Mills*, 57 N.Y.S.2d 810, 185 Misc. 851, affirmed 62 N.Y.S.2d 619, 270 App.Div. 930.
Ohio.—*Dehmer v. Campbell*, 188 N.E. 6, 127 Ohio St. 285.

Statute held invalid

Okl.—*Faught v. City of Sapulpa*, 292 P. 15, 145 Okl. 164.

57. U.S.—*Board of Com'rs of Rogers County v. Bristow Battery Co.*, D.C.Okl., 38 F.2d 195, reversed on other grounds C.C.A., *Bristow Battery Co. v. Board of Com'rs of Rogers County, Okl.*, 37 F.2d 504, certiorari denied *Board of County Com'rs of Rogers County, Okl.*, v.

Bristow Battery Co., 51 S.Ct. 23, 282 U.S. 543, 75 L.Ed. 748 and rehearing denied *Bristow Battery Co. v. Board of Com'rs of Rogers County, Okl.*, C.C.A., 38 F.2d 562, certiorari denied *Board of County Com'rs of Rogers County, Okl.*, v. *Bristow Battery Co.*, 51 S.Ct. 23, 282 U.S. 843, 75 L.Ed. 748.

La.—*Thistlethwaite v. Mayor and Board of Aldermen of City of Opelousas*, 7 So.2d 175, 199 La. 890—*Lapeyronnie v. Police Jury of Parish of Jefferson*, 189 So. 132, 192 La. 775—*Miller v. Town of Bernice*, 173 So. 192, 186 La. 742—*McGuffie v. Police Jury of Catahoula Parish*, 163 So. 141, 183 La. 391.

Nature of statute

Oklahoma statute relating to incontestability of municipal securities was held merely special statute of limitations, not *lis pendens* statute.—*City of Shidler v. H. C. Speer & Sons Co.*, C.C.A.Okl., 62 F.2d 544.

Injunction against sale

Taxpayers' action to enjoin sale of bonds to construct public utility in town is an attack on the validity of the bond issue and must be brought within specified time after attorney general's approval, or is barred.—*Johnson v. Town Board of Trustees of Arnett*, 281 P. 777, 139 Okl. 187.

Attack on security of bonds is attack on the bonds themselves under the prescription provision.—*Miller v. Town of Bernice*, 173 So. 192, 186 La. 742.

58. Ohio.—*Dehmer v. Campbell*, 188 N.E. 6, 127 Ohio St. 285.

59. Ohio.—*Dehmer v. Campbell*, supra.

60. La.—*Miller v. Town of Bernice*, 173 So. 192, 186 La. 742.

61. Ohio.—*Dehmer v. Campbell*, 188 N.E. 6, 127 Ohio St. 285.
44 C.J. p 1422 note 78.

62. Wis.—*Sayles v. Hartford*, 152 N.W. 853, 161 Wis. 136.
44 C.J. p 1422 note 79.

63. Mass.—*Baldwin v. Wilbraham*, 4 N.E. 829, 140 Mass. 459.
N.J.—*Jamouneau v. Division of Tax Appeals*, 66 A.2d 534, 2 N.J. 325.
44 C.J. p 1422 note 80.

64. Ark.—*McCarley v. Hundhausen*, 162 S.W.2d 565, 204 Ark. XVIII.
Pa.—*White v. Peoples, Com.Pl.*, 32 Del.Co. 368, 35 Mun.L.R. 241—*Brobst v. Allentown Housing Authority, Com.Pl.*, 18 Lehigh Co.L.J. 157.

65. N.J.—*Suburban Homes Co. v. Town of West Orange*, 144 A. 794, 104 N.J.Eq. 227.

66. N.Y.—*In re Reynolds*, 96 N.E. 87, 416, 202 N.Y. 430.

67. N.J.—*Suburban Homes Co. v. Town of West Orange*, 144 A. 794, 104 N.J.Eq. 227.

68. Pa.—*Chew v. Philadelphia*, 101 A. 915, 257 Pa. 589, L.R.A.1918A 986.

69. Mich.—*Detroit v. Wayne Cir. Judge*, 87 N.W. 376, 128 Mich. 438.
44 C.J. p 1423 note 84.

Repeal of statute

Taxpayers could maintain suit to restrain threatened misuse of funds without showing interest or damage of specified amount where statute requiring such showing had been repealed.—*Wolgemoed v. Village of Constantine*, 290 N.W. 388, 292 Mich. 232—*Bacon v. City of Detroit*, 375 N.W. 800, 282 Mich. 150.

lar fund, or the threatened damage to his property by reason of the misuse of such fund, equals the amount specified,⁷⁰ or where a taxpayer owns property worth the amount specified which is threatened with sale, or liable to a lien, for a tax, in consequence of the proposed misuse.⁷¹

Venue. A suit to enjoin payments under an illegal contract and to declare the contract void should be commenced in the county in which the contract was made, as that county is the one in which the cause of action arose.⁷² Under some statutes the action must be brought in the county where the defendant, against whom substantial relief is sought, resides, and an action brought in any other county may be dismissed on demurrer.⁷³ Parties against whom the relief sought is merely incidental to that sought against others are treated as nominal parties in determining the proper venue under such statutes.⁷⁴

§ 2162. Parties

- a. In general
- b. Plaintiffs in general
- c. Defendants in general
- d. Municipality or state
- e. Municipal or other public officers
- f. Contractors and other persons dealing with municipality or with municipal authorities
- g. Joinder
- h. Intervention

a. In General

All persons whose presence are essential to a com-

plete determination of the controversy must be made parties to a taxpayers' suit.

In accordance with general rules, all persons who are interested in the subject matter of the suit and whose rights are to be affected by the judgment or decree to be rendered therein or whose presence is essential to a complete determination of the controversy must be made parties to a taxpayers' suit.⁷⁵ On the other hand, persons whose rights or interests are in no way involved in the suit and cannot be affected by any judgment therein are neither necessary nor proper parties thereto.⁷⁶

In a purely statutory proceeding the express provisions of the statute as to who may or must be made parties must be strictly followed.⁷⁷

b. Plaintiffs in General

A taxpayers' suit may usually be brought in the name of one taxpayer on behalf of all the taxpayers.

It is usually held that, where the rights of taxpayers as such are directly affected, suits may be brought by them in their own names,⁷⁸ but in some jurisdictions the rule is otherwise in the absence of statutory authorization, as discussed supra § 2140. Where the right to sue exists, one or more of the taxpayers as plaintiffs may be permitted to represent the other taxpayers.⁷⁹ It should, however, appear that the suit is brought on behalf of all taxpayers as well as those who are parties.⁸⁰ Where the municipality and the counsel have been made parties defendant in a suit to restrain an unlawful expenditure by certain officers, the municipality and members of the council are not entitled to a transfer to the position of plaintiffs.⁸¹

Persons not residents or taxpayers cannot, under statute requiring every action to be prosecuted in the name of the real party in interest, complain of the invalidity of an ordinance by a city of the third class not the county seat, or of its action in creating an indebtedness for the securing of the holding of the circuit court therein.—Patterson v. Davis, 153 S.W. 780, 152 Ky. 530.

79. Ohio.—Ohio Fuel Gas Co. v. City of Mt. Vernon, 174 N.E. 260, 37 Ohio App. 159.

Wash.—State v. Seattle, 109 P. 309, 59 Wash. 68.

44 C.J. p 1423 note 96.

Taxpayer's action as class or representative action in general see supra § 2157.

80. Pa.—Wilson v. Blaine, 105 A. 555, 262 Pa. 367—Cavanaugh v. Mayor of City of Scranton, Com. Pl., 39 Lack.Jur. 153.

44 C.J. p 1423 note 97.

81. Md.—Renshaw v. Grace, 142 A. 99, 155 Md. 294.

70. Mich.—Cooper v. Detroit, 192 N. W. 616, 222 Mich. 360—McManus v. Petoskey, 129 N.W. 681, 164 Mich. 390.

71. Mich.—McManus v. Petoskey, supra.
44 C.J. p 1423 note 86.

72. N.Y.—Knowles v. New York, 75 N.Y.S. 725, 71 App.Div. 410.
44 C.J. p 1423 note 88.
Venue in suits to which municipal corporation a party in general see infra § 2203.

73. Ga.—Behr v. City of Macon, 21 S.E.2d 169, 194 Ga. 334.

74. Ga.—Behr v. City of Macon, supra.

75. U.S.—California Water Service Co. v. City of Redding, D.C.Cal., 22 F.Supp. 641, affirmed 58 S.Ct. 865, 304 U.S. 252, 82 L.Ed. 323—Iowa Southern Utilities Co. v. Town of Lamoni, D.C.Iowa, 11 F.Supp. 581, appeal dismissed, C.C.A., Iowa Southern Utilities Co. v.

Town of Lamoni, Iowa, 79 F.2d 1000.

Ala.—Hamilton v. City of Anniston, 27 So.2d 857, 248 Ala. 396.

Mont.—Montana-Dakota Utilities Co. v. City of Havre, 94 P.2d 660, 109 Mont. 164.

N.Y.—Smith v. City of Buffalo, 78 N.Y.S.2d 540, 191 Misc. 439.

44 C.J. p 1423 note 91.

Parties in actions by or against municipalities generally see infra § 2204.

76. N.Y.—American Dry Dock Co. v. City of New York, 21 N.Y.S.2d 943, 174 Misc. 813, affirmed 26 N.Y.S.2d 704, 261 App.Div. 1068, affirmed 36 N.E.2d 696, 286 N.Y. 658.

77. Kan.—Watts v. Wichita County, 22 P. 313, 41 Kan. 402—Chicago, etc., R. Co. v. Evans, 21 P. 216, 41 Kan. 94.

78. Idaho.—Moore v. Hupp, 105 P. 209, 17 Idaho 232.

44 C.J. p 1423 note 94.

In *Ohio* suits under statute may be brought in the name of the taxpayer,⁸² and, as discussed *infra* subdivision e of this section, it is not necessary for him to sue in the name of the solicitor. However, the suit must be on behalf of the municipality.⁸³ The fact that a suit which is not brought under a statute is in the name of the municipality on relation of the taxpayer instead of in the name of the taxpayer for the use of the municipality, or on behalf of all the taxpayers of the village, does not require a denial of relief,⁸⁴ but the court may treat the suit as one in the name of the taxpayer on behalf of the municipality.⁸⁵

c. Defendants in General

Persons who are interested in the subject matter of the action and may be affected by the decree may be made defendants in a taxpayers' suit.

Under general rules, persons who are interested in the subject matter of the action and who may be affected by the decree or judgment may be made defendants⁸⁶ and, as discussed *infra* subdivision g of this section, may be joined as such. Thus, in an action against municipal officers, other persons who are necessary to a complete and binding judgment on everyone interested may be made defendants;⁸⁷ but this is only incidental to the cause of action against the officers.⁸⁸ Moreover, the enumeration in a taxpayers' statute of the persons against whom actions under it may be brought does not dispense with the necessity of bringing in as parties other persons who will be directly affected by the judg-

ment and who are necessary parties to a complete determination of the controversy.⁸⁹

d. Municipality or State

The municipal corporation is a necessary party to a taxpayers' suit where its presence as a party is necessary to a complete determination of the case.

The propriety of making the municipality a party to an action under a taxpayers' statute has been recognized or upheld.⁹⁰ Moreover, in accordance with the general rule, under certain conditions the municipality may be a necessary party,⁹¹ as where the effect of the suit is to divest the municipality of its property,⁹² or where its presence as a party is necessary to a complete determination of the controversy,⁹³ as in a suit to set aside a conveyance of property already made to the municipality⁹⁴ or to set aside a contract of which it has received the consideration.⁹⁵ So the view has been taken that the municipality is a necessary party to a suit to cancel certain transfers or leases of municipal lands,⁹⁶ to enjoin payments to municipal employees,⁹⁷ to enjoin the creation of a debt,⁹⁸ to enjoin the issuance of bonds,⁹⁹ and to enjoin the collection of a tax for the payment of bonds.¹ It has been held that the municipality is a necessary party to a suit to prevent the making of a contract;² but there is also authority to the contrary.³

The municipality has been regarded as a necessary party to a suit to restrain the performance of a contract,⁴ including payments under a contract;⁵

82. Ohio.—Cincinnati St. R. Co. v. Smith, 29 Ohio St. 291—Wood v. Pleasant Ridge, 12 Ohio Cir.Ct. 177, 5 Ohio Cir.Dec. 516.

83. Ohio.—Wood v. Pleasant Ridge, *supra*.
44 C.J. p 1423 note 2.

84. Ohio.—Walker v. Dillonvale, 93 N.E. 220, 82 Ohio St. 1337, 19 Ann. Cas. 773.

85. Ohio.—Walker v. Dillonvale, *supra*.

86. Ohio.—Walker v. Dillonvale, 92 N.E. 220, 82 Ohio St. 137, 19 Ann. Cas. 773, reversed on other grounds 11 Ohio Cir.Ct., N.S., 385, 30 Ohio Cir.Ct. 623.
44 C.J. p 1424 note 8.

87. N.Y.—Wenk v. New York, 73 N.Y.S. 1003, 36 Misc. 496, affirmed 75 N.Y.S. 1135, 69 App.Div. 621.

88. N.Y.—Wenk v. New York, *supra*.

89. N.Y.—Osterhoudt v. Ulster County, 98 N.Y. 239.

90. Ala.—City of Birmingham v. Wilkinson, 194 So. 548, 239 Ala. 199.

Neb.—Taxpayers League of Wayne

County v. Wightman, 296 N.W. 886, 139 Neb. 212.
44 C.J. p 1424 note 9.

Nominal and real party in interest
Ohio—Ohio Fuel Gas Co. v. City of Mt. Vernon, 174 N.E. 260, 37 Ohio App. 159.

91. N.Y.—Herder v. Clifford, 230 N.Y.S. 464, 132 Misc. 666, appeal dismissed 232 N.Y.S. 56, 225 App.Div. 780, affirmed 234 N.Y.S. 811, 227 App.Div. 645, reversed on other grounds 169 N.E. 118, 252 N.Y. 141.
Tex.—Spears v. City of South Houston, Civ.App., 137 S.W.2d 197, affirmed 150 S.W.2d 74, 136 Tex. 218.
44 C.J. p 1424 note 11.

92. Iowa.—Moore v. Held, 35 N.W. 623, 73 Iowa 538.
44 C.J. p 1424 note 12.

93. Okl.—Vaughan v. Latta, 33 P.2d 795, 168 Okl. 492.

Wis.—Coyle v. Richter, 234 N.W. 906, 203 Wis. 590.

44 C.J. p 1424 note 13.

94. Iowa.—Moore v. Held, 35 N.W. 623, 73 Iowa 538—Turner v. Cruzen, 30 N.W. 483, 70 Iowa 202.

95. N.Y.—Eames v. Kellar, 92 N.Y.S. 665, 102 App.Div. 207.

96. N.Y.—Bachia v. Havemeyer Point Estates, 136 N.Y.S. 435, 77 Misc. 362, 4 N.Y.Civ.Proc.N.S. 113.

Wis.—Klema v. Milwaukee Electric Ry. & Light Co., 237 N.W. 115, 205 Wis. 217.

97. Conn.—Samis v. King, 40 Conn. 298.

98. Ga.—Saunders v. Rainey, 80 S.E. 305, 141 Ga. 77.
44 C.J. p 1424 note 18.

99. N.Y.—Hurlburt v. Banks, 1 Abb. N.Cas. 157, 52 How.Pr. 196, affirmed 67 N.Y. 568.

1. Tex.—Bradford v. Westbrook, 88 S.W. 382, 39 Tex.Civ.App. 638.

2. Ill.—Schumacher v. Klitzing, 187 N.E. 458, 353 Ill. 530.
44 C.J. p 1424 note 21.

3. N.Y.—McBride v. Ashley, 154 N.Y.S. 1010, 91 Misc. 585, affirmed 160 N.Y.S. 406, 174 App.Div. 650.
44 C.J. p 1424 note 22.

4. N.Y.—Eames v. Kellar, 92 N.Y.S. 665, 102 App.Div. 207.

5. La.—Wilkinson v. Poag, App., 181 So. 27.

Tex.—Basham v. Holcombe, Civ.App., 240 S.W. 691.

but, where no relief is sought against the municipality or its presence is not necessary to a complete determination of the controversy, it is not a necessary party to a suit to enjoin the contractor from performing;⁶ and where there is no attempt to divest the municipality of any right or to impose any liability on it, and no relief against it is sought, it is not an indispensable party to an action to enjoin municipal officers from making an unauthorized purchase.⁷ Moreover, it has been laid down that the municipality should be made a party to an action to recover funds or personal property wrongfully taken or misapplied;⁸ but the view has also been taken, in the case of an action under a statute to compel the restoration of municipal funds or other property, that the municipality is not a necessary party,⁹ although in such case it has been regarded as a proper party.¹⁰

State or people. Ordinarily the taxpayer need not sue in the name of the state,¹¹ and under some statutes it is error to sue in the name of the state on the relation of the taxpayer.¹² However, the right of taxpayers to maintain a suit in the name of the people on behalf of themselves and other taxpayers interested to compel a municipal officer to account for certain taxes collected by him has been upheld.¹³ Under some statutes an action may be maintained by taxpayers in the name of the state for the penalty imposed because of the wrongful disposal of municipal funds or other property,¹⁴ where the prescribed conditions precedent, discussed supra § 2158, have been performed; but such an

action cannot be maintained in the name of the state on relation of the county attorney.¹⁵ In a suit under a statute it has been held that the state cannot be made a party defendant.¹⁶

The state has been held to be a necessary party to a taxpayer's suit to enjoin collection of a tax which involved the annexation of territory by the municipality only where the annexation is merely voidable; where the annexation involved is absolutely void as beyond the power of the municipality, the state is not a necessary party.¹⁷

e. Municipal or Other Public Officers

Municipal officers are proper parties to taxpayers' suits involving their acts, and may be necessary parties.

The propriety of making certain municipal officers parties to taxpayers' actions has been recognized or upheld,¹⁸ and under some statutes a municipal officer may be a party defendant to a suit to prevent an illegal act, although he may not be guilty of any culpable wrong.¹⁹ Moreover, certain municipal officers have been regarded as necessary parties to particular suits,²⁰ as, for example, a suit to enjoin the perpetration of ultra vires or illegal acts in general²¹ or to restrain enforcement of an illegal ordinance which it is the duty of the officer to enforce.²²

On the other hand, the view has been taken that, since an injunction against the municipality binds its officers and agents, the suit may be brought against the municipality alone without making its officers and agents parties.²³ So, where the primary duty to perform certain acts is on the council, agents

6. Ohio.—Knorr v. Miller, 11 Ohio Dec. (Reprint) 165, 25 Cinc.L.Bul. 128.

7. Minn.—Williams v. Klemmer, 224 N.W. 261, 177 Minn. 44.

8. Okl.—Vaughan v. Latta, 38 P.2d 795, 168 Okl. 492.

Wis.—Coyle v. Richter, 234 N.W. 906, 203 Wis. 590.

44 C.J. p 1424 note 26.

As party defendant

On refusal of municipality to bring the action, it must be joined as a party defendant.

Cal.—Osborn v. Stone, 150 P. 367, 170 Cal. 480.

Wis.—Coyle v. Richter, 234 N.W. 906, 203 Wis. 590.

Amendment of proceedings to include the municipality as a party should be required by the court where taxpayer has failed to do so.—Coyle v. Richter, supra.

9. N.Y.—Hicks v. Cocks, 153 N.Y.S. 776, 167 App.Div. 862.

10. N.Y.—Marjohn Realty Co., Inc. v. Long Beach, 204 N.Y.S. 53, 122 Misc. 763, affirmed 306 N.Y.S. 933,

211 App.Div. 805, 207 N.Y.S. 876, 211 App.Div. 860.

11. Ala.—New Orleans, etc., R. Co. v. Dunn, 51 Ala. 128.

Md.—Baltimore v. Gill, 31 Md. 375.

12. Ohio.—Fischer v. City of Cleveland, 181 N.E. 668, 42 Ohio App. 75.

13. Ill.—People v. Holten, 122 N.E. 540, 287 Ill. 225.

14. Okl.—State v. Muskogee, 172 P. 796, 70 Okl. 19.

44 C.J. p 1424 note 32.

15. Okl.—Territory v. Woolsey, 130 P. 934, 35 Okl. 545, 550.

44 C.J. p 1425 note 34.

16. Mass.—Hodgdon v. Haverhill, 79 N.E. 480, 193 Mass. 406.

17. Tex.—City of Port Arthur v. Gaskin, Civ.App., 107 S.W.2d 610—Town of Griffing Park v. City of Port Arthur, Civ.App., 36 S.W.2d 593.

18. Wis.—Ryan v. Olson, 197 N.W. 727, 183 Wis. 290.

44 C.J. p 1425 note 37.

19. N.Y.—Wenk v. New York, 64 N. E. 509, 171 N.Y. 607.

20. Pa.—Wilson v. City of Philadelphia, 198 A. 893, 330 Pa. 350.

44 C.J. p 1425 notes 40–43.

Boards of aldermen and councilmen were held necessary parties to taxpayer's suit for value or restoration of municipal property which was sold without enactment of ordinance, as required by statute.—Russell v. Bell, 6 S.W.2d 236, 224 Ky. 298.

21. Ala.—Gillespie v. Gibbs, 41 So. 868, 147 Ala. 449.

N.Y.—Barnes v. McGuire, 68 N.Y.S. 485, 33 Misc. 438.

22. Pa.—Wilson v. City of Philadelphia, 198 A. 893, 330 Pa. 350.

23. Ga.—City of Albany v. Lipsey, 84 S.E.2d 513, 199 Ga. 437—Adel v. Woodall, 50 S.E. 481, 122 Ga. 535.

N.Y.—New York State Electric & Gas Corporation v. City of Plattsburg, 6 N.Y.S.2d 419, 163 Misc. 597, modified on other grounds 13 N.Y.S.2d 318, 256 App.Div. 732, 257 App.Div. 1022, modified on other grounds 24 N.E.2d 122, 281 N.Y. 450, reargument denied 26 N.E.2d 812, 282 N.Y. 682.

who act for the council in discharge of such duties are not necessary parties to an action to compel performance thereof by the council.²⁴ There is also authority for the view that officers who have no further action to take in connection with the transaction complained of are not necessary parties to a suit for an injunction;²⁵ and that an officer who is indirectly interested in a transaction pursuant to which a conveyance of municipal property was made is not a necessary party to a suit to rescind the conveyance.²⁶ Moreover, it has been held that, in an action to recover municipal funds which have been misappropriated, the municipal officers entitled to the custody of such funds are not necessary parties.²⁷

Officers in power when suit brought. In a suit under a taxpayers' statute to enjoin the acts of municipal officers those acting as such at the time of the suit have been considered proper parties defendant,²⁸ and former incumbents, although they were the authors of the initial wrong, are neither necessary²⁹ nor proper³⁰ parties where affirmative relief is not sought against them personally.

Municipal officer as plaintiff taxpayer. The right of a municipal officer to sue in his individual capacity as a taxpayer has been recognized.³¹

Legal officer of municipality. In a suit under a statute it has been held not necessary for the taxpayer to sue in the name of the solicitor.³²

State officers. It is ordinarily held that a ratepayer's or taxpayer's action need not be brought by, or in the name of, the attorney general;³³ nor is it necessary that such officer should be made a party.³⁴ While in some jurisdictions the pro-

priety of a suit by the state's attorney on the relation of a taxpayer has been recognized,³⁵ under some decisions therein it would appear that in such a suit certain relief usually obtainable in a taxpayer's suit cannot be granted.³⁶ Where the expenditure of certain funds by the municipality requires the approval of a specified state officer, such officer is a necessary party to an action to restrain such expenditure.³⁷

f. Contractors and Other Persons Dealing with Municipality or with Municipal Authorities

As a general rule, all persons dealing with the municipal corporation or its officers who are interested in the subject matter of the suit and whose rights will be affected by the decree should be made parties to a taxpayers' suit.

Under general rules, all persons dealing with the municipal corporation or with municipal officers, who are materially interested in the subject matter of a taxpayers' suit in equity should be made parties if their rights are to be affected by the decree.³⁸ Thus it is usually held that, in a suit to set aside or annul,³⁹ or to restrain the performance of,⁴⁰ a contract, the person who contracted with the municipal corporation should be made a party, as for example in suits to restrain payments under such contracts.⁴¹ Moreover, the view has been taken that in a proceeding by certiorari instituted by a taxpayer to review a contract the contractor should be made a party.⁴² There is, however, authority for the view that the contractor is not an indispensable party to a suit to enjoin the municipality from performing a contract,⁴³ including the making of payments under the con-

Pa.—White v. Peoples, Com.Pl., 32 Del.Co. 368, 35 Mun.L.R. 241.

24. Ga.—Screws v. City of Atlanta, 8 S.E.2d 16, 189 Ga. 839.

25. N.Y.—Gibbs v. Luther, 143 N.Y. S. 90, 81 Misc. 611, affirmed 143 N.Y.S. 1118, 158 App.Div. 951. 44 C.J. p 1425 note 46.

26. Wis.—Ryan v. Olson, 197 N.W. 727, 183 Wis. 290.

27. N.C.—Brown v. Walker, 123 S. E. 633, 188 N.C. 52.

28. N.Y.—Wenk v. New York, 64 N. E. 509, 171 N.Y. 607.

29. N.Y.—Wenk v. New York, supra.

30. N.Y.—Wenk v. New York, supra.

Held proper party

Neb.—Taxpayers League of Wayne County v. Wightman, 396 N.W. 886, 139 Neb. 212.

31. Ala.—Gillespie v. Gibbs, 41 So. 868, 147 Ala. 449. 44 C.J. p 1425 note 53.

32. Ohio.—Cincinnati St. R. Co. v. Smith, 29 Ohio St. 291.

33. Tenn.—Colburn v. Chattanooga, 2 Tenn.Cas. 22. 44 C.J. p 1425 notes 55, 56.

34. Ala.—New Orleans, etc., R. Co. v. Dunn, 51 Ala. 128. 44 C.J. p 1425 note 56.

35. Ill.—Jackson v. Norris, 72 Ill. 364.

Restrain public nuisance

Ohio.—Fischer v. City of Cleveland, 181 N.E. 668, 42 Ohio App. 75.

36. Ill.—Streuber v. Alton, 149 N.E. 577, 319 Ill. 43, 41 L.R.A., N.S., 1405.

37. Ill.—Capesius v. Moulton, 12 N. E.2d 911, 293 Ill.App. 630.

38. Mont.—Montana-Dakota Utili-

ties Co v. City of Havre, 94 P.2d 660, 109 Mont. 164.

44 C.J. p 1426 note 60.

39. N.Y.—Page v. Gallup, 191 P. 460, 26 N.M. 239. 44 C.J. p 1426 note 61.

40. Ala.—Balsden v. City of Greenville, 111 So. 2, 215 Ala. 512. 44 C.J. p 1426 note 62.

41. La.—Wilkinson v. Poag, App., 181 So. 27. 44 C.J. p 1426 note 63.

Issuing notes and bonds

Improvement contractor was held necessary party in taxpayer's action to enjoin city from issuing notes and bonds under contract.—Balsden v. City of Greenville, 111 So. 2, 215 Ala. 512.

42. N.J.—Cunningham v. Merchantville, 39 A. 639, 61 N.J.Law 466.

43. Mont.—Davenport v. Kleinschmidt, 13 P. 249, 6 Mont. 502,

tract,⁴⁴ and in a suit to restrain municipal officers from making an unauthorized purchase and paying therefor the seller is not an indispensable party.⁴⁵ It has been held that, in a suit to prevent entering into a contract, the proposed contractor is a necessary party.⁴⁶ On the other hand, it has been held that the proposed contractor is not even a proper party to a suit by a taxpayer to restrain the execution of a contract as directed by an ordinance.⁴⁷

Holders of bonds or other evidence of indebtedness. It is usually held that, in a suit to cancel municipal bonds, to enjoin their payment or the payment of interest thereon, or otherwise to determine their validity, where the bonds have been delivered, the holders of such bonds must be made parties.⁴⁸ Similarly, in a suit to cancel, or to enjoin the payment of, warrants, the holders of such warrants are necessary parties,⁴⁹ as are the owners and holders of notes and a trust deed in an action to enjoin the payment of installments on an executed contract to purchase realty under which the notes and trust deed were issued.⁵⁰ Moreover, the view has been taken that, in a proceeding by certiorari to review the issuance of bonds in payment of work done under a contract, the contractor to whom they were issued should be made a party.⁵¹ On the other hand, it has been held that, in an action to compel the return of certain bonds to the municipality which issued them, the holders of such

bonds who reside beyond the jurisdiction of the court are not indispensable parties,⁵² and, as discussed *infra* § 2172, that, where no fact is alleged which would affect their title to the bonds held by them, their omission as parties is not ground for reversal. The holder of a municipal note has also been held not to be an indispensable party to an action to restrain collection of a tax to pay it where the issue was the authority of the municipal officers to construct an improvement, funds for which were lent to the municipality on the security of the note,⁵³ although, as discussed *infra* § 2168, the court could not enter a decree invalidating the note without joining the noteholder as a party defendant.

Sureties on bond of municipal officer. Sureties on the bond of a municipal officer have been regarded as proper parties defendant in an action to compel such officers to pay over certain funds to the municipality.⁵⁴ On the other hand, in an action under a statute to recover a penalty for misappropriation of municipal funds, the view has been taken that sureties on the official bonds of the officers charged with the misappropriation are not proper parties.⁵⁵

Miscellaneous illustrations. In the notes will be found illustrations of cases in which certain persons or corporations have been held to be⁵⁶ or not to be⁵⁷ proper or necessary parties.

appeal dismissed 12 S.Ct. 983, 145 U.S. 644, 36 L.Ed. 859.
44 C.J. p 1426 note 65.

44. Mont.—Davenport v. Kleinschmidt, 20 P. 823, 8 Mont. 467—Davenport v. Kleinschmidt, 13 P. 249, 6 Mont. 502, appeal dismissed 12 S.Ct. 983, 145 U.S. 641, 36 L.Ed. 859.

45. Minn.—Williams v. Klemmer, 224 N.W. 261, 177 Minn. 44.

46. N.Y.—Jensen v. Schenectady Bd. of Contract, etc., 134 N.Y.S. 630, 74 Misc. 641.

Tex.—Basham v. Holcombe, Civ. App., 240 S.W. 691.

47. Ohio—Johnson v. Farley, 11 Ohio S. & C.P. 639, 8 Ohio N.P. 498.

44 C.J. p 1426 note 69.

48. U.S.—Bristow Battery Co. v. Board of Com'rs of Rogers County, Okl., C.C.A.Okl., 38 F.2d 562, certiorari denied Board of County Com'rs of Rogers County, Okl. v. Bristow Battery Co., 51 S.Ct. 23, 282 U.S. 843, 75 L.Ed. 748.

Tex.—Lowe v. City of Del Rio, 122 S.W.2d 191, 132 Tex. 111—Dwyer v. Hackworth, 57 Tex. 245—Hay-

ward v. City of Corpus Christi, Civ.App., 195 S.W.2d 995

44 C.J. p 1427 note 78

49. Tex.—Lowe v. City of Del Rio, 122 S.W.2d 191, 132 Tex. 111.

44 C.J. p 1426 note 71.

50. Ill.—Stripe v. Yager, 180, N.E. 915, 348 Ill. 362

51. N.J.—Cunningham v. Merchantville, 39 A. 639, 61 N.J.Law 466.

52. Cal.—Mock v. Santa Rosa, 58 P. 826, 126 Cal. 330.

53. Cal.—Holman v. Santa Cruz County, App., 205 P.2d 767.

54. Minn.—Burns v. Essling, 191 N.W. 899, 154 Minn. 304.

44 C.J. p 1427 note 75.

55. Okl.—State v. Muskogee, 172 P. 796, 70 Okl. 19.

56. N.Y.—Marjohn Realty Co., Inc. v. Long Beach, 204 N.Y.S. 53, 122 Misc. 763, affirmed 206 N.Y.S. 933, 211 App.Div. 805, 207 N.Y.S. 876, 211 App.Div. 860.

44 C.J. p 1427 note 77.

Federal public works administrator

U.S.—California Water Service Co. v. City of Redding, D.C.Cal., 22 F. Supp. 641. Affirmed 58 S.Ct. 865, 304 U.S. 252, 82 L.Ed. 1323—Iowa Southern Utilities Co. v. Town of

Lamoni, D.C.Iowa, 11 F.Supp. 581, appeal dismissed, C.C.A., Iowa Southern Utilities Co. v. Town of Lamoni, Iowa, 79 F.2d 1000.

Alleged lender of temporary loan to city for construction of building and alleged contractors for construction of building were materially interested in subject matter of suit to enjoin distribution of proceeds of loan and construction of building, and they were necessary parties, since their rights would be directly affected by final decree.—Hamilton v. City of Anniston, 27 So.2d 857, 248 Ala 396.

57. Cal.—Reed v. Wing, 144 P. 964, 168 Cal. 706.

44 C.J. p 1427 note 78.

United States or its agencies

N.Y.—American Dock Co. v. City of New York, 21 N.Y.S.2d 943, 174 Misc. 813, affirmed 26 N.Y.S.2d 704, 261 App.Div. 1063, affirmed 36 N.E.2d 696, 286 N.Y. 658—New York State Electric & Gas Corporation v. City of Plattsburgh, 12 N.Y.S.2d 318, 256 App.Div. 732, 257 App. Div. 1022, modified on other grounds 24 N.E.2d 122, 281 N.Y. 450, reargument denied 26 N.E.2d 812, 282 N.Y. 682.

g. Joinder

Taxpayers may join as parties plaintiff in a taxpayers' suit.

Taxpayers may join as parties plaintiff, in a taxpayers' suit,⁵⁸ although some are resident and others nonresident taxpayers.⁵⁹ The joinder of the lowest bidder for a municipal contract with a taxpayer in a taxpayer's action to enjoin the award of the contract to any other person has been held not a misjoinder of parties.⁶⁰ The propriety of the joinder of the state by the state's attorney with a taxpayer as parties plaintiff, in a suit to restrain enforcement of a rule of a municipal board of education, has been recognized.⁶¹

A taxpayer suing on behalf of the municipal corporation to recover municipal funds illegally paid out may unite as defendants all against whom any relief is asked, and whose right will be affected by the determination of the action.⁶² Where the one common right which it is sought to establish is a decree that a municipal board is without authority to create a certain indebtedness, the joinder as defendants in a suit for an injunction and cancellation of two persons to whom notes were given in different capacities was proper.⁶³

h. Intervention

Persons with an interest in the subject matter of a taxpayers' suit ordinarily may intervene to protect their rights.

While a stranger without any interest needing protection in a taxpayers' suit is not entitled to intervene therein,⁶⁴ one who actually has an interest in the subject matter thereof ordinarily may intervene to protect his rights.⁶⁵ However, the prospective grantee of a franchise which taxpayers seek to enjoin does not have such an interest which entitles him to intervene.⁶⁶ Under general rules the right of intervention in taxpayers' actions has been recognized in particular instances where the right to intervene was sought by the municipality,⁶⁷ by another taxpayer,⁶⁸ or by third persons.⁶⁹ However, one not a taxpayer is not entitled to intervene in behalf of the municipality.⁷⁰ The application of a taxpayer to intervene in a taxpayer's action as plaintiff has been denied where the action had been pending for six years and applicant would not have been a competent party when the action was begun.⁷¹

Petition to intervene. The form and sufficiency of a petition to intervene in a taxpayers' suit are governed by general rules.⁷² It must show sufficient interest in the petitioner to entitle him to intervene.⁷³ In the absence of statute or rule, the petition need not be verified.⁷⁴ A petition to intervene in a taxpayers' suit is addressed to the sound discretion of the court,⁷⁵ but it should be granted if sufficient grounds therefor appear.⁷⁶

58. N.Y.—Burland Printing Co. v. La Guardia, 9 N.Y.S.2d 616.

44 C.J. p 1427 note 79.

Joinder of parties in actions by or against municipal corporations generally see *infra* § 2204.

59. Ga.—Board of Lights, etc., v. Dobbs, 105 S.E. 611, 151 Ga. 53.

La.—Sentell v. Avoyelles Parish Police Jury, 18 So. 910, 48 La. Ann. 96.

60. N.Y.—Burland Printing Co. v. La Guardia, 9 N.Y.S.2d 616.

61. Ill.—People v. Chicago, 199 Ill. App. 356.

62. Minn.—Burns v. Van Buskirk, 203 N.W. 608, 163 Minn. 48. 44 C.J. p 1427 note 82.

63. Ga.—Brumby v. Board of Lights, etc., 95 S.E. 7, 147 Ga. 592.

64. Ga.—Morris v. City Council of Augusta, 48 S.E.2d 855, 204 Ga. 26.

65. Ga.—Morris v. City Council of Augusta, *supra*.

66. N.C.—Mullen v. Town of Louisville, 33 S.E.2d 484, 225 N.C. 53.

67. Ind.—Bollenbacher v. Harris, 148 N.E. 417, 196 Ind. 657. 44 C.J. p 1427 note 86.

Procedure

Municipality does not make an appearance and become a party to the action by counsel signing a brief for the city and its officers; leave of the court must be sought and granted.—Schumacher v. Klitzing, 187 N.E. 458, 353 Ill. 530.

68. Ark.—Laman v. Moore, 100 S.W. 2d 971, 193 Ark. 446.

Ind.—Barnard v. Kruzan, 46 N.E.2d 238, 221 Ind. 208. 44 C.J. p 1427 note 87.

69. Ind.—Bollenbacher v. Harris, 148 N.E. 417, 196 Ind. 657. 44 C.J. p 1427 note 88.

Payment of pension

In suit to enjoin payment of pension to retired officer, he was entitled to intervene as an interested party.—Morris v. City Council of Augusta, 48 S.E.2d 855, 204 Ga. 26.

70. U.S.—Carney v. City of Grinnell, Iowa, C.C.A. Iowa, 53 F.2d 44. Intervention by taxpayer in suit affecting municipality or officers thereof see *supra* § 2124.

71. N.Y.—Coyne v. Yonkers, 109 N.Y.S. 625, 57 Misc. 366.

72. Ind.—Barnard v. Kruzan, 46 N.E.2d 238, 221 Ind. 208.

Scandalous matter; sham pleading

Taxpayer's petition to intervene in another taxpayer's class action for construction of will bequeathing sums in trust for city, on ground that plaintiff would compromise action to detriment of all taxpayers and that there would be collusion and fraud, was not scandalous or such a sham pleading as could be struck out under statute.—Barnard v. Kruzan, *supra*.

73. Ga.—City of Macon v. Ries, 181 S.E. 782, 181 Ga. 166.

Ind.—Barnard v. Kruzan, 46 N.E.2d 238, 221 Ind. 208.

Mich.—Hays v. City of Kalamazoo, 25 N.W.2d 787, 316 Mich. 443.

74. Ind.—Barnard v. Kruzan, 46 N.E.2d 238, 221 Ind. 208.

75. Ind.—Barnard v. Kruzan, *supra*. Mich.—Hays v. City of Kalamazoo, Mich., 25 N.W.2d 787, 316 Mich. 443.

Discretion held not abused

Mich.—Hays v. City of Kalamazoo, Mich., *supra*.

76. Ind.—Barnard v. Kruzan, 46 N.E.2d 238, 221 Ind. 208.

§ 2163. Process

Process in actions by or against municipal corporations is considered *infra* § 2205.

Examine Pocket Parts for later cases.

§ 2164. Pleading

- a. Complaint, petition, or bill
- b. Plea or answer; cross bill or cross complaint
- c. Demurrer and motions
- d. Amended and supplemental pleadings
- e. Issues, proof, and variance

a. Complaint, Petition, or Bill

(1) In general

77. Ky.—Louisville & N. R. Co. v. City of Jackson, 186 S.W.2d 1051, 281 Ky. 639.

78. Cal.—Pratt v. Security Trust & Savings Bank, 59 P.2d 862, 15 Cal. App.2d 630—Los Angeles Athletic Club v. City of Long Beach, 17 P.2d 1061, 128 Cal.App. 427.

Mass.—Amory v. Assessors of Boston, 37 N.E.2d 459, 310 Mass. 199, 44 C.J. p 1428 note 98.

Alternative pleading

Allegation that local housing authority could complete its program only by diverting tax funds levied for other purposes or by an increase in the assessment was not sufficient to authorize injunction restraining local housing authority from performing its functions, since, allegation being in the alternative, conversion of funds levied for other purposes was not charged, but only the necessity for increase in tax assessment.—Woodworth v. Gallman, 10 S.E.2d 316, 195 S.C. 157.

Prayer for relief

A bill in a taxpayer's suit in behalf of a municipality containing a prayer for general relief is not rendered insufficient because it also contains a prayer for specific relief for the benefit of the taxpayer as an individual.—R. D. Lamar, Inc., v. Ray, 182 So. 292, 132 Fla. 704.

79. Ala.—Balsden v. City of Greenville, 111 So. 2, 215 Ala. 512.
Ark.—Pruitt v. Pine Bluff Water & Sewer Extension Dist. No. 2, 214 S.W.2d 489.

Cal.—Pratt v. Security Trust & Savings Bank, 59 P.2d 862, 15 Cal.App.2d 630—Los Angeles Athletic Club v. City of Long Beach, 17 P.2d 1061, 128 Cal.App. 427.

Fla.—Dickey v. Broward County Port Authority, 185 So. 349, 135 Fla. 622—Ranger Realty Co. v. Miller, 136 So. 546, 102 Fla. 378.

Ga.—Mayor and Aldermen of Savannah v. Fawcett, 197 S.E. 253, 186 Ga. 132.

Ill.—Price v. City of Mattoon, 4 N.E.2d 850, 384 Ill. 512.

Kan.—Lewis v. City of South Hutchinson, 174 P.2d 51, 162 Kan. 104—Kansas Utilities Co. v. City of Paola, 80 P.2d 1084, 148 Kan. 267.

Ky.—King v. Rowland, 168 S.W.2d 755, 293 Ky. 198—Waddle v. City of Somerset, 134 S.W.2d 956, 281 Ky. 30—Rowland v. City of Paris, 13 S.W.2d 791, 227 Ky. 570.

Mass.—Amory v. Assessors of Boston, 37 N.E.2d 459, 310 Mass. 199.
Mont.—Grady v. City of Livingston, 141 P.2d 346, 115 Mont. 47.

N.Y.—Klein v. O'Dwyer, 80 N.Y.S.2d 343, 192 Misc. 421—Davidson v. City of Elmira, 44 N.Y.S.2d 302, 180 Misc. 1052, affirmed 46 N.Y.S.2d 655, 267 App.Div. 797, appeal denied 47 N.Y.S.2d 604, 267 App.Div. 926—Birch v. Huile, 9 N.Y.S.2d 450, 169 Misc. 1011, affirmed 11 N.Y.S.2d 839, 256 App.Div. 1057.

Ohio.—City of Columbus ex rel. Falter v. Columbus Metropolitan Housing Authority, Com.Pl., 67 N.E.2d 338, affirmed, App., 68 N.E.2d 108.

Pa.—Book v. Hall, Com.Pl., 47 Dauph.Co. 293, affirmed 15 A.2d 355, 339 Pa. 470.

Tex.—Spears v. City of South Houston, 150 S.W.2d 74, 136 Tex. 218—Rote v. Bexar County Water Control & Improvement Dist. No. 4, Civ.App., 91 S.W.2d 1095, error dismissed.

44 C.J. p 1428 note 99.

Jurisdictional facts

(1) Jurisdictional facts must be alleged.—Welling v. Buck, 53 N.Y.S.2d 281, 184 Misc. 322.

(2) Complaint held sufficient.—Dowling v. Board of Assessors of City of Boston, 168 N.E. 73, 268 Mass. 480.

Contract must be set forth if relief sought depends on its invalidity.—Lewis v. City of South Hutchinson, 174 P.2d 51, 162 Kan. 104.

(2) Compliance with conditions

(3) Description of, and statement as to, parties; capacity of plaintiff

(4) Interest of plaintiff and injury or damage

(1) In General

As a general rule, the complaint in a taxpayer's suit must allege all the facts necessary to authorize the relief demanded.

Except as statute may otherwise provide,⁷⁷ general rules as to complaints, petitions, or bills apply in taxpayers' actions.⁷⁸ Thus, it must ordinarily allege all facts necessary to authorize the relief demanded,⁷⁹ as, for example, the facts showing illegality or lack of authority,⁸⁰ fraud, collusion,

Illegality of settlement by municipality

N.Y.—Herder v. Clifford, 230 N.Y.S. 464, 132 Misc. 666, appeal dismissed 232 N.Y.S. 56, 225 App.Div. 780, affirmed 234 N.Y.S. 811, 227 App.Div. 645, reversed on other grounds 169 N.E. 118, 252 N.Y. 141.

Answer as taxpayer's action

N.Y.—Petition of Board of Fire Com'rs of Columbia-Litchfield Fire Dist., 29 N.Y.S.2d 605.

80. Ala.—Hamilton v. City of Aniston, 27 So.2d 857, 248 Ala. 396.
Ga.—Lee v. City of Atlanta, 29 S.E.2d 774, 197 Ga. 518.

Kan.—Lewis v. City of South Hutchinson, 174 P.2d 51, 162 Kan. 104.

Ky.—Waddle v. City of Somerset, 134 S.W.2d 956, 281 Ky. 30—Davis v. City of Newport, 40 S.W.2d 281, 239 Ky. 610.

Mass.—Amory v. Assessors of Boston, 37 N.E.2d 459, 310 Mass. 199—Ashton v. Treasurer of City of Fall River, 191 N.E. 393, 287 Mass. 276.

N.Y.—Clark v. City of New York, 28 N.Y.S.2d 182, 262 App.Div. 855, reargument denied 29 N.Y.S.2d 152, 262 App.Div. 871, appeal denied 36 N.E.2d 917, 286 N.Y. 731—Goldstein v. Mills, 57 N.Y.S.2d 810, 185 Misc. 851, affirmed 62 N.Y.S.2d 619, 270 App.Div. 930—Davidson v. City of Elmira, 44 N.Y.S.2d 302, 180 Misc. 1052, affirmed 46 N.Y.S.2d 655, 267 App.Div. 797, appeal denied 47 N.Y.S.2d 604, 267 App.Div. 926—Kahn v. Blinn, 60 N.Y.S.2d 413—Bartholomew v. Village of Endicott, 59 N.Y.S.2d 84.

Okl.—State ex rel. Woods v. Cole, 63 P.2d 730, 178 Okl. 567.

Pa.—Cavanaugh v. Mayor of City of Scranton, Com.Pl., 39 Lack.Jur. 153.

Tenn.—Terry v. Commissioners of Cookeville, 198 S.W.2d 1010, 184 Tenn. 347.

44 C.J. p 1428 note 1.

or bad faith,⁸¹ failure to perform duties specifically imposed,⁸² or the waste of, or injury to, municipal property,⁸³ as a necessary element of plaintiff's right to relief. Where the suit is in behalf of the municipal corporation, the complaint must disclose a ground of recovery in such behalf.⁸⁴ A complaint not based on or not involving the noncompliance with statutory provisions need not negative such compliance.⁸⁵

Certainty; conclusions. In accordance with general rules, the allegations must be definite and certain;⁸⁶ and all matters of substance must be alleged positively and not in the form of recitals.⁸⁷ Issuable facts and not mere conclusions or general

allegations must, under general rules, be alleged in the complaint or bill.⁸⁸ This rule applies to allegations as to illegality or lack of authority,⁸⁹ as to fraud, collusion, or bad faith,⁹⁰ and as to waste of, or injury to, municipal property.⁹¹ Conversely, allegations of facts sufficient to bring the case within a statutory provision giving a taxpayer the right to sue have been held sufficient, notwithstanding a failure to characterize in the words of the statute the acts complained of.⁹²

Miscellaneous illustrations. In the notes will be found illustrations of complaints, petitions, or bills which have been regarded as sufficient⁹³ or insuffi-

Ultra vires acts

Cal.—Pratt v. Security Trust & Savings Bank, 59 P.2d 862, 15 Cal.App. 2d 630.

Sufficient allegations

Mass.—Burt v. Municipal Council of Taunton, 172 N.E. 230, 272 Mass. 130.

Insufficient allegations

N.Y.—French v. McGoldrick, 4 N.Y. S.2d 306, 254 App.Div. 744, affirmed 16 N.E.2d 300, 278 N.Y. 645—Neufeld v. O'Dwyer, 79 N.Y.S.2d 53, 192 Misc. 538—Birch v. Hule, 9 N.Y.S.2d 450, 169 Misc. 1011, affirmed 11 N.Y.S.2d 839, 256 App.Div. 1057. Tex.—Mayer v. Kostas, Civ.App., 71 S.W.2d 398, error refused.

Validated acts

Petition was demurrable where challenged acts and proceedings occurred prior to enactment of statute validating them.—Woodworth v. Gallman, 10 S.E.2d 316, 195 S.C. 157.

81. Cal.—Hodgeman v. City of San Diego, 128 P.2d 412, 53 Cal.App.2d 610—Pratt v. Security Trust & Savings Bank, 59 P.2d 862, 15 Cal.App.2d 630.

Kan.—Lewis v. City of South Hutchinson, 174 P.2d 51, 162 Kan. 104.

Mass.—Ashton v. Treasurer of City of Fall River, 191 N.E. 393, 287 Mass. 276.

N.Y.—Browne v. Walker, 229 N.Y.S. 26, 131 Misc. 736—Kahn v. Blinn, 60 N.Y.S.2d 413.

44 C.J. p 1428 note 2.

Where illegality is not shown, complaint in a taxpayer's action to prevent action by a municipal official must allege fraud, collusion, corruption, or bad faith.—Talcott v. City of Buffalo, 26 N.E. 363, 125 N.Y. 280—Klein v. O'Dwyer, 80 N.Y.S. 2d 343, 192 Misc. 421.

Filing constructive fraud held sufficient.—Taxpayers League of Wayne County v. Wightman, 296 N.W. 886, 139 Neb. 212.

Insufficient allegations

Mass.—Dealtry v. Selectmen of

Town of Watertown, 180 N.E. 621, 279 Mass. 22.

N.Y.—French v. McGoldrick, 4 N.Y.S.2d 306, 254 App.Div. 744, affirmed 16 N.E.2d 300, 278 N.Y. 645.

82. Cal.—Pratt v. Security Trust & Savings Bank, 59 P.2d 862, 15 Cal.App.2d 630.

Conn.—English v. Smith, 196 A. 781, 123 Conn. 572.

Okl.—State ex rel. Woods v. Elk City, 62 P.2d 1203, 178 Okl. 521.

83. Kan.—Lewis v. City of South Hutchinson, 174 P.2d 51, 162 Kan. 104.

Ky.—Waddle v. City of Somerset, 134 S.W.2d 956, 281 Ky. 30.

N.Y.—Lewis v. Board of Education of New York City, 179 N.E. 315, 258 N.Y. 117—Birch v. Hule, 9 N.Y.S.2d 450, 169 Misc. 1011, affirmed 11 N.Y.S.2d 839, 256 App.Div. 1057.

44 C.J. p 1428 note 3.

Specification of waste

Allegations in taxpayer's action as to illegality of appropriations contained in budget were sufficient without specifying waste.—Wilmerding v. LaGuardia, 52 N.Y.S.2d 169, 268 App.Div. 496, motion denied 52 N.Y.S.2d 941, 268 App.Div. 1027.

Allegations held sufficient

N.Y.—Ford v. Walker, 237 N.Y.S. 545, 227 App.Div. 416.

84. Okl.—State ex rel. Woods v. Elk City, 62 P.2d 1203, 178 Okl. 521.

85. Conn.—English v. Smith, 196 A. 781, 123 Conn. 572.

86. Ga.—Mayor and Aldermen of Savannah v. Fawcett, 197 S.E. 253, 186 Ga. 132.

Kan.—Lewis v. City of South Hutchinson, 174 P.2d 51, 162 Kan. 104.

Ky.—Waddle v. City of Somerset, 134 S.W.2d 956, 281 Ky. 30.

Tex.—Spears v. City of South Houston, Civ.App., 137 S.W.2d 197, affirmed 150 S.W.2d 74, 136 Tex. 218.

44 C.J. p 1428 note 5.

Information and belief

In absence of demurrer, allegations on information and belief are

sufficient.—Stripe v. City of Waukegan, 254 Ill.App. 74.

87. Cal.—Pratt v. Security Trust & Savings Bank, 59 P.2d 862, 15 Cal.App.2d 630.

88. S.C.—Woodworth v. Gallman, 10 S.E.2d 316, 195 S.C. 157.

Tex.—Mayer v. Kostas, Civ.App., 71 S.W.2d 398, error refused.

44 C.J. p 1428 note 8.

89. N.Y.—Blanshard v. City of New York, 253 N.Y.S. 419, 141 Misc. 609, affirmed 257 N.Y.S. 973, 236 App.Div. 663, affirmed 186 N.E. 29, 262 N.Y. 5—Kahn v. Blinn, 60 N.Y.S. 2d 413.

44 C.J. p 1428 note 9.

90. N.Y.—Blanshard v. City of New York, 253 N.Y.S. 419, 141 Misc. 609, affirmed 257 N.Y.S. 973, 236 App.Div. 663, affirmed 186 N.E. 29, 262 N.Y. 5.

44 C.J. p 1429 note 10.

Innuendoes and legal conclusions

Demurrer was properly sustained where no facts were alleged showing fraud but only innuendoes and legal conclusions were relied on by plaintiff.—Hodgeman v. City of San Diego, 128 P.2d 412, 53 Cal.App.2d 610.

91. N.Y.—Bush v. Coler, 69 N.Y.S. 770, 60 App.Div. 56, affirmed 63 N.E. 1115, 170 N.Y. 587.

92. N.Y.—Hicks v. Cocks, 153 N.Y.S. 776, 167 App.Div. 862.

93. Fla.—Smith v. City of Winter Haven, 18 So.2d 4, 154 Fla. 439.

Ky.—King v. Rowland, 168 S.W.2d 755, 293 Ky. 198—Waddle v. City of Somerset, 134 S.W.2d 956, 281 Ky. 30.

La.—People's Gas & Fuel Co. v. Town of Ruston, 141 So. 36, 174 La. 485.

Md.—Matthaei v. Housing Authority of Baltimore City, 9 A.2d 835, 177 Md. 506.

Mass.—Bell v. Treasurer of Cambridge, 38 N.E.2d 660, 310 Mass. 484.

Mont.—Grady v. City of Livingston, 141 P.2d 346, 115 Mont. 47.

N.Y.—Wilmerding v. LaGuardia, 52 N.Y.S.2d 169, 268 App.Div. 496, mo-

cient.⁸⁴

(2) Compliance with Conditions

The plaintiff in a taxpayer's suit should allege facts which show compliance with conditions on which his right to sue depends.

Under general rules plaintiff should allege facts which show compliance with conditions on which his right to sue depends.⁸⁵ Thus, where his right to sue depends on his having requested the municipality or the municipal authorities to take the steps necessary for the proper protection of the interests of the municipality and of the taxpayers unless such request would be useless, he should allege that he made such request⁸⁶ and that it was

refused,⁸⁷ or he should allege such facts as will show that such request would be useless or a mere idle ceremony.⁸⁸ Where a statute requires objections to be made to the council against a proposed bond issue, the complaint in an action to enjoin the issuance of such bonds must allege that objections were so made.⁸⁹

(3) Description of, and Statement as to, Parties; Capacity of Plaintiff

The complaint in a taxpayer's suit should show that the plaintiff suing as such is a taxpayer.

Where plaintiff sues as a taxpayer, his pleading should show that he is a taxpayer.¹ Moreover, it has been held that ordinarily the complaint or bill

tion denied 52 N.Y.S.2d 941, 268 App.Div. 1027—American LaFrance & Foamite Corporation v. City of New York, 283 N.Y.S. 899, 246 App. Div. 699.

Wis.—Horlick v. Swoboda, 267 N.W. 38, 221 Wis. 373.
44 C.J. p 1429 note 14.

Action to declare contract void

Colo.—Ferch v. Hansen, 174 P.2d 719, 115 Colo. 366.

Wash.—Washington Fruit & Produce Co. v. City of Yakima, 100 P.2d 8, 3 Wash.2d 152, 128 A.L.R. 159, opinion adhered to 103 P.2d 1106, 3 Wash.2d 152.

Attack on municipal resolution

N.Y.—Elbert v. Village of North Hills, 28 N.Y.S.2d 172, 262 App. Div. 856, reargument denied 29 N.Y.S.2d 152, 262 App.Div. 872.

Cancellation of instruments

Cal.—Mahoney v. City and County of San Francisco, 257 P. 49, 201 Cal. 248.

Fla.—R. D. Lamar, Inc. v. Ray, 182 So. 292, 132 Fla. 704.

Restraining action

(1) In general.
Colo.—Fredericksen v. City and County of Denver, 81 P.2d 378, 102 Colo. 508.

Ill.—Miller v. City of Chicago, 180 N.E. 627, 348 Ill. 34.

Mont.—Commonwealth Public Service Co. of Montana v. City of Deer Lodge, 28 P.2d 472, 96 Mont. 15.

N.Y.—Bartholomew v. Village of Endicott, 59 N.Y.S.2d 84.

Ohio.—Morrow v. City of Cleveland, 56 N.E.2d 333, 73 Ohio App. 460.

(2) Bill to enjoin issuance of bonds.

Ga.—Cochran v. City of Thomasville, 146 S.E. 462, 167 Ga. 679.

Kan.—Kansas Utilities Co. v. City of Paola, 80 P.2d 1084, 148 Kan. 267.

Okl.—Livesay v. Town of Webb City, 277 P. 1036, 137 Okl. 81.

Va.—Appalachian Electric Power Co.

v. Town of Galax, 4 S.E.2d 390, 173 Va. 329.

44 C.J. p 1429 note 14 [b] (5)-(7).

(3) Bill to enjoin misuse of funds.
—Wolgammood v. Village of Constantine, 290 N.W. 388, 292 Mich. 222—44 C.J. p 1429 note 14 [b] (9)-(14).

(4) Complaint to enjoin performance of contract.—Cranak v. Link, 17 N.W.2d 359, 219 Minn. 112—44 C.J. p 1429 note 14 [b] (1), (3).

94. Cal.—O'Connell v. City and County of San Francisco, 284 P. 655, 204 Cal. 1

Ga.—Lee v. City of Atlanta, 29 S.E. 2d 774, 197 Ga. 518.

44 C.J. p 1429 note 15.

Injunction

Ga.—Behr v. City of Macon, 21 S.E. 2d 169, 194 Ga. 334.

Ill.—Illinois Anti-Vivisection Soc. v. City of Chicago, 7 N.E.2d 379, 289 Ill.App. 391—Baltzer v. City of Chicago, 260 Ill.App. 384.

Kan.—Lewis v. City of South Hutchinson, 174 P.2d 51, 162 Kan. 104.

Ky.—Rowland v. City of Paris, 13 S.W.2d 791, 227 Ky. 570.

Mass.—Amory v. Assessors of Boston, 37 N.E.2d 459, 310 Mass. 199.

44 C.J. p 1429 note 15 [a].

Recovery of unlawful payments

Conn.—English v. Smith, 196 A. 781, 123 Conn. 572.

95. Cal.—Sturgeon v. City of Hawthorne, 289 P. 229, 106 Cal.App. 352.

44 C.J. p 1429 note 17.

Tender or payment of taxes

Ga.—Behr v. City of Macon, 21 S.E. 2d 169, 194 Ga. 334—Mayor and Aldermen of Savannah v. Fawcett, 197 S.E. 253, 186 Ga. 132.

96. Ga.—Holt v. City of Fayetteville, 149 S.E. 892, 169 Ga. 126.

Ky.—Commonwealth, by and through, Barton v. Mauney, 80 S.W.2d 568, 258 Ky. 429—Wagner v. Wallingford, 76 S.W.2d 826, 257 Ky. 477.

Tex.—City of Corpus Christi ex rel.

Harris v. Flato, Civ.App., 83 S.W. 2d 433, error dismissed.

44 C.J. p 1429 note 19.

Service of demand

Service of demand signed by specified number of resident taxpayers must be alleged under some statutes.—State ex rel. Higgs v. Muskogee Iron Works, 103 P.2d 101, 187 Okl. 419.

97. Ky.—Wagner v. Wallingford, 78 S.W.2d 326, 257 Ky. 477.

Neb.—Taxpayers League of Wayne County v. Wightman, 296 N.W. 886, 139 Neb. 212.

Tex.—City of Corpus Christi ex rel Harris v. Flato, Civ.App., 83 S.W. 2d 433, error dismissed.

98. Ga.—Behr v. City of Macon, 21 S.E.2d 169, 194 Ga. 334.

Ky.—Commonwealth, by and through Barton v. Mauney, 80 S.W.2d 568, 258 Ky. 429

Neb.—Darnell v. City of Broken Bow, 299 N.W. 274, 139 Neb. 844, 136 A.L.R. 101.

Tex.—City of Corpus Christi ex rel Harris v. Flato, Civ.App., 83 S.W. 2d 433, error dismissed.

44 C.J. p 1429 note 20.

Appearance and resistance by municipality establish that demand would have been idle ceremony.—Darnell v. City of Broken Bow, 299 N.W. 274, 139 Neb. 844, 136 A.L.R. 101.

Officials in office

Petition in suit to recover allegedly excess payments of salary made to city commissioner was held demurrable, where it was not alleged that commissioner was in office when suit was instituted.—Commonwealth, by and through Barton, v. Mauney, 80 S.W.2d 568, 258 Ky. 429.

99. Cal.—Sturgeon v. City of Hawthorne, 289 P. 229, 106 Cal.App. 352.

1. Ky.—Price v. Flannery, 7 S.W.2d 1067, 225 Ky. 486.

44 C.J. p 1430 note 22.

should allege that suit is brought on behalf of all taxpayers as well as those who are named as parties.² However, the omission of such allegation is not fatal where the complaint or bill clearly shows on its face that the right sought to be vindicated is a public right and the primary relief demanded is relief to which the whole body of taxpayers only is entitled.³ Allegations showing plaintiff taxpayer's relations to the municipality, and his request to the solicitor to bring an action, and the refusal of such request, have been held sufficient to show plaintiff's capacity to bring an action under some statutes.⁴

(4) Interest of Plaintiff and Injury or Damage

The complaint in a taxpayer's suit must ordinarily allege facts showing a right or interest in the plaintiff entitling him to sue. Injury must also generally be shown.

Under general rules, in a taxpayer's action, the complaint or bill must allege facts showing a right or interest in plaintiff which entitles him to sue,⁵ distinct from that of the general public.⁶ The general rule that the bill or complaint should show

injury applies,⁷ and the allegations should show that plaintiff's interests as a taxpayer are or will be affected or prejudiced by the act which it is sought to enjoin or to redress.⁸ However, it has been held that the bill or complaint in a suit for an injunction need not show damage or injury other than that which presumably results from the mere violation of the particular right involved.⁹ A complaint shows an injury to plaintiff where it shows that he is a taxpayer and that payments on an unauthorized contract are to be made out of the general treasury of the municipality.¹⁰

Amount of taxes or assessment; increase of tax.

The fact that plaintiff does not state in express terms that the burden of taxation will be increased by the alleged wrongful acts does not render the complaint insufficient;¹¹ it is sufficient for plaintiff to allege facts from which it will appear that the municipality will be deprived of certain revenue which otherwise must be raised by taxation.¹² However, a failure to allege facts from which it appears that plaintiff's taxes would be increased has been regarded as material.¹³ In a suit to en-

Stockholder in taxpaying corporation

Allegation that plaintiff, suing for city's benefit, owned stock in corporation paying city taxes did not show that he was taxpayer.—Price v. Flannery, *supra*.

Allegation held sufficient

Md.—Heath v. Mayor & City Council of Baltimore, 58 A.2d 896.

2. Wis.—Thorndike v. Milwaukee Auditorium Co., 126 N.W. 881, 143 Wis. 1.

44 C.J. p 1430 note 23.

3. Wis.—Thorndike v. Milwaukee Auditorium Co., 126 N.W. 881, 143 Wis. 1.—Cawker v. Milwaukee, 113 N.W. 417, 133 Wis. 85.

4. Ohio—Butler v. Karb, 25 Ohio S. & C.P. 210, 16 Ohio N.P.N.S. 593, reversed on other grounds 117 N.E. 953, 96 Ohio St. 472.

5. Ga.—Holt v. City of Fayetteville, 149 S.E. 892, 169 Ga. 126.

Ill.—Price v. City of Mattoon, 4 N.E. 2d 850, 364 Ill. 512.—Haas v. Lincoln Park Com'rs, 171 N.E. 526, 339 Ill. 491.

N.C.—Corpus Juris cited in Hughes v. Teaster, 166 S.E. 745, 203 N.C. 651. 44 C.J. p 1430 note 28.

Effect of authorization to sue

The fact that court authorized taxpayer and voter to institute action did not deprive commissioner of right to challenge sufficiency of complaint, on ground of want of "special interest" of taxpayer and voter with-in statute.—Knockenmuss v. De Kerkhove, 285 N.W. 441, 65 S.D. 446.

Property owner

Plaintiff failing to state that he was abutting property owner could not sue on behalf of such property owners to enjoin agreement between city and street railway amending franchise to permit operation of motorbuses.—Russell v. Kentucky Utilities Co., 22 S.W.2d 289, 231 Ky. 830, 66 A.L.R. 1238.

6. Md.—Ruark v. International Union of Operating Engineers, Local Union No. 37, 146 A. 797, 157 Md. 576.—Davidson v. Baltimore, 53 A. 1121, 96 Md. 509.

7. Ark.—Lewis v. A. Hirsch & Co., 90 S.W.2d 976, 192 Ark. 209.

Ga.—Perkins v. Mayor, etc., of Madison, 165 SE 811, 175 Ga. 714.

Ill.—Schumacher v. Klitzing, 269 Ill. App. 60, affirmed 187 N.E. 458, 353 Ill. 530.—Illinois Anti-Vivisection Soc. v. City of Chicago, 7 N.E.2d 379, 289 Ill.App. 391.

Md.—Ruark v. International Union of Operating Engineers, Local Union No. 37, 146 A. 797, 157 Md. 576.

Tenn.—Rutherford v. City of Nashville, 79 S.W.2d 581, 168 Tenn. 499.

Tex.—Womack v. City of West University Place, Civ.App., 32 S.W.2d 930.

W.Va.—Baier v. City of St. Albans, 39 S.E.2d 145, 128 W.Va. 630. 44 C.J. p 1430 note 31.

Irreparable injury

Irreparable injury must be shown under some statutes to justify equitable relief.

Ill.—Price v. City of Mattoon, 4 N.E. 2d 850, 364 Ill. 512.

Tex.—Spears v. City of South Houston, 150 S.W.2d 74, 136 Tex. 218.

8. Ark.—Lewis v. A. Hirsch & Co., 90 S.W.2d 976, 192 Ark. 209.

Conn.—Cassidy v. City of Waterbury, 33 A.2d 142, 130 Conn. 237.

Ill.—Price v. City of Mattoon, 4 N.E. 2d 850, 364 Ill. 512.

Iowa.—Donovan Const. Co. v. City of Waterloo, 231 N.W. 499, 211 Iowa 506.

Kan.—Jaeger v. City of Hillsboro, 190 P.2d 420, 164 Kan. 633.

Or.—Morris v. City of Salem, 174 P. 2d 192, 179 Or. 666.

44 C.J. p 1430 note 32.

9. Md.—Baltimore v. Keyser, 19 A. 706, 72 Md. 106.

44 C.J. p 1430 note 33.

10. Iowa.—Hanson v. Hunter, 48 N. W. 1005, 53 N.W. 84, 86 Iowa 722.

11. La.—Handy v. New Orleans, 1 So. 593, 39 La. Ann. 107.

Tex.—City of Wichita Falls v. Cooper, Civ.App., 170 S.W.2d 777.

12. La.—Handy v. New Orleans, 1 So. 593, 39 La. Ann. 107.

Tex.—City of Wichita Falls v. Cooper, Civ.App., 170 S.W.2d 777.

13. Kan.—Robertson v. Kansas City, 56 P.2d 1032, 143 Kan. 726.

Or.—Morris v. City of Salem, 174 P. 2d 192, 179 Or. 666.

Tex.—Texsan Service Co. v. City of Nixon, Civ.App., 158 S.W.2d 88, error refused.—Young v. Taylor, Civ.App., 92 S.W.2d 1075.—Sayles v. Abilene, Civ.App., 196 S.W. 1000.

Allegations held insufficient

U.S.—Missouri Utilities Co. v. City

join the misapplication of public funds, it is not necessary to allege the amount of taxes paid or to be paid by plaintiff.¹⁴ Where the statute requires that plaintiff's assessment shall be a certain amount, the complaint should allege the amount of plaintiff's assessment.¹⁵

Miscellaneous illustrations. In the notes will be found illustrations of cases in which allegations as to the interest of, or injury to, plaintiffs have been held sufficient¹⁶ or have been regarded as insufficient.¹⁷

b. Plea or Answer; Cross Bill or Cross Complaint

The defendant in a taxpayer's suit must plead affirmative matter on which he relies as a defense.

General rules as to pleadings in defense apply in taxpayers' actions.¹⁸ Thus, defendant must plead affirmative matter on which he relies to meet plaintiff's case.¹⁹ The view has been taken that ordinarily the defense of laches must be set up by plea or answer,²⁰ but, as discussed *infra* subdivision c of this section, under certain conditions the question may be raised by demurrer. Where the right of plaintiff to sue depends on the "refusal, failure or neglect" of the proper officers to sue,

an answer alleging that the municipality had not refused to bring the action is not sufficient to show that plaintiff was not authorized to sue in the absence of a further allegation that there had not been a failure or neglect to sue.²¹

A cross complaint which seeks relief foreign to the subject matter of the suit cannot be sustained.²²

c. Demurrer and Motions

In a proper case the sufficiency of the complaint in a taxpayer's suit may be attacked by demurrer or motion.

General rules as to demurrers apply in taxpayers' actions.²³ While ordinarily the defense of laches must be set up by plea or answer, as discussed *supra* subdivision b of this section, the question may sometimes be raised by demurrer.²⁴ A bill defective for failure to allege demand on, and refusal of, the municipality to sue has been held subject to special demurrer.²⁵ In passing on the sufficiency of a bill or complaint to which a demurrer has been interposed, the allegations of fact therein must be taken as true;²⁶ and the court can inquire only whether the pleading is sufficient under the rules of law to make a case, if its allegations should be supported by competent proof.²⁷ In accordance

of California, D.C.Mo., 14 F.Supp. 613.

Kan.—Drenning v. Board of Com'rs of City of Topeka, 81 P.2d 720, 148 Kan. 366, 117 A.L.R. 884.

44 C.J. p 1430 note 37 [a].

14. Ill.—Chicago v. Nichols, 52 N.E. 359, 177 Ill. 97.

15. N.Y.—Lees v. Cohoes Motor Car Co., 203 N.Y.S. 65, 122 Misc. 373—Epstein v. Smith, 121 N.Y.S. 854. Particular taxpayers entitled to sue see *supra* § 2141.

16. Mo.—Stoeck v. Edwards, 244 S. W. 802, 295 Mo. 402.

44 C.J. p 1430 note 41.

17. Kan.—Jaeger v. City of Hillsboro, 190 P.2d 420, 164 Kan. 533.

44 C.J. p 1431 note 42.

18. Cal.—Mines v. Del Valle, 257 P. 530, 271 Cal. 273.

Denial held to raise no issue of fact Cal.—Mines v. Del Valle, *supra*.

19. Cal.—Osburn v. Stone, 150 P. 367, 170 Cal. 480.

44 C.J. p 1431 note 46.

Facts showing emergency

Ky.—Booth v. Board of Education of City of Owensboro, 17 S.W.2d 1013, 229 Ky. 719.

20. Ill.—Schnell v. Rock Island, 83 N.E. 462, 232 Ill. 89, 14 L.R.A., N.S., 874.

44 C.J. p 1431 note 47.

21. Okl.—State v. Muskogee, 172 P. 796, 70 Okl. 19.

22. Cal.—Reed v. Wing, 144 P. 964, 168 Cal. 706.

44 C.J. p 1431 note 50.

23. Cal.—Mahoney v. City and County of San Francisco, 257 P. 49, 201 Cal. 248.

Mass.—Ashton v. Treasurer of City of Fall River, 191 N.E. 393, 287 Mass. 276.

Tex.—Texsan Service Co. v. City of Nixon, Civ.App., 158 S.W.2d 88, error refused—Spears v. City of South Houston, Civ.App., 137 S.W. 2d 197, affirmed 150 S.W.2d 74, 136 Tex. 218.

General or special demurrer

Failure of complaint to cancel contracts by city to show what portion of alleged expenditures for improvements would be expended under first contract, and what under second, should have been raised by special demurrer, not general demurrer.—Mahoney v. San Francisco, 257 P. 49, 201 Cal. 248.

Prematurity of suit

In suit to enjoin issuance and sale of bonds by town, allegation of bill that town commissioners failed to levy tax for liquidation of bonds, as directed by enabling act, was demurrable as premature, in view of presumption that commissioners, as public officials, would make such levy during remainder of current year after filing of bill.—Terry v. Com-

missioners of Cookeville, 198 S.W.2d 1010, 184 Tenn. 347.

Allegations stricken on demurrer

Ga.—Lawson v. City of Moultrie, 22 S.E.2d 592, 194 Ga. 699.

24. Cal.—Warfield v. Anglo & London Paris Nat. Bank, 260 P. 881, 202 Cal. 345.

Ill.—Schnell v. Rock Island, 83 N.E. 462, 232 Ill. 89, 14 L.R.A., N.S., 874. Tex.—City of Corpus Christi ex rel. Harris v. Flato, Civ.App., 83 S.W. 2d 483, error dismissed.

Petition held not to show laches on demurrer.—City of Del Rio v. Lowe, Civ.App., 111 S.W.2d 1208, reversed on other grounds Lowe v. City of Del Rio, 122 S.W.2d 191, 132 Tex. 111.

25. Ky.—Wagner v. Wallingford, 78 S.W.2d 326, 267 Ky. 477.

26. Ariz.—Crawford v. City of Prescott, 83 P.2d 789, 52 Ariz. 471.

Ultimate facts

Wis.—Horlick v. Swoboda, 267 N.W. 38, 221 Wis. 373.

27. Mich.—Bates v. Hastings, 108 N.W. 1005, 145 Mich. 574.

44 C.J. p 1431 note 55.

Extraneous matters not considered

N.Y.—Wibmerding v. LaGuardia, 52 N.Y.S.2d 169, 268 App.Div. 498, motion denied 52 N.Y.S.2d 941, 268 App.Div. 1037.

with the general rule, however, a conclusion of law is not admitted by a demurrer.²⁸

The denial of a motion to dismiss a taxpayer's complaint for insufficiency is not a holding on the merits of the matters presented by the complaint so as to entitle the taxpayer to a declaratory judgment on the pleadings on a subsequent motion.²⁹

Uncertainty in the allegations does not necessarily render a complaint subject to general demurrer.³⁰

Demurrer raising questions as to capacity to sue and parties. While the right to raise by special demurrer the claim that plaintiff has not legal capacity to sue has been recognized,³¹ the view has also been taken that the question as to whether certain taxpayers are authorized to act for and protect the rights of a municipality cannot be raised by demurrer.³² It has been held that the fact that a municipality was not formally impleaded in a taxpayer's action to compel municipal officers to pay into the municipal treasury money illegally expended did not render the complaint subject to a general demurrer.³³

Motion to strike. Under general rules irrelevant or impertinent allegations may be stricken out on motion.³⁴

d. Amended and Supplemental Pleadings

General rules as to amended and supplemental pleadings apply in taxpayers' actions.

General rules as to amended and supplemental pleadings apply in taxpayers' actions.³⁵ Thus, the court has upheld or recognized the right of plain-

tiff to amend his pleading by inserting a statement that the action is brought on behalf of the corporation instead of on behalf of plaintiff and other taxpayers,³⁶ and a statement showing that the amount of plaintiff's assessment equals the minimum fixed in the statute which authorizes the action.³⁷ It has been held that an amendment to a complaint in an action brought by plaintiff in an individual capacity, so as to convert the action into a taxpayer's action, should not have been granted, as such amendment was not in furtherance of justice under the circumstances.³⁸ Moreover, the refusal of an application to amend a complaint so as to permit litigation with respect to the interests of an adjoining municipality which forms no part of the defendant municipality has been upheld.³⁹

Under some statutes the complaint may be amended nunc pro tunc.⁴⁰ Where, pending a suit to restrain certain acts of municipal officers, some of the acts in question are performed, the right of plaintiff to file a supplemental complaint seeking redress for the acts so performed has been upheld,⁴¹ but plaintiff cannot set up by supplemental complaint a different cause of action from that stated in the original complaint, which did not exist when the original suit was commenced.⁴²

e. Issues, Proof, and Variance

Only such issues are before the court in a taxpayer's suit as are raised by the pleadings therein.

Only such issues are before the court in a taxpayer's suit as are raised by the pleadings therein.⁴³ Where specific facts alleged in the bill are

28. N.Y.—Talcott v. Buffalo, 26 N.E. 263, 125 N.Y. 280.
Wis.—Horlick v. Swoboda, 267 N.W. 38, 221 Wis. 373.

29. N.Y.—Wilmerding v. La Guardia, 26 N.Y.S.2d 105, 176 Misc. 449.

30. Cal.—Osburn v. Stone, 150 P. 367, 170 Cal. 480.

44 C.J. p 1431 note 59.

31. Ohio.—Nicholson v. Malle, 15 Ohio S. & C.P. 682, 3 Ohio N.P., N.S., 201.

44 C.J. p 1431 note 56.

32. Ill.—People v. Holten, 102 N.E. 171, 259 Ill. 219.

44 C.J. p 1431 note 57.

33. Cal.—Osburn v. Stone, 150 P. 367, 170 Cal. 480.

34. Pa.—In re Millvale Borough No. 1, 14 Pa.Co. 79.

44 C.J. p 1431 note 63.

35. N.Y.—Hoey v. Dalton, 213 N.Y. S. 583, 126 Misc. 194.

Waste

In action to restrain illegal acts by municipal officer, omission of charge that alleged illegality will

result in waste may be corrected by amendment.—Birch v. Hule, 9 N.Y. S.2d 450, 169 Misc. 1011, affirmed 11 N.Y.S.2d 839, 256 App.Div. 1057.

Change in theory of complaint

Where a bill seeking adjudication that a certain bond issue was invalid was insufficient, prosecutor should be permitted to amend so as to state cause for relief appropriate to taxpayers whose property in the district might be shown to be illegally or excessively taxed.—Martha Bright Farms v. Broward County Port Authority, 158 So. 70, 117 Fla. 361, appeal dismissed Martha Bright Farms v. Davis, 55 S.Ct. 209, 293 U.S. 531, 79 L.Ed. 640.

36. Ohio.—Shaw v. Jones, 6 Ohio S. & C.P. 453, 4 Ohio N.P. 372.

37. N.Y.—Hoey v. Dalton, 213 N.Y. S. 583, 126 Misc. 194.—Wilkins v. New York, 30 N.Y.S. 424, 9 Misc. 610.

38. N.Y.—Guenther v. Patch, 140 N.Y.S. 228, 155 App.Div. 27.
44 C.J. p 1432 note 70.

39. Minn.—Reed v. Hibbing, 184 N.W. 842, 150 Minn. 130.

40. N.Y.—Hoey v. Dalton, 213 N.Y. S. 583, 126 Misc. 194.

41. N.Y.—Latham v. Richards, 15 Hun 129.

42. N.Y.—Bush v. O'Brien, 68 N.Y.S. 651, 58 App.Div. 118.

44 C.J. p 1432 note 73.

43. Fla.—Pierce v. Isaac, 184 So. 509, 134 Fla. 666.

Neb.—Wightman v. City of Wayne, 15 N.W.2d 78, 144 Neb. 871.

Issues raised by denials

In suit to enjoin city's contract for constructing lighting system, defendants' denials raised issue of plaintiffs' right to maintain action.—Donovan Const. Co. v. City of Waterloo, 231 N.W. 499, 211 Iowa 506.

Anticipating successful bidder

Validity of lease of city property to corporation of which councilman is stockholder cannot be considered, in suit to enjoin execution of contract for lease to successful bidder,

admitted by the answer, a general denial of such facts does not put them in issue.⁴⁴ A verified plea of general issue is sufficient to raise the question of the authority of a municipal officer to execute the contract under attack,⁴⁵ but a mere denial by municipal officers that they unlawfully approved, allowed, or ordered paid, or unlawfully paid, specified claims was held to raise no issue of fact,⁴⁶ as was a denial that such expenditures materially increased taxation.⁴⁷

Evidence as to questions or issues not raised by the pleadings is not admissible;⁴⁸ on the other hand, evidence, otherwise proper, as to matters so raised is admissible.⁴⁹

Variance. In accordance with general rules, the pleading and proof in taxpayers' suits must correspond; a material variance is fatal.⁵⁰

§ 2165. Evidence

- a. Presumptions
- b. Burden of proof
- c. Admissibility
- d. Weight and sufficiency

a. Presumptions

There is a presumption in taxpayers' actions that the

municipal authorities have acted within the limits of their authority.

General rules as to presumptions in civil actions apply in taxpayers' actions.⁵¹ Thus, in accordance with general rules, the presumption is that the municipal authorities have acted and are acting regularly within the limits of their authority and without intention of violating the law,⁵² and in good faith and not fraudulently.⁵³ The presumption as to the regularity and legality of official acts may be rebutted,⁵⁴ but, as discussed infra subdivision b of this section, the burden in this respect is on plaintiff.

Acts or intention of electors. In a suit to enjoin the issuance of bonds, the presumption has been indulged that all the electors are presumed to have voted at an election to authorize the bonds,⁵⁵ and that electors who failed to vote assented to the affirmative vote as shown by the returns.⁵⁶

Injury or damage. The view has been taken that, where the act complained of is illegal or unauthorized, the law presumes that injury may result to the municipality, and through the municipality to the taxpayers,⁵⁷ and that in a suit to restrain the un-

since court is not called on to anticipate who successful bidder will be—*Board of Councilmen of City of Frankfort v. Pattie*, 12 S.W.2d 1108, 227 Ky. 343.

44. W.Va.—*Zimmerman v. Town of New Martinsville*, 188 S.E. 124, 117 W.Va. 752, 109 A.L.R. 958.

45. Ill.—*Selby v. Village of Winfield*, 255 Ill. App. 67.

46. Cal.—*Mines v. Del Valle*, 257 P. 530, 201 Cal. 273.

47. Cal.—*Mines v. Del Valle*, *supra*.

48. La.—*Roth v. Thibodaux*, 68 So. 412, 137 La. 210.
44 C.J. p 1432 note 75.

49. Ga.—*Adel v. Woodall*, 50 S.E. 481, 122 Ga. 535.
44 C.J. p 1432 note 76.

50. Variance not shown

Ga.—*City of Albany v. Lipsey*, 34 S.E.2d 513, 199 Ga. 437.

51. Ill.—*Gates v. Sweitzer*, 179 N.E. 837, 347 Ill. 353, 79 A.L.R. 1151.

Mo.—*Carter Carburetor Corp. v. City of St. Louis*, 203 S.W.2d 438, 356 Mo. 646.

N.J.—*Alchele v. Borough of Oaklyn*, Super.L., 64 A.2d 924.

Bonds are presumed to be in hands of bona fide purchasers in suit to enjoin collection of taxes for payment thereof.—*City of Del Rio v. Lowe*, Civ.App., 111 S.W.2d 1208, reversed on other grounds *Lowe v.*

City of Del Rio, 122 S.W.2d 191, 132 Tex. 111.

Mere fact of near relationship between municipal officers and officer of contractor raises no presumption of impropriety in contractual relation between town and contractor.—*Dealtry v. Selectmen of Town of Watertown*, 180 N.E. 621, 279 Mass. 22—*Sylvester v. Webb*, 60 N.E. 495, 179 Mass. 236.

52. Mass.—*Burt v. Municipal Council of Taunton*, 172 N.E. 230, 272 Mass. 130.

N.Y.—*Hanrahan v. Corrou*, 12 N.Y.S. 2d 536, 170 Misc. 922.

Wash.—*Von Herberg v. City of Seattle*, 288 P. 646, 157 Wash. 141, 70 A.L.R. 417.

44 C.J. p 1432 note 84

Legality of classification of businesses

Va.—*City of Fredericksburg v. Sanitary Grocery Co.*, 190 S.E. 318, 188 Va. 57, 110 A.L.R. 1195.

Legality of warrants

Ark.—*Chesnutt v. Yates*, 9 S.W.2d 37, 177 Ark. 894.

Preliminary proceedings and investigation in general

Ill.—*Avery v. City of Chicago*, 178 N.E. 351, 345 Ill. 640.

Mo.—*Bell v. City of Fayette*, 28 S.W. 2d 356, 325 Mo. 75.

44 C.J. p 1432 note 84 [c].

Regularity of meeting of board

N.Y.—*Loos v. City of New York*, 9

N.Y.S.2d 760, 170 Misc. 14, 104, reversed on other grounds 13 N.Y.S. 2d 119, 257 App.Div. 219.

53. Ind.—*Letz Mfg. Co. v. Public Service Commission of Indiana*, 4 N.E.2d 194, 210 Ind. 467.

44 C.J. p 1432 note 85.

54. Ind.—*Letz Mfg. Co. v. Public Service Commission of Indiana*, 4 N.E.2d 194, 210 Ind. 467.

Neb.—*Kelly v. Broadwell*, 92 N.W. 643, 3 Neb., Unoff., 617.

Good faith

Want of good faith and honest motives on the part of municipal authorities in making contract will be presumed from a reckless and wanton disregard of the taxpayers' interests.—*Hanrahan v. Corrou*, 12 N.Y.S.2d 536, 170 Misc. 922.

55. Mo.—*Bauch v. Cabool*, 148 S.W. 1003, 165 Mo.App. 486.

56. S.D.—*Treat v. De Jean*, 118 N.W. 709, 22 S.D. 505.

57. Wash.—*Barnett v. Lincoln*, 299 P. 392, 162 Wash. 613.

44 C.J. p 1432 note 90.

Waste or injury

N.Y.—*Bauer v. City of Niagara Falls*, 29 N.Y.S.2d 448, 262 App.Div. 938—*American La France & Foamite Corporation v. City of New York*, 281 N.Y.S. 519, 156 Misc. 2, affirmed 283 N.Y.S. 899, 246 App.Div. 699.

lawful use of municipal funds or other property, it may reasonably be presumed that the taxes of plaintiff taxpayer would be increased by the illegal act in question.⁵⁸

Continuance in office. Under the general rule a presumption of the continuance in office of certain municipal officers charged with the commission of a wrongful act has been indulged.⁵⁹

b. Burden of Proof

The plaintiff in a taxpayer's suit generally has the burden of proving the material allegations essential to authorize the relief demanded.

General rules as to the burden of proof in civil actions apply in taxpayers' actions.⁶⁰ Thus plaintiff has the burden of sustaining material allegations

or claims essential to authorize the relief demanded,⁶¹ such as illegality or lack of authority,⁶² fraud or collusion,⁶³ bad faith,⁶⁴ undue influence,⁶⁵ or diversion of municipal revenues.⁶⁶ In a taxpayer's action for recovery of a statutory penalty the burden is on the taxpayer to prove all the facts necessary to bring the case under the provisions of the statute.⁶⁷ Where a municipal contract is attacked as having been let without compliance with the competitive bidding statute, the burden of proving that the contract so let comes within a statutory exception is on the party claiming the benefit of the exception.⁶⁸

Fact or extent of injury or interest. In his capacity as a taxpayer plaintiff must show that he has a special interest in the subject matter, distinct

58. Minn.—Nerlien v. Brooten, 102 N.W. 867, 94 Minn. 361.

59. Wis.—Ryan v. Olson, 197 N.W. 727, 183 Wis. 290.

60. N.J.—Alchele v. Borough of Oaklyn, Super.L.D., 64 A.2d 924.

61. Ark.—Chesnutt v. Yates, 9 S.W. 2d 37, 177 Ark. 894.

Kan.—Jaeger v. City of Hillsboro, 190 P.2d 420, 164 Kan. 533—Tucker v. Raney, 65 P.2d 329, 145 Kan. 256. Ky.—Jones v. City of Paducah, 142 S.W.2d 365, 283 Ky. 628.

N.Y.—Evadan Realty Corp. v. Paterson, 78 N.Y.S.2d 114, 192 Misc. 850.

Pa.—Soltz v. Yeadon Borough School Dist., Com.Pl., 29 Del.Co 188

44 C.J. p 1433 note 97.

Bona fide holding of bonds or warrants

A taxpayer who seeks to enjoin the collection of taxes by a municipality to pay bonds or warrants for an improvement has the burden of showing that the bonds or warrants are not in the hands of bona fide holders, where the municipality would be estopped to assert their invalidity against such holders.—City of Del Rio v. Lowe, Civ.App., 111 S.W.2d 1208, reversed on other grounds Lowe v. City of Del Rio, 122 S.W.2d 191, 132 Tex. 111—Marshall v. Elgin, Tex. Civ.App., 143 S.W. 670.

Estoppel of municipality

Taxpayers who sought to restrain payment of nonnegotiable warrants had burden of proving that city was not estopped to allege invalidity of the warrants as against the holder thereof as by proving that the city had not received the benefit of the improvements, but in absence of such proof were not entitled to relief.—City of Del Rio v. Lowe, Civ.App., 111 S.W.2d 1208, reversed on other grounds Lowe v. City of Del Rio, 122 S.W.2d 191, 132 Tex. 111.

62. Iowa.—Weiss v. Incorporated

Town of Woodbine, 295 N.W. 873, 229 Iowa 978

N.Y.—Evadan Realty Corp. v. Paterson, 78 N.Y.S.2d 114, 192 Misc. 850—Pratt v. La Guardia, 47 N.Y. S.2d 359, 182 Misc. 462, affirmed 52 N.Y.S.2d 569, 268 App.Div. 973, appeal granted 62 N.E.2d 394, 294 N.Y. 842.

Ohio.—Union Ice Corporation v. City of Niles, 13 Ohio Supp. 115.

Pa.—Gericke v. City of Philadelphia, 44 A.2d 233, 353 Pa. 60.

Tenn.—Rutherford v. City of Nashville, 79 S.W.2d 581, 168 Tenn. 499

Tex.—City of Del Rio v. Lowe, Civ. App., 111 S.W.2d 1208, reversed on other grounds Lowe v. City of Del Rio, 122 S.W.2d 191, 132 Tex. 111.

Va.—City of Fredericksburg v. Sanitary Grocery Co., 190 S.E. 318, 168 Va. 57, 110 A.L.R. 1195.

44 C.J. p 1433 note 98.

Invalidity of warrants

Ark.—Chesnutt v. Yates, 9 S.W.2d 37, 177 Ark. 894.

Tex.—City of Del Rio v. Lowe, Civ. App., 111 S.W.2d 1208, reversed on other grounds Lowe v. City of Del Rio, 122 S.W.2d 191, 132 Tex. 111.

Illegality of contract

Ky.—City of Covington v. O. F. Moore Co., 290 S.W. 1066, 218 Ky. 102.

44 C.J. p 1433 note 98 [d].

Excessive indebtedness

(1) The party attacking municipal action because it creates an excessive indebtedness must prove such fact.—Premier Const. Co. v. Kimmell, 20 S.W.2d 77, 230 Ky. 439—City of Covington v. O. F. Moore Co., 290 S.W. 1066, 218 Ky. 102—Waddle v. City of Somerset, 134 S.W.2d 956, 281 Ky. 30—44 C.J. p 1433 note 98 [b] (1), (2).

(2) The rule has been applied in actions to enjoin the issuance of funding bonds.—City of Frankfort v. Fuss, 29 S.W.2d 603, 235 Ky. 143.

(3) However, under a statute re-

quiring the municipality to prove a proposed funding bond issue to be within the debt limits in actions seeking approval of such issue, the municipality has been held to have such burden of proof in an action to enjoin the issue of bonds.—Louisville & N. R. Co. v. City of Jackson, 136 S.W.2d 1051, 281 Ky. 639—Ehert v. Board of Education, 128 S.W.2d 185, 278 Ky. 75.

63. Ind.—Underwood v. Fairbanks, Morse & Co., 185 N.E. 118, 205 Ind. 316.

N.Y.—Kahn v. Blinn, 60 N.Y.S.2d 413, 44 C.J. p 1433 note 99

64. Ill.—Dillon v. Chicago Park Dist., 84 N.E.2d 867, 337 Ill.App. 100.

N.Y.—Kahn v. Blinn, 60 N.Y.S.2d 413.

65. Ark.—Lackey v. Fayetteville Water Co., 96 S.W. 622, 80 Ark. 108.

66. Ohio—Roodman v. City of Cleveland, 70 N.E.2d 695, 78 Ohio App. 401.

67. Okl.—Dowler v. State ex rel. Prunty, 66 P.2d 1081, 179 Okl. 532—Buckeye Engine Co. v. City of Cherokee, 153 P. 1166, 54 Okl. 509.

Service of demand on municipality

Okl.—State ex rel. Higgs v. Muskogee Iron Works, 103 P.2d 101, 187 Okl. 419—State ex rel. Sweeney v. Oklahoma Power & Water Co., 92 P.2d 352, 185 Okl. 392.

Knowledge of illegality

In suit to recover statutory penalty for illegal expenditure of city funds from recipient thereof, taxpayer had burden of showing that recipient had notice that contract under which funds were paid was unlawful, fraudulent, or void.—State ex rel. Prunty v. Dowler, 69 P.2d 68, 180 Okl. 265—Dowler v. State ex rel. Prunty, 66 P.2d 1081, 179 Okl. 532—Buckeye Engine Co. v. City of Cherokee, 153 P. 1166, 54 Okl. 509.

68. N.C.—Moore v. Lambeth, 175 S. E. 714, 207 N.C. 23.

from that of the general public,⁶⁹ but in a representative suit to enjoin the dissipation of municipal funds plaintiff taxpayer need not prove the extent or amount of his damages if an injunction prayed for should be refused.⁷⁰ It is not necessary for plaintiff to show the amount of taxes which he has paid or which he is to pay,⁷¹ although, where he seeks to enjoin performance of an illegal contract, he must prove that he would save in taxes from the granting of the injunction.⁷²

c. Admissibility

In accordance with general rules, only competent, relevant, and material evidence is admissible in a taxpayer's suit.

Rules as to the admissibility of evidence in civil actions in general apply in taxpayers' actions.⁷³ Where the motive of plaintiff in instituting the action is immaterial, evidence as to his motive is not admissible.⁷⁴ Where taxpayers do not lose their right to relief, if with knowledge of the fact they do not object to certain illegal or unauthorized acts of the municipal authorities, evidence as to such knowledge and failure to object⁷⁵ and as to participation in such acts to a certain extent on the part of some taxpayers⁷⁶ is immaterial. Evidence

as to the validity of, or as to other matters involved in or affecting, elections has been held admissible⁷⁷ or inadmissible⁷⁸ under the particular circumstances of the case.

Fraud and bad faith. The rule has been laid down that the widest latitude should be permitted in the introduction of evidence to support allegations of fraud in a suit to enjoin payments under a contract.⁷⁹ Where, in a suit to prevent the making of a contract on the ground that statutory requirements as to letting to the lowest bidder have not been complied with, parol evidence to the effect that the municipal authorities acted fraudulently and from improper motives is admissible, notwithstanding the existence of the official records.⁸⁰ On the other hand, legal evidence to show good faith on the part of municipal officers is admissible where the matter is in issue.⁸¹

d. Weight and Sufficiency

Arbitrary or illegal action by municipal officials must be clearly proved.

General rules as to the weight and sufficiency of evidence in civil actions apply in taxpayers' actions,⁸² and it must be clearly proved that the mu-

69. Iowa.—*Corpus juris* cited in *Donovan Const. Co. v. City of Waterloo*, 231 N.W. 499, 501, 211 Iowa 506.

Md.—*Davidson v. Baltimore*, 53 A. 1121, 96 Md. 509.

70. Mo.—*St. Louis Civic League v. St. Louis*, 223 S.W. 891.

71. Ill.—*Chicago v. Nichols*, 52 N. E. 359, 177 Ill. 97.

72. U.S.—*Missouri Public Service Corporation v. Fairbanks, Morse & Co.*, D.C.Mo., 19 F.Supp. 45.

73. Mass.—*Fluet v. Eberhardt*, 2 N. E.2d 463, 294 Mass. 408.

Admissibility of evidence in actions by or against municipal corporations generally see *infra* § 2208.

Evidence admissible under pleading see *supra* § 2164 f.

Admissible evidence

Ala.—*Hamilton v. City of Anniston*, 27 So 2d 857, 248 Ala. 396.

Conn.—*Sullivan v. Willis*, 163 A. 407, 116 Conn. 9.

Fla.—*Logan v. Board of Public Instruction for Polk County*, 158 So. 720, 118 Fla. 184.

Md.—*Smart v. Graham*, 20 A.2d 574, 179 Md. 476.

Mass.—*Fluet v. Eberhardt*, 2 N.E.2d 463, 294 Mass. 408.

Ohio.—*State ex rel. Sergi v. City of Youngstown*, 40 N.E.2d 477, 63 Ohio App. 254, appeal dismissed 32 N.E.2d 852, 138 Ohio St. 123.

44 C.J. p 1434 note 7 [a].

Inadmissible evidence

La.—*McCann v. Morgan City*, 139 So. 481, 173 La. 1063.

Md.—*Smart v. Graham*, 20 A.2d 574, 179 Md. 476.

Mo.—*Missouri Service Co. v. City of Stanberry*, 108 S.W.2d 25, 341 Mo. 500.

44 C.J. p 1434 note 7 [b].

74. Minn.—*Burns v. Essling*, 203 N. W. 605, 163 Minn. 57.

75. Minn.—*Burns v. Essling*, *supra*.

76. Minn.—*Burns v. Essling*, *supra*.

77. Mo.—*Bauch v. Cabool*, 148 S.W. 1003, 165 Mo App 486.

44 C.J. p 1434 note 14.

78. S.D.—*Treat v. De Jean*, 118 N. W. 709, 22 S.D. 505.

44 C.J. p 1434 note 15.

79. Wash.—*Wade v. Tacoma*, 230 P. 99, 131 Wash. 245.

80. Ill.—*Stubbs v. Aurora*, 160 Ill. App. 351.

81. Conn.—*Sullivan v. Willis*, 163 A. 407, 116 Conn. 9.

Mo.—*Wegmann Realty Co. v. City of St. Louis*, 47 S.W.2d 770, 329 Mo. 972.

82. Ga.—*Morris v. City Council of Augusta*, 48 S.E.2d 855, 204 Ga. 26.

Minn.—*Yaeger v. Giguere*, 23 N.W. 2d 22, 222 Minn. 41.

Tenn.—*Hammon v. Miller*, 13 Tenn. App. 458.

Wash.—*Weisfield v. City of Seattle*, 40 P.2d 149, 130 Wash. 288, 96 A.L.R. 1190.

Affidavits that bidding on city contract was made uncertain by wage requirements thereof were held mere conclusions and without probative value—*Morse v. Delaney*, 218 N.Y.S. 571, 128 Misc. 317, affirmed 219 N.Y.S. 867, 218 App.Div. 826, affirmed 155 N.E. 628, 244 N.Y. 317, 50 A.L.R. 1473.

Evidence held sufficient

Okl.—*Dowler v. State ex rel. Prunty*, 66 P.2d 1081, 179 Okl. 532.

Evidence held insufficient

(1) In general.

Cal.—*Holman v. Santa Cruz County*, App., 205 P.2d 767.

Fla.—*Richard v. City of Fort Lauderdale*, 1 So 2d 202, 146 Fla. 349.

Mo.—*Arkansas-Missouri Power Corporation v. City of Kennett*, 159 S.W.2d 782, 349 Mo. 173.

N.J.—*Lawrence v. Neiss*, 57 A.2d 505, 141 N.J.Eq. 348.

Ohio.—*Roodman v. City of Cleveland*, 70 N.E.2d 635, 78 Ohio App. 401.

Pa.—*White v. Chester Municipal Authority*, 36 A.2d 455, 349 Pa. 118.

44 C.J. p 1434 note 18 [a].

(2) To warrant injunctive relief.

Kan.—*Tucker v. Raney*, 65 P.2d 329, 145 Kan. 256.

La.—*Wilkinson v. Poag*, App., 181 So. 27.

Wash.—*Bayha v. Public Utility Dist. No. 1 of Grays Harbor County*, 97 P.2d 614, 2 Wash.2d 85.

(3) To establish laches.—*Warden v. City of Grafton*, 26 S.E.2d 1, 125 W.Va. 658.

municipal officials acted in an arbitrary and illegal manner.⁸³ In accordance with these general rules there have been various holdings as to the sufficiency of the evidence to show illegality or want of authority,⁸⁴ fraud,⁸⁵ bad faith, collusion, or undue influence,⁸⁶ waste,⁸⁶ and injury.⁸⁷

§ 2166. Dismissal, Discontinuance, or Nonsuit

Failure of the plaintiff to prove the essential allegations of his complaint authorizes dismissal of his suit.

General rules as to dismissal, discontinuance, and nonsuit apply in taxpayers' actions.⁸⁸ Accordingly, a bill in a taxpayer's suit may be dismissed for want of equity.⁸⁹ So, failure of plaintiff to establish the essential charges of his complaint re-

quires dismissal of the suit.⁹⁰

Want or defect of parties. In accordance with general rules, in a suit for an injunction, it has been held that the omission of a necessary party is not ground for dismissal,⁹¹ and that the bill should be retained in order that the proper parties may be brought in;⁹² but a dismissal is proper where a necessary party is omitted after a reasonable opportunity to have such party brought in has been given.⁹³

Want of jurisdictional amount. In some jurisdictions a bill to enjoin the misuse of a municipal fund must be dismissed whenever it appears affirmatively in the case that the amount involved is less than the minimum jurisdictional amount fixed by a general statute.⁹⁴

83. Md.—Smart v. Graham, 20 A.2d 574, 179 Md. 476.

44 C.J. p 1434 note 18 [c].

84. Ky.—City of Covington v. O. F. Moore Co., 290 S.W. 1066, 218 Ky 102.

Wis.—Prueher v. City of Bloomer, 4 N.W.2d 186, 241 Wis. 17.

Evidence held sufficient

(1) In general.

Cal.—Casper v. City and County of San Francisco, 57 P.2d 920, 6 Cal. 2d 376.

Md.—Smart v. Graham, 20 A.2d 574, 179 Md. 476.

Mo.—Missouri Service Co. v. City of Stanberry, 108 S.W.2d 25, 341 Mo. 500.

Ohio.—Powers v. City of Cincinnati, 187 N.E. 305, 45 Ohio App. 445.

Wash.—Weisfeld v. City of Seattle, 40 P.2d 149, 180 Wash. 288, 96 A.L.R. 1190.

44 C.J. p 1434 note 19 [a].

(2) To show illegality or want of authority.

Cal.—Holman v. Santa Cruz County, App., 205 P.2d 767.

Wash.—Weisfeld v. City of Seattle, 40 P.2d 149, 180 Wash. 288, 96 A.L.R. 1190.

(3) To show authority or absence of illegality.

Ala.—Hamilton v. City of Anniston, 31 So.2d 715, 249 Ala. 479.

Kan.—Jaeger v. City of Hillsboro, 190 P.2d 420, 164 Kan. 533.

Mont.—Colwell v. City of Great Falls, 157 P.2d 1013, 117 Mont. 126.

Mont.—Montana-Dakota Utilities Co. v. City of Havre, 94 P.2d 660, 109 Mont. 164.

Ohio.—Pathe v. Donaldson, 163 N.E. 204, 29 Ohio App. 171, error dismissed 166 N.E. 202, 119 Ohio St. 648.

Okl.—Toohey v. Town of Canton, 60 P.2d 729, 177 Okl. 426.

Evidence held insufficient

(1) In general.

Iowa.—Weiss v. Incorporated Town

of Woodbine, 295 N.W. 873, 229 Iowa 978.

Minn.—Hendricks v. City of Minneapolis, 290 N.W. 428, 207 Minn. 151.

44 C.J. p 1435 note 19 [b].

(2) To show illegality or want of authority.

Ill.—Panozzo v. City of Rockford, 28 N.E.2d 748, 306 Ill.App. 443.

N.Y.—Loos v. City of New York, 9 N.Y.S.2d 760, 170 Misc. 14, 104, reversed on other grounds 13 N.Y.S. 2d 119, 257 App. Div. 219—Terrell v. Strong, 35 N.Y.S. 1000, 14 Misc. 258.

(3) To overcome presumption of legality.—Panozzo v. City of Rockford, 28 N.E.2d 748, 306 Ill.App. 443.

85. Ill.—Dillon v. Chicago Park Dist. 84 N.E.2d 867, 337 Ill.App. 100.

Md.—Smart v. Graham, 20 A.2d 574, 179 Md. 476.

Mass.—Archambault v. City of Lowell, 180 N.E. 167, 278 Mass. 327.

Mo.—Missouri Service Co. v. City of Stanberry, 108 S.W.2d 25, 341 Mo. 500—Wegmann Realty Co. v. City of St. Louis, 47 S.W.2d 770, 329 Mo. 972.

N.C.—Turner v. City of Reidsville, 29 S.E.2d 211, 224 N.C. 42.

Pa.—White v. Chester Municipal Authority, 36 A.2d 455, 349 Pa. 118.

44 C.J. p 1435 note 20.

Clear showing of fraud or abuse of discretion must be made before the court will interfere with municipal action on that account.—Cordingley v. Borough of Mendham, 171 A. 158, 12 N.J.Misc. 331.

Evidence held insufficient

(1) In general.—White v. Chester Municipal Authority, 36 A.2d 455, 349 Pa. 118—44 C.J. p 1435 note 20 [b].

(2) To establish fraud, corruption, collusion, or bad faith by city officials.

Ill.—Simpson v. City of Highwood, 23 N.E.2d 62, 372 Ill. 212, 124 A.L.R. 1459—Dillon v. Chicago

Park Dist., 84 N.E.2d 867, 337 Ill. App. 100.

Md.—Smart v. Graham, 20 A.2d 574, 179 Md. 476.

Minn.—Hendricks v. City of Minneapolis, 290 N.W. 428, 207 Minn. 151.

—Davies v. Village of Madelia, 287 N.W. 1, 205 Minn. 526, 123 A.L.R. 569.

Mo.—Sager v. City of Stanberry, 78 S.W.2d 431, 336 Mo. 213.

N.Y.—Hanrahan v. Corron, 12 N.Y. S.2d 536, 170 Misc. 922—Wilmerding v. O'Brien, 268 N.Y.S. 206, 149 Misc. 735.

86. N.Y.—Maribu v. 'Nohowec, 293 N.Y.S. 457, 161 Misc. 944.

44 C.J. p 1435 note 21.

87. N.J.—Houghton v. Jersey City, 102 A. 898, 90 N.J.Law 689.

44 C.J. p 1435 note 22.

88. Ohio.—Marr v. Schuster, 163 N.E. 510, 29 Ohio App. 347.

Failure to furnish bond as security for costs as ground for dismissal see supra § 2158 a.

Absence of illegality or injury requires dismissal of suit

Ill.—Illinois Anti-Vivisection Soc. v. City of Chicago, 7 N.E.2d 379, 289 Ill.App. 391.

La.—Black v. New Orleans R., etc., Co., 82 So. 81, 145 La. 180.

89. Ill.—People, for Use of All Taxpayers of City of Chicago v. Brady, 53 N.E.2d 496, 329 Ill.App. 688.

90. Pa.—White v. Chester Municipal Authority, 36 A.2d 455, 349 Pa. 118.

—Hartman v. City of Scranton, Com. Pl. 42 Lack. Jur. 157.

91. Ill.—Howell v. Peoria, 90 Ill. 104.

44 C.J. p 1435 note 26.

92. Ill.—Howell v. Peoria, supra.

93. Tex.—Bonner v. Texarkana, Civ. App., 227 S.W. 505.

44 C.J. p 1435 note 28.

94. Mich.—McManus v. Petoskey, 129 N.W. 681, 164 Mich. 390—Kim-

Abandonment of intention to perform illegal act. It has been held that a suit may properly be dismissed where, in its answer, defendant municipality alleges an intention to abandon the course complained of, and plaintiff thereafter persists in his prosecution of the suit.⁹⁵

Discontinuance. A motion by a taxpayer to restrain plaintiff taxpayer from discontinuing a suit has been denied where no effort was made for several years to bring the case to trial and the case was one of doubtful merit.⁹⁶

§ 2167. Hearing or Trial

Rules governing the trial and hearing in civil actions generally apply in taxpayers' actions.

Rules with respect to trials and hearings in civil actions in general apply in taxpayers' actions.⁹⁷ The court will not consider or determine irrelevant or collateral matters,⁹⁸ such as the legality of the municipality for which certain officers propose to act,⁹⁹ the qualification of the officers whose acts are in question,¹ and title to property.² In a taxpayer's suit to invalidate a grant by the municipal board of a permit to operate busses on the city streets, the sole concern of the trial court was the determination of whether the statutory or charter requirements were met.³ In a suit to enjoin the issuance of bonds by an improvement district in a municipality, the court has no jurisdiction to determine for property owners what property was to be included within the district.⁴

merle v. Cassopolis, 125 N.W. 65, 160 Mich. 90.

95. Wis.—Borner v. Prescott, 136 N. W. 552, 150 Wis. 197.

96. N.Y.—Coyne v. Yonkers, 109 N. Y.S. 625, 57 Misc. 366.

97. Tex.—Texsan Service Co. v. City of Nixon, Civ.App., 158 S.W.2d 88, error refused.

Questions for the court

(1) Whether corporation is quasi-public, making essential property exempt from local taxation, is for courts to determine on facts of each case.—Philadelphia Rural Transit Co. v. City of Philadelphia, 159 A. 861, 309 Pa. 84.

(2) Whether a confidential relation existed between elected city officials and a defendant who without their knowledge received a commission on purchase of waterworks by city and whether any undue influence was exercised by such defendant were questions of law.—White v. Chester Municipal Authority, 36 A.2d 455, 349 Pa. 118.

Evidence held sufficient to take case to jury

N.C.—Atkinson v. City of Asheville, 169 S.E. 801, 205 N.C. 36.

98. Mass.—Higginson v. Boston Treasurer, etc., 99 N.E. 523, 212 Mass. 583, 42 L.R.A.N.S., 215, 44 C.J. p. 1417 note 93.

99. N.Y.—Abell v. Hunter, 207 N. Y.S. 203, 211 App.Div. 467, affirmed 148 N.E. 765, 240 N.Y. 702.

1. Mass.—Hodgdon v. Haverhill, 79 N.E. 830, 193 Mass. 406.

2. Fla.—City of South Miami v. State ex rel. Gibbs, 197 So. 109, 143 Fla. 524.

N.Y.—Lakes Island Realty Co. v. McDermott, 160 N.Y.S. 450, 96 Misc. 37.

3. N.Y.—Loos v. City of New York, 9 N.Y.S.2d 760, 170 Misc. 14, 104, reversed on other grounds 13 N.Y. S.2d 119, 257 App.Div. 219.

4. Ark.—Riddle v. Ballew, 197 S.W. 27, 130 Ark. 161.

5. Md.—Baltimore v. Keyser, 19 A. 706, 72 Md. 106.

6. Md.—Baltimore v. Keyser, supra.

There is authority for the view that matters which are not responsive to the bill will not be considered on an application for a preliminary injunction.⁵ So, the court will not consider on an application for a temporary injunction the question as to the motive of plaintiff in bringing the suit,⁶ and as to whether he is the real party in interest;⁷ these matters should be determined by proof on the final hearing.⁸ It has also been held that the right of a public utility to occupy the streets under a street lighting contract or otherwise would not be determined in a suit to enjoin the construction of a municipal light plant and interference with such contract, where quo warranto proceedings were pending in which such rights could be determined.⁹

Foundation for evidence. It has been held that plaintiff need not call as witnesses the persons who were in charge of, or who made certain entries in, the municipal books in order to render admissible, on behalf of plaintiff, testimony as to such entries.¹⁰

Findings. Findings by the court in taxpayer's suits based on sufficient evidence are proper.¹¹ In an action to recover money wrongfully appropriated, the fact that a statute expressly forbade the appropriation in question warrants a finding by the court as a matter of law that the members of the municipal council acted in bad faith.¹²

§ 2168. Judgment, Writ, Order, or Decree

General rules as to the judgment or decree apply in taxpayers' actions.

Wis.—Ricketson v. Milwaukee, 81 N. W. 864, 105 Wis. 591, 47 L.R.A. 685.

7. Wis.—Ricketson v. Milwaukee, supra.

8. Md.—Baltimore v. Keyser, 19 A. 706, 72 Md. 106.

Wis.—Ricketson v. Milwaukee, 81 N. W. 864, 105 Wis. 591, 47 L.R.A. 685.

9. U.S.—Northwestern Light & Power Co. v. Town of Milford, C.C.A. Iowa, 82 F.2d 45, modified on other grounds 82 F.2d 1023.

10. Tenn.—Burns v. Nashville, 221 S.W. 828, 142 Tenn. 541, 44 C.J. p. 1436 note 38.

11. Cal.—Hodgeman v. City of San Diego, 123 P.2d 412, 53 Cal.App.2d 610.

Premature findings

N.Y.—New York State Electric & Gas Corporation v. City of Plattsburg, 12 N.Y.S.2d 318, 256 App.Div. 732, 257 App.Div. 1022, modified on other grounds 24 N.E.2d 122, 281 N.Y. 450, reargument denied 26 N. E.2d 812, 282 N.Y. 682.

12. Minn.—Burns v. Easling, 203 N. W. 605, 163 Minn. 57.

44 C.J. p. 1436 note 39.

'Rules' governing judgments or decrees in civil actions in general apply in taxpayers' actions.¹³ For the purpose of an interlocutory injunction the decision of the court should be definite and certain.¹⁴

§ 2169. — Relief

- a. In general
- b. Right to preliminary or interlocutory injunction in general
- c. Time to which relief relates, changed conditions, and ineffective or unnecessary injunction
- d. Relief in relation to parties
- e. Relief in relation to pleadings
- f. Incidental, alternative, or additional relief; relief to defendant

a. In General

The relief granted in a taxpayer's suit should fit the needs and equities of the situation.

The general rule in equity that, subject to certain definite rules, the court will grant such relief as will be just and equitable under the circumstances, as discussed in Equity § 599, has been applied in taxpayers' suits,¹⁵ but the relief must be consistent with the findings of the court.¹⁶ Where the only plan of the municipal authorities for the construction of an improvement is related to a proposed illegal contract for the use of such improvement, the judgment in a suit to enjoin the making of such contract should confine itself to restraining the execution thereof, and should not determine the question of the power of the authorities to make the improvement.¹⁷ The court will not declare an ordinance to be emergent in proceedings to enjoin a referendum vote where the ordinance itself does not

do so since this would be the assumption of a legislative function.¹⁸ Where a part only of an issue of municipal bonds is illegal, according to some cases an injunction against the whole issue will not be granted,¹⁹ but, as to that portion which would exceed the permitted amount of indebtedness, an injunction is proper.²⁰

In a taxpayer's suit to cancel a release of lien for a special assessment, plaintiff is not entitled to an adjudication that such assessment is valid.²¹ In a suit to enjoin payments for certain purposes the injunction should be limited to payments out of funds which could not properly be used for such purposes.²² On the other hand, it is improper to restrict the operation of an injunction to payment of an indebtedness out of a particular fund where the indebtedness is illegal and no equities warranting such a restriction are established.²³ Where, in a suit to enjoin the issuance of bonds, it appears that the only real ground of complaint is that the transaction is not to be handled by the proper officers, the decree has been limited to restraining the delivery of the bonds to persons not duly authorized, for negotiation and sale, and to prohibiting the receipt and expenditure of the proceeds by such persons.²⁴

Where municipal electors authorized the expenditure of a specified amount for the erection of a building, the court enjoined the municipal authorities from entering into any contracts for a building, the total cost of which would exceed the unexpended balance or amounts authorized by the electors,²⁵ but a decree enjoining defendants from letting any additional contracts for a particular improvement has been held to be too broad because the municipality was entitled thereafter to provide a method for meeting further expenses without improperly increasing the municipal indebtedness.²⁶

13. Tex.—Corpus Christi v. Mireur, Civ.App., 214 S.W. 528.

44 C.J. p 1436 note 43.

Contents

In suit to annul lease by city of two street ends with harbor areas in front of and adjacent thereto, adjudication in decree for plaintiff, that certain areas at such street ends were public streets, extended and dedicated to the use of the public as such, would be eliminated as not necessary to the decision—Bremeron Municipal League v. Bremer, 130 P.2d 367, 15 Wash.2d 231.

14. Ga.—Tate v. Elberton, 71 S.E. 420, 136 Ga. 301.

44 C.J. p 1436 note 44.

15. Mich.—Lake Superior District Power Co. v. City of Bessemer, 285 N.W. 20, 288 Mich. 455.

N.Y.—Wilmerding v. La Guardia, 54 N.Y.S.2d 531, 184 Misc. 607

44 C.J. p 1436 note 47.

Refund of payments

(1) In general.—Leflingwell v. Scutt, 224 N.Y.S. 168, 221 App.Div. 462—44 C.J. p 1436 note 47 [c].

(2) Court enjoining further execution of city's illegal contract should not require return of reasonable payments already made, where the municipality has obtained benefits from the partial performance of the contract.—Williams v. City of Emmett, 6 P.2d 475, 51 Idaho 500.

16. Mo.—Ewing v. Kansas City, 180 S.W.2d 234, 238 Mo.App. 266.

17. Ky.—Board of Park Com'rs of Ashland v. Shanklin, 199 S.W.2d 721, 304 Ky. 43.

18. Wash.—Arnold v. Carroll, 179 P. 801, 106 Wash. 241.

19. Tex.—Vernon v. Montgomery, Civ.App., 265 S.W. 188.

44 C.J. p 1436 note 48

20. Wash.—Seymour v. Tacoma, 83 P. 1059, 6 Wash. 427.

44 C.J. p 1436 note 49.

21. Conn.—Sauter v. Mahan, 111 A. 186, 95 Conn. 311, 316.

44 C.J. p 1436 note 50.

22. Ill.—Evans v. Holman, 91 N.E. 723, 244 Ill. 596.

23. Ga.—Tate v. Elberton, 71 S.E. 420, 136 Ga. 301.

24. Fla.—Tampa v. Salomonson, 17 So. 581, 35 Fla. 446.

25. Pa.—Raff v. Philadelphia, 100 A. 815, 256 Pa. 312.

26. Pa.—McAnulty v. Pittsburgh, 131 A. 263, 284 Pa. 304.

44 C.J. p 1437 note 55.

b. Right to Preliminary or Interlocutory Injunction in General

The issuance of a preliminary injunction in a taxpayer's suit is a matter within the discretion of the court.

Preliminary or temporary injunctions are permissible in taxpayers' actions,²⁷ in the discretion of the court;²⁸ but in order to justify the issuance of such an injunction plaintiff's rights must be certain as to the law²⁹ and the facts.³⁰ However, if the court believes that the taxpayer has a meritorious cause and waste of public funds may result, it should grant preliminary relief.³¹ A preliminary injunction may be refused under the doctrine of the balance of convenience,³² and where no pressing necessity therefor is present.³³ Moreover, a preliminary injunction has been refused on the ground that plaintiff was fully protected, pending the suit, by a restraining order already issued.³⁴

Security. It seems that security for damages should be required on the issuance of a preliminary injunction in a taxpayer's suit.³⁵ Under some statutes a bond conditioned for the payment of costs may also constitute the security for damages on the issuance of a preliminary injunction.³⁶

c. Time to Which Relief Relates, Changed Conditions, and Ineffective or Unnecessary Injunction

Ordinarily, an injunction should not be issued in a taxpayer's suit where at the time of the decision conditions have so changed that no unlawful act is threat-

ened; nor should it be issued where the act complained of has already been performed.

While the acts of the parties after a bill or complaint in equity is filed in a taxpayer's suit cannot deprive the court of jurisdiction to give some relief,³⁷ what relief is to be granted may under certain circumstances depend on the condition of the case when it is decided.³⁸ The fact that an injunction is probably unnecessary does not of itself render the granting of such injunction erroneous as a matter of law.³⁹ Ordinarily, however, an injunction should not be issued where at the time of the decision conditions have so changed that no unlawful act is threatened,⁴⁰ but the discontinuance of the illegal course or act does not necessarily deprive plaintiff of the right to relief.⁴¹ In accordance with the general rule an injunction will not be granted where the issuance of the injunction would be ineffective,⁴² as where the act complained of has already been performed;⁴³ but in such case the court is not prevented from granting some relief,⁴⁴ and the rule has no application where the relief sought is to prevent the proposed payment by the municipal authorities of special assessments on the property of abutting owners, although previously such authorities had formally attempted to relieve such owners of liability for such assessment and to provide for payment thereof out of the municipal funds.⁴⁵

Recall of injunction. Where the conditions obtaining at the time of the issuance of an injunction in a taxpayer's suit have changed through the

27. U.S.—Morton Salt Co. v. City of South Hutchinson, C.C.A.Kan., 159 F.2d 897.

Entry into illegal contract

N.Y.—Bartholomew v. Village of Endicott, 59 N.Y.S.2d 89.

28. Minn.—Behrens v. City of Minneapolis, 271 N.W. 814, 199 Minn. 363.

29. N.Y.—Stockton v. Buffalo, 95 N.Y.S. 509, 108 App.Div. 170, 44 C.J. p 1437 note 57.

Doubt as to substantive merits of petition is sufficient to require denial of temporary injunction or order.—Birch v. Hule, 9 N.Y.S.2d 450, 169 Misc. 1011, affirmed 11 N.Y.S.2d 839, 256 App.Div. 1057.

Injunction properly denied

N.Y.—Wittmer v. Greenhalgh, 9 N.Y.S.2d 259, 256 App.Div. 839.

30. N.Y.—Stockton v. Buffalo, 95 N.Y.S. 509, 108 App.Div. 170, 44 C.J. p 1437 note 58.

In absence of clear and convincing proof, temporary injunction will not be issued.—Elth v. City of New York, 300 N.Y.S. 558, 165 Misc. 18.

31. N.Y.—Welling v. Portfolio, 26 N.Y.S.2d 823.

32. N.Y.—Brockway Motor Truck Corporation v. City of New York, 261 N.Y.S. 725, 145 Misc. 693, 44 C.J. p 1437 note 59.

33. N.Y.—Wilmerding v. La Guardia, 50 N.Y.S.2d 292, 183 Misc. 142, affirmed 52 N.Y.S.2d 169, 268 App.Div. 496, motion denied 52 N.Y.S.2d 941, 268 App.Div. 1027.

34. Wis.—Cawker v. Milwaukee, 113 N.W. 417, 133 Wis. 35, 44 C.J. p 1437 note 60.

35. Mich.—Torrent v. Muskegon, 10 N.W. 132, 47 Mich. 115, 41 Am.R. 715.

36. N.Y.—Burns v. Watertown, 218 N.Y.S. 90, 126 Misc. 140—Potsdam Electric Light, etc., Co. v. Potsdam, 97 N.Y.S. 190, 49 Misc. 18, affirmed 98 N.Y.S. 1113, 113 App.Div. 894. Bond for costs as condition precedent see supra § 2158.

37. Ill.—Holden v. Alton, 53 N.E. 556, 179 Ill. 318.

Md.—Konig v. Baltimore, 95 A. 478, 126 Md. 606, 97 A. 837, 128 Md. 465.

38. Md.—Konig v. Baltimore, 97 A. 837, 128 Md. 465.

44 C.J. p 1437 note 66.

39. Conn.—Sauter v. Mahan, 111 A. 186, 95 Conn. 311.

44 C.J. p 1437 note 67.

40. Ill.—Evans v. Holman, 91 N.E. 723, 244 Ill. 596.

44 C.J. p 1437 note 68.

41. Ky.—Roberts v. Louisville, 17 S.W. 216, 92 Ky. 95, 13 Ky.L. 406, 13 L.R.A. 844.

44 C.J. p 1437 note 69.

42. S.D.—Erickson v. City of Sioux Falls, 14 N.W.2d 89, 70 S.D. 40.

43. Ala.—Corpus Juris cited in Alabama Power Co. v. City of Guntersville, 177 So. 332, 340, 235 Ala. 186.

Pa.—White v. Peoples, Com.Pl., 32 Del.Co. 368, 35 Mun.L.R. 241.

Tex.—Spears v. City of South Houston, 150 S.W.2d 74, 136 Tex. 218, 44 C.J. p 1438 note 71.

44. Ill.—Holden v. Alton, 53 N.E. 556, 179 Ill. 318.

45. Ga.—Savannah v. Richter, 137 S.E. 148, 160 Ga. 177.

passage of a validating act, the injunction may be recalled.⁴⁶

d. Relief in Relation to Parties

As a general rule the decree in a taxpayer's suit should adjudicate only the rights of the parties.

In accordance with the general rule in equity, a decree in a taxpayer's suit should be confined to an adjudication of the rights of the parties to the suit.⁴⁷ Thus, while the holder of a note may not be an indispensable party to an action to restrain collection of a tax to pay it, the court cannot enter a decree invalidating the note without joining the noteholder as a party defendant.⁴⁸ Even where certain persons have been made parties, if neither the municipality nor the taxpayers have any rights against such persons, a decree against them in favor of plaintiff taxpayers should not be granted,⁴⁹ but ordinarily the rights of persons who are parties may be determined,⁵⁰ even though other persons who are not subject to the jurisdiction of the court may be interested in the subject matter generally involved.⁵¹ Recovery may be had against municipal officers who participated in an illegal purchase, although their liability is shared by other officers who were not made parties to the action.⁵² Where several defendants are officers of a municipality, and the acts complained of were done under color and in excess of their authority, it has been held that the recovery may be against them both as individuals and in their official capacity, although they were formally sued only as officers.⁵³ Notwithstanding a default by a municipal treasurer who is made a party defendant with the municipality to a suit to enjoin the wrongful expenditure of municipal funds, an injunction may properly be granted against the treasurer.⁵⁴ In an action to recover funds which have been misappropriated, the court may include in its judgment a direction that the money recovered

shall be paid to the office of the municipal clerk for the use of the proper authorities, notwithstanding the omission as parties of the officers entitled to the custody of municipal funds.⁵⁵

e. Relief in Relation to Pleadings

As a general rule the relief in a taxpayer's suit should be based on, and conform to, all the pleadings in the case.

In accordance with general rules, the relief granted in a taxpayer's suit must be based on, and authorized by, the allegations and prayer of the bill or complaint;⁵⁶ but relief which is in accordance with such allegations and prayer, if otherwise proper, may be granted,⁵⁷ and a like rule applies with respect to relief which is within the allegations of defendant's pleading.⁵⁸ While a prayer for general relief is ordinarily given a broad construction favorable to plaintiff,⁵⁹ the view has been taken that it is ineffective to obtain relief of which defendant has not been fairly apprised by the other prayers.⁶⁰ In particular instances the decree rendered or considered has been regarded as authorized⁶¹ or not authorized⁶² by the allegations of the bill.

f. Incidental, Alternative, or Additional Relief; Relief to Defendant

Incidental, additional, or alternative relief may generally be granted in a taxpayer's suit.

In accordance with general rules, the court in taxpayers' suits may grant incidental, additional, or alternative relief.⁶³ Where conditions have changed since the commencement of a suit for an injunction, the court may in a proper case require restitution⁶⁴ or compensation⁶⁵ if the pleadings and proof authorize such relief. There is authority for the view that if, in a suit by a taxpayer to rescind a conveyance of real property made by the municipality, it appears that the property is in the hands of an innocent purchaser, the court may grant relief

46. Mont.—Weber v. City of Helena, 297 P. 455, 89 Mont. 109.

47. Wash.—Stallcup v. Tacoma, 42 P. 541, 13 Wash. 141, 52 Am.S.R. 25, error dismissed 17 S.Ct. 998, 165 U.S. 719, 41 L.Ed. 1185.

48 C.J. p 1438 note 75.

48. Cal.—Holman v. Santa Cruz County, App., 205 P.2d 767.

49. Ill.—Evans v. Holman, 91 N.E. 723, 244 Ill. 596.

44 C.J. p 1438 note 76.

50. Ill.—Welch v. Post, 99 Ill. 471.

51. Ill.—Welch v. Post, supra.

52. Wis.—Reetz v. Kitch, 283 N.W. 348, 230 Wis. 1.

53. Cal.—Mock v. Santa Rosa, 58 P. 826, 126 Cal. 330.

44 C.J. p 1438 note 79.

64 C.J.S.—64

54. Conn.—New London v. Brainard, 22 Conn. 552.

55. N.C.—Brown v. Walker, 123 S.E. 633, 188 N.C. 52.

56. Iowa.—Ramsay v. Marble Rock, 98 N.W. 134, 123 Iowa 7.
44 C.J. p 1438 note 83.

57. Ga.—Adel v. Woodall, 50 S.E. 481, 122 Ga. 535.
44 C.J. p 1438 note 84

58. Tex.—Graves v. O'Neil, Civ. App., 189 S.W. 778.

59. N.Y.—Fraser v. Buffalo, 213 N. Y.S. 804, 215 App.Div. 861, affirmed 164 N.E. 602, 248 N.Y. 554.
44 C.J. p 1439 note 86.

60. Pa.—Bullitt v. Philadelphia, 19 Pa Dist 1091.
44 C.J. p 1439 note 87.

61. Ga.—Adel v. Woodall, 50 S.E. 481, 122 Ga. 535.
44 C.J. p 1438 note 83.

62. Iowa.—Ramsay v. Marble Rock, 98 N.W. 134, 123 Iowa 7, 9.
44 C.J. p 1439 note 89.

63. Wis.—Ryan v. Olson, 197 N.W. 727, 183 Wis. 290.
44 C.J. p 1439 notes 92–95.

64. Ill.—Holden v. Alton, 53 N.E. 556, 179 Ill. 318, 325.
44 C.J. p 1439 note 92.

65. Md.—Konig v. Baltimore, 97 A. 837, 128 Md. 465.

by awarding damages where the complaint contains a prayer for general relief.⁶⁶ In a suit for the cancellation of releases of liens for special assessments, a successful plaintiff is entitled to an order requiring a surrender of the releases.⁶⁷

In a suit to compel reimbursement on the part of municipal officers, an injunction preventing them from disposing of their property has been held improper where there is no proof that they purchased the property with moneys belonging to the municipal corporation.⁶⁸ Where, in a suit to enjoin an alleged conspiracy by defendant municipality and defendant mining company to destroy, by mining, a part of the municipality, plaintiff is not entitled to an injunction, the court cannot retain the case to award damages for possible injuries to plaintiff's property which may arise in the future,⁶⁹ and in such suit defendant mining company cannot be compelled to seek the vacation of streets involved in the transaction between such company and the municipality.⁷⁰

Relief to defendant and against plaintiff. While the view has been taken that taxpayers will not be required, in a suit to restrain payments under an illegal contract, to offer payment for what has already been done under the contract,⁷¹ it has been held, in a suit by a taxpayer to cancel a contract, that the municipality will be required to do equity by paying the reasonable value of what it has received under the contract prior to the institution of the suit.⁷² Moreover, under other circumstances relief has been granted to defendant.⁷³

§ 2170. — Construction, Effect, and Enforcement

A temporary injunction in a taxpayer's suit should be construed in the light of the allegations of the bill and the purpose of the suit.

In accordance with general rules discussed in Injunctions § 207, a temporary injunction or restrain-

ing order in a taxpayer's suit must be construed and given effect in the light of the allegations of the bill and the purpose of the suit.⁷⁴ A decree enjoining certain officers of a municipality from entering into a proposed contract has been construed as not an injunction against the exercise by the municipal council of its legislative powers, although the officers enjoined had not been authorized by the council to enter into such contract.⁷⁵

The decision of the court in a taxpayer's suit enjoining the municipality from issuing bonds for the purpose of paying the award in a condemnation proceeding has been held to nullify the prior condemnation proceedings.⁷⁶

Enforcement. Where, in a taxpayer's suit, one of the defendants has been directed to account to the city for moneys wrongfully received, the right of plaintiff to take proper proceedings for the enforcement of the decree has been recognized.⁷⁷

§ 2171. Costs and Expenses

Costs in taxpayers' suits may sometimes be decreed against the municipal corporation.

In taxpayers' actions the court in a proper case may decree costs against the municipal corporation,⁷⁸ and, according to some cases, a reasonable amount to cover plaintiff's expenses,⁷⁹ including a fee for plaintiff's attorney.⁸⁰

Award against municipal officers or employees. A municipal officer or employee who is a party defendant may be liable for costs;⁸¹ but the view has been taken that in actions against municipal officers relating to their official duties costs should not be awarded against them in the absence of any showing of gross negligence, bad faith, or malice, although the act complained of is shown to be unauthorized and is enjoined.⁸²

Award against persons dealing with municipality. Plaintiff may be entitled to an award of costs

66. Wis.—Ryan v. Olson, 197 N.W. 727, 188 Wis. 290.
44 C.J. p 1439 note 94.

67. Conn.—Sauter v. Mahan, 111 A. 186, 95 Conn. 311.

68. Tenn.—Burns v. Nashville, 221 S.W. 828, 142 Tenn. 541.

69. Minn.—Reed v. Hibbing, 184 N. W. 842, 150 Minn. 130.

70. Minn.—Reed v. Hibbing, *supra*.

71. Ill.—Koons v. Richardson, 227 Ill.App. 477.

72. Neb.—Grand Island Gas Co. v. West, 45 N.W. 242, 28 Neb. 852.

73. Ga.—Marietta v. Dobbins, 104 S. E. 444, 150 Ga. 422.
44 C.J. p 1439 note 2.

74. Wis.—Smith v. Burlington, 109 N.W. 79, 129 Wis. 336.
44 C.J. p 1439 note 4.

75. Ga.—Augusta v. Thomas, 126 S. E. 144, 159 Ga. 435.

76. Neb.—City of Kearney v. Consumers Public Power Dist., 18 N. W.2d 437, 146 Neb. 29.

Right of city under award is destroyed.—City of Kearney v. Consumers Public Power Dist., *supra*.

77. Mich.—Campbell v. Western Electric Co., 71 N.W. 644, 118 Mich. 338.
44 C.J. p 1440 note 7.

78. Mass.—Kennedy v. City of Holyoke, 44 N.E.2d 786, 312 Mass. 248.
44 C.J. p 1440 note 9.

79. Ind.—Michigan City v. Marwick, 116 N.E. 434, 119 N.E. 154, 67 Ind. App. 294.

44 C.J. p 1440 note 10.

80. Md.—Konig v. Baltimore, 97 A. 837, 128 Md. 465.
S.C.—Shillito v. City of Spartanburg, 51 S.E.2d 95, 214 S.C. 11.

81. Mass.—Kennedy v. City of Holyoke, 44 N.E.2d 786, 312 Mass. 248.
44 C.J. p 1440 note 13.

82. N.Y.—O'Connor v. Walsh, 82 N. Y.S. 499, 83 App.Div. 179—Wakefield v. Brophy, 122 N.Y.S. 632, 67 Misc. 298.

against a person who has dealt with the municipal authorities and who is a party defendant.⁸³

Liability of plaintiff; defendant's right to costs. Under certain circumstances defendant may be entitled to costs as against plaintiff.⁸⁴ However, since taxpayers' suits under some statutes are considered in the public interest, costs therein are not awarded against the taxpayers bringing suit, although they are unsuccessful.⁸⁵

Investigation of financial affairs of municipality. Under some statutes providing for an investigation into the financial affairs of a municipality on application of a specified number of freeholders, the court may direct payment of the costs of such investigation by the municipality.⁸⁶ The petitioners under some of such statutes are liable for costs and expenses if the institution of the proceeding is not justified.⁸⁷ In such a proceeding the officers whose acts are in question must defend themselves at their own expense,⁸⁸ and costs therein may be awarded against such officers if the plaintiffs establish their case.⁸⁹ The costs of the proceedings may be payable out of municipal funds where the investigation benefited the municipality and no dishonest motive or corrupt act by the officers is shown.⁹⁰ It has been held that the award of costs in such investiga-

tion is governed by statutory provisions relative to costs in special proceedings.⁹¹

In a suit under the Ohio statute, where the city solicitor has refused to sue, plaintiff taxpayer may be allowed costs,⁹² and reasonable compensation for his attorney⁹³ payable out of funds recovered by the taxpayer for the municipality;⁹⁴ but compensation for plaintiff's attorney cannot be awarded under the statute where judgment is not in favor of plaintiff,⁹⁵ where suit is not actually in behalf of the municipality,⁹⁶ or where the municipality has no solicitor.⁹⁷

§ 2172. Review

Rules governing appeals in civil actions generally apply in taxpayers' suits.

Rules governing appeals and writs of error in civil actions in general apply in taxpayers' actions.⁹⁸ It has been held that certiorari will not lie to review a determination in a proceeding under a statute authorizing the institution by freeholders of an investigation of municipal finances;⁹⁹ an appeal is the proper method for reviewing such determination.¹ A suit to enjoin certain municipal officers from entering into a contract is not premature so as to prevent the appellate court from considering questions

83. Ill.—Chicago v. McCoy, 26 N.E. 363, 136 Ill. 344, 11 L.R.A. 413. 44 C.J. p 1440 note 18.

84. Wis.—Borner v. Prescott, 136 N.W. 552, 150 Wis. 197. 44 C.J. p 1441 note 25.

Discretion of court

Mich.—Lake Superior District Power Co. v. City of Bessemer, 285 N.W. 20, 288 Mich. 455.

85. Mass.—Howard v. City of Chicopee, 12 N.E.2d 106, 299 Mass. 115.—Leonard v. School Committee of City of Springfield, 135 N.E. 459, 241 Mass. 325.—Fuller v. Haines, 112 N.E. 873, 224 Mass. 176.—Lee v. City of Lynn, 111 N.E. 700, 223 Mass. 109.

86. N.J.—North Bergen Tp. v. Gough, 154 A. 113, 107 N.J.Law 424.

Allowance to experts

Order granting allowances to experts who made summary investigation into financial affairs of municipality was held valid, although directing payment of certain sums from allowance to assistants.—North Bergen Tp. v. Gough, supra.

Fees of commissioner and counsel N.J.—In re City of Newark, 194 A. 620, 119 N.J.Law 221.

Stenographic service

N.J.—In re City of Newark, supra.

87. N.Y.—Matter of Monticello, 205

N.Y.S. 839, 123 Misc. 556, affirmed 206 N.Y.S. 970, 211 App.Div. 826, 829.

88. N.Y.—Matter of Kenmore, 110 N.Y.S. 1008, 59 Misc. 388.

89. N.Y.—In re Village of Haverstraw, Rockland County, 229 N.Y.S. 357, 132 Misc. 42. 44 C.J. p 1440 note 16.

90. N.Y.—In re Village of Haverstraw, Rockland County, supra.

91. N.Y.—In re Plattsburgh Taxpayers, 51 N.E. 512, 157 N.Y. 78. 44 C.J. p 1440 note 17.

92. Ohio.—Guckenberger v. Dexter, 18 Ohio Cir.Ct. 244, 10 Ohio Cir. Dec. 174. 44 C.J. p 1440 note 20.

93. Ohio.—Council of Village of Bedford v. State, 175 N.E. 607, 123 Ohio St. 413.—Horstman v. Cincinnati, 1 Ohio App. 444, 17 Ohio Cir. Ct., N.S., 285, 34 Ohio Cir.Ct. 336.—Guckenberger v. Dexter, 18 Ohio Cir.Ct. 244, 10 Ohio Cir.Dec. 174. 44 C.J. p 1440 note 21.

Intervening taxpayer

Ohio.—City of Cincinnati v. Gamble, 46 N.E.2d 778, 70 Ohio App 457.—City of Cleveland v. Walsh, 37 N.E.2d 397, 67 Ohio App. 479.

As against contractor

Assessment of taxpayer's attorney's fees and expenditures against

contractor was held unauthorized in taxpayer's suit to enjoin carrying out of contract entered into between municipality and contractor.—Fairbanks, Morse & Co. v. Hill, 194 N.E. 397, 48 Ohio App. 418.

94. Ohio.—Council of Village of Bedford v. State, 175 N.E. 607, 123 Ohio St. 413.

95. Ohio.—Oliver v. Cincinnati, 12 Ohio App 432. 44 C.J. p 1440 note 22.

96. Ohio.—Brown v. Toledo, 10 Ohio Cir.Ct. 642, 5 Ohio Cir.Dec. 115. 44 C.J. p 1440 note 23.

97. Ohio.—Brundige v. Ashley, 57 N.E. 226, 62 Ohio St. 526. 44 C.J. p 1441 note 24.

98. Ky.—West Covington v. Dods, 153 SW 964, 152 Ky. 617. 44 C.J. p 1441 note 39.

Jurisdiction

N.J.—Jamouneau v. City of Newark, 53 A.2d 620, 25 N.J.Misc. 345, reversed on other grounds Jamouneau v. Division of Tax Appeals in Dept. of Taxation and Finance, 66 A.2d 534, 2 N.J. 325.

Reversal for errors of law

N.C.—Surles v. Grady, 199 S.E. 79, 214 N.C. 305.

99. N.Y.—People v. Kellogg, 47 N.Y. S. 1023, 22 App.Div. 176.

1. N.Y.—People v. Kellogg, supra.

involved in an appeal from a decree in such suit, although the municipal council had not authorized such officers to enter into the contract.² On an appeal from an order granting an injunction pendente lite, the court will not decide on an ex parte affidavit the question as to whether plaintiff was a mere dummy in bringing suit.³ Where only moot or abstract questions are involved in the appeal, the appeal may be dismissed.⁴

Questions as to pleadings and proof. A complaint containing allegations of waste and illegal, corrupt, or fraudulent official action on the part of municipal officers has been held sufficient on appeal to sustain the jurisdiction of the lower court to grant an injunction order restraining such action.⁵ On ap-

peal from a judgment of dismissal the petition has been so construed as to uphold the judgment.⁶ However, an order entered without proof or sufficient allegations in a proceeding to supercede a special tax levy should be reversed and the case remanded for further development.⁷

Questions as to parties. Where the municipality is vitally interested in the questions to be determined in a particular suit and it is, therefore, a necessary party, its omission as a party is ground for reversal;⁸ but where, in a suit to have returned to a municipality certain bonds issued by it, no fact is alleged which would affect the title of certain bondholders, it has been held that their omission as parties to the suit is not ground for reversal.⁹

XX. CLAIMS AGAINST MUNICIPALITY

§ 2173. Necessity for Presenting

- a. In general
- b. Claims within requirement
- c. Sufficiency of presentation

a. In General

Claims against a municipal corporation must usually be presented to a particular officer or board for audit and allowance or rejection.

As commonly required by the statutes relating to municipal corporations, or by the municipal charters or ordinances, all demands¹⁰ or all unliquidated claims against the municipal corporation must be presented to a specified officer or board for audit and allowance or rejection.¹¹ Such a statutory or charter provision is known as a "cash basis",¹² or "non-claim"¹³ statute or law, and may be waived, since it does not constitute a prerequisite to a right of recovery.¹⁴

A distinction is to be observed between presenting a claim as a statutory condition precedent to the bringing of an action for tort as discussed supra §§ 922-930, or as a statutory condition precedent to bringing an action in general, as considered infra § 2199, and the presentation of a claim for audit, in that the former is not a presentation for audit,¹⁵ although there is authority for the view that certain provisions for the presentation of claims for audit are exclusive and that claims which may be so presented cannot be made the subject of an action.¹⁶

b. Claims within Requirement

All claims or demands against a municipal corporation which come within the provisions of the statute, charter, or ordinance should be presented.

All claims or demands against the municipal corporation which come within the provisions of the statute, charter, or ordinance should be presented.¹⁷

2. Ga.—Augusta v. Thomas, 126 S. E. 144, 159 Ga. 435.

3. Ill.—Bednarski v. West Hammond, 170 Ill.App. 543.

4. Va.—Ficklen v. Danville, 131 S.E. 689, 132 S.E. 705, 146 Va. 426. 44 C.J. p 1441 note 37.

5. N.Y.—Blaschko v. Wurster, 51 N. E. 303, 156 N.Y. 437.

6. Ky.—Bosworth v. Middlesboro, 227 S.W. 170, 190 Ky. 246. 44 C.J. p 1441 note 42.

7. W.Va.—New River Grocery Co. v. City of Hinton, 172 S.E. 528, 114 W.Va. 449.

8. Ga.—Saunders v. Rainey, 80 S. E. 305, 141 Ga. 77.

9. Cal.—Mock v. Santa Rosa, 58 P. 826, 126 Cal. 330.

10. U.S.—Welles v. Portuguese-American Bank, Cal., 211 F. 561, 564, 128 C.C.A. 161, rehearing de-

nied 215 F. 81, 131 C.C.A. 389, and reversed on other grounds 37 S.Ct. 3, 242 U.S. 7, 61 L.Ed. 115.

44 C.J. p 1442 note 51.

11. Wis.—Appleton Water Works Co. v. Appleton, 117 N.W. 816, 136 Wis. 395.

44 C.J. p 1442 note 52.

Claim against municipality as affected by creditor's suit see Creditors' Suits § 17 c.

12. Kan.—City of Osawatimie v. Board of Com'rs of Miami County, 110 P.2d 748, 153 Kan. 332—City of Valley Falls v. Board of Com'rs of Jefferson County, 82 P.2d 1088, 148 Kan. 429.

13. Ala.—Downs v. City of Birmingham, 198 So. 231, 240 Ala. 177.

14. Ala.—Downs v. City of Birmingham, supra.

Acts constituting waiver

A city, by paying plaintiff's claim for difference between amount of salary that plaintiff had been paid as city commissioner and amount of plaintiff's salary as fixed by amendment to constitution "waived" compliance by plaintiff with requirements of statute providing that claims against cities must be filed with city clerk within one year from accrual thereof or be barred.—Downs v. City of Birmingham, supra.

15. N.Y.—Eppig v. New York, 68 N. Y.S. 41, 57 App.Div. 114.

Wis.—Read v. Madison, 155 N.W. 954, 162 Wis. 94—Bunker v. City of Hudson, 99 N.W. 448, 132 Wis. 43.

16. N.Y.—Palm v. Mt. Vernon, 210 N.Y.S. 308, 213 App.Div. 255.

17. Cal.—Trower v. San Francisco, 109 P. 617, 157 Cal. 762.

Under some provisions all demands of every sort must be presented to, and approved by, the auditor before payment can be made from the treasury,¹⁸ and this has been held to include a contractual obligation of the municipality.¹⁹ Other provisions apply to claims for damages arising from tort as well as to those arising on contract,²⁰ although some of the provisions have been held to refer only to claims arising on contracts,²¹ especially when the claim is required to be itemized.²² Still other statutory or charter provisions have been held applicable only to claims for damages of a specified nature.²³

On the other hand claims which are not within the meaning of the statute or charter need not be presented.²⁴ Accordingly it has been held that presentation is not necessary of a demand under a contract which has not been made directly with the municipality,²⁵ of a claim for compensation for property taken or damaged for public use,²⁶ or of a claim of the state for moneys improperly withheld by the municipality.²⁷ The requirement of such presentation or filing does not apply to a claim

which was in process of adjudication when the requirement went into effect.²⁸ Charter provisions relating to the filing of claims do not apply to persons making levies against a city under a statute providing a special form of garnishment for the benefit of a person who holds a judgment against a defendant to whom money is owing and unpaid by the city.²⁹

Claims for salary or fixed charges. A claim for the salary of an officer or for other like fixed charges generally is not required to be presented for audit.³⁰ Where, however, a claimant is to be paid by the day during the term, not of his office, but of his employment, it has been held necessary for him to present his claim.³¹ A statute requiring presentation of "all accounts and demands against a city" applies to claims against the city arising in the ordinary course of carrying on the city government, and not to contracts where the time and amount of payment are definitely and specifically determined by express agreement between the parties, and all under the intendment of other provisions of the stat-

Wash—Abbott v. Spokane, 135 P 483, 75 Wash. 602.

44 C.J. p 1442 note 52 [b], [c], p 1443 note 66.

Claims of bondholders

A statute requiring all claims for damages against a city or town to be filed is applicable to claims of holders of local improvement district bonds—City of Longview v. Longview Co., 150 P.2d 395, 21 Wash.2d 248.

Municipal claims

Such requirements have been held to apply to claims of one municipality against another municipality, as well as to claims of private persons—City of Osawatimie v. Board of Com'rs of Miami County, 110 P.2d 748, 153 Kan. 332—City of Valley Falls v. Board of Com'rs of Jefferson County, 82 P.2d 1088, 148 Kan. 429.

18. Cal—Metropolitan Life Ins. Co. v. Rolph, 194 P. 1005, 1007, 184 Cal 557.

44 C.J. p 1443 note 62.

19. Cal—First Nat. Bank v. City of Whittier, 292 P. 661, 109 Cal.App. 217.

Implied contract

A city has been held liable on implied contract for purchase of gas under which amount to be paid out was uncertain until claim was filed, only in amount for which claims were filed against existing unexpended appropriation made and approved for purposes for which claims were drawn—Oklahoma Natural Gas Corporation v. City of Enid, 65 P.2d 440, 179 Okl. 288.

20. Neb—Wheeler v. Omaha, 196 N. W. 894, 111 Neb. 494.

44 C.J. p 1442 note 53.

Presentation of claim for injury as condition to action for tort see supra §§ 922-930.

21. Ariz.—City of Phoenix v. Mayfield, 20 P.2d 296, 41 Ariz. 537.

Mo—Haggard v. Carthage, 67 S.W. 567, 168 Mo. 129.

Okl—McEwen Mfg. Co. v. Covington, 239 P. 219, 112 Okl. 40.

41 C.J. p 1442 note 54.

22. Ariz.—City of Phoenix v. Mayfield, 20 P.2d 296, 41 Ariz. 537.

23. Minn.—Johnson v. Duluth, 158 N.W. 616, 133 Minn. 405.

44 C.J. p 1442 note 56.

24. N.Y.—People v. Craig, 133 N. E. 419, 232 N.Y. 125.

44 C.J. p 1442 note 52 [d], [e].

25. US—Welles v. Portuguese-American Bank, Cal., 211 F. 561, 564, 128 C.C.A. 161, rehearing denied 215 F. 81, 131 C.C.A. 359, and reversed on other grounds 37 S.Ct. 3, 242 U.S. 7, 61 L.Ed. 115.

44 C.J. p 1442 note 51 [a].

26. Wash.—Provident Trust Co. v. Spokane, 134 P. 927, 75 Wash. 217.

44 C.J. p 1443 note 65.

27. N.Y.—People v. City of Yonkers, 30 N.Y.S.2d 678, 177 Misc. 406, affirmed 48 N.Y.S.2d 336, 267 App. Div. 959, affirmed 59 N.E.2d 786, 293 N.Y. 880.

Fines

N.Y.—People v. City of Yonkers, 30 N.Y.S.2d 678, 177 Misc. 406, affirmed 48 N.Y.S.2d 336, 267 App. Div. 959, affirmed 59 N.E.2d 786, 293 N.Y. 880.

28. Kan.—Board of Com'rs of Saline County v. City of Salina, 56 P.2d 68, 143 Kan. 557.

29. Cal.—Department of Water and Power of City of Los Angeles v. Inyo Chemical Co., 108 P.2d 410, 16 Cal.2d 744.

State as judgment creditor

Where state as judgment creditor of a corporation to which money was owing and unpaid by charter city made levy against city under statute providing special form of garnishment for benefit of person who holds judgment against defendant to whom money is owing and unpaid, city by virtue of the levy did not owe the money directly to the state which was not required to file claim in accordance with charter provisions, but the levy was merely a demand for the payment in court of moneys owing by the city to the judgment debtor of party making the demand who presumably complied with charter requirements for filing claims in liquidating claim—Department of Water and Power of City of Los Angeles v. Inyo Chemical Co., supra.

30. Ala.—Downs v. City of Birmingham, 198 So. 231, 240 Ala. 177.

Cal.—Ames v. City and County of San Francisco, 18 P. 397, 76 Cal. 325.

Minn.—Naeseth v. Village of Hibbing, 242 N.W. 6, 185 Minn. 526.

44 C.J. p 1443 notes 57, 58.

Notice of claim for salary as condition to action therefor see supra § 540.

31. Mass.—O'Neill v. Worcester County, 96 N.E. 1100, 210 Mass. 374.

ute.³² A charter requiring "all claims for damages" to be presented does not apply to a claim on a contract constituting a direct promise to pay money.³³

Moral and equitable claims. Except as limited by the constitution and general laws, a municipality, under its delegated powers, may allow and pay moral and equitable claims,³⁴ and the extent to which such claims should be recognized is primarily for municipal determination.³⁵ In the absence of a law prohibiting a city from paying a claim which has not been properly filed, a city may recognize a moral obligation founded on a just claim of substantial pecuniary right and pay the claim,³⁶ even though no recovery thereon might be available by action at law.³⁷

c. Sufficiency of Presentation

The presentation must be made to the officer or board authorized to receive it, and must at least substantially comply with the requirements of the statute or charter as to the manner of making it.

The presentation must be made in at least substantial compliance with the method prescribed by the statute or charter,³⁸ and must be made to the

officer or board designated by the statute or charter to receive and audit it,³⁹ or authorized to order its payment,⁴⁰ unless the officers themselves are the wrongdoers.⁴¹ A claim is presented to the common council when it is filed with the clerk of the council,⁴² or presented to the mayor and by him to the council.⁴³ A presentation, however, which is made to an officer or board which has usurped the office is invalid.⁴⁴

§ 2174. Time for Presenting

A claim against a municipal corporation must, when presentation is necessary, be presented within the time prescribed by statute or charter.

The presentation of a claim should be made within the time prescribed by the statute or charter,⁴⁵ after the claim or cause of action has accrued to claimant,⁴⁶ that is, within the specified time after the accrual of the last item of the claim or account;⁴⁷ and, if not presented within the prescribed time, the claim is barred, at least as far as the municipal authorities are concerned.⁴⁸ The time begins to run from the time claimant has knowledge of his right to a claim.⁴⁹

32. U.S.—Forsyth v. Crellin, Mont., 210 F. 835, 127 C.C.A. 385.

44 C.J. p 1443 note 60

33. Wash.—Williams v. Seattle, 138 P. 300, 302, 78 Wash. 15.

44 C.J. p 1443 note 61.

34. N.Y.—Evans v. Berry, 186 N.E. 203, 262 N.Y. 61, 89 A.L.R. 387—Blazejewski v. Eckert, 3 N.Y.S.2d 87, 166 Misc. 716.

35. N.Y.—Evans v. Berry, 186 N.E. 203, 262 N.Y. 61, 89 A.L.R. 387.

36. Ala.—Downs v. City of Birmingham, 198 So. 231, 240 Ala. 177.

37. Ala.—Downs v. City of Birmingham, supra.

38. Minn.—Freeman v. City of Minneapolis, 17 N.W. 364, 219 Minn. 202.

Purpose

The statute relating to method of presenting claims against municipalities was "intended to establish a uniform rule which should apply to all municipalities, thus avoiding the confusion arising out of the many dissimilar provisions contained in their various charters."—Freeman v. City of Minneapolis, supra—Johnson v. City of Duluth, 158 N.W. 616, 617, 133 Minn. 405.

39. N.J.—Fox v. Clark, 59 A. 224, 72 N.J.Law 100.

N.Y.—Matter of Agar, 47 N.Y.S. 477, 21 Misc. 145.

Tex.—Puckett & Wear v. City of Ft. Worth, Civ.App., 180 S.W. 1115.

44 C.J. p 1444 note 74.

If village board is not authorized to audit and allow claim of a specified nature, it need not be presented to the board.—Kaime v. Omro, 5 N.W. 838, 49 Wis. 371

40. Cal.—Chilberg v. City of Los Angeles, 128 P.2d 693, 54 Cal.App. 2d 99.

41. Tex.—Puckett & Wear v. City of Ft. Worth, Civ.App., 180 S.W. 1115.

42. Wis.—Oshkosh Waterworks Co. v. Oshkosh, 81 N.W. 1040, 106 Wis. 83.

44 C.J. p 1444 note 74 [c], [f].

43. N.Y.—Vermeule v. Corning, 174 N.Y.S. 220, 186 App.Div. 206, affirmed 130 N.E. 903, 230 N.Y. 585.

44 C.J. p 1444 note 74 [d].

44. R.I.—Murphy v. Moles, 25 A. 977, 18 R.I. 100.

45. N.Y.—People v. Prendergast, 150 N.Y.S. 683, 88 Misc. 307, affirmed 153 N.Y.S. 1137, 169 App.Div. 959.

44 C.J. p 1444 note 75.

46. Ala.—Downs v. City of Birmingham, 198 So. 231, 240 Ala. 177. Cal.—Ames v. City and County of San Francisco, 18 P. 397, 76 Cal. 325—First Nat. Bank v. City of Whittier, 292 P. 661, 109 Cal.App. 217.

N.Y.—Collyer v. President and Trustees of Village of Ossining, 290 N.Y.S. 681, 248 App.Div. 913.

Wash.—City of Longview v. Longview Co., 150 P.2d 395, 21 Wash.2d 248—Marks v. Seattle, 152 P. 706.

88 Wash. 61—International Con-

tract Co. v. Seattle, 134 P. 502, 74 Wash. 662.

44 C.J. p 1444 note 76.

Filing held timely

Wash.—Lynn v. City of Longview, 131 P.2d 164, 15 Wash.2d 528, 143 A.L.R. 1336.

General law held inapplicable to a village incorporated under a special charter.—Collyer v. President and Trustees of Village of Ossining, 290 N.Y.S. 681, 248 App.Div. 913.

47. Cal.—Gamble v. City of Sacramento, 110 P.2d 530, 43 Cal.App.2d 200.

Rule not applicable

A policeman's claim which was presented to city in February, 1937, for deductions from salary for the years 1932-1935, was barred under charter provision that claims must be presented within six months, as against contention that limitations did not begin to run until three years after last deduction in December, 1935, on theory that payment of salary was an open "book account" instead of cash transaction.—Gamble v. City of Sacramento, supra.

48. Ala.—Downs v. City of Birmingham, 198 So. 231, 240 Ala. 177—Montgomery County v. Montgomery, 70 So. 642, 195 Ala. 197.

Cal.—Gamble v. City of Sacramento, 110 P.2d 530, 43 Cal.App.2d 200.

Neb.—Redell v. Omaha, 113 N.W. 1054, 80 Neb. 178.

44 C.J. p 1444 note 75 [e].

49. Wash.—City of Longview v.

§ 2175. Statement and Verification or Proof of Claim

The statement and verification and proof of a claim presented against a municipal corporation for audit should at least substantially comply with statutory or charter requirements.

There must be at least substantial compliance with the requirements imposed by statute, charter, or ordinance with respect to the formal statement of the claim as a condition precedent to its allowance,⁵⁰ such as to the manner of its being itemized, by stating in detail the particulars of the claim,⁵¹ unless itemization is not required by the statute or charter.⁵² However, no narrow rule of construction should be applied to the wording of the claim;⁵³ and, where the claim consists of a single item, dates and amounts need not be separately stated.⁵⁴ Moreover, if the mode or extent of itemizing an account is not specifically fixed by statute, if the common council to which the account is presented regards the account as insufficiently itemized, it owes a duty to claimant to bring the objection to his attention.⁵⁵

Verification and proof. There must also be substantial compliance with the statute or charter as to verification and proof of the claim presented.⁵⁶ The verifying affidavit must show that claimant has such personal knowledge of the facts that the auditing officer or board may intelligently act thereon;⁵⁷ and, if the affidavit is made by an assignee of the claim, it must appear that he has such personal

knowledge of the facts stated in the affidavit, and not merely that he verily believes the facts.⁵⁸ It has been held, however, that verification is not required where the claim is wholly repudiated and claimant is obliged to prove the justice of his claim in an action at law.⁵⁹

Objections. Except where the statute absolutely prohibits allowance of a defective claim,⁶⁰ objections as to the manner of presenting the claim,⁶¹ and as to its verification or itemization,⁶² may be waived, such as by a failure to urge the objections within the time provided for rejection on that ground.⁶³ It has been held, however, that the failure of a board of trustees of a village to return a bill presented to it for audit, on the ground that it was not verified as required by statute,⁶⁴ or to object to the bill on such ground,⁶⁵ is not a waiver of the defect.

§ 2176. Audit

- a. Auditing officer or board
- b. Nature and extent of auditing powers and duties in general

a. Auditing Officer or Board

The power and duty to audit claims against a municipal corporation are generally vested in a particular officer or board.

The question as to what officer or board has the power to audit claims is usually fixed by statute, charter, or ordinance,⁶⁶ and, accordingly, as so pro-

Longview Co., 150 P.2d 395, 21 Wash 2d 248.

50. Cal.—Madary v. City of Fresno, 128 P. 340, 20 Cal App. 91.

N.Y.—People v. Green, 3 Hun 208, 5 Thomps. & C. 376

44 C.J. p 1445 note 82.

51. Cal.—Kelso v. Teale, 39 P. 948, 106 Cal. 477—Chapman v. City of Fullerton, 265 P. 1035, 90 Cal App 463.

44 C.J. p 1445 note 82.

52. Kan.—City of Weir v. Board of Com'rs of Cherokee County, 33 P. 2d 1108, 140 Kan. 30.

53. N.J.—State v. Hoboken, 38 N.J. Law 391.

Wis.—Moyer v. Oshkosh, 139 N.W. 378, 151 Wis. 586

44 C.J. p 1445 note 83.

54. Cal.—Kelso v. Teale, 39 P. 948, 106 Cal. 477.

55. N.Y.—Vermeule v. Corning, 174 N.Y.S. 220, 186 App.Div. 206, affirmed 130 N.E. 903, 230 N.Y. 585.

44 C.J. p 1446 note 89.

56. Mich.—Merrifield v. Village of Paw Paw, 265 N.W. 461, 274 Mich. 550.

44 C.J. p 1445 notes 82 [c], 86 [a].

The purpose of the statute providing that village shall not allow any claim unless it shall be accompanied with affidavit of person rendering it "is to minimize the everpresent possibility of trumped-up claims being presented to the municipality."—Merrifield v. Village of Paw Paw, supra.

Not condition precedent

Where the statute requires verification of a demand presented, "while it might be necessary for the claimant to present such a claim to the city council before suit could be maintained, yet we think it was not the purpose of the statute that such claims should be verified as a condition precedent to the city council's allowance thereof, or to the institution of an action against the city."—Forsyth v. Crellin, Mont., 210 F. 835, 838, 127 C.C.A. 385.

57. Mich.—Kelley v. City of Flint, 232 N.W. 407, 251 Mich. 691.

58. Mich.—Kelley v. City of Flint, supra.

Information and belief insufficient

A court rule permitting chancery pleading verified on information and belief has been held inapplicable to

a claim against a city—Kelley v. City of Flint, supra

59. N.J.—Mee v. Montclair, 83 A. 764, 83 N.J. Law 274, reversed on other grounds 86 A. 261, 84 N.J. Law 400.

60. Ind.—Campbell v. Brackett, 90 N.E. 777, 45 Ind App. 293.

44 C.J. p 1445 note 86

61. N.Y.—People v. Justice, 147 N. Y.S. 257.

44 C.J. p 1445 note 84

62. Mich.—Wright v. Portland, 76 N.W. 141, 118 Mich. 23.

N.Y.—Sweet v. Buffalo, 36 N.Y.S. 760, 92 Hun 404, affirmed 53 N.E. 1132, 158 N.Y. 695.

44 C.J. p 1445 note 85.

63. N.Y.—Sweet v. Buffalo, supra.

44 C.J. p 1445 note 85 [a].

64. N.Y.—Commonwealth Water Co. v. Castleton, 183 N.Y.S. 753, 192 App.Div. 697.

65. N.Y.—Commonwealth Water Co. v. Castleton, supra.

66. N.Y.—Jones v. Greeff, 270 N.Y. S. 316, 240 App.Div. 373.

44 C.J. p 1443 note 67.

vided, claims against a municipal corporation may be audited by the municipal auditor,⁶⁷ the comptroller,⁶⁸ the finance department,⁶⁹ the mayor,⁷⁰ the civil service commission,⁷¹ some designated board or body,⁷² or a special agent properly appointed for that purpose.⁷³ Unless required by statute, it is not essential that the power to settle claims against the municipality and the power to investigate and examine such claims be intrusted to the same body or official,⁷⁴ but it is sufficient that the power to investigate and examine exists somewhere in the municipal government in aid of the charter power of the municipal council to compromise claims.⁷⁵

b. Nature and Extent of Auditing Powers and Duties in General

The powers and duties of a municipal auditing officer

67. Cal.—City and County of San Francisco v Broderick, 43 P 860, 111 Cal 302.

44 C.J. p 1443 note 68

In aid of compromising power

A charter provision authorizing city auditor to investigate claims against city is local law, by passage of which city council delegates authority to auditor in aid of council's power to compromise claims against city.—Lattinville v. Ereth, 26 N.Y. S.2d 434, 175 Misc. 1076.

68. Cal.—City and County of San Francisco v. Boyd, 140 P.2d 666, 22 Cal 2d 685.

N.Y.—Greenberg v. City of New York, 274 N.Y.S. 4, 152 Misc. 488—People v. Flagg, 16 How.Pr. 36
44 C.J. p 1443 note 69.

Routine claims

A charter provision requiring comptroller to settle and adjust claims has been held to refer to settlements and adjustments of ordinary routine claims and not to franchises.—Greenberg v. City of New York, 274 N.Y.S. 4, 152 Misc. 488.

Mandatory claims

(1) Deficits incurred by city board of transportation in fixing its employees' salaries become mandatory charges or claims against city, the comptroller of which is required to audit and pay them.—Wilmerding v. O'Dwyer, 69 N.Y.S.2d 82, affirmed 69 N.Y.S.2d 90, 272 App.Div. 35, reversed on other grounds 76 N.E.2d 325, 297 N.Y. 664, motion to amend remittitur denied 77 N.E.2d 793, 297 N.Y. 781.

(2) Such a deficit resulting from fixing of employees' salaries and incurring expenses for municipal operation of transit facilities in excess of operating revenues requires appropriation pursuant to mandatory provisions of Rapid Transit Law, as well as audit by city comptroller, and, hence, is mandatory charge or

claim against city.—Wilmerding v O'Dwyer, supra.

69. N.Y.—McGinness v. New York, 26 Hun 142.

44 C.J. p 1441 note 70

Comptroller through bureau of audit in finance department

N.Y.—Jones v. Greeff, 270 N.Y.S. 316, 240 App.Div. 373.

70. N.J.—Fox v. Clark, 59 A. 224, 72 N.J.Law 100.

44 C.J. p 1444 note 71.

71. N.Y.—Drummond v. Kern, 27 N.Y.S.2d 332, 176 Misc. 669

Civil service commission in general see supra § 690.

Photographer's bill held not subject to audit

N.Y.—Drummond v. Kern, supra.

72. Tex.—Williams v. Tompkins, Civ.App., 42 S.W.2d 106, reversed on other grounds, Com.App., Tompkins v. Williams, 62 S.W.2d 70.
44 C.J. p 1444 note 72

Municipal commissioners

Tex.—Williams v. Tompkins, Civ. App., 42 S.W.2d 106, reversed on other grounds, Com.App., Tompkins v. Williams, 62 S.W.2d 70.

Board of supervisors

If a claimant who seeks to hold a municipality liable for defect in maintenance of a highway, under the Public Liability Act, prevails, with or without litigation, the legislative body, which in the case of the city and county of San Francisco is the board of supervisors, has authority to allow payment.—Wilkes v. City and County of San Francisco, 112 P. 2d 759, 44 Cal.App.2d 393.

73. R.I.—Foster v. Angell, 33 A. 406, 19 R.I. 285.

44 C.J. p 1444 note 73.

74. N.Y.—Lattinville v. Ereth, 26 N.Y.S.2d 434, 175 Misc. 1076.

75. N.Y.—Lattinville v. Ereth, supra.

76. Tex.—Williams v. Tompkins,

or board are judicial or quasi-judicial, and are generally limited by statute or ordinance.

Except where the statute or charter provides otherwise,⁷⁶ the powers and duties of a municipal auditing officer or board are not merely clerical,⁷⁷ but are judicial⁷⁸ or quasi-judicial.⁷⁹ In passing on a claim it functions as a special tribunal,⁸⁰ and may judicially fix the amount of the liability,⁸¹ make adjustments thereon,⁸² and certify the conclusion reached.⁸³

The auditing officers, however, are generally restricted in their powers and duties by the statutes and ordinances,⁸⁴ even though in particular instances the safeguards provided by legislation may seem harsh;⁸⁵ and, although power to audit generally includes power to determine whether the

Civ.App., 42 S.W.2d 106, reversed on other grounds, Com.App., Tompkins v. Williams, 62 S.W.2d 70.

"Correct"

Under a charter requiring auditor to sign claims found "correct," "correct" refers to mathematical or clerical correctness.—Williams v. Tompkins, Tex Civ.App., 42 S.W.2d 106, reversed on other grounds, Com.App., Tompkins v. Williams, 62 S.W.2d 70.

77. N.Y.—People ex rel. Burnet v. Jackson, 85 N.Y. 541.

78. Tex.—Williams v. Tompkins, Civ.App., 42 S.W.2d 106, reversed on other grounds, Com.App., 62 S.W.2d 70.

79. N.D.—State v. Taylor, 156 N.W. 561, 566, 33 N.D. 76, L.R.A. 1918B 156, Ann Cas.1918A 583.
44 C.J. p 1446 note 90.

80. Tex.—Williams v. Tompkins, Civ.App., 42 S.W.2d 106, reversed on other grounds, Com.App., Tompkins v. Williams, 62 S.W.2d 70.

81. Tex.—Williams v. Tompkins, Civ.App., 42 S.W.2d 106, reversed on other grounds, Com.App., Tompkins v. Williams, 62 S.W.2d 70.

82. Tex.—Williams v. Tompkins, Civ.App., 42 S.W.2d 106, reversed on other grounds, Com.App., Tompkins v. Williams, 62 S.W.2d 70.

83. Tex.—Williams v. Tompkins, Civ.App., 42 S.W.2d 106, reversed on other grounds, Com.App., Tompkins v. Williams, 62 S.W.2d 70.

84. Neb.—Redell v. Omaha, 113 N.W. 1054, 80 Neb. 178.

N.Y.—People ex rel. Grieme v. McGoldrick, 276 N.Y.S. 879, 243 App. Div. 629.

Tex.—Williams v. Tompkins, Civ. App., 42 S.W.2d 106, reversed on other grounds, Com.App., Tompkins v. Williams, 62 S.W.2d 70.

44 C.J. p 1443 note 67, p 1444 note 77.

85. Mass.—Connor v. Morse, 20 N.E. 2d 424, 303 Mass. 42.

claim is just and legal, in whole or in part,⁸⁶ and to pass on its reasonableness,⁸⁷ an auditing officer violates his public duty if he authorizes the payment of claims that involve an illegal expenditure of public funds.⁸⁸ A limitation on a right to audit and contest the reasonableness of a claim will not be read into a statute by inference.⁸⁹ An audit is invalid if it is not made within the time therefor prescribed by statute,⁹⁰ such as prior to payment.⁹¹ An auditing officer or board is bound to audit an unpaid legal claim, if its payment is authorized by law,⁹² and it has been held that it cannot be restricted in the exercise of its office by a city ordinance.⁹³ A council, as the governing body, may, by ordinance, allow just claims which are not collectable by action,⁹⁴ and, under some statutes, such allowance may be made even after the claim has been disapproved by other officers.⁹⁵

Audit by governor. Under a statute providing that the compensation of a person designated by the governor to make an investigation in a proceeding for the removal of a public officer shall be fixed by the governor, if the governor has audited and allowed a claim for services rendered on the hearing of charges against a former mayor, and has made requisition on the city board for money to pay it, the amount so fixed by the governor cannot thereafter be reduced by the city comptroller,⁹⁶ although in other respects the claim may be audited by the comptroller.⁹⁷

Award by attorney general. Under a statute re-

quiring a city to pay the reasonable expenses incurred by a state agency in compelling the payment of money by the city to such agency, a city comptroller has no jurisdiction to pass on the reasonableness of an award made by the attorney general to the trustees of a public building for fees and disbursements expended in proceedings to require the city to make an annual payment for the maintenance of the building.⁹⁸ An allowance by the attorney general of the claim of a special deputy appointed to conduct prosecutions within the city has been held to be final if there has been an appropriation therefor by the legislature, and the comptroller has been held to have no authority to audit the claim;⁹⁹ but such an allowance is not final if the expenses are not covered by appropriations, and the city comptroller may audit it and reject it if it is excessive.¹

The term "audit," as applied to claims against municipalities, is well understood, and means to hear and examine a claim,² and, in its broadest sense, it includes the adjustment or allowance, disallowance, or rejection of the claim.³

§ 2177. — Hearing

The municipal auditing officer or board should ascertain the reasonableness and correctness of a claim before allowing it, and for this purpose should conduct a hearing at which the claimant and opposing witnesses may be summoned and heard.

The audit of a claim must be conducted as directed by the charter or other governing statute,⁴

The safeguards erected to protect public treasuries are not to be thrust aside or evaded because public officers believe in particular instances that their operation is harsh, but there should be strict application to particular instances—Connor v. Morse, supra

86. N.Y.—People ex rel. Burnet v. Jackson, 85 N.Y. 541—People v. Penn Yan, 37 N.Y.S. 535, 2 App.Div. 29, affirmed 47 N.E. 1110, 153 N.Y. 643.

87. N.Y.—People ex rel. Grieme v. McGoldrick, 276 N.Y.S. 879, 243 App.Div. 629—People ex rel. McLennan v. Grout, 77 N.Y.S. 321, 38 Misc. 181.

88. Cal.—City and County of San Francisco v. Boyd, 140 P.2d 666, 22 Cal.2d 685.

89. N.Y.—Tobin v. La Guardia, 34 N.Y.S.2d 660, 178 Misc. 567, affirmed 36 N.Y.S.2d 187, 264 App.Div. 848, reversed on other grounds 48 N.E.2d 287, 290 N.Y. 119, motion denied 49 N.E.2d 1009, 290 N.Y. 743.

90. N.Y.—Matter of Plattsburgh, 50 N.Y.S. 356, 27 App.Div. 353.

44 C.J. p 1444 note 75 [d], p 1446 note 91 [a].

Time for presenting claim see supra § 2174

91. N.Y.—Matter of Plattsburgh, 50 N.Y.S. 356, 27 App.Div. 353, reversed on other grounds 51 N.E. 512, 157 N.Y. 78

92. Cal.—City and County of San Francisco v. Broderick, 43 P. 960, 111 Cal. 302.

93. Cal.—City and County of San Francisco v. Broderick, supra

94. Ohio.—State v. Brown, 8 Ohio Cir.Ct. 103, 4 Ohio Cir.Dec. 345.

Pa.—Bailey v. Sherry, 3 Pa.Dist. 543

95. Pa.—Schweers v. Muhlenberg, 19 Pa.Super. 388

Tex.—Riggins v. Richards, Civ.App., 79 S.W. 84.

44 C.J. p 1445 note 80.

96. N.Y.—Glendon v. City of New York, 12 N.E.2d 428, 276 N.Y. 329.

97. N.Y.—Glendon v. City of New York, supra.

98. N.Y.—Tobin v. La Guardia, 48 N.E.2d 287, 290 N.Y. 119.

99. N.Y.—People ex rel. Rand v. Craig, 131 N.E. 894, 231 N.Y. 216.

1. N.Y.—People ex rel. Rand v. Craig, supra

2. N.Y.—Glendon v. City of New York, 294 N.Y.S. 890, 250 App.Div. 556, reversed on other grounds 12 N.E.2d 428, 276 N.Y. 329

"Audit" defined generally see Audit 7 C.J.S. p 1274 note 27-p 1277 note 88

3. N.Y.—People ex rel. Myers v. Barnes, 20 N.E. 609, 21 N.E. 739, 114 N.Y. 317—Glendon v. City of New York, 294 N.Y.S. 890, 250 App. Div. 556, reversed on other grounds 12 N.E.2d 428, 276 N.Y. 329.

Appropriation of money as audit

An ordinance appropriating money for reimbursement of property owner for expense of repaving occasioned by error in city engineer's specifications could be construed as audit by city council of claim based on valid subsisting contract rather than acknowledgment of tort liability.—City of Houston v. Chapman, 123 S.W.2d 652, 132 Tex. 443.

4. N.Y.—People v. Amsterdam, 36 N.Y.S. 59, 90 Hun 488.

44 C.J. p 1446 note 91.

and it is generally the duty of the auditing officer or board to ascertain the reasonableness and correctness of any claim before approving or allowing it.⁵ Claimant generally has the right to offer his proof and to confront and examine opposing witnesses;⁶ and in passing on the claim the auditing officer may hear evidence,⁷ and, under some statutes, may require any person presenting a claim to be sworn concerning it and answer orally as to any facts relevant to the justness thereof,⁸ unless the claim is not one presently pending against the city,⁹ and such power is not affected by the fact that it may be abused without the restraining hand of a court to keep it within proper bounds;¹⁰ but the auditing officer must confine his investigation to questions pertinent to the claims and issues raised thereby.¹¹

The auditing officer may fix the time and place of the hearing or examination,¹² provided such time or place is reasonable under the circumstances;¹³ and he may issue and serve a subpoena directing claimant to appear before him at the hearing,¹⁴ as a necessary corollary to his right to examine claimant, although the charter is silent on his power to

issue a subpoena.¹⁵

Money taken from person arrested. Under some statutes, the city police commissioner may issue a subpoena requiring a claimant of money, taken from him at the time of his arrest and deposited with the property clerk, to appear and be sworn before such clerk and to answer orally as to facts relative to the justness of his claim,¹⁶ notwithstanding an action is pending by claimant against the property clerk to recover damages for the conversion of such money.¹⁷

§ 2178. — Decision or Award in General

The decision or award should show that the claim was duly audited and allowed, in full or for some exact amount, or that it was rejected; and it should comply with necessary formal requisites.

The claim, where not rejected, must be audited in full or for some exact amount,¹⁸ although a claim may be allowed conditionally, as where it is allowed to be paid when there is money in the treasury.¹⁹ In making his decision, the auditor is not justified in showing any favoritism by auditing the claim of one person in preference to that of another, on the theory that there may not be suffi-

5. Colo.—Denver v. Republican Pub Co., 155 P. 311, 60 Colo. 571.

44 C.J. p 1446 note 92.

6. N.Y.—People v. Amsterdam, 36 N.Y.S. 59, 90 Hun 488.

7. Tex.—Williams v. Tompkins, Civ App., 42 S.W.2d 106, reversed on other grounds, Com App., Tompkins v. Williams, 62 S.W.2d 70.

8. N.Y.—Matter of Grout, 93 N.Y.S. 711, 105 App Div. 98, 34 N.Y.Civ. Proc 231.

44 C.J. p 1446 note 94.

The purpose of the statute authorizing comptroller to require any person presenting a claim against the city to be sworn before him and to testify as to justness of his claim is to allow comptroller an opportunity to examine into the claim and decide how to dispose of it.—Daniel J. Rice, Inc., v. City of New York, 42 N.Y.S.2d 532, 180 Misc. 860.

Duplicate legislation

The New York City charter 1936 § 93 subd. d, authorizing the city comptroller to administer oaths to settle claim in favor of or against the city is a duplication in function and power of administrative code section authorizing the comptroller to require claimants to be sworn before him touching claims against the city and, therefore, is viewed in the same light.—In re Allen Street, City of New York, 43 N.Y.S.2d 316, 181 Misc. 860.

9. N.Y.—In re Allen Street, City of New York, supra.

Return of assessments paid

Under statute authorizing city comptroller to require claimants to be sworn before him touching claims against the city, the comptroller is not authorized to subpoena attorneys bringing on motions in court for orders directing him to return assessments paid pursuant to certain local laws.—In re Allen Street, City of New York, supra.

10. N.Y.—Lattinville v. Ereth, 26 N.Y.S.2d 434, 175 Misc. 1076.

11. N.Y.—Lattinville v. Ereth, supra.

12. N.Y.—Daniel J. Rice, Inc. v. City of New York, 42 N.Y.S.2d 532, 180 Misc. 860.

Requested time

Although comptroller has statutory authority within limits of reasonableness to fix time and place of examination of one presenting a claim against city, claimant corporation being unable at the time fixed by comptroller to produce any person having extensive information concerning claim did not interfere with orderly procedure by requesting comptroller to fix a time at comptroller's convenience for examination when some three years later a person allegedly having such information returned to city.—Daniel J. Rice, Inc., v. City of New York, supra.

13. N.Y.—Daniel J. Rice, Inc., v. City of New York, supra.

Tex.—City of Houston v. Chapman, Civ.App., 145 S.W.2d 669.

14. N.Y.—Lattinville v. Ereth, 26 N.Y.S.2d 434, 175 Misc. 1076.

Admission of service of notice requiring claimant against city to appear for examination cannot prevail when challenged unless sustained.—Threat v. City of New York, 288 N.Y.S. 976, 159 Misc. 868.

Service on attorney

(1) As regards validity of service of notice by city on claimant to appear for examination by service on attorney representing claimant, service of original claim on city is not tantamount to commencement of action and attorney is not an attorney appearing in any action.—Threat v. City of New York, supra.

(2) Where claimant retained attorney, designated him as such in filed claim against city, and further affirmed his acts in her complaint, claimant could not repudiate authority of attorney to receive notice requiring claimant to appear for examination.—Threat v. City of New York, supra.

15. N.Y.—Lattinville v. Ereth, 26 N.Y.S.2d 434, 175 Misc. 1076.

16. N.Y.—Russo v. Valentine, 62 N.E.2d 221, 294 N.Y. 338.

17. N.Y.—Russo v. Valentine, supra.

18. Cal.—Spring Valley Water-Works v. Ashbury, 52 Cal. 126.

19. Neb.—National Lumber Co. v. Wymore, 46 N.W. 622, 30 Neb. 356.

cient money in the treasury to meet all demands on it.²⁰ An award of an auditing board is insufficient where it is not signed by all of the board, as required by statute,²¹ or where it does not receive the concurrence of a majority as required by the municipal charter,²² or, where the claim is for materials furnished to the city, it is not shown to refer to a contract for such materials.²³ In the absence of proof to the contrary, it will be presumed that the auditing officer properly performed his duty, and that the account or claim, as audited and allowed, is correct;²⁴ and, where the proper board passes on a claim presented to it, the common council has been held to have no power to review such action and increase the amount of the award.²⁵ Where an order for the payment of a claim against a city is passed over the mayor's veto by a two-thirds vote, one vote of which is cast by an alderman who is one of the claimants, and whose vote is necessary to pass it over the veto, the record has been held not admissible in evidence to prove the city's liability on the claim.²⁶

Duty to allow or disallow. If the auditing officer or board finds the claim to be reasonable and just, it is its duty to allow the claim;²⁷ but a disallowance of a claim which exceeds the revenue for the current year, has been held to be proper,²⁸ and a claim which is made without legal authority should be rejected.²⁹ An allowance of a claim after the expiration of the time prescribed by statute for its allowance or rejection is a nullity,³⁰ as is the allowance of an unenforceable claim where a statute

expressly prohibits its recognition.³¹ Power to audit mandatory claims does not give arbitrary power to reduce or reject such claims.³² A decision of a board which is invalid for the lack of a majority vote may be validated at a subsequent meeting by a majority vote of the board passing a resolution adopting, ratifying, and confirming its previous action.³³ It has been held that the execution of a note for a claim, which has been before the council, is a sufficient allowance of the claim whether or not it is valid as a note.³⁴

§ 2179. — Review of Decision

Under some statutes, an appeal may be taken from the allowance or disallowance of a claim against a municipal corporation, but only such decisions as come within the meaning of the statute providing the remedy may be reviewed.

Under some statutes, or charters, the proper mode of review is by an appeal to a particular court from the allowance or disallowance of a claim against a municipal corporation, as provided for in the statute or charter;³⁵ and a substantial compliance with the statutory provisions in taking an appeal gives the appellate court jurisdiction thereof,³⁶ such as with respect to the time of taking an appeal after the decision,³⁷ the verification of the claim,³⁸ the giving of an appeal bond,³⁹ and as to the pleading on appeal.⁴⁰ Under some of these statutes, the right of appeal is also given to taxpayers,⁴¹ and pending the appeal an order allowing the claim is suspended.⁴² Where one resolution allows combinable claims of the same claim-

20. Cal.—San Francisco v Broderick, 43 P 960, 111 Cal 302.

21. N.Y.—Nelson v. Mayor, etc., of the City of New York, 5 N.Y.S. 688, 1 Silv.Sup. 471, affirmed 29 N.E. 814, 131 N.Y. 4.

22. Neb.—State v. Darnier, 144 N.W. 1048, 95 Neb. 39.
44 C.J. p 1446 note 99

23. N.Y.—Nelson v. Mayor, etc., of the City of New York, 5 N.Y.S. 688, 1 Silv.Sup. 471, affirmed 29 N.E. 814, 131 N.Y. 4.

24. N.J.—Butts v. Hoboken, 38 N.J. Law 391.

Illegality of commissioners' audit of claim against city cannot be presumed.—Williams v. Tompkins, Civ. App., 42 S.W.2d 106, reversed on other grounds, Com.App., Tompkins v. Williams, 62 S.W.2d 70.

25. Mich.—Schneider v. Blades, 65 N.W. 559, 108 Mich. 3.

26. Conn.—Walker v. Waterbury, 69 A. 1021, 81 Conn. 13.
44 C.J. p 1446 note 1.

27. Mich.—Kelley v. City of Flint, 232 N.W. 407, 251 Mich. 691.

28. Cal.—Smith v. Broderick, 40 P. 1033, 107 Cal. 644, 48 Am.S.R. 167.

29. N.Y.—People ex rel. Burnet v. Jackson, 85 N.Y. 511

30. Wis.—State v. Bardon, 79 N.W. 226, 103 Wis. 297.

31. Idaho—Tate v. Johnson, 181 P. 523, 32 Idaho 251

32. N.Y.—Willmerding v. O'Dwyer, 69 N.Y.S.2d 82, affirmed 69 N.Y.S. 2d 90, 272 App.Div. 35, reversed on other grounds, 76 N.E.2d 325, 297 N.Y. 664, motion to amend remittitur denied 77 N.E.2d 793, 297 N.Y. 781.

33. Ill.—Curtis v. Gowan, 34 Ill App. 516.

34. Wash.—La France Fire Engine Co. v. Mt. Vernon, 39 P. 367, 11 Wash. 203.

35. Minn.—State v. St. Louis County Dist. Ct., 97 N.W. 132, 90 Minn. 457.
44 C.J. p 1447 note 5.

36. S.D.—Starcher v. Gregory, 121 N.W. 388, 23 S.D. 217.
44 C.J. p 1447 note 6.

37. Wis.—Oshkosh Waterworks Co.

v. City of Oshkosh, 81 N.W. 1040, 106 Wis. 83—Mason v. Ashland, 74 N.W. 357, 98 Wis. 540.

44 C.J. p 1447 note 5 [c] (2)–(4). (7), (8).

Revival

A claim barred for failure to present appeal in due time is not revived by repeal of the statute—Morgan v. City of Rhinelander, 81 N.W. 132, 105 Wis. 138.

38. Wis.—Read v. Madison, 155 N.W. 954, 162 Wis. 94

44 C.J. p 1447 note 5 [c] (5).

39. Wis.—Stephani v. Manitowoc, 76 N.W. 1110, 101 Wis. 59

44 C.J. p 1447 note 5 [c] (9)–(13).

40. Wis.—Davey v. Janesville, 87 N.W. 813, 111 Wis. 628.

44 C.J. p 1447 note 5 [c] (14)–(17).

41. Minn.—Maki v. Lomen, 246 N.W. 531, 188 Minn. 78.

Neb.—Lobeck v. State, 101 N.W. 247, 72 Neb. 595.

44 C.J. p 1447 note 7.

42. Neb.—Lobeck v. State, 101 N.W. 247, 72 Neb. 595.

44 C.J. p 1447 note 7 [a].

ant, a single notice of appeal by the requisite number of taxpayers is sufficient.⁴³

Under other statutes, the remedy is by certiorari,⁴⁴ and with respect to the right to the remedy of certiorari the examination of a claim against a municipality ordinarily constitutes a trial, and its allowance or rejection is a judgment of a statutory tribunal charged with the duty of passing on the account.⁴⁵

Action. Under some statutes, where a claim against a city or village is disallowed, the appropriate remedy of claimant is by action,⁴⁶ but claimant's remedy in such a case against a town is by certiorari.⁴⁷ A statutory provision that, on rejection of a claim, claimant may appeal to a specified court by a bill of exceptions has been construed as not providing an exclusive remedy, but as permitting the bringing of an action where the claim has been presented and rejected.⁴⁸

§ 2180. — Effect of Allowance or Disallowance

An allowance or disallowance of a claim against a municipal corporation in the absence of fraud or collusion, is final and conclusive and not subject to collateral attack; and, unless it is tainted with fraud or collusion, or is ultra vires or void, it is generally binding on the parties thereto.

The acts of an auditing officer or board, within its jurisdiction, in the absence of fraud and collusion, are final and conclusive, and cannot be questioned in a collateral proceeding.⁴⁹ However, since such officers or boards, in allowing accounts or

claims, are limited to the powers conferred on them by the statute or ordinance, as discussed supra § 2176 b, when they transgress these limitations, their acts, like those of any other tribunal of limited jurisdiction, are void,⁵⁰ even though the parties have acted in good faith.⁵¹ The fact that the auditing board has attempted to act favorably on a claim which is presented in a defective form does not legalize the audit,⁵² although the municipal corporation has received value from claimant.⁵³

Generally the allowance of a claim, where the officer or board has jurisdiction, constitutes an adjudication binding on the municipality,⁵⁴ and a recovery may be had thereon, even though the allowance is a conditional one,⁵⁵ or although the allowance is for a smaller amount than that claimed, if it is unconditionally accepted by claimant.⁵⁶ An allowance, however, has been held not binding where it is tainted with fraud or collusion,⁵⁷ or where it is an ultra vires⁵⁸ or void⁵⁹ contract. Under some statutes, the allowance of a claim by the auditing officer or board is not an adjudication,⁶⁰ and, as has been held, an allowance for less than the amount claimed is not a judgment, but an offer, which is not binding on either party until it is accepted.⁶¹

Bar to action. Under some statutes, an audit of a claim against a city or village, as distinguished from a town or county, does not bar an action thereon;⁶² and a claimant's right to resort to the courts for recovery is not precluded by the fact that the municipality has rejected his claim,⁶³ or has by

43. Minn.—Maki v. Lomen, 246 N. W. 531, 188 Minn. 78.

44. N.J.—Hoxsey v. Paterson, 39 N. J. Law 489.
44 C.J. p 1447 note 8.

Certiorari to review audit of claims generally see Certiorari § 19

45. N.Y.—People ex rel. Hunter Arms Co. v. Foster, 288 N.Y.S. 295, 247 App.Div. 619.

46. N.Y.—Davidson v. White Plains, 90 N.E. 825, 197 N.Y. 266.
44 C.J. p 1447 note 13.

47. N.Y.—People v. Barnes, 44 Hun 574, affirmed 20 N.E. 609, 21 N.E. 739, 114 N.Y. 317—People v. Highland, 8 N.Y.St. 531.
44 C.J. p 1448 note 14.

48. Miss.—Pyland v. Purvis, 40 So. 7, 87 Miss. 433.

49. Mich.—Corpus Juris cited in Ottawa Lumber Co. v. Matthews, 288 N.W. 552, 555, 291 Mich. 83.

Tex.—Corpus Juris quoted in Williams v. Tompkins, Civ.App., 42 S. W.2d 106, 111, 112, reversed on

other grounds, Com.App., Tompkins v. Williams, 62 S.W.2d 70.
44 C.J. p 1448 note 15

50. Ind.—Campbell v. Brackett, 90 N.E. 777, 45 Ind.App. 293.
44 C.J. p 1448 note 17.

51. Ind.—Campbell v. Brackett, supra.

Suit to recover

Where a claim against a municipality is allowed and paid in violation of an express statute, it is no defense to a suit to recover the money that the parties acted in good faith.—Campbell v. Brackett, supra.

52. Cal.—Chapman v. City of Fullerton, 265 P. 1035, 90 Cal.App. 463.

53. Cal.—Chapman v. City of Fullerton, supra.

54. Neb.—National Lumber Co. v. Wymore, 46 N.W. 622, 30 Neb. 356.
44 C.J. p 1448 note 19.

55. Neb.—National Lumber Co. v. Wymore, supra.
44 C.J. p 1448 note 19 [c].

56. Wis.—Sharp v. Mauston, 66 N. W. 803, 92 Wis. 629.

44 C.J. p 1448 note 19 [d].

57. N.Y.—Nelson v. New York, 29 N.E. 814, 131 N.Y. 4.
44 C.J. p 1448 note 20.

58. Pa.—Commonwealth v. Sholtis, 24 Pa.Super. 487.

59. Cal.—Higgins v. San Diego, 45 P. 824, 118 Cal. 524.
44 C.J. p 1448 note 22.

60. Iowa.—Fullerton v. Des Moines, 115 N.W. 607.
44 C.J. p 1446 note 90 [a].

61. Neb.—State v. Minden, 120 N. W. 913, 84 Neb. 193, 21 L.R.A.N. S., 289.

62. N.Y.—Nunziato v. City of White Plains, 7 N.Y.S.2d 831, 255 App. Div. 885.

Effect of audit of claim against: County see Counties §§ 313-315. Town see the C.J.S. title Towns § 177, also 63 C.J. p 213 notes 26-3.

63. Miss.—Pyland v. Purvis, 40 So. 7, 87 Miss. 433.
44 C.J. p 1448 note 23.

a duly authorized vote refused to recognize the claim as valid;⁶⁴ nor is such a recovery precluded by the auditor's refusal to issue proper warrants for the payment of the claim.⁶⁵ A statutory provision that the audit of a claim against a city by the common council shall be final and conclusive as to the amount thereof does not bar an action thereon by a claimant aggrieved by such order,⁶⁶ but such determination is final and conclusive only as to city officers challenging it.⁶⁷

Waiver or estoppel. Where claimant takes no steps to review the order or to compel a further audit, ordinarily he cannot sue for the balance of his claim in excess of that allowed;⁶⁸ and the acceptance by claimant of the amount allowed, although less than the amount claimed, is a waiver of the right to insist on payment of the balance rejected,⁶⁹ but not where such waiver has been expressly excluded.⁷⁰

Rescission of allowance. The allowance of a claim may be rescinded⁷¹ before the rights of third persons have vested,⁷² or before claimant has changed his position to his own disadvantage,⁷³ although not after he has been actually paid.⁷⁴

Reaudit. The auditing officer or board has no power to reaudit claims which have been passed on by their predecessors in office,⁷⁵ and the fact that

a public officer has submitted to a reaudit of his accounts for certain years by the comptroller does not estop him from objecting to a new audit by a new comptroller.⁷⁶ Where the claim is disallowed, and thereafter a corrected bill is presented to the same auditors, claimant may not thereafter allege that they were without power to re-examine and allow or disallow the claim.⁷⁷

§ 2181. Compromise

Except to the extent that it is limited or forbidden by statute or charter, a municipal corporation may compromise and settle claims for or against it, either before or after suit has been commenced on the claims.

A municipal corporation, except to the extent that it is limited or forbidden by statute or charter,⁷⁸ has the power, even without express authority, and either before or after suit has been commenced on the claim,⁷⁹ to compromise and settle a disputed claim for or against it,⁸⁰ arising out of subject matter concerning which the municipality has the general power to contract, if at the time of the settlement there is a bona fide reasonable doubt or dispute as to the liability of the municipality,⁸¹ which is not based on a total lack of authority to incur the debt or obligation;⁸² and, under such circumstances, compromises are favored.⁸³ This power to compromise is implied from municipal capacity to sue or to be sued.⁸⁴

64. N.Y.—Gullford v. Cornell, 18 Barb. 615, affirmed 13 N.Y. 143.

65. Cal.—Engelbreton v. San Diego, 197 P. 651, 185 Cal. 475.
44 C.J. p 1448 note 23 [b].

66. N.Y.—Nunziato v. City of White Plains, 7 N.Y.S.2d 831, 255 App. Div. 885.

67. N.Y.—Nunziato v. City of White Plains, *supra*.

68. Ind.—Eitzold v. Huntington County, 146 N.E. 842, 82 Ind.App. 655.
N.Y.—Guidet v. New York, 12 Hun 566.

69. Mich.—Davey v. Big Rapids, 48 N.W. 178, 85 Mich. 56.
44 C.J. p 1449 note 25.

Creditor who accepts benefits of audit without protest or reservation, and acquiesces therein without questioning legality of action of auditing body, cannot subsequently repudiate the action taken.—People ex rel. Oswego Falls Corporation v. Foster, 295 N.Y.S. 891, 251 App.Div. 65, motion denied 298 N.Y.S. 742, 251 App.Div. 879, affirmed 15 N.E.2d 433, 278 N.Y. 494.

70. U.S.—Smith v. Salt Lake City, C.C.Utah, 83 F. 784, reversed on other grounds 104 F. 457, 48 C.C.A. 637.

71. N.J.—Burke v. Gormley, 80 A. 483, 79 N.J. Law 259.

44 C.J. p 1449 note 27.

72. Tex.—Smith v. Anson, Civ.App., 160 S.W. 114.

44 C.J. p 1449 note 28.

73. Neb.—State v. Minden, 120 N.W. 913, 84 Neb. 193, 21 L.R.A.N.S., 289.

44 C.J. p 1449 note 29.

74. Tex.—Smith v. Anson, Civ.App., 160 S.W. 114.

44 C.J. p 1449 note 30.

75. Tex.—Williams v. Tompkins, Civ.App., 42 S.W.2d 106, reversed on other grounds, Com.App., Tompkins v. Williams, 62 S.W.2d 70.

44 C.J. p 1449 note 32.

76. Pa.—Commonwealth v. Patterson, 56 A. 27, 206 Pa. 522.

77. N.Y.—Matter of Weeks, 94 N.Y.S. 468, 106 App.Div. 45, 89 N.Y.S. 826, 97 App.Div. 131.

78. Ky.—Citizens Nat. Bank's Trustee v. Town of Loyall, 88 S.W.2d 952, 262 Ky. 39.

Minn.—Snyder v. City of St. Paul, 267 N.W. 249, 197 Minn. 308, 105 A.L.R. 168.

79. La.—Board of Com'rs of Orleans Levee Dist. v. Blythe, 113 So. 150, 163 La. 929.

Wash.—City of Seattle v. Dutton, 265 P. 729, 147 Wash. 224.

80. Fla.—City of Coral Gables v. State, 176 So. 40, 128 Fla. 874.

Ky.—Citizens Nat. Bank's Trustee v. Town of Loyall, 88 S.W.2d 952, 262 Ky. 39.

La.—Board of Com'rs of Orleans Levee Dist. v. Blythe, 113 So. 150, 163 La. 929—Dugas v. Town of Donaldsonville, 33 La. Ann. 668.

Mass.—George A. Fuller Co. v. Commonwealth, 21 NE2d 529, 303 Mass. 216.

Minn.—*Corpus Juris* quoted in Snyder v. City of St. Paul, 267 N.W. 249, 250, 197 Minn. 308, 105 A.L.R. 168.

Ohio.—Cleveland & Pittsburg R. Co. v. City of Cleveland, 15 Ohio Cir. Ct. N.S., 193, 33 Ohio Cir.Ct. 482.

Wash.—Christie v. Port of Olympia, 179 P.2d 294, 27 Wash.2d 534—Abrams v. City of Seattle, 23 P.2d 869, 173 Wash. 495.

44 C.J. p 1449 note 35.

Compromise of:

Actions see *infra* § 2197.

Claim for taxes see *supra* § 2078.

81. Fla.—City of Coral Gables v. State, 176 So. 40, 128 Fla. 874.

82. Fla.—City of Coral Gables v. State, *supra*.

83. U.S.—Port of Palm Beach Dist. v. Goethals, C.C.A.Fla., 104 F.2d 706.

84. U.S.—Columbus Gas & Fuel Co.

A municipal corporation may compromise a claim equitably payable by it,⁸⁵ although the claim is not legally binding on it;⁸⁶ but it may not exercise its power of compromise to the extent of destroying or impairing any governmental function.⁸⁷ It may not make a gift under the guise of a compromise of an entirely unfounded claim,⁸⁸ but the right to compromise and settle an existing and asserted claim does not depend on the ultimate decision for or against its validity.⁸⁹ Before satisfaction the compromise may be revoked by the municipality;⁹⁰ and the promise of an annuity in satisfaction of a claim,⁹¹ or a compromise of illegal claims,⁹² or an agreement to pay a person having no claim whatever,⁹³ is not binding.

Board or official authorized to compromise. Power to compromise doubtful claims is inherent in the common council as the representative of the municipality⁹⁴ where the claim is of such a nature as to come within its jurisdiction.⁹⁵ It has also been held that a board of park commissioners may compromise and settle claims within its jurisdiction.⁹⁶

The fact, however, that the municipality may itself compromise claims does not give such authority to one of its officers or agents.⁹⁷ The mayor cannot, unless specially authorized, compromise any claim, or, by acting under such a compromise, estop the assertion of the city's legal rights;⁹⁸ and it has been held that the corporation counsel has no power to compromise claims rejected by the comptroller without the comptroller's knowledge or consent,⁹⁹ or to make a settlement concerning tax refunds without approval of the city council.¹ Claimant may appoint an attorney to make a compromise on his behalf.²

Statutory provisions. Under some statutes which have been held constitutional,³ express provision is made for the adjustment or composition of claims of creditors of a municipality,⁴ and as to the compromise being conclusive, except on the ground of fraud or collusion.⁵ Under some statutes, the compromising power may be specially conferred by statute on officers or boards other than the common council,⁶ but statutes conferring authority on mu-

v. City of Columbus, D.C. Ohio, 42 F.Supp. 762.

La.—Orleans Levee Dist. Comrs. v. Blythe, 113 So. 150, 163 La. 929

Mass.—George A. Fuller Co. v. Commonwealth, 21 N.E.2d 529, 303 Mass 216

Minn.—Snyder v. City of St. Paul, 267 N.W. 249, 250, 197 Minn. 308, 105 A.L.R. 168.

85. N.Y.—Blazejewski v. Eckert, 3 N.Y.S.2d 87, 166 Misc. 716.

Wash.—Abrams v. City of Seattle, 23 P.2d 869, 173 Wash. 495.

86. N.Y.—Blazejewski v. Eckert, 3 N.Y.S.2d 87, 166 Misc. 716.

87. Ohio.—Cleveland & Pittsburg R. Co. v. City of Cleveland, 15 Ohio Cir.Ct., N.S., 193, 33 Ohio Cir.Ct. 482.

88. Minn.—Corpus Juris cited in Snyder v. City of St. Paul, 267 N.W. 249, 250, 197 Minn. 308, 105 A.L.R. 168

N.H.—Clough v. Verrette, 109 A. 78, 79 N.H. 356.

Medical bills

The compromise of a claim against a city for physician's, hospital, and nursing bills of one wounded while assisting a policeman to execute a search warrant was invalid, as without consideration.—Caudill v. Pinstion, 24 S.W.2d 938, 233 Ky. 12.

89. Minn.—Corpus Juris quoted in Snyder v. City of St. Paul, 267 N.W. 249, 250, 197 Minn. 308, 105 A.L.R. 168

Wash.—Corpus Juris cited in Abrams v. City of Seattle, 23 P.2d 869, 872, 173 Wash. 495.

44 C.J. p 1449 note 38.

90. Ill.—Rock Island v. McEniry, 39 Ill.App. 218.

91. Ohio.—Mitchell v. Cincinnati, 7 Ohio Dec (Reprint) 310, 2 Cinc.L. Bul. 96.

92. N.Y.—Ft. Edward v. Fish, 33 N.Y.S. 784, 86 Hun 548, affirmed 50 N.E. 973, 156 N.Y. 363. 44 C.J. p 1450 note 49.

93. Ohio.—Cincinnati v. Rogers, 16 Ohio App. 139.

94. Ky.—Forester v. Coombs Land Co., 126 S.W.2d 433, 277 Ky. 279.

Minn.—Corpus Juris cited in Snyder v. City of St. Paul, 267 N.W. 249, 250, 197 Minn. 308, 105 A.L.R. 168

Pa.—Public Defense Ass'n v. City of Pittsburg, 9 Pa. Dist & Co. 474, 18 Mun. L.R. 141, 73 Pittsb. Leg. J. 865, 74 Pittsb. Leg. J. 601.

Wash.—City of Seattle v. Dutton, 265 P. 729, 147 Wash. 224.

44 C.J. p 1449 note 39.

95. Wash.—City of Seattle v. Dutton, supra.

96. Wash.—City of Seattle v. Dutton, supra.

Claim for death of park employee

Wash.—City of Seattle v. Dutton, supra.

97. Mass.—George A. Fuller Co. v. Commonwealth, 21 N.E.2d 529, 303 Mass 216.

The claim agent of a city cannot make settlement of a claim against city for personal injuries and must be assumed to have accomplished his duties when he makes report to city department which referred claim to him.—Discargar v. City of Seattle, 191 P.2d 870, 30 Wash.2d 461.

98. La.—New Orleans v. Tulane Educational Fund, 15 So. 161, 46 La. Ann. 861.

99. N.Y.—Bush v. O'Brien, 58 N.E. 106, 164 N.Y. 205.

1. N.Y.—Crennan v. Brennan, 39 N.Y.S.2d 393, 265 App. Div. 1013

2. N.Y.—Glendon v. City of New York, 294 N.Y.S. 890, 250 App. Div. 556, reversed on other grounds 12 N.E.2d 428, 276 N.Y. 329.

3. U.S.—Faltoute Iron & Steel Co. v. City of Asbury Park, N.J., 62 S.Ct. 1129, 316 U.S. 502, 86 L. Ed. 1629—Christmas v. City of Asbury Park, D.C.N.J., 53 F.Supp. 64.

4. U.S.—Faltoute Iron & Steel Co. v. City of Asbury Park, N.J., 62 S.Ct. 1129, 316 U.S. 502, 86 L. Ed. 1629—Christmas v. City of Asbury Park, D.C.N.J., 53 F.Supp. 64.

Ky.—Forester v. Coombs Land Co., 126 S.W.2d 433, 277 Ky. 279

N.Y.—Boland v. City of Niagara Falls, 33 N.Y.S.2d 455, 178 Misc. 125.

Settlement by issuance of warrants

Where city had power to settle claim by issuance of warrants, settlement was not rendered invalid as purchase of stock because ordinance directed warrants to issue to persons designated in settlement agreement who held claimant's preferred stock.—Abrams v. City of Seattle, 23 P.2d 869, 173 Wash. 495.

5. Ky.—Forester v. Coombs Land Co., 126 S.W.2d 433, 277 Ky. 279.

6. Cal.—People v. Coon, 25 Cal. 635. N.J.—De Muro v. Martini, 61 A.2d 230; 137 N.J. Law 640, affirmed 64 A.2d 351, 1 N.J. 516.

nicipalities, boards, and commissions are to be strictly construed;⁷ and the power of a municipality in this behalf may be defined and limited by the statute or charter.⁸

Effect of compromise. If a compromise agreement of a claim against a municipality is made in good faith by an authorized board or official,⁹ and is based on a valuable consideration,¹⁰ it is valid and binding and imposes a liability on the municipality, and, if the municipality, by resolution, directs the city manager and clerk to execute and deliver a draft in payment of the amount of the settlement, it imposes a duty on such manager and clerk to execute and deliver such a draft,¹¹ and, if the manager and clerk refuse to do so, the municipality is exonerated from default in its obligation to claimant.¹² A compromise is not binding on claimant's surety unless he also consents thereto.¹³

§ 2182. Arbitration

A municipal corporation, unless prohibited by positive law, generally has power to submit to arbitration claims asserted by or against it.

The power to contract, as discussed supra §§ 976-987, and to sue and be sued, as considered infra § 2186, generally implies in a municipal or quasi-municipal corporation power to submit to arbitration claims asserted by or against it,¹⁴ unless it is pro-

hibited from doing so by positive law.¹⁵ A statute providing for arbitration by "all persons" includes municipal corporations,¹⁶ although their power in this behalf may be restricted by construction of a statute;¹⁷ but the legislature has no power to direct that claims against a municipality shall be ascertained by arbitrators instead of a jury, without requiring the consent of the corporation.¹⁸

The officer or board who may consent to arbitration may be fixed by statute;¹⁹ but generally such power must be vested in the governing body which has the power to maintain or defend suits;²⁰ and independently of statute, it has been held that the municipal attorney may consent to an arbitration for the city,²¹ and a fortiori the council may intrust the selection of arbitrators to him.²² An agent appointed by a municipality to compromise a claim may submit it to arbitration.²³

A demand for an arbitration, when required, must be made on the municipality within the period specified in the arbitration clauses of a written contract.²⁴

§ 2183. Assignment

In the absence of a statute or ordinance to the contrary, claims against a municipal corporation may be assigned.

Unless there is some statute or ordinance forbid-

The board of commissioners of a city which, pursuant to statute, on assuming power specifically reserved to itself the power to approve all claims against municipality and order payment thereof, had authority to adjust a claim against the municipality for commissions of an architect relative to a veterans' housing project for the municipality, as against claim that only the mayor and director of department of public works had sole power to adjust the claim—*De Muro v. Martini*, 64 A.2d 351, 1 N.J. 516.

7. Ohio—*Cincinnati v. Rogers*, 16 Ohio App. 139.
44 C.J. p 1450 note 42.

8. Wash.—*State v. Carroll*, 162 P. 593, 94 Wash. 531.
44 C.J. p 1450 note 43.

9. Minn.—*Snyder v. City of St. Paul*, 267 N.W. 249, 197 Minn. 308, 105 A.L.R. 168.

Pa.—*Public Defense Ass'n v. City of Pittsburgh*, 9 Pa.Dist. & Co. 474, 18 Mun.L.R. 141, 73 Pittsb.Leg.J. 865, 74 Pittsb.Leg.J. 601.

10. Ky.—*Caudill v. Pinston*, 24 S.W. 2d 938, 233 Ky. 12.

Settlement with injured employee

Agreement of city, whose charter authorized it to maintain disabled

employees who were injured in performance of their duties, to pay a certain amount in one lump sum to a street and bridge department employee who was disabled by injury received while removing trees and trash from streets, was in full and final settlement of its assumed obligation under its charter, and therefore was based on valuable consideration, and hence imposed liability on city, as against contention that city was not liable because injuries were sustained in work which was purely a governmental function—*City of Beaumont v. Stephenson*, Tex.Civ App., 95 S.W.2d 1360, error dismissed.

11. Tex.—*City of Beaumont v. Stephenson*, supra.

12. Tex.—*City of Beaumont v. Stephenson*, supra.

13. Ill.—*Chicago v. Agnew*, 182 Ill. App. 499, reversed on other grounds 106 N.E. 252, 264 Ill. 288.

14. Ohio.—*Parks v. Cleveland Ry Co.*, 176 N.E. 472, 38 Ohio App. 315, affirmed 177 N.E. 28, 124 Ohio St. 79.

Or.—*West v. Coos County*, 237 P. 961, 115 Or. 409, 40 A.L.R. 1362.

Tex.—*Brazoria County v. Knutson*, 176 S.W.2d 740, 142 Tex. 172.

Wis.—*Joyce v. Sauk County*, 239 N.W. 439, 206 Wis. 202.

44 C.J. p 1450 note 56.

15. Ohio.—*Parks v. Cleveland Ry Co.*, 176 N.E. 472, 38 Ohio App. 315, affirmed 177 N.E. 28, 124 Ohio St. 79.

Tex.—*Brazoria County v. Knutson*, 176 S.W.2d 740, 142 Tex. 172.

16. Or.—*West v. Coos County*, 237 P. 961, 963, 115 Or. 409, 40 A.L.R. 1362.

44 C.J. p 1450 note 57.

17. Mass.—*Osborn v. Fall River*, 5 N.E. 483, 140 Mass. 508.

44 C.J. p 1450 note 58.

18. N.Y.—*Baldwin v. New York*, 1 Abb. Dec. 75, 3 Keyes 387.

19. N.J.—*Cleveland v. Jersey City Bd. of Finance*, etc., 38 N.J. Law 259.

44 C.J. p 1450 note 60.

20. Wis.—*Joyce v. Sauk County*, 239 N.W. 439, 206 Wis. 202.

21. N.J.—*Paret v. Bayonne*, 39 N.J. Law 559, affirmed 40 N.J. Law 333.

22. Wis.—*Kane v. Fond du Lac*, 40 Wis. 495.

23. Vt.—*Schoff v. Bloomfield*, 8 Vt. 472.

24. S.D.—*Hatch v. Mt. Vernon*, 178 N.W. 931, 43 S.D. 216.

44 C.J. p 1451 note 65.

ding it,²⁵ claims against a municipal corporation are assignable the same as other choses in action;²⁶ but notice to the municipality, through the proper officer, is essential to perfect the assignment,²⁷ although knowledge of the transaction by the municipality may constitute notice to it.²⁸ The fact that there is no fund in existence from which the claim can be paid at the time of its assignment, or that the claim is not presently enforceable by action because it is based on an unauthorized contract, does not prevent the assignment of the claim operating as an equitable assignment if the municipality should subsequently voluntarily recognize its liability or become bound to pay the claim.²⁹

Partial assignment. A claim or demand against a municipality generally cannot be split and portions thereof assigned to different individuals, unless the municipality consents thereto,³⁰ although, as has been held, such an assignment may be recognized and enforced in equity,³¹ and a creditor may not compel his debtor to assign any part of the sum due him by a municipality in partial payment or total settlement of the creditor's debt.³² The partial assignment, however, of a claim against a city is not against public policy,³³ and, in the absence of a statute to the contrary, has been held to be val-

id,³⁴ and, where such an assignment has been assented to by the municipality, a recovery in an action at law by one of the assignees does not prevent a recovery by the others.³⁵

Wages. Under some charters or ordinances which have been held to be a valid exercise of municipal powers,³⁶ the sale or encumbrance of a municipal employee's wages is prohibited, and an assignment in violation thereof is void.³⁷ Such an ordinance or charter, however, does not prevent an employee from exercising his statutory right to appoint a trustee to sue the city, for the employee's benefit, for matured and disputed claims for wages;³⁸ and an ordinance prohibiting the assignment of unearned wages does not prevent the assignment of earned wages.³⁹

§ 2184. Interest

Although there is authority to the contrary, interest ordinarily is not allowable on a claim against a municipal corporation, except to the extent that it is provided for by statute or by express agreement between the parties.

According to some authorities, a municipal or quasi-municipal corporation ordinarily is liable for interest on its debts to the same extent as an individual.⁴⁰ On the other hand, according to other

25. Mo.—Gordon v. Jefferson City, 85 S.W. 617, 111 Mo App. 23. 44 C.J. p 1451 note 67.

26. Mo.—Gordon v. Jefferson City, supra. 44 C.J. p 1451 note 68.

Assignability of choses in action in general see Assignments §§ 2-7.

Assignment of:

Contract for public improvement or of claims thereunder see supra §§ 1014, 1015.

Warrant see supra § 1898.

Councilman as assignee

Under some statutes, claims of third persons acquired by councilman by assignment may be dealt with by the city—Sauer v. Monroe, 199 S.E. 487, 171 Va. 421.

Misnomer of municipality

An insurance company, to which realty company intended to assign right of action against city for damages to realty from construction of street extension viaduct across railroad yards by provision in deed, conveying such realty to insurance company, that realty company's claim against "Mayor and City Council" for such damages was assigned to grantee, acquired title to such right of action, although city's corporate name was changed from that stated in deed before execution of deed and assignment.—Life & Casualty Ins. Co. of Tennessee v. City of Nashville, 137 S.W.2d 287, 175 Tenn. 688.

27. N.J.—Miller v. Stockton, 46 A. 619, 64 N.J. Law 614.

Tex.—Shultz v. Galveston, 3 Tex. Civ. App. § 438.

44 C.J. p 1451 note 69.

28. N.J.—U. S. Fidelity, etc., Co. v. Newark, 74 A. 192, 76 N.J. Eq. 230, affirmed 81 A. 758, 79 N.J. Eq. 584, 37 L.R.A. (N.S.), 575.

29. N.Y.—Jones v. New York, 90 N. Y. 387.

30. Mo.—Gordon v. Jefferson City, 85 S.W. 617, 111 Mo App. 23.

Pa.—Appeals of City of Philadelphia, 86 Pa. 179.

44 C.J. p 1451 note 68 [a].

Partial assignments generally see Assignments §§ 38-40.

31. Mass.—James v. City of Newton, 8 N.E. 122, 142 Mass. 378, 56 Am.R. 692.

N.Y.—Hall v. City of Buffalo, 2 Abb. Dec 301, 1 Keyes 193.

Or.—Little v. City of Portland, 37 P. 911, 26 Or. 235.

32. Ga.—Green v. Potomac Engineering, etc., Co., 69 S.E. 544, 135 Ga. 387.

33. Or.—Little v. City of Portland, 37 P. 911, 26 Or. 235.

34. Or.—Little v. City of Portland, supra.

35. Or.—Little v. City of Portland, supra.

36. Mo.—Coleman v. Kansas City, 156 S.W.2d 644, 348 Mo. 916—State

ex rel. Kansas City Loan Guarantee Co. v. Kent, 71 S.W. 1066, 98 Mo.App. 281.

37. Mo.—Coleman v. Kansas City, 156 S.W.2d 644, 348 Mo. 916—State ex rel. Kansas City Loan Guarantee Co. v. Kent, 71 S.W. 1066, 98 Mo.App. 281.

Assignment of wages generally see Assignments §§ 17, 19 b, 21.

38. Mo.—Coleman v. Kansas City, 156 S.W.2d 644, 348 Mo. 916.

Assignments held valid

Assignments whereby city employees, for purpose of collection by action against city, transferred claims against city for wages to a trustee to maintain action for employees' benefit were valid, notwithstanding city charter provision prohibiting sale, encumbrance, or assignment of wages by city employees, and assignments did not constitute "sales" of claims within charter provision.—Coleman v. Kansas City, supra.

39. Mo.—Kansas City Loan Guarantee Co. v. Kansas City, 98 S.W. 459, 200 Mo. 159.

40. U.S.—Highway Const. Co. of Ohio v. City of Miami, Fla., C.C.A. Fla., 126 F.2d 777, certiorari denied 63 S.Ct. 35, 317 U.S. 643, 87 L. Ed. 518.

N.J.—Hudson County Nat. Bank v. City of Bayonne, 174 A. 241, 113 N. J. Law 258.

authorities, no interest is recoverable on a municipal indebtedness, except to the extent that there is an express agreement,⁴¹ or special statutory authorization⁴² therefor, and except in the case of money which has been unlawfully obtained by the municipality, or which, if lawfully obtained, is unlawfully withheld by it,⁴³ unless the particular act of withholding by a municipal board or officer is ultra vires and void.⁴⁴

Interest is recoverable where expressly provided for by statute,⁴⁵ and the terms of a general interest statute have been held broad enough to embrace cities,⁴⁶ but as to this there is authority to the contrary.⁴⁷ Interest is not recoverable on amounts, the payment of which has been tendered and re-

fused;⁴⁸ but the holder of a claim is not bound by an advertisement of a municipality, where in ignorance thereof, that it is ready to pay all obligations and will pay no interest after a certain date.⁴⁹ A contractor who fails to complete a subway in the time allowed by his contract is not entitled to interest on percentages retained by the city after the work should have been finished, which would have been paid on earlier completion of the work, since these moneys would have been earned only by expenditure of further capital.⁵⁰

Rate of interest. Where interest is recoverable by a claimant on an indebtedness against a municipality, it usually is recoverable at the legal rate of interest for indebtedness in general,⁵¹ unless a spe-

N.Y.—*Kelly v. City of Yonkers*, 11 N.Y.S.2d 424, affirmed 14 N.Y.S.2d 142, 257 App.Div. 966.

Ohio.—*State ex rel. Bruml v. Village of Brooklyn*, 49 N.E.2d 684, 141 Ohio St. 593.—*City of Cincinnati v. Whetstone*, 24 N.E. 409, 47 Ohio St. 196.

44 C.J. p 1451 note 73.

Interest on:

Claim relating to municipal improvement see supra § 1278.

Warrant see supra § 1897.

41. Ariz.—*Miners & Merchants Bank v. Herron*, 47 P.2d 430, 46 Ariz. 71. Cal.—*Powell v. City of Los Angeles*, 272 P. 336, 95 Cal.App. 151.

Ill.—*Morgan v. City of Rockford*, 31 N.E.2d 596, 375 Ill. 326.—*American Mexican Refining Co. v. Wetzel*, 183 N.E. 593, 350 Ill. 575.—*Board of Trustees of Police Pension Fund of Glen Ellyn v. Village of Glen Ellyn*, 85 N.E.2d 473, 337 Ill.App. 183.—*Willadsen v. City of East Peoria*, 47 N.E.2d 136, 317 Ill.App. 541.—*Standard Oil Co. v. Town of Patterson*, 21 N.E.2d 12, 300 Ill. App. 385.—*Cook v. City of Staunton*, 14 N.E.2d 696, 295 Ill.App. 111.—*Hawthorne Park Dist. v. Seipp, Princell & Co.*, 4 N.E.2d 117, 286 Ill. App. 599.

44 C.J. p 1451 note 74.

42. Ariz.—*Miners & Merchants Bank v. Herron*, 47 P.2d 430, 46 Ariz. 71. Cal.—*Engelbreton v. City of San Diego*, 197 P. 651, 185 Cal. 475.—*Powell v. City of Los Angeles*, 272 P. 336, 95 Cal.App. 151.

Ill.—*Morgan v. City of Rockford*, 31 N.E.2d 596, 375 Ill. 326.

N.Y.—*People ex rel. Emigrant Industrial Sav. Bank v. Sexton*, 20 N.Y.S.2d 41, 259 App.Div. 566, affirmed *People ex rel. Emigrant Industrial Sav. Bank v. Sexton*, 29 N.E.2d 469, 284 N.Y. 57.

44 C.J. p 1451 note 74 [a].

43. U.S.—*Norfolk & W. Ry. Co. v. Board of Education of City of Chicago*, C.C.A.Ill., 114 F.2d 859.

Cal.—*Powell v. City of Los Angeles*, 272 P. 336, 95 Cal.App. 151.

Ill.—*Morgan v. City of Rockford*, 31 N.E.2d 596, 375 Ill. 326.—*Board of Trustees of Police Pension Fund of Glen Ellyn v. Village of Glen Ellyn*, 85 N.E.2d 473, 337 Ill.App. 183.—*Willadsen v. City of East Peoria*, 47 N.E.2d 136, 317 Ill.App. 541.—*Cook v. City of Staunton*, 14 N.E.2d 696, 295 Ill.App. 111.—*Hawthorne Park Dist. v. Seipp, Princell & Co.*, 4 N.E.2d 117, 286 Ill.App. 599.

44 C.J. p 1451 note 75.

Penalty

City was not liable for penalty in form of interest for withholding funds from assignee of improvement contractor, collected and disbursed by city as trustee.—*Powell v. City of Los Angeles*, 272 P. 336, 95 Cal. App. 151.

Diversion of police pension fund

Where village did not establish police pension fund on obtaining population of more than five thousand as required by statute, and village wrongfully diverted to its own use funds which should have been set aside for police pension fund, village would be held liable for interest on the money wrongfully diverted, even though no contract existed requiring village to pay interest.—*Board of Trustees of Police Pension Fund of Glen Ellyn v. Village of Glen Ellyn*, 85 N.E.2d 473, 337 Ill.App. 183.

44. Cal.—*Powell v. City of Los Angeles*, 272 P. 336, 95 Cal.App. 151.

Retention by city council, without authority, of money and bonds due assignee of improvement contractor, was ultra vires, and city was not liable for interest.—*Powell v. City of Los Angeles*, supra.

45. U.S.—*Cranford Co. v. City of New York*, C.C.A.N.Y., 38 F.2d 52, certiorari denied *City of New York v. Cranford Co.*, 50 S.Ct. 411, 281 U.S. 760, 74 L.Ed. 1169.

Ill.—*Merchants' Loan, etc., Co. v. Chicago*, 105 N.E. 726, 264 Ill. 76. N.Y.—*Coughlin v. New York*, 71 N.Y.S. 91, 35 Misc. 446.

46. Mo.—*Simmons Hardware Co. v. St. Louis*, 192 S.W. 394.

An "account," within an interest statute, allowing creditors to receive interest on accounts after they become due and demand of payment is made, is not a claim based on contract only, but equivalent in general sense to "claim" or "demand", so that statute permits recovery of interest on liquidated claims arising by operation of law, such as claims for compensation due city license tax collector, clerks, and inspectors under another statute, as well as on contracts.—*Coleman v. Kansas City*, 182 S.W.2d 74, 353 Mo. 150.

47. Cal.—*Engelbreton v. City of San Diego*, 197 P. 651, 185 Cal. 475. Miss.—*City of Indianola v. Gates*, 179 So. 284, 181 Miss. 145.—*City of Natchez v. McGehee*, 127 So. 902, 157 Miss. 225.

In policeman's action against city for salary, court improperly allowed interest on judgment.—*City of Natchez v. McGehee*, supra.

48. N.Y.—*Ginsberg v. City of Long Beach*, 25 N.Y.S.2d 460, 261 App. Div. 921, affirmed 36 N.E.2d 637, 286 N.Y. 400.

49. La.—*Keith v. New Orleans*, 10 La. Ann. 423.

50. N.Y.—*Litchfield Const. Co. v. City of New York*, 155 N.E. 116, 244 N.Y. 251, motion denied 155 N.E. 898, 244 N.Y. 563.

51. N.J.—*Hudson County Nat. Bank v. City of Bayonne*, 174 A. 241, 113 N.J. Law 258.

N.Y.—*In re Bronx River Parkway in City of New York*, 20 N.Y.S.2d 53, 259 App.Div. 552, affirmed 29 N.E.2d 465, 284 N.Y. 48, remittitur amended 30 N.E.2d 729, 284 N.Y. 701, affirmed *A. F. & G. Realty Corporation v. City of New York*,

cial rate of interest for the particular claim or indebtedness is fixed by agreement between the parties⁵² or is fixed by statute.⁵³ A statute fixing the rate of interest on claims against a municipality has been held to be not unconstitutional,⁵⁴ and, in the absence of express language indicating a contrary intent, it has also been held to be prospective only, and not retroactive, in its effect,⁵⁵ and not to affect or impair any existing right which has accrued prior to the effective date of the statute,⁵⁶ and, accordingly, interest may be allowed at the old rate on as much of the claims as accrued prior to

the taking effect of the new rate, and at the new rate on as much of the claims as accrued thereafter.⁵⁷

Time from which interest accrues. Where interest is recoverable, it generally does not accrue from the date of maturity of the claim,⁵⁸ but only from the date of demand or presentation of the claim,⁵⁹ unless it is otherwise agreed.⁶⁰ However, it has been held, under particular circumstances, that interest is payable from the date when payment became finally due and payable under the contract,⁶¹ or from the time funds are available in the

61 S.Ct. 839, 313 U.S. 540, 85 L.Ed. 1508—*Kelly v. City of Yonkers*, 11 N.Y.S.2d 424, affirmed 14 N.Y.S.2d 142, 257 App.Div. 966.

Okl.—*Mid-Continent Pipe Line Co. v. Seminole County Excise Board*, 146 P.2d 996, 194 Okl. 40.

Special statutory rates held not applicable to contracts with municipality.—*Mid-Continent Pipe Line Co. v. Seminole County Excise Board*, supra.

52. N.J.—*Hudson County Nat. Bank v. City of Bayonne*, 174 A. 241, 113 N.J.Law 258.

53. N.Y.—*Tobin v. La Guardia*, 48 N.E.2d 287, 290 N.Y. 119—*Spencer, White & Prentiss v. City of New York*, 75 N.Y.S.2d 629, 189 Misc. 616, affirmed 66 N.Y.S.2d 619, 271 App.Div. 824, appeal denied 67 N.Y.S.2d 701, 271 App.Div. 926—*People ex rel. Emigrant Industrial Sav. Bank v. Miller*, 18 N.Y.S.2d 192, 173 Misc. 538, modified on other grounds *People ex rel. Emigrant Industrial Sav. Bank v. Sexton*, 20 N.Y.S.2d 41, 259 App.Div. 566, affirmed 29 N.E.2d 469, 284 N.Y. 57.

Statute construed

N.Y.—*In re Bronx River Parkway in City of New York*, 29 N.E.2d 465, 284 N.Y. 48, remittitur amended 30 N.E.2d 729, 284 N.Y. 701, affirmed A. F. & G. Realty Corporation v. City of New York, 61 S.Ct. 839, 313 U.S. 540, 85 L.Ed. 1508—*People ex rel. Emigrant Industrial Sav. Bank v. Sexton*, 20 N.Y.S.2d 41, 259 App.Div. 566, affirmed *People ex rel. Emigrant Industrial Sav. Bank v. Sexton*, 29 N.E.2d 469, 284 N.Y. 57.

54. N.Y.—*People ex rel. Emigrant Industrial Sav. Bank v. Sexton*, 29 N.E.2d 469, 284 N.Y. 57—*In re Bronx River Parkway in City of New York*, 29 N.E.2d 465, 284 N.Y. 48, remittitur amended 30 N.E.2d 729, 284 N.Y. 701, affirmed A. F. & G. Realty Corporation v. City of New York, 61 S.Ct. 839, 313 U.S. 540, 85 L.Ed. 1508.

55. N.Y.—*People ex rel. Emigrant Industrial Sav. Bank v. Sexton*, 29

N.E.2d 469, 284 N.Y. 57—*In re Bronx River Parkway in City of New York*, 20 N.Y.S.2d 53, 259 App.Div. 552, affirmed 29 N.E.2d 465, 284 N.Y. 48, remittitur amended 30 N.E.2d 729, 284 N.Y. 701, affirmed A. F. & G. Realty Corporation v. City of New York, 61 S.Ct. 839, 313 U.S. 540, 85 L.Ed. 1508—*People ex rel. Atlantic, Gulf & Pacific Co. v. Miller*, 17 N.Y.S.2d 202, 173 Misc. 397—*Application and Petition of Gillespie*, 16 N.Y.S.2d 579, 173 Misc. 336.

"Accrued"

A statute providing that rate of interest to be paid by a municipal corporation on judgments or "accrued" claims against corporation shall not exceed four per cent per annum is not retroactive, the word "accrued," although grammatically in the past tense, being required to be construed as a description and not as referable to a date previous to the effective date of the statute—*People ex rel. Emigrant Industrial Sav. Bank v. Sexton*, 29 N.E.2d 469, 284 N.Y. 57.

56. N.Y.—*People ex rel. Atlantic, Gulf & Pacific Co. v. Miller*, 17 N.Y.S.2d 202, 173 Misc. 397—*Application and Petition of Gillespie*, 16 N.Y.S.2d 579, 173 Misc. 336.

57. N.Y.—*In re Bronx River Parkway in City of New York*, 20 N.Y.S.2d 53, 259 App.Div. 552, affirmed 29 N.E.2d 465, 284 N.Y. 48, remittitur amended 30 N.E.2d 729, 284 N.Y. 701, affirmed A. F. & G. Realty Corporation v. City of New York, 61 S.Ct. 839, 313 U.S. 540, 85 L.Ed. 1508—*People ex rel. Heller v. Miller*, 20 N.Y.S.2d 51, 259 App.Div. 517—*People ex rel. Emigrant Industrial Sav. Bank v. Sexton*, 20 N.Y.S.2d 41, 259 App.Div. 566, affirmed *People ex rel. Emigrant Industrial Sav. Bank v. Sexton*, 29 N.E.2d 469, 284 N.Y. 57—*People v. City of Yonkers*, 30 N.Y.S.2d 678, 177 Misc. 406, affirmed 48 N.Y.S.2d 336, 267 App.Div. 959, affirmed 59 N.E.2d 786, 293 N.Y. 880.

58. N.Y.—*O'Keefe v. New York*, 68 N.E. 588, 176 N.Y. 297, 298, 44 C.J. p 1452 note 79.

59. U.S.—*Dock Contractor Co. v. New York, C.C.A.N.Y.*, 296 F. 377. Mo.—*Coleman v. Kansas City*, 182 S.W.2d 74, 353 Mo. 150—*Coleman v. Kansas City*, 156 S.W.2d 644, 348 Mo. 916.

N.J.—*Corpus Juris* cited in *Hudson County Nat. Bank v. City of Bayonne*, 174 A. 241, 243, 113 N.J.Law 258—*Harper v. Atlantic City*, 38 A.2d 874, 22 N.J.Misc. 323.

N.Y.—*Smith v. New York Bd. of Education*, 101 N.E. 791, 208 N.Y. 84, 86, Ann.Cas.1914D 406—*Sullivan v. Whitney*, 25 N.Y.S.2d 762.

44 C.J. p 1451 note 78.

Board of education

This rule has been held to apply to the advantage and protection of a board of education.—*Smith v. New York Bd. of Education*, 101 N.E. 791, 208 N.Y. 84, Ann.Cas.1914D 406.

44 C.J. p 1452 note 80.

Demand on disbursing officer

N.Y.—*Rapid Transit Subway Const. Co. v. City of New York*, 182 N.E. 145, 259 N.Y. 472.

Reason for demand

The rule that to entitle claimant against municipality to interest demand must be made although demand would not be necessary against individual under similar circumstances is based on fact that it would be burdensome to require officers of municipality to seek out creditor and tender payment.—*Logan v. City of Two Rivers*, 278 N.W. 861, 227 Wis. 499.

Claims against a city for unpaid salaries of city employees do not draw interest until demand is made against city for payment, and, hence, interest should be awarded against city in action on claims at six per cent per annum, simple interest, only from date of commencement of action where there was no proof of demand for payment other than filing of action.—*Coleman v. Kansas City*, 156 S.W.2d 644, 348 Mo. 916.

60. N.J.—*Harper v. Atlantic City*, 38 A.2d 874, 22 N.J.Misc. 323.

61. U.S.—*Highway Const. Co. of Ohio v. City of Miami, Fla.*, C.C.A. Fla., 126 F.2d 777, certiorari denied

treasury and the municipality fails or refuses to pay;⁶² and, where the statute provides that no suit can be brought except on audited bills, interest may be allowed only from the time of the audit.⁶³ It has also been held that, where, by statute, no right of action exists against the municipality until the lapse of a specified time after the presentation of the demand, interest can be allowed only from the lapse of such time after presentation.⁶⁴

A demand, when necessary to entitle a claimant to interest on his claim, must be for the sum actually due;⁶⁵ and, while no particular technical form of demand is required, the total absence of a request for payment is not a sufficient demand.⁶⁶

Additional interest. Where a claimant has given a receipt in full, on receiving partial progress payments, without reserving an additional claim for interest, he cannot recover additional interest.⁶⁷

§ 2185. Payment

A claim against a municipal corporation which has been allowed by the proper auditing officer or board, should be paid.

Disbursing officers, performing only municipal functions, must make payment of a claim allowed by the proper auditing officer or board,⁶⁸ except that they are not required to pay a claim for an unauthorized expenditure, and not properly chargeable to the municipality, even though it has been properly certified as correct.⁶⁹ A statute authorizing a

particular officer to adjust any claim on which a suit has been brought, and, when adjusted, duly to provide for its payment, has been held mandatory in respect of providing for payment.⁷⁰

Manner of payment or collection. Under statutes providing that no money shall be paid except on a warrant, payment cannot be compelled on a mere showing of an audit of the claim,⁷¹ and under such a statute a payment of a claim against a city in cash without a warrant is an illegal act.⁷² On the other hand, where a board allows a claim, illegal on its face, the auditor may refuse to draw a warrant in payment thereof.⁷³

Claims or judgments against a municipality must be collected in the manner provided by statute;⁷⁴ but, in the absence of a constitutional or statutory requirement, claims against a municipality need not be paid in the order in which they accrue.⁷⁵ A claimant is not authorized to appropriate public funds coming into his hands in payment of his claim.⁷⁶

Administrative officers. Merely administrative officers have no authority to pay claims, except when ordered to do so by the municipal council,⁷⁷ fiscal board,⁷⁸ or officers clothed by law with authority to order the payment of claims.⁷⁹ However, it will be presumed, in the absence of anything to the contrary, that claims paid by a city auditor were approved and certified to him as required by statute.⁸⁰

63 S.Ct. 35, 317 U.S. 643, 87 L.Ed. 518.

62 Mich.—Tumey v. City of Detroit, Dept. of St. Rys., 25 N.W.2d 571, 316 Mich. 400.

44 C.J. p 1452 note 84.

Agreement to repay deducted salary

Employees of department of street railways from whose salary deductions were made under agreement that amounts would be repaid when funds became available were entitled to recover interest on such amounts from time funds were available to city to pay such amounts rather than from date when actions were instituted against city.—Tumey v. City of Detroit, Dept. of St. Rys., supra.

63 N.Y.—Cooke v. Saratoga Springs, 23 Hun 55.

64 N.Y.—Brooklyn Public Library v. City of New York, 228 N.Y.S. 491, 222 App.Div. 422, affirmed 166 N.E. 179, 250 N.Y. 495, reargument and amendment of remittitur denied 168 N.E. 438, 251 N.Y. 589—Van Wart v. New York, 52 How. Pr. 78.

65 N.Y.—Sweeny v. New York, 74

N.Y.S. 589, 69 App.Div. 80, reversed on other grounds 66 N.E. 101, 173 N.Y. 414

66 N.Y.—Chalmers v. City of New York, 211 N.Y.S. 430, 125 Misc. 686

67 N.Y.—Ryan v. New York, 166 N.Y.S. 575, 179 App.Div. 181.

68 Iowa.—Ireland v. Hunnel, 57 N. W. 715, 90 Iowa 98.
44 C.J. p 1452 note 88.

Payment of:

Indebtedness generally see supra § 1890.

Judgment see infra § 2211.

Claim held properly audited and established for payment

Tex.—Williams v. Tompkins, Civ. App., 42 S.W.2d 106, reversed on other grounds, Com.App., Tompkins v. Williams, 62 S.W.2d 70.

69 N.Y.—Continental Guaranty Corporation v. Craig, 202 N.Y.S. 11, 207 App.Div. 261.

70 N.Y.—People v. Connolly, 4 Abb. Pr.N.S. 375.

71 N.Y.—People v. Wood, 71 N.Y. 371.

72 Wash.—Hillyard v. Carabin, 165 P. 381, 96 Wash. 368.

73 Cal.—Walton v. McChetridge, 52 P. 733, 120 Cal. 443—White v. Mitchell, 104 P. 333, 11 Cal.App. 202.

74 N.Y.—Davidson v. White Plains, 90 N.E. 825, 197 N.Y. 266.

Okl.—Beaty v. Oklahoma, 214 P. 912, 89 Okl. 182.

44 C.J. p 1452 note 96.

Evidence of payment

Pa.—McCully v. Borough of Dormont, 90 Pittsb.Leg.J. 553, 35 Berks Co.L.J. 391.

75 Okl.—Murrell v. City of Sapulpa, 297 P. 241, 148 Okl. 16.

76 Okl.—Beaty v. Oklahoma, 214 P. 912, 89 Okl. 182.

77 Ill.—East St. Louis v. Flannigen, 34 Ill.App. 596.

78 Cal.—Harris v. San Francisco, 52 Cal. 553.

N.Y.—People v. Neilson, 3 Hun 214, 5 Thomps. & C. 367, 48 How.Pr. 454.

79 Ind.—Holtscaw v. State, 92 N.E. 121, 46 Ind.App. 238.

80 Ky.—Barron v. Garland, 115 S. W. 789—Barron v. Kaufman, 115 S. W. 787, 131 Ky. 642.

Recovery back. Where a claim is voluntarily paid with full knowledge of all the facts, the money cannot be recovered back, although it was not due or owing;⁸¹ nor, in the absence of fraud or

collusion, may payments which were regularly and properly made be recovered back on the mere ground that no ordinance appears to have authorized them.⁸²

XXI. ACTIONS

§ 2186. Capacity to Sue and Be Sued and Right of Action

- a. In general
- b. Right of action

a. In General

As a general rule, a municipal corporation may sue and be sued.

As a general rule, a municipal corporation may sue⁸³ and be sued.⁸⁴ While this power or capacity is frequently based on charters or other statutes,⁸⁵ according to some authorities an express authorization by the municipal charter is not essential,⁸⁶ and the power to sue and be sued is incident to the existence of the corporation.⁸⁷ Ac-

cording to some authorities the immunity of the state from suit does not extend absolutely to municipal corporations.⁸⁸ It has been held or recognized, however, that a municipality, with respect to the performance of delegated sovereign governmental powers, is exempt from suit unless permission to sue is expressly granted,⁸⁹ and in some jurisdictions a municipality, as an integral part of the sovereignty of the state, may not be sued in the absence of consent or of statutory authorization.⁹⁰ The liability of municipal corporations for torts is discussed in detail *supra* §§ 745-918.

The mere absence of authorization by the governing body to the law officer to bring a particular action does not affect the corporation's capacity to sue in such action.⁹¹

81. Mich.—Advertiser, etc., Co. v. Detroit, 5 N.W. 72, 43 Mich. 116.

Neb.—City of Scottsbluff v. Western Public Service Co., 254 N.W. 712, 127 Neb. 160.

82. Ohio.—Norwalk v. Christian, 25 Ohio Cir.Ct., N.S., 419.
44 C.J. p 1452 note 95.

83. Colo.—School District No. 1 in City and County of Denver v. Faker, 105 P.2d 406, 106 Colo. 356.

Mass.—National Shawmut Bank of Boston v. City of Waterville, Me., 189 N.E. 92, 285 Mass. 252.

Tex.—McCollum v. City of Richardson, Civ.App., 121 S.W.2d 423, error dismissed.

44 C.J. p 1453 note 1.

84. U.S.—North Miami, Fla., v. Meredith, C.C.A.Fla., 121 F.2d 279, certiorari denied 62 S.Ct. 138, 314 U.S. 674, 86 L.Ed. 539—**Corpus Juris cited in** Department of Water and Power of City of Los Angeles v. Anderson, C.C.A.Nev., 95 F.2d 577, 581.

Colo.—School District No. 1 in City and County of Denver v. Faker, 105 P.2d 406, 106 Colo. 356.

Mass.—National Shawmut Bank of Boston v. City of Waterville, Me., 189 N.E. 92, 285 Mass. 252.

Tex.—McCollum v. City of Richardson, Civ.App., 121 S.W.2d 423, error dismissed.

44 C.J. p 1453 note 2.

85. Cal.—Otis v. City of Los Angeles, 126 P.2d 954, 52 Cal.App.2d 605.

Colo.—School District No. 1 in City and County of Denver v. Faker, 105 P.2d 406, 106 Colo. 356.

Mass.—National Shawmut Bank of Boston v. City of Waterville, Me., 189 N.E. 92, 285 Mass. 252.
44 C.J. p 1453 notes 1, 2.

86. Tenn.—Jonesborough v. McKee, 2 Yerg. 167.

Wis.—Janesville v. Milwaukee, etc., R. Co., 7 Wis. 484.
44 C.J. p 1453 note 4.

87. Tenn.—Jonesborough v. McKee, 2 Yerg. 167.

Fire district

(1) Fire district as a quasi corporation had inherent power or capacity to sue or to be sued.—Prout v. Pittsfield Fire Dist., 28 N.E. 679, 154 Mass. 450.

(2) In New York, however, under former statutes relative to fire districts outside an incorporated village or city, a fire district was not a jural person or legal entity against which an action could be maintained. U.S.—Hellowell v. Grafeld, D.C.N.Y., 22 F.Supp. 765.

N.Y.—Fabric Fire Hose Co. v. Town of Whitestone, 175 N.Y.S. 191, 187 App.Div. 118—Buffalo Fire Appliance Corporation v. Mountindale Fire Dist., 246 N.Y.S. 620, 138 Misc. 285.

88. Md.—Mayor and City Council of Baltimore v. State for Use of Blueford, 195 A. 571, 173 Md. 267.

In the exercise of its quasi-private or corporate powers a municipal corporation is liable to the same extent as private corporations.—Hubbell v. South Hutchinson, 68 P. 53, 64 Kan. 645.

Port authority of another state

A port authority organized under the laws of another state and granted power to construct, manage, operate, and control harbor improvements was neither governmental nor local in character so as to be exempt from liability to suit.—Harman v. City of Ft. Lauderdale, 234 N.Y.S. 196, 134 Misc. 133.

89. Md.—Cox v. Board of Com'rs of Anne Arundel County, 31 A.2d 179, 181 Md. 428—Mayor and City Council of Baltimore v. State for Use of Blueford, 195 A. 571, 173 Md. 267. Ohio.—Clifton Hills Realty Co. v. City of Cincinnati, 21 N.E.2d 993, 60 Ohio App. 443.

Corporation of another state

A municipal corporation of another state may not be sued because of acts done or omitted to be done in its governmental capacity, notwithstanding the law of its creation subjects it in terms of broad import to liability to be sued.—Eastern Union Co. of Delaware v. Moffat Tunnel Improvement Dist., 178 A. 864, 6 W. W. Harr. Del., 488.

90. S.C.—Home Building & Loan Ass'n v. City of Spartanburg, 194 S.E. 143, 185 S.C. 353—Bomar v. City of Spartanburg, 187 S.E. 921, 181 S.C. 453.

91. Wis.—Milwaukee v. Herman Zoehrlaut Leather Co., 90 N.W. 187, 114 Wis. 276.

Attorney as representative of municipal corporation in actions generally see *infra* § 2206.

Authority to institute or to defend actions generally see *infra* § 2187.

As a general rule, the dissolution of a municipal-ity terminates its capacity to sue⁹² and be sued.⁹³

Prior to incorporation no action will lie by⁹⁴ or against⁹⁵ an alleged municipal corporation, at least where it is not a de facto corporation.⁹⁶

Scope and extent of capacity. As an incident to its capacity to sue or to be sued, a municipal corporation may perform every act required to prosecute or to defend an action.⁹⁷ Usually, however, it has no special right not common to corporations in general,⁹⁸ and its standing in a court of equity in its proprietary capacity is not greater than that of any private litigant.⁹⁹ A constitutional provision governing actions against the state does not apply to actions against a municipal corporation.¹ A municipal corporation having capacity to sue and to be sued may sue or be sued both at law and in equity, as considered infra §§ 2188-2193.

b. Right of Action

- (1) Against municipal corporation
- (2) By municipal corporation

(1) Against Municipal Corporation

Some statutes have specified the grounds on which actions against municipal corporations may be maintained, and, according to some authorities, a strict construction of a statute giving a right of action is essential.

The grounds on which actions against municipal corporations may be maintained have been specified by some statutes,² and it has been stated broadly that a right of action against a municipality is a matter of legislative favor and may be withheld,

granted absolutely, or granted on condition.³ The fact that plaintiff may not be able to obtain satisfaction of a judgment against defendant municipal corporation does not affect his right to sue and obtain judgment.⁴ According to some authorities a statute which gives a right of action against a municipality must be strictly construed,⁵ and a statute which creates a right of action for certain acts does not include the right to sue a municipal corporation unless such right to sue is expressly included.⁶ It has been stated broadly that a citizen of a municipality may not complain of an act done or threatened by the municipality unless the injury to him is greater than, or different from, that suffered by the members of the public generally.⁷

Relief against a municipal corporation may be obtained in actions to recover money⁸ or the value of other property⁹ to which the municipal corporation is not entitled, to quiet title, as shown in the C. J.S. title Quieting Title § 56, also 44 C.J. p 1456 note 48, and to foreclose a vendor's lien.¹⁰ While it seems that, if a municipal corporation fails to provide funds to meet obligations where it is required by statute so to do, an action will lie against it,¹¹ the municipal corporation is not liable, in the first instance at least, where it has, in accordance with the statute, placed the necessary funds in the hands of the particular board or department which has contracted the obligation in question.¹² A municipal corporation may not be sued to enforce a liability properly chargeable against another distinct municipal entity.¹³ No action may be brought against a city as administrator or collector of a

92. U.S.—Beckwith v. Racine, C.C. Wis., 3 F.Cas.No.1,213, 7 Biss. 142, affirmed 100 U.S. 514, 25 L.Ed. 699.

93. U.S.—Beckwith v. Racine, supra. Ga.—Walker v. East Rome, 89 S.E. 204, 145 Ga. 294.

94. U.S.—Lonsdale v. Portland, D. C., 15 F.Cas.No.8,578, Deady 1, 1 Or. 381.
44 C.J. p 1454 note 9.

95. Wis.—Winneconne v. Winneconne, 86 N.W. 589, 111 Wis. 10.
44 C.J. p 1454 note 10.

96. Wis.—Winneconne v. Winneconne, supra.

De facto municipal corporations generally see supra § 30.

97. Ariz.—Flagstaff v. Gomez, 202 P. 401, 23 Ariz. 184, 23 A.L.R. 661.

98. N.Y.—Moran v. Long Island City, 5 N.E. 80, 101 N.Y. 439.

99. N.Y.—New York v. McAneny, 190 N.Y.S. 87, 115 Misc. 433.

1. Cal.—Goldtree v. San Diego, 97 P. 216, 8 Cal.App. 505.

2. Or.—Spencer v. School Dist. No. 1, 254 P. 357, 121 Or. 511.

3. Minn.—Paul v. Faricy, 37 N.W. 2d 427.

4. U.S.—Roswell Drainage Dist. v. Parker, C.C.A.N.M., 53 F.2d 793.
Iowa—Slusser v. Burlington, 42 Iowa 378.

Enforcement of judgment against municipal corporation generally see infra § 2212.

5. S.C.—Athanas v. City of Spartanburg, 12 S.E.2d 39, 196 S.C. 19—Reeves v. City of Easley, 166 S.E. 120, 167 S.C. 231.

Limitation of rule

The principle of strict construction stated in the text must be applied to all of the facts of each case whether admitted by demurrer or established by testimony.—Athanas v. City of Spartanburg, 12 S.E.2d 39, 196 S.C. 19.

6. U.S.—Wilcox v. City of Idaho Falls, D.C.Idaho, 23 F.Supp. 626.

7. Ky.—City of Covington v. Averbeck, 50 S.W.2d 50, 244 Ky. 117.

Right of taxpayer to sue in general see supra § 2122.

8. U.S.—Louisiana v. Wood, Mo., 102 U.S. 294, 26 L.Ed. 153.

Ill.—Bloomington Tp Highway Comrs. v. Bloomington, 97 N.E. 280, 253 Ill. 164, Ann.Cas.1913A 471.

44 C.J. p 1456 note 45.

9. Ill.—Elgin v. Joslyn, 26 N.E. 1090, 136 Ill. 525.

44 C.J. p 1456 note 46.

10. Tex.—Ft. Worth v. Reynolds, Civ.App., 190 S.W. 501.
44 C.J. p 1456 note 49.

11. N.Y.—Dannat v. New York, 66 N.Y. 585.

12. N.Y.—Richardson v. Mt. Vernon, 138 N.Y.S. 703, 154 App.Div. 71, affirmed 105 N.E. 1097, 211 N.Y. 582.

44 C.J. p 1456 note 53.

13. Ill.—Crane v. Urbana, 2 Ill.App. 559.

Ind.—Huntington v. Day, 55 Ind. 7.

44 C.J. p 1456 note 54.

fund where a receiver of such fund has been appointed.¹⁴ Creditors of a municipal corporation have been permitted to maintain a suit to set aside as fraudulent a conveyance to a third person by another than the municipal corporation of land paid for by the corporation as a gift to the grantee.¹⁵ A proceeding for the purpose of collecting a claim of one individual against another may not be maintained against a municipal corporation.¹⁶

The right of action against a municipal corporation for tort is considered supra § 919; and the right of action against a municipal corporation on contract generally is considered supra §§ 1024, 1026.

Representative actions. A municipal corporation may be made defendant as representative of private persons whose interests are affected where it represented such persons in the transaction out of which the action has arisen,¹⁷ and it may also as defendant represent the public where certain public rights are involved.¹⁸ Its capacity to be sued in respect of the private rights of its citizens or inhabitants, however, has been denied where it is not in any sense their representative in respect of such rights.¹⁹

(2) By Municipal Corporation

Some statutes have specified the grounds on which actions by municipal corporations may be maintained, and, in order to maintain an action, it is essential that a municipal corporation should have the requisite interest in the subject matter of the litigation.

The grounds on which actions by municipal corporations may be maintained have been specified by some statutes.²⁰ In order to permit the maintenance of an action by a municipal corporation, such

corporation must have the requisite interest in the subject matter involved.²¹

It has been held or recognized that a municipal corporation may maintain an action of ejectment,²² to rescind a sale of municipal lands,²³ to cancel municipal water-right obligations,²⁴ and to quiet title or to remove a cloud from title, as discussed in the C.J.S. title Quietening Title § 55, also 44 C.J. p 1457 note 64, 51 C.J. p 210 note 76. A municipal corporation, however, may not sue in the name of the state on an official bond running to the state, where the state has no interest in the moneys involved.²⁵ A municipality may question the constitutionality of a statute changing its form of government²⁶ and may invoke the protection afforded by the constitution to prevent a violation of its rights by a statute.²⁷ A municipality cannot maintain an action for defamation²⁸ even in its proprietary capacity.²⁹

The right of action by a municipal corporation on contract generally is considered supra § 1025.

Representative actions. The right of a municipal corporation to sue to protect the rights of its citizens or inhabitants, where it represented them in the transaction out of which the action has arisen, has been upheld.³⁰ Such actions are usually actions in equity, as discussed infra § 2190, and a reason sometimes given for permitting the action is that it will avoid a multiplicity of suits.³¹ Moreover, the municipal corporation may sue as representative of the public for the vindication of certain public rights.³² On the other hand, the right of a municipal corporation to sue in respect of the private rights of its citizens or inhabitants has been denied where it cannot in any sense be regarded as

14. U.S.—*Wilder v. New Orleans*, C.C.La., 67 F. 567.

15. Ala.—*Southern R. Co. v. Hartshorn*, 43 So. 583, 150 Ala. 217, 124 Am.S.R. 68.

44 C.J. p 1456 note 56.

16. Ill.—*Brazil v. City of Chicago*, 43 N.E.2d 212, 315 Ill.App. 436.

17. U.S.—*In re Engelhard, etc., Co.*, Ky., 34 S.Ct. 258, 231 U.S. 646, 58 L.Ed. 416.

18. Ill.—*Healy v. Deering*, 83 N.E. 226, 231 Ill. 423, 121 Am.S.R. 331.

44 C.J. p 1454 note 25.

19. N.Y.—*Richman v. Consolidated Gas Co.*, 100 N.Y.S. 81, 114 App.Div. 216, affirmed 78 N.E. 871, 186 N.Y. 209.

44 C.J. p 1454 note 26.

20. Or.—*Spencer v. School Dist. No. 1*, 254 P. 357, 121 Or. 511.

21. Mass.—*In re Opinions of the Justices*, 199 N.E. 538, 293 Mass. 589.

22. Cal.—*Daly City v. Holbrook*, 178 P. 725, 39 Cal.App. 326.

44 C.J. p 1456 note 60.

Ejectment to recover possession of street from obstructor see supra § 1752.

City, succeeding to interest of town

The city of New York, successor in interest of the Town of Gravesend, had standing to maintain an action in ejectment which was founded on an alleged breach of condition subsequent in a deed executed by such town.—*City of New York v. Coney Island Fire Department*, 18 N.Y.S.2d 923, 259 App.Div. 286, reargument denied 20 N.Y.S.2d 410, 259 App.Div. 888, affirmed 32 N.E.2d 827, 285 N.Y. 535.

23. Colo.—*Denver v. Kent*, 1 Colo. 336.

24. *Certificates issued fraudulently* Colo.—*Goldfield v. MacDonald*, 119 P. 1069, 52 Colo. 143.

25. Pa.—*Commonwealth v. Scranton*, 64 A. 321, 214 Pa. 595—Com-

monwealth v. Schadt, 64 A. 320, 214 Pa. 592.

26. La.—*Gretna v. Bailey*, 75 So. 491, 141 La. 625, Ann.Cas.1918E 566.

27. La.—*Gretna v. Bailey*, supra.

28. Ill.—*Chicago v. Tribune Co.*, 139 N.E. 86, 307 Ill. 595, 28 A.L.R. 1368.

Who may maintain action for defamation generally see Libel and Slander §§ 145-147.

29. Ill.—*Chicago v. Tribune Co.*, 139 N.E. 86, 307 Ill. 595, 28 A.L.R. 1368

44 C.J. p 1457 note 70.

30. Mich.—*Saginaw v. Consumers' Power Co.*, 182 N.W. 146, 213 Mich. 460.

44 C.J. p 1454 note 18.

31. Mich.—*Saginaw v. Consumers' Power Co.*, supra.

44 C.J. p 1454 note 20.

32. N.D.—*Lamoure v. Lasell*, 145 N.W. 577, 26 N.D. 638.

44 C.J. p 1454 note 21.

a representative of the public or of its inhabitants or citizens,³³ and it has been held that such corporation may not maintain an action to protect the rights of its resident taxpayers where the litigation does not affect such corporation directly.³⁴ It has been held that a municipal corporation cannot maintain an action for damages as a trustee of an express trust on an agreement alleged to have been entered into by it for the benefit of certain of its inhabitants.³⁵

§ 2187. Authority to Institute or Defend Actions

What officer or body has power to bring action in behalf of, and to defend actions against, a municipal corporation is sometimes determined by statutory provision.

While, if a municipal corporation has a right of action, either in its governmental or in its proprietary capacity, some person must represent it in an action in order to render the right of action effective,³⁶ and a municipal corporation as plaintiff cannot come into court without being represented by its duly authorized officers,³⁷ according to some authorities a municipal officer cannot initiate an action on behalf of the corporation except where authorized, expressly or by implication, by statute or ordinance or resolution of the governing body.³⁸ By statute the power and duty to initiate actions on behalf of a municipal corporation may be conferred expressly or by implication on the municipal council or other governing body,³⁹ on the legal officer or official counsel of the corporation, in certain speci-

fied cases, as discussed *infra* § 2206, or on other officers in certain cases.⁴⁰ There is authority for the view that the corporate name may generally be used by any officer or board authorized to represent the corporate interest involved in the action⁴¹ and that by virtue of his office and the general powers conferred by statute the mayor is authorized to initiate actions in the name and on behalf of the corporation.⁴² Under some statutes the mayor and treasurer of the municipality are authorized to direct in writing the commencement of particular actions.⁴³ A stranger cannot, without authority, prosecute a suit in the corporate name.⁴⁴

There may be a ratification of the act of one purporting to act on behalf of the corporation in instituting proceedings.⁴⁵

Where several different agents are authorized to sue in behalf of a municipality, it has been held that the court has the power to see that the agent who first sues is acting in good faith,⁴⁶ and that, where it appears that such agent is not conducting the litigation in good faith and in the real interest of the municipality, the court may authorize another agent to appear, file appropriate pleadings, and take steps essential to protect the interests of the municipality.⁴⁷

Defending actions. Some statutes confer the power and duty to defend actions against a municipal corporation on the municipal council or other governing body,⁴⁸ and as to particular matters certain departments are sometimes authorized to defend in the name of the corporation.⁴⁹

33. Ill.—*Park v. Modern Woodmen of America*, 54 N.E. 932, 181 Ill. 214.

44 C.J. p 1454 note 22.

34. Wis.—*State ex rel. City of Sheboygan v. Board of Sup'rs of Sheboygan County*, 216 N.W. 144, 194 Wis. 456.

Payment of tax money to county

In denying the right of a city to maintain a suit to prevent the payment over to a county of taxes collected by a city officer from taxpayers resident in the city under a levy made by the county board as a general county tax, it was stated that the city was not the guardian of its citizens in their relations with state and county.—*City of Appleton v. Bachman*, 220 N.W. 393, 197 Wis. 4.

Suit to prevent collection of taxes

City was not authorized to maintain a suit to enjoin state officers from enforcing a gasoline tax law, notwithstanding it was a purchaser of gasoline subject to the tax, in view of the fact that the burden of

the tax would be passed on to the citizens of the city who furnished its revenues.—*City of Racine v. Levitan*, 220 N.W. 398, 196 Wis. 604, rehearing denied 221 N.W. 109, 196 Wis. 604.

35. Conn.—*New Haven v. New Haven, etc., R. Co.*, 25 A. 316, 62 Conn. 252, 18 L.R.A. 256.

36. Miss.—*Gully v. Williams Bros.*, 180 So. 400, 182 Miss. 119.

37. S.D.—*Cralle v. American-News Co.*, 212 N.W. 913, 51 S.D. 176.

38. Ohio.—*In re King*, 14 Ohio App. 88.

Pa.—*Lebanon v. Lebanon, etc., R. Co.*, 1 Pa. Dist. 563.

44 C.J. p 1455 note 27.

39. S.D.—*Halverson v. Williams*, 160 N.W. 730, 38 S.D. 176.

44 C.J. p 1455 note 28.

40. N.H.—*Stone v. Cray*, 200 A. 517, 89 N.H. 483.

41. Ky.—*Williamsburg v. Weesner*, 176 S.W. 224, 164 Ky. 769.

Pa.—*Philadelphia v. Germantown Pass. R. Co.*, 10 Phila. 165.

42. Ky.—*Williamsburg v. Weesner*, 176 S.W. 224, 164 Ky. 769.

44 C.J. p 1455 note 31.

43. Me.—*Rockland v. Ulmer*, 32 A. 972, 87 Me. 357—*McFadden v. Haynes, etc., Ice Co.*, 29 A. 1068, 86 Me. 319.

44. Ky.—*Williamsburg v. Weesner*, 176 S.W. 224, 164 Ky. 769.

Pa.—*Philadelphia v. Strawbridge*, 12 Phila. 482.

45. N.J.—*Sayre v. Orange, Sup.*, 67 A. 933.

44 C.J. p 1455 note 36.

46. Miss.—*City of Biloxi v. Gully*, 193 So. 786, 187 Miss. 664.

47. Miss.—*City of Biloxi v. Gully*, *supra*.

48. S.D.—*Halverson v. Williams*, 160 N.W. 730, 38 S.D. 176.

44 C.J. p 1455 note 34.

Authority of official counsel as to conduct of litigation see *infra* § 2206.

49. N.Y.—*King v. Randolph*, 50 N.Y. S. 902, 28 App. Div. 25.

§ 2188. Nature and Form of Actions or Proceedings

The nature and form of actions or proceedings against or by a municipal corporation generally are discussed *infra* §§ 2189–2193; the nature and form of an action against a municipal corporation for tort are discussed *supra* § 919; and the nature and form of an action on contract generally by or against a municipal corporation are discussed *supra* §§ 1024–1026. The right of action by or against a municipal corporation generally is discussed *supra* § 2186.

Examine Pocket Parts for later cases.

§ 2189. — Against Municipal Corporation

As a general rule a cause of action against a municipal corporation may be enforced by an action in any form which would be appropriate in an action against a private corporation or an individual.

As a general rule, whenever a cause of action exists against a municipal corporation, it may be prosecuted by an action in any form which would be appropriate in an action against a private corporation or an individual,⁵⁰ and, where it has capacity to be sued, it may be sued both at law and in equity.⁵¹ Assumpsit will lie against a municipal corporation to recover on an unliquidated claim⁵² or on an obligation implied in law.⁵³ An attorney at law who is entitled to fees for the taking of acknowledgments to instruments by a municipal officer may maintain an action for money had and received to the use of

plaintiff against the municipal corporation where such fees have been paid into the municipal treasury.⁵⁴ In certain cases, instead of proceeding by mandamus, the enforcement of a claim against a municipal corporation by an ordinary action at law has been regarded as proper,⁵⁵ and, where a claim is unliquidated or disputed, as necessary.⁵⁶

§ 2190. — By Municipal Corporation

In a proper case a municipal corporation may enforce its rights by a suit in equity or may maintain assumpsit to enforce a claim.

The right of a municipal corporation to resort to a court of equity has expressly been recognized.⁵⁷ Suits by a municipal corporation to protect its citizens or inhabitants, where it represented them in the transaction out of which the suit has arisen, are usually suits in equity.⁵⁸ Assumpsit will lie in a proper case to enforce a claim of a municipal corporation.⁵⁹

§ 2191. — Attachment and Garnishment

A municipal corporation may be entitled to take advantage of attachment statutes, and some statutes authorize the attachment of property of a municipal corporation or authorize garnishment against such a corporation as defendant.

The right of a municipal corporation to take advantage of attachment statutes has been upheld.⁶⁰

Particular statutes may be broad enough to permit the attachment of property of a municipal corporation⁶¹ or to authorize garnishment against such

50. N.C.—Winslow v. Perquimans County, 64 N.C. 218.

51. U.S.—Roswell Drainage Dist. v. Parker, C.C.A.N.M., 53 F.2d 793.

52. Mich.—Waterman-Waterbury Co. v. Cato Tp. School Dist. No. 4, 150 N.W. 104, 183 Mich. 168.

53. U.S.—Norfolk & W. Ry. Co. v. Board of Education of City of Chicago, C.C.A.Ill., 114 F.2d 859.

44 C.J. p 1456 note 41.
Implied contracts of municipal corporation generally see *supra* § 975

54. N.J.—Samson v. City of Newark, 15 A.2d 452, 125 N.J.Law 221.

55. N.Y.—People v. City of Schenectady, 60 N.Y.S.2d 911, 186 Misc. 385.

44 C.J. p 1456 note 42.
Effect of another adequate remedy on right to enforce claims by mandamus see Mandamus § 17 a.

56. Mich.—Bloomshild v. Bay City, 158 N.W. 1043, 192 Mich. 488.

44 C.J. p 1456 note 43.
Whether unliquidated claim enforceable by mandamus generally see Mandamus § 144.

57. N.Y.—Haverstraw v. Eckerson, 84 N.E. 578, 192 N.Y. 54, 20 L.R.A., N.S., 287.

58. W.Va.—St. Mary's v. Hope Natural Gas Co., 76 S.E. 841, 71 W.Va. 76, 43 L.R.A., N.S., 994.
44 C.J. p 1454 note 20.

59. S.C.—Columbia v. Harrison, 9 S.C.L. 213.
44 C.J. p 1456 note 59.

60. Cal.—Morgan v. Menzies, 60 Cal. 341.
Md.—Gordon v. Baltimore, 5 Gill 231.

44 C.J. p 1457 note 72.
Necessity of bond see Attachment § 145.

61. Municipal corporation of another state

(1) It has been held that property of a municipal corporation of a state other than the state of the forum may be subject to attachment.—Harman v. City of Ft. Lauderdale, 234 N.Y.S. 196, 134 Misc. 183.

(2) Funds of such a corporation acting in a proprietary or private capacity, in the hands of a depository in the state of the forum, are subject

to attachment.—Doyle v. City of Astoria, Or., 262 N.Y.S. 572, 147 Misc. 127, affirmed 262 N.Y.S. 973, 238 App. Div. 833.

(3) In this connection it has been held that funds forwarded to a bank to pay bonds of such a corporation must be treated as part of the municipality's free funds held in its corporate capacity and subject to its control, and, therefore, subject to attachment.—Doyle v. City of Astoria, Or., *supra*.

(4) Such municipal corporation, by maintaining a water system to supply private consumers for compensation, was engaged in a business activity, and funds held for such purposes were held in a proprietary, not in a governmental, capacity, and therefore, were subject to attachment.—Doyle v. City of Astoria, Or., *supra*.

(5) In this respect the functions of a port authority organized and existing under the laws of another state and empowered to construct, manage, operate, and control a harbor improvement were private and proprietary, and not governmental,

a corporation as defendant.⁶² So, under some statutes, there may be reached by garnishment debts due a municipal corporation⁶³ of a private nature.⁶⁴ However, taxes and public revenues of such corporations cannot be reached by garnishment,⁶⁵ and the right to obtain jurisdiction in an action against a municipal corporation of another state by the attachment of property of such corporation in the state where the action is brought has been denied.⁶⁶

Whether a municipal corporation may be garnishee is discussed in Garnishment § 39 c (4).

§ 2192. — Injunctions

A municipal corporation may maintain a suit for an injunction to protect public rights.

A municipal corporation may sue to protect by injunction public rights⁶⁷ in the same manner as a private person or corporation may seek redress in a proper case.⁶⁸ It has been held that an injunction will not issue at the suit of a judgment credi-

tor restraining municipal authorities from paying claims due the judgment debtor.⁶⁹

General rules as to procedure in injunction suits, considered in Injunctions §§ 162-223, usually apply in suits to which a municipal corporation is a party.⁷⁰

§ 2193. — Receivers

As a general rule, courts may not appoint a receiver for a municipal corporation in the absence of statutory authorization.

There is authority for the view that, in the absence of statutory authorization, courts do not have power to appoint receivers for local political subdivisions of the state,⁷¹ and in some jurisdictions the courts may not appoint receivers for a public corporation in an action against it.⁷² In any event, in general a receiver will not be appointed in the absence of insolvency or of threatened irreparable damage.⁷³ The view has been taken that the court

and certificates of indebtedness deposited by such authority in the state of the forum were subject to attachment.—*Harman v. City of Ft. Lauderdale*, 234 N.Y.S. 196, 134 Misc. 133.

62. Nonresident municipal corporation

Term "defendant," within statute respecting attachment by trustee process against nonresident defendant, includes nonresident municipal corporation.—*National Shawmut Bank of Boston v. City of Waterville, Me.*, 189 N.E. 92, 285 Mass. 252.

63. U.S.—*Canal St., etc., R. Co. v. Hart, La.*, 5 S.Ct. 1127, 114 U.S. 654, 29 L.Ed. 226.

44 C.J. p 1457 note 74.

64. Ala.—*Murphree v. Mobile*, 18 So. 740, 108 Ala. 663.

La.—*Municipality No. 3 v. Hart*, 6 La. Ann. 570.

44 C.J. p 1457 note 75.

65. Ala.—*Murphree v. Mobile*, 18 So. 740, 108 Ala. 663.

44 C.J. p 1457 note 76.

Moneys recovered on official bond of municipal officer

Where municipal officer failed to account for money raised for specific purpose, money obtained by municipal corporation as result of suit on such officer's official bond could not be garnished by judgment creditor of such municipality.—*Stephens v. Bragg City*, 27 S.W.2d 1063, 224 Mo. App. 469.

66. U.S.—*Parks Co. v. Decatur, Ky.*, 138 F. 550, 70 C.C.A. 674.

Improvement district

Action against improvement district of another state created to construct and operate tunnel, begun by writ of foreign attachment served

on railroad company as garnishee indebted to district for rentals for use of tunnel, was not maintainable, even if district's debt to plaintiff was incurred and rentals earned in its proprietary capacity.—*Eastern Union Co. of Delaware v. Moffat Tunnel Improvement Dist.*, 178 A. 864, 6 W. W. Harr., Del., 488.

67. Tex.—*Sutherland v. Winnsboro*, Civ. App., 225 S.W. 63.
44 C.J. p 1457 note 79.

Injunction:

Against violation of ordinance see Injunctions § 123.

To protect public welfare, property, and rights in general see Injunctions §§ 123-129.

Necessity of bond of municipal corporation see Injunctions § 166 c.
Persons entitled to injunction in general see Injunctions § 35.

Injunction not authorized

New Jersey township sued on note was not entitled to have plaintiff enjoined from prosecuting its action to judgment because New Jersey municipal finance commission, pursuant to New Jersey statute, had taken over financial affairs of township, which was unable to pay its debts, since statute did not prohibit entry of judgment against such a municipality, but merely prohibited enforcement of judgment.—*Township of Delaware v. Central-Penn Nat Bank of Philadelphia*, C.C.A.N.J., 79 F.2d 255.

68. Tex.—*Sutherland v. Winnsboro*, Civ. App., 225 S.W. 63.

69. Pa.—*Granite Co. v. Douglass*, 3 Pa. Dist. 133.

Injunctions against municipal corporations generally see Injunctions § 111.

70. Damages on dissolution

The fact that a city attorney is personally interested in city bonds will not deprive the city of its right to damages on the dissolution of an injunction against the collection of taxes to pay interest on such bonds.—*Mason v. Shawneetown*, 77 Ill. 533.

71. Or.—*Corpus Juris* cited in *City of Enterprise v. State*, 69 P.2d 953, 956, 156 Or. 623.

Against whom receivers may be appointed in general see the C.J.S. title *Receivers* § 12, also 53 C.J. p 30 note 25—p 31 note 38.

Municipal debt readjustments under bankruptcy laws see *Bankruptcy* § 963-1008.

Property subject to receivership in general see the C.J.S. title *Receivers* §§ 13, 14, also 53 C.J. p 31 note 40—p 32 note 82.

Repeal of charter

Where, however, taxes had been duly levied in pursuance of law before the repeal of a municipal charter, the court had power to lay hold by its receiver of the assets belonging to the city when its charter was repealed, including such taxes as were levied and collected, but undisposed of, and all taxes uncollected, and all property of every description, except property held for strictly public uses, and could administer such assets for the benefit of the creditors.—*Garrett v. Memphis*, C.C.Tenn., 5 F. 860.

72. La.—*Depew v. Venice Drain Dist.*, 105 So. 78, 158 La. 1099.

73. Tenn.—*Hurlburt v. Lookout Mountain, Ch A.*, 49 S.W. 301.

should not appoint, at the request of a judgment creditor, a receiver to receive the proceeds of claims against a municipality in favor of the judgment debtor.⁷⁴

§ 2194. Actions or Suits in Corporate Name

Except as otherwise provided by statute, a municipal corporation may, and under some circumstances should, sue and be sued in its proper corporate name.

Except where it is otherwise provided by statute,⁷⁵ a municipal corporation may sue⁷⁶ and be sued,⁷⁷ and in some jurisdictions or under some statutes should sue⁷⁸ and be sued,⁷⁹ in its proper corporate name, and not in the names of the individuals who compose it or of the municipal council or authorities.⁸⁰ In some instances slight or technical variances in the corporate name have not been regarded as fatal in actions or proceedings by municipalities.⁸¹ The municipality may sue in its own name on contracts made by some officer or agent for its benefit.⁸²

Change of name. After a lawful change of the corporate name, as a rule action should be brought in the new name in the case of an action by⁸³ or against⁸⁴ a municipal corporation.

§ 2195. Actions by or against Municipal Officer or Department, and Use of Name of Officer or Agent

Except as otherwise provided by statute, a municipal corporation may not sue in the name of its officers or

agents, and, in the absence of statutory authorization, a department of the municipality may not sue or be sued in the departmental name.

A municipal corporation may not sue⁸⁵ or be sued⁸⁶ in the name of its officers or agents except as otherwise provided by statute;⁸⁷ and the names of its officers or agents need not be designated.⁸⁸ An officer of the corporation usually cannot maintain an action in his official name without statutory authorization,⁸⁹ but a statute may authorize a municipal officer to maintain a suit in his own name with respect to certain matters.⁹⁰ It has been held that a municipal officer can prosecute in his own name an action for certain fees due to him in his official capacity, where he is obliged to account for, and to pay over, such fees to the municipality.⁹¹ In order that a municipal corporation or unit may be regarded as a party to an action or proceeding brought only against its officers, as such, such corporation or unit must in fact be the real party in interest.⁹² Actions against municipal officers for personal liability are discussed *supra* § 545 b (3).

In the absence of statutory authorization, a department of the municipal government may not, in the departmental name, sue⁹³ or be sued.⁹⁴ Some statutes authorize an action in the departmental name by⁹⁵ or against⁹⁶ a municipal department. It has been held that in determining the rights of the parties an action against a municipal department is regarded as one against the municipal corporation itself.⁹⁷

74. Pa.—Granite Co. v. Douglass, 3 Pa Dist. 133

75. R.I.—Valcourt v. Providence, 26 A. 45, 18 R.I. 160.
44 C.J. p 1458 note 92.

76. Cal.—Daly City v. Holbrook, 178 P. 725, 39 Cal.App. 326.
44 C.J. p 1458 note 93.

Alternative rights

Town in suing may be described as "inhabitants of town" or "town of" and city by corporate name only or preceded by words "inhabitants of."—Inhabitants of City of Bladeford v. Bennett, 147 A. 151, 128 Me. 240.

77. Ga.—City of Hartwell v. Shultz, 8 S.E.2d 708, 62 Ga.App. 515.
44 C.J. p 1458 note 94, 96 [h].

78. Ky.—Buckner v. Clay, 206 S.W. 2d 827, 306 Ky. 194.
N.H.—Stone v. Cray, 200 A. 517, 89 N.H. 483.
44 C.J. p 1458 note 95.

79. Ky.—Buckner v. Clay, 206 S.W. 2d 827, 306 Ky. 194.
44 C.J. p 1458 note 96.

80. Ky.—Buckner v. Clay, *supra*.
Action in name of officers or agents
see *infra* § 2195.

81. La.—Opelousas v. Andrus, 37 La. Ann. 699.

82. Mass.—Boston v. Schaffer, 9 Pick. 415.

83. Ind.—Ft. Wayne v. Jackson, 7 Blackf. 36.
44 C.J. p 1458 note 1.

84. Ga.—City of Hartwell v. Shultz, 8 S.E.2d 708, 62 Ga.App. 515.
44 C.J. p 1458 note 2.

85. Ky.—Buckner v. Clay, 206 S.W. 2d 827, 306 Ky. 194.
Mich.—Romeo v. Chapman, 2 Mich. 179

86. Ky.—Buckner v. Clay, 206 S.W. 2d 827, 306 Ky. 194.
44 C.J. p 1458 note 5.

87. N.Y.—Brooklyn Eastern Dist. Fire Dept. v. Acker, 26 How.Pr. 263
44 C.J. p 1458 note 6.

88. Ala.—Powers v. Decatur, 54 Ala. 214.

89. N.Y.—Pounds v. Lee Ave. Theatre Co., 147 N.Y.S. 815, 84 Misc. 623.
44 C.J. p 1458 note 8.

90. Mass.—Mayor of Cambridge v. Dean, 14 N.E.2d 163, 300 Mass 174.

91. N.H.—Potter v. Norris, 26 N.H. 330.

92. Wash.—State ex rel. Fleming v. Cohn, 121 P.2d 954, 12 Wash.2d 415.

93. Minn.—American Electric Co. v. Waseca, 113 N.W. 899, 102 Minn. 329.

N.Y.—New York Balance Dock Co. v. New York, 8 Hun 247.

94. N.Y.—Swift v. New York, 83 N. Y. 528.
44 C.J. p 1459 note 11.

95. Mich.—Niles Public Works v. Pinch, 116 N.W. 408, 152 Mich. 517.
44 C.J. p 1459 note 12.

96. Minn.—American Electric Co. v. Waseca, 113 N.W. 899, 102 Minn. 329.
44 C.J. p 1459 note 13.

97. N.C.—Mack v. Charlotte City Waterworks, 107 S.E. 244, 181 N. C. 383.
44 C.J. p 1459 note 14.

§ 2196. Actions by State or State Officer on Behalf of Municipal Corporation

As a general rule a state may not sue with respect to, or for the recovery of, property or funds belonging solely to a municipal corporation, in the absence of statutory authorization; but some statutes have authorized a suit by the state or state officers for the benefit of municipal corporations.

Except where there is a statutory provision giving a right of action to the state,⁹⁸ it has been held that the state may not maintain an action with respect to property which belongs to a municipal corporation with regard to which the state has no interest or right of possession or control,⁹⁹ that the state may not sue for the recovery of funds belonging to a municipality,¹ that, where moneys belonging to the municipality are misappropriated, it alone, and not the state, can sue for their recovery,² and also that the state cannot maintain an action to prevent or to avoid the sale of corporate property.³ The right of the attorney general to maintain an action to restrain a municipality from making an unauthorized contract, however, has been recognized.⁴ The state, and not the municipality, has been held the proper party to enforce a forfeited bond where the statute provides summary proceedings in the name of the state for the collection of such bonds, even though the amount of the forfeiture inures to the

benefit of the municipality.⁵ Statutes sometimes expressly confer on a state officer the right to maintain an action for the use and benefit of a municipal corporation,⁶ and the fact that the corporation has the right to bring the action in its own name and right does not affect the right of such state officer to sue;⁷ moreover, the fact that causes of action in favor of two different corporations are joined in the suit by the state officer is not fatal where the causes grow out of the same act and there is only one defendant.⁸

§ 2197. Compromise and Settlement of Pending Action

As a general rule, a municipal corporation may compromise or settle pending actions brought by or against it.

As a general rule, a municipal corporation may compromise or settle pending actions brought by⁹ or against¹⁰ it. While the power to compromise is sometimes expressly conferred by statute,¹¹ it is generally considered that the power arises out of the power to sue and to be sued.¹²

The usual requisites of a valid compromise and settlement, discussed in *Compromise and Settlement* §§ 2-12, must exist.¹³

98. Ind.—*State v. Clamme*, 134 N.E. 676, 80 Ind. App. 147.

44 C.J. p 1459 note 16.

99. N.Y.—*People v. Eooth*, 32 N.Y. 397.

59 C.J. p 317 note 28.

1. Ind.—*State v. Clamme*, 134 N.E. 676, 80 Ind. App. 147.

2. N.Y.—*People v. Fields*, 58 N.Y. 491.

44 C.J. p 1459 note 17—59 C.J. p 317 note 28 [a].

3. N.Y.—*People v. New York*, 27 How. Pr. 34.

44 C.J. p 1459 note 18.

4. Mich.—*Attorney-General v. Public Lighting Commn.*, 118 N.W. 935, 155 Mich. 207.

5. La.—*State v. Harris*, 2 La. Ann. 516.

6. Miss.—*Robertson v. Monroe County*, 79 So. 187, 118 Miss. 541. 44 C.J. p 1459 note 22.

7. Miss.—*Robertson v. Monroe County*, *supra*.

8. Miss.—*Robertson v. Monroe County*, *supra*.

Joinder of parties in actions involving municipal corporations generally see *infra* § 2204.

9. Kan.—*State ex rel. v. City of Pratt*, 85 P.2d 10, 148 Kan. 885.

N.Y.—*Herder v. Clifford*, 230 N.Y.S. 464, 132 Misc. 666, appeal dismissed 232 N.Y.S. 56, 225 App. Div.

780, and affirmed 234 N.Y.S. 811, 227 App. Div. 645, reversed on other grounds 169 N.E. 118, 252 N.Y. 141.

44 C.J. p 1459 note 26.

Before judgment becomes final

Unless forbidden by statute, a municipal corporation has power to settle and compromise disputed claims in its favor after suit begun thereon at any time before judgment thereof becomes final.—*State ex rel. v. City of Pratt*, 85 P.2d 10, 148 Kan. 885.

10. U.S.—*Columbus Gas & Fuel Co. v. City of Columbus*, D.C. Ohio, 42 F. Supp. 762.

Colo.—*Corpus Juris cited in School District No. 1 in City and County of Denver v. Faker*, 105 P.2d 406, 407, 106 Colo. 356.

44 C.J. p 1459 note 27.

Compromise of content of will

(1) In an action by the heirs of a testator against a municipal corporation to set aside the residuary clause of a will in which such corporation was designated as beneficiary, where plaintiff's claim was based on reasonable grounds and was asserted in good faith, the municipal corporation could lawfully compromise its claim to the residuary estate, especially when compromise was to become effective only after approval by the court.—*Schnack v. City of Larned*, 186 P. 1012, 106 Kan. 177.

(2) Usually the attorney general of the state or the county attorney would have no special official concern with such compromise, notwithstanding the testamentary gift was for a public purpose.—*Schnack v. City of Larned*, *supra*.

11. Cal.—*Oakland v. Oakland Water Front Co.*, 124 P. 251, 162 Cal. 675.

12. U.S.—*Blanchard v. City of Casper*, C.C.A. Wyo., 81 F.2d 452—*Columbus Gas & Fuel Co. v. City of Columbus*, D.C. Ohio, 42 F. Supp. 762.

Colo.—*Corpus Juris cited in School District No. 1 in City and County of Denver v. Faker*, 105 P.2d 406, 407, 106 Colo. 356.

Fla.—*Williams v. Public Utility Protective League of Florida*, 178 So. 286, 130 Fla. 603.

Ill.—*People ex rel. Ammann v. Dipper*, 63 N.E.2d 870, 392 Ill. 38.

44 C.J. p 1459 note 29.

13. Minn.—*Oakman v. Eveleth*, 203 N.W. 514, 163 Minn. 100.

Neb.—*Farnham v. Lincoln*, 106 N.W. 666, 75 Neb. 502.

44 C.J. p 1459 note 31.

Doubtful claim

Where there is no dispute as to the amount of the liability to the municipality or a contention that the entire amount is not collectable, a municipality is without authority to settle for less than the full amount,

Compromise of claim against a municipality generally is discussed supra § 2181, compromise of claim for taxes supra § 2073, arbitration of claim against municipality supra § 2182, and compromise and settlement of final judgment infra § 2211.

By whom made and method of authorization. Usually the municipal council or other governing body is authorized to compromise a pending action by¹⁴ or against¹⁵ a municipal corporation. According to some authorities a law officer of defendant municipal corporation has no authority to compromise a pending action in the absence of statutory authorization,¹⁶ but a compromise effected by the law officer with the concurrence of another officer who has the power to compromise has been upheld.¹⁷ There must be due compliance with a statutory provision authorizing the law officer to enter into an agreement to compromise.¹⁸

An ordinance which authorizes the municipality to settle a claim involved in litigation against former officials, is not legislative in character and, therefore, is not within the purview of a charter provision for initiative and referendum in the enactment of legislation.¹⁹

Taxpayer's action. The right of a municipal corporation to compromise a taxpayer's action to re-

cover money from a third person has been upheld even though the corporation had failed to take the initiative.²⁰

§ 2198. Conditions Precedent in General

There must be due compliance with conditions precedent to actions by or against municipal corporations.

Usually a municipal corporation is not held to the performance of acts other than such as are required of an individual, in order to maintain an action.²¹ Under some statutes no action can be brought in the name of the municipality where it has not authorized the action²² and notice has not been given to its law officer.²³ Under other statutes particular actions may not be commenced unless commencement is directed in writing by certain municipal officers.²⁴ A statutory provision prohibiting the law officer from commencing an action unless directed by the mayor, however, has been construed as not creating a condition precedent to the right to sue.²⁵

Some statutory provisions exempt municipal corporations from furnishing sureties or cash as security as a condition to maintaining a proceeding or obtaining relief, except in the case of specific regulation.²⁶ Charter provisions exempting municipal

for that would be an attempt unlawfully to divert the public money to a private use.—*People v. Holten*, 122 N.E. 540, 287 Ill. 225—44 C.J. p 1459 note 31 [a].

Regulation by constitution

(1) A constitutional provision that the general assembly shall not have power to release, extinguish, or authorize the releasing or extinguishing, in whole or in part, of indebtedness or liability to any municipality of the state denies the power to compromise where the liability is fixed and certain.—*Steele v. Taylor, for Use and Benefit of Laurel County*, 113 S.W.2d 423, 272 Ky. 11.

(2) Such constitutional provision does not, however, forbid the compromise of pending litigation to recover on claims that are unliquidated and uncertain in amount at any time before final judgment.—*Steele v. Taylor, for Use and Benefit of Laurel County*, supra.

Settlement justified

Where special assessment was annulled by trial court and landowner, pending city's appeal, offered over one half thereof in settlement, city had power and duty to accept settlement if concluding that settlement should be accepted, as regards claim that city negligently dismissed appeal and was liable to owners of street improvement bonds for differ-

ence between amount of assessment and amount of settlement.—*Blanchard v. City of Casper*, C.C.A.Wyo., 81 F.2d 452.

14. Neb.—*Farnham v. Lincoln*, 106 N.W. 666, 75 Neb. 502.
44 C.J. p 1460 note 33.

15. U.S.—*Columbus Gas & Fuel Co. v. City of Columbus*, D.C.Ohio, 42 F.Supp. 762.

44 C.J. p 1460 notes 33 [a], 34.

Discretion

Where compromise was within discretion of city council and was made in good faith, court would not interfere.—*Columbus Gas & Fuel Co. v. City of Columbus*, supra.

16. Pa.—*Manieri v. City of Philadelphia*, 10 Pa.Dist. & Co. 292.
44 C.J. p 1460 note 35.

17. N.Y.—*O'Brien v. New York*, 57 N.Y.S. 1039, 40 App.Div. 321, affirmed 55 N.E. 1093, 160 N.Y. 691.
44 C.J. p 1460 note 36.

18. Writing and approval

Where alleged compromise agreement with corporation counsel of city of second class providing for discontinuance of two tax certiorari proceedings and payment by city of specified sum was neither in writing nor approved by board of estimate and apportionment, the alleged compromise agreement was not enforceable, in view of the requirements of the governing statute.—*Fischer v.*

Bloomer, 51 N.Y.S.2d 415, 268 App. Div. 947.

19. Minn.—*Oakman v. Eveleth*, 203 N.W. 514, 163 Minn. 100

20. Minn.—*Oakman v. Eveleth*, supra.

44 C.J. p 1460 note 32.

21. Ky.—*Covington v. McNickle*, 18 B.Mon. 262.

44 C.J. p 1460 note 38.

22. Pa.—*Clauchs v. Pittsburgh*, 14 Pa.Dist. 571.

Authority to bring action on behalf of municipal corporation generally see supra § 2187.

23. Pa.—*Clauchs v. Pittsburgh*, supra.

Sufficiency of notice

Under a statutory provision that no action shall be brought by any city officer in the name of the city without notice to the regularly chosen solicitor, it has been held that notice to the assistant of the solicitor who was duly authorized by the solicitor was sufficient.—*Rafferty v. Pittsburg*, 15 Pa.Super. 77.

24. Me.—*McFadden v. Haynes, etc.*, Ice Co., 29 A. 1068, 86 Me. 319.
44 C.J. p 1460 note 41.

25. N.Y.—*Syracuse v. Roscoe*, 123 N.Y.S. 403, 66 Misc. 317.

26. N.Y.—*City of Utica v. Hanna*, 163 N.E. 573, 249 N.Y. 26—Application of Town Superintendent of

corporations from giving a bond in actions and suits are valid.²⁷

Actions against municipal corporation. The legislature may prescribe conditions precedent to an action against a corporation,²⁸ as where the right of action is created by statute.²⁹ While there must be a compliance with conditions precedent,³⁰ as a general rule substantial compliance is sufficient.³¹ Since conditions precedent are not favored,³² the creation of such conditions will not be presumed where the intention to create them is not plain.³³ The courts have refused to regard as a condition precedent the obtaining of a warrant.³⁴

§ 2199. Notice, Demand, or Presentation of Claim

- a. In general
- b. Validity of statutes or ordinances
- c. Nature and purpose; construction and operation in general
- d. To what claims, actions, or proceedings requirement applicable
- e. Form and contents
- f. Presentation or service
- g. Objections, waiver, or loss of right to object, and excuse for noncompliance

a. In General

In the absence of statutory or charter requirement, presentation of a claim or giving notice is not a prerequisite to an action against a municipal corporation, but some statutes require the giving, making, or presenta-

tion of a notice, demand, or claim as a condition precedent to such an action.

In the absence of a statutory or charter provision to the contrary, it is not necessary, as a prerequisite to an action against a municipal corporation, that the claim or demand should have been presented for payment, or a notice given.³⁵ As a general rule, however, statutes requiring that a notice, demand, or claim shall be given, made or presented, and also similar charter provisions adopted by municipalities pursuant to due authorization, are mandatory,³⁶ and create conditions precedent,³⁷ and a failure to comply with such a provision defeats recovery.³⁸

While it has been stated that strict compliance with statutory or charter provisions for the presentation of claims against municipalities is required,³⁹ and in any event substantial compliance with such a provision is required,⁴⁰ substantial compliance has been regarded as sufficient, in the absence of an intention to mislead.⁴¹ It has been held that in no case is a second presentation of claim necessary.⁴²

Notice or presentation of claim before bringing action against a municipal corporation for tort is discussed supra §§ 922-930, and notice or presentation of claim before bringing action against a municipal corporation on contract generally is considered supra § 1024.

Effect will be accorded a provision making the rejection of the claim or application in whole or in part,⁴³ or the neglect or refusal of the governing

Highways of Town of Frankfort, 87 N.Y.S.2d 453, 194 Misc. 732.

27. Tex.—Susholtz v. City of Houston, Com.App., 37 S.W.2d 728.

28. N.Y.—Kaufman v. New York City Housing Authority, 67 N.Y.S.2d 174, 188 Misc. 877, affirmed 70 N.Y.S.2d 329, 272 App.Div. 829.

44 C.J. p 1460 note 43.

29. Cal.—Artukovich v. Astendorf, 131 P.2d 831, 21 Cal.2d 329.

Wis.—McKeague v. Green Bay, 82 N.W. 708, 106 Wis. 577.

30. N.Y.—Swift v. New York, 83 N.Y. 528—Tomasetti Const. Co. v. State, 59 N.Y.S.2d 863, 186 Misc. 790.

44 C.J. p 1460 note 45.

31. N.Y.—Giovanniello v. City of New York, 296 N.Y.S. 886, 163 Misc. 868.

32. N.Y.—Arnold v. North Tarrytown, 122 N.Y.S. 92, 137 App.Div. 68, affirmed 96 N.E. 1109, 203 N.Y. 536.

33. N.Y.—Moren v. New York, 148 N.Y.S. 1010, 163 App.Div. 561—

Arnold v. North Tarrytown, 122 N.Y.S. 92, 137 App.Div. 68, affirmed 96 N.E. 1109, 203 N.Y. 536.

34. Mo.—Kansas City Loan Guarantee Co. v. Kansas City, 98 S.W. 459, 200 Mo. 159.

35. Cal.—Wood v. Board of Police and Fire Pension Com'rs of City of Long Beach, 120 P.2d 898, 49 Cal.App.2d 52.

44 C.J. p 1460 note 51.

Bill for attorney's fees

N.J.—Samson v. City of Newark, 15 A.2d 452, 125 N.J.Law 221.

36. Cal.—Campbell v. City of Los Angeles, 117 P.2d 901, 47 Cal.App. 2d 310.

44 C.J. p 1461 note 54.

37. N.Y.—Lee v. State, 64 N.Y.S.2d 417, 187 Misc. 268.

Tex.—City of Houston v. Chapman, Civ.App., 145 S.W.2d 669, error dismissed, judgment correct.

44 C.J. p 1461 note 55—11 C.J. p 817 note 83 [c].

Failure to present claim as defense to action see infra § 2200.

Presentation of claim:

As prerequisite to recovery of costs see infra § 2214.

For audit in general see supra §§ 2173, 2174.

38. Tex.—Geo. L. Simpson & Co. v. City of Lubbock, Civ.App., 17 S.W.2d 163, error dismissed.

39. N.Y.—Commissioners of the State Insurance Fund v. Town of Howard, 31 N.Y.S.2d 910, 177 Misc. 820, affirmed 34 N.Y.S.2d 823, 263 App.Div. 1068, appeal denied 35 N.Y.S.2d 737, 264 App.Div. 828.

40. N.Y.—MacDonald v. New York, 59 N.Y.S. 16, 42 App.Div. 263.

41. Cal.—Milovich v. City of Los Angeles, 108 P.2d 960, 42 Cal.App. 2d 364—Sandstoe v. Atchison, T. & S. F. Ry. Co., 82 P.2d 216, 28 Cal. App.2d 215.

42. N.Y.—Williams v. Buffalo, 14 N.Y.St. 81.

44 C.J. p 1461 note 56.

43. Mont.—Leggat v. Butte, 168 P. 38, 54 Mont. 137.

44 C.J. p 1462 note 57.

Time to sue see infra § 2201.

body or a particular officer to make adjustment or payment within a specified time,⁴⁴ a condition precedent. A statutory or charter right of the officer on whom the power to adjust and settle claims has been conferred to examine a claimant has a bearing on whether such officer has neglected or refused to adjust the claim,⁴⁵ and there is no such neglect or refusal where want of adjustment or payment is due to the refusal or inability of claimant to appear for examination if examination is sought,⁴⁶ in the absence of waiver or any loss of right of such officer to examine claimant.⁴⁷ There is authority for the view that, where, after presentation, no action is taken on the claim for an unreasonable time, claimant may sue notwithstanding the charter provides that the rejection of the claims shall be final and shall be a bar to any action other than by appeal to a specified court.⁴⁸

Several conditions for one action. Sometimes different statutory provisions requiring notice or presentation of claim are applicable to the same action,⁴⁹ and compliance with such provisions is necessary.⁵⁰

b. Validity of Statutes or Ordinances

As a general rule statutes requiring notice or presentation of a claim or demand as a condition precedent to an action against a municipal corporation are valid.

The legislature has power to enact a statutory provision requiring notice or presentation of a claim or demand as a condition precedent to an action against a municipal corporation,⁵¹ as where the right of action is created by statute⁵² or even

where the right exists at common law.⁵³ The right of a municipal council to require by ordinance the presentation of a claim as a condition precedent has been denied in the absence of statutory authorization;⁵⁴ but, where the corporation has authority to frame its own charter, a charter provision adopted by it, which requires the presentation of a claim within a specified time, is valid⁵⁵ where it does not contravene any constitutional or statutory provision.⁵⁶

Reasonableness of provision. There is authority for the view that provisions in this regard must be reasonable whether enacted by the legislature⁵⁷ or by the corporation itself,⁵⁸ including a provision as to the time after accrual within which a claim must be presented.⁵⁹ The view has been taken, however, that, where the right of action is purely a statutory one, whether the limitations imposed are reasonable or unreasonable are questions for the legislature and not for the courts.⁶⁰

c. Nature and Purpose; Construction and Operation in General

Whether or not a requirement for the presentation of a claim or for giving notice constitutes a condition precedent to an action against a municipal corporation depends largely on the terms of the requirement duly construed.

The express terms of some statutes or charters make clear the legislative intent to create a condition precedent.⁶¹ So, usually, a condition precedent is created by a provision that no action against a municipal corporation shall be maintained unless a claim shall have been presented,⁶² unless there

44. N.Y.—Mack Pav. Co. v. New York, 127 N.Y.S. 738, 142 App.Div. 702.

44 C.J. p 1462 note 58.

45. N.Y.—Casey v. New York, 111 N.E. 764, 217 N.Y. 192.

46. N.Y.—Johannes v. City of New York, 12 N.Y.S.2d 430, 257 App. Div. 197, affirmed 24 N.E.2d 489, 281 N.Y. 825.

44 C.J. p 1462 note 58 [b] (3).

47. N.Y.—Casey v. New York, 111 N.E. 764, 217 N.Y. 192—Johannes v. City of New York, 12 N.Y.S.2d 430, 257 App.Div. 197, affirmed 24 N.E.2d 489, 281 N.Y. 825.

48. Wis.—Kraft v. Madison, 73 N.W. 775, 98 Wis. 252.

49. N.Y.—Bernreither v. New York, 107 N.Y.S. 1006, 123 App.Div. 291, affirmed 89 N.E. 1096, 196 N.Y. 506.

44 C.J. p 1462 notes 60, 61.

50. N.Y.—Bernreither v. New York, *supra*.

44 C.J. p 1462 note 61.

51. Cal.—Continental Ins. Co. v.

City of Los Angeles, 268 P. 920, 92 Cal App. 585.

Ga.—*Corpus Juris* cited in Parrish v. Mayor and Aldermen of Savannah, 196 S.E. 721, 723, 185 Ga. 828.

44 C.J. p 1462 note 63.

52. Conn.—Crocker v. Hartford, 34 A. 98, 66 Conn. 387.

64 C.J. p 1462 note 64.

53. N.Y.—Reinig v. Buffalo, 6 N.E. 792, 102 N.Y. 308.

54. Ala.—Alabama City, etc., R. Co. v. Gadsden, 64 So. 91, 185 Ala. 263, Ann.Cas.1916C 573.

44 C.J. p 1462 note 66.

55. Wash.—Cole v. Seattle, 116 P. 257, 64 Wash. 1, 34 L.R.A.,N.S., 1166, Ann.Cas.1913A 344—Scurry v. Seattle, 36 P. 145, 8 Wash. 279.

56. Wash.—Scurry v. Seattle, *supra*. 44 C.J. p 1462 note 68.

57. Cal.—Gelmann v. San Francisco Police Com'rs, 112 P. 553, 158 Cal. 748.

44 C.J. p 1462 note 69.

58. Wash.—Hase v. Seattle, 98 P. 370, 51 Wash. 174, 20 L.R.A.,N.S.,

938—Durham v. Spokane, 68 P. 383, 27 Wash. 615.

59. Wash.—Scurry v. Seattle, 36 P. 145, 8 Wash. 278.

44 C.J. p 1462 note 71.

60. Mich.—Moulter v. Grand Rapids, 118 N.W. 919, 155 Mich. 165.

61. Cal.—Coen v. Los Angeles, 234 P. 426, 70 Cal.App. 752.

44 C.J. p 1461 note 55, p 1463 note 74.

Failure to present claim as defense see *infra* § 2200.

Submission of bill of account

U.S.—Potts v. Village of Havestraw, C.C.A.N.Y., 93 F.2d 506.

62. In New York

(1) The rule stated in the text has been announced.—Benreither v. New York, 89 N.E. 1096, 196 N.Y. 506.

(2) The view has been expressed that the presentation of a claim to the comptroller provided for by the charter of the city of New York is not an essential part of a cause of action but is a condition of main-

shall have been neglect or refusal to adjust or pay the claim within a specified time,⁶³ or unless notice of intention to commence an action shall have been filed or given within a specified time after the cause of action shall have accrued.⁶⁴

While the fact that a statute provides for the presentation of a claim does not necessarily make such presentation a condition precedent to an action thereon,⁶⁵ some provisions have been construed as creating conditions precedent, even though they do not expressly forbid the bringing or maintenance of an action if the statutory requirement is not complied with.⁶⁶

According to some authorities under a provision that failure to present a claim or to give notice within a specified time after accrual or after the occurrence on which the action is based shall be a bar to an action against the municipality, presentation of a claim or giving notice is a prerequisite to the right to bring an action,⁶⁷ and such provision is not a statute of limitations.⁶⁸ According to other authorities, where failure to present a claim within a specified time after accrual is specifically made a bar to the claim, presentation is not a prerequisite to the bringing of an action,⁶⁹ and failure to present the claim is a matter of defense, as discussed *infra* §

2200; but, while such a statute has been referred to as one of limitation,⁷⁰ it is not technically a statute of limitations.⁷¹

In some decisions, in construing provisions, the language of which might be regarded as creating conditions precedent, a distinction has been made between rights of action created by statute and those which exist independently of statute.⁷² Accordingly, where the statute creates the right and also imposes a requirement as to notice or presentation of a claim, such requirement is regarded as a condition precedent to the right of action;⁷³ but, where the right of action exists independently of the statute which requires a notice or presentation of a claim, such requirement affects the remedy⁷⁴ and is in the nature of a statute of limitations,⁷⁵ unless the provision is such as to prohibit the court from taking jurisdiction in the event of noncompliance with the statute.⁷⁶

It has been held, with respect to an action against a municipal corporation brought in a state other than that in which such corporation exists and is situated, that a requirement for presentment of claim obtains only if present in the law of the state where action is brought,⁷⁷ and that a statute of the state in which such corporation exists and is situated

taining the action—*Dickinson v. New York*, 92 N.Y. 584—44 C.J. p 1461 note 55 [b] (2).

63. Essential part of cause of action

It has been held that, under a provision that no action shall be maintained against a municipality unless it shall appear by and as an allegation of the complaint that the officer to whom the claim was presented has neglected or refused to adjust or pay it for a specified period after presentment, such neglect or refusal is an essential part of claimant's cause of action—*Casey v. New York*, 111 N.E. 764, 217 N.Y. 192—*Johannes v. City of New York*, 12 N.Y.S.2d 430, 257 App.Div. 197, affirmed 24 N.E.2d 489, 281 N.Y. 825.

64. In New York

(1) The rule stated in the text has been announced—*Bernreither v. New York*, 89 N.E. 1096, 196 N.Y. 506—*Foley v. New York*, 37 N.Y.S. 465, 1 App.Div. 586.

(2) In some cases, the view was expressed that the statutory provision in question related to, or affected, the remedy or procedure, and not the right or cause of action—*Sheehy v. New York*, 54 N.E. 749, 160 N.Y. 139—*Missano v. New York*, 54 N.E. 744, 160 N.Y. 123.

(3) It has also been stated that such a provision is not a limitation on the right of action but creates a

condition precedent.—*Green v. Port Jervis*, 66 N.Y.S. 1042, 55 App.Div. 58.

65. U.S.—*Downey v. City of Yonkers*, D.C.N.Y., 23 F.Supp. 1018. *Okl—Pawhuska v. Pawhuska Oil, etc., Co.*, 248 P. 336, 118 Okl. 201. 44 C.J. p 1463 note 75.

Presentment for payment and audit U.S.—*Downey v. City of Yonkers*, D.C.N.Y., 23 F.Supp. 1018.

66. Or.—*Richardson v. Salem*, 94 P. 34, 51 Or. 125. 44 C.J. p 1463 note 76.

Compliance before bringing action

In a case in which the view was taken that the statute involved was a restriction on the exercise of the right of action and not on the right itself, the rule was announced that a statute requiring the presentation of a claim must be complied with before bringing an action, whether or not the statute in specific terms prohibits the bringing of an action without such compliance.—*Town Council of Town of Hudson v. Ladd*, 263 P. 703, 37 Wyo. 419.

67. Ill.—*Erford v. Peoria*, 82 N.E. 374, 229 Ill. 546. 44 C.J. p 1463 note 78.

68. N.Y.—*Winter v. Niagara Falls*, 82 N.E. 1101, 190 N.Y. 198, 123 Am.S.R. 540, 13 Ann.Cas. 486.

Limitations of actions in general see *infra* § 2201.

69. Ala.—*Alabama City, etc., R. Co. v. Gadsden*, 64 So. 91, 185 Ala. 263. Ann.Cas.1916C 573. 44 C.J. p 1463 note 80.

70. Mich.—*Van Auken v. Adrian*, 98 N.W. 15, 135 Mich. 534.

Bar and answer to action or proceeding

Statutory provision that failure to present claim in the manner and within the time specified shall be a bar and answer to an action or proceeding to collect claim is a limitation statute.—*Hamilton v. Salt Lake City*, 106 P.2d 1028, 99 Utah 362.

71. Ala.—*Montgomery County v. Montgomery*, 70 So. 642, 195 Ala. 197.

72. Wyo.—*Town Council of Town of Hudson v. Ladd*, 263 P. 703, 37 Wyo. 419.

44 C.J. p 1463 notes 87–89.

73. Wyo.—*Town Council of Town of Hudson v. Ladd*, *supra*.

44 C.J. p 1463 note 87.

74. Wyo.—*Town Council of Town of Hudson v. Ladd*, *supra*.

44 C.J. p 1463 note 89.

75. Wis.—*Bunker v. Hudson*, 99 N. W. 448, 122 Wis. 43.

44 C.J. p 1463 note 89.

76. Wis.—*Bunker v. Hudson*, *supra*.

44 C.J. p 1463 note 90.

77. U.S.—*Department of Water and Power of City of Los Angeles v.*

imposing such requirement does not apply to an action brought in another state,⁷⁸ on the theory that such a statute goes to the remedy and not to the right.⁷⁹

While an examination of the claimant by the officer authorized to adjust and settle claims, for which provision is sometimes made, is not a condition precedent to the maintenance of an action on the claim,⁸⁰ claimant's ignoring a subpoena or notice to appear for examination has been regarded as a bar to an action on the claim.⁸¹ The provision for such examination is not a statute of limitations,⁸² and the holding of the examination neither limits nor extends the time within which the action may be begun.⁸³

Purpose of requirement. A requirement for the presentation of a claim before bringing action is intended for the protection or benefit of the municipality,⁸⁴ and not of claimant.⁸⁵ The purpose of such requirement is to permit municipal officials to make due investigation as to the merits of the claim,⁸⁶ to prevent actions on fictitious claims,⁸⁷ to permit the preparation of a defense to the claim,⁸⁸ or to permit settlement or allowance of the claim without litigation or unnecessary expense if settlement or allowance is deemed proper.⁸⁹

Retrospective operation of statutes or ordinances.

The statutes under discussion are usually not given a retroactive effect,⁹⁰ and this construction may be necessitated by a saving clause in the statute.⁹¹ On the other hand, its application to existing claims may be warranted or required by the language of the statute⁹² or of a charter provision adopted by the corporation itself.⁹³ The repeal of a statute pending an action has been held to operate on such action on the ground that the statutory provision affected the remedy only and the action was based on common-law principles.⁹⁴

d. To What Claims, Actions, or Proceedings Requirement Applicable

The determination as to what claims, actions, or proceedings a requirement for notice or presentation of claim before commencing action or proceeding against a municipal corporation applies depends largely on the terms of the provision imposing the requirement.

The question as to what claims, actions, or proceedings provisions as to notice or presentation of claims apply must be decided by a reference to the terms of the particular statute or charter provision.⁹⁵ On the ground that certain statutory or charter provisions as to the presentation of a claim are in derogation of the common law,⁹⁶ it has been held that such provisions should be strictly construed

Anderson, C.C.A. Nev., 95 F.2d 577, certiorari denied 59 S.Ct. 67, 305 U.S. 607, 83 L.Ed. 386.

78. U.S.—Department of Water and Power of City of Los Angeles v. Anderson, *supra*.

79. U.S.—Department of Water and Power of City of Los Angeles v. Anderson, *supra*.

80. N.Y.—Moran v. New York, 148 N.Y.S. 1010, 103 App.Div. 1010.

81. N.Y.—Daniel J. Rice, Inc., v. City of New York, 42 N.Y.S.2d 532, 180 Misc. 860.

82. N.Y.—Daniel J. Rice, Inc., v. City of New York, *supra*.

83. N.Y.—Daniel J. Rice, Inc., v. City of New York, *supra*.

84. N.Y.—Dickinson v. New York, 92 N.Y. 584.

Tex.—City of Houston v. Chapman, Civ.App., 145 S.W.2d 669, error dismissed, judgment correct.

85. N.Y.—Dickinson v. New York, 92 N.Y. 584.

86. Cal.—Milovich v. City of Los Angeles, 108 P.2d 960, 42 Cal.App. 2d 364.

Mich.—Northrup v. City of Jackson, 262 N.W. 641, 273 Mich. 20.

N.Y.—Smith v. New York, 85 N.Y. S. 150, 88 App.Div. 606.

Appraisal of facts on which claim based

The purpose of the requirement of filing notice of claim was to appraise the comptroller of the facts on which the claim was based—Brooklyn Public Library v. City of New York, 226 N.Y.S. 491, 222 App. Div. 422, affirmed 166 N.E. 179, 250 N.Y. 495, reargument and amendment of remittitur denied 168 N.E. 438, 251 N.Y. 589.

87. Tex.—City of Houston v. Chapman, Civ.App., 145 S.W.2d 669, error dismissed, judgment correct.

88. Mich.—Northrup v. City of Jackson, 262 N.W. 641, 273 Mich. 20.

89. Cal.—Milovich v. City of Los Angeles, 108 P.2d 950, 42 Cal.App. 2d 364.

Mich.—Northrup v. City of Jackson, 262 N.W. 641, 273 Mich. 20.

N.Y.—Smith v. New York, 85 N.Y.S. 150, 88 App.Div. 606.

Wis.—Trustees of University Co-op. Co. v. City of Madison, 288 N.W. 742, 233 Wis. 100.

90. Minn.—Diamond Iron Works v. Minneapolis, 152 N.W. 647, 129 Minn. 267.

44 C.J. p 1464 note 96.

91. N.Y.—Brennan v. Albany, 128 N.Y.S. 334, 143 App.Div. 752.

92. Wash.—Perkins v. South Bend, 233 P. 655, 133 Wash. 349.

Wis.—Reed v. Madison, 53 N.W. 547, 83 Wis. 171, 17 L.R.A. 733.

44 C.J. p 1464 note 98.

93. Wash.—Scurry v. Seattle, 36 P. 145, 8 Wash. 278.

44 C.J. p 1464 note 99.

94. N.Y.—Devlin v. New York, 23 N.Y.S. 888, 4 Misc. 106.

95. Wis.—Sauk County v. City of Baraboo, 248 N.W. 418, 211 Wis. 428.

44 C.J. p 1464 note 3, 11 C.J. p 817 note 83 [c].

Claim of county

Some statutes apply to a claim of a county against a city.

Ala.—Montgomery County v. Montgomery, 70 So. 642, 195 Ala. 197.

Wis.—Sauk County v. City of Baraboo, 248 N.W. 418, 211 Wis. 428.

Rent for occupation without special contract

In order to claim the benefit, as against a municipal corporation, of a statute providing that the occupant, without special contract, of any lands shall be liable for the rent to any person entitled thereto, a claim under such statute must be filed.—Root v. City of Topeka, 139 P.2d 393, 157 Kan. 260.

96. Tex.—Geo. L. Simpson & Co. v.

in order to permit them to operate only on those claims, actions, or proceedings to which it was intended that they should apply,⁹⁷ but the view has been taken that the statutes apply to all classes of claims not expressly excepted in the law itself.⁹⁸ The general statutes, other than those relating only to personal injuries and to actions for torts in general, vary in their phraseology in the different jurisdictions, with the result that many of them have been construed as embracing all claims,⁹⁹ while other statutes are held to apply only to particular types of claims,¹ such as claims arising out of a contract,² or claims for torts.³

Certain provisions of the type here considered which in terms are applicable to actions against a municipality do not apply to actions against a body having a corporate entity related to, but separate from, the municipality,⁴ such as provisions requiring the presentation of a claim,⁵ or the neglect or refusal of a certain officer to adjust or to pay the claim.⁶

Suits in equity. Usually provisions for notice or

presentation of a claim do not apply to actions in equity,⁷ even though incidental damages are demanded.⁸ Where no ground for equitable relief by injunction exists, the proceeding may not be treated as an action for damages in the absence of the presentation of a claim.⁹ Sometimes the statute is specifically made applicable to actions in equity in certain cases,¹⁰ and, subject to certain limitations,¹¹ the terms of a general statute requiring the presentation of a claim have been regarded as sufficiently broad to include actions of an equitable nature as well as actions at law.¹²

e. Form and Contents

Generally, a statement of claim should be sufficient to permit a determination as to its merits, and, where duly required, it is essential that the claim should be in writing, itemized, and verified.

A statement of a claim should contain information sufficient to enable the body to which it is presented to pass on it,¹³ and there can be no recovery for claims or demands not contained in the statement.¹⁴ However, technical or absolute accuracy

City of Lubbock, Civ.App., 17 S.W.2d 163, error dismissed.

44 C.J. p 1463 note 92

97. Tex.—Geo L Simpson & Co. v. City of Lubbock, supra.

44 C.J. p 1464 note 93

Strict construction with respect to actions for torts see supra § 923 b

98. In California

(1) The rule stated in the text has been announced.—Farmers, etc., Bank v. Los Angeles, 91 P. 795, 151 Cal. 655.

(2) It has also been laid down, however, that a provision requiring the presentation of claim as prerequisite to action against a municipal corporation is in derogation of common right and must be strictly construed.—Los Angeles Brick & Clay Products Co. v. City of Los Angeles, 141 P.2d 46, 60 Cal.App.2d 478.

99. N.Y.—Reining v. Buffalo, 6 N.E. 792, 102 N.Y. 308—Pulitzer v. New York, 62 N.Y.S. 587, 48 App Div. 6.

44 C.J. p 1464 note 4.

1. Cal.—Trower v. San Francisco, 109 P. 617, 157 Cal. 762.

44 C.J. p 1465 note 6.

Provision applicable only to claims for money

Cal.—Los Angeles Brick & Clay Products Co. v. City of Los Angeles, 141 P.2d 46, 60 Cal.App.2d 478.

2. N.C.—Neal v. Marion, 35 S.E. 812, 126 N.C. 412.

44 C.J. p 1465 note 7.

Requirement of itemization

Generally, municipal charter or

statutory provisions for notice or presentation of claims to city apply only to actions ex contractu, especially when required to be itemized.—City of Phoenix v. Mayfield, 20 P. 2d 296, 41 Ariz. 537.

3. U.S.—Downey v. City of Yonkers, D.C.N.Y., 23 F.Supp. 1018.

Tex.—Geo L Simpson & Co. v. City of Lubbock, Civ.App., 17 S.W.2d 163, error dismissed

4. N.Y.—People v Craig, 133 N.E. 419, 232 N.Y. 125.

5. N.Y.—People v. Craig, supra—Caldwell v. New York Board of Education, 216 N.Y.S. 501, 127 Misc. 492.

6. N.Y.—People v. Craig, 133 N.E. 419, 232 N.Y. 125.

7. U.S.—Corpus Juris cited in George v. City of Asheville, C.C.A. N.C., 80 F.2d 50, 53.

N.Y.—Ravensdale Holding Co. v. Village of Hastings on Hudson, 281 N.Y.S. 913, 156 Misc. 777.

44 C.J. p 1465 note 14.

8. Minn.—Joyce v. Janesville, 155 N.W. 1067, 132 Minn. 121, L.R.A. 1916D 426.

44 C.J. p 1465 notes 14, 15.

9. Cal.—Bigelow v. Los Angeles, 75 P. 111, 141 Cal. 503.

10. Ga.—Augusta v. Marks, 52 S.E. 589, 124 Ga. 365.

11. Injunctive relief only

The provision of Village L. § 341-b, as amended by L. 1937 c 745, and L. 1945 c 694, § 9, does not apply to

suits for injunctive relief only.—Pansmith v. Incorporated Village of Island Park, 68 N.Y.Supp 2d 694, 188 Misc. 1052.

12. Particular statute

(1) Village L. § 341-b, as amended by L. 1937 c 745 and L. 1945 c (91, § 9, applies to actions of an equitable nature in which the recovery of damages is sought.—Schenker v Village of Liberty, 24 N.Y.S.2d 511, 261 App. Div. 54—Pansmith v Incorporated Village of Island Park, 68 N.Y.S.2d 694, 188 Misc. 1052—Harrigan v. Village of Delhi, 34 N.Y.S.2d 168—Village of Fleischmanns v. Silberman, 15 N.Y.S.2d 904.

(2) Prior to amendment the provision of such section requiring the presentation of claim within a specified time after the cause of action accrued did not apply to certain actions of an equitable nature.—Ravensdale Holding Co. v. Village of Hastings on Hudson, 281 N.Y.S. 913, 156 Misc. 777

13. Colo.—Walpole v. Pueblo, 54 P. 910, 12 Colo App. 151.

44 C.J. p 1465 note 19.

Amendment

A bill or account submitted under New York Village L. § 89 subd 21 could not be treated as amended by a subsequent bill or account where a different subject matter was involved in each case.—Potts v. Village of Haverstraw, C.C.A.N.Y., 93 F.2d 506.

14. Cal.—Coen v. Los Angeles, 234 P. 426, 70 Cal.App. 752.

44 C.J. p 1465 note 20.

is not required,¹⁵ and a substantial compliance with the statute is usually sufficient.¹⁶ When so required by statute, the statement of a claim should be in writing,¹⁷ and itemized.¹⁸

Form and contents of claim presented for audit and payment in general are discussed *supra* § 2175; and form and contents of notice or claim with respect to action for torts *supra* § 925.

Amount claimed. Under some provisions the exact amount claimed as damages is not an essential part of the claim.¹⁹ In case of unliquidated damages, it has been held that the statement need not state the amount claimed.²⁰

Verification. When so required, the statement of the claim should be verified.²¹ There is authority for the view that, where there are several claimants, both or either may properly verify the claim.²² The view has been taken that the presentation of a verified claim was not necessary in a case in which plaintiff had made a payment, under duress, to defendant corporation.²³

f. Presentation or Service

There must be due compliance with requirements as to the manner of presenting claim or giving notice before commencing an action against a municipal corporation, including requirements as to the person by whom, or to or on whom, claim is to be presented or notice given, and as to the time for presenting claim or giving notice.

While provisions as to the manner of presentation or service must be followed,²⁴ a substantial compliance is usually sufficient.²⁵ Where no particular manner of presenting a claim is designated,

the statute should be given a reasonable or practical construction in this regard.²⁶ Usually presentation to, or service on, the municipal council or other governing body need not be made while such body is in session.²⁷ While service should ordinarily be made in the office of the designated officer,²⁸ the fact that a claim is presented outside the office is not fatal where the officer does not insist on service in the office.²⁹ The officer who is to be served may make an acknowledgment of service.³⁰

Statutes in force when a claim arises will govern the manner of presenting a claim in the absence of a contrary legislative intention.³¹

By whom presented or served. Usually a notice or claim may and must be given or presented by claimant³² or by his duly authorized agent or representative.³³ Presentation of a claim by one who has assigned it as security is sufficient to enable him to sue, where presentation is made with the knowledge and acquiescence of the assignee.³⁴

To whom or on whom presented or served. The claim must be presented or notice must be given to the particular officer, board, or body designated in the statute.³⁵ Usually, however, presentation or notice to a representative of a designated body is regarded as a sufficient compliance.³⁶ Thus for this purpose a city clerk³⁷ or a city auditor³⁸ has been regarded as the representative of the municipal council or other governing body, and in general the officer who is the custodian of the records and files of the governing body is the proper officer to re-

15. Ala.—Reid v. Mobile, 104 So. 787, 213 Ala. 321.
44 C.J. p 1465 note 21.

16. Ala.—Reid v. Mobile, 104 So. 787, 213 Ala. 321.

17. N.Y.—Farley v. Lockport, 113 N.Y.S. 702, 61 Misc. 417.
44 C.J. p 1465 note 24.

18. Or.—Richardson v. Salem, 94 P. 34, 51 Or. 125.
44 C.J. p 1465 note 25.

19. N.Y.—Brooklyn Public Library v. City of New York, 226 N.Y.S. 491, 222 App.Div. 422, affirmed 166 N.E. 179, 250 N.Y. 495, reargument and amendment of remittitur denied 168 N.E. 438, 251 N.Y. 589.

20. R.I.—Burdick v. Richmond, 17 A. 917, 16 R.I. 502.

21. N.Y.—Tannenbaum v. City of New York, 50 N.Y.S.2d 122, 182 Misc. 109, affirmed 52 N.Y.S.2d 600, 268 App.Div. 1062, appeal denied 53 N.Y.S.2d 535, 269 App.Div. 668.
44 C.J. p 1465 note 27.

Sufficiency of affidavit

Where verification is required, the

averments of the affidavit verifying the claim must be such that, if false, charge of perjury may be predicated thereon—Kelley v. City of Flint, 232 N.W. 407, 251 Mich. 691.

22. Wash.—James v. Seattle, 123 P. 472, 68 Wash. 359.

23. N.J.—Mee v. Montclair, 83 A. 764, 83 N.J. Law 274, reversed on other grounds 86 A. 261, 84 N.J. Law 400.

24. Or.—Richardson v. Salem, 94 P. 34, 51 Or. 125.

25. N.Y.—McIntee v. Middletown, 81 N.Y.S. 124, 80 App.Div. 434.

26. N.Y.—Magee v. Troy, 1 N.Y.S. 24, 48 Hun 383, affirmed 23 N.E. 1148, 119 N.Y. 640.

N.D.—Pyke v. Jamestown, 107 N.W. 359, 15 N.D. 157.
44 C.J. p 1466 note 34.

27. N.D.—Pyke v. Jamestown, 107 N.W. 359, 15 N.D. 157.
44 C.J. p 1466 note 35.

28. Minn.—Peterson v. Cokato, 87 N.W. 615, 84 Minn. 205.

29. N.D.—Pyke v. Jamestown, 107 N.W. 359, 15 N.D. 157.

30. Iowa.—McCartney v. Washington, 100 N.W. 80, 124 Iowa 382.

31. Ala.—Montgomery v. Shirley, 48 So. 679, 159 Ala. 239.

32. Ala.—Birmingham v. Chestnutt, 49 So. 813, 161 Ala. 253.
N.Y.—Ruprecht v. New York, 92 N.Y. S. 421, 102 App.Div. 809.

33. Ala.—Birmingham v. Chestnutt, 49 So. 813, 161 Ala. 253.
44 C.J. p 1466 note 40.

34. Mich.—Lamson v. Marshall, 95 N.W. 78, 138 Mich. 250.

35. N.C.—Nevins v. City of Lexington, 194 S.E. 293, 212 N.C. 616.
44 C.J. p 1466 note 42½.

36. Mont.—Tigerman v. Butte, 119 P. 477, 44 Mont. 138.

37. Mont.—Tigerman v. Butte, *supra*.
44 C.J. p 1466 note 44.

38. N.D.—Pyke v. Jamestown, 107 N.W. 359, 15 N.D. 157.
44 C.J. p 1466 note 45.

ceive a claim or notice.³⁹ Likewise, the courts have regarded as sufficient, presentation to, or service on, an assistant of the designated officer,⁴⁰ or other authorized representative of such officer.⁴¹ Presentation to, or service on, a particular officer has been upheld by virtue of a general statutory provision governing service on a board or body.⁴²

Where the claim or notice ultimately comes into the hands of the proper officer, the mere fact that it was originally delivered to a different officer is not, it has been held, a fatal defect;⁴³ but there must have been an intention and an attempt to comply with the statute,⁴⁴ and it must appear that it has been acted on by the proper officer.⁴⁵

Plaintiff need not make service on officers or boards other than those designated in the statute,⁴⁶ and, where a statute provides for presentation to the mayor and common council, it is not necessary to give a separate notice to the mayor where the mayor and common council constitute the board of audit and the mayor and board of aldermen constitute the council.⁴⁷ In order that a municipal corporation may take advantage of an alleged failure to serve notice on a particular officer, it must appear that such an officer has been duly appointed and that he has an office at a fixed place.⁴⁸

Time for presentation or service. Under some statutes or charter provisions adopted by a municipal corporation a claim must be presented within the time designated after maturity or accrual in order to permit a recovery thereon,⁴⁹ but some statutes have been so construed as not to require the presentation of a claim within a specified time after

the accrual of the cause of action.⁵⁰

g. Objections, Waiver, or Loss of Right to Object, and Excuse for Noncompliance

While the right of the officer to whom the claim is to be presented to waive compliance with the requirement has been denied, according to some authorities the municipal corporation may not rely on want of verification of the claim where the claim was rejected or was not paid for reasons other than want of verification.

There is authority for the view that compliance with a statute requiring the presentation of a claim cannot be waived by the officer to whom it is to be presented.⁵¹ The mere retention by the municipal authorities of a claim without objection as to its sufficiency does not constitute a waiver of the right to rely on the defects in the claim,⁵² as, for example, the lack of verification.⁵³ It has been held, however, that, where the mode or extent of itemizing an account is not specifically fixed by statute, the municipal authorities owe to claimant the duty to call to his attention defects in itemization,⁵⁴ and that the municipal corporation may not take advantage of the failure to verify the claim where it was rejected solely on the ground that the municipality was not liable,⁵⁵ or where it was not paid solely because there were no funds available.⁵⁶

The unreasonable refusal of a board to certify or approve a claim or bill,⁵⁷ or to issue a warrant,⁵⁸ is a sufficient excuse for failure to obtain such certification, approval, or warrant, and a municipal council cannot avoid liability on the part of the corporation by refusing or neglecting to act on a claim.⁵⁹ The failure of certain officers to approve a claim, however, does not excuse claimant's fail-

39. U.S.—Grand Forks v. Allman, N. D., 153 F. 532, 83 C.C.A. 554.

44 C.J. p 1466 note 46.

40. Mass.—McCabe v. Cambridge, 134 Mass. 484.

Minn.—Kelly v. Minneapolis, 79 N.W. 653, 77 Minn. 76.

44 C.J. p 1466 note 47.

41. N.Y.—MacDonald v. New York, 59 N.Y.S. 16, 42 App.Div. 263.

44 C.J. p 1466 note 48.

42. N.Y.—Dobson v. Onelda, 94 N.Y.S. 958, 106 App.Div. 377—McIntee v. Middletown, 81 N.Y.S. 124, 80 App.Div. 434.

14 C.J. p 1466 note 49.

43. N.Y.—Missano v. New York, 54 N.E. 744, 160 N.Y. 123.

44 C.J. p 1466 note 50.

44. N.Y.—Babcock v. New York, 9 N.Y.S. 368, 56 Hun 196.

44 C.J. p 1467 note 51.

45. N.Y.—Watts v. New York, 117 N.Y.S. 612, 133 App.Div. 400.

46. Minn.—Kleopfert v. Minneapolis, 95 N.W. 908, 90 Minn. 158.

Claim of attorney for special committee of council

An attorney acting as counsel to special committee of city council appointed to investigate municipal civil service commission was obliged under city charter only to present his bill for audit to city comptroller, and was not required to submit statement of his charges to either council or the special committee and have it audited by them as a prerequisite to recovery.—Ellis v. City of New York, 46 N.Y.S.2d 363, 180 Misc. 968, affirmed 47 N.Y.S.2d 96, 267 App.Div. 810.

47. U.S.—Grand Forks v. Allman, N. D., 153 F. 532, 83 C.C.A. 554.

48. Ill.—Donaldson v. Dieterich, 93 N.E. 366, 247 Ill. 522.

49. Cal.—Germann v. San Francisco Police Com'rs, 112 P. 553, 158 Cal. 748.

44 C.J. p 1467 note 57.

50. Iowa.—Foley v. Cedar Rapids, 110 N.W. 158, 133 Iowa 64.

44 C.J. p 1467 note 58.

51. Cal.—O'Brien v. City and County of San Francisco, App., 116 P. 2d 450.

N.Y.—Angelo v. City of New York, 53 N.Y.S.2d 487, 183 Misc. 391.

44 C.J. p 1467 note 60.

52. N.Y.—Mack Pav. Co. v. New York, 127 N.Y.S. 738, 142 App.Div. 702.

53. N.Y.—Commonwealth Water Co. v. Castleton, 183 N.Y.S. 753, 192 App.Div. 697.

54. N.Y.—Vermeule v. Corning, 174 N.Y.S. 220, 186 App.Div. 206, affirmed 130 N.E. 903, 230 N.Y. 585.

55. Wash.—Pearson v. Seattle, 44 P. 884, 14 Wash. 438.

56. Okl.—Covington v. Antrim Lumber Co., 252 P. 50, 123 Okl. 129.

57. N.Y.—Davidson v. White Plains, 90 N.E. 825, 197 N.Y. 266—Bancker v. Mayor, 8 Hun 409.

58. N.Y.—Gregory v. New York, 33 Hun 451.

59. Cal.—Gill v. Oakland, 57 P. 150, 124 Cal. 335.

ure to present it to another officer as required by statute, where there is no statutory requirement for approval.⁶⁰ The failure of an agent of claimant to present a claim as required by statute does not excuse noncompliance.⁶¹

Some statutory provisions authorizing the court to correct, supply, or disregard irregularities and omissions in a notice of claim do not authorize such action where the manner or time of service is involved.⁶²

Time for objection. Where presentation is a condition precedent going to the jurisdiction of the subject matter, there is authority for the view that the objection that the requirement as to claim or notice has not been complied with may be taken at any time;⁶³ but the rule is otherwise where the statute is in the nature of a statute of limitations,⁶⁴ and in the latter case noncompliance is waived by defendant's failure to raise the question by proper pleading.⁶⁵ It has been held that on a hearing as to damages after default, defendant corporation may show its nonliability for want of notice.⁶⁶

§ 2200. Defenses

- a. Action against municipal corporation
- b. Action by municipal corporation

a. Action against Municipal Corporation

Courts do not favor defenses to honest demands against municipal corporations, based on mere irregularities and informalities; failure to present a claim is a matter of defense under some statutes.

It has been stated broadly that courts do not favor defenses to honest demands against municipal corporations, based on mere irregularities and informalities.⁶⁷ Where one seeks to recover money paid under protest to avoid prosecution under an invalid ordinance, the invalidity of the ordinance is no defense.⁶⁸

It has been stated broadly that a municipal corporation may make the same defenses against the state as it may make against an individual in the absence of a charter or other statutory provision to the contrary.⁶⁹

Want of funds as a defense to claim under contract is discussed *supra* § 1024.

Want of due presentation of claim. Under some statutes the fact that a claim has not been presented for allowance is a matter of defense,⁷⁰ and in some jurisdictions under a statute which makes the failure to present a claim within a specified time from accrual a bar to the claim, such failure is defensive matter.⁷¹ The right to rely on the failure to present a claim as a defense may be lost by failure of the corporation to set it up,⁷² and the right of the corporation to rely on defects in the statement of claim may be lost or waived.⁷³ Failure to present a claim required by statute as a condition precedent to the right to costs is not a defense to the action.⁷⁴

Failure of plaintiff to deposit security for costs as required in certain cases in actions against a municipal corporation does not constitute a defense to the merits.⁷⁵

Set-off or counterclaim. A municipality may set up any facts constituting a set-off;⁷⁶ and a statute authorizing actions to be brought by, and in the name of, the state to recover municipal money unlawfully obtained does not deprive a municipality of the right to set off such cause of action in an action brought against it.⁷⁷ It has been stated broadly that a tax levied by a municipal corporation cannot be allowed as a set-off or counterclaim.⁷⁸

b. Action by Municipal Corporation

The fact that a municipal corporation was exercising a governmental function with respect to an occurrence on which an action for tort by such corporation is based does not constitute a defense to such action.

60. Cal.—Geimann v. San Francisco Police Comrs., 112 P. 553, 158 Cal. 748.

61. Cal.—Geimann v. San Francisco Police Comrs., *supra*.

62. N.Y.—Broome County v. Binghamton Taxicab Co., 75 N.Y.S.2d 423, 190 Misc. 925.

63. Wis.—Telford v. Ashland, 75 N. W. 1006, 100 Wis. 238.
44 C.J. p 1467 note 71.

64. Wis.—Bunker v. Hudson, 99 N. W. 448, 122 Wis. 43—O'Connor v. Fond du Lac, 85 N.W. 327, 109 Wis. 253, 53 L.R.A. 831.

65. Wis.—Bunker v. Hudson, 99 N. W. 448, 122 Wis. 43—O'Connor v. Fond du Lac, 85 N.W. 327, 109 Wis. 253, 53 L.R.A. 831.

66. Conn.—Gardner v. New London, 28 A. 42, 63 Conn. 267.

67. N.Y.—Moore v. New York, 73 N. Y. 238, 29 Am.R. 134.

68. Ill.—Harvey v. Olney, 42 Ill. 336.

69. Ky.—Commonwealth v. Lexington, 6 Ky.L. 520, 13 Ky.Op. 184.

70. Mich.—Keenan v. Mt. Pleasant, 142 N.W. 1114, 176 Mich. 620.
Presentation of claim as condition precedent see *supra* § 2199.

71. Ala.—Huntsville v. Goodenrath, 68 So. 676, 13 Ala.App. 579.
Nature of statutes requiring presentation of claim before bringing action see *supra* § 2199 c.

72. Mich.—Canfield v. Jackson, 70 N.W. 444, 112 Mich. 120.

73. Mich.—Spier v. Kalamazoo, 101 N.W. 846, 138 Mich. 652—Germaine v. Muskegon, 63 N.W. 78, 105 Mich. 213.

44 C.J. p 1468 note 88.

74. N.Y.—Baine v. Rochester, 85 N. Y. 523, 62 How.Pr. 346, 1 N.Y.Civ. Proc. 269.

75. Que.—Lalonge dit Gascon v. St. Vincent de Paul, 27 Que.Super. 218.

76. Cal.—Corbett v. Widber, 55 P. 764, 123 Cal. 154.

77. N.Y.—Wood v. New York, 73 N. Y. 556.

78. N.C.—Bourne v. Board of Financial Control for Buncombe County, 176 S.E. 306, 207 N.C. 170.

The fact that an action by a municipal corporation for tort is based on an occurrence in which the corporation was exercising a governmental function and that it cannot, therefore, be charged with negligence, is not a defense,⁷⁹ and in such case the contributory negligence of an employee of the corporation is not imputable to it so as to prevent a recovery.⁸⁰

Set-off or counterclaim. While it has been held that a general statute authorizing set-off does not apply where an action is brought by a municipality in its governmental capacity,⁸¹ certain special statutes confer the right of set-off or counterclaim on a private corporation when it is sued by a municipality.⁸²

§ 2201. Time to Sue and Limitations

a. In general

b. Prematurity and provision for delay before bringing section

a. In General

Some statutes provide for a special period of limitations applicable to actions against municipal corporations.

Subject to certain qualifications, generally statutes of limitation may run for and against municipal corporations, as discussed in the title Limitations of Actions § 17, and the general statutes may apply notwithstanding an attempted shortening, by a statutory provision, of the period within which a claim against the municipality can be enforced, where such provision is invalid.⁸³ Some statutes provide for a special period of limitations in case of actions against municipal corporations⁸⁴ and such statutes are usually held valid,⁸⁵ unless contrary to some

special constitutional provision.⁸⁶ Generally a statutory or charter provision for a special period of limitation in an action against a municipality is mandatory,⁸⁷ and it is the duty of the municipality to invoke such provision.⁸⁸ A statutory provision that an action may not be maintained against the municipality unless commenced within a specified time after the cause of action accrues is one of limitations and does not prescribe a condition precedent, with respect to a common-law right of action.⁸⁹

Some special statutes of limitation have been held to apply only to actions on contracts or obligations arising from, or growing out of, contracts.⁹⁰ Where a statute of limitations is made applicable only to certain actions against a named municipality, only the municipality can take advantage thereof.⁹¹ A statutory provision validating certain evidences of indebtedness of municipal corporations does not create a cause of action to which a statute of limitations applicable to statutory actions will apply.⁹² A statute which imposes on a municipal officer the duty to seek recovery of money within a specified period does not, it has been held, prevent the municipality from bringing an action after such period.⁹³

Running of statute. Where a fund is held in trust by a municipality and there has been no repudiation of the trust, the statute of limitations is not a defense.⁹⁴ The presentation of a claim to the proper officer of the city, although a necessary preliminary to enable an action to be brought against the city, is not the commencement of an action so as to stop the running of the statute.⁹⁵ Under a

79. *Willful and intentional tort*
Ga.—Columbus R. Co. v. Columbus,
113 S.E. 243, 29 Ga.App. 8.

80. Ga.—Columbus R. Co. v. Columbus, supra.

N.J.—Paterson v. Erie R. Co., 75 A.
922, 78 N.J.Law 592, 30 L.R.A., N.S.,
209.

44 C.J. p 1468 note 97.

81. N.J.—Township Committee of
Piscataway Tp. v. First Nat. Bank,
163 A. 101, 10 N.J.Misc. 1219, af-
firmed 168 A. 757, 111 N.J.Law 412,
90 A.L.R. 423.

82. N.J.—Township Committee of
Piscataway Tp. v. First Nat. Bank,
168 A. 757, 111 N.J.Law 412, 90
A.L.R. 423.

83. Cal.—Geimann v. San Francisco
Police Comra., 112 P. 553, 158 Cal.
748.

44 C.J. p 1468 note 1.

84. Iowa.—Foley v. Cedar Rapids,
110 N.W. 158, 133 Iowa 64.

44 C.J. p 1469 note 2.

Applicability of doctrine of laches
to suits involving municipal cor-
porations generally see Equity §
114.

Statute held inapplicable

N.Y.—Ravensdale Holding Co. v. Vil-
lage of Hastings on Hudson, 281
N.Y.S. 913, 156 Misc. 777.

85. N.Y.—Jones v. Albany, 45 N.E.
557, 151 N.Y. 223.

Tex.—Dallas v. Young, Civ.App., 28
S.W. 1036.

86. Ky.—Louisville v. Seibert, 51 S.
W. 310, 31 Ky.L. 328—Louisville v.
Kuntz, 47 S.W. 592, 104 Ky. 584, 20
Ky.L. 805.

87. Fla.—Town of Mount Dora v.
Green, 158 So. 131, 117 Fla. 385.

88. Fla.—Town of Mount Dora v.
Green, supra.

89. N.Y.—Arnold v. North Tarry-
town, 122 N.Y.S. 92, 137 App.Div.
68, affirmed 96 N.E. 1109, 203 N.
Y. 536.

44 C.J. p 1469 note 7.

90. N.Y.—McGaffin v. Cohoes, 74 N.
Y. 387, 30 Am R 307.

Limitations in actions:
For tort see supra § 931.
On contract generally see supra §
1024.

91. La.—Rosetta Gravel-Pav., etc.,
Co. v. Kennedy, 26 So. 468, 51 La.
Ann. 1535.

92. Minn.—Thornton v. East Grand
Forks, 118 N.W. 834, 106 Minn. 233.

93. Ohio.—Cleveland v. Legal News
Pub. Co., 144 N.E. 256, 110 Ohio
St. 360.

94. U.S.—New Orleans v. Fisher,
La., 21 S.Ct. 347, 180 U.S. 185, 45 L.
Ed. 485.

Termination and repudiation of trust
affecting running of statute of lim-
itations generally see Limitations
of Actions § 182.

95. N.Y.—Brehm v. New York, 10 N.
E. 158, 104 N.Y. 186.

statutory provision that the time of the continuance of a stay by statutory prohibition is not a part of the time limited for the commencement of an action, the running of the statute of limitations is suspended for the period after the presentation of claim during which a statute prevents the bringing of an action,⁹⁶ but the running of the statute is not suspended beyond such period for the period taken for the examination of plaintiff as claimant pursuant to statutory authorization, which was adjourned by stipulation between the claimant and the examining officer.⁹⁷

Waiver or estoppel. An agent of a municipality of limited authority may not, without express authorization waive the right of the municipality to invoke a special statute of limitations which is mandatory,⁹⁸ and such agent may not, by his conduct, estop the municipality from invoking such statute.⁹⁹

b. Prematurity and Provision for Delay before Bringing Action

An action begun before the maturity of demand against a municipal corporation is premature. Some statutes or charter provisions require a delay after presentation of claim for a reasonable time or for a specified

period before bringing action against a municipal corporation.

An action begun before the maturity of demand against the municipality is premature and should be dismissed.¹ In the absence of a provision for delay it has been held that plaintiff need not delay the bringing of action after he has complied with the statutory requirement for notice or claim.² Under a provision that no action may be brought until the claim has been rejected, time must be given for action on the claim before action may be brought.³

Provision for delay for reasonable time. Some statutory or charter provisions require delay in bringing action until a reasonable time has elapsed for investigating or passing on the claim presented.⁴ Some statutes of this description apply only to claims on contract.⁵

Provision for delay for specified time. Statutory or charter provisions sometimes require that no action shall be brought or maintained against the municipality until after a specified time from the presentation of a claim.⁶ The validity of such provisions has been recognized,⁷ even with respect to a common-law action.⁸ Such a provision has been construed as creating a condition precedent,⁹ and

96. N.Y.—Brehm v. New York, supra—Woodcrest Const. Co. v. City of New York, 57 N.Y.S.2d 498, 185 N.Y.S.2d 18.

97. N.Y.—Woodcrest Const. Co. v. City of New York, supra.

98. Fla.—Town of Mount Dora v. Green, 158 So. 131, 117 Fla. 385.

99. Fla.—Town of Mount Dora v. Green, supra.

1. U.S.—Trinidad v. Hokasona, Colo., 178 F. 438, 102 C.C.A. 421.

2. Wis.—Gutkind v. Elroy, 73 N.W. 325, 97 Wis. 649.

In New York

(1) The rule stated in the text has been applied.—Jones v. Albany, 45 N.E. 557, 151 N.Y. 223.

(2) In an earlier case in a lower court, however, the view was taken that claimant should delay bringing action until the municipal authorities have had a reasonable opportunity to examine the claim presented.—Freligh v. Saugerties, 24 N.Y.S. 182, 70 Hun 589.

3. Cal.—Spencer v. Los Angeles, 179 P. 163, 180 Cal. 103.

Rejection of claim as condition precedent see supra § 2199 a.

4. Mich.—Mason v. Muskegon, 70 N.W. 332, 111 Mich. 687.

44 C.J. p 1469 note 21.

5. N.Y.—Jones v. Albany, 45 N.E. 557, 151 N.Y. 223.

Provisions applicable in actions for tort see supra § 931.

6. N.Y.—McGovern v. City of New York, 290 N.Y.S. 809, 160 Misc. 714, affirmed 286 N.Y.S. 286, 247 App. Div. 775, affirmed 3 N.E.2d 866, 272 N.Y. 455.

44 C.J. p 1469 note 24.

The purpose of the statute is to permit the municipality to investigate the validity of the claim and determine whether it desires to pay or settle it without litigation.—McGovern v. City of New York, supra—44 C.J. p 1469 note 24 [a].

Service of summons within specified period after presentation of claim does not constitute compliance with requirement of delay of specified period before prosecution or maintenance of action, notwithstanding complaint is not served until after the expiration of such period.—McGovern v. City of New York, supra.

Extension of time

(1) Where plaintiff had waited for a period longer than that required by the statute before bringing action, it was held that it was not shown that the action was brought prematurely, notwithstanding reservations of additional time for adjustment of claim in stipulations between plaintiff as claimant and a municipal officer adjourning hearings for the examination of claimant by such officer as authorized by statute, in view of certain admissions in the answer of defendant municipal corporation

and its failure to plead as an affirmative defense the special agreement in the stipulations.—Di Bartolo v. City of New York, 56 N.E.2d 71, 293 N.Y. 114, motion denied 56 N.E.2d 749, 293 N.Y. 756.

(2) The power of the municipal officer to waive the effect of his stipulation has been recognized.—Angelo v. City of New York, 53 N.Y.S. 2d 487, 183 Misc. 391.

(3) Notwithstanding plaintiff had waited more than the required period before bringing action, however, it was held that the action was premature because it was in violation of a stipulation adjourning the examination of claimant, which provided a delay of a specified period after the conclusion of the examination before bringing action, especially in view of claimant's failure to appear for examination on the adjourned date.—Angelo v. City of New York, supra.

(4) Other extensions of time see 44 C.J. p 1469 note 24 [d].

7. N.Y.—Reinig v. Buffalo, 6 N.E. 792, 102 N.Y. 308.

Wash.—Cole v. Seattle, 116 P. 257, 64 Wash. 1, 34 L.R.A., N.S., 1166, Ann.Cas.1913A 344—Scurry v. Seattle, 36 P. 145, 8 Wash. 278.

8. N.Y.—Reinig v. Buffalo, 6 N.E. 792, 102 N.Y. 308.

9. N.Y.—Reinig v. Buffalo, supra. 44 C.J. p 1469 note 24, p 1470 note 25.

is not a statute of limitations.¹⁰

There must be at least a substantial compliance with a provision of this type.¹¹ The requirement may not be waived by a municipal officer.¹²

Some statutes of this nature are limited in their application to claims of a specified nature,¹³ while others have a broader application,¹⁴ and include all actions.¹⁵

It has been stated generally that a noncompliance with a statutory provision for delay may be taken advantage of by defendant at any stage of the proceedings.¹⁶

§ 2202. Jurisdiction

Questions as to jurisdiction of actions to which a municipal corporation is a party are determinable largely by local statutes and rules of practice.

Usually a municipal corporation may be sued in courts of general jurisdiction,¹⁷ but statutes sometimes contain provisions conferring exclusive jurisdiction of actions by or against a city on a particular court.¹⁸ In various decisions the right of particular courts to exercise jurisdiction in actions to which a municipal corporation is a party has been recognized¹⁹ or denied.²⁰

Consent of the officers or agents of the municipality does not give jurisdiction of actions where jurisdiction is not conferred by law.²¹

Where, pending an action against a town, such town is made a city by an act of the legislature, the

court has the same jurisdiction over the city as it would have had over the town.²²

The right of a municipal corporation to waive objection as to jurisdiction has been recognized.²³

Action against foreign municipal corporation. It has been held that whether an action against a municipal corporation of a particular state shall be entertained by a court of another state is to be determined by the law of such other state,²⁴ particularly where the cause of action has arisen in such other state.²⁵ According to some authorities such an action may be entertained under some circumstances.²⁶ The right to take jurisdiction of an action against a municipal corporation of another state has been denied in certain cases, however,²⁷ and a plea to the jurisdiction in a suit for injunction and an accounting against the municipal council of a foreign municipal corporation of another state has been sustained.²⁸

§ 2203. Venue

- a. In general
- b. Change of venue

a. In General

According to some authorities an action against a municipal corporation must be brought in the county in which such corporation is situated in the absence of statute fixing venue elsewhere, but this rule is not accepted universally, at least to the fullest extent.

While, in some jurisdictions, there is no common-law rule or principle of public policy which con-

10. N.Y.—*Bernreither v. New York*, 107 N.Y.S. 1006, 123 App.Div. 291, affirmed 89 N.E. 1096, 196 N.Y. 506.

11. N.Y.—*MacDonald v. New York*, 59 N.Y.S. 16, 42 App.Div. 263.

12. The corporation council may not waive requirements—*McGovern v. City of New York*, 290 N.Y.S. 809, 160 Misc. 714, affirmed 286 N.Y.S. 286, 247 App.Div. 775, affirmed 2 N.E.2d 866, 272 N.Y. 455.

13. N.Y.—*Onondaga County v. Amsterdam*, 124 N.Y.S. 558, 139 App.Div. 877.

44 C.J. p 1470 note 27.

14. N.Y.—*McGovern v. City of New York*, 290 N.Y.S. 809, 160 Misc. 714, affirmed 286 N.Y.S. 286, 247 App.Div. 775, affirmed 3 N.E.2d 866, 272 N.Y. 455.

44 C.J. p 1469 note 24.

15. N.Y.—*Reinig v. Buffalo*, 6 N.E. 792, 102 N.Y. 308.

16. N.Y.—*Reinig v. Buffalo*, supra. Pleading compliance see *infra* § 2207.

17. N.Y.—*Port Jervis Water Works Co. v. Port Jervis*, 45 N.E. 388, 151 N.Y. 111.

44 C.J. p 1470 note 33.

Effect of venue statute

The supreme court in a particular county has jurisdiction of a proceeding against a village situated in a different county, notwithstanding the provision of a statute that the place of trial of actions and proceedings against a village shall be in the county in which the village is situated, in view of the fact that, under the constitution, the supreme court has general jurisdiction in law and equity.—*Herricks Road Corp. v. Godfrey*, 63 N.Y.S.2d 447.

18. Proceeding not within statute

Mich.—*In re Albers*, 71 N.W. 1110, 113 Mich. 640.

44 C.J. p 1470 note 34 [a].

19. N.Y.—*Eldred v. New York*, 144 N.Y.S. 402, 159 App.Div. 301.

44 C.J. p 1470 note 35.

20. N.J.—*Townsend v. Essex County School Dist. No. 12*, 41 N.J.Law 312.

44 C.J. p 1470 note 36.

21. N.Y.—*Callahan v. New York*, 66 N.Y. 656.

Pa.—*Oil City v. McAboy*, 74 Pa. 249.

Consent to jurisdiction generally see Courts § 85.

22. Ill.—*Olney v. Harvey*, 50 Ill. 453, 99 Am D. 530.

23. Colo.—*Pueblo v. Dye*, 96 P. 969, 44 Colo 35.

44 C.J. p 1471 note 44

Waiver of objections to jurisdiction generally see Courts §§ 109–111.

24. Mass.—*National Shawmut Bank of Boston v. City of Waterville, Me.*, 189 N.E. 92, 285 Mass. 252.

25. Mass.—*National Shawmut Bank of Boston v. City of Waterville, Me.*, supra.

26. Kan.—*Baker v. Kansas City*, 233 P. 1012, 118 Kan. 27.

Mass.—*National Shawmut Bank of Boston v. City of Waterville, Me.*, 189 N.E. 92, 285 Mass. 252.

27. U.S.—*Parks Co. v. City of Decatur, Ky.*, 138 F. 550, 70 C.C.A. 674. Del.—*Eastern Union Co. of Delaware v. Moffat Tunnel Improvement Dist.*, 178 A. 864, 6 W.W.Harr. 488.

28. S.C.—*McKinne v. Augusta*, 26 S. C.Eq. 55.

fines the venue of an action against a municipal corporation to the county in which such corporation is situated;²⁹ actions against municipal corporations have been described as local and not transitory,³⁰ and the rule has been stated that as a general rule such actions must be brought in the county in which the municipality is situated,³¹ or in the courts of the municipality,³² except where venue is expressly fixed elsewhere by statute.³³ In some jurisdictions, the rule is applied, even though the action is one which ordinarily would be regarded as local to, and would be tried in, a county other than that in which defendant corporation is situated;³⁴ but in other jurisdictions the rule seems to be confined to actions which ordinarily would be regarded as transi-

tory,³⁵ and actions against municipalities which are in their nature local to a county or place other than that in which defendant has its situs are properly brought in such other place or county.³⁶ In still other jurisdictions, certain actions against municipal corporations are described as transitory,³⁷ but the venue is in the county in which defendant corporation is situated;³⁸ however, by force of statute an action may be maintained in a different county.³⁹

Some statutory or charter provisions in terms fix the place of trial of actions or proceedings against a municipal corporation in the county in which such corporation is situated.⁴⁰ Some provisions of this

29. Mass.—National Shawmut Bank of Boston v. City of Waterville, Me., 189 N.E. 92, 285 Mass. 252.

30. Kan.—Corpus Juris cited in *Trader v. Southwestern Bell Telephone Co.*, 66 P.2d 414, 416, 145 Kan. 690.

Miss.—Corpus Juris quoted in *City of Jackson v. Wallace*, 196 So. 223, 224, 189 Miss. 252.
44 C.J. p 1471 note 46.

31. Kan.—Corpus Juris cited in *Trader v. Southwestern Bell Telephone Co.*, 66 P.2d 414, 416, 145 Kan. 690.

Miss.—Corpus Juris quoted in *Jackson v. Wallace*, 196 So. 223, 224, 189 Miss. 252.

Neb.—Cooper v. Sanitary Dist. No. 1 of Lancaster County, 19 N.W.2d 619, 146 Neb. 412.
44 C.J. p 1471 note 47.

In absence of statute clearly prescribing the venue of a suit against a municipality, the common law which fixes the venue at the place of domicile would prevail.—Board of Mississippi Levee Com'rs v. Kellner, 196 So. 779, 189 Miss. 232.—City of Jackson v. Wallace, 196 So. 223, 189 Miss. 252.

Action involving official action of municipal officers

It has been held that, where an action in which a municipal corporation is a defendant, involves the official conduct of its officers in the county of its situs, the proper venue is such county.—Boyd & Goforth v. First Nat. Bank, 155 S.E. 577, 199 N.C. 687—44 C.J. p 1471 note 47 [c] (1).

Question as to venue

Whether a municipal corporation may be sued elsewhere than in the county in which it is situated is a question as to venue and not as to jurisdiction.—Scaife Co. v. Dornack, 1 N.W.2d 856, 211 Minn. 349.

In Pennsylvania

(1) The rule stated in the text has been announced.—McGuire v. Board

of City Trusts of City of Philadelphia, 51 Pa.Dist. & Co. 495, 10 Sch. Reg. 15—44 C.J. p 1471 note 47.

(2) It has been stated, however, that a municipal corporation can be sued only in courts of its own county, or in the supreme court.—Williams v. Fields, Com.Pl., 28 North.Co. 125.

In Texas

(1) The rule stated in the text has been announced.—City of Corpus Christi v. Coffin, Civ.App., 35 S.W.2d 202, followed in *City of Corpus Christi v. Miller*, 35 S.W.2d 204—44 C.J. p 1471 note 47.

(2) It has been held or recognized, however, that common-law rules as to revenue do not obtain even with respect to actions against municipal corporations.—Tahoka v. Jackson, 276 S.W. 662, 115 Tex. 89.

(3) In any event, the rule is subject to exceptions by reason of statutory rules providing otherwise, by reason of the nature of the action and the like.—City of Dallas v. Hopkins, Civ.App., 16 S.W.2d 852, error dismissed.

32. Md.—Phillips v. Baltimore, 72 A. 902, 110 Md. 431, 25 L.R.A., N.S., 711.

44 C.J. p 1471 note 48.

33. Miss.—Corpus Juris quoted in *City of Jackson v. Wallace*, 196 So. 223, 189 Miss. 252.

Wash.—North Yakima v. King County Superior Ct., 30 P. 1053, 4 Wash. 655.

34. Tenn.—Piercy v. Johnson City, 169 S.W. 765, 130 Tenn. 231, L.R.A. 1915F 1029.

44 C.J. p 1471 note 50.

In Texas

(1) The rule stated in the text has apparently been recognized.—Mineral Wells v. Acme Brick Co., Civ.App., 262 S.W. 177—44 C.J. p 1471 note 50 [a].

(2) The authority of such decisions has been weakened, however, by views expressed in subsequent

cases.—City of Corpus Christi v. Live Oak County, Civ.App., 103 S.W.2d 226.—City of Dallas v. Hopkins, Civ.App., 16 S.W.2d 852, error dismissed.

35. Md.—Phillips v. Baltimore, 72 A. 902, 110 Md. 431, 25 L.R.A., N.S., 711.

36. Md.—Baltimore v. Meredith's Ford, etc., Turnp. Co., 65 A. 35, 104 Md. 351, 10 Ann.Cas. 35.

44 C.J. p 1472 note 52.

Action pertaining to real property

(1) It has been stated that an action against a municipal corporation is inherently local, apparently with respect to the county in which such corporation is situated, except where the action pertains to real property.—Swanson v. City of Sioux Falls, 266 N.W. 115, 64 S.D. 175.

(2) It has been stated that there is an established exception to the general rule that an action against a municipal corporation must be brought in the county of its domicile or where it is situated, in actions which pertain to real estate, which generally must be brought in the county where the land lies.—Cooper v. Sanitary Dist. No. 1 of Lancaster County, 19 N.W.2d 619, 146 Neb. 412.—State v. Central Nebraska Public Power & Irrigation Dist., 300 N.W. 379, 140 Neb. 471.

37. Ohio.—Fostoria v. Fox, 54 N.E. 370, 60 Ohio St. 340—Cincinnati, etc., Turnp. Co. v. Milford, 13 Ohio Cir.Ct., N.S., 170, 32 Ohio Cir.Ct. 497.

38. Ohio.—Fostoria v. Fox, 54 N.E. 370, 60 Ohio St. 340—Cincinnati, etc., Turnp. Co. v. Milford, 13 Ohio Cir.Ct., N.S., 170, 32 Ohio Cir.Ct. 497.

39. Ohio.—Muskingum County Infirmary v. Toledo, 15 Ohio St. 409.

40. N.Y.—Bagan v. Fritz, 35 N.Y.S.2d 530, 274 App.Div. 1082—Colonial Motor Coach Corporation v. City of Albany, 242 N.Y.S. 689, 229 App. Div. 308.

type apply to actions or proceedings which are transitory,⁴¹ or, according to some decisions which pertain to, or grow out of, governmental affairs of the municipality,⁴² and do not control actions or proceedings for the recovery of real property which by another statute are assigned to a local forum.⁴³

It has been held that certain statutory provisions regulating the venue of actions against a "corporation" do not apply to actions against municipal corporations,⁴⁴ but a contrary view in this respect has been taken with respect to some statutes.⁴⁵

A statutory provision authorizing defendant municipal corporation to have the cause transferred for trial to a county other than that in which plaintiff resides and other than that in which defendant municipal corporation is situated does not permit plaintiff to commence an action in a neutral county or to select his own forum.⁴⁶

Location in two counties. Where a municipality is partly situated within two counties, its situs, as between such counties, for purposes of venue is in the county in which its municipal offices and government are located,⁴⁷ in the absence of a statutory provision to the contrary.⁴⁸ Under a provision of the charter of a municipal corporation, which is co-extensive with several counties, that an action against such corporation shall be tried in the county within such corporation in which the cause of action arose or in a specified county within such corporation, an action must be tried in such speci-

fied county where the cause of action arose therein.⁴⁹

Effect of contract. The power of a municipality to contract to perform an obligation in a county other than that in which it is situated and thereby to fix the venue of an action to enforce the obligation has been recognized.⁵⁰

Waiver of objection. It has been held or recognized that a municipality may waive an objection with respect to the venue⁵¹ by entering an appearance without raising the question as to venue.⁵² Where an action is brought in a wrong county and defendant corporation has appeared and answered and a trial has been held, under some statutes the question as to dismissal or retention of the action is within the discretion of the trial court.⁵³ Where the corporation has instituted an action in a county other than the one in which it is located, it may not thereafter question the authority of the court, whose jurisdiction it has invoked, to proceed in the action.⁵⁴

b. Change of Venue

As a general rule a municipal corporation is entitled to have an action against it transferred for trial to the county in which it is situated, where the action should have been brought in such county.

When an action which should have been brought against a municipal corporation in the county in which it is situated is brought outside such county, the corporation has a right to demand a transfer of the cause to such county.⁵⁵ Under some statutes a

The legislature has power to make actions against a municipal corporation triable in the county in which such corporation is situated—*Getman v. New York*, 21 N.Y.S. 116, 66 Hun 236.

41. Minn.—*Hjelm v. City of St. Cloud*, 152 N.W. 408, 129 Minn. 240. N.Y.—*Czarnowsky v. City of Rochester*, 66 N.Y.S. 931, 55 App.Div. 388, affirmed 59 N.E. 1121, 165 N.Y. 649.

42. Minn.—*Hjelm v. City of St. Cloud*, 152 N.W. 408, 129 Minn. 240.

43. Minn.—*Hjelm v. City of St. Cloud*, supra. N.Y.—*Czarnowsky v. City of Rochester*, 66 N.Y.S. 931, 55 App.Div. 388, affirmed 59 N.E. 1121, 165 N.Y. 649.

44. Md.—*Phillips v. Baltimore*, 72 A. 902, 110 Md. 431, 25 L.R.A., N.S., 711.

45. Okl.—*Oklahoma City v. Rose*, 56 P.2d 775, 178 Okl. 607—*Oklahoma City v. District Court of Thirteenth Judicial Dist.*, 32 P.2d 318, 168 Okl. 235, 93 A.L.R. 489.

46. Cal.—*San Jose Ice & Cold Storage Co. v. City of San Jose*, 64 P. 2d 1099, 19 Cal.App.2d 62, rehear-

ing denied 65 P.2d 1324, 19 Cal.App. 2d 62.

47. Ga.—*Arlington v. Calhoun*, 95 S. E. 991, 148 Ga. 132, L.R.A.1918E 773.

44 C.J. p 1472 note 59.

48. Ga.—*Arlington v. Calhoun*, supra.

49. N.Y.—*Battleman v. Hoffman's Estate*, 13 N.Y.S.2d 655, 257 App. Div. 987—*Knowles v. City of New York*, 75 N.Y.S. 725, 71 App.Div. 410.

Charter provision held not repealed N.Y.—*Battleman v. Hoffman's Estate*, 13 N.Y.S.2d 655, 257 App.Div. 987.

50. Tex.—*Tahoka v. Jackson*, 376 S.W. 662, 115 Tex. 89.

44 C.J. p 1473 note 61.

51. Md.—*Ireton v. Baltimore*, 61 Md. 432.

N.Y.—*Herricks Road Corp. v. Godfrey*, 63 N.Y.S.2d 447.

52. U.S.—*Department of Water and Power of City of Los Angeles v. Anderson*, C.C.A.Nev., 95 F.2d 577, certiorari denied 59 S.Ct. 67, 305 U.S. 607, 83 L.Ed. 386.

Appearance by legal officer of municipality

Okl.—*Oklahoma Ry. Co. v. Boyd*, 282 P. 157, 140 Okl. 45.

53. Mass.—*Osgood v. Lynn*, 130 Mass. 335.

54. Tenn.—*Johnson City v. Unaka Milling Co.*, 7 Tenn.Civ.A. 490.

55. N.Y.—*Bagan v. Fritz*, 85 N.Y.S. 2d 530, 274 App.Div. 1082—*Colonial Motor Coach Corporation v. City of Albany*, 242 N.Y.S. 689, 229 App. Div. 308—*Herricks Road Corp. v. Godfrey*, 63 N.Y.S.2d 447.

44 C.J. p 1472 note 66

Change of venue generally see the C.J.S. title Venue §§ 126-219, also 67 C.J. p 132 note 74—p 224 note 26.

Change as between counties with which municipality coextensive

Under the provision of the Greater New York Charter that an action against the city of New York shall be tried in the county within the city in which the cause of action arose or in the county of New York, a motion to change the place of trial from a county within the city other

change of venue, in certain cases, may be had from the county in which the corporation is situated,⁵⁶ as, for example, where local prejudice is shown to exist.⁵⁷ In some jurisdictions, where the action is properly brought in the county in which the corporation is situated, a change of venue may not be granted on the application of a single codefendant of the corporation.⁵⁸ Under some statutes a municipal corporation, as plaintiff, is entitled in some cases to a change of venue to a county other than that in which such corporation is situated and other than that in which defendant resides, is doing business, or is situated.⁵⁹

Defendant municipality may, by entry of appearance and pleading to the merits, waive the benefit of a statute permitting such municipality to have the cause transferred for trial to a county other than that in which plaintiff resides and other than that in which defendant municipality is situated.⁶⁰

§ 2204. Parties

- a. In general
- b. Joinder
- c. Intervention

a. In General

The question who are necessary or proper parties in actions by or against a municipal corporation or whether a municipal corporation is a necessary or proper party to

an action between others depends largely on the nature of the action and the relief sought.

The question who are necessary or proper parties in actions by or against municipal corporations depends largely on the nature of the action and the relief sought,⁶¹ and a like rule applies in determining whether a municipal corporation is a necessary or proper party to an action between others.⁶² Where a cause of action exists in favor of the corporation, it is the proper party plaintiff in an action to enforce it.⁶³

Citizens or inhabitants of municipality. In some jurisdictions in actions against municipal corporations its citizens or inhabitants are not ordinarily necessary or proper parties,⁶⁴ but, by virtue of a statute, for the purpose of satisfying a judgment against the corporation out of their property, under rules discussed *infra* § 2212, its citizens or inhabitants have been regarded as parties.⁶⁵

The substitution of a municipality, as party defendant is proper where a statute imposes liability on such municipality for previously accruing causes of action against another municipality, which the substituted municipality has absorbed,⁶⁶ but no formal substitution of parties is required where the corporation which has commenced an action is dissolved, and a new corporation bearing the same name is organized and includes substantially the same inhabitants and territory.⁶⁷

than the county of New York to the county of New York should be granted where the cause of action arose in the county of New York—*Battleman v. Hoffman's Estate*, 13 N.Y.S. 2d 655, 257 App.Div. 987—*Knowles v. City of New York*, 75 N.Y.S. 725, 71 App.Div. 410.

56. N.Y.—*MacArthur Bros. Co. v. New York*, 168 N.Y.S. 407, 101 Misc. 591, reversed on other grounds 169 N.Y.S. 767, 182 App.Div. 640.

57. Pa.—*Penn R. Co. v. Reading*, 98 A. 791, 264 Pa. 110, Ann.Cas.1918E 562.

44 C.J. p 1472 note 68.

53. Minn.—*State v. Quinn*, 156 N.W. 284, 132 Minn. 219.

59. Cal.—*Arcturarius v. City of Los Angeles*, 75 P.2d 76, 24 Cal.App.2d 365.

60. U.S.—*Department of Water and Power of City of Los Angeles v. Anderson, C.C.A.Nev.*, 95 F.2d 577, certiorari denied 59 S.Ct. 67, 305 U.S. 607, 85 L.Ed. 386.

61. Ky.—*Buckner v. Clay*, 206 S.W. 2d 827, 306 Ky. 194.

Parties to action:

For tort see *supra* § 932.

On contract generally see *supra* §§ 1024-1026.

Municipal officer not necessary party

A municipal officer who had made acknowledgments to tax certificates before attorneys at law was not a necessary party to an action against the municipal corporation by such attorneys for fees allowed by statute for taking acknowledgments, since the fees to which attorneys as acknowledging officers were entitled were required to be paid into the municipal treasury and such officer was in no sense liable for them—*Samson v. City of Newark*, 15 A.2d 452, 125 N.J.Law 221.

62. Proper but not necessary party

While a municipal corporation which under the terms of deeds had acquired a fee-simple title to certain real property on the termination of the existence of one of the organizations which were joint grantees in such deed and had conveyed the property to another by deed reserving certain rights or privileges should properly have been made a party to a suit in equity by another of such joint grantees, which had continued as a body corporate, to obtain a determination as to such reserved rights or privileges, such municipal corporation was not a necessary party to such suit.—*Woman's*

Relief Corps No. 1 Mich. of City of South Haven v. South Haven City and Township Library Bd, 20 N.W. 2d 820, 313 Mich. 85.

Not proper party

The mayor and aldermen of a city were not proper parties to a suit in equity against the trustees of the public library of such city with respect to the construction of a building by such trustees, which was brought by an adjoining owner.—*Howard v. Jersey City*, 140 A 261, 102 N.J.Eq. 213.

63. N.Y.—*Mt. Morris v. Pavilion Natural Gas Co.*, 183 N.Y.S. 792, affirmed 187 N.Y.S. 957, 196 App.Div. 918.

64. N.J.—*Lyon v. Elizabeth*, 43 N.J. Law 158.

44 C.J. p 1473 note 76.

65. Conn.—*Beardsley v. Smith*, 16 Conn. 368, 41 Am.D. 148.

66. Ala.—*Birmingham v. Darden*, 55 So. 1014, 1 Ala.App. 479.

67. Ala.—*Mobile Transp. Co. v. Mobile*, 30 So. 645, 128 Ala. 335, 86 Am.S.R. 143, 64 L.R.A. 333, affirmed 23 S.Ct. 170, 187 U.S. 479, 47 L. Ed. 266.

b. Joinder

Whether a municipal corporation may or should be joined as a party to a particular action or whether another may or should be joined as a party to an action to which such a corporation is a party depends on the nature of the action, the relief sought, and the particular facts.

The propriety or necessity of the joinder of a municipal corporation as a party to an action or of the joinder of another as a party to an action to which such a corporation is a party depends on the nature of the action, the relief sought, and the particular facts.⁶⁸ Thus, in various instances, it has been held necessary or proper to join the municipality as a party defendant,⁶⁹ while in other instances the joinder of a municipality as a defendant has been held unnecessary.⁷⁰ The joinder of two corporations as defendants is improper where there is no basis in law for the alleged joint liability.⁷¹ Where a duty to perform a certain act which a municipal officer has refused to perform may be imposed on him by the judgment in an action against the corporation, such officer is a proper party defendant,⁷² but, where such an officer is not in default, he should not be made a party defendant.⁷³ Some statutes are construed as making municipal officers parties in their official capacity to an action against the corporation, even though they are not specifically designated as parties.⁷⁴ The failure to join a particular board as a party defendant in an action against a municipality may constitute merely a formal defect⁷⁵ which is not reached by a general demurrer, as discussed *infra* § 2207.

c. Intervention

Generally, rules applicable in civil actions apply in determining the propriety of intervention by a municipal

corporation or to intervention in actions to which such a corporation is a party.

In accordance with general rules discussed in Equity §§ 160-163, and in the C.J.S. title Parties §§ 53-71, also 47 C.J. p 93 note 71-p 120 note 59, the right to intervene has been recognized in particular instances where the right has been sought by a municipal corporation,⁷⁶ or by a particular officer or board.⁷⁷ On the other hand, intervention has been regarded as improper or as properly denied in particular instances where the right has been sought by the corporation,⁷⁸ by a citizen,⁷⁹ or by a taxpayer seeking to assert a personal claim.⁸⁰

The time when intervention by a municipal corporation was sought has been considered in passing on a motion asking permission to intervene.⁸¹

§ 2205. Process

- a. In general
- b. Form and requisites
- c. Service
- d. Return and proof of service
- e. Objections and waiver; voluntary appearance

a. In General

Alias process may be issued for the appearance of defendant municipality where an action against it is pending in a particular county after a change of venue.

Where an action against a municipality is pending in a particular county after change of venue, the propriety of the issuance of alias process for appearance of defendant has been recognized.⁸²

Whatever process binds a municipal corporation binds its officers who are privy to its duties and affairs.⁸³

68. Ala.—Southern R. Co. v. Hartshorn, 43 So. 583, 150 Ala. 217, 124 Am S.R. 68.

44 C.J. p 1473 note 83.

69. Minn.—American Electric Co. v. Vasceca, 113 N.W. 899, 102 Minn 329.

44 C.J. p 1473 note 84.

70. Md.—Carette v. Broring Bldg Co., 132 A. 619, 150 Md. 198, 46 A.L.R. 1.

44 C.J. p 1473 note 85.

71. Ala.—Columbiana v. Kelley, 55 So. 526, 172 Ala. 336.

44 C.J. p 1473 note 86.

72. Mich.—Klatt v. Detroit, 127 N. W. 409, 162 Mich. 186.

44 C.J. p 1473 note 87.

73. Tex.—Berlin Iron-Bridge Co. v. San Antonio, Civ.App., 50 S.W. 408.

44 C.J. p 1473 note 88.

74. Miss.—Jonestown v. Ganong, 52 So. 579, 97 Miss. 67.

75. Ky.—Simrall v. Covington, 29 S. W. 880, 16 Ky.L. 770.

44 C.J. p 1474 note 90.

76. Tex.—Feris v. Bassett, Civ.App., 227 S.W. 233.

44 C.J. p 1474 note 94.

Petition held not one for intervention

Miss.—City of Biloxi v. Gully, 193 So. 786, 187 Miss. 664.

77. N.Y.—Buck v. New York, 212 N.Y.S. 310, 214 App Div. 629.

44 C.J. p 1474 note 95.

78. N.Y.—Morrell v. Brooklyn Borough Gas Co., 132 N.E. 130, 231 N.Y. 405.

44 C.J. p 1474 note 96.

Discretion not abused

Where a municipal corporation would have been a proper party to an action, but it was not a necessary party for the determination of the issues involved, the denial of its petition to intervene was upheld, since

the denial was not an abuse of discretion—Woman's Relief Corps. No. 1 Mich. of City of South Haven v. South Haven City and Township Library Bd., 20 N.W.2d 820, 313 Mich. 85.

79. Ky.—Princeton v. Princeton Electric Light, etc., Co., 179 S.W. 1074, 166 Ky. 730.

44 C.J. p 1474 note 97.

80. Ga.—City of Atlanta v. Screws, 21 S.E.2d 424, 194 Ga. 214.

Intervention:

By taxpayer for purpose of protecting rights of municipality see *supra* § 2124.

In taxpayer's action see *supra* § 2162.

81. N.Y.—Reid v. Products Mfg. Co., 190 N.Y.S. 403, 116 Misc. 424.

44 C.J. p 1474 note 98.

82. Ind.—Knox v. Golding, 91 N.E. 857, 92 N.E. 986, 46 Ind.App. 634.

83. Fla.—State ex rel. Gulf Life Ins.

b. Form and Requisites

There should be due compliance with statutory provisions regulating the form and requisites of process in actions against municipal corporations.

Where the statute so provides, process against a municipal corporation should run against it in its corporate name.⁸⁴ A summons, however, has been held not to be vitiated because, in addition to directing that the corporation be summoned, it also names officers of the corporation,⁸⁵ and the fact that the summons directs that an officer of the municipality instead of the municipality shall be summoned is not necessarily a fatal defect under some statutes.⁸⁶ Under a statute providing that an action may be commenced by declaration, such declaration is in the nature of process which may be used in actions against municipal corporations.⁸⁷

c. Service

- (1) In general
- (2) Time and place
- (3) On whom service to be made
- (4) Manner of service

(1) In General

Process must be properly served on a municipal corporation in order to confer jurisdiction of an action against it, in the absence of waiver by appearance or otherwise.

Generally, at least in the absence of an appearance, process against municipal corporations must be properly served in order to confer jurisdiction.⁸⁸

According to some authorities the rule of strict construction applies to general or local provisions specifically regulating the service of summons in actions against municipal corporations,⁸⁹ and there must be specific compliance with such provisions.⁹⁰ Certain statutes expressly relating to service of process on corporations have been held not to apply to municipal corporations.⁹¹ The mere delivery of a copy of a summons to an officer of the municipality does not of itself make him a party so as to authorize him to file an answer.⁹² There is authority for the view that service should be made by an officer of the county in which defendant corporation is situated.⁹³

Service of process in actions in federal courts is discussed in Federal Courts § 124.

(2) Time and Place

Special statutory or charter provisions fixing the minimum time between service of process and the return date govern in an action against a municipal corporation, but, in the absence of statute governing the matter, the common-law practice controls. Usually service on defendant municipality should be made at its situs.

The number of days which must intervene between the day of service and the return day of a summons, in an action against a municipal corporation, may be governed by special statutory or charter provision.⁹⁴ In the absence of a special statutory provision it has been held that a statute applicable to individuals does not apply,⁹⁵ and that the common-law practice in the court of king's bench, requiring that at least fifteen days shall in-

Co. v. City of Live Oak, 170 So. 608, 126 Fla. 132.

84. Mich.—Menominee v. Menominee Cir. Judge, 46 N.W. 23, 81 Mich. 577.

N.C.—Loughran v. Hickory, 40 S.E. 46, 129 N.C. 281.

85. Tex.—Houston v. Emery, 13 S.W. 264, 76 Tex. 282.
44 C.J. p 1474 note 8.

86. Ind.—Knox v. Golding, 81 N.E. 857, 92 N.E. 986, 46 Ind.App. 634.
Mich.—Menominee v. Menominee Cir. Judge, 46 N.W. 23, 81 Mich. 577.

87. Mich.—Menominee v. Menominee Cir. Judge, supra.

88. Wis.—Watertown v. Robinson, 34 N.W. 139, 69 Wis. 230.
44 C.J. p 1474 note 13.

89. N.Y.—Crawford v. City of Newburgh, 249 N.Y.S. 477, 231 App. Div. 613.

90. N.Y.—Crawford v. City of Newburgh, supra.

91. Nev.—City of Los Angeles, Cal., v. Eighth Judicial Dist. Court, 67 P.2d 1019, 1023, 58 Nev. 1.
44 C.J. p 1475 note 16.

Municipal corporation of another state

(1) It has been held that statutory provisions regulating service of process on a "foreign corporation" or on an "incorporated company" created or existing under the laws of another state do not apply to service on a municipal corporation created and existing under the laws of another state—City of Los Angeles, Cal., v. Eighth Judicial Dist. Court, supra.

(2) Such municipal corporation was not subject to such statutory provisions, notwithstanding it had entered the state of the forum in its proprietary capacity and had constructed an electric transmission line on public lands of the United States.—City of Los Angeles, Cal., v. Eighth Judicial Dist. Court, supra.

(3) The foregoing conclusion obtained notwithstanding a statutory provision that any municipal corporation organized in another state which enters the state of the forum for the purpose of doing business shall be subject to the laws of the state of the forum relative to taxa-

tion, police regulations, and all laws and reasonable regulations specifically applicable to any particular business or activity in which such municipalities may engage as the same are, or may be, applicable to foreign corporations doing like or similar business or work in the state.—City of Los Angeles, Cal., v. Eighth Judicial Dist. Court, supra.

(4) In this connection it has been laid down broadly that the word "'corporations' is never construed to include municipal corporations."—City of Los Angeles, Cal., v. Eighth Judicial Dist. Court, supra.

92. W.Va.—Miller v. Aracoma, 54 S.E. 148, 30 W.Va. 606.

93. Ohio.—Fostoria v. Fox, 54 N.E. 370, 60 Ohio St. 340.

94. Mich.—Menominee v. Menominee Cir. Judge, 46 N.W. 23, 81 Mich. 577.

N.J.—Raub v. Phillipsburg, 37 N.J. Law 48.

44 C.J. p 1475 note 20.

95. N.J.—McNeal v. Gloucester City, 18 A. 112, 51 N.J. Law 444.

tervene between the day of service and the return day, prevails.⁹⁶

It seems that usually service should be made where defendant corporation has its situs.⁹⁷

(3) On Whom Service to Be Made

Service of process should be made on the mayor or other head of a municipal corporation in an action against it, in the absence of statutory or charter provision for service on some other person or persons.

Service of process in an action against a municipal corporation should be made on the mayor or other head of the corporation,⁹⁸ except where, by statute or charter, provision is made for service on some other person or persons.⁹⁹ While the view has been taken that a charter provision as to who must be served prevails over a later general statute,¹ it has been held that a general statute designating the officers on whom service may be made is controlling as against an earlier charter provision regulating the matter.² Jurisdiction is not acquired by service on one other than the officer or agent named in the statute,³ or, where the common law is in force, on one other than the mayor or chief officer.⁴ Where a summons is served on the mayor, service on members of the board of aldermen or on councilmen does not affect the validity of service on the mayor.⁵

Where the act creating a quasi-public corporation does not provide for organization with any head officer, service on all the members is sufficient in the absence of proof of organization.⁶ It has been held that certain statutory provisions authorizing service of process on a domestic corporation by service on a specified officer of the state in certain contingencies do not authorize service on such officer with respect to a municipal corporation established by a private act of the legislature, where there have never been any officers of such municipality or any attempt to function by it, or in its behalf, and such private act does not designate any person on whom service may be made.⁷ A statute providing for service of process on an incorporated company created and existing under the laws of another state on a specified officer of the state in certain contingencies does not authorize service on such officer with respect to a municipal corporation organized and existing under the laws of another state.⁸

Failure to qualify, resignation, and vacancy; dissolution of corporation. Service on an officer elect before acceptance and qualification⁹ or on an officer whose resignation has become effective¹⁰ usually is insufficient, and the fact that there is a vacancy in an office on the incumbent of which process must be served does not authorize service on a different officer.¹¹ Where by constitutional or statutory pro-

96. N.J.—McNeal v. Gloucester City, *supra*.

97. Ohio.—Fostoria v. Fox, 54 N.E. 370, 60 Ohio St. 340.

Under some statutes, where an action against a municipal corporation is properly brought in a county in which the cause of action or some part of it arose other than the county in which such corporation is situated, summons may be issued to, and served in, the county in which such corporation is situated.—Oklahoma City v. Rose, 56 P.2d 775, 176 Okl. 607—Oklahoma City v. District Court of Thirteenth Judicial Dist., 32 P.2d 318, 168 Okl. 235, 93 A.L.R. 489.

98. Ga.—Corpus Juris quoted in Gibbs v. City of Social Circle, 12 S.E.2d 335, 336, 191 Ga. 422. 44 C.J. p 1475 notes 24, 26 [a].

In the absence of statute, common-law rule that service of process on a municipal corporation shall be on the mayor is in force.—Gibbs v. City of Social Circle, *supra*.

Mayor pro tempore

Service on the mayor pro tempore was proper notwithstanding the elected mayor happened to be present at the time on a short furlough from the armed forces of the government into which the elected mayor

had been inducted.—Oglesby v. Town of Winnfield, La.App., 27 So.2d 137.

Acknowledgment of service

In view of the fact that the mayor was the proper person on whom service of process must be had, as designated by statute, he had authority to acknowledge on behalf of city service of notice of suit already filed.—In re Kleinhens Estate, 63 N.E.2d 315, 76 Ohio App. 122.

99. Ga.—Corpus Juris quoted in Gibbs v. City of Social Circle, 12 S.E.2d 335, 336, 191 Ga. 422. Or.—Walters v. Dock Commission of City of Portland, 270 P. 778, 126 Or. 487.

44 C.J. p 1475 note 26.

1. U.S.—Stabler v. Alexandria, C.C. Minn., 42 F. 490. 44 C.J. p 1475 note 27.

2. N.Y.—Crawford v. City of Newburgh, 249 N.Y.S. 477, 231 App.Div. 613.

3. Mich.—Brooke v. Brooke, 262 N. W. 426, 272 Mich. 627.

Or.—Walters v. Dock Commission of City of Portland, 270 P. 778, 126 Or. 487.

44 C.J. p 1475 note 28.

Construction and operation of statute

(1) The word "may," as used in a statutory provision that service of

process may be made on the mayor, city clerk, or city attorney, is permissive as to service on the mayor, city clerk, or attorney, but is mandatory in that it excludes service of process on all other officers or employees.—Brooke v. Brooke, 262 N.W. 426, 272 Mich. 627.

(2) Accordingly, under such provision service on an employee of city treasurer's office was a nullity.—Brooke v. Brooke, *supra*.

4. Mo.—Cloud v. Pierce City, 86 Mo. 357.

5. Ga.—Gibbs v. City of Social Circle, 12 S.E.2d 335, 191 Ga. 422.

N.C.—Loughran v. Hickory, 40 S.E. 46, 129 N.C. 281.

6. Ala.—King v. Harbor Bd., 57 Ala. 135.

7. Utility district

Tenn.—Bradley v. Rock Gardens Utility Dist., 212 S.W.2d 657, 186 Tenn. 665.

8. Nev.—City of Los Angeles, Cal., v. Eighth Judicial Dist. Court, 67 P.2d 1019, 58 Nev. 1.

9. U.S.—Perkins v. Watertown, C.C. Wis., 19 F.Cas.No.10,991, 5 Biss. 320.

10. U.S.—Amy v. Watertown, Wis., 9 S.Ct. 530, 130 U.S. 301, 32 L.Ed. 946.

11. U.S.—Amy v. Watertown, *supra*.

vision officers are to continue in office until the qualification of their successors, service is properly made on an officer whose stated term has expired, where his successor has not qualified,¹² and under such a provision service on those in office when there was an ineffectual attempt to dissolve a corporation is sufficient, if such service is otherwise authorized.¹³ It has been held that a person served as mayor of a defunct municipality has no standing to appear to set aside the service of process on him where he has no personal interest in the action.¹⁴

(4) Manner of Service

In the absence of statutory or charter provision prescribing the manner of service of process on a municipal corporation, the common-law practice must be followed; but, if the manner of service is prescribed by statutory or charter provision, due compliance with such provision is required.

In the absence of statutory or charter provisions regulating the manner in which process shall be served on municipal corporations, the common-law practice must be followed,¹⁵ but, where a statute or charter points out a particular method of service, such method must be followed,¹⁶ and a strict compliance is required.¹⁷

At common law service is properly made by reading the process to the proper officer,¹⁸ and under some statutes or charters service may be made by delivering a certified copy to the proper officer or officers;¹⁹ but a charter provision for the delivery of a certified copy of a summons has been held not applicable to an action of ejectment.²⁰ There must be due compliance with statutory provisions for service by delivering or leaving a copy of the summons.²¹

A statute providing that personal service on a domestic corporation is dispensed with where the

corporation has ceased to do business and has no known officers, directors, or other legal representative, on whom personal service may be had, does not authorize service by publication on a municipal corporation established by private act of the legislature, where there have never been any officers of such corporation or any attempt to function by or in its behalf, and such private act does not designate any one on whom service may be made.²²

d. Return and Proof of Service

The return should show on what officer of the municipal corporation the summons has been served.

Usually a return should show on what officer the summons has been served,²³ but there is authority for the view that it is not necessary to show by the return the particular office occupied by the person on whom service was made.²⁴ A return that a summons against a municipal corporation was executed by delivering a true copy thereof to the proper officer of the corporation, naming him and giving him his official title, is a sufficient return without evidence aliunde that the person named was in fact such official.²⁵ An affidavit entitled in an action, naming a municipality as one of defendants, and averring that a summons and complaint were served on defendants and on members of the common council, sufficiently shows that the municipality was a defendant and was served with the summons and complaint.²⁶

Where, after an inaccurate return as to service of summons in an action against a municipal corporation has been made, the court permits an amendment of the return so as to accord with the facts and to conform to the statute regulating service, it is proper to override a motion to quash the service.²⁷

Wis.—Watertown v. Robinson, 34 N. W. 139, 69 Wis. 230.

34 C.J. p 1475 note 34.

12. Tex.—Jones v. Jefferson, 1 S.W. 903, 66 Tex. 576.

13. U.S.—Ringling v. Hempstead, Tex., 193 F. 596, 113 C.C.A. 464.

14. U.S.—U. S. Bank v. Kendall, C. C.Kan., 179 F. 914.

15. N.J.—Cooper v. Cape May Point, 51 A. 511, 67 N.J.Law 437.

16. Wis.—Westport Tp. v. City of Madison, 19 N.W.2d 309, 247 Wis. 326.

44 C.J. p 1476 note 40.

17. Wis.—Westport Tp. v. City of Madison, supra.

18. Ill.—People v. Cairo, 50 Ill. 154.

19. U.S.—Amy v. Watertown, Wis., 9 S.Ct. 530, 130 U.S. 301, 32 L.Ed. 946.

Wis.—Watertown v. Robinson, 34 N. W. 139, 69 Wis. 230.

20. U.S.—Robertson v. Roe, C.C. Ohio, 20 F.Cas.No.11,927, 5 McLean 459.

44 C.J. p 1476 note 43.

Process or notice in action of ejectment generally see Ejectment § 55.

21. Personal service

Merely leaving a copy of the summons and complaint at the window of the office of the officer, on whom service is authorized, when no one is present in such office does not constitute personal service under a statute providing for personal service by delivering a copy of the summons.—Landsberg v. City of New York, 277 N.Y.S. 533, 243 App.Div. 740.

Leaving copy at office

Leaving a copy of a summons at

the residence of a designated officer did not constitute compliance with a statute authorizing the leaving of a copy in the office of such officer with the person apparently in charge of such office, in lieu of delivering the copy to such officer, and did not constitute service.—Westport Tp. v. City of Madison, 19 N.W.2d 309, 247 Wis. 326.

22. Tenn.—Bradley v. Rock Gardens Utility Dist., 212 S.W.2d 657, 186 Tenn. 665.

23. Md.—Dugan v. Baltimore, 16 A. 501, 70 Md. 1.

24. Tenn.—Wartrace v. Wartrace, etc., Turnp. Co., 2 Coldw. 515.

25. Miss.—Meridian v. Trussell, 52 Miss. 711.

26. N.Y.—People v. Dwyer, 90 N.Y. 402, 2 N.Y.Civ.Proc. 379.

27. Kan.—Bellmeyer v. City of Coff-

a. Objections and Waiver; Voluntary Appearance

A municipal corporation may appear to defend in an action notwithstanding it has not received formal notice; whether a particular officer of such corporation may waive service of process on it depends on whether such officer has been duly authorized in that respect, either expressly or implicitly.

The right of a municipal corporation to appear in defense of an action, even though it has received no formal notice, has been recognized,²⁸ and it has been stated broadly that a municipal corporation may waive defects in a summons and contest an action with the same effect as though it had been properly served.²⁹

It has been held that the officer on whom service may be made may waive service³⁰ by appearing,³¹ but the contrary view has been taken³² on the theory that an appearance, in order to operate as a waiver, must be by the corporation in its corporate capacity.³³ The right of officers, not designated in the statute as officers who may be served, to confer jurisdiction by the acceptance or waiver of service, has been denied,³⁴ and the rule has been announced that, where a liability is asserted against a municipality which, if not established, would be a liability of municipal officers, officers of the municipality may not waive the issuance and service of a summons in the absence of statutory authorization.³⁵ There is authority for the view that the appearance in a cause of the officers of a public corporation, in their individual capacities, does not waive defects in notice as to the corporation.³⁶

While a municipality may waive service of summons by filing an answer which shows for itself that

it is an answer,³⁷ the mere fact that the instrument filed is denominated "answer" does not constitute a waiver or confer jurisdiction unless the instrument itself shows that it is an answer.³⁸

Official counsel or law officer. While there is authority for the view that appearance by the official counsel or law officer of the municipality³⁹ or his filing of an answer,⁴⁰ or both,⁴¹ constitute a waiver of the objection that there has not been effective service of process, it has also been held that in the absence of due authority he may not effect a waiver by general appearance⁴² or by a statement reciting an express waiver.⁴³

Defects in return. The failure of the return to show on what officer process was served is a defect which may be waived.⁴⁴

Authorization by governing body. The right of the governing body of the municipality to authorize a voluntary appearance has been recognized,⁴⁵ but a resolution authorizing a certain officer to confess judgment does not authorize him to waive the issuance and service of a summons or to enter a voluntary appearance.⁴⁶

§ 2206. Appearance and Representation by Attorney

The corporation counsel or attorney has the authority and duty to conduct litigation involving the municipal corporation or an agency thereof, and, in the conduct of litigation, the official attorney has the same power to act for the municipality as an attorney for a private person.

The corporation counsel or attorney is generally a municipal officer, as discussed supra § 695, and has the authority and duty to conduct litigation in-

feyville, 118 P.2d 619, 154 Kan 346.

28. U.S.—Ringling v. Hempstead, Tex., 193 F. 596, 113 C.C.A. 464.
Iowa.—Rankin v. Charlton, 139 N.W. 560, 141 N.W. 424, 160 Iowa 265.
44 C.J. p 1476 note 50.

Appearance by filing answer

Municipal corporation, when sued without issuance and service of summons, may file answer in defense, thereby entering its appearance.—Faught v. City of Sapulpa, 292 P. 15, 145 Okl. 164.

29. Okl.—City of Norman v. Lewis, 69 P.2d 377, 180 Okl. 344.

Waiver by appearance

U.S.—Kansas City, Mo., v. Fairfax Drainage Dist. of Wyandotte County, Kan., C.C.A.Kan., 34 F.2d 357, certiorari denied 50 S.Ct. 237, 281 U.S. 722, 74 L.Ed. 1140.

Ga.—City Council of Augusta v. Diseker, 189 S.E. 601, 54 Ga.App. 801.

30. Kan.—North Lawrence v. Hoysradt, 6 Kan. 170.

31. Kan.—North Lawrence v. Hoysradt, supra.
44 C.J. p 1476 note 52.

32. Neb.—Chicago, etc., R. Co. v. Hitchcock County, 84 N.W. 97, 60 Neb. 722.

33. Neb.—Chicago, etc., R. Co. v. Hitchcock County, supra.

34. Okl.—Oklahoma City v. McWilliams, 236 P. 417, 108 Okl. 268.

35. Okl.—Faught v. City of Sapulpa, 292 P. 15, 145 Okl. 164.

36. Ill.—People v. Jones, 98 N.E. 962, 254 Ill. 521.

37. Okl.—Faught v. City of Sapulpa, 292 P. 15, 145 Okl. 164.

38. Okl.—Faught v. City of Sapulpa, supra.

39. Md.—Ireton v. Baltimore, 61 Md 432.

40. Mo.—State v. Hackmann, 229 S. W. 1082, 287 Mo 156.

41. U.S.—Ringling v. Hempstead, Tex., 193 F. 596, 113 C.C.A. 464.

42. Neb.—Chicago, etc., R. Co. v. Hitchcock County, 84 N.W. 97, 60 Neb. 722.

Okl.—Oklahoma City v. McWilliams, 236 P. 417, 108 Okl. 268.

43. Neb.—Chicago, etc., R. Co. v. Hitchcock County, 84 N.W. 97, 60 Neb. 722.

44. Md.—Dugan v. Baltimore, 16 A. 501, 70 Md. 1.

44 C.J. p 1476 note 62.

45. Iowa.—Rankin v. Charlton, 139 N.W. 560, 141 N.W. 424, 160 Iowa 265.

44 C.J. p 1476 note 63.

46. Neb.—Chicago, etc., R. Co. v. Hitchcock County, 84 N.W. 97, 60 Neb. 722.

volving the municipal corporation⁴⁷ or an agency thereof.⁴⁸ A charter provision that the corporation counsel may, in his discretion, appear in any action against any officer employed by the city by reason of any acts done while in the performance of his duty by such officer, whenever such appearance is requested by the head of the department or bureau by which the officer is employed, invests the head of such department or bureau with discretion to determine whether the action is prima facie founded on an act done by defendant while in the performance of his duty, and such determination, followed by a request to the corporation counsel to appear and defend, is not subject to judicial review.⁴⁹ However, under a charter providing that the corporation counsel shall be the attorney for the city, and each and every officer, and shall conduct all the law business in which the city is interested, except as otherwise provided, whether such business is in charge of a single officer or board, and that he shall be the legal adviser of the mayor, municipal boards, and officers, and shall furnish them such advice and legal assistance as may be required, but prohibiting the corporation counsel from acting in any merely private litigation, it has been

held that the law business in which the municipality is interested should be construed to mean a legal, and not a speculative, interest, and that the charter does not authorize the corporation counsel to appear for and defend a policeman sued for a willful assault in making an arrest.⁵⁰

The corporation counsel represents the corporation as a whole and not merely the municipal legislative body.⁵¹ However, the right of the governing body to control his actions in ordinary civil suits which affect the corporation as an individual or which relate to its business affairs has been recognized,⁵² but this right has been denied where the litigation relates to matters of police regulations and affects the public generally.⁵³ In the conduct of litigation, the official attorney has the same power to act for the municipality as an attorney for a private individual or corporation,⁵⁴ but ordinarily he has no greater rights in this respect⁵⁵ unless the charter under which he is elected or appointed confers such rights.⁵⁶ Unless the attorney has expressly been granted authority with respect thereto, he has no authority to surrender the subject matter of the cause of action,⁵⁷ and it has been held that he

47. *Ariz.*—*State Consol. Pub. Co. v. Hill*, 3 P.2d 525, 39 *Ariz.* 21, rehearing denied and modified on other grounds 4 P.2d 668, 39 *Ariz.* 163.

Ky.—*City of Hickman v. First Nat. Bank in City & State of N. Y.*, 211 S.W.2d 801.

N.Y.—*Kay v. Board of Higher Education of City of New York*, 20 N.Y.S.2d 898, 260 App.Div. 9, appeal denied 23 N.Y.S.2d 479, 260 App.Div. 849, and 24 N.Y.S.2d 986, 260 App.Div. 924, motion denied 25 N.Y.S.2d 792, 260 App.Div. 912.

Tex.—*Chrestman v. Tompkins*, Civ. App., 5 S.W.2d 257, error refused. 44 C.J. p 1477 note 67.

Appearance by official counsel as waiving objections as to service of process see supra § 2205.

Authority of official counsel generally see supra § 695.

48. *Cal.*—*Denman v. Webster*, 70 P. 1063, 7 *Cal Unrep.* 65.

Duty and power of official counsel to act for municipal boards and officers generally see supra § 695.

Power conferred by ordinance

City ordinances, declaring the corporation counsel, to be head of the law department, and conferring authority on him and his assistants to superintend and conduct all the law business of the city, unless in violation of some valid statute, are broad enough and specific enough to make it his duty to conduct legal proceedings instituted by a municipal board subject to control and direction by

the board.—*People v. Faherty*, 137 N.E. 506, 306 *Ill.* 519.

School district

City held not legally interested in the litigation of a school district within a charter provision requiring the city attorney to assist in suits in which the city is legally interested.—*Ward v. San Diego School Dist.*, 265 P. 821, 203 *Cal.* 712.

49. N.Y.—*Briggs v. Lahey*, 91 N.Y.S. 576, 101 App.Div. 136.

43 C.J. p 886 note 21.

Judge of court "in and for" a city held not an officer in the service of the city whom the city attorney in his discretion may represent.—*Ledwith v. Rosalsky*, 155 N.E. 688, 244 N.Y. 406, motion denied 157 N.E. 858, 245 N.Y. 563.

50. N.Y.—*Donahue v. Keeshan*, 87 N.Y.S. 144, 91 App.Div. 602.

51. N.Y.—*Kay v. Board of Higher Education of City of New York*, 20 N.Y.S.2d 898, 260 App.Div. 9, appeal denied 23 N.Y.S.2d 479, 260 App.Div. 849, and 24 N.Y.S.2d 986, 260 App.Div. 924, motion denied 25 N.Y.S.2d 792, 260 App.Div. 912.—*Lowber v. New York*, 5 *Abb.Pr.* 325, modified on other grounds 28 *Barb.* 262.

52. N.H.—*Portsmouth v. New Hampshire Nat. Bank*, 83 A. 459, 76 N.H. 577.

44 C.J. p 1477 note 68.

53. *Ill.*—*Flynn v. Springfield*, 120 *Ill.App.* 266.

44 C.J. p 1477 note 69.

54. *Pa.*—*Pennsylvania R. Co. v. City of Pittsburgh*, 6 A.2d 907, 335 *Pa.* 449.

44 C.J. p 1477 note 72.

Power to bind municipality generally see supra § 695.

Notice imputed to city

Where city solicitor has full authority to act for the city and all its departments, the city cannot claim that it was without knowledge of the filing of an account in a decedent's estate where it was represented at the audit thereof by an assistant city solicitor who entered an appearance for the city solicitor, even though the assistant city solicitor was present to prosecute one particular claim and the city's claim of lack of notice is in respect of another claim, of which, however, the city solicitor's office was fully cognizant.—*In re Kline's Estate*, 46 *Pa.Dist. & Co.* 142.

Power to determine defense

It has been held that the corporation counsel has the power to determine the nature of the defense which shall be interposed to an action brought on a claim against the city.—*Bush v. O'Brien*, 58 N.E. 106, 164 N.Y. 205.

55. N.C.—*Town of Bath v. Norman*, 39 S.E.2d 363, 226 N.C. 502.

56. N.Y.—*Bush v. O'Brien*, 58 N.E. 106, 164 N.Y. 205.

57. N.C.—*Town of Bath v. Norman*, 39 S.E.2d 363, 226 N.C. 502.

cannot waive the right of the city to appeal.⁵⁸ In the conduct of litigation the official attorney may be required to perform mandatory statutory duties.⁵⁹

Representation by other than official counsel and substitution. Counsel other than the official counsel or attorney may represent the municipality⁶⁰ with the consent of the official counsel,⁶¹ unless it is otherwise provided by statute or charter provision.⁶² The power of the official counsel, in the absence of a statute or ordinance to the contrary, to delegate his authority to another has been recognized,⁶³ but under some statutes his right to give an effectual consent to the substitution of other counsel has been denied.⁶⁴ A statute or charter provision barring representation of the municipality or an agency thereof by counsel other than the official counsel or attorney is subject to the express exceptions contained therein⁶⁵ and such exceptions as are necessarily implied,⁶⁶ as where fraud, collusion, or corruption is charged with respect to the doing or not doing of an act by the official attorney⁶⁷ or where the official attorney is called on to represent conflicting interests or is otherwise disqualified.⁶⁸ Under general rules, a formal substitution of attorneys has been held necessary where a change of attor-

neys by a municipal corporation is intended.⁶⁹

Authority to institute proceedings. While it has been broadly stated that it is the duty of the municipal attorney to institute proceedings for the recovery of municipal funds unlawfully diverted, paid out, or embezzled,⁷⁰ and while under some statutes the power and duty to institute proceedings on behalf of the corporation in certain specified cases is imposed on him,⁷¹ in the absence of due authorization it has been held that the official counsel has no authority to institute actions on behalf of the corporation.⁷² There is authority for the view that if a corporation counsel brings an action, although not directed by the mayor as required by the charter, defendant cannot take advantage of the lack of authority.⁷³

Presumption as to authority. In the absence of any showing to the contrary it will be presumed that a municipal attorney was authorized to appear on behalf of the municipal corporation⁷⁴ in bringing an action,⁷⁵ or in defending it.⁷⁶ Moreover, a presumption in favor of the authority of an attorney other than the law officer to bring an action may be indulged.⁷⁷

Authority to confess judgment see *infra* § 2211.

Compromise and settlement of pending action by municipal attorney see *supra* § 2197.

Municipality held estopped to deny authority of solicitor to consent to verdict against it—*Ervin v. City of Pittsburgh*, 14 A.2d 297, 339 Pa 241.

58. Ill.—*O'Neill v. Chicago*, 169 Ill. App. 546.

59. Validity of judgment

In an action by a city board to recover illegal expenditures, the failure of the city law director to cooperate with the attorney general and to perform the mandatory statutory duties resting on him to notify the attorney general of the filing of the action, keep him informed of its progress, and to submit the final judgment to him, did not destroy the validity of a judgment rendered against the city board in the absence of a showing of collusion on the part of the law director as counsel. —*Lynch v. Board of Education of City School Dist. of City of Lakewood*, 156 N.E. 188, 116 Ohio St. 361.

60. Ill.—*Indiana Harbor Belt R. Co. v. Calumet City*, 63 N.E.2d 369, 391 Ill. 280.

44 C.J. p 1477 note 76.

61. N.Y.—*New York v. Exch. F. Ins. Co.*, 22 N.Y.Super. 424.

44 C.J. p 1477 note 77.

Only city attorney or another authorized by him could confer jurisdiction by appearance, under charter giving city attorney sole authority over city's litigation, and city attorney could not divest himself of authority over action against city.—*Walters v. Dock Commission of City of Portland*, 270 P. 778, 126 Or. 487.

62. N.J.—*Hoxsey v. Paterson*, 40 N. J. Law 186.

Employment of associate counsel is not barred by charter provision imposing on city counsel duty to defend suits against city.—*Hoxsey v. Paterson*, *supra*.

63. N.Y.—*New York v. Exch. F. Ins. Co.*, 9 Abb.Pr. 243 note, 17 How.Pr. 380.

His general partner, it has been held, cannot appear for the city without special authority.—*Wilcox v. Clement*, 4 Den. (N.Y.) 160.

64. N.J.—*Hoxsey v. Paterson*, 40 N. J. Law 186.

65. N.Y.—*Kay v. Board of Higher Education of City of New York*, 20 N.Y.S.2d 898, 260 App.Div. 9, appeal denied 23 N.Y.S.2d 479, 260 App.Div. 849, and 24 N.Y.S.2d 986, 260 App.Div. 924, motion denied 25 N.Y.S.2d 792, 260 App.Div. 912.

66. N.Y.—*Kay v. Board of Higher Education of City of New York*, *supra*.

67. N.Y.—*Kay v. Board of Higher Education of City of New York*, *supra*.

68. N.Y.—*Kay v. Board of Higher Education of City of New York*, *supra*.

69. N.Y.—*Parker v. Williamsburgh*, 13 How.Pr. 250.

70. Ariz.—*State Consol. Pub. Co. v. Hill*, 3 P.2d 525, 39 Ariz. 21, rehearing denied and modified on other grounds 4 P.2d 668, 39 Ariz. 163.

71. Ohio.—*Maxwell v. Ohio Fuel Gas Co.*, 22 N.E.2d 639, 61 Ohio App. 394.

44 C.J. p 1477 note 86.

Liberal construction

Such statutes are remedial in character and consequently subject to a liberal construction.—*Maxwell v. Ohio Fuel Gas Co.*, *supra*.

72. Pa.—*Lebanon v. Lebanon, etc., St. R. Co.*, 1 Pa.Dist. 563.

44 C.J. p 1477 note 85.

Authority to institute actions generally see *supra* § 2187.

73. N.Y.—*Syracuse v. Roscoe*, 123 N.Y.S. 403, 66 Misc. 317.

74. Ind.—*Neff v. City of Indianapolis*, 198 N.E. 328, 209 Ind. 203.

44 C.J. p 1477 note 88.

75. Tex.—*O'Connor v. Laredo, Civ. App.*, 167 S.W. 1091.

44 C.J. p 1477 note 89.

76. Iowa.—*Rankin v. Chariton*, 139 N.W. 560, 141 N.W. 424, 160 Iowa 265.

77. N.Y.—*New York v. Exchange F. Ins. Co.*, 3 Abb.Dec. 261, 3 Keyes

§ 2207. Pleading

- a. In general
- b. Existence and character of municipality and incidents of incorporation
- c. Designation and description of parties
- d. Complaint or bill
- e. Plea, answer, and affidavit of defense
- f. Reply
- g. Demurrer
- h. Amended and supplemental pleadings
- i. Signature and verification
- j. Objections, waiver, and cure
- k. Issues, proof, and variance

a. In General

In the absence of statutes providing otherwise, the general rules of pleading apply in an action to which a municipal corporation is a party.

In the absence of statutes providing otherwise, the general rules of pleading apply in an action to which a municipal corporation is a party.⁷⁸

b. Existence and Character of Municipality and Incidents of Incorporation

- (1) In general
- (2) Admissions
- (3) Plea or answer raising issue as to corporate character or existence

(1) In General

Where the court cannot take judicial notice of the fact of incorporation, the pleading must in some manner show corporate existence.

Where the statute under which a municipal corporation is incorporated is judicially noticed, it is not necessary to allege that it is a municipal corporation.⁷⁹ However, where the court cannot take

judicial notice of the fact of incorporation, the pleading must in some manner show corporate existence.⁸⁰ There is authority for the view that, where the cause of action depends on the statutory class to which a municipality belongs, the complaint should designate the class,⁸¹ but where the statute requires the court to take judicial notice of the class to which a corporate party belongs it is not necessary to plead that fact.⁸²

The fact that an allegation as to the organization and the existence of the corporation is not direct is not necessarily fatal,⁸³ and particular descriptions of a party have been construed as amounting to an allegation that it is a municipal corporation⁸⁴ of a particular character.⁸⁵ A distinct averment of the existence of a municipal corporation is sufficient,⁸⁶ and it is not necessary specifically to allege compliance with each step in the process of organization.⁸⁷ An allegation by a city that it is a municipal corporation, and has been for a specified number of years, does not fix the date of its incorporation or preclude it from proving the true date.⁸⁸ An averment that a particular municipal board was "duly appointed, organized and acting as such under the laws providing for such board" is not subject to the objection that it does not aver that the board was a legally constituted one.⁸⁹

(2) Admissions

Where the municipal corporation appears and makes an affirmative defense, it admits its corporate existence.

Where the municipal corporation appears and makes an affirmative defense, it admits its corporate existence.⁹⁰ There is authority for the view that the fact that an action is brought against a municipality in its corporate name does not necessarily admit the legal existence of defendant.⁹¹ Defendant in an action by a municipality admits the

486, 3 Transcr.A. 206, 34 How.Pr. 103, affirmed 22 N.Y.Super. 424.

78. Cal.—Hunt v. San Francisco, 11 Cal. 250.

Ill.—McGovern v. Chicago, 202 Ill. App. 139, affirmed 118 N.E. 3, 281 Ill. 264.

Particular action or proceeding in which municipal corporation involved:

By taxpayer see supra § 2164.

For:

Compensation of municipal officer or agent in general see supra §§ 540, 729.

Damages for injury from public improvement see supra § 1285.

Tort see supra §§ 933-937.

On:

Contract in general see supra §§ 1024, 1025.

Municipal bond see supra § 1975
Public improvement contract see supra § 1211.

79. Wis.—Smith v. Janesville, 9 N. W. 789, 52 Wis. 680.
44 C.J. p 1478 note 98.

80. Iowa.—Hard v. Decorah, 43 Iowa 313.
44 C.J. p 1478 note 99.

81. Cal.—Prichett v. Stanialaus Co., 14 P. 795, 78 Cal. 310.

82. Mo.—Brookfield v. Tooev, 43 S. W. 387, 141 Mo. 619—Savannah v. Dickey, 33 Mo.App. 522.

83. Kan.—Lewis v. Eskridge, 34 P. 892, 52 Kan. 282.
44 C.J. p 1478 note 3.

84. Mont.—Drew v. Butte, 119 P. 279, 44 Mont. 124.
44 C.J. p 1478 note 4.

85. Mich.—Clark v. North Muskegon, 50 N.W. 254, 88 Mich. 308.
44 C.J. p 1478 note 5.

86. Vt.—Crockett v. Barre, 29 A. 147, 66 Vt. 269.

87. Vt.—Crockett v. Barre, supra.
44 C.J. p 1478 note 7.

88. Tex.—Eustis v. Henrietta, Civ. App., 37 S.W. 632.

89. Ind.—Huntington v. Boyd, 57 N. E. 939, 25 Ind.App. 250.

90. Kan.—Erle v. Phelps, 42 P. 336, 56 Kan. 135.
Mo.—Eubank v. Edina, 88 Mo. 650.

91. W.Va.—Hornbrook v. Elm Grove, 21 S.E. 851, 40 W.Va. 543, 28 L.R.A. 416.

corporate existence of plaintiff by setting up a cross demand against plaintiff in its corporate name, and may not question the existence of the corporation.⁹²

(3) Plea or Answer Raising Issue as to Corporate Character or Existence

Although there is authority to the contrary, it has been held that an issue as to corporate existence of a plaintiff municipal corporation is not raised by a plea of the general issue, and that a bare denial will not put in issue the corporate character of a defendant municipal corporation.

It has been held that an issue as to the corporate existence of a plaintiff municipal corporation is not raised by a plea of the general issue,⁹³ but the rule is not universal⁹⁴ and it has been recognized that the question is more or less affected by the provisions of the different codes.⁹⁵ A statute which requires the question as to corporate existence to be raised more specifically in actions by corporations, as discussed in Corporations § 1327, has been construed as applying to municipal corporations.⁹⁶ Defendant may by the plea of nul tiel corporation raise the question as to the corporate existence of plaintiff municipal corporation.⁹⁷

The rule has been laid down that a bare denial will not put in issue the corporate character of a defendant municipal corporation,⁹⁸ but defendant may, when sued as a corporation, raise the question as to corporate existence by a proper plea in abatement.⁹⁹ A plea which in one part denies corporate existence and in another part amounts to an admission of such existence is ineffective.¹

c. Designation and Description of Parties

The correct name of the corporate defendant should be used in the pleading, and, where an action is brought against officers of a municipal corporation as such, the word "as" should precede their official designation.

The correct corporate name of the corporate defendant should be used in the pleading,² and there should be a compliance with a statutory provision that a particular municipal department shall be sued in a specified name.³ Where an action is brought against officers of a municipality as such, the word "as" should precede their official designation.⁴ A mistake in the caption of the complaint in an action against municipal officers, as to their official designations, is not fatal if the allegations in the body of the complaint show with sufficient certainty the real capacity in which they are parties to the action.⁵ The complaint in an action by a corporation need not show the names of the individuals filling the offices of mayor and councilmen.⁶

Misnomer in obligation sued on. In an action by a municipal corporation on an obligation running to it in a wrong name, the complaint should aver that defendant bound himself to plaintiff by the name contained in such obligation.⁷

d. Complaint or Bill

- (1) In general
- (2) Capacity and authority of municipality, officer, or board
- (3) Presentation of claim or demand or giving notice

(1) In General

The complaint must allege all the facts on which liability may be predicated in an action by or against a municipal corporation.

Under general rules the complaint must allege all the facts on which liability may be predicated in an action by⁸ or against⁹ a municipal corporation. Where an action is brought on a claim against the original municipality, but after its con-

92. Wis.—McKnight v. Mineral Point, 1 Pinn. 99.

93. Me.—Orono v. Wedgewood, 44 Me. 49, 69 Am.D. 81.
44 C.J. p 1478 note 14.

94. Wis.—McKnight v. Mineral Point, 1 Pinn. 99.
44 C.J. p 1478 note 15.

95. If allegation of corporate existence is essential to cause of action, a general denial requires plaintiff to prove corporate existence under code provision which was manifestly intended by legislature to require proof of every material allegation under general denial—Denver v. Spokane Falls, 34 P. 926, 7 Wash. 226.

96. Mich.—Smith v. Adrian, 1 Mich. 495.
44 C.J. p 1478 note 18.

97. Ill.—Lewiston v. Proctor, 27 Ill. 414.

98. Iowa.—Stier v. Oskaloosa, 41 Iowa 353.

99. Wis.—Winneconne v. Winneconne, 86 N.W. 589, 111 Wis. 10.
44 C.J. p 1479 note 21.

1. Ind.—Connersville v. Wadleigh, 6 Blackf. 297.
44 C.J. p 1479 note 22.

2. Mo.—Barker v. Phelps, 39 Mo. App 288.
44 C.J. p 1479 note 24.
Use of corporate name in general see supra § 2194.

3. N.Y.—People v. Emerson, 169 N.Y.S. 297, 102 Misc. 183.
44 C.J. p 1479 note 25.

4. N.Y.—Bennett v. Whitney, 94 N.Y. 302.
44 C.J. p 1479 note 26.
Actions in name of corporate officers in general see supra § 2195.

5. Cal.—Owens v. Dudley, 122 P. 1087, 162 Cal. 422.

6. Ala.—Powers v. Decatur, 54 Ala. 214.

7. Ind.—Ft. Wayne v. Jackson, 7 Blackf. 36.

8. Colo.—Denver v. Republican Pub. Co., 155 P. 311, 60 Colo. 571.
44 C.J. p 1479 note 32.

Petition alleging a fraudulent conspiracy to pay public funds in a manner contrary to statute was held to state cause of action for recovery of such money.—Kansas City v. Halvorson, 177 S.W.2d 495, 352 Mo. 280.

9. U.S.—Reed v. City of Bartlesville, Okl., C.C.A.Okl., 33 F.2d 36.
Ga.—City of Hogansville v. Farrell Heating & Plumbing Co., 132 S.E. 436, 161 Ga. 780.

Tex.—City of Houston v. Chapman, 123 S.W.2d 652, 132 Tex. 443.
44 C.J. p 1479 note 33.

solidation with another municipality, the complaint must state facts showing that the cause of action accrued against the original municipality prior to its consolidation.¹⁰ Under general rules it has been held that plaintiff need not allege facts to show that his cause of action against a municipality is not barred by a statute of limitations.¹¹

Funds available and character of indebtedness.

While the rule has been laid down that it is not necessary to allege the amount in a fund from which the claim sued on is payable,¹² a complaint which shows that the debt on which the action is based was illegally contracted has been held insufficient.¹³

Venue. The venue is sufficiently disclosed by plaintiff's pleading where the action is entitled in a court of a particular county and in the body of the pleading defendant municipality, in which the facts constituting the cause of action occurred, is stated to be in such county.¹⁴

(2) Capacity and Authority of Municipality, Officer, or Board

It is usually held that where judicial notice is taken of the statute under which a municipal corporation is incorporated and of its powers, it is not necessary for it specifically to allege that it has legal power to sue, nor is it necessary that other corporate powers should be pleaded.

While there is authority for the view that, where the right of action against a municipal corporation depends on whether certain acts are within the scope of its corporate powers, facts from which the conclusion that the particular power exists may be

drawn should be alleged,¹⁵ it is not always necessary for the corporation to show in its complaint that the transaction on which it bases its cause of action was within its powers.¹⁶ Moreover, it is usually held that, where judicial notice is taken of the statute under which a municipal corporation is incorporated and of its powers, it is not necessary for it specifically to allege that it has legal capacity to sue,¹⁷ nor is it necessary that other corporate powers should be pleaded in the complaint in an action by¹⁸ or against¹⁹ the municipality. Where an action is brought by the proper officer in the name of the municipal corporation, it is not necessary in the first instance to plead that the corporation authorized the bringing of the action.²⁰

(3) Presentation of Claim or Demand or Giving Notice

Where presentation of a claim or demand or giving notice, or rejection, is a condition precedent to the right of action or to the recovery of costs, performance of such condition or a waiver, or excuse for nonperformance, must be alleged in the complaint.

In accordance with the general rule, where presentation of a claim or demand or giving notice, or rejection, is a condition precedent to the right of action, as discussed supra § 2199, or to the recovery of costs, as discussed infra § 2214, presentation of a claim or giving notice²¹ within a specified time,²² and rejection or failure to adjust or to pay,²³ or a waiver, or excuse for nonperformance, of such conditions precedent,²⁴ must be alleged in the complaint. The complaint ordinarily should show notice

10. Minn.—Adams v. Minneapolis, 20 Minn. 484.

11. N.Y.—Arnold v. North Tarrytown, 122 N.Y.S. 92, 187 App.Div. 68, affirmed 96 N.E. 1109, 203 N.Y. 536—City of New York v. Seidman, 246 N.Y.S. 393, 138 Misc. 524.

12. Cal.—Marin Water, etc., Co. v. Sausalito, 143 P. 767, 168 Cal. 587. Fund out of which judgment payable see infra § 2211.

Lack of funds as defense to action based on contract see supra § 1024.

13. Ga.—Whigham v. Gulf Refining Co., 93 S.E. 238, 20 Ga.App. 427.

14. Md.—Guest v. Church Hill, 45 A. 882, 90 Md. 689.

15. Mo.—Mitchell v. Clinton, 12 S. W. 793, 99 Mo. 153.

16. Mo.—Weston v. Greene County Bank, App., 192 S.W. 126.

17. Wis.—Janesville v. Milwaukee, etc., R. Co., 7 Wis. 484.

18. Tex.—O'Connor v. Laredo, Civ. App., 167 S.W. 1091, 44 C.J. p 1480 note 46.

19. Tex.—Dwyer v. Brenham, 65 Tex. 526.

20. Neb.—Lincoln St. R. Co. v. Lincoln, 84 N.W. 802, 61 Neb. 109.

Authority of attorney

It is not necessary that the authority of an attorney to represent a plaintiff municipality shall appear on the face of a complaint.—Inhabitants of York Harbor Village Corporation v. Libby, 140 A. 382, 126 Me. 537—44 C.J. p 1480 note 49.

Board of councilmen

A complaint has been upheld as showing the capacity of a board of councilmen to sue.—Frankfort v. Capital Hotel Co., 224 S.W. 197, 188 Ky. 754.

21. Ala.—City of Birmingham v. Lynch, 197 So. 46, 29 Ala.App. 242, certiorari denied 197 So. 48, 240 Ala. 24.

N.Y.—City of New York v. Seidman, 246 N.Y.S. 393, 138 Misc. 524—Hawkins v. Oneida County, 38 N. Y.S.2d 844, affirmed 47 N.Y.S.2d 574, 267 App.Div. 547, motion denied 78 N.E.2d 350, 297 N.Y. 807,

reversed on other grounds 79 N.E. 2d 458, 297 N.Y. 393.

Pa.—Honan v. City of Scranton, Com.Pl., 48 Lack.Jur. 49, 38 Mun. L.R. 188.

44 C.J. p 1480 note 55.

22. Neb.—Hastings v. Foxworthy, 63 N.W. 955, 45 Neb. 676, 34 L.R.A. 321.

44 C.J. p 1480 note 56.

23. N.Y.—Kaplan v. City of Poughkeepsie, 18 N.E.2d 13, 279 N.Y. 153—Johannes v. City of New York, 12 N.Y.S.2d 430, 257 App.Div. 197, affirmed 24 N.E.2d 489, 281 N.Y. 825—Angelo v. City of New York, N.Y.Sup., 63 N.Y.S.2d 243, 186 Misc. 369—City of New York v. Seidman, N.Y.Sup., 246 N.Y.S. 393, 138 Misc. 524.

44 C.J. p 1480 note 57.

Allegation held insufficient

N.Y.—Johannes v. City of New York, 12 N.Y.S.2d 430, 257 App.Div. 197, affirmed 24 N.E.2d 489, 281 N.Y. 825.

44 C.J. p 1480 note 57 [a] (1), (2).

24. N.Y.—Winter v. Niagara Falls,

or presentation to the proper officer or body,²⁵ but it has been held that an allegation that a notice was served on defendant municipality is sufficient to permit proof that the service was on the proper officer.²⁶ Plaintiff is not required to set forth in his petition, or to attach thereto, a copy of the written claim or demand which he presented as a condition precedent to the action.²⁷

A statutory requirement that the moving papers shall show the presentation of a claim to a specified officer and his neglect or refusal to adjust or to pay within a specified time has been held not applicable to a claim against an independent board which has a corporate existence separate from the municipality.²⁸

Failure to present claim as "bar." It has been held that the complaint must show due presentation under a statute providing that failure to present the claim within a specified time shall be a bar to an action against the municipality,²⁹ but in construing a statute making the failure to present a claim within a specified time a bar to the claim it has been held that the complaint need not show presentation,³⁰ and that the failure to present should be set up by defendant corporation, as discussed *infra* subdivision e of this section, these different conclusions being based on different views as to whether such a statute creates a condition precedent, as discussed *supra* § 2199 c.

Itemization and verification. Where a statute providing for the presentation of a claim as a condition precedent requires that the claim shall be itemized³¹ or verified,³² compliance with such requirements should be alleged in the complaint.

Time for investigation, adjustment, or payment.

The complaint must show compliance with statutory provisions for a specified interval between presentation of the claim and the bringing of action or for a specified time after presentation for payment or rejection.³³

e. Plea, Answer, and Affidavit of Defense

- (1) In general
- (2) Noncompliance with requirement as to presentation of claim or giving notice
- (3) Form and language

(1) In General

New matter or affirmative defenses must be specifically pleaded in an action by or against a municipal corporation, and a statutory provision requiring an affidavit of defense to be filed with pleas in certain cases has been held to be binding on a municipal corporation, although municipalities are sometimes exempt by statute from filing such affidavits in certain cases.

Under general rules, new matter or affirmative defenses must be specially pleaded in an action by³⁴ or against³⁵ a municipal corporation. A statutory provision forbidding an extension of time to a corporation to answer or demur in certain specified actions, except on notice to plaintiff's attorney, has been held applicable to municipal corporations,³⁶ as has a statute authorizing a judgment by default in certain actions unless defendant corporation serves with its answer or demurrer a copy of an order directing the issues to be tried, as discussed *infra* § 2211.

Statute of limitations. Under the general rule, a special statute of limitations must be pleaded by defendant corporation in order that it may claim the benefit of it,³⁷ but a failure specifically to refer to a charter provision fixing a special period of lim-

82 N.E. 1101, 190 N.Y. 198, 123 Am.S.R. 540, 13 Ann.Cas. 486.

44 C.J. p 1480 note 58.

25. N.Y.—Watts v. New York, 117 N.Y.S. 612, 133 App.Div. 400—Ryan v. Schenectady, 154 N.Y.S. 890, 91 Misc. 296.

26. Mo.—Burnette v. St. Joseph, 87 S.W. 589, 112 Mo.App. 668.

27. Ga.—Augusta v. Marks, 52 S.E. 539, 124 Ga. 365—Columbus v. McDaniel, 45 S.E. 59, 117 Ga. 823.

28. N.Y.—People v. Craig, 133 N.E. 419, 232 N.Y. 125.

44 C.J. p 1481 note 74.

29. N.Y.—Winter v. Niagara Falls, 82 N.E. 1101, 190 N.Y. 198, 123 Am.S.R. 540, 13 Ann.Cas. 486.

44 C.J. p 1481 note 63.

30. Ala.—Town of Linden v. American-La France & Foamite Industries, 167 So. 548, 232 Ala. 167.

44 C.J. p 1481 note 64.

31. N.Y.—Commonwealth Water Co. v. Castleton, 183 N.Y.S. 753, 192 App.Div. 697.

Or.—Richardson v. Salem, 94 P. 34, 51 Or. 125.

32. N.Y.—Commonwealth Water Co. v. Castleton, 183 N.Y.S. 753, 192 App.Div. 697.

Or.—Richardson v. Salem, 94 P. 34, 51 Or. 125.

33. N.Y.—Casey v. New York, 111 N.E. 764, 217 N.Y. 192.

44 C.J. p 1481 note 72.

34. Tex.—O'Connor v. Laredo, Civ. App., 167 S.W. 1091.

44 C.J. p 1481 note 77.

Plea, answer, and affidavit of defense in action:

By taxpayer see *supra* § 2164.

For tort see *supra* § 935.

On:

Contract in general see *supra* § 1024.

Municipal bond see *supra* § 1975.

Municipal improvement contract see *supra* § 1211.

35. U.S.—New York v. Jersey City Third Nat. Bank, N.Y., 221 F. 175, 137 C.C.A. 75.

44 C.J. p 1481 note 78.

Violation of charter held sufficiently pleaded

N.Y.—Riverside Chemical Co. v. City of Niagara Falls, 55 N.Y.S.2d 446, 269 App.Div. 810.

36. N.Y.—Moran v. Long Island City, 5 N.E. 80, 101 N.Y. 439.

37. N.Y.—Arnold v. North Tarrytown, 122 N.Y.S. 92, 137 App.Div. 68, affirmed 96 N.E. 1109, 203 N.Y. 536.

44 C.J. p 1481 note 83.

Time to sue and limitations see *supra* § 2201.

itations in an action against a municipality is not fatal where sufficient facts are pleaded to indicate that the charter provision in question is relied on.³⁸

Affidavits of defense. A statutory provision requiring an affidavit of defense to be filed with pleas in certain cases has been held binding on a municipal corporation,³⁹ although municipalities are sometimes exempt by statute from filing affidavits of defense in certain cases.⁴⁰

(2) Noncompliance with Requirement as to Presentation of Claim or Giving Notice

Where a statute providing for the presentation of a claim does not create a condition precedent to the right of action, the defendant must raise the defense by proper pleading.

Where a statute providing for the presentation of a claim is construed as not creating a condition precedent to the right of action, as discussed supra § 2199, defendant must raise the defense by proper pleading.⁴¹ It has been held that in such case noncompliance must specifically be pleaded;⁴² but there is authority for the view that failure to present can be shown under the plea of the general issue, as discussed infra subdivision k of this section. Where presentation of a claim or giving notice is a condition precedent, compliance with the statute must be pleaded by plaintiff, as discussed supra subdivision d (3) of this section, it is not necessary for defendant corporation specifically to set up noncompliance in his answer,⁴³ and it may by demurrer take advantage of the failure of plaintiff properly to plead compliance, as discussed infra subdivision g of this section. In various cases in which plaintiff has alleged compliance with such conditions precedent, the answer of defendant has been held sufficient to raise an issue in this respect.⁴⁴ Where the pleadings of the municipality admit that

the proper municipal official had neglected and refused to make an adjustment or payment within the time allowed by law, and the municipality desires to rely on a stipulation of the parties to show that the action was prematurely commenced, it has been held that the special agreement so relied on should be pleaded as an affirmative defense.⁴⁵

(3) Form and Language

The rule which requires a defendant to answer positively as to facts alleged in a verified complaint which are presumably within his knowledge has been held to apply to municipal corporations, as has a statute permitting a denial of any knowledge or information sufficient to form a belief.

The rule under a statute which requires a defendant to answer positively as to the facts alleged in a verified complaint which are presumably within his knowledge has been held to apply to municipal corporations,⁴⁶ and in any event an answer that defendant corporation has no knowledge or information in respect of certain allegations and therefore denies them is insufficient where such a denial is not recognized by the statute.⁴⁷ Under other statutes, however, which permit a denial of "any knowledge or information sufficient to form a belief," it has been held that a defendant corporation may make such a denial of the allegation of the complaint that a claim required as a condition precedent was duly presented;⁴⁸ but, in respect of an individual defendant in an action by a municipality, the rule has been laid down that such a denial as to the truth of allegations which relate to matters of public record, open by law to public inspection and with knowledge of which defendant is chargeable by law, is insufficient,⁴⁹ although there is authority for the view that this rule does not in every case prevent an individual defendant from using this form of denial of allegations with respect to matters of public record.⁵⁰

38. Ky.—Covington v. Hoadley, 83 Ky. 444.

39. Ill.—McGovern v. Chicago, 202 Ill.App. 139, affirmed 118 N.E. 3, 281 Ill. 264.

40. Pa.—Borough of Wilkinsburg v. School District, 148 A. 77, 298 Pa. 193—Jozefski v. City of Erie, Com. Pl., 22 Erie Co. 193.
44 C.J. p 1482 note 88.

Statute held suspended

Pa.—Stedman v. Borough of Shenandoah, Com.Pl., 43 Sch.Leg.Rec. 178, 61 York Leg.Rec. 149.

41. Ala.—Town of Linden v. American-La France & Foamite Industries, 167 So. 548, 232 Ala. 167.
44 C.J. p 1482 note 90.

42. Ala.—Huntsville v. Goodenrath, 68 So. 676, 13 Ala.App. 579.
44 C.J. p 1482 note 91.

43. N.Y.—Johannes v. City of New York, 12 N.Y.S.2d 430, 257 App. Div. 197, affirmed 24 N.E.2d 489, 281 N.Y. 825.

44 C.J. p 1482 note 95.

44. Cal.—Gelmann v. San Francisco Police Com'rs, 112 P. 553, 158 Cal. 748.

44 C.J. p 1482 note 97.

45. N.Y.—Di Bartolo v. City of New York, 56 N.E.2d 71, 293 N.Y. 114, motion denied 56 N.E.2d 749, 293 N.Y. 756.

Answer held sufficient

N.Y.—Angelo v. City of New York, 63 N.Y.S.2d 243, 186 Misc. 369.

46. Cal.—San Francisco Gas Co. v. San Francisco, 9 Cal. 453.

Denial of knowledge or information generally see the C.J.S. title Pleading § 149, also 49 C.J. p 263 note 58—p 267 note 96.

47. Cal.—San Francisco Gas Co. v. San Francisco, supra.

48. N.Y.—Mack Pav. Co. v. New York, 127 N.Y.S. 738, 142 App.Div. 702.

44 C.J. p 1482 note 4.

49. N.Y.—New York v. Matthews, 72 N.E. 629, 180 N.Y. 41.

50. N.Y.—New York v. Halsey, 116 N.Y.S. 947, 132 App.Div. 192.

f. Reply

It has been held that a municipal corporation need not file a reply to a set-off, counterclaim, or new matter contained in an affidavit of defense.

It has been held that a municipal corporation need not file a reply to a set-off, counterclaim, or new matter contained in an affidavit of defense, whether or not the new matter constitutes an affirmative defense.⁵¹

g. Demurrer

General rules as to demurrers apply in actions to which a municipal corporation is a party, and, if judicial notice is taken of the charter, questions as to municipal power may be raised by demurrer.

General rules as to demurrers apply in actions to which a municipal corporation is a party.⁵² If judicial notice is taken of the charter, the question whether certain action was within the municipal powers may be raised by demurrer.⁵³ A complaint which shows on its face that the debt on which it is based was illegally contracted is subject to demurrer.⁵⁴ However, it has been held that the alleged fact that the municipal attorney has not been duly authorized to bring the action is not ground for demurrer,⁵⁵ nor is the failure to join, as a party to an action against a municipality, a board which had completed its duties in connection with the transaction involved, ground for a general demurrer, since the defect is merely formal.⁵⁶

Defect in designation of parties. In some jurisdictions the failure of the complaint to use the correct name of a corporate defendant is ground for demurrer,⁵⁷ even though the demurrer is not interposed until after appearance and pleading.⁵⁸

Failure to show performance of condition precedent. Where presentation of claim or giving notice is a condition precedent to the right of action, as

discussed supra § 2199, a failure to allege performance of such a condition⁵⁹ within the time specified,⁶⁰ or an excuse for nonperformance,⁶¹ renders the complaint demurrable for failure to state facts sufficient to constitute a cause of action.⁶² A like rule applies to a failure to allege compliance with a statutory provision that no action shall be brought until the expiration of a specified time after the claim shall have been presented.⁶³ However, if one count of the complaint is based on a transaction as to which no claim need be presented, it is improper to sustain a demurrer on the ground of failure to present, even though other counts are subject to such objection.⁶⁴

h. Amended and Supplemental Pleadings

General rules as to the amendment of pleadings apply in actions to which a municipal corporation is a party, although it has been held that a municipality will not be so strictly held to promptness in asking for leave to amend as will an individual.

General rules as to the amendment of pleadings apply in actions to which a municipal corporation is a party.⁶⁵ Thus the right to amend the complaint so as to show compliance with a statutory requirement as to presentation of a claim or giving notice has been recognized or upheld where no allegation in this respect is made⁶⁶ or where the allegation is defective.⁶⁷ Likewise, the right of the trial court to permit an amendment adding an allegation that a certain board had unreasonably refused to audit and certify a claim has been recognized.⁶⁸ Where the court takes judicial notice of a municipal charter, it is proper to strike from the complaint as redundant matter recitations of provisions of the charter.⁶⁹ It has been held that a municipality will not be so strictly held to promptness in asking for leave to amend as will an individual.⁷⁰

51. Pa.—City of Philadelphia v. Holmes Electric Protective Co., 31 Pa. Dist. & Co. 206.

52. Colo.—Empire Land & Canal Co. v. Board of Com'rs of Rio Grande County, 40 P. 449, 21 Colo. 244.

53. Va.—Duncan v. Lynchburg, 34 S.E. 964, 48 L.R.A. 331. Judicial notice of municipal charters see Evidence § 35.

54. Ga.—Whigham v. Gulf Refining Co., 93 S.E. 238, 20 Ga.App. 427.

55. Wis.—Milwaukee v. Herman Zoehrlaut Leather Co., 90 N.W. 187, 114 Wis. 276.

56. Ky.—Simrall v. Covington, 29 S.W. 880, 16 Ky.L. 770. 44 C.J. p 1483 note 15.

57. Ga.—East Rome v. Rome, 58 S.E. 854, 129 Ga. 290—Dexter v. Gay, 42 S.E. 94, 115 Ga. 765.

Designation of parties see supra subdivision c of this section.

58. Ga.—Mayfield v. College Park, 92 S.E. 289, 19 Ga.App. 823.

59. Ala.—City of Birmingham v. Lynch, 197 So. 46, 29 Ala.App. 242, certiorari denied 197 So. 48, 240 Ala. 24.

44 C.J. p 1483 note 21.

60. N.C.—Dockery v. Hamlet, 78 S.E. 13, 162 N.C. 118.

44 C.J. p 1483 note 22.

61. N.Y.—Winter v. Niagara Falls, 82 N.E. 1101, 190 N.Y. 198—Jewell v. Ithaca, 76 N.Y.S. 126, 72 App. Div. 220.

62. Wis.—Daniels v. Racine, 74 N.W. 553, 98 Wis. 649.

44 C.J. p 1483 note 24.

63. N.Y.—Reining v. Buffalo, 6 N.E. 792, 102 N.Y. 308.

64. Wash.—Johnson v. Endicott, 211 P. 717, 123 Wash. 1.

65. N.C.—Dockery v. Hamlet, 78 S.E. 13, 162 N.C. 118.

66. N.Y.—Denair v. Brooklyn, 5 N.Y.S. 835. 43 C.J. p 1234 note 19 [d].

67. N.C.—Dockery v. Hamlet, 78 S.E. 13, 162 N.C. 118.

68. N.Y.—Davidson v. White Plains, 90 N.E. 825, 197 N.Y. 266.

69. Wis.—Dorch v. Chippewa County, 19 N.W. 79, 60 Wis. 227. Judicial notice of municipal charters see Evidence § 35.

70. N.Y.—Seaver v. New York, 7 Hun 331—Brooks v. New York, 12 Abb.N.Cas. 350—Greer v. New York, 1 Abb.Pr.N.S., 206.

Plaintiff protected against delay Where a city desired to amend its

Amendments as to parties. In some jurisdictions amendments are allowed to set out the proper corporate title,⁷¹ and a petition against the trustees of a municipality may be amended under the code so as to make the municipality itself a defendant where the issues are not thereby changed.⁷² In other jurisdictions a complaint in an action by⁷³ or against⁷⁴ a municipal corporation, in which the corporate name is incorrectly stated, is not subject to amendment, as the action is regarded as a nullity; but, where the municipal corporation is a necessary party defendant and the complaint properly includes, as defendants, certain municipal officers, an amendment designating defendant municipality in its proper corporate capacity is permissible,⁷⁵ as is one which adds the municipality in its proper corporate name.⁷⁶ An amendment, substituting a municipality as a party defendant where a statute imposed liability on such municipality for previously accruing liability of another municipality whose territory had been absorbed by the substituted municipality, has been permitted under the code;⁷⁷ but no formal substitution is necessary where a new municipal corporation is organized which bears the same name as a dissolved municipal corporation and includes substantially the same inhabitants and territory, as discussed supra § 2204; and the view has been taken that a mere change in the name of a municipal corporation does not require an alteration in the pleadings.⁷⁸

i. Signature and Verification

It has been held that the pleadings need not be signed by an officer of the municipal corporation, and under statutes so providing certain pleadings should be verified.

It has been held that the pleadings need not be signed by an officer of the municipal corporation.⁷⁹ Under a statute so providing, the complaint in an action against a municipality must be verified.⁸⁰

It has been held that a pleading of a municipality may be verified on information and belief by a member of the common council.⁸¹ Certain statutes dispensing with proof of incorporation and of corporate existence in the absence of an affidavit of denial or verified answer or plea have been held to apply to municipal corporations,⁸² as has a statute providing that no "person" shall be permitted to deny the execution of a written instrument except by verified plea.⁸³ Moreover, under statute, a failure of certain persons sued as municipal officers to deny under oath their character as such amounts to an admission, and no proof of their official character is required.⁸⁴ There is authority for the view that a plea by which it is desired to raise an issue as to the authority of the law officer to institute an action on behalf of the corporation should be verified.⁸⁵

Effect of answer not sworn to. It has been held that, where a case is submitted on bill and answer, the answer of a municipality, signed by its attorney in his official capacity, must be taken as true, although not sworn to.⁸⁶

j. Objections, Waiver, and Cure

General rules as to objections to pleadings and waiver thereof apply in actions involving municipal corporations.

General rules as to objections to pleadings and waiver thereof apply in actions involving municipal corporations.⁸⁷ Thus a defendant corporation loses its right to object to an improper designation of itself contained in the complaint by answering, going to trial, and permitting the rendition of judgment in the proper name.⁸⁸ It has been held that by failing to raise the objection by answer⁸⁹ or demurrer⁹⁰ defendant corporation does not lose its right to object to a complaint which fails to allege the giving of notice, or the lapse of a specified time between the

answer by introducing new matter which would compel plaintiff to re-notice the case for trial, and as a result set the hearing back on the calendar for a long period, the motion was granted on condition that the city agree to apply for a preference of the trial.—*Stemmler v. New York*, 61 N.Y.S. 403, 45 App.Div. 573.
 71. Pa.—*Wood v. City of Philadelphia*, 27 Pa. 502, 3 Cas. 502. 44 C.J. p 1483 note 35.
 72. Ky.—*Latonia v. Hopkins*, 47 S. W. 248, 104 Ky. 419, 20 Ky.L. 620.
 73. Ga.—*East Rome v. Rome*, 58 S. E. 854, 129 Ga. 290.
 74. Ga.—*White v. Forsyth*, 71 S.E. 1073, 136 Ga. 634.
 44 C.J. p 1483 note 38.
 75. Ga.—*White v. Forsyth*, supra.

76. Ga.—*Saunders v. Rainey*, 80 S. E. 305, 141 Ga. 77—*Gelders v. Fitzgerald*, 69 S.E. 569, 135 Ga. 400.
 77. Ala.—*Birmingham v. Darden*, 55 So. 1014, 1 Ala.App. 479.
 78. Cal.—*People v. San Francisco*, 21 Cal. 668.
 44 C.J. p 1483 note 44.
 79. Ill.—*Larrison v. Peoria, etc., R. Co.*, 77 Ill. 11.
 44 C.J. p 1484 note 46.
 80. N.C.—*Kalte v. City of Lexington*, 197 S.E. 691, 213 N.C. 779.
 81. U.S.—*Hitchcock v. Galveston*, C.C.Tex., 12 F.Cas.No.6,534, 3 Woods 287.
 82. Del.—*Downs v. Smyrna*, 45 A. 717, 18 Del. 132.
 44 C.J. p 1484 note 49.

83. Ill.—*Chicago v. Peck*, 63 N.E. 711, 195 Ill. 260.
 84. Ind.—*Hobart v. State*, 154 N.E. 384, 198 Ind. 574.
 85. Tex.—*O'Connor v. Laredo*, Civ. App., 167 S.W. 1091.
 86. U.S.—*Seligman v. Santa Rosa*, C.C.Cal., 81 F. 524.
 87. Okl.—*Kingfisher v. Pratt*, 43 P. 1068, 4 Okl. 284.
 88. Okl.—*Kingfisher v. Pratt*, supra.
 89. N.Y.—*Krall v. New York*, 60 N. Y.S. 661, 44 App.Div. 259.
 44 C.J. p 1484 note 57.
 90. Mich.—*Moulthrop v. Detroit*, 188 N.W. 433, 218 Mich. 464.
 44 C.J. p 1484 note 58.

presentation of claim and the commencement of action,⁹¹ where these matters are conditions precedent to the right of action as discussed supra § 2199. There is authority for the view that plaintiff by admission at the trial may lose the right to rely on defendant's failure to plead.⁹² It has been held that a complaint which fails to allege due presentation of a claim is not aided by a verdict in favor of plaintiff.⁹³ In accordance with the general rule, defects in the complaint may be cured by the answer.⁹⁴ The answer of the municipality, where it is indefinite and uncertain,⁹⁵ frivolous,⁹⁶ or sham,⁹⁷ is subject to the same procedure as in the case of the pleading of an individual.

k. Issues, Proof, and Variance

General rules as to issues, proof, and variance apply in an action to which a municipal corporation is a party.

General rules as to issues, proof, and variance apply in an action to which a municipal corporation is a party.⁹⁸ There is authority for the view that a general denial will put a plaintiff municipal corporation to its proof as to every allegation material to its cause of action,⁹⁹ and it has been held that defendant need not specifically aver want of authority of an alleged agent for a body politic legally equivalent to a municipal corporation, in order to raise an issue as to such agency.¹ Failure of plaintiff to plead the presentation of a claim or the giving of notice which is a condition precedent to his right of action, as discussed supra § 2199, or to his right to costs, infra § 2214, renders proof of such presentation inadmissible.² Under a general denial, defendant municipal corporation may show any fact which tends to negative any element of plaintiff's cause of

action which the latter was bound to prove in the first instance;³ and there is authority for the view that, under a plea of the general issue, a municipality may avail itself of exemption from suit on the ground that the act complained of involved the disbursement of the corporate revenue and was discretionary with the corporate authorities,⁴ and that under such a plea defendant may show a failure to present a claim where such failure is a defense to the action.⁵

Variance. Under the general rule, a material variance between the pleading and proof in an action by⁶ or against⁷ a municipality is fatal.

§ 2208. Evidence

General rules of evidence in civil actions ordinarily apply in actions to which a municipal corporation is a party.

General rules of evidence in civil actions ordinarily apply in actions to which a municipal corporation is a party.⁸

Presumptions. General rules as to presumptions in civil actions apply in actions to which a municipal corporation is a party.⁹ The presumption has been indulged that municipal officials properly performed their duties,¹⁰ that funds collected for any fiscal year were expended in payment of municipal demands which accrued during the year,¹¹ that a claim which was presented met the statutory requirements,¹² or that bills were properly audited when entered where such bills were entered as charges against a municipality.¹³

Burden of proof. General rules as to the burden of proof in civil actions ordinarily apply in actions

91. N.Y.—Thrall v. Cuba Village, 84 N.Y.S. 661, 88 App.Div. 410.

92. N.Y.—Rapp v. New York, 162 N.Y.S. 300, 176 App.Div. 155.

44 C.J. p 1484 note 62.

93. Or.—Philomath v. Ingle, 68 P. 803, 41 Or. 289.

94. U.S.—Putnam v. New Albany, C.C.Ind., 20 F.Cas.No.11,481, 4 Biss. 365.

95. N.Y.—New York Mut. Gas-light Co. v. New York, 49 How.Pr. 227.

96. N.Y.—New York Mut. Gas-light Co. v. New York, supra.

97. N.Y.—New York Mut. Gas-light Co. v. New York, supra.

98. Wash.—Denver v. Spokane Falls, 34 P. 926, 7 Wash. 226.

99. Wash.—Denver v. Spokane Falls, supra.

1. Conn.—Lucier v. Norfolk, 123 A. 711, 99 Conn. 686.

44 C.J. p 1484 note 74.

2. Iowa.—Pardey v. Mechanicsville, 70 N.W. 189, 101 Iowa 266.

44 C.J. p 1484 note 77.

3. N.Y.—Murtagh v. New York, 94 N.Y.S. 308, 106 App.Div. 98.

4. La.—Bennett v. New Orleans, 14 La.Ann. 120.

5. Mich.—Moulthrop v. Detroit, 188 N.W. 433, 218 Mich. 464—Clark v. Davidson, 76 N.W. 971, 118 Mich. 420.

6. Ind.—Ft. Wayne v. Jackson, 7 Blackf. 36.

44 C.J. p 1485 note 83.

7. Ala.—Columbiana v. Kelley, 55 So. 526, 172 Ala. 336.

8. Ill.—Trustees of Tp. No. 8 v. Lilly, 26 N.E.2d 489, 373 Ill. 431.

44 C.J. p 1485 note 87.

9. Ill.—Trustees of Schools of Tp. No. 8 v. Lilly, 26 N.E.2d 489, 373 Ill. 431.

Tex.—Leake v. Dallas, Civ.App., 197 S.W. 472.

Presumption as to authority of attorney to represent municipality see supra § 2206.

Presumptions from proved facts will be available to municipalities, but assumptions not based on proved facts are of no avail.—Moore v. Inhabitants of Town of Springfield, Me., 64 A.2d 569.

10. U.S.—Lovell v. First Nat. Bank, D.C.Ala., 15 F.Supp. 149.

Regularity of acts of officers in general see Evidence § 146.

11. Cal.—Hammond v. City of Burbank, 59 P.2d 495, 6 Cal.2d 646, appeal dismissed 57 S.Ct. 316, 299 U.S. 519, 81 L.Ed. 383.

12. N.Y.—Vermeule v. Corning, 174 N.Y.S. 220, 186 App.Div. 206, affirmed 130 N.E. 903, 230 N.Y. 585.

44 C.J. p 1485 note 91.

13. Mo.—St. Louis Gas Light Co. v. St. Louis, 84 Mo. 202, affirmed 11 Mo.App. 55.

44 C.J. p 1485 note 92.

to which a municipal corporation is a party.¹⁴ Thus plaintiff has the burden of proving those facts which are essential to recovery.¹⁵ Where these matters constitute conditions precedent, as discussed supra § 2199, plaintiff must prove presentation of a claim or giving notice¹⁶ within a specified time,¹⁷ the rejection of a claim or failure to adjust or to pay,¹⁸ the lapse of a specified time between presentation of a claim and the bringing of action or the lapse of the required time after presentation for payment or rejection,¹⁹ or an excuse for nonperformance of such conditions precedent,²⁰ provided the claim of performance is controverted.²¹

A defendant municipality has the burden of establishing affirmative defenses,²² as has defendant in an action brought by the municipality.²³

While it has been held that, where defendant has by proper plea raised an issue as to corporate existence, a plaintiff municipality must prove such existence,²⁴ where the court takes judicial notice of incorporation it is not necessary to prove incorporation,²⁵ although the rule is otherwise where the court cannot take judicial notice of incorporation.²⁶

Admissibility. Generally speaking, if the proffered evidence is competent, material, and relevant to the issues, it is admissible;²⁷ otherwise it is not.²⁸

Weight and sufficiency. General rules as to the weight and sufficiency of evidence in civil actions have been applied in actions to which a municipal corporation is a party, and under such rules it has been determined that particular evidence is sufficient²⁹ or insufficient³⁰ to support or require a particular finding or result.

§ 2209. Dismissal and Nonsuit

Where the presentation of claim or the giving of notice and rejection of claim is a condition precedent, the defendant may take advantage of the absence of allegation or proof of performance of such condition by motion to dismiss the complaint, and the failure of the complaint to use the correct name of a municipal corporation has been held ground for dismissal on demurrer.

Under general rules, where the presentation of claim or the giving of notice and rejection of the claim is a condition precedent as discussed supra § 2199, and must therefore be alleged and proved by plaintiff, supra §§ 2207, 2208, defendant may take advantage of the absence of such allegation or proof by motion to dismiss the complaint.³¹ The failure of the complaint to use the correct name of a defendant³² or plaintiff³³ municipal corporation has been held to constitute ground for dismissal on demurrer.

14. *Tex.*—Leake v. Dallas, Civ.App., 197 S.W. 472.

15. *Miss.*—City of Jackson v. Alabama & V. R. Co., 160 So. 602, 172 Miss. 528.

44 C.J. p 1485 note 96.

16. *Wis.*—Sowle v. Tomah, 51 N.W. 571, 81 Wis. 349.

44 C.J. p 1485 note 98

17. *Neb.*—Hastings v. Foxworthy, 63 N.W. 955, 45 Neb. 676, 34 L.R.A. 321.

44 C.J. p 1485 note 99.

18. *N.Y.*—Kaplan v. City of Poughkeepsie, 18 N.E.2d 13, 279 N.Y. 153.

44 C.J. p 1485 note 1.

19. *N.Y.*—Reining v. Buffalo, 6 N.E. 792, 102 N.Y. 308.

44 C.J. p 1485 note 2.

20. *N.Y.*—Angelo v. City of New York, 63 N.Y.S.2d 243, 186 Misc. 369.

44 C.J. p 1485 note 3.

21. *N.Y.*—Russell v. New York, 1 Daly 263.

Wis.—Sowle v. Tomah, 51 N.W. 571, 81 Wis. 349.

22. *Me.*—Moore v. Inhabitants of Town of Springfield, 64 A.2d 569.

44 C.J. p 1485 note 5.

Violation of debt limit

Municipalities which seek to escape liabilities, otherwise incurred

in good faith and within their corporate powers, on the ground that they thereby violated the debt limit provisions of the constitution, have burden of proving every essential fact to establish the bar and are held to strict proof of existence of necessary facts; and this is true notwithstanding the principle that one who contracts with a city or town, by which an indebtedness or liability is created, must at his peril take notice of its financial standing and satisfy himself as to whether its debt limit is or will thereby be exceeded. —*Moore v. Inhabitants of Town of Springfield*, supra.

23. *Pa.*—Chambersburg Borough v. Chambersburg Gas Co., 38 Pa.Super. 311.

44 C.J. p 1486 note 6

24. *Ill.*—Lewiston v. Proctor, 27 Ill. 414.

25. *Mo.*—Savannah v. Dickey, 83 Mo.App. 522.

Judicial notice of incorporation of municipality see Evidence § 35.

26. *Mo.*—Hopkins v. Kansas City, etc., R. Co., 79 Mo. 98.

27. *Iowa.*—Cedar Rapids Water Co. v. Cedar Rapids, 90 N.W. 746, 117 Iowa 250.

44 C.J. p 1486 note 15.

Invalidity of ordinance

(1) Evidence was admissible to

establish invalidity of appropriation ordinance for payment of claim, since ordinance was not final judicial act.—*City of Houston v. Chapman*, 123 S.W.2d 652, 132 Tex. 443

(2) Admissibility of evidence to prove ordinance generally see supra § 447.

28. *Ill.*—Chicago v. English, 54 N.E. 609, 180 Ill. 476.

44 C.J. p 1487 note 16.

29. *Ark.*—Incorporated Town of Ozark v. Ozark Water Co., 81 S.W.2d 920, 190 Ark. 872.

Cal.—City of Los Angeles v. Grace S. S. Co., 2 P.2d 401, 116 Cal.App. 237.

Mo.—Kansas City v. Halvorson, 177 S.W.2d 495, 352 Mo. 280.

Tex.—City of Houston v. Chapman, Civ.App., 145 S.W.2d 669, error dismissed, judgment correct.

44 C.J. p 1487 note 18.

30. *Or.*—National Fire Alarm Co. v. Portland, 117 P. 285, 59 Or. 409.

44 C.J. p 1487 note 19.

31. *N.Y.*—Kaplan v. City of Poughkeepsie, 18 N.E.2d 13, 279 N.Y. 153.

44 C.J. p 1487 note 24.

32. *Ga.*—Dexter v. Gay, 42 S.E. 94, 115 Ga. 765—Boon v. Jackson, 25 S.E. 518, 98 Ga. 490.

33. *Ga.*—East Rome v. Rome, 58 S.E. 854, 129 Ga. 290.

§ 2210. Trial

In accordance with the general rules governing trials in civil cases, in an action to which a municipal corporation is a party questions of fact should be submitted to the jury under proper instructions from the court.

Except where it is otherwise provided by statute,³⁴ general rules as to the trial of civil actions apply in actions to which a municipal corporation is a party.³⁵ Accordingly, in such an action, questions of law should be determined by the court,³⁶ and questions of fact should be submitted to the jury³⁷ under proper instructions from the court.³⁸ Thus the charge should not be misleading,³⁹ and should not invade the province of the jury.⁴⁰ Even though part of a charge in an action against a municipal corporation is not entirely accurate, if the charge as a whole fully and fairly submits the case to the jury the defect is not fatal.⁴¹ In applying general rules particular instructions have been approved, or held necessary or proper,⁴² or have been disapproved or held unnecessary or improper.⁴³

Verdict and findings. General rules as to the verdict and findings in civil actions apply in actions to which a municipal corporation is a party.⁴⁴ Where the fact that a claim has not been presented is by statute made a matter of defense, the denial of a motion by defendant to direct a verdict on the ground that plaintiff has not shown affirmatively that the claim was presented is proper.⁴⁵

§ 2211. Judgment or Decree

- a. In general
- b. Necessity for process
- c. Judgment by confession or consent
- d. Judgment by default

- e. Form and contents
- f. Lien, priority, and funds applicable
- g. Amending, opening, and vacating
- h. Satisfaction, settlement, and payment

a. In General

Except as modified by statute, general rules as to judgments or decrees ordinarily apply in actions to which a municipal corporation is a party.

Except as modified by statute,⁴⁶ general rules as to judgments or decrees ordinarily apply in actions to which a municipal corporation is a party.⁴⁷

Where a judgment against the city directs that a certified copy thereof be delivered to the city council, compliance therewith is not essential to the validity of the judgment or proceedings to enforce it.⁴⁸

Arrest of judgment. A failure of plaintiff to plead performance of a condition precedent as to giving notice has been held to be ground for arrest of judgment.⁴⁹

Interest. A statute providing that judgments bear interest has been held to apply to judgments against municipalities.⁵⁰

b. Necessity for Process

Unless the court has acquired jurisdiction by due service of process or by a waiver thereof, judgment against a municipal corporation is improper.

Under the general rule, unless the court has acquired jurisdiction by due service of process or by a waiver by appearance or otherwise, a judgment by default⁵¹ or other judgment⁵² against a municipal corporation is improper.

34. N.Y.—Lewenthal v. New York, 5 Lans. 532, 61 Barb. 511.

44 C.J. p 1487 note 30.

35. Ga.—Sheehan v. City Council of Augusta, 30 S.E.2d 502, 71 Ga.App. 233.

44 C.J. p 1488 note 32.

36. Miss.—Pass Christian v. Washington, 34 So. 225, 81 Miss. 470.

44 C.J. p 1488 note 34.

37. Ga.—Sheehan v. City Council of Augusta, 30 S.E.2d 502, 71 Ga.App. 233.

N.Y.—In re Marzen's Estate, 254 N.Y.S. 107, 234 App.Div. 869.

Tex.—City of Houston v. Chapman, 123 S.W.2d 652, 132 Tex. 443.

44 C.J. p 1488 note 35.

38. U.S.—Detroit v. Grummond, Mich., 121 F. 963, 58 C.C.A. 301.

39. U.S.—Detroit v. Grummond, supra.

40. Ind.—Teague v. Bloomington, 81 N.E. 103, 40 Ind.App. 68.

41. Ga.—Columbus v. McDaniel, 45 S.E. 59, 117 Ga. 823.

42. Iowa.—Cedar Rapids Water Co. v. Cedar Rapids, 90 N.W. 746, 117 Iowa 250.

44 C.J. p 1488 note 41.

43. Iowa.—Kemper v. Burlington, 47 N.W. 72, 81 Iowa 354.

44 C.J. p 1488 note 42.

44. N.Y.—Kramrath v. Albany, 28 N.E. 400, 127 N.Y. 575.

44 C.J. p 1488 note 44.

45. Mich.—Kenan v. Mt. Pleasant, 142 N.W. 1114, 176 Mich. 620.

46. Statute enacted as safeguard against rendition of judgments based on illegal claims against municipalities should be strictly followed by courts—State v. Kimbrell, 5 P.2d 366, 152 Okl. 239.

47. S.D.—Coolsaet v. City of Vebelen, 226 N.W. 726, 55 S.D. 485, 67 A.L.R. 1499.

Judgment in action:

For tort see supra § 946.

On municipal:

Bond see supra § 1977.

Improvement contract see supra § 1213.

Taxpayers' actions see supra §§ 2168-2170.

48. Ill.—Cairo v. Everett, 107 Ill. 75.

49. Iowa.—Pardey v. Mechanicsville, 70 N.W. 189, 101 Iowa 266.

50. Ala.—Jefferson County v. City of Birmingham, 178 So. 226, 235 Ala. 199—City of Birmingham v. Simmons, 132 So. 322, 222 Ala. 309, 74 A.L.R. 766.

51. Neb.—Chicago, etc., R. Co. v. Hitchcock County, 84 N.W. 97, 60 Neb. 722.

44 C.J. p 1489 note 58.

52. Okl.—State v. City of Tulsa, 5 P.2d 744, 153 Okl. 262—Murrell v. City of Sapulpa, 297 P. 241, 148 Okl. 16—Faught v. City of Sapulpa, 292 P. 15, 145 Okl. 164.

44 C.J. p 1489 note 59.

Waiver of process see supra § 2205.

c. Judgment by Confession or Consent

The right of a municipal corporation to confess or to consent to judgment or decree has been recognized.

General rules as to judgment by confession and by consent ordinarily apply in actions to which a municipal corporation is a party,⁵³ and in applying these rules the right of a municipal corporation to confess or to consent to judgment or decree has been recognized or upheld;⁵⁴ but where the court in which a judgment by consent is entered has no jurisdiction the judgment is invalid.⁵⁵ There must be an absence of collusion or fraud on the part of the municipal authorities who confess judgment against the municipality in order to render such judgment valid,⁵⁶ and it has been held that a consent judgment is void, or at least voidable, where it includes obligations which the officers giving the consent have no right to assume on behalf of the municipality.⁵⁷

Who may consent or confess. Under some statutes the governing body of the municipality has exclusive authority to confess judgment against the municipality.⁵⁸ In the absence of a controlling statute or proof of lack of authority, it has been held that attorneys representing the municipality may bind it by consent to a judgment or decree.⁵⁹ However, it has been held that an attorney representing the municipality is without authority to consent to a judgment which gives away the whole corpus of the controversy,⁶⁰ and under some statutes it has been held that the law officer acting alone has no

power to confess or to offer to confess judgment;⁶¹ but with the consent of the officer who has authority to settle claims against the municipality the law officer may make such offer.⁶²

d. Judgment by Default

The validity of judgments or decrees by default against municipal corporations has been recognized, but there is authority for the view that the failure of the legal officer of the municipal corporation to appear, resulting in a default judgment, will be more readily excused than default by counsel for an individual.

General rules as to judgments or decrees by default ordinarily apply in actions to which a municipal corporation is a party,⁶³ and in applying these rules the validity of judgments or decrees by default against municipal corporations has been recognized.⁶⁴ There is authority for the view that the failure of the legal officer of the municipal corporation to appear, whereby an order by default is rendered against the municipality, will be more readily excused than where the default is that of counsel for an individual.⁶⁵ A statute authorizing a judgment by default in certain actions unless defendant municipal corporation serves with its answer or demurrer a copy of an order directing the issues to be tried has been construed as applicable to municipal corporations.⁶⁶ It has been held that the mayor of a municipal corporation has no authority to permit plaintiff to take a judgment by default against the municipality in an action in which a summons has been served on the mayor.⁶⁷

53. S.D.—Coolsaet v. City of Veb-len, 226 N.W. 726, 55 S.D. 485, 67 A.L.R. 1499.

54. S.D.—Coolsaet v. City of Veb-len, *supra*.
44 C.J. p 1489 note 63.

55. Okl.—Oklahoma City v. McWilliams, 236 P. 417, 108 Okl. 268.
44 C.J. p 1489 note 64.

56. Okl.—Oklahoma City v. McWilliams, *supra*.

57. S.D.—Coolsaet v. City of Veb-len, 226 N.W. 726, 55 S.D. 485, 67 A.L.R. 1499.

Wash.—State v. De Mattos, 152 P. 721, 88 Wash. 35.

Moral obligation after verdict for city

Where city had been advised that claim was invalid because of failure to meet statutory requirements, and verdict had been directed for city after trial on the claim, but council voted to consent to judgment for part of claim on ground that city was morally obligated, the transaction was a gift, not a settlement of disputed claim and was beyond the

council's power.—Connor v. Morse, 20 N.E.2d 424, 303 Mass. 42.

58. Okl.—Oklahoma City v. McWilliams, 236 P. 417, 108 Okl. 268.
44 C.J. p 1489 note 67.

59. S.D.—Coolsaet v. City of Veb-len, 226 N.W. 726, 55 S.D. 485, 67 A.L.R. 1499.

Utah.—Salt Lake City v. Salt Lake Inv. Co., 134 P. 603, 43 Utah 181.

Evidence held insufficient

To warrant vacation of judgment entered on filing of an agreement for judgment signed by city attorney on ground that attorney was not authorized by city to enter agreement for judgment.—City of Medford v. Corbett, 20 N.E.2d 402, 302 Mass. 573.

60. N.C.—Town of Bath v. Norman, 39 S.E.2d 363, 226 N.C. 502.

Official action of governing board required

Authority to consent to such judgment should rest on official action of governing board of the municipality rather than on casual personal assent of its members.—Town of Bath v. Norman, *supra*.

61. N.C.—Bush v. O'Brien, 58 N.E. 106, 164 N.Y. 205, 31 N.Y.Civ.Proc. 324.

44 C.J. p 1489 note 69.

62. N.Y.—O'Brien v. New York, 57 N.Y.S. 1039, 40 App.Div. 331, affirmed 55 N.E. 1098, 160 N.Y. 691.

63. N.Y.—Hyams v. Amchir, N.Y. Sup., 57 N.Y.S.2d 77.

Necessity for process to sustain judgment by default *see supra* subdivision b of this section.

Default in appearing at trial constitutes abandonment of pleading within statute authorizing judgment by default.—Hyams v. Amchir, *supra*.

64. N.J.—Cooper v. Cape May Point, 51 A. 511, 67 N.J.Law 437.

44 C.J. p 1489 note 74.

65. N.J.—Lewis v. Elizabeth, 26 N. J.Eq. 298.

44 C.J. p 1489 note 75.

66. N.Y.—Moran v. Long Island City, 5 N.E. 80, 101 N.Y. 439.

67. S.D.—Halverson v. Williams, 166 N.W. 730, 38 S.D. 176.

44 C.J. p 1489 note 78.

e. Form and Contents

It has been held that a judgment should not be rendered absolutely against a municipal corporation on claims payable only out of a particular fund, nor should it award execution.

General rules as to the form and contents of decrees or judgments ordinarily apply in actions to which a municipal corporation is a party.⁶⁸ Where a municipality having an option of paying in money or in municipal orders fails to exercise the option, a money recovery may be had.⁶⁹

While ordinarily, in an action in personam against a municipality, the judgment should not direct payment out of a particular fund,⁷⁰ it has been held that judgment should not be rendered absolutely against a municipality on claims payable only out of a particular fund,⁷¹ especially where the fund is one over which the municipal officers have no control.⁷² However, a constitutional provision that no city shall incur indebtedness exceeding in any year the income of such year does not require that a judgment rendered for a past indebtedness shall provide that it be paid out of the revenues received for the years in which it was incurred,⁷³ and the judgment should be general,⁷⁴ but should be limited in amount to the amount of unexpended balances applicable to claims when such claims accrued.⁷⁵

Designation of parties. Ordinarily it is proper for the judgment in an action against a municipal corporation to follow the name of defendant as set forth in the summons and complaint.⁷⁶ Where municipal officers automatically become parties to an action against the municipality, in their official capacity, the judgment is not void where it is rendered against such officers, especially where the pe-

tition asks that they be required to act,⁷⁷ but where an action is brought against the officers of a municipality a judgment against the municipality cannot be rendered.⁷⁸

Provision for enforcement. The rule has been laid down that the judgment cannot award execution,⁷⁹ and in an action which has none of the features of a mandamus proceeding the judgment should not contain a provision ordering the governing body of the municipality to assess and collect a tax for the purpose of satisfying the judgment.⁸⁰

f. Lien, Priority, and Funds Applicable

The general rule is that a judgment against a municipal corporation is not a lien on its property held for public uses, nor is it a lien on privately owned real estate within the municipal boundaries. Judgments are not payable out of funds raised or appropriated for other purposes, and it has been held that a judgment does not take precedence over other claims.

The general rule is that a judgment against a municipal corporation is not a lien on its property held for public uses;⁸¹ nor is it a lien on privately owned real estate within the municipal boundaries.⁸²

Judgments are not payable out of funds raised by levy for another purpose,⁸³ or out of funds appropriated for another purpose,⁸⁴ or out of the general funds when chargeable only on the surplus fund.⁸⁵ However, it has been held that a statutory provision that indebtedness shall not be incurred or a warrant drawn in payment of any indebtedness to exceed the amount of funds on hand in the treasury at the time is not a limitation on the compulsory power of the courts to make effective judgments against municipal corporations.⁸⁶ The right to re-

68. Wis.—Herman v. Oconto, 76 N. W. 364, 100 Wis. 391.

69. Wis.—Herman v. Oconto, *supra*.

70. Ill.—Bond v. Hoopeston, 168 Ill. App. 617—Chicago v. Duffy, 117 Ill. App. 261, affirmed 75 N.E. 912, 218 Ill. 242.

71. Iowa.—Midwest Securities Corporation v. Des Moines, 202 N.W. 565, 200 Iowa 245.

44 C.J. p 1490 note 86.

Funds appropriated

Holders of claims against a city which are entitled to payment only from and out of the funds appropriated to payment of such claims are not entitled to an absolute judgment against the city.—Johnson v. New Orleans, 24 So. 635, 50 La. Ann. 920—44 C.J. p 1374 note 24.

72. Ill.—Crane v. Urbana, 2 Ill. App. 559.

73. Cal.—Buck v. Eureka, 50 P. 1065, 119 Cal. 44.

44 C.J. p 1490 note 89.

Constitutional or statutory debt limit in general see *supra* § 1846.

74. Cal.—Higgins v. San Diego Water Co., 45 P. 824, 50 P. 670, 118 Cal. 524.

44 C.J. p 1490 note 90.

75. Cal.—Higgins v. San Diego Water Co., *supra*.

76. Ala.—Birmingham v. Crane, 56 So. 723, 175 Ala. 90.

46 C.J. p 1489 note 82.

77. Miss.—Jonestown v. Ganong, 52 So. 579, 692, 97 Miss. 67.

78. N.C.—Young v. Barden, 90 N.C. 424.

79. Tex.—Shuford v. City of Dallas, 190 S.W.2d 721, 144 Tex. 342.

44 C.J. p 1490 note 92.

Execution against property of municipal corporation see *infra* § 2212.

80. Tex.—Clarendon v. Betts, Civ. App., 174 S.W. 958.

Mandamus to enforce judgment against municipality see Mandamus § 144 c.

81. U.S.—Vallette v. City of Vero Beach, C.C.A.Fla., 104 F.2d 59, 124 A.L.R. 686, certiorari denied Vallette v. City of Vero Beach, 60 S. Ct. 110, 308 U.S. 586, 84 L.Ed. 491.

Fla.—City of Sanford v. McClelland, 163 So. 513, 121 Fla. 253—City of Sanford v. Dofnos Corporation, 156 So. 112, 115 Fla. 795—Little River Bank & Trust Co. v. Johnson, 141 So. 141, 105 Fla. 212.

44 C.J. p 1491 note 9.

82. N.C.—Virginia-Carolina Joint Stock Land Bank v. Watt, 178 S.E. 228, 207 N.C. 577.

83. U.S.—U. S. v. New Orleans, C. Cl. A., 44 F. 590, affirmed 15 S.Ct. 378, 156 U.S. 353, 39 L.Ed. 450.

84. U.S.—Evans v. Pittsburgh, C.C. Pa., 8 F.Cas.No.4,568.

85. Cal.—Smith v. Broderick, 40 P. 1033, 107 Cal. 644, 48 Am.S.R. 167.

86. Miss.—Jonestown v. Ganong, 52 So. 579, 692, 97 Miss. 67.

sort to a sinking fund for the payment of a judgment has been recognized.⁸⁷ Under some statutes the municipality cannot exhaust the entire revenue provided for unbonded expenditures with one class of disbursements and refuse to pay a judgment out of the revenues for the current year.⁸⁸ While the courts sometimes give a judgment priority over other claims payable from general revenues of the municipal corporation,⁸⁹ it has been held that a judgment does not take precedence over other claims.⁹⁰ Under some statutes current expenses have precedence over judgments;⁹¹ and it has been held, irrespective of a specific statutory provision, that necessary current expenses are entitled to payment out of the current revenues in preference to a judgment against the city for a tort.⁹² Some statutes and ordinances provide for the registration of judgments and for their payment in the order in which they are registered,⁹³ but the municipality cannot rely on such a statutory provision to resist the payment of a judgment merely because other judgments have been registered prior thereto in the absence of proof that the holders of such judgments are demanding payment.⁹⁴

Proof as to funds for payment. Under a statute so providing before judgment may be entered there must be proof that the amount for which recovery is sought remains unexpended to the credit of the

appropriation to the object or purpose on which the claim sued on is founded.⁹⁵

g. Amending, Opening, and Vacating

General rules as to amending, opening, and vacating judgments apply in actions to which a municipal corporation is a party, and under a statute so providing a specified officer may proceed for the opening of judgments against the corporation.

General rules as to amending, opening, and vacating judgments apply in actions to which a municipal corporation is a party.⁹⁶ Under a statute so providing, a specified officer may proceed for the opening of judgments against the corporation,⁹⁷ but irrespective of the validity or existence of such statute it has been held that the court could on motion made on behalf of such officer vacate a judgment.⁹⁸ Collusion between third persons and municipal employees or officials not shown to have resulted in injury to the municipality is not cause for setting aside a judgment regularly obtained,⁹⁹ nor can a judgment entered against the municipality by consent be set aside in the absence of any irregularity, fraud, or mistake, simply because a new corporation counsel believes a better result can be obtained by contesting the litigation.¹ An application of a municipality pending appeal from a judgment against a third person to intervene as defendant for the purpose of opening the judgment has been denied.²

87. Okl.—State ex rel Crane Co v. Goerke, 126 P.2d 1005, 191 Okl. 1—Jones v. Blaine, 300 P. 369, 149 Okl. 153—Shawnee v. Tecumseh, 150 P. 890, 52 Okl. 509.

Where fund may be replenished

Under statute relating to use of sinking funds, judgments against municipality for which no tax levies have been made should not be paid from sinking fund unless it definitely appears that sinking fund will or may be replaced by collections so that it will be sufficient to pay obligations thereafter falling due—Conner v. Battles, 87 P.2d 121, 184 Okl. 351.

88. U.S.—New Orleans v. U. S., La., 49 F. 40, 1 C.C.A. 148.

89. Miss.—Jonestown v. Ganong, 52 So. 579, 692, 97 Miss. 67.

Even if other municipal affairs will suffer, municipality financially able to pay judgment against it must do so.—State v. Village of Pemberville, 175 N.E. 890, 38 Ohio App. 162.

90. Cal.—Fresno Canal, etc., Co. v. McKenzie, 65 P. 473, 67 P. 900, 135 Cal. 497.

Current operating expenses

Unsatisfied judgments against municipality were not debt charges but current operating expenses, within

statute, and hence holder thereof in seeking their payment had no priority over municipality's fund allocated for current operating expenses.—State ex rel. Ohio Public Service Co. v. City of Alliance, 3 N.E.2d 698, 52 Ohio App. 252.

91. La.—State v. New Orleans, 41 So 115, 116 La. 851.

44 C.J. p 1491 note 20.

92. Tex.—Sherman v. Smith, 35 S.W. 294, 12 Tex.Civ.App. 580.

93. Ill.—People ex rel. Cohn v. City of Chicago, 31 N.E.2d 321, 308 Ill. App 50, reversed on other grounds 37 N.E.2d 153, 377 Ill. 502, followed in People ex rel. Gertz v. Kelly, 37 N.E.2d 155, 377 Ill. 561—People ex rel. Krajci v. Kelly, 279 Ill.App. 22, 44 C.J. p 1491 note 22.

Provision held valid

Ill.—People ex rel. Ratkowski v. Kelly, 33 N.E.2d 237, 309 Ill.App. 445, rehearing granted and reversed on other grounds 37 N.E.2d 570, 311 Ill.App. 657—People ex rel. Cohn v. City of Chicago, 31 N.E.2d 321, 308 Ill.App. 50, reversed on other grounds 37 N.E.2d 153, 377 Ill. 502, followed in People ex rel. Gertz v. Kelly, 37 N.E.2d 155, 377 Ill. 561—People ex rel. Krajci v. Kelly, 279 Ill.App. 22.

94. Ill.—People ex rel. Cohn v. City

of Chicago, 37 N.E.2d 153, 377 Ill. 502, followed in People ex rel. Gertz v. Kelly, 37 N.E.2d 155, 377 Ill. 561—People ex rel. Mercantile Nat. Bank of Chicago v. City of Chicago, 37 N.E.2d 151, 377 Ill. 573 —People v. Kelly, 196 N.E. 795, 381 Ill. 54.

44 C.J. p 1491 note 23.

95. N.Y.—Tribune v. New York, 48 Barb. 240

44 C.J. p 1488 note 50.

96. N.Y.—New York v. Brady, 22 N.E. 237, 115 N.Y. 599.

Evidence held insufficient

To warrant vacation.—City of Medford v. Corbett, 20 N.E.2d 402, 302 Mass. 573.

97. N.Y.—Sharp v. New York, 31 Barb. 572, 9 Abb.Pr. 243, 18 How. Pr. 97.

44 C.J. p 1490 note 3.

98. N.Y.—Baldwin v. New York, 1 Abb.Dec. 75, 2 Keyes 887.

44 C.J. p 1490 note 4.

99. N.Y.—New York v. Brady, 22 N.E. 237, 115 N.Y. 599,

1. N.Y.—Law v. New York, 32 How. Pr. 385.

2. N.Y.—Reld v. Products Mfg. Co., 190 N.Y.S. 403, 116 Misc. 424.

44 C.J. p 1491 note 8.

h. Satisfaction, Settlement, and Payment

General rules as to the satisfaction, settlement, and payment of judgments ordinarily apply in actions to which a municipal corporation is a party, and special provision is sometimes made by statute for the payment of such judgments, and it has been held that a municipality has no power to release or discharge a judgment against persons who are solvent for less than the full amount where no controversy exists as to the validity and binding effect of the judgment.

General rules as to the satisfaction, settlement, and payment of judgments ordinarily apply in actions to which a municipal corporation is a party.³ It is the duty of the municipality to make provision for the payment of valid judgments against it.⁴ Special provision is sometimes made by statute for the payment of such judgments.⁵ Thus, under some statutes, it is discretionary with the municipal authorities to provide for the payment of judgments either by a single payment⁶ or by payments in installments,⁷ but if provision has been made for payment by a single payment the right to pay in installments ceases.⁸ Statutory authority to pay judgments "against the city" does not include judgments against a special board.⁹ Payment of a default judgment obtained against a city based on an award is made at the city's peril where made pending an action to restrain the city from paying the award to the person to whom payment was made.¹⁰ The abolishment of a board which held a judgment against a municipality and the transfer of the powers and duties of such board to the governing body of such municipality has been held not to relieve the governing body from providing for the payment of such judgment.¹¹ Where the city corporation and the county organization are separate, county

officers have no authority to interfere to prevent payment of a judgment against the city.¹²

While it has been stated that a municipality's power to sue includes the right to exercise discretion as to releasing judgments in its favor,¹³ and while it has been held that a municipality may accept less than the full amount where the judgment debtor is not able to pay the full amount and the corporation is not able to enforce full payment,¹⁴ ordinarily a municipality has no power to compromise and settle a final judgment in its favor for less than is due thereon,¹⁵ especially where the persons against whom it is rendered are solvent and responsible and there is no controversy as to the validity and binding effect of the judgment.¹⁶

Setting off debt due municipality. Under a statute so providing, it is lawful for the municipality to extinguish a judgment against it by offsetting and crediting the amount thereof on and against any overdue taxes, assessments, water rates, or other indebtedness of a public nature due from such judgment creditor.¹⁷

§ 2212. — Enforcement; Dormant Judgments and Revival

- a. Enforcement
- b. Dormant judgments and revival

a. Enforcement

- (1) In general
- (2) Execution

(1) In General

Judgments against a municipal corporation must be

3. Legal tender

A judgment against a municipality is payable only in legal tender.—Porter v. Thompson, 22 Iowa 391.

4. Ohio.—State ex rel. Turner v. Village of Bremen, 156 N.E. 134, 116 Ohio St. 294.—State ex rel. Ohio Public Service Co. v. City of Alliance, 3 N.E.2d 698, 52 Ohio App. 252.—State v. Village of Pemberville, 175 N.E. 890, 38 Ohio App. 162.

44 C.J. p 1166 note 72.

5. Tex.—San Antonio v. Routledge, 102 S.W. 756, 46 Tex.Civ.App. 196.

6. Cal.—Cary v. Long, 184 P. 857, 181 Cal. 443.

7. Cal.—Cary v. Long. *supra*.

8. Cal.—Metropolitan L. Ins. Co. v. Rolph, 194 P. 1005, 184 Cal. 557.

9. U.S.—U. S. v. New Orleans Bd. of Liquidation, La., 60 F. 387, 9 C.C.A. 37.

10. N.Y.—Spears v. New York, 87 N. Y. 359.

11. La.—State v. Pilsbury, 30 La. Ann 705

12. N.Y.—Baker v. New York, 9 Abb Pr. 82.

13. Ill.—People ex rel. Ammann v. Dipper, 63 N.E.2d 870, 392 Ill. 38 —Agnew v. Brall, 16 N.E. 230, 124 Ill. 312.

Compromise or settlement of pending action see *supra* § 2197

14. Minn.—Oakman v. Eveleth, 203 N.W. 514, 163 Minn. 100.

15. Kan.—State ex rel. v. City of Pratt, 85 P.2d 10, 148 Kan. 885.

While the right of appeal exists a judgment cannot be regarded as final but may be settled by the municipality for less than the full amount.—Agnew v. Brall, 16 N.E. 230, 124 Ill. 312.

Statutes held not to confer power Kan.—State ex rel. v. City of Pratt, 85 P.2d 10, 148 Kan. 885.

Series of judgments

Municipal corporation could not compromise and settle for less than

face value a series of judgments, all a part of one principal judgment, none of which judgments had been appealed from, and all of which were final and conclusive.—State ex rel. v. City of Pratt, *supra*.

16. Ill.—Agnew v. Brall, 16 N.E. 230, 124 Ill. 312.

Minn.—Oakman v. Eveleth, 203 N.W. 514, 163 Minn. 100.

17. The expression "other indebtedness of a public nature," as used in statute permitting a municipality to set off taxes, assessments, water rates, or "other indebtedness of a public nature," against a judgment creditor's judgment, must be read, in consonance with the maxim of ejusdem generis, as though it were stated "other like indebtedness of a public nature," and, so construed, city's claim against individual as surety on indemnity bond of defaulting public official was not, either before or after it was reduced to judgment, within purview of statute.—Zane v. Brown, 8 A.2d 367, 126 N.J.Eq. 300.

enforced and collected in the manner provided by law, and in some jurisdictions there are special statutory provisions therefor.

Judgments against a municipal corporation must be enforced and collected in the manner provided by law.¹⁸ In some jurisdictions there are special statutory provisions for the enforcement or collection of such judgments.¹⁹ Unless the statute discloses an intention to make the method so provided exclusive, it will be regarded as cumulative to common-law remedies.²⁰ A statute prescribing the particular mode of collecting judgments against towns has been held not applicable to judgments against cities,²¹ but a statute providing a mode for enforcing the payment of judgments against counties and townships has been held to apply as well to judgments against cities.²²

Duty of officers to carry out decree. Where a decree requiring the performance of certain acts runs against the municipality alone, it is the duty of the proper officers to carry out the decree,²³ and they may be required to do all acts within their power to cause the municipality to obey the decree against it.²⁴

Judgment against municipality and an individual.

Where a judgment by default is recovered against a municipality and an individual, resort need not be first had to the property of the individual.²⁵ The right of a municipality to move for the enforcement of a judgment against other parties to an action to which the municipality was a party defendant has been recognized.²⁶

(2) Execution

As a general rule, execution cannot be issued or levied against the property of a municipal corporation in the absence of a statute granting such right, but this rule has been modified somewhat, and property owned by a municipality in its proprietary capacity and not useful or used for public purposes is ordinarily subject to execution.

As a general rule, execution cannot be issued or levied against the property of a municipal corporation in the absence of a statute granting such right.²⁷ However, statutes sometimes grant such right,²⁸ and without reference to statutory sanction the rule has been modified to some extent and municipal judgment creditors have been accorded a limited right to levy execution against certain municipal property.²⁹ The question whether or not

18. Okl.—*Beatty v. Oklahoma City*, 214 P. 912, 89 Okl. 182.

44 C.J. p 1491 note 26.

Enforcement of judgment against municipality by mandamus:

Generally see Mandamus § 144 c.

To compel levy of tax to pay judgment see Mandamus § 192 b.

Garnishment and attachment see *supra* § 2191.

19. Cal.—*C. J. Kubach Co. v. City of Long Beach*, 48 P.2d 181, 8 Cal. App.2d 567.

Okl.—*Beatty v. Oklahoma City*, 214 P. 912, 89 Okl. 182.

44 C.J. p 1491 notes 25, 26.

Adoption of statute by municipality
Municipal reliance on the statute in a proceeding to compel payment of a judgment has been held to constitute an election on the part of the municipality to be governed thereby in the matter of payment of the judgment notwithstanding its charter contained provisions governing payment of judgments, where charter gave municipality power to avail itself of rights and privileges extended by general law.—*Le Clerg v. City of San Diego*, 24 P.2d 156, 218 Cal. 494.

Time for enforcement

Statute held to contemplate that judgments against municipalities are not enforceable until after levy and collection of annual taxes for payment thereof.—*Le Clerg v. City of San Diego*, *supra*.

20. Cal.—*C. J. Kubach Co. v. City of Long Beach*, 48 P.2d 181, 8 Cal. App.2d 567.

Fla.—*City of Bradenton v. Fusillo*, 184 So. 234, 134 Fla. 759.

21. Wis.—*Watertown v. Cady*, 20 Wis. 501—*State v. Milwaukee*, 20 Wis. 37.

22. Pa.—*Monaghan v. Philadelphia*, 28 Pa. 207.

44 C.J. p 1491 note 28.

23. Decree for specific performance
Mass.—*Parrotta v. Hederson*, 53 N.E. 2d 97, 315 Mass. 416.

24. Mass.—*Commonwealth v. Town of Hudson*, 52 N.E.2d 566, 315 Mass. 335.

25. Iowa.—*Palmer v. Stacy*, 44 Iowa 340.

26. N.Y.—*Rodee v. Ogdensburg*, 151 N.Y.S. 349, 165 App.Div. 651, appeal dismissed 112 N.E. 1074, 218 N.Y. 621.

44 C.J. p 1492 note 43.

27. Ill.—*Moore v. Town of Brown*, 27 N.E.2d 533, 373 Ill. 583—*People ex rel. Toman v. Crane*, 23 N.E.2d 337, 372 Ill. 228—*Farrow v. Eldred Drainage and Levee Dist.*, 194 N.E. 515, 359 Ill. 347.

Mich.—*Waterman-Waterbury Co. v. School Dist. No. 4 of Cato Tp.*, 150 N.W. 104, 183 Mich. 168.

S.C.—*Brooks v. One Motor Bus Carrying 1937-38 South Carolina License V 1357*, Motor No. 45590, Serial No. 40476, 3 S.E.2d 42, 190 S.C. 379.

Utah.—*Upper Blue Bench Irr. Dist. v. Continental Nat. Bank & Trust Co.*, 72 P.2d 1048, 93 Utah 325.

Tex.—*City of Laredo v. Frishmuth*, Civ.App., 196 S.W. 190, error dismissed by agreement.

Execution to enforce judgment for costs see *infra* § 2214.

Property of public or quasi-public corporations generally as subject to execution see Executions § 36.

Issuance prohibited by statute
Mich.—*Daley v. City of Melvindale*, 260 N.W. 898, 271 Mich. 431.

28. N.Y.—*Kelly v. City of Yonkers*, 274 N.Y.S. 781, 242 App.Div. 798—*Kelly v. City of Yonkers*, 11 N.Y. S.2d 424, affirmed 14 N.Y.S.2d 142, 257 App.Div. 966.

29. Fla.—*City of Bradenton v. Fusillo*, 184 So. 234, 134 Fla. 759—*City of Coral Gables v. Hepkins*, 144 So. 385, 107 Fla. 778—*Little River Bank & Trust Co. v. Johnson*, 141 So. 141, 105 Fla. 212.

Okl.—*Beadles v. Smyser*, 87 P. 292, 17 Okl. 162, reversed on other grounds 28 S.Ct. 522, 209 U.S. 393, 52 L.Ed. 849.

Tex.—*City of Clarendon v. Betts*, Civ.App., 174 S.W. 958.

Property common pledge of creditors
The property of a municipal corporation is the common pledge of its creditors subject to the numerous exceptions to, and immunities from, the rule established by the decided cases.—*J. B. McCrary Co. v. Town of Winnfield*, D.C.La., 40 F.Supp. 427.

Fact that the municipality is authorized to levy taxes for the payment of the judgment against it does not preclude the issuance and levy of execution.—*City of Sanford*

particular property is leviable is to be determined by the usage and purposes for which it is held.³⁰ Property of a municipality held or used for public purposes or governmental or municipal purposes,³¹ or taxes due a municipality,³² or public revenues derived from taxes,³³ or stamped with a public purpose and need,³⁴ are not ordinarily subject to execution.

es,³¹ or taxes due a municipality,³² or public revenues derived from taxes,³³ or stamped with a public purpose and need,³⁴ are not ordinarily subject to execution.

v. Dofnos Corporation, 156 So. 142, 115 Fla. 795.

In New York

(1) It has been declared that a municipal corporation, equally with a private corporation, may have its property taken in execution, if payment of a judgment is not otherwise made.—*Darlington v. Mayor of City of New York*, 31 N.Y. 164, 38 Am. D. 248.

(2) However, it has also been indicated that orders and judgments directing municipal bodies to make payments of sums of money are not enforceable by execution as is the method in actions against individuals.—*Donner-Hanna Coke Corporation v. Eberhardt*, 280 N.Y.S. 607, 156 Misc. 41.

30. U.S.—*J. B. McCrary Co. v. Town of Winnfield*, D.C.La., 40 F.Supp. 427.

31. U.S.—*Corpus Juris* quoted in *J. B. McCrary Co. v. Town of Winnfield*, D.C.La., 40 F.Supp. 427, 434. Ala.—*Equitable Loan & Security Co. v. Edwardsville*, 38 So. 1016, 143 Ala. 182.

Cal.—*C. J. Kubach Co. v. City of Long Beach*, 48 P.2d 181, 8 Cal.App. 2d 567.—*Marin Water & Power Co. v. Town of Sausalito*, 193 P. 294, 49 Cal.App. 78.

Del.—*Eastern Union Co. of Delaware v. Moffat Tunnel Improvement Dist.*, 178 A. 864, 6 W.W.Harr. 488. Fla.—*Hoperich v. City of Sebring*, 161 So. 275, 119 Fla. 250, followed in *Tucker v. City of Sebring*, 161 So. 278, 119 Fla. 256.—*City of Coral Gables v. Hepkins*, 144 So. 385, 107 Fla. 778.—*Little River Bank & Trust Co. v. Johnson*, 141 So. 141, 105 Fla. 212.

Ky.—*City of Hazard v. Duff*, 154 S. W.2d 28, 287 Ky. 427.—*Board of Councilmen of City of Frankfort v. White*, 6 S.W.2d 699, 224 Ky. 570.

La.—*Bullis v. Town of Jackson*, 14 So.2d 1, 208 La. 289.—*American-La France & Foamite Industries v. Town of Winnfield*, 168 So. 293, 184 La. 1043.—*Bullis v. Town of Jackson*, App., 4 So.2d 550.

N.J.—*Martin v. City of Asbury Park*, 176 A. 172, 114 N.J.Law 298.—*Township Committee of Piscataway Tp. v. First Nat. Bank*, 163 A. 101, 10 N.J.Misc. 1219, affirmed 168 A. 757, 111 N.J.Law 412, 90 A.L.R. 423.

Ohio.—*Cincinnati v. Frost, Stearns & Co.*, 8 Ohio Dec. Reprint, 107, 6 Cinc.L.Bul. 684.

Okl.—*Beadles v. Smyser*, 87 P. 292, 17 Okl. 162, reversed on other

grounds 28 S.Ct. 522, 209 U.S. 393, 52 L.Ed. 849.

Tex.—*City of Edinburg v. Ellis*, Civ. App., 42 S.W.2d 291, reversed on other grounds, Com.App., 59 S.W.2d 99.—*City of Clarendon v. Betts*, Civ.App., 174 S.W. 958, 23 C.J. p 355 note 72.

The theory in some jurisdictions is that municipal property dedicated to public use is not owned by the municipality as a corporation but by the general public and, therefore, is not subject to seizure and sale on a writ of fieri facias by a judgment creditor.

U.S.—*J. B. McCrary Co. v. Town of Winnfield*, D.C.La., 40 F.Supp. 427. La.—*American-La France & Foamite Industries v. Town of Winnfield*, 168 So. 293, 184 La. 1043.—*Town of Farmerville v. Commercial Credit Co.*, 136 So. 82, 173 La. 43.

Property necessary to carry on government is not subject to execution.—*Maryland Casualty Co. v. Leland*, 199 S.E. 7, 214 N.C. 235.

Sovereign functions

Property acquired by a municipality for, and employed in the discharge of, its sovereign functions cannot be diverted to the satisfaction of obligations resting on them in their character of private corporation.—*Martin v. City of Asbury Park*, 176 A. 172, 114 N.J.Law 298.

Property used for municipal purposes

Municipal property, acquired in, and necessary to discharge of, strictly local municipal purposes, as distinguished from governmental purposes, for which authority is conferred by the municipal charter, is held by it for public purposes and is exempt from execution.—*Board of Councilmen of City of Frankfort v. White*, 6 S.W.2d 699, 224 Ky. 570.

Corporate purposes

Real and personal property of a municipal corporation, held and used by it for corporate purposes, is exempt from levy and sale under execution.—*Christmas v. City of Asbury Park*, D.C.N.J., 53 F.Supp. 64.—*Murdock v. City of Asbury Park*, D.C.N.Y., 48 F.Supp. 18, applying law of New Jersey.

Street maintenance storage house

House and lot, acquired in strictly governmental capacity and used to store tools and implements for maintaining streets, cannot be seized and sold to satisfy judgment against city.—*Board of Councilmen of City of Frankfort v. White*, 6 S.W.2d 699, 224 Ky. 570.

Land leased to private person for public bathing

Land acquired by city near ocean under statute authorizing such acquisition for public purposes and leased to private person for purpose of maintaining thereon public bathing establishment previously erected by city was not subject to levy of execution, since land was devoted to "public purpose."—*Martin v. City of Asbury Park*, 176 A. 172, 114 N.J.Law 298.

32. U.S.—*Corpus Juris* quoted in *J. B. McCrary Co. v. Town of Winnfield*, D.C.La., 40 F.Supp. 427, 434.

Iowa.—*Hedge v. City of Des Moines*, 119 N.W. 276, 141 Iowa 4, 23 C.J. p 356 note 74.

33. Cal.—*C. J. Kubach Co. v. City of Long Beach*, 48 P.2d 181, 8 Cal. App.2d 567.

Del.—*Eastern Union Co. of Delaware v. Moffat Tunnel Improvement Dist.*, 178 A. 864, 6 W.W.Harr. 488. N.J.—*Township Committee of Piscataway Tp. v. First Nat. Bank*, 163 A. 101, 10 N.J.Misc. 1219, affirmed 168 A. 757, 111 N.J.Law 412, 90 A.L.R. 423.

Land received in payment of taxes

Tex.—*Sherman v. Williams*, 19 S.W. 606, 84 Tex. 421.

Receipts helping to pay city expenses

The mere fact that amounts received by the municipality help to pay its expenses does not make such receipts revenue in the sense of income derived from taxes exempt from execution.

U.S.—*Hart v. City of New Orleans*, C.C.La., 12 F. 292.

Cal.—*C. J. Kubach Co. v. City of Long Beach*, 48 P.2d 181, 8 Cal.App. 2d 567.

34. Del.—*Eastern Union Co. of Delaware v. Moffat Tunnel Improvement Dist.*, 178 A. 864, 6 W.W.Harr. 488.

Property acquired with proceeds of exempt bonds partakes of the same exempt character as the bonds themselves.—*City of Coral Gables v. Hepkins*, 144 So. 385, 107 Fla. 778.

Rents

In absence of legislative characterization of stores in city building as public and a presumed legislative declaration that rent revenue derived by municipality from renting stores to private individuals was part of the public fisc of municipality, the court was without power, granted or inherent, to decree rents intrinsically public revenue.—*J. B. McCrary*

On the other hand, property owned by a municipality in its proprietary capacity and not useful or used for public purposes is ordinarily subject to execution.³⁵ In this connection it has been held that property used in the operation and maintenance of a municipal waterworks system is subject to execution.³⁶ However, it has been held that property owned by a municipality in its proprietary capacity for the purpose of exercising proprietary functions authorized by the constitution is not subject to execution,³⁷ and that, notwithstanding property is being used in a sense in a proprietary capacity, if it is being used for public purposes and to satisfy the needs and necessities which the public it serves demands, it is not subject to execution.³⁸ Thus, while

the construction, operation, and maintenance of public utilities by municipal corporations for the benefit and convenience of their inhabitants ordinarily constitute the exercise of private and proprietary powers, as discussed supra § 1050, it has been held that property forming a part of a municipal waterworks system³⁹ or gas plant⁴⁰ is not subject to execution. The mere fact that the use of property for public purposes is temporarily or partially discontinued does not change the exempt character of the property.⁴¹ Property which has been acquired by a municipality for public use and has been in the past devoted to such use is not subject to execution unless and until it is shown that its devotion to such use has been entirely abandoned.⁴²

Co. v. Town of Winnfield, D.C.La., 40 F.Supp. 427.

35. U.S.—Shamrock Towing Co. v. City of New York, D.C.N.Y., 20 F.2d 444—*Corpus Juris* quoted in J. B. McCrary Co. v. Town of Winnfield, D.C.La., 40 F.Supp. 427, 434

Ala.—Southern Ry. Co. v. Hartshorne, 43 So. 583, 150 Ala. 217, 124 Am.S.R. 68.

Cal.—*Corpus Juris* quoted in Meyer v. State Land Settlement Board, 286 P. 743, 746, 104 Cal.App. 577

Del.—*Corpus Juris* cited in Eastern Union Co. of Delaware v. Moffat Tunnel Improvement Dist., 178 A. 864, 872, 6 W.W.Harr. 488.

Fla.—City of Bradenton v. Fusillo, 184 So. 234, 134 Fla. 759—City of Sanford v. McClelland, 163 So. 513, 121 Fla. 253—City of Sanford v. Dofnos Corporation, 156 So. 142, 115 Fla. 795—City of Coral Gables v. Hepkins, 144 So. 385, 107 Fla. 778.

Ky.—City of Hazard v. Duff, 154 S.W. 2d 28, 287 Ky. 427.

La.—Bullis v. Town of Jackson, 14 So.2d 1, 203 La. 289—Town of Farmerville v. Commercial Credit Co., 136 So. 82, 173 La. 43.

Ohio.—State ex rel First Nat. Bank of North Baltimore v. Village of Botkins, 48 N.E.2d 865, 141 Ohio St. 437.

Okl.—Beadles v. Smyser, 87 P. 292, 17 Okl. 162, reversed on other grounds 28 S.Ct. 522, 209 U.S. 393, 52 L.Ed. 849.

23 C.J. p 356 note 75.

Strictly private property of a municipality is subject to execution.—Board of Councilmen of City of Frankfort v. White, 6 S.W.2d 699, 224 Ky. 570.

Land acquired for taxes

(1) It has been held that land acquired under tax foreclosure proceedings and held for resale may be levied on and sold to satisfy judgment recovered against municipality.—City of Sanford v. McClelland, 163 So. 513, 121 Fla. 253—City of Sanford

v. Dofnos Corporation, 156 So. 142, 115 Fla. 795.

(2) However, it has also been held that property not adapted to, or used for, public purposes, which was conveyed to a municipality in compromise of a suit brought by it against its tax collector and the sureties on his bond, on his failure to pay over taxes assessed and collected, stands in the same position as would the money collected if paid over; and, since under statute such taxes could be applied only to the objects for which they were levied, they were not subject to execution on a judgment against the municipality.—Sherman v. Williams, 19 S.W. 606, 84 Tex. 421, 31 Am.S.R. 66.

33. Ky.—City of Hazard v. Duff, 154 S.W.2d 28, 287 Ky. 427.

37. Cal.—C. J. Kubach Co. v. City of Long Beach, 48 P.2d 181, 8 Cal.App.2d 567—Marin Water & Power Co. v. Town of Sausalito, 193 P. 294, 49 Cal.App. 78.

Oil lease by city on subsurface of property, surface of which was used for proprietary function authorized by constitution, was not exempt from execution, since lease was not made in city's governmental capacity or as necessary incident to exercise of proprietary use function.—C. J. Kubach Co. v. City of Long Beach, 48 P.2d 181, 8 Cal.App.2d 567.

38. Del.—Eastern Union Co. of Delaware v. Moffat Tunnel Improvement Dist., 178 A. 864, 6 W.W.Harr. 488.

Golf course acquired, as authorized by city charter, with proceeds of bonds could not be sold under execution.—City of Coral Gables v. Hepkins, 144 So. 385, 107 Fla. 778.

39. La.—Town of Farmerville v. Commercial Credit Company, 136 So. 82, 173 La. 43, 76 A.L.R. 686.

40. La.—Bullis v. Town of Jackson, App., 4 So.2d 550.

41. Cal.—C. J. Kubach Co. v. City

of Long Beach, 48 P.2d 181, 8 Cal.App.2d 567.

Ohio.—Cincinnati v. Frost, Stearns & Co., 8 Ohio Dec., Reprint, 107, 5 Cinc.L.Bul. 684.

Part of building not required for municipal functions

(1) Proceeds from rental of part of building not required for governmental or municipal purposes, for which building was erected, but set off and equipped so as to reap income until necessary to occupy it in discharge of municipal functions, have been held not subject to execution.—Board of Councilmen of City of Frankfort v. White, 6 S.W.2d 699, 224 Ky. 570.

(2) However, where municipal authorities leased part of the municipality's city hall to private individuals for storekeeping, which was not a governmental function but a private venture, if not an ultra vires act, it was held that the municipality forfeited its immunity from execution by writ of fieri facias on rental return received from that part of building so rented, and, hence, such rental return was subject to seizure and sale under execution in satisfaction of an ordinary judgment against municipality.—J. B. McCrary Co. v. Town of Winnfield, D.C.La., 40 F.Supp. 427.

Lease of property not otherwise subject to execution will not remove the exemption where the lease reserves right in municipality to resume operation of property.—City of Coral Gables v. Hepkins, 144 So. 385, 107 Fla. 778.

42. U.S.—J. B. McCrary Co. v. Town of Winnfield, D.C.La., 40 F.Supp. 427.

Cal.—United Taxpayers' Co. v. City and County of San Francisco, 259 P. 1101, 202 Cal. 264.

Fla.—Hoperich v. City of Sebring, 161 So. 275, 119 Fla. 250, followed in Tucker v. City of Sebring, 161 So. 278, 119 Fla. 256.

La.—Bullis v. Town of Jackson, 14

Property fully conveyed by a municipality prior to the issuance and levy of a writ of execution against the municipality is not subject to levy,⁴³ and, if levied on, the municipality may in such case move to quash the levy.⁴⁴

The general rule is that the private property of individuals within the limits of the territory of a municipal corporation cannot be subjected to the payment of a judgment against the corporation by levy based on an execution against the corporation,⁴⁵ especially where the constitution so provides,⁴⁶ but, in the absence of such constitutional inhibition, a statute providing for the levy of an execution against the corporation on the individual property of citizens in certain cases has been held constitutional,⁴⁷ and given effect.⁴⁸

The right of certain officers to redeem municipal property from sale under execution, properly made, has been denied.⁴⁹

As foundation for mandamus. Under the practice in some jurisdictions, it has been held that execution may issue against a municipality not for the purpose of seizing and selling its public property, but for the purpose of laying a foundation for a mandamus proceeding.⁵⁰

Demand and refusal. Under a statute so providing execution may not issue unless and until payment of the judgment has been demanded and refused.⁵¹

Income or revenue from public property. Income

or revenue derived from property held by a municipality in its governmental capacity has been held not to be subject to execution.⁵² However, it has been held that revenue derived from privately used public property is subject to execution.⁵³

Levy as creating lien. The actual levy of an execution on municipal property which is subject to seizure on execution creates a lien on such property.⁵⁴

Municipal declaration as to character of property. A declaration by the municipal authorities as to the character of property sought to be reached by execution does not clothe it with a character it does not possess,⁵⁵ especially where it is made after the levy of execution and contradicts prior official records.⁵⁶

Stay. General rules governing the stay of execution, as discussed in Executions §§ 139-141, have been applied.⁵⁷ The validity of execution against a municipality is not affected by the fact that the municipality was not served with notice of entry of an order vacating an injunction restraining the municipality from paying a judgment.⁵⁸

Where a municipality is the judgment creditor, it has the same right to control its judgment and to fieri facias as any judgment creditor,⁵⁹ and may cause a fieri facias once issued to be set aside.⁶⁰

b. Dormant Judgments and Revival

Dormant judgment statutes apply to judgments

- So.2d 1, 203 La 259—Town of Farmerville v. Commercial Credit Co., 136 So. 82, 173 La 43—City of New Orleans v. Werlein, 24 So. 232, 50 La.App. 1251.
43. Cal.—United Taxpayers' Co. v. City and County of San Francisco, 259 P. 1101, 202 Cal. 264.
44. Cal.—United Taxpayers' Co. v. City and County of San Francisco, supra.
45. Fla.—Little River Bank & Trust Co. v. Johnson, 141 So. 141, 105 Fla 212
- 44 C.J. p 1492 note 31.
46. Colo.—People ex rel. Rogers v. Letford, 79 P.2d 274, 102 Colo 284.
47. Conn.—Beardsley v. Smith, 16 Conn. 368, 41 Am D. 148.
48. Conn.—Beardsley v. Smith, supra.
49. Cal.—People v. Hays, 4 Cal. 127.
50. U.S.—Murdock v. City of Asbury Park, D.C.N.Y., 48 F.Supp. 18, applying law of New Jersey.
- N.J.—Martin v. City of Asbury Park, 176 A. 172, 114 N.J.Law 298—

- Township Committee of Piscataway Tp v First Nat. Bank of Dunellen, 168 A. 757, 111 N.J.Law 412, 90 A.L.R. 423.
51. N.Y.—Kelly v. City of Yonkers, 11 N.Y.S 2d 424, affirmed 14 N.Y.S 2d 142, 257 App Div. 966.
52. U.S.—Klein v. New Orleans, La., 99 U.S. 149, 25 L.Ed. 430
- Cal.—C. J. Kubach Co. v. City of Long Beach, 48 P.2d 181, 8 Cal App 2d 567.
- Ky.—Board of Councilmen of City of Frankfort v. White, 6 S.W.2d 699, 224 Ky 570.
53. Stores in part of city hall
- U.S.—J. B. McCrary Co. v. Town of Winnfield, D.C.La., 40 F.Supp. 427
54. Fla.—City of Sanford v McClelland, 163 So. 513, 121 Fla. 253
- City of Sanford v. Dofnos Corporation, 156 So. 142, 115 Fla. 795.
55. The fact that city classifies royalties as revenues does not make them exempt from execution, if they are otherwise subject to execution.—C. J. Kubach Co. v. City of Long Beach, 48 P.2d 181, 8 Cal.App 2d 567.
56. Ky.—City of Hazard v. Duff, 154 S.W.2d 28, 287 Ky. 427.

- Ordinance not effective until after levy**
- Fla.—Northern Inv Corporation v. City of Cocoa, 158 So. 889, 118 Fla. 405
57. Perpetual stay held properly refused
- Fla.—City of Coral Gables v. Hepkins, 144 So. 385, 107 Fla. 778.
58. N.Y.—Kelly v City of Yonkers, 11 N.Y.S 2d 424, affirmed 14 N.Y. S 2d 142, 257 App Div. 966.
- Knowledge held tantamount to actual notice**
- N.Y.—Kelly v. City of Yonkers, supra
59. La.—Lynne v. New Orleans, 26 La Ann 48
- Levati facias**
- Writ of execution on judgment obtained on scire facias issued on municipal lien or claim against realty is levati facias.—Provident Trust Co. of Philadelphia v. Judicial Building & Loan Ass'n, 171 A. 287, 112 Pa Super. 352.
60. La.—Lynne v. New Orleans, supra.

against municipal corporations, unless such judgments are expressly excepted therefrom.

Dormant judgment statutes, as discussed generally in Judgments § 532 b, apply to judgments against municipal corporations,⁶¹ unless such judgments are expressly excepted therefrom.⁶² Accordingly, under the terms of some statutes, a judgment becomes dormant if execution is not sued out within a prescribed time.⁶³ In applying such statutes in jurisdictions in which execution is not available as a remedy to enforce a judgment against a municipality, as discussed *supra* subsection a (2) of this section, a judgment becomes dormant where no tax is levied and mandamus to enforce it is not brought within the statutory time provided for issuing execution in ordinary cases to keep the judgment alive.⁶⁴ A municipal corporation may be barred from relying on a dormancy statute on principles of equitable estoppel,⁶⁵ or by reason of an express contract,⁶⁶ and a judgment against a municipal corporation may be revived in the same manner as one against a private person.⁶⁷ Where the corporation has been dissolved by act of the legislature, and the same people and territory organized into a new corporation by a different name, *scire facias* to revive a judgment against the old municipality may be brought against the new one.⁶⁸ After the judgment has become dormant, the levy of a tax and payment on such judgment will not revive it.⁶⁹

§ 2213. Appeal and Error

Rules governing appeal and error in actions to

which a municipal corporation is a party, in so far as they involve the application of the rules governing appeals in civil actions generally, are discussed in Appeal and Error.

Examine Pocket Parts for later cases.

§ 2214. Costs

Except as otherwise provided by statute, rules as to costs applicable in civil actions generally apply in actions to which a municipal corporation is a party, but the rule imposing costs on the unsuccessful party has been held not to apply where the municipality sues or is sued in the capacity of an agent of the state in the conduct of local government.

Except as otherwise provided by a valid statute,⁷⁰ rules as to costs applicable in civil actions in general apply in actions to which a municipal corporation is a party.⁷¹ Thus, the general rule that costs can be imposed and recovered only in cases where there is statutory authority therefor, as discussed in Costs § 2, applies,⁷² as does the general rule, as discussed in Costs § 8, that costs are imposed on the unsuccessful party,⁷³ and the exceptions thereto,⁷⁴ and a municipal corporation as the successful party is entitled to the inclusion of a counsel fee.⁷⁵ However, the rule imposing costs on the unsuccessful party has been held not to apply where the municipality sues or is sued in the capacity of agent of the state in the conduct of local government,⁷⁶ and, under a statute so providing, the municipality is not liable for costs in an action by it unless the institution of the action is duly authorized.⁷⁷ A municipality cannot be charged with costs where it is not a party to the proceedings.⁷⁸

61. Neb.—*Alter v. State*, 86 N.W. 1080, 62 Neb. 239.
34 C.J. p 656 note 75.

62. Okl.—*City of Drumright v. McCormick*, 35 P.2d 951, 169 Okl. 67.

63. U.S.—*Beadles v. Smyser*, Okl., 28 S.Ct. 522, 209 U.S. 393, 52 L.Ed. 849.

44 C.J. p 1492 note 40.

64. U.S.—*Brockway v. Oswego Tp.*, C.C.Kan., 40 F. 612.

Neb.—*Alter v. State*, 86 N.W. 1080, 62 Neb. 239.

65. U.S.—*Beadles v. Smyser*, Okl., 28 S.Ct. 522, 209 U.S. 393, 52 L.Ed. 849.

34 C.J. p 658 note 96 [a].

66. U.S.—*Beadles v. Smyser*, *supra*.
34 C.J. p 658 note 96 [a].

67. U.S.—*Brockway v. Oswego Tp.*, C.C.Kan., 40 F. 612.

34 C.J. p 667 note 70.

68. U.S.—*Grantland v. Memphis*, C. C.Tenn., 12 F. 287.

69. Neb.—*Alter v. State*, 86 N.W. 1080, 62 Neb. 239.

70. La.—*Henderson v. City of Shreveport*, App., 26 So.2d 766.

Statute held invalid

A statute exempting a municipal corporation from liability for costs in certain actions against it has been held unconstitutional.—*Durkee v. Janesville*, 28 Wis. 464, 9 Am.R. 500.

71. N.J.—*De Muro v. Martini*, 64 A. 2d 351, 1 N.J. 516.

44 C.J. p 1493 note 69.

Costs in:

Action against municipal corporation for tort see *supra* § 948.

Proceedings for enforcement of ordinances see *supra* §§ 380-384.

Taxpayer's action see *supra* § 2171.

72. A municipal corporation is not liable for court costs in the absence of statutory authority.—*King County v. City of Seattle*, 80 P.2d 838, 195 Wash. 293.

73. N.J.—*De Muro v. Martini*, 64 A. 2d 351, 1 N.J. 516.

44 C.J. p 1493 note 71.

74. Suit in equity in interest of both

Where it was to interest of oppos-

ing parties that main questions involved in equity suit should be settled, costs should have been borne equally, one half by unsuccessful plaintiffs and one half by defendant city.—*Goodwin v. City of Jacksonville*, 21 So.2d 209, 155 Fla. 729.

75. N.J.—*Jersey City v. Jersey City Water Supply Co.*, 117 A. 626, 93 N.J.Eq. 620.

76. Ill.—*Grafton v. Mooney*, 89 Ill. App. 622.

77. Pa.—*Clauhs v. Pittsburgh*, 14 Pa.Dist. 571.

44 C.J. p 1493 note 74.

78. Ky.—*Chesapeake, etc., R. Co. v. Harmon*, 166 S.W. 786, 159 Ky. 59, Ann.Cas.1915D 562.

44 C.J. p 1493 note 76.

Suit not a "class suit"

Suit by city to procure funds allegedly due city from sales tax funds was not a "class suit" in the sense that a city not participating in a duly authorized manner could be charged with costs and fees, notwithstanding general allegation in complaint that all cities are entitled

Presentation of claim as condition precedent. Under some statutes costs cannot be awarded to one who sues a municipality unless the claim was presented to it in proper form before the commencement of the action.⁷⁹ Presentation must be made to the proper officer or board⁸⁰ in such a manner as to afford opportunity and sufficient information to the officer to whom it is presented to enable him to present it to the proper auditing officers and procure authority to pay;⁸¹ and, under some statutes, the claim must be verified,⁸² and must be presented by one asserting authority to act for claimant.⁸³ Where the claim is not presented and plaintiff is

successful, neither party is entitled to costs.⁸⁴

Enforcement. It has been held that a judgment against a municipality for costs will not be enforced by execution,⁸⁵ but that the proper remedy is by mandamus to compel a levy.⁸⁶ Where the municipal corporation is entitled to the costs, suit should be brought in its name on an undertaking for costs given by the opposing party.⁸⁷ Where a municipal corporation as defendant is successful on appeal as against a codefendant and plaintiff fails utterly in the action, the appellate court may order plaintiff to pay the costs directly to the corporation.⁸⁸

XXII. CRIMINAL RESPONSIBILITY

§ 2215. Nature and Grounds in General

While a municipal corporation cannot be indicted for offenses which derive their criminality from evil intention, or which consist in a violation of those social duties which appertain to men and subjects such as treason, perjury, or offenses against the person, a municipal corporation is indictable for either nonfeasance, misfeasance, or malfeasance, in respect of public duties imposed on it by law.

While it has been broadly stated that a municipal corporation cannot be guilty of a crime either as a principal offender or as an aider and abettor,⁸⁹ and it is no doubt true that a municipality cannot be indicted for offenses which derive their criminality from evil intention, or which consist in a violation of those social duties which appertain to men and subjects such as treason, perjury, or of-

fenses against the person,⁹⁰ it is established that a municipal corporation is indictable at common law for either nonfeasance, misfeasance, or malfeasance, in respect of public duties imposed on it by law,⁹¹ and modern judicial tendency, like public sentiment, is toward assimilating such corporations to natural persons in their liabilities, criminal as well as civil.⁹² However, its liability is to be confined to those of its acts which are of a private or proprietary nature, and it is not subject to indictment for the exercise or failure to exercise its governmental functions.⁹³ A municipality may be indicted for creating a public nuisance,⁹⁴ or for neglecting its duty to keep in repair its streets or highways,⁹⁵ to erect or repair municipal bridges,⁹⁶ or to construct and maintain in good condition a proper sewer sys-

to share in the recovery.—Page v. Alexander, 177 S.W.2d 415, 206 Ark. 479.

79. Okl.—Pawhuska v. Pawhuska Oil, etc., Co., 248 P. 336, 118 Okl. 201.

44 C.J. p 1493 note 79.
Presentation of claim as condition precedent to maintenance of action see supra § 2199.

80. N.Y.—Gage v. Hornellsville, 12 N.E. 817, 106 N.Y. 667.

44 C.J. p 1493 note 80.

81. N.Y.—Spaulding v. Waverly, 44 N.Y.S. 112, 12 App.Div. 594.

82. Okl.—Hugo v. Nance, 136 P. 346, 39 Okl. 640.

44 C.J. p 1494 note 82.

83. N.Y.—Spaulding v. Waverly, 44 N.Y.S. 112, 12 App.Div. 594.

84. N.Y.—Baine v. Rochester, 85 N.Y. 523, 1 N.Y.Civ.Proc. 269, 62 How.Pr. 346.

85. Ill.—Chicago v. Nichols, 52 N.E. 359, 177 Ill. 97.

44 C.J. p 1494 note 85.

Execution to enforce judgment against municipality generally see supra § 2212 a (3).

86. Pa.—Hodges v. Board of Revision, 3 L.T.N.S., 77.

Mandamus as proper remedy:

To enforce judgment against municipal corporation generally see Mandamus § 144 c.

To compel levy and assessment of taxes generally see Mandamus § 182.

87. N.Y.—New York v. Bannan, 58 N.Y.S. 1031, 42 App.Div. 191.

Suits in corporate name in general see supra § 2194.

88. N.Y.—Merchants', etc., Nat. Bank v. New York, 97 N.Y. 355.

89. Ohio.—Gaines v. Village of Wyoming, 13 Ohio Supp. 38.

90. Wash.—State v. Metropolitan Park Dist., 171 P. 254, 100 Wash. 449.

44 C.J. p 1495 note 32.

91. Ky.—City of Ludlow v. Commonwealth, 56 S.W.2d 958, 247 Ky. 166.

44 C.J. p 1495 note 33.

Construction of ramp on lands devoted by city to public footway ex-

tending to municipal building without guard rails or barriers on adjacent ground levels, or other device adequate for protection of persons exercising reasonable care in use of premises, was an indictable public wrong—Allas v. Borough of Rumson, 181 A. 175, 115 N.J.Law 593, 102 A.L.R. 648.

92. Pa.—Commonwealth v. Bredin, 30 A. 921, 165 Pa. 224.

Tenn.—State v. Shelbyville Corp., 4 Sneed 176.

93. Wash.—State v. Metropolitan Park Dist., 171 P. 254, 100 Wash. 449.

44 C.J. p 1495 note 35.

94. Ky.—City of Ludlow v. Commonwealth, 56 S.W.2d 958, 247 Ky. 166.

44 C.J. p 1495 note 36.

95. Tenn.—Southern R. Co. v. State, 169 S.W. 1173, 130 Tenn. 261, L.R.A.1915B 766.

44 C.J. p 1496 note 37.

96. Wis.—Saukville v. State, 33 N.W. 88, 69 Wis. 178.

44 C.J. p 1496 note 38.

tem.⁹⁷ A town has been held liable to an indictment for not erecting a bridge ordered by the road commissioners.⁹⁸ It has even been held that a municipality is indictable for permitting a public nuisance to be maintained within the corporate limits, because it is vested with the power to enact and enforce ordinances for the preservation of the public health and for the removal of nuisances;⁹⁹ but this has been denied as involving a governmental function.¹ A municipal corporation has been held not to be punishable for a failure to perform a duty to put up signboards at railroad crossings imposed by statute on overseers of common roads.²

§ 2216. Prosecutions

- a. In general
- b. Trial and evidence
- c. Fines, forfeitures, and penalties

a. In General

The indictment should be against the municipal corporation, and the necessity for various allegations in indictments charging various offenses has been adjudicated.

It has been held that the indictment should be against the municipal corporation and not against its inhabitants,³ or against the mayor and council;⁴ but it has also been held that, if persons named in an indictment for maintaining a nuisance are described as the mayor and councilmen of a town, naming the town, the persons so named are indicted in their corporate capacity, and not as individuals,⁵ and that the indictment or presentment need not allege in terms that the mayor and aldermen are an incorporated body.⁶ An indictment for failure to keep a highway in repair need not allege the authority by which the highway was laid out,⁷ or set forth the width of the highway.⁸ In an indictment against a town for not erecting a bridge ordered by the road commissioners, it is not necessary to set forth that the selectmen had, previous to such or-

der, neglected to build such bridge;⁹ and it is not necessary in an indictment for a nuisance caused by a sewer to allege negligence in the adoption of the plan of the sewerage system or careless execution thereof.¹⁰ Where a notice, signed by citizens of a borough, requesting a constable to return a nuisance, is attached by the constable to his return, the notice is a part of the return and is sufficient to support an indictment.¹¹

b. Trial and Evidence

General rules as to the trial and evidence in criminal proceedings generally have been applied in criminal prosecutions against a municipal corporation.

General rules as to the trial¹² and evidence¹³ in criminal proceedings have been applied in criminal prosecutions against a municipal corporation. An allegation or averment in the indictment, not necessary or material to a perfect description of the offense, but suited only to negative an anticipated defense, need not be proved in order to authorize a conviction.¹⁴ Where an indictment on behalf of an administrator to recover a statutory penalty for a defect in a highway, whereby decedent's death occurred, describes decedent as late of a certain county, the right of the administrator to prosecute the indictment may be proved by letters of administration granted by the probate court of another county.¹⁵ An ordinance providing a punishment for maintaining a nuisance within a municipality is not admissible in a prosecution against the municipality for maintaining a nuisance.¹⁶ In a prosecution for maintaining a public nuisance by allowing a street to remain in an unsafe condition, an instruction to the jury which outlines the facts constituting the offense need not use the words "common nuisance."¹⁷

c. Fines, Forfeitures, and Penalties

On conviction of a municipal corporation of an offense, it seems that the proper penalty to be assessed

97. Ky.—City of Ludlow v. Commonwealth, 56 S.W.2d 958, 247 Ky. 166.

44 C.J. p 1496 note 39.

98. Vt.—State v. Whitingham, 7 Vt. 390.

99. N.Y.—People v. Albany, 11 Wend. (N.Y.) 539, 27 Am D. 95.
Tenn.—McCrowell v. Bristol, 5 Lea 685—State v. Shelbyville Corp., 4 Sneed 176.

1. Ky.—Georgetown v. Commonwealth, 73 S.W. 1011, 115 Ky. 382, 24 Ky.L. 2285, 61 L.R.A. 673.
44 C.J. p 1496 note 43.

2. Tenn.—State v. Manchester, 3 Baxt. 416.

44 C.J. p 1496 note 44.

3. Mass.—Commonwealth v. Dedham, 16 Mass. 141.

44 C.J. p 1496 note 48.

4. Pa.—Commonwealth v. Ephrata Borough, 2 Pa Dist. 349.

44 C.J. p 1497 note 49.

5. Pa.—Commonwealth v. Bredin, 30 A. 921, 165 Pa. 224.

44 C.J. p 1497 note 50.

6. Tenn.—State v. Murfreesboro, 11 Humphr. 217.

7. Me.—State v. Madison, 63 Me. 546.

8. Me.—State v. Madison, supra.

9. Vt.—State v. Whitingham, 7 Vt. 390.

10. Me.—State v. Portland, 74 Me. 268, 43 Am R 586.

11. Pa.—Commonwealth v. Bredin, 30 A. 921, 165 Pa. 224.

12. Ky.—Ludlow v. Commonwealth, 145 S.W. 406, 147 Ky. 706, 39 L.R.A., N.S., 411, Ann.Cas.1913D 301.

13. Ky.—Ludlow v. Commonwealth, supra.

14. Me.—State v. Bangor, 30 Me. 341.

15. Me.—State v. Bangor, supra.

16. Ky.—Newport v. Commonwealth, 55 S.W. 914, 103 Ky. 151, 21 Ky.L. 1591.

17. Ky.—Ludlow v. Commonwealth, 145 S.W. 406, 147 Ky. 706, 39 L.R.A., N.S., 411, Ann.Cas.1913D 301.

against it is a fine or a judgment for the abatement of the nuisance.

It is obvious that a municipal corporation cannot be imprisoned on conviction of an offense, and it seems that the proper penalty to be assessed against it is a fine,¹⁸ or a judgment for the abatement of the nuisance.¹⁹ Under a statute subjecting mu-

nicipal corporations to a fine, penalty, or forfeiture for defects in highways, whereby loss of life has occurred, the amount of the amercement, within the limits of the statute, is to be fixed by the court in its discretion and not by the jury,²⁰ and the decision of the trial court as to the amount is final.²¹

MUNICIPALIS. See Municipal Corporations § 2.

MUNICIPALITY. See Municipal Corporations § 1.

MUNICIPIUM. See Municipal Corporations § 2.

MUNIMENTS OF TITLE. A general expression for all means of evidence, by which an owner, corporate or individual, may defend title to real property.¹ As generally defined the term refers to title deeds and other documents relating to the title to land.²

MUNITION. Whatever materials are used in war for defense or for annoying an enemy; ammunition; also, stores and provisions; military stores of all kinds.³

MUNUS. A gift; an office; a benefice or feud. Also, a gladiatorial show or spectacle.⁴ It has been distinguished from "donum" see 28 C.J.S. p 55 note 20.

MURAGE. A duty for the repairs of the town walls.⁵

MURDER. See Homicide §§ 13-36.

MURIATIC ACID. See Acid 1 C.J.S. p 770 note 84.1.

MUSCOGEE NATION. See Indians § 9 a.

MUSCOVADO. Raw sugar.⁶

MUSEUM. A repository or a collection of natural, scientific, or literary curiosities or objects of interest, or of works of art.⁷

MUSHROOM. In popular application, any edible fungus of the order Agaricales, especially, the field or common mushroom (*Agaricus campestris*).⁸

MUSIC. A tone or tones having any or all of the features of rhythm, melody, or consonance.⁹ Also, a composition so made; such compositions collectively.¹⁰ "Music" has been compared with, and distinguished from, "noise."¹¹

MUSICAL. Of or pertaining to music or the performance of music.¹²

18. Ill.—*People v. Chicago*, 100 N.E. 194, 256 Ill. 558, 43 L.R.A., N.S., 954, Ann. Cas. 1913E 305.
44 C.J. p 1497 note 65.

19. Pa.—*Commonwealth v. Bredin*, 30 A. 921, 165 Pa. 224.
Tenn.—*McCrowell v. Bristol*, 5 Lea 685.

20. Me.—*State v. Bangor*, 41 Me. 533.

21. Me.—*State v. Bangor*, supra.

1. N.Y.—*Browne v. Perris*, 7 N.Y. S. 172, 23 Abb.N.Cas. 226, 229.
44 C.J. p 1498 note 26.

2. Wyo.—*Merrill v. Rocky Mountain Cattle Co.*, 181 P. 964, 971, 26 Wyo. 219.

Held muniments of title

(1) Judgment that plaintiff take nothing against defendant.—*Becton v. Dublin*, Tex.Civ.App., 163 S.W.2d 907, 911.

(2) Land trust certificates.—*Naragansett Mut. Fire Ins. Co. v. Burnham*, 154 A. 909, 911, 51 R.I. 371.

(3) Map of railroad right of way, with notations, testified to by surveyor as result of his own work.—

Atlantic Coast Line R. Co. v. Searson, 135 S.E. 567, 571, 137 S.C. 468.

(4) Tax deed.—*Mitchell v. Moore*, 13 So.2d 314, 315, 152 Fla. 813.

(5) Water decree.—*Reynolds Irr. Dist. v. Sproat*, 151 P.2d 773, 775, 65 Idaho 617.

(6) Will.—*In re Puett's Will*, 47 S.E.2d 488, 491, 229 N.C. 8.

Held not muniments of title

(1) Certificate of sale of real property by sheriff.—*Stoddard v. Stoddard*, 26 N.Y.S.2d 151, 153, 261 App. Div. 315.

(2) Monition proceedings.—*Land Co. v. Rudd*, La.App., 193 So. 230, 231, 232.

3. Webster New Int.D.

Phrases

(1) "Munition manufacturer's tax"—*Carbon Steel Co. v. Lewellyn*, D.C.Pa., 255 F. 364, 367.

(2) "Munitions of war" include living fat cattle.—*U. S. v. Sheldon*, Vt., 2 Wheat. (U.S.) 119, 122, 4 L. Ed. 199.

4. Black L.D.

5. Eng.—*Truro v. Reynolds*, 8 Bing

275, 282, 21 E.C.L. 538, 131 Reprint 407.

6. US—*Gossler v. Goodrich*, C.C. Mass., 10 F.Cas. No. 5,631, 3 Cliff. 71.

7. Conn.—*Esterbrook v. Hebrew Ladies' Orphan Soc.*, 82 A. 561, 566, 85 Conn. 289, 41 L.R.A., N.S., 615.

44 C.J. p 1498 note 35.

8. Webster New Int.D.

44 C.J. p 1498 note 37.

9. Webster New Int.D.

US.—See *Æolian Co. v. Hallett & Davis Piano Co.*, C.C. Mass., 134 F. 872, 880.

10. Webster New Int.D.

"Music" is said to be included in the meaning of the terms "goods, wares, or merchandise."—*Commonwealth v. Nax*, 13 Gratt. 789, 791, 54 Va. 789, 791.

11. Puerto Rico.—*People v. Vilaró*, 13 Puerto Rico 35, 40.

12. US—*Æolian Co. v. Hallett & Davis Piano Co.*, C.C. Mass., 134 F. 872, 880.

44 C.J. p 1498 note 42.

MUSICIAN. One skilled in the art or science of music; especially a professional singer, musical performer, conductor, or the like.¹³

MUSKET. A hand firearm formerly carried by soldiers.¹⁴ It has been distinguished from "shotgun."¹⁵

MUSKRAT FARM. See 35 C.J.S. p 747 note 77.

MUSLIN. Any of various cotton cloths.¹⁶

MUSSEL. See Fish § 1.

MUSSEL BED. A bed or repository of mussels.¹⁷ It does not constitute an island, see Island 48 C.J.S. p 775 note 48.

MUST. The word "must" means obliged;¹⁸ to be obliged;¹⁹ to be legally or morally obliged to do a given thing;²⁰ to be necessary;²¹ required.²² It

creates an obligation and imposes a physical or moral necessity;²³ and it implies obligation or compulsion.²⁴

In ordinary parlance²⁵ "must" is a word of command,²⁶ compulsory in meaning,²⁷ generally mandatory²⁸ or imperative,²⁹ and not directory³⁰ or discretionary.³¹ However, such construction is not always imperative.³² "Must" may be construed as merely directory,³³ and not mandatory³⁴ or imperative,³⁵ implying use of discretion.³⁶ Whether the word is to be construed as mandatory or as permissive is to be determined in each case from the apparent intention as gathered from the context,³⁷ considering the whole instrument in which it is used³⁸ and the object sought to be accomplished.³⁹

"Must" has been held to be synonymous with, or the equivalent of, "may" see 57 C.J.S. p 459 note 27, "shall,"⁴⁰ and "will."⁴¹

Phrases

(1) "Musical compositions" see index to title Copyright and Literary Property.

(2) "Musical instrument" see Instrument 44 C.J.S. p 418 notes 91-93.2.

(3) Other phrases as to which more recent adjudications have not been found see 44 C.J. p 1498 note 42.

13. Webster New Int.D.

Mass.—See Commonwealth v. Plaisted, 19 N.E. 224, 148 Mass. 375, 380, 12 Am S.R. 566, 2 L.R.A. 142.

14. Webster New Int.D.

15. Tenn.—Burks v. State, 36 S.W. 2d 892, 893, 162 Tenn 406. 58 C.J. p 701 note 72 [b].

16. Webster New Int D.

Swiss muslins

U.S.—U. S. v. Albert, N.Y., 60 F. 1012, 1013, 9 C.C.A. 332. 44 C.J. p 1498 note 48.

17. Century D.

18. Ohio.—Willis v. Seeley, Com.Pl., 68 N.E.2d 484, 485.

19. Pa.—In re Mount Pleasant Tp. Road, 2 Pa.Dist. & Co. 120, 122.

20. N.D.—Murie v. Cavalier County, 278 N.W. 243, 248, 68 N.D. 242.

21. Pa.—In re Mount Pleasant Tp. Road, 2 Pa.Dist. & Co. 120, 122.

Similarly expressed

The word "must" connotes the idea of necessity.—Campbell v. Johnson, 79 N.E.2d 147, 149, 83 Ohio App. 225.

22. Ohio.—Willis v. Seeley, Com.Pl., 68 N.E.2d 484, 485.

23. Ohio.—Willis v. Seeley, supra.

24. N.D.—Murie v. Cavalier County, 278 N.W. 243, 248, 68 N.D. 242.

25. Cal.—Pleasant Grove Union

School Dist v. Algeo, 215 P. 726, 61 Cal.App. 660.

Phrases

(1) "Must take" is not equivalent to "are to take" see Are 6 C.J.S. p 331 note 30.

(2) Other phrases as to which more recent adjudications have not been found see 44 C.J. p 1499 notes 71-81.

26. N.Y.—People v. Bailey, 171 N. Y.S. 394, 396, 103 Misc. 366.

27. Cal.—Pleasant Grove Union School Dist. v. Algeo, 215 P. 726, 61 Cal.App. 660.

28. Cal.—Corpus Juris cited in State v. Superior Court in and for City and County of San Francisco, 58 P.2d 1322, 1324, 14 Cal.App.2d 718.

Del.—Terry v. Stull, 168 A. 251, 256, 19 Del Ch. 412.

Ohio.—Willis v. Seeley, Com.Pl., 68 N.E.2d 484, 485. 44 C.J. p 1498 note 58.

Ordinary meaning of "must" is of mandatory effect.—Samuell v. American Mortgage Corporation, Tex.Civ. App., 78 S.W.2d 1036, 1040.

Suggestive of mandatory meaning Minn.—Wenger v. Wenger, 274 N.W. 517, 519, 200 Minn. 436.

29. U.S.—Berg v. Merchant, C.C.A. Ohio, 15 F.2d 990, 991.

Mo.—State v. Price, 85 S.W. 922, 923, 111 Mo.App. 423.

"Must" denotes imperative action N.C.—Jones v. Palmer, 2 S.E.2d 850, 852, 215 N.C. 696.

30. N.Y.—Hemmer v. Hustace, 3 N. Y.S. 850, 851, 51 Hun 457.

Pa.—In re Mount Pleasant Tp., 2 Pa. Dist. & Co. 120, 122.

31. Iowa.—Patch v. Osceola, etc., Counties, 159 N.W. 694, 696, 178 Iowa 283.

32. Cal.—Pleasant Grove Union

School Dist. v. Algeo, 215 P. 726, 61 Cal.App. 660.

33. Cal.—In re Atkins' Estate, 8 P. 2d 1052, 1054, 121 Cal.App. 251.

Mich.—Robinson v. City of Saginaw, 255 N.W. 396, 397, 267 Mich. 557.

Wyo.—Corpus Juris cited in Delfelder v. Teton Land & Investment Co., 24 P.2d 702, 708, 46 Wyo. 142. 44 C.J. p 1499 note 63.

34. Cal.—In re Atkins' Estate, 8 P. 2d 1052, 1054, 121 Cal.App. 251.

Mich.—Robinson v. City of Saginaw, 255 N.W. 396, 397, 267 Mich. 557.

Wyo.—Corpus Juris cited in Delfelder v. Teton Land & Investment Co., 24 P.2d 702, 708, 46 Wyo. 142. 44 C.J. p 1499 note 64.

35. Mich.—Robinson v. City of Saginaw, 255 N.W. 396, 397, 267 Mich. 557.

Wyo.—Corpus Juris cited in Delfelder v. Teton Land & Investment Co., 24 P.2d 702, 708, 46 Wyo. 142. 44 C.J. p 1499 note 65.

36. Wyo.—Corpus Juris cited in Delfelder v. Teton Land & Investment Co., 24 P.2d 702, 708, 46 Wyo. 142.

44 C.J. p 1499 note 66.

37. Utah.—Gibbs v. Gibbs, 73 P. 641, 653, 26 Utah 382.

44 C.J. p 1499 note 68.

38. N.Y.—People v. Bailey, 171 N. Y.S. 394, 396, 103 Misc. 366.

39. D.C.—Fields v. U. S., 27 App.D. C. 433, 440.

N.Y.—People v. Bailey, 171 N.Y.S. 394, 396, 103 Misc. 366.

40. Ark.—Fort Smith Gas Co. v. Kincannon, 150 S.W.2d 968, 970, 202 Ark. 216.

Minn.—In re Trusteeship of First Minneapolis Trust Co., 277 N.W. 899, 902, 202 Minn. 187.

44 C.J. p 1498 note 58 [b]—57 C.J. p 550 note 44 [a].

41. Minn.—In re Trusteeship of

It has been compared with, or distinguished from, "allow" see 3 C.J.S. p 889 note 96, "may" see 37 C.J.S. p 459 note 31, and "ought."⁴²

MUSTER As a noun, a term sometimes applied to a troop of soldiers already enrolled, armed, and trained.⁴³

As a verb, to accept or approve the troops collected;⁴⁴ to call together a military force;⁴⁵ to enroll in service; to inspect and enter troops on the muster roll of the army; to summon together.⁴⁶ It would seem that the word "muster" may be used accurately in describing the gathering together of men by military order at the various camps for the purpose of selecting and later training those who on examination appear to possess the necessary qualifications.⁴⁷

MUSTIZO. See Indians § 2 c.

MUTATA FORMA INTEREMETUR PROPE SUBSTANTIA REI. See 44 C.J. p 1499 note 91.

MUTATION OF LIBEL. In practice, an amendment allowed to a libel, by which there is an alteration of the substance of the libel, as by propounding a new cause of action, or asking one thing instead of another.⁴⁸

MUTATIS MUTANDIS. With the necessary changes in points of detail;⁴⁹ with necessary changes in details to conform to a single vital alteration.⁵⁰

MUTATO NOMINE DE TE FABULA NARRATUR. See 44 C.J. p 1499 note 95.

MUTE. A dumb person.⁵¹

In English criminal law, a prisoner is said to stand mute when, being arraigned for treason or felony, he either makes no answer at all, or answers foreign to the purpose with such matter as is not allowable, and will not answer otherwise, or, on having pleaded not guilty, refuses to put himself on the country.⁵²

MUTILATE. The term "mutilate," as applied to a person, means to cut off a limb or an essential part of the body;⁵³ to cut off or deprive of a limb or essential part of, as an animal body;⁵⁴ to cut or break off, or otherwise remove any part of;⁵⁵ to deprive of a limb⁵⁶ or some essential part;⁵⁷ to disfigure;⁵⁸ to maim;⁵⁹ to deprive a man of the use of those limbs which may be useful to him in fight.⁶⁰

As applied to an article, it means something less than total destruction.⁶¹ In the sense in which the word is generally used by law writers and by judges⁶² it means to render imperfect;⁶³ to render imperfect by cutting off or destroying a part;⁶⁴ to retrench, remove, expunge, or delete an essential or material part of, so as to render incomplete or imperfect.⁶⁵

Mutilated. Destitute or deprived of some essential or valuable part; greatly shortened.⁶⁶

First Minneapolis Trust Co., *supra*.

Mo—State v. Summers, App., 281 S. W. 123, 124.

44 C.J. p 1498 note 58 [c].

42. Mont.—State v. Blaine, 124 P. 516, 517, 45 Mont. 482.

43. Mass.—Tyler v. Pomeroy, 8 Allen 480, 498.

44. Mass.—Tyler v. Pomeroy, *supra*.

44 C.J. p 1499 note 84.

45. Pa.—Mechanics' Sav. Bank v. Sallade, 1 Woodw. 23, 24, 26.

46. R.I.—Bannister v. Soldiers' Bonus Bd., 112 A. 422, 423, 43 R.I. 346, 350, 13 A.L.R. 589.

47. "Mustered into the federal service"

R.I.—Bannister v. Soldiers' Bonus Bd., *supra*.

48. Black L.D.

49. Black L.D.

44 C.J. p 1499 note 93.

50. Mass.—Copeland v. Eaton, 95 N. E. 291, 292, 293, 209 Mass. 139, Ann.Cas.1912B 521.

44 C.J. p 1499 note 94.

51. Standard D Deaf-mute see Insane Persons § 2 d.

52. Black L.D.

44 C.J. p 1500 note 97.

See Criminal Law § 413.

53. Cal.—People v. Bullington, 80 P.2d 1030, 1032, 27 Cal.App.2d 396.

44 C.J. p 1500 note 99.

54. Ga.—Young v. Central of Georgia R. Co., 47 S.E. 556, 120 Ga. 25, 102 Am.S.R. 68, 65 L.R.A. 436, 1 Ann.Cas. 24.

Tex.—Stubbs v. Moursund, Civ.App., 222 S.W. 632, 634.

55. Ga.—Young v. Central of Georgia R. Co., 47 S.E. 556, 120 Ga. 25, 102 Am.S.R. 68, 65 L.R.A. 436, 1 Ann.Cas. 24.

56. Cal.—People v. Bullington, 80 P.2d 1030, 1032, 27 Cal.App.2d 396

57. Cal.—People v. Bullington, *supra*.

N.Y.—Martin v. Blydenburgh, 1 Daly 314, 317.

58. Cal.—People v. Bullington, 80 P.2d 1030, 1032, 27 Cal.App.2d 396.

Ga.—Young v. Central of Georgia R. Co., 47 S.E. 556, 120 Ga. 25, 102

Am.S.R. 68, 65 L.R.A. 436, 1 Ann.Cas. 24.

59. Cal.—People v. Bullington, 80 P.2d 1030, 1032, 27 Cal.App.2d 396.

Ga.—Young v. Central of Georgia R. Co., 47 S.E. 556, 120 Ga. 25, 102 Am.S.R. 68, 65 L.R.A. 436, 1 Ann.Cas. 24.

60. Cal.—People v. Bullington, 80 P.2d 1030, 1032, 27 Cal.App.2d 396

61. Ind.—Tinsley v. Carwile, 10 N. E.2d 597, 600, 212 Ind. 675.

62. Ind.—Tinsley v. Carwile, *supra*.

63. Cal.—People v. Bullington, 80 P.2d 1030, 1032, 27 Cal.App.2d 396.

Ind.—Tinsley v. Carwile, 10 N.E.2d 597, 600, 212 Ind. 675—Woodhill v. Patton, 76 Ind. 575, 583, 40 Am.R. 269.

64. Cal.—People v. Bullington, 80 P.2d 1030, 1032, 27 Cal.App.2d 396.

65. Ga.—Young v. Central of Georgia R. Co., 47 S.E. 556, 120 Ga. 25, 102 Am.S.R. 68, 65 L.R.A. 436, 1 Ann.Cas. 24.

66. Tex.—Stubbs v. Moursund, Civ. App., 222 S.W. 632, 634.

Mutilation. A word sometimes used in the sense of a revocation.⁶⁷ As applied to written documents, such as wills, court records, and the like, this term means rendering the document imperfect by the subtraction from it of some essential part, as by cutting, tearing, burning, or erasure, but without totally destroying it.⁶⁸

The mutilation of an instrument, as distinguished from an alteration, is discussed in *Alteration of Instruments* § 1. The revocation of wills by mutilation is treated in the C.J.S. title *Wills* §§ 276-281, also 68 C.J. p 814 note 37-p 822 note 73. The mutilation of records as ground for denial of a discharge in bankruptcy is discussed in *Bankruptcy* § 520 c. For other particular references consult the *Descriptive-Word Index*.

MUTINY. To rise against lawful or constituted authority, particularly in the naval or military service.⁶⁹ "Mutiny" has been compared with "insurrection" see *Insurrection and Sedition* § 1 a. Mutiny in the military sense is treated in *Army and Navy* § 39; inciting to mutiny or engaging in mutiny on shipboard by seamen see the C.J.S. title *Seamen* §§ 259, 261, also 56 C.J. p 1139 note 7-p 1143 note 4, p 1144 note 41-p 1146 note 90.

MUTTONHEAD. A dull, heavy, and uninteresting person.⁷⁰

MUTUAL. Reciprocally acting or related; reciprocally receiving and giving; reciprocal; interchanged;⁷¹ reciprocally acting, giving, receiving, in-

terchanging.⁷² It sometimes means substantially equal.⁷³ The word in itself denotes a common interest⁷⁴ and properly implies reciprocal action.⁷⁵

"Mutual" and "common" have been compared or distinguished, and the words have also been held to be equivalents or synonyms, see 15 C.J.S. p 590 notes 49, 52. "Mutual" has been contrasted with, or distinguished from, "equal" see 30 C.J.S. p 293 note 64.1.

Phrases employing the word are set out in the note.⁷⁶

MUTUAL BENEFIT INSURANCE. See *Insurance* §§ 1435-1693. For more specific references consult index to *Insurance*.

MUTUALITY. The state or quality of being mutual; reciprocity; interchange.⁷⁷ The term "mutuality" is used in various connections throughout this work, particular reference being made to the indexes to the titles *Contracts* and *Equity*. For other references consult the *Descriptive-Word Index*.

MUTUALLY. The adverb of "mutual."⁷⁸

MUTUARY. A receiver of property pledged under a form of contract called a mutuum.⁷⁹

MUTUUM. See *Bailments* § 10.

MY. Belonging to me.⁸⁰

MYELITIS. Chronic inflammation of the spine;⁸¹ a diseased condition or degeneration of the spinal cord.⁸² It has been compared with neurasthenia.⁸³

67. Ind.—Woodfill v. Patton, 76 Ind. 575, 583, 40 Am.R. 269.

44 C.J. p 1500 note 10.

68. Black L.D.

69. U.S.—U. S. v. Kraftt, N.J., 249 F. 919, 925, 162 C.C.A. 117, L.R.A. 1918F 402.

70. N.J.—Ruthenbeck v First Criminal Judicial Dist. Court of Bergen County, 147 A. 625, 7 N.J.Misc. 969.

71. La.—Platt v. Bender, App., 178 So. 678, 682.
44 C.J. p 1500 note 15.

72. Miss.—Canal-Commercial Trust & Savings Bank v. Brewer, 108 So. 424, 431, 143 Miss. 146, 47 A.L.R. 45—Hoover Commercial Co. v. Humphrey, 66 So. 214, 216, 107 Miss. 810.

73. U.S.—Herold v. Park View Building, etc., Assoc. N.J., 210 F. 577, 582, 127 C.C.A. 213.

74. Okl.—Naill v. Order of United Commercial Travelers, 229 P. 833, 837, 103 Okl. 179.
44 C.J. p 1500 note 16.

75. U.S.—Platt v. Bender, App., 178 So. 678, 682.

76. *Phrases*

(1) "Mutual combat" see 15 C.J. S. p 240 notes 47-50.

(2) "Mutual covenants" defined see *Contracts* § 331.

(3) "Mutual credits" as a ground for equitable setoff and as distinguished from "mutual debts" see the C.J.S. title *Set-Off and Counterclaim* § 5, also 57 C.J. p 364 notes 90-94; as used in the *Bankruptcy Act* see *Bankruptcy* § 211.

(4) "Mutual insurance companies" see *Insurance* §§ 104-114.

(5) "Mutual mistake" see 58 C.J. S. p 832 notes 43-47.

(6) "Mutual satisfaction" held to mean reasonable satisfaction.—Bondy v. Harvey, C.C.A.N.Y., 62 F.2d 521, 524.

(7) "Mutual wills" see the C.J.S. title *Wills* § 1364, also 69 C.J. p 1297 notes 88-92.

(8) For other phrases employing the word "mutual" see index to *Contracts*, and for additional phrases as

to which more recent adjudications have not been found see 44 C.J. p 1501 notes 20-10.

77. *Century D.*

78. Webster New Int.D.

Phrases employing the word "mutually" and as to which more recent adjudications have not been found see 45 C.J. p 361 notes 12-17.

79. U.S.—Rahilly v. Wilson, C.C. Minn., 20 F.Cas No 11,532, 3 Dill. 420, 426.

80. *Century D.*

45 C.J. p 361 note 24.

Phrases employing the word "my" and as to which more recent adjudications have not been found see 45 C.J. p 361 note 25-p 363 note 28.

81. Ill.—Wabash Western R. Co. v. Friedman, 41 Ill.App. 270, 271.
45 C.J. p 363 note 29.

82. Wash.—Robinson v. Spokane Tract. Co., 91 P. 972, 973, 47 Wash. 303.

83. Wash.—Robinson v. Spokane Tract. Co., supra.
45 C.J. p 363 note 30.

MYELOGRAM. Commonly known as a spinal puncture, by means of which a specimen of the spinal fluid is withdrawn for examination.⁸⁴

MYELOMA. A malignant growth of a rare type; it is a progressive condition, and if nothing is done to treat it, it proceeds to the ultimate destruction of the bone.⁸⁵

MYOCARDITIS. An inflammation of the muscular wall of the heart;⁸⁶ an inflammatory disease of the myocardium;⁸⁷ an inflammation of the heart muscles caused by some local infection;⁸⁸ also described as a weakening of the heart muscles.⁸⁹

MYOCARDIUM. The muscular part of the wall of the heart;⁹⁰ the muscular substance of the heart.⁹¹

MYOPIA. A term used to designate shortness of sight.⁹²

MYSELF. An emphatic form of the first personal pronoun I or me.⁹³

MYSTERY. A term sometimes applied to a person's trade, art or occupation.⁹⁴

MYSTIC WILLS. See the C.J.S. title Wills § 208, also 68 C.J. p 725 notes 69-72.

MYXEDEMA. Another name for hypothyroidism.⁹⁵

N. The fourteenth letter of the English alphabet.⁹⁶ The letter occurs in various abbreviations, see Abbreviations 1 C.J.S. p 276 note 5.

NAG. To nag means, in common acceptation, to annoy by petty faultfinding or persistent scolding or urging; to be persistently worrying or irritating by continued faultfinding, scolding, or urging.⁹⁷

Nagging. It has been said that "nagging" is a very general and indefinite term;⁹⁸ but it also has been said that the term is of doubtful origin, and although it may not have been known at the common law it has been judicially and well defined and has come to have a definite meaning through usage.⁹⁹ Persistent urging amounts to nagging, and nagging is the exercise of domestic force by which the mind becomes irritated, disturbed, ruffled, wearied, and troubled, so that the judgment may become confused and the free action of the will is out of normal control.¹ The word carries with it the idea of continuity.²

Nagged. Irritated by persistent urging; persistently annoyed; disturbed; ruffled in mind; wearied; troubled.³

NAIL. A more or less slender, usually pointed piece of metal (rarely of wood), generally with a head intended to be struck by a hammer, used for driving into or through wood or other material to hold two or more pieces together.⁴

NAKED. Having on no clothes or covering; nude; bare; uncovered.⁵

Phrases employing the word are set out in the note,⁶ and for additional phrases as to which more

84. S.C.—Wardlaw v. J. G. Ridgeway Const. Co., 46 S.E.2d 662, 212 S.C. 116.

85. Ohio.—Conrad v. Industrial Commission, 16 N.E.2d 780, 781, 58 Ohio App. 434.

86. Ohio.—Vogt v. Industrial Commission of Ohio, 31 N.E.2d 93, 95, 66 Ohio App. 216.

87. Tex.—Gorman v. American General Ins. Co., Civ.App., 179 S.W.2d 814, 815.

88. Colo.—Brown v. Hughes, 30 P.2d 259, 260, 94 Colo. 295.

89. Ark.—Great Republic Life Ins. Co. v. Lankford, 127 S.W.2d 811, 813, 198 Ark. 166.

90. Tex.—Gorman v. American General Ins. Co., Civ.App., 179 S.W.2d 814, 815.

91. Ohio.—Vogt v. Industrial Commission of Ohio, 31 N.E.2d 93, 95, 66 Ohio App. 216.

92. N.C.—Harrell v. Norvill, 50 N.C. 29, 31.

93. Century D. "Myself note" see Bills and Notes § 7 a (1).

94. Me.—State v. Bishop, 15 Me. 122, 124 45 C.J. p 363 note 33

95. U.S.—U. S. v. 62 Packages, More or Less, of Marmola Prescription Tablets, D.C.Wis., 48 F.Supp. 878, 885

96. Webster New Int.D.

97. Pa.—Kolopen v. Kolopen, 25 A.2d 569, 571, 148 Pa.Super. 311

98. Pa.—Kolopen v. Kolopen, supra

99. N.M.—Trigg v. Trigg, 22 P.2d 119, 126, 37 N.M. 296.

1. N.M.—Trigg v. Trigg, supra.

2. Ga.—Alford v. Alford, 7 S.E.2d 278, 281, 189 Ga. 630.

3. N.M.—Trigg v. Trigg, 22 P.2d 119, 126, 37 N.M. 296.

Tex.—Buchanan v. Davis, Com.App., 12 S.W.2d 978, 982.

4. Webster New Int.D.

Nail factory held to include the nail machines, bluing cylinder, grind-

stone, shears, scouring machines, nail bins, pulleys, and levers situated in the building and used as a part of the factory—Delaware, L. & W. R. Co. v. Oxford Iron Co., 36 N.J.Eq. 452, 453.

5. Webster New Int.D.

Held inapplicable to describe persons without clothing only to the waist.—Commonwealth v. Dejardin, 126 Mass. 46, 47, 30 Am.R. 652.

6. **Naked possession**

(1) Actual possession or occupation of an estate without any apparent right to hold and continue such possession.—English v. Doe, 7 Ga. 387, 391-45 C.J. p 363 note 43.

(2) The lowest and most imperfect degree of title.—Pendleton v. Hooper, 13 S.E. 313, 87 Ga. 108, 27 Am.S.R. 227-45 C.J. p 363 note 44.

Other phrases

(1) "Bare naked lie" see Bare 9 C.J.S. p 1540 note 9.

(2) "Naked possibility or expectancy" see Expectancy 35 C.J.S. p 204 note 43.

recent adjudications have not been found see 45 C.J. p 363 note 49—p 364 note 53.

NAM. A Latin word often used by the old writers in introducing the quotation of a Latin maxim.⁷

Nam quis aspernabitur idem jus sibi dici, quod ipse aliis dixit, vel dici efficit? A maxim meaning "Who would spurn for himself the same law which he has laid down, or caused to be laid down for another?"⁸

Other maxims. "Nam" as the first word of other maxims as to which there have been no recent ap-

plications see 45 C.J. p 364 note 64, p 391 notes 1-3.

NAME. As a noun, the word "name" is defined in Names § 1. As a verb, to designate by name or specifically for any purpose; to mention by name; to utter or publish the name of.⁹

NAMELY. A term which imports interpretation, that is, indicates what is included in the previous term.¹⁰ The word "namely" has the same meaning as the word "videlicet,"¹¹ and "to wit," called "videlicet," is a phrase, which in its popular sense means "namely" as stated in the C.J.S. definition of To Wit, also 63 C.J. p 86 notes 27, 28.

(3) "Naked power" see the C.J.S. title Powers § 7, also 49 C.J. p 1252 note 63.

(4) "Naked promise;" one given without any consideration, equivalent, or reciprocal obligation, and for that reason not enforceable at law.—Black L.D.—45 C.J. p 363 note 48.

(5) "Naked trust" also called simple, passive, technical, or dry trust see the C.J.S. title Trusts § 17, also 65 C.J. p 227 note 9.

7. Black L.D.

8. La.—Tircuit v. Burton-Swartz Cypress Co., 110 So. 489, 492, 162 La. 319.

9. Webster New Int.D.

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(1) "Named orchestra" or "named band."—Nebraska Nat. Hotel Co. v. O'Malley, D.C.Neb., 63 F.Supp. 26, 29.

(2) Other phrases as to which more recent adjudications have not

been found see 45 C.J. p 364 notes 67-72.

10. La.—Corpus Juris quoted in Garrison v. City of Shreveport, 154 So. 622, 623, 179 La. 605. 45 C.J. p 364 note 74.

11. La.—Garrison v. City of Shreveport, 154 So. 622, 623, 624, 179 La. 605.

"Videlicet" defined see the C.J.S. definition Videlicet, also 67 C.J. p 244 note 35—p 245 note 39.

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